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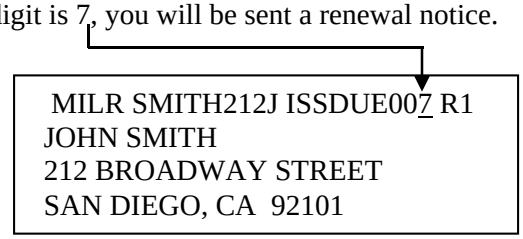

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MILITARY LAW REVIEW

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TARGETING AND CIVILIAN RISK MITIGATION: THE ESSENTIAL ROLE OF PRECAUTIONARY MEASURES

GEOFFREY CORN[*] AND JAMES A. SCHOETTLER, JR. [**]

We must fight the insurgents, and will use the tools at our disposal to both defeat the enemy and protect our forces. But we will not win based on the number of Taliban we kill, but instead on our ability to separate insurgents from the center of gravity—–the people. That means we must respect and protect the population from coercion and violence—–and operate in a manner which will win their support.[1]

[*] Professor of Law, South Texas College of Law; Lieutenant Colonel (Retired), U.S. Army Judge Advocate General's Corps. Prior to joining the faculty at South Texas, Professor Corn served in a variety of military assignments, including as the Army's Senior Law of War Advisor, Supervisory Defense Counsel for the Western United States, Chief of International Law for U.S. Army Europe, and as a Tactical Intelligence Officer in Panama. Professor Corn would like to thank his research assistant, Jennifer Whittington, South Texas College of Law Class of 2016.

[**] Adjunct Professor of Law, Georgetown University Law Center; Colonel (Retired), U.S. Army Judge Advocate General's Corps. Professor Schoettler served thirty years on active duty and in the U.S. Army Reserve. His most recent assignments prior to retirement were as Assistant Chief (Individual Mobilization Augmentee), International and Operational Law Division, Office of the Judge Advocate General, U.S. Army, and Deputy Counsel and Staff Judge Advocate, U.S. Army Element (Individual Mobilization Augmentee), Defense Prisoner of War/Missing Personnel Office, U.S. Department of Defense.

[1] U.S. DEP'T OF DEF., DIR., TACTICAL DIRECTIVE (6 July 2009). Excerpt from General Stanley McChrystal's 2009 Tactical Directive, issued by him as Commander of North Atlantic Treaty Organization's (NATO) International Security Assistance Force (ISAF), Kabul, Afghanistan [hereinafter McChrystal Tactical Directive].

I. Introduction

International humanitarian law (IHL), or the law of armed conflict (LOAC), is built on a foundation of core principles. It is probably not an overstatement that these principles figure prominently in the opening salvos of any educational or instructional effort related to the law. Be it in a university classroom, a military briefing, an international training program, another educational venue, or even in opinions of international and domestic tribunals adjudicating IHL/LOAC related issues, "the principles" of the law seem to invariably open the discourse.

Law of Armed Conflict principles also guide the interpretation and implementation of the more specific treaty and customary law rules that have been adopted over time, to provide greater clarity in striking the LOAC's essential balance between necessity and humanity. In addition, the principles fill gaps that exist in the seams between these specific rules. These functions are emphasized in the 2015 U.S. Department of Defense (DoD) *Law of War Manual*, which introduces the reader to LOAC principles with the following paragraphs:

> Law of war principles provide the foundation for the specific law of war rules. Legal principles, however, are not as specific as rules, and thus interpretations of how principles apply to a given situation may vary.
>
> Law of war principles: (1) help practitioners interpret and apply specific treaty or customary rules; (2) provide a general guide for conduct during war when no specific rule applies; and (3) work as interdependent and reinforcing parts of a coherent system.[2]

The multi-faceted function and effect of LOAC principles should come as no surprise. The principles reflect the deep roots of historical and practical tradition upon which the contemporary and much more extensive body of treaty and customary law has been erected. These principles also provide the architectural framework of the LOAC that has, over the past two centuries, been fleshed out with more extensive and explicit rules. Whether the principles are a foundation or a framework, an understanding

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[2] U.S. DEP'T OF DEF., LAW OF WAR MANUAL 51 (2015) [hereinafter DOD LAW OF WAR MANUAL].

of these principles is essential to begin to comprehend the complex relationship between the objectives of armed hostilities, and the internationally mandated regulations intended to mitigate the inevitable suffering produced by such hostilities.

One need only engage in a cursory review of academic texts, military manuals, and other training materials to quickly identify the principles that are commonly categorized as "core," "foundational," or "cardinal": military necessity, humanity, distinction, proportionality, and the prohibition against unnecessary suffering.[3] Each of these provides an essential contribution to the regulatory function of the law, and it is therefore equally unsurprising that they are so universally recognized.

What is somewhat perplexing, and in our view unfortunate, is the common (although not universal) absence of "precautionary measures" among the list of core or foundational LOAC principles. Collectively, precautionary measures can and should be regarded as such a principle: the planning and execution of military operations includes an obligation to take constant care, through both active and passive measures, to mitigate the risk to civilians and civilian property arising from military operations. While a "precautions principle" is recognized by the International Committee of the Red Cross (ICRC), it is not typically included in important military manuals such as the DoD *Law of War Manual*. This omission arguably reflects a broader reality: that in the discourse and study of the law, precautionary measures are afforded less significance than the more commonly identified principles listed above. Why is this perplexing? Because, at least in U.S. military practice, there is an overriding emphasis on taking precautions to mitigate the risks of the very military operations that are justified and evaluated, on the basis of the more commonly identified "core" principles, such as necessity and proportionality. Indeed, the precautions principle reflects the sum of all efforts to apply the other "core" principles in good faith. Thus, practitioners and other experts engaged in the difficult business of analyzing and applying the law that regulates the conduct of hostilities—the use of lethal combat power during armed conflict—learn very quickly that the package of obligations falling under the umbrella of "precautions"

[3] *Introduction to the Law of Armed Conflict*, INT'L COMM. OF THE RED CROSS 14 (June 2002), https://www.icrc.org/eng/assets/files/other/law1_final.pdf.

is a genuine focal point for civilian risk mitigation in target selection and attack execution.[4]

In a very real sense, an inverse relationship between the theoretical and the practical has evolved. At the theoretical (or academic/scholarly) level, precautionary measures never seem to get the attention they deserve. But at the operational/implementation level, they are, in many ways, more pragmatically significant than other principles routinely considered to be central to the effective regulation of armed conflict. This is why the omission of precautionary measures as a separate core or fundamental IHL/LOAC principle is so unfortunate, and why it is time to elevate the status of the package of measures embodied in the precautions principle to an equally significant status in the IHL/LOAC lexicon.

The practical significance of precautionary measures justifies and indeed necessitates emphasizing precautions as a core or fundamental IHL/LOAC principle. As one of the authors explained in a prior article,[5] application of the principle of precautions often provides the most effective legal mechanism to advance the underlying humanitarian objective of LOAC regulation of the conduct of hostilities: mitigating risk to individuals not participating in hostilities and to property that is not otherwise a military objective. Of course, achieving that objective begins with a commitment to LOAC principles that are today universally recognized, most notably the principle of distinction.[6] But in reality,

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[4] *See, e.g.*, Jean-Francois Queguiner, *Precautions Under the Law Governing Hostilities*, 88 INT'L REV. RED CROSS 793, 797-803 (2006), https://www.icrc.org/eng/assets/files/other/irrc_864_queguiner.pdf.

[5] *See* Geoffrey S. Corn, *War, Law, and the Oft Overlooked Value of Process as a Precautionary Measure*, 42 PEPP. L. REV. 419 (2014) [hereinafter Corn] (this article builds on the cited article's discussion of precautions and civilian risk mitigation).

[6] *See* DOD LAW OF WAR MANUAL, *supra* note 2, at 50-51, 62; United Kingdom Ministry of Defence, Joint Service Publication 383, *The Joint Service Manual of the Law of Armed Conflict* para. 2.5 (2004); Canada, Department of National Defence, Joint Doctrine Manual B-GJ-005-101/FP-021, *Law of Armed Conflict at the Operational and Tactical Levels* 2-1, 2-2 (Aug. 13, 2001); JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: CHAPTERS 1, 2 (2009), https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf [hereinafter HENCKAERTS & DOSWALD-BECK] (indicating that distinction is so recognized). The following passage from a seminal opinion of the International Court of Justice highlights the importance of distinction as a key Law of Armed Conflict (LOAC) principle:

> After sketching the historical development of the body of rules which originally were called "laws and customs of war" and later came to be termed "international humanitarian law," the Court observes that the

distinction's contribution towards the LOAC's humanitarian objective is in large measure binary: for armed forces committed to compliance with the law, distinction is a predicate—indeed essential—first step in the mosaic of legal and policy considerations in the conduct of hostilities to mitigate civilian risk; and for armed forces or other organized belligerent groups unconcerned with LOAC compliance, disregard of distinction reflects their concept of military operations, in which targeting civilians and civilian objects is considered a method of warfare. In short, an armed force's or armed group's commitment to compliance with distinction is the essential first step that will lead inevitably to implementation of a range of other measures to mitigate risk to civilians and civilian property by distinguishing them from lawful objects of attack, whereas noncompliance with distinction provides the surest proof that an armed force or armed group is not committed to the LOAC and that any claims of its compliance with the LOAC are completely meaningless.

The great challenge of the law today, therefore, tracks along two different paths. At the most basic level, efforts must continue to persuade armed forces and belligerent groups to commit to implementing and complying with distinction. In practice, this means that they must be urged to make tactical and operational decisions that limit the deliberate object of their lethal combat power to lawful military objectives, to distinguish themselves from the civilian population, and to use or damage civilian private property only when justified by imperative military necessity. They also must be encouraged to follow and respect the principle of proportionality, which prohibits any attack where the anticipated collateral damage and incidental injury is assessed as excessive in relation to the anticipated military advantage that will result from the attack. But for

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> cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.

Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 94, 97 (July 8).

many armed forces—certainly for any military organization that holds itself out as professional—commitment to these principles is simply axiomatic. Thus, for these forces, the vital alternate vector focuses on enhancing the protective effect of the application of these other principles through the implementation of precautionary measures. The implementation of these measures is essential to mitigate the risk to civilians from striking targets that, when evaluated during the planning phase, met the distinction principle. Mitigating this risk can reduce the complexity of proportionality compliance by reducing civilian exposure to the effects of combat power even before the proportionality of the attack is evaluated.

This article will focus on both the meaning and implementation of precautionary measures. It will begin by discussing the treaty-based implementation of precautions, with a particular focus on the use of warnings as a precautionary measure. It will then briefly consider how expanding the conception of precautionary measures beyond the treaty-based obligations will enhance civilian risk mitigation and contribute to achieving the humanitarian objectives of the LOAC. Finally, this article will explain why precautions are in fact such a vital risk-mitigating tool from a pragmatic operational perspective by focusing on how commanders committed to the LOAC balance of necessity versus humanity will instinctively gravitate to, and embrace, the logic of the precautions principle during the execution of combat operations.

II. Treaty-Based Precautions Dissected

When Additional Protocol I (AP I) was opened for signature in 1977, it sought to significantly improve the protection of civilians from the harmful effects of combat operations. To that end, Part IV of the treaty is devoted to protecting civilians and civilian objects from the consequence of combat operations, and includes a range of treaty rules that provide the foundation for the regulation of lethal combat power.[7] While many of the treaty's rules may have already applied either as best practices, or from a sense of customary international legal obligation, AP I was the first

[7] Protocol (I) Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, Civilian population Section I General Protection against effects of hostilities, June 8, 1977, 1125 UNTS 3 [hereinafter AP I]; *see also* Geoffrey S. Corn & Gary P. Corn, *The Law of Operational Targeting: Viewing the LOAC through an Operational Lens*, 47 TEX. INT'L L.J. 337 (2012).

successful effort to create a positive legal regime to govern this part of armed conflict. Accordingly, a treaty developed to update the Geneva Conventions—four treaties that included almost no regulation of the conduct of hostilities and focused instead on those considered "*hors de combat*"—featured a regulatory framework to protect civilians from the destructive consequences of combat.[8]

Included within this comprehensive regulatory regime were specific rules characterized as "precautionary measures" to mitigate civilian risk by requiring military operational decision-makers to take civilians and civilian objects into account in the planning and execution of both offensive and defensive military operations. These measures were codified in Articles 57 and 58 of AP I.[9] Article 57 focused on what are best understood as "positive" precautions: measures that are integrated into the attack decision-making process that mitigate the risk of violating the distinction or proportionality obligation.[10] In contrast, Article 58 focused on what are best understood as "passive" precautions, obligating belligerents to mitigate civilian risk by segregating civilians from military objectives and making it easier for an enemy to distinguish combatants from civilians during attacks.[11]

Because the measures in Article 57 are "positive" in nature, they have tended to be the focus of compliance with the precautions obligation. While this is somewhat under-inclusive and risks diluting the importance of the "passive" precautions obligation established by Article 58, there is no doubt that Article 57 is critical in the scheme of civilian risk mitigation. Article 57, like AP I itself, is binding as a matter of treaty law only during international armed conflicts,[12] and only on parties to AP I—which notably does not include the United States, Israel, and other non-party states.[13] However, the obligations imposed by this rule are generally

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[8] JEAN PICTET, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 19–21 (Yves Sandoz et al. eds., 1987) [hereinafter AP I COMMENTARY].

[9] *See* AP I, *supra* note 7, arts. 57, 58.

[10] *Protocols I and II Additional to the Geneva Conventions*, INT'L COMM. OF THE RED CROSS (Jan. 1, 2009), https://www.icrc.org/eng/resources/documents/misc/additional-protocols-1977.htm.

[11] AP I, *supra* note 7, art. 58; *see also* M. Sassoli & A. Quintin, *Active and Passive Precautions in Air and Missile Warfare*, 44 ISR. Y.B. HUM. RTS. 69 (2014).

[12] AP I COMMENTARY, *supra* note 8, at 21.

[13] *See State Parties to Protocol I*, INT'L COMM. OF THE RED CROSS, https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470 (last visited Mar. 14, 2016).

considered incorporated into customary international law binding on all parties, and applicable during any armed conflict.[14]

Article 57 provides that:

> 1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.
>
> 2. With respect to attacks, the following precautions shall be taken:
>
> (a) those who plan or decide upon an attack shall:
>
> (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
>
> (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
>
> (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
>
> (b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination

[14] HENCKAERTS & DOSWALD-BECK, *supra* note 6, Rule 22 ("State practice establishes this rule as a norm of customary international law applicable in both international and non-international conflicts.").

> thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
>
> (c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.
>
> 3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.
>
> 4. In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.
>
> 5. No provision of this Article may be construed as authorizing any attacks against the civilian population, civilians or civilian objects.[15]

The list of precautions included in Article 57 must be "unpacked" to appreciate the overall significance of precautions as both a rule and a broader principle. Initially, however, it is important to consider the level of detail included in the article.

The first sentence of Article 57 is perhaps the most compelling expression of a precautions "principle," a characterization supported by the ICRC Commentary:

> This is a general principle which imposes an important duty on belligerents with respect to civilian populations. This provision appropriately supplements the basic rule of Article 48 (Basic rule), which urges Parties to the conflict to always distinguish between the civilian population and combatants, as well as between civilian objectives and military objectives. It is quite clear that by respecting this

[15] AP I, *supra* note 7, art. 57.

> obligation the Parties to the conflict will spare the civilian population, civilians and civilian objects. Even though this is only an enunciation of a general principle which is already recognized in customary law, it is good that it is included at the beginning of this article in black and white, as the other paragraphs are devoted to the practical application of this principle . . . .[16]

The obligation is clear and emphatic: "constant care shall be taken to spare the civilian population, civilians and civilian objects."[17] Indeed, as emphasized in a prior article,[18] Article 57 is located among the rules related to the planning and execution of attacks—commonly referred to within military circles as the "targeting process."[19] The locus of Article 57 within treaty rules focused almost exclusively on the regulation of attacks suggests that the precautions obligation may be limited to the employment of lethal combat power. However, the obligation must be conceived more broadly to apply to all military decision-making that may result in an adverse effect on civilians. In short, there is no legal or practical reason the constant care obligation should be applicable only to targeting decisions.

A broader conception of this "constant care" obligation is consistent with the balance between military necessity and humanity. This balance lies at the very core of the LOAC, and it is essential to the effective implementation of the law that it influence and guide all military decisions, whether or not they involve attacks. This broad conception of the obligation is reflected in both the ICRC Commentary to Article 57,[20] and in the DoD *Law of War Manual*.[21] According to the Commentary, "the term 'military operations' should be understood to mean any movements, maneuvers, and other activities whatsoever carried out by the armed forces with a view to combat."[22] The *Manual* echoes this general obligation. The *Manual* provides that, "parties to a conflict must take feasible precautions

---

[16] AP I COMMENTARY, *supra* note 8, at 680.
[17] AP I, *supra* note 7, art. 57(1).
[18] *See* Corn, *supra* note 5.
[19] U.S. DEP'T OF ARMY, FIELD MANUAL 3-60, THE TARGETING PROCESS para. 1-1 (26 Nov. 2010) [hereinafter FM 3-60]. FM 3-60 has been superseded by Army Techniques Publication (ATP) 3-60, but the core concepts remain the same. U.S. DEP'T OF ARMY, ARMY TECH. PUB. 3-60, TARGETING para. 1-3 (7 May, 2015).
[20] AP I COMMENTARY, *supra* note 8, at 683.
[21] DOD LAW OF WAR MANUAL, *supra* note 2, at 52–60.
[22] AP I COMMENTARY, *supra* note 8, at 680.

to reduce the risk of harm to the civilian population and other protected persons and objects."[23] The fact that the *Manual* does not expressly limit this obligation to targeting decisions is important, for it reinforces the inference that the "constant care" obligation extends to every aspect of military operational training, planning, and mission execution.

Constant care is, of course, a quite general obligation. But generality need not dilute its significance. The conduct of military operations involves synchronizing and leveraging combat power—the deliberate application of often lethal capabilities in order to produce maximum effect upon an enemy. The ultimate objective is to dictate conditions of "the fight" in order to impose one's will upon the enemy, a process that requires every member of a military unit to contend with the inherent brutality of combat. This fundamental nature of military operations is emphasized in the U.S. Army's most basic soldier training doctrine:

> Modern combat is chaotic, intense, and shockingly destructive. In your first battle, you will experience the confusing and often terrifying sights, sounds, smells, and dangers of the battlefield—but you must learn to survive and win despite them.
>
> 1. You could face a fierce and relentless enemy.
> 2. You could be surrounded by destruction and death.
> 3. Your leaders and fellow soldiers may shout urgent commands and warnings.
> 4. Rounds might impact near you.
> 5. The air could be filled with the smell of explosives and propellant.
> 6. You might hear the screams of a wounded comrade.
>
> However, even in all this confusion and fear, remember that you are not alone. You are part of a well-trained team, backed by the most powerful combined arms force, and the most modern technology in the world. You must keep faith with your fellow Soldiers, remember your training, and do your duty to the best of your ability. If

[23] DOD LAW OF WAR MANUAL, *supra* note 2, at 188.

> you do, and you uphold your Warrior Ethos, you can win and return home with honor.[24]

The brutal reality of warfare necessitates that military personnel be incorporated into a warrior culture. This requires developing within the soldier a "warrior ethos"—an instinct for combat aggressiveness, decisive action, and the willingness to unleash maximum combat power on an opponent to accomplish the military mission.[25] Military commanders and the forces they lead will, therefore, pursue a unique "warrior culture" consistent with these needs, a culture described by the U.S. Army as follows:

> The Warrior Culture, a shared set of important beliefs, values, and assumptions, is crucial and perishable. Therefore, the Army must continually affirm, develop, and sustain it, as it maintains the nation's existence. Its martial ethic connects American warriors of today with those whose previous sacrifices allowed our nation to persevere. You, the individual Soldier, are the foundation for the Warrior Culture. As in larger institutions, the Armed Forces use culture, in this case Warrior Culture, to let people know they are part of something bigger than just themselves; they have responsibilities not only to the people around them, but also to those who have gone before and to those who will come after them. The Warrior Culture is a part of who you are, and a custom you can take pride in. Personal courage, loyalty to comrades, and dedication to duty are attributes integral to putting your life on the line.[26]

But developing an instinct for combat aggression is only one aspect of a credible warrior ethos. Warrior culture, and the ethos it produces, must also embrace humanitarian-based limitations on the use of violence. The "constant care" obligation established by Article 57 should be recognized as a manifestation of this essential humanitarian component to a credible warrior ethos. Truly effective military units are those whose leaders and

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[24] U.S. DEP'T OF ARMY, TRAINING CIRC. 3-21.75, THE WARRIOR ETHOS AND SOLDIER COMBAT SKILLS xiii (12 Aug. 2013) [hereinafter TC 3-21.57].

[25] U.S. ARMY RESEARCH INST. FOR THE BEHAVIORAL AND SOC. SCI., RESEARCH REPORT NO. 1827, WARRIOR ETHOS: ANALYSIS OF THE CONCEPT AND INITIAL DEVELOPMENT OF APPLICATIONS 1 (2004).

[26] TC 3-21.75, *supra* note 24, para. 1-6.

members embrace the obligation to constantly endeavor to mitigate risk to civilians, the wounded and others *hors de combat*, and to civilian property and protected objects, while leveraging the lethal combat power with which they have been entrusted. The very general "constant care" obligation codified by Article 57 manifests this important component of the "ethical warrior," which is an aspect of the warrior culture emphasized by former U.S. Army Chief of Staff General Eric Shinseki:

> Every organization has an internal culture and ethos. A true Warrior Ethos must underpin the Army's enduring traditions and values. It must drive a personal commitment to excellence and ethical mission accomplishment to make our Soldiers different from all others in the world. This ethos must be a fundamental characteristic of the U.S. Army as Soldiers imbued with an ethically grounded Warrior Ethos who clearly symbolize the Army's unwavering commitment to the nation we serve. The Army has always embraced this ethos but the demands of Transformation will require a renewed effort to ensure all Soldiers truly understand and embody this Warrior Ethos.[27]

The ethical component of the warrior ethos is the doctrinal link to the LOAC "constant care" obligation, and reflects the importance of limits on the violence and destruction of war. Thus, the very notion of the professional warrior embraces the objectives inherent in the LOAC. As the same Army training manual cited above notes,

> The conduct of armed hostilities on land is regulated by FM 27-10 and the Law of Land Warfare. Their purpose is to diminish the evils of war by protecting combatants *and* noncombatants from unnecessary suffering, and by safe guarding certain fundamental human rights of those who fall into the hands of the enemy, particularly enemy prisoners of war (EPWs), detainees, wounded and sick, and civilians. Every [s]oldier adheres to these laws, and

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[27] *Introduction to the Warrior Ethos*, MISS. COLL. ROTC, http://www.mc.edu/rotc/files/5813/1471/5888/MSL_101_Values__Ethics_Sect_01_Intro_to_the_Warrior_Ethos.pdf (last visited Mar. 14, 2016).

> ensures that his subordinates adhere to them as well, during the conduct of their duties.[28]

As this paragraph emphasizes, the warrior culture is essential to develop a warrior ethos, and an ethical foundation is essential to that ethos. Respect for LOAC obligations is the essential touchstone for that ethical foundation.

The "constant care" obligation therefore serves a vital balancing function, reminding commanders and the soldiers they lead that the warrior instinct of aggression and decisive action must always be tempered by a genuine commitment to mitigate risk to civilians, the wounded, and others *hors de combat*. This overarching influence on training for, planning, and executing combat operations is an essential foundation for civilian risk mitigation. Accordingly, greater clarity on how this "constant care" obligation should be implemented at the tactical and operational level will contribute to both the humanitarian objectives of the LOAC and the development of an ethically sound warrior ethos. Accordingly, it is important to understand how Article 57 quickly transitions from the general to the specific pursuant to the LOAC and in military practice.

III. Precautions in the Target Planning Process: A Natural Counterweight to Military Necessity

Humanitarian obligations always limit the use of lethal combat power, no matter what the context. Distinction permits deliberate attack only against lawful targets; proportionality prohibits such attacks when the anticipated risk to civilians and/or their property is assessed as excessive in relation to the anticipated military advantage; and unnecessary suffering prohibits the use of weapons and tactics that the international community has determined would inflict unnecessary suffering on combatants, such as denial of quarter or the use of weapons that produce fragments that cannot be detected with x-rays.[29] It is, however, obvious that the protective impact of these rules will be substantially influenced by the circumstances surrounding the attack decision and the precautions taken to assess the risk of violating these principles. Deliberate/planned targeting decisions will obviously involve greater opportunity to assess LOAC compliance than time-sensitive attack decisions, but such

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[28] *Id.*(emphasis added).

[29] *See* HENCKAERTS & DOSWALD-BECK, *supra* note 6, Rules 46, 79.

compliance must be assessed in all cases. Other factors, such as the nature of the enemy (whether or not the enemy distinguishes himself from the civilian population), the sophistication of friendly intelligence, surveillance, reconnaissance assets, and the training and experience of the decision-makers will also impact their ability to implement LOAC requirements.

Precautionary measures, if properly implemented as a priority in the planning of attacks and other military operations involving combat power, can play a vital part in civilian risk mitigation during all hostilities, and hold promise to enhance the ability of armed forces to ensure they give full humanitarian effect to other core LOAC principles. Civilian risk mitigation begins with implementation of the distinction obligation, AP I's "Basic Rule."[30] With commitment to the distinction obligation as a requisite foundation, civilian risk mitigation then turns on implementing feasible precautionary measures, and, once implemented, refraining from any attack expected to cause indiscriminate effects or otherwise violate the "proportionality" principle. While proportionality considerations certainly play an important humanitarian role in the targeting planning and execution process, precautionary measures bridge the conceptual borderline between distinction and proportionality. In practice, implementing feasible precautions as a second step in the targeting legality assessment will often mitigate the complexity of the proportionality assessment as a final step in this assessment by ensuring that all measures are taken so that attacks are only conducted when the risk to civilians are minimized and hence, the proportionality balance will tip decisively in favor of the "concrete and direct military advantage anticipated" to be gained from the attack.

The precautions obligation applies to all targeting decisions involving risk to civilians (there is no obligation to consider such measures where an attack will not place civilians or civilian objects at risk, although such operations are increasingly rare).[31] However, as with the principles of distinction and proportionality, the circumstances of an attack will impact the extent to which such measures will influence attack decisions. Precautions related to time-sensitive attacks can be expected to be *ad hoc* and generally cursory, as the soldiers engaged in the attack will rarely have the opportunity to consider and/or implement extensive precautions.

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[30] AP I COMMENTARY, *supra* note 8, at 680.
[31] FM 3-60, *supra* note 19, para. 2-87.

However, it is important to recognize that the precautions obligation is not insignificant, even in the case of a time-sensitive attack. Instead, the "constant care" obligation demands that soldiers be trained and directed to instinctively endeavor to mitigate civilian risk in *all* situations, not just those allowing for deliberative decision-making processes.[32] This is accomplished by training that emphasizes the need to verify the nature of potential targets as effectively as the circumstances permit, limiting the effects of attack as much as possible to the intended target or targets, and foregoing attacks to prevent civilian casualties when doing so is consistent with the dictates of mission accomplishment and/or required by the LOAC.[33]

It is, however, in the deliberate targeting process where precautions hold the greatest potential for civilian risk mitigation. It is, therefore, unsurprising that both Article 57 and the DoD *Law of War Manual* discussion of precautions focus principally on the deliberate/planned targeting context. Indeed, Article 57's enumerated precautionary obligations are directed toward "those who plan or decide upon attacks."[34] While in theory, every soldier who engages a target is planning and deciding upon an attack, the enumerated precautionary measures in Article 57 seem weighted heavily towards a deliberate target/attack planning process. This is unsurprising, for it is logical to expect a better "payoff" from precautions during the deliberate targeting process, where commanders and their operational planners develop courses of action designed to maximize the effect of combat power by synchronizing the full range of available battle operating systems. The deliberative nature of this process affords these operational planners and decision-makers the opportunity to integrate feasible civilian risk mitigation measures into their plans.

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[32] AP I COMMENTARY, *supra* note 8, at 679 ("On the level of the '*jus in bello*,' Article 49 'Definition of attacks and scope of application' defines attacks as covering both offensive and defensive acts, i.e., all combat activity. All these considerations mean that Article 57 applies to all attacks, whether they are acts of aggression or a response to aggression. The fact that a Party considers itself to be the victim of aggression does not exempt it from any of the precautions to be taken in pursuance of this article.").

[33] *See, e.g.*, *Teaching File*, ICRC RES. CEN. (June 30, 2002), https:www. icrc. org/eng/resources/documents/misc/5p8ex4.htm; *see also* Geoffrey S. Corn, et. al., *Belligerent Targeting and the Invalidity of the Least Harmful Means Rule*, 89 INT'L L. STUD. 536 (2013) (explaining the difference between policy-based limitations on lethal force authority directed against enemy belligerents and the LOAC authority to engage such belligerents).

[34] AP I, *supra* note 7, art. 57(2)(a).

A deliberate targeting process will focus heavily on the effects that can be produced by the carefully "tailored" leverage of lethal combat power.[35] Distinction and proportionality, as noted above, provide the starting points for LOAC implementation in this deliberative process by forces committed to fulfilling LOAC obligations. However, because the nature of precautionary measures is more naturally linked to the process of tailoring combat power to satisfy mission essential objectives, these measures "fit" more naturally within the deliberate targeting process. Each of the specific obligations codified in Article 57 illustrate this logical "fit."

A. Information and Situational Awareness

The first enumerated precautionary measure imposed by Article 57 is the requirement that targeting decision makers "do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives . . . ."[36] The focus of this precautionary measure is information and situational awareness, which is obviously an essential predicate to good-faith implementation of the distinction obligation.

Maximizing situational awareness—friendly forces, enemy forces, civilians, wounded and other *hors de combat*, and the surrounding environment—is a central component in the military decision-making process.[37] Commanders devote substantial resources to gathering information, processing the information into actionable intelligence, and constantly updating the information and the intelligence produced from it.[38] Indeed, an essential aspect of the targeting process is focusing intelligence, surveillance, reconnaissance (ISR) and target acquisition resources to satisfy the commander's intelligence and information requirements.[39] This is only logical; maximizing the effects of combat power necessitates maximizing the accuracy of situational awareness. Commanders have no legitimate interest in wasting resources on targets whose attack will not make a meaningful contribution to mission

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[35] Corn & Corn, *supra* note 7, at 349-353.
[36] *Id.* art. 57(2)(a)(i).
[37] JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS II-1 (11 Aug. 2011), http://www.dtic.mil/doctrine/new_pubs/jp3_0.pdf [hereinafter JP 3-0].
[38] *Id.*
[39] FM 3-60, *supra* note 19, paras. 2-27–2-30.

accomplishment, and therefore, should constantly endeavor to direct attacks only towards lawful military objectives.

The Article 57 "target verification" obligation is obviously intended to mitigate civilian risk, and not intended to enhance the effectiveness of attacks or military operations. However, both of these outcomes are inextricably linked: maximizing situational awareness in order to enhance the effects of combat power directed against lawful targets inherently mitigates the risk that the effects of an attack will be inadvertently directed against civilians or their property. Commanders therefore have a natural incentive to implement this obligation, and ensure "information maximization" is a central component of their targeting process.

Demanding that commanders act only on completely accurate information is, however, unrealistic; even the very best efforts to gather tactical and operational information cannot be expected to produce perfection in the information gathering process. The LOAC recognizes this reality, and seeks to balance the obligation to gather information with practical limitations on information access, which is reflected in the standard for assessing compliance: the axiom that operational decision-makers must be judged based on the information reasonably available to the commander at the time of the attack decision.[40] This is reflected in the feasibility qualifier incorporated into Article 57 and emphasized in the DoD *Law of War Manual*.[41]

What is or is not feasible in relation to information gathering and assessment, as with other enumerated precautions, is therefore a vitally important consideration. Unfortunately, it is impossible to provide anything close to an objective definition of feasibility in relation to any precautionary obligation, as what is or is not feasible is inherently contextual.[42] The contextual nature of this qualifier need not, however, completely nullify the obligation. Instead, the assessment of feasibility

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[40] See DOD LAW OF WAR MANUAL, *supra* note 2, at 192–93, para. 5.4.2; *see also* YORAM DINSTEIN, CONDUCT OF HOSTILITIES UNDER THE LAW OF INT'L ARMED CONFLICT 122–23 (Cambridge, 2nd ed. 2004) (addressing the subjective component to the proportionality equation).

[41] AP I, *supra* note 7, art. 57(2) (a); DOD LAW OF WAR MANUAL, *supra* note 2, at 237–41.

[42] *See, e.g.*, Theo Boutruche, *Expert Opinion on the Meaning and Scope of Feasible Precautions Under International Humanitarian Law and Related Assessment of the Conduct of the Parties to the Gaza Conflict in the Context of the Operation "Protective Edge"* 15, GLOBAL ASSETS (2015), http://www.diakonia.se/globalassets/blocks-ihl-site/ihl-file-list/ihl--expert-opionions/precautions-under-international-humanitarian-law-of-the-operation-protective-edge.pdf.

must be guided by the logic underlying the qualification, which is that commanders cannot be held to a standard of completely accurate situational awareness in all circumstances. Such a requirement would be inherently inconsistent with the realities of warfare, the chaos of combat, enemy efforts to conceal its activities, assets, vulnerabilities, and intentions, enemy deception, and the limits of available friendly ISR assets. Instead, commanders are expected to develop and maintain the most accurate situational awareness possible in the context of these many influences.

The ICRC Commentary to Article 57 purports to acknowledge the inherent limitations on situational awareness, but suggests an extremely demanding test for compliance with Article 57 even in light of these limitations:

> Admittedly, those who plan or decide upon such an attack will base their decision on information given them, and they cannot be expected to have personal knowledge of the objective to be attacked and of its exact nature. However, this does not detract from their responsibility, and in case of doubt, even if there is only slight doubt, they must call for additional information and if need be give orders for further reconnaissance to those of their subordinates and those responsible for supportive weapons (particularly artillery and air force) whose business this is, and who are answerable to them. In the case of long-distance attacks, information will be obtained in particular from aerial reconnaissance and from intelligence units, which will of course attempt to gather information about enemy military objectives by various means. The evaluation of the information obtained must include a serious check of its accuracy, particularly as there is nothing to prevent the enemy from setting up fake military objectives or camouflaging the true ones. In fact it is clear that no responsible military commander would wish to attack objectives which were of no military interest. In this respect humanitarian interests and military interests coincide.[43]

[43] AP I COMMENTARY, *supra* note 8, at 680–81.

Whether it is an accurate statement of military practice that even "slight doubt" requires delaying an attack in favor of making efforts to gather additional information is debatable. Like any information-gathering effort, elimination of all doubt as to the true nature of a proposed target seems to create an unrealistic expectation of tactical and operational decision-makers struggling to apply the law in good faith, in the midst of the often chaotic situations of conflict. What is realistic is an expectation that doubt must be balanced against the perceived urgency of attack necessity, and the opportunity to gather additional information under the circumstances prevailing at the time. However, what seems indisputable is that commanders should constantly endeavor to develop the most accurate intelligence possible under the circumstances and within the time available, not only for humanitarian reasons, but to maximize the effects of their combat power consistent with the realities of the hostilities.

Unlike Article 57, the DoD *Law of War Manual* emphasizes the "good faith" foundation for all exercises of operational and tactical judgment and uses the term "available" to qualify the situational awareness obligation.[44] Specifically, the DoD *Law of War Manual* provides:

> Assessing Information in Conducting Attacks. Persons who plan, authorize, or make other decisions in conducting attacks must make the judgments required by the law of war in good faith and on the basis of information available to them at the time. For example, a commander must, on the basis of available information, determine in good faith that a target is a military objective before authorizing an attack. Similarly, the expected incidental damage to civilians or civilian objects must be assessed in good faith, given the information available to the commander at the time.
>
> In making the judgments that are required by the law of war rules governing attacks, persons may rely on information obtained from other sources, including human intelligence or other sources of information. For example, in a long-distance attack, a commander may rely on information obtained from aerial reconnaissance and

[44] DOD LAW OF WAR MANUAL, *supra* note 2, at 192–93.

> intelligence units in determining whether to conduct an attack.[45]

Does use of the term "available" information indicate a dilution of the situational awareness obligation by Article 57? Does it endorse a purely subjective test of reasonableness, whereby a commander's subjective belief that a target qualifies as lawful should be considered conclusive because he made that judgment based on the information, "available" to him? Does the DoD *Law of War Manual* relieve commanders of an obligation to seek additional information related to potential targets because they may simply rely on whatever limited information is "available" at the time of a decision.[46] Such a superficial reading of the *Manual* is implausible, as it would amount to an endorsement of willful blindness.[47] More importantly, this reading lacks any meaningful foundation in operational practice and ignores the tactical and operational value of maximum situational awareness. Indeed, interpreting the *Manual* to endorse this type of willful blindness in the target assessment process verges on the absurd for two reasons. First, a willful blindness approach to the target information gathering would be fundamentally inconsistent with the overall obligation to take "constant care" to mitigate risk to civilians and their property. As a result, this interpretation of the DoD *Law of War Manual* disconnects the information obligation from the broader "constant care" obligation on which it is based.

Commanders employ combat power to impose their will on an enemy, and as a result the ultimate operational goal of such employment is to maximize the effects of combat power. Given that combat power is limited, information is essential to deciding where best to apply limited resources to achieve tactical and strategic goals, and any competent commander will approach the targeting process with a voracious appetite for constantly evolving information to be sure his or her combat assets are used in the most effective manner possible.

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[45] DOD LAW OF WAR MANUAL, *supra* note 2, at 196.

[46] For a critical analysis of the standard to be applied when evaluating the sufficiency of military commanders' claims of compliance with targeting standards, *see* Kristen Dorman, *Proportionality and Distinction in the International Criminal Tribunal for the Former Yugoslavia*, 12 AUSTL. INT'L L. J. 83, 92 (2005).

[47] Indeed, such a reading would be inconsistent with the "good faith" assessment required by the *Manual* language quoted in the text.

Commanders understand that information is the life-blood of tactical success and operational dominance.[48] Information is the tool that enables the commander to anticipate the enemy's decision-cycle, set the tempo of the battle, and seize and retain initiative—central tenets to successful military operations.[49] A "willful blindness" approach is fundamentally inconsistent with the central role of information dominance in the process of employing combat power. It is information dominance that ultimately sets the conditions for achieving operational success, which is truly all about initiative and imposing conditions on an opponent. This relationship between maximizing situational awareness and success in battle is reflected in the following extract from the U.S. Army's primary doctrinal statement on the role of landpower:

> Joint doctrine discusses traditional war as a confrontation between nation-states or coalitions of nation-states. This confrontation typically involves small-scale to large-scale, force-on-force military operations in which enemies use various conventional military capabilities against each other. Landpower normally solidifies the outcome, even when it is not the definitive instrument. Landpower is the ability—by threat, force, or occupation—*to gain, sustain, and exploit control over land, resources, and people.* Landpower is at the very heart of unified land operations. Landpower includes the ability to—
>
> - Impose the Nation's will on an enemy, by force if necessary.
> - Engage to influence, shape, prevent, and deter in an operational environment.
> - Establish and maintain a stable environment that sets the conditions for political and economic development.
> - Address the consequences of catastrophic events—both natural and man-made—to restore infrastructure and reestablish basic civil services.
> - Support and provide a base from which joint forces can influence and dominate the air and

[48] JP 3-0, *supra* note 37, II-1.
[49] *Id.* III-20-22.

> maritime domains of an operational environment.[50]

A doctrinal endorsement of situational "willful blindness" cannot, therefore, be squared with the true nature of military operational doctrine or practice. And, as the DoD *Law of War Manual* emphasizes, the meaning of "available" information must be framed by the expectation that commanders will implement their obligations in good faith, an expectation that frames all other aspects of precautions.[51] Good faith implementation of both LOAC obligations and the responsibility to lead forces in combat translates into the imperative that subordinates at every level be inculcated with an appreciation for the value of timely and accurate intelligence. They must also appreciate how information ultimately contributes to the efficient and effective use of finite combat resources. Developing this understanding and the corresponding commitment to constant efforts to enhance situational awareness will inevitably contribute to the mitigation of civilian risk by decreasing the likelihood of poorly informed attack decisions that endanger civilians. This is simply an essential aspect of mission accomplishment.

Attacks cannot, of course, be delayed indefinitely in order to gather additional information, and even an expansive Commentary interpretation of Article 57 does not require endless delay. Commanders must at some point "cut off" the information input. But, the instinct to demand the very best situational awareness should align the humanitarian objectives of Article 57 with the operational imperative to continue to gather information right up to the point of attack execution, and in many situations commanders will continue to adjust attack options, where possible, after initiating an attack, by relying on real-time ISR. When commanders or those executing an attack receive information, even during the execution process, that alters the threat picture sufficiently to call the validity of the attack into question—either from a legal or operational perspective—the only militarily logical response is to forego the attack.

B. Civilian Protection in the Targeting Decision Cycle

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[50] NORMAN M. WADE, THE ARMY OPERATIONS & DOCTRINE SMARTBOOK 1–13 (5th ed. 2015).

[51] DOD LAW OF WAR MANUAL, *supra* note 2, 192–93.

Article 57 obligates those planning and executing target decisions to "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects." [52] Accordingly, once the best available information has resulted in the determination that a lawful target should be attacked, the next step in the precautions process is to develop a tactical execution plan that will produce the desired operational effect while at the same time mitigating civilian risk.

Assessing various attack options and selecting the option that produces the best tactical and legal outcome is central to target decision-making, especially in the deliberate/pre-planned targeting process. Commanders rely extensively on expertise from staff principals and subordinate commanders to produce the most tactically desirable outcomes.[53] Inputs into this process range from mission-essential tasks, intelligence, logistics, capabilities of available combat systems, non-kinetic alternatives (such as electronic warfare and deception), risk assessment, legal requirements, rules of engagement, demands for future operations, and more.[54]

Article 57(2)(a)(ii) requires that commanders inject another consideration into this process: civilian risk mitigation.[55] According to the ICRC Commentary, this provision of Article 57 was focused primarily on ensuring that commanders integrate "proportionality" considerations into the attack planning process.[56] However, the text of the sub-paragraph ("with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects") is broader than proportionality, given Article 57's reference to both "avoiding" and "minimizing" civilian risk. In other words, the broadest and most logical reading of this obligation is that impact on civilians resulting from various courses of action must be included among the range

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[52] AP I, *supra* note 7, art. 57(2)(a)(ii).
[53] *See* COL. EDWARD T. BOHNEMANN, MCTP TRENDS IN A DECISIVE ACTION WARFIGHTER EXERCISE 8–9 (2014), http://usacac.army.mil/sites/default/files/documents/cact/FINAL%20MCTP%20Trends%20in%20a%20Decisive%20Action%20WFX%20(EDITED%2014%20January%202015).pdf.
[54] *See* JOINT CHIEFS OF STAFF, THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA 19-20 (2004), http://archive.defense.gov/news/Mar2005/d2000318nms.pdf.
[55] AP I COMMENTARY, supra note 8, at 682 ("This sub-paragraph deals with the choice of means and methods of attack to be used so as to prevent loss or damage to the population.").
[56] *Id.* at 682–83.

of operational and tactical considerations already integrated into the attack decision-making process.

For the U.S. military, civilian risk considerations is reflected by the recent inclusion of "civilians" into the METT-T equation.[57] This equation, referring to, "Mission, Enemy, Terrain and Weather, Troops and Support Available, and Time Available," is the traditional pneumonic used to identify the relevant factors impacting mission and course of action planning.[58] Today, the pneumonic includes a "C," referring to civilian considerations.[59] Accordingly, core doctrinal methodology applicable to all military planning now requires commanders to constantly incorporate civilian risk mitigation into attack course of action assessment. This is reflected in the Army Doctrinal Reference Publication, ADRP 3-0, *Unified Land Operations*:

> Mission Variables
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> Upon receipt of a warning order or mission, Army leaders filter relevant information categorized by the operational variables into the categories of the mission variables used during mission analysis. They use the mission variables to refine their understanding of the situation. The mission variables consist of mission, enemy, terrain and weather, troops and support available, time available, and civil considerations (METT-TC). Incorporating the analysis of the operational variables with METT-TC ensures Army leaders consider the best available relevant information about conditions that pertain to the mission.[60]

For the civilian consideration component of METT-TC to have significance, it is necessary that commanders and their planners constantly factor civilian risk mitigation into course of action development efforts. Article 57's "feasible precautions" obligation reflects this necessity, and should be understood as complementary to the civilian consideration component of METT-TC. Careful targeting analysis will often reveal that it is possible to select alternate attack options, adjust selected attack

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[57] JAMES W. WILLIAMS, A HISTORY OF ARMY AVIATION: FROM ITS BEGINNINGS TO THE WAR ON TERROR 277 (2005).
[58] *Id.*
[59] *Id.*
[60] U.S. DEP'T OF ARMY, ARMY DOCTRINE REF. PUB. 3-0, UNIFIED LAND OPERATIONS para. 1-10 (May 2012), http://fas.org/irp/doddir/army/adrp3_0.pdf [hereinafter ADRP 3-0].

options, or take other measures such as issuing warnings that will reduce civilian risk without compromising the commander's desired operational effect. In any event, the doctrinal change expressly adopting "civilians" as part of the planning factors means that the commander is obligated to consider implementing such "precautions" in the targeting process whenever the anticipated consequences of an attack place civilians or civilian property at risk (no consideration is required when there is no such risk).

However, this obligation is not absolute, but is instead qualified by feasibility considerations. Of course, where a commander is simply incapable of adopting an alternate course of action (for example when he does not have resources or time available to do so), the alternate cannot be considered feasible. On this point, there is little dispute. What is often disputed is whether increased risk to friendly forces is a consideration rendering an alternate course of action not feasible.[61] One point is clear, however: where a commander is able to select an attack option that will produce the desired operational effect while mitigating civilian risk, without exposing friendly forces to increased enemy risk, he must do so pursuant to Article 57. And, because doing so will in no way degrade the contribution of the attack on mission accomplishment, selection is also mandated by the civilian consideration of METT-TC.

Thus, two aspects of this "feasible precautions" obligation emerge from these authorities. First, where a commander can produce "equivalent effects" *after* implementing precautionary measures that mitigate civilian risk, he must do so. Second, there is no *obligation* for commanders to implement precautionary measures when doing so will degrade the operational effect of an attack that could otherwise be achieved in a manner consistent with the other key principles of the LOAC (e.g., proportionality and distinction) without implementing the precaution.

Ultimately, the objectives of Article 57 are completely aligned with operational and tactical logic: develop attack options that maximize the disabling effect on the enemy while mitigating risk to friendly forces and civilians alike. Failing to consider civilian risk mitigation in selecting among courses of action in the attack planning process is, therefore, inconsistent with both the LOAC's humanitarian objectives and U.S. military doctrine; indeed, excluding this consideration risks distorting

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[61] *See* Reuven Ziegler & Shai Otzari, *Do Soldiers' Lives Matter? A View from Proportionality*, 45 ISR. L. REV. 53, 56-58 (2012).

outcomes in a way that undermines both humanitarian and legitimate military goals. Again, consider how Army doctrine emphasizes securing operational advantages that mitigate, among other things, civilian risk:

> The dynamic relationships among friendly forces, enemy forces, and the other variables of an operational environment (PMESII-PT [political, military, economic, social, information, infrastructure, physical environment, time] and METT-TC) make land operations exceedingly difficult to understand and visualize. Understanding each of these parts separately is important but not sufficient to understand the relationships among them. Friendly forces compete with enemy forces to attain operational advantages within an operational environment. These advantages facilitate Army forces closing with and destroying the enemy with minimal losses to friendly forces as well as civilians and their property.[62]

Civilian risk mitigation cannot, however, depend exclusively on the planning process. Even the best efforts to ascertain the true nature of a target and select the most civilian risk-averse tactic for attacking the target cannot guarantee absolute accuracy. In many situations, new and/or better information will arise during the attack execution phase itself. Obviously, the "constant care" obligation must also consider how such information must impact the ultimate attack decision.

C. Attack Suspension

A natural corollary to the information/situational awareness obligation is what is best understood as the "attack suspension" obligation. Specifically, Article 57(2)(b) provides that "an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to

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[62] ADRP 3-0, *supra* note 60, para. 1-41. Several Joint publications note that assessment of PMESII is critical to understanding the operational environment. *See*, *e.g.*, JOINT CHIEFS OF STAFF, JOINT PUB. 3-24, COUNTERINSURGENCY I-4 (22 Nov. 2013); JOINT CHIEFS OF STAFF, JOINT PUB. 5-0, JOINT OPERATION PLANNING 3-9 (11 Aug. 2011).

the concrete and direct military advantage anticipated."[63] The obvious objective of this rule is to prohibit those executing an attack from adopting an attitude of willful blindness towards evolving information simply because execution of the attack has been ordered.

Willful blindness in relation to battlefield or tactical information is not only operationally derelict, but is also incompatible with the "constant care" obligation. No matter where or when in the attack cycle new information becomes available that calls into question the legality of an initiated attack, those executing an attack must consider this information and, where they are able, modify or suspend the attack if the information indicates that key principles, like proportionality, otherwise would be violated. Article 57's attack suspension rule imposes an explicit obligation against completing an initiated attack based solely on the pre-attack assessment, when new information undermines the factual predicate for that assessment.[64] Instead, the individual in control of the attack must remain cognizant of the reality that in the chaotic and fluid situations of battle, new information may arise even moments before attack culmination.

Neither Article 57 nor the DoD *Law of War Manual* indicates the quantity or quality of information that would necessitate suspending or canceling an attack. Any attempt to do so would be foolish and probably futile, as no two attack situations are alike. Information is obviously central to this obligation, and it would be illogical to assume that this "suspension/cancelation" obligation somehow supersedes the "feasible information collection" obligation that applies during attack planning. Accordingly, these obligations function in a complementary manner: even during attack execution, commanders and their subordinates executing the commander's orders must continue to gather information related to the nominated or intended target in order to modify or suspend an initiated attack when the factual predicate for the operational and legal assessments that led to ordering the attack change.

Normally, the level of information gathering that is feasible during the attack-execution phase will not be analogous to that which is feasible during the attack-planning phase. There may, of course, be exceptions—situations where the attacking forces may actually be in a position to gather

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[63] AP I, *supra* note 7, art. 57(2)(b).
[64] *Id.*

more accurate information than was available during the planning process. For example, a pilot operating a Remotely Piloted Vehicle armed with precision strike munitions will often be capable of gathering and assessing substantial real-time information up to the point of, and even during, the attack.[65] Or, perhaps a raid into an alleged enemy base camp will result in recognizing that one of the buildings nominated for attack is occupied by civilians, and not belligerents, and therefore is protected from attack under the LOAC.

Ultimately, while no two situations are identical, this rule forecloses a "because we started, we always have a right to finish" mentality in relation to attack operations. Instead, it reinforces each individual combatant's obligation to mitigate civilian risk at every stage of the planning and execution process. Individuals on the verge of completing an attack are entrusted with the responsibility and duty to exercise initiative to suspend or cancel an attack inconsistent with the expectations established by the information relied upon to launch the attack. This obligation applies to both the commander who ordered the attack and the subordinates entrusted with the responsibility to execute that order. The alternative is simply incompatible with the notion of the "ethically grounded" warrior discussed above: no soldier should feel justified in culminating an attack against what was originally assessed as a lawful target but later discovered to be anything but. Allowing such outcomes would transform the attack from justified to unjustified violence, even in the context of war.

There is, however, an important caution that must be associated with this obligation: the test of compliance is one of reasonable judgment, not absolute accuracy.[66] Compliance with precautionary obligations cannot be based on information that was unavailable at the time of decision.[67] The importance of this principle of compliance assessment is perhaps most significant in relation to the attack suspension/cancellation obligation. It is an unfortunate reality of war that there will be many situations where attacks should have and would have been suspended or cancelled had the attacking commander or combatant known more about the situation. Article 57 does not condemn such attacks even when they result in tragic

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[65] *Domestic Unmanned Aerial Vehicles (UAVs) and Drones*, ELECTRONIC PRIVACY INFO. CTR., https://epic.org/privacy/drones/.

[66] *See* Geoffrey S. Corn, *Unarmed But How Dangerous? Civilian Augmentees, the Law of Armed Conflict, and the Search for a More Effective Test for Permissible Civilian Battlefield Functions*, 2 J. NAT'L SECURITY L. POL'Y 257 (2008), http://www.seven Horizons.org/docs/cornunarmedbuthowdangerous.pdf.

[67] *See id.*

consequences to civilians so long as the facts known to those planning and executing the attack at the time the attack was planned and executed supported their assessment that the attack complied with the LOAC. A violation only occurs when the reasonably available or actually known information at the time the attack was planned and executed indicated that proceeding with the attack would be inconsistent with applicable LOAC principles and rules. And, as noted above, gathering and processing additional information will frequently be most difficult during the attack execution, and thus this difficulty must be considered in *post hoc* assessments of compliance.

D. Warnings

Providing advance warnings to civilians in order to mitigate the risk of attack is one of the most potentially effective, yet commonly debated precautionary measures. Article 57 of AP I specifically requires that "effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit."[68] Israel's recent operations in Gaza and the Israeli Defense Force's (IDF's) extensive efforts to provide such warnings triggered substantial debate on the nature of this obligation.[69] Some worry that the IDF created an unrealistically high bar on when and how to provide warnings; others criticized the IDF because the warnings did not produce their intended effects, while others debated whether the extent of warnings were the result of policy decisions, and not legal obligation.[70] All these reactions reflect the continuing uncertainty about the obligation imposed by Article 57's warnings rule.

At the outset, it is essential to note the sub-paragraph of Article 57 dealing with warnings includes a unique qualifier: "unless circumstances

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[68] AP I, *supra* note 7, art. 57(2)(c).

[69] *Legal Framework Applicable to Aerial Strikes against Terrorists*, IDF MAG CORPS, http://www.law.idf.il/592-6584-en/Patzar.aspx (last visited Mar. 8, 2016) (Many of the precautions taken by the Israeli Defense Force (IDF) reflect policy considerations and exceed that which is legally required. Since such policy practices are not legally obligated, they may change from time-to-time and from one front to another. For example, Israel's use in the Gaza Strip of non-lethal warning shots to the roofs of buildings which constitute military targets, prior to conducting aerial strikes part of a precautionary procedure known as "knocking on the roof," is not legally obligated and derives from the unique characteristics of this front, which are not applicable in other fronts. *Id.*

[70] Steven Erlanger & Fares Akram, *Israel Warns Gaza Targets by Phone and Leaflet* N.Y. TIMES, July 9, 2015, at A8, [hereinafter Erlanger].

do not permit."[71] While the warning rule is commonly summarized as an obligation to provide "feasible warnings,"[72] this is textually inaccurate, and indeed it is possible to interpret "circumstances do not permit" as suggesting a greater obligation than "feasible," in that it might require warnings whenever it is physically possible to do so.

Does the warning requirement apply whenever a commander has the capacity to issue the warning? Given the importance of minimizing the risk of civilian casualties and the potential contribution that warnings could make to achieve this effect, coupled with the language used in Article 57 ("shall be given"), such an interpretation is plausible. On the other hand, such a broad interpretation would create an almost absolute requirement to issue warnings regardless of the tactical compromise that may result, as there will be few, if any, situations when providing a warning would not be possible. For example, in almost any situation a warning could be relayed by use of a bull-horn, or even yelling, towards a group of civilians, or by "buzzing" a town before launching an air attack. If the rule intends that the obligation to warn could be excused only in the rarest situations, however, why would the rule be qualified at all?

In reality, the text of Article 57 does not support an overly broad interpretation. First, because the rule imposes an obligation to provide an "effective" advance warning, Article 57 does not appear to require a warning if the only warning possible would be ineffective. Second, the phrase "circumstances do not permit" is susceptible to an interpretation that would limit the warning requirement. Specifically, the use of the word "circumstances" suggests that the obligation to give warnings is situational, based on the particular circumstances at the time. Thus, under some circumstances, a commander might not be able to give a warning, while in other circumstances, he or she might.

Parsing the meaning of "circumstances do not permit" is challenging. The explanation of this qualifier in the ICRC Commentary only provides limited help. The Commentary references loss of necessary surprise in relation to an attack as the motive for including the qualifier in the rule.[73] As a threshold matter, this indicates that the word "circumstances" as used in Article 57 is not intended to be interpreted as applicable only in "lack of physical capacity to warn" situations or in situations when a warning

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[71] AP I, *supra* note 7, art. 57(2)(c).
[72] *See, e.g.*, WILLIAM H. BOOTHBY, THE LAW OF TARGETING 128–29 (2012).
[73] AP I COMMENTARY, *supra* note 8, at 686.

would be ineffective, as such an interpretation would render the qualification superfluous. Instead, this qualification to the obligation to warn must be measured by the operational and tactical circumstances the commander is facing. Certainly, allowing a commander to forego issuing warnings that would compromise tactical effectiveness makes sense and is consistent with military logic, thereby enhancing the credibility of the rule. On the other hand, the Commentary's explanation is of limited utility as virtually any warning will produce some degradation of tactical advantage. Perhaps a more sensible interpretation would be to limit the qualifier to circumstances involving "surprise" attacks, where the lack of warning is part of the tactical basis for the attack. Alternatively, it may be that the qualifier applies whenever the warning will result in some degradation, and cede some advantage to an enemy that would materially compromise mission success, and outweigh the advantage that warnings might offer to the attacker as a means to reduce risk of violating other limitations in Article 57 of AP I.

The Department of Defense's *Law of War Manual* echoes the Commentary in suggesting that the "unless circumstances do not permit" qualifier applies to attacks requiring surprise.[74] However, the *Manual* also suggests that "exploiting the element of surprise in order to provide for mission accomplishment and preserving the security of the attacking force" is not the only situation in which a warning is not required,[75] although the *Manual* does not provide insight into other justifications for not giving warnings.

There is merit to the *Manual's* broader conception of this qualifier. From an operational perspective, it seems illogical to limit the "unless circumstances do not permit" qualifier to preserving the element of surprise in an attack. Advance warning of any attack could enable the enemy to more efficiently prepare its defense against the attack, ceding an advantage to the enemy. However, because giving any warning will arguably have some negative effect on an attacking force, allowing *any* loss of tactical effectiveness to justify dispensing with the warning requirement is overbroad. It would result in an exception that swallows the rule.

If the warning requirement is to have any meaning, it must therefore be understood as a presumptive requirement, imposing a burden on the

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[74] DOD LAW OF WAR MANUAL, *supra* note 2, at 200, 238–39.
[75] *Id.* at 238.

commander to provide warnings absent legitimate military reasons to forego warnings. Such an approach weighs heavily in favor of issuing warnings, and militates against dispensing with warnings for any loss of tactical advantage, however slight. Rather, using loss of surprise as a point of analogy, warnings should be required unless providing them will jeopardize mission success in the same way that loss of surprise would jeopardize a surprise attack. Ultimately, warnings should be dispensed with only when the commander assesses that issuing them will negate the anticipated success of a course of action. This is a high bar, requiring a good deal of understanding of the tactical basis for the attack and an ability to assess the extent of any loss of tactical advantage. The ability to apply this standard effectively will depend on the commander's good-faith commitment to civilian risk mitigation and willingness to take on tactical risk in order to improve the prospects for successful civilian risk mitigation.

Perhaps the most important consequence of this conception of precautions is that it should influence the way commanders and other operational decision-makers are trained. These individuals, entrusted with substantial lethal combat power, should be instructed to assume that warnings to civilians are required when they have the capacity to provide them. This obligation should yield only in the face of good faith determinations that the benefits of giving warnings is outweighed by degradation of tactical and operational effects of an anticipated military action. Further, commanders must ensure that warnings are "effective."[76] Thus, for example, critics of Operation Protective Edge have asserted that the IDF failed to comply with the "effective" requirement.[77]

The International Committee of the Red Cross's Commentary to Article 57 provides little guidance on the term "effectiveness" but does offer the following insight into the Commentary's discussion of ruses: "[E]ven though ruses of war are not prohibited . . . , they would be unacceptable if they were to deceive the population and nullify the proper function of warnings, which is to give civilians the chance to protect themselves."[78] This reference to the "proper function of warnings" as being "to give civilians the chance to protect themselves," suggests that to

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[76] *See, e.g.*, Erlanger, *supra* note 70 (asserting that some observers criticize the warnings provided by the IDF during Operation Protective Edge in Gaza as ineffective).
[77] *Id.*
[78] AP I COMMENTARY, *supra* note 8, at 687.

be effective, a warning must give civilians that *chance,* even though the warning does not necessarily guarantee that outcome.

Some critics of the IDF's efforts to warn in Operation Protective Edge look to the outcome of the IDF's attacks to determine whether the warnings given were effective.[79] This is an unworkable and illogical interpretation of the "effective" requirement, as it subjects commanders to a *post hoc* outcome-based standard. Commanders must be judged prospectively on the good faith and reasonable efforts they made to provide civilians an opportunity to avoid the effects of an attack, as best as possible, under the circumstances as these circumstances presented themselves, before and at the time the attack was launched.

A *post hoc* assessment of effectiveness undermines the very core of the "precautions" principle, which is to require a good faith assessment of civilian risk mitigation opportunities prior to an attack. The enumerated requirements of Article 57 can only incentivize civilian risk mitigation by focusing upon good faith compliance with the "constant care" civilian risk mitigation obligation in planning and execution of attacks. Assessing the "effective" element of the warnings obligation on the basis of the outcome of an attack renders warning irrelevant, since the commander will be judged based on the results of the attack and not based on whether warnings were given. This would be unfortunate, for it will foreclose any incentive to explore possible evolutions and improvements in warnings techniques that might prove highly beneficial to civilians and civilian property in the future.

Compliance with the effective warning requirement must be assessed by asking whether a commander who employs a particular warning did so based on a credible expectation that it *would* be effective. A warning should only be condemned where it was clear, given the circumstances ruling prior to or at the time of the attack, that the warning would provide civilians a meaningful opportunity to avoid the harmful effects of an attack. Such a prospective assessment of compliance with the warnings

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[79] *See, e.g.*, *Israel/Gaza conflict: Questions and Answers*, AMNESTY INT'L (July 25, 2014), https://www.amnesty.org/en/latest/news/2014/07/israelgaza-conflict-questions-and-answers/; *Israel/Palestine: Unlawful Israeli Airstrikes Kill Civilians*, HUMAN RIGHTS WATCH (July 15, 2014), https://www.hrw.org/news/2014/07/15/israel/palestine-unlawful-israeli-airstrikes-kill-civilians [hereinafter HUMAN RIGHTS WATCH]; 50 *Days of Death & Destruction: Israel's "Operation Protective Edge"*, INST. FOR MIDDLE EAST UNDERSTANDING (Sept. 10, 2014), http://imeu.org/article/50-days-of-death-destruction-israels-operation-protective-edge.

requirement will encourage commanders to develop innovative warning techniques that are effective while discarding those that do not work. But "effective" need not be synonymous with actual effects; reasonable expectation of effect is the more logical basis for assessing effectiveness.

The Israeli Defense Forces' use of the so-called "roof knock" illustrates the risk of retrospective, effects-based assessment of compliance with the warning requirement. In Operation Protective Edge, the IDF employed a technique of striking residential buildings assessed as lawful military objectives with a low yield warhead prior to launching the much more destructive actual attack. The expectation was that these "roof knocks" would compel civilians in the building to immediately evacuate in order to reduce the risk they would be killed or injured by the actual attack.[80] In some cases, however, it was reported that residents confused the warning attack with the actual attack, and were thereby lulled into a false sense of safety in the buildings.[81] Other reports indicated that the time lapse between the warning strike and the actual attack was insufficient to allow for a complete evacuation.[82] As a result, there were alleged incidents where the warning strike did not produce the intended risk mitigation effect.[83]

Condemning IDF commanders for use of this innovative warning technique creates a genuine risk that they will develop an indifference to improved warning techniques in future operations. Indeed, instead of encouraging them to continue to seek innovative warning techniques, this "effects based" criticism will create greater incentive for commanders to look for justifications for not utilizing warnings. Even if the "roof knock"

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[80] JINSA-COMMISSIONED GAZA CONFLICT TASK FORCE, 2014 GAZA WAR ASSESSMENT: THE NEW FACE OF CONFLICT 10–11, 11–12 (2015) [hereinafter JINSA Report].

[81] U.N. Human Rights Council, *Report of the Independent Commission of Inquiry on the 2014 Gaza Conflict*, ¶42, U.N. Doc. A/HRC/29/52 (June 24, 2015) [hereinafter A/HCR/29/52]; U.N. Human Rights Council, *Report of the detailed findings of the Commission of Inquiry on the 2014 Gaza Conflict*, ¶ 236, U.N. Doc. A/HRC/29/CRP.4 (June 24, 2015) [hereinafter A/HCR/29/CRP.4]; HUMAN RIGHTS WATCH, *supra* note 79 (Patrons at the Fun Time Beach Café assumed that a nearby small-missile impact was a mistake and returned to the shelter of the café, which was subsequently hit by a larger-precision strike.).

[82] A/HCR/29/52, *supra* note 81, ¶ 42; A/HCR/29/CRP.4, *supra* note 81, ¶ 237; HUMAN RIGHTS WATCH, *supra* note 79 (The Ghafour family sought shelter in an adjacent home because they could not clear their block in under five minutes.); *Israel: Targeting Civilian Homes for Alleged Military Purposes Is a War Crime*, EURO-MEDITERRANEAN HUMAN RIGHTS MONITOR (July 14, 2014), http://www.euromid.org/en/article/550/Israel:-Targeting-civilian-homes-for-alleged-military-purposes-is-a-war-crime.

[83] *See* A/HCR/29/52, *supra* note 81, ¶42; A/HCR/29/CRP.4, *supra* note 81, ¶¶ 235–42.

technique did not work in all cases, IDF commanders deserve praise for seeking innovative methods to provide effective warning. Any shortcomings in the outcome of these efforts should be carefully assessed to enable them to improve the technique in the future but should not be used to condemn the IDF or its commanders for a failure to comply with Article 57 of AP I.

E. The "Least Risk" Rule

Another important enumerated precautionary measure within Article 57 is the "least harmful target" rule: "when a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects."[84]

One aspect of this provision is uncontroversial: it applies only when a commander has more than one option to achieve the same or similar military advantage.[85] Where a commander only has one option available, this rule of precaution is obviously inapplicable. But in those situations where the commander is presented with two or more potential options, any one of which will produce the desired "effect" on the enemy, this risk mitigation rule comes into play. For example, if the desired "effect" is to deprive an enemy headquarters of power, an attack on any number of potential targets in the chain of power delivery might produce the effect. Thus, under those circumstances, a commander should choose the option that is most likely to knock out the enemy's power with the least impact on civilians and civilian objects.

Where multiple target options are viable, the least risky option rule imposes a logical obligation on the attacking commander to select the option that poses the least risk to civilians and/or civilian objects. This obligation is consistent with both the "constant care" imperative and the underlying LOAC balance between necessity and humanity. Indeed, it also is consistent with military practice, in which harmful effects on civilians is properly understood to have a negative impact on mission accomplishment.[86] In fact, selecting the least risk target option should be an instinctual decision criterion for any credible commander—why would

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[84] AP I, *supra* note 7, art. 57(3).
[85] *Id.*
[86] *See, e.g.*, McChrystal Tactical Directive, *supra* note 1.

anyone choose the option that creates *greater* risk to civilians and civilian property if such risk can be avoided or minimized with no detriment to mission accomplishment? The only answer would be that the commander who does not choose the least risky option may be using the attack as a pretext to inflict unlawful and illegitimate harm on civilians and/or their property. In the modern era, such a choice would clearly be inconsistent with the most basic conception of humanitarian regulation.

Unfortunately, if a commander is *so* indifferent towards the potential suffering of civilians as to deliberately select an attack option that exacerbates civilian risk when a less risky option is viable, it is unlikely that a positive rule of international law will avert this negative humanitarian consequence. Ultimately, however, the "least risk" rule, like all other aspects of the LOAC, is premised on the assumption that commanders will endeavor in good faith to achieve the humanitarian objectives of the law. Thus, assessing the scope and effect of this rule must begin with the assumption that the commander implementing it will approach the targeting decision with a good faith commitment to feasible civilian risk mitigation.

What is far more complex for any such commander is assessing what qualifies as the same or similar military advantage in weighing various tactical options. The ICRC Commentary provides almost no insight into how military advantage should be weighted between multiple viable attack options. It is clear, however, that the rule does not impose an absolute requirement to select the attack option that minimizes civilian risk in all situations. When the least risky option fails to produce the tactical or operational advantage that will result from an option that creates greater civilian risk, the comparison between the two does not fall within the scope of the rule. In such situations, the commander is free, as a matter of law,[87] to select the option that results in greater civilian risk so long as that risk comports with other LOAC obligations (such as precautionary warnings and proportionality).

A potential for achieving greater military advantage does not mean that the commander *must* or even *should* select an attack option that creates greater civilian risk, however. Indeed, it will often be the case that the commander decides to accept a compromise of tactical or operational advantage in order to mitigate civilian risk even when doing so is not required as a matter of law. This is a common aspect of rules of

[87] AP I, *supra* note 7, art. 57(3).

engagement ("ROE") that impose restrictions on the use of combat power above and beyond those required by the LOAC. The reasons for such policy-based ROE restrictions are multi-faceted, and ROE restrictions are often adopted in hopes of avoiding alienation of the civilian population. However, in such situations, an ROE-based decision to forego an attack, even if motivated by an effort to mitigate civilian risk, is not legally mandated. This fact is an important aspect of contemporary military operations, and the difference between legal and policy-based courses of action should be constantly emphasized. Failing to do so risks creating a false expectation that the overriding consideration in selecting among attack options is civilian risk and that commanders must always select attack options that create the least risk to civilians and their property even if such options are tactically inferior.

Ultimately, the law mandates selection of the least risk option only when multiple attack options offer the same or similar military advantage.[88] Military advantage is, however, a complex and multi-faceted concept, and involves a range of considerations. The complexity of defining and comparing military advantage, coupled with the increasingly common but erroneous assertion that Article 57 always requires selection of the least risk option, may explain why the DoD *Law of War Manual* indicates that the United States does not consider Article 57(3) of AP I to be "customary international law."[89] In support of this assertion, the *Manual* cites the 1991 *U.S. Comments on the International Committee of the Red Cross's Memorandum on the Applicability of International Humanitarian Law in the Gulf Region*, which noted that the rule is relevant only when options are available and only when a choice is consistent with mission accomplishment and friendly force risk mitigation.[90]

This is an unfortunately cryptic justification for rejecting the customary nature of Article 57(3). It would have been more credible to emphasize the true nature of the obligation (i.e., to choose the least risk option only where there are options to achieve the same or similar military advantage) and the difficulty of making qualitative comparisons of military advantage. But the fact remains that where there are at least two attack options that will produce the same or similar military advantage, civilian risk mitigation becomes the decisive selection criteria.[91] Indeed, it

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[88] *Id.*
[89] DOD LAW OF WAR MANUAL, *supra* note 2, at 241 n. 303.
[90] *Id.*
[91] AP I, *supra* note 7, art. 57(3).

would arguably be difficult to identify examples from U.S. practice where the "least risk" criteria was applied on this basis.

It is therefore relatively clear that the key consideration related to implementing this obligation is a comparison of the available courses of action and the military advantage associated with each of them. Perhaps the most complex and controversial aspect of this consideration is the role of friendly risk mitigation, that is, the impact of an attack on the military capacity of the attacker and its allies. The 1991 U.S. Comments cited above (and referred to in the DoD *Law of War Manual*) indicate that a military advantage should not be considered to be the "same or similar" when the friendly risk inherent in one attack option is greater than another attack option.[92] In other words, protecting friendly forces from enemy countermeasures, or the exposure of friendly forces to risk, is a consideration that the United States believes should influence the comparison of the military advantage derived from alternate attack options.[93] There are critics who strongly reject the notion that friendly risk or "force protection" is a valid consideration in weighing and comparing multiple attack options.[94]

The term "force protection" is misleading and operationally unsound as a description of what is at issue in assessing friendly risk.[95] Friendly risk in the context of an attack means the impact of the attack (and any countermeasures in response to the attack) upon the capacity of friendly forces to continue to fight; by contrast, force protection refers to a range of passive and active measures to protect the force from avoidable risk. In U.S. military doctrine, force protection specifically exempts considerations of the risk of exposing friendly forces from hostile actions in "actions to defeat the enemy" (which would include attacks). The Department of Defense defines force protection as

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[92] *See supra* note 79, and accompanying text.

[93] JOINT CHIEFS OF STAFF, JOINT PUB. 3-16, MULTINATIONAL OPERATIONS, III-11 (16 July 2013), http://www.dtic.mil/doctrine/new_pubs/jp3_16.pdf.

[94] Ziv Bohrer & Mark Osiel, *Proportionality in Military Force at War's Multiple Levels: Averting Civilian Casualties v. Safeguarding Soldiers*, 46 VAND. J. TRANSNAT'L L. 747, 747–51 (2013) [hereinafter Bohrer & Osiel]; Ziv Bohrer & Mark Osiel, *Proportionality in War: Protecting Soldiers From Enemy Captivity, and Israel's Operation Cast Lead—"The Soldiers Are Everyone's Children"* 22 S. CAL. INTERDISC. L.J. 637, 680–89 (2013); UNIV. CTR. FOR INT'L HUMANITARIAN LAW GENEVA, EXPERT MEETING "TARGETING MILITARY OBJECTIVES" 17–19 (2005).

[95] U.S. DEP'T OF ARMY, ARMY DOCTRINE REF. PUB. 3-37, PROTECTION (31 Aug. 2012), http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/adrp3_37.pdf.

> Preventive measures taken to mitigate hostile actions against Department of Defense personnel (to include family members), resources, facilities, and critical information. Force protection does not include actions to defeat the enemy or protect against accidents, weather, or disease.[96]

Unlike force protection, preserving combat capability is a distinct tactical and operational imperative.[97] Commanders plan and execute operations in with the goal of imposing their will on the enemy through the most efficient and effective use of finite resources.[98] Preserving combat capability and minimizing the loss of friendly resources is a central

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[96] *Id.* at v.

[97] U.S. military doctrine on joint operations includes "protection" as a joint operational function. Joint functions are defined as follows:

> Joint functions are related capabilities and activities grouped together to help JFCs integrate, synchronize, and direct joint operations. Functions that are common to joint operations at all levels of war fall into six basic groups—command and control, intelligence, fires, movement and maneuver, protection, and sustainment.

JP 3-0, *supra* note 37, at xiv. While U.S. doctrine utilizes the term, "protection", the definition of the term indicates that this joint function is focused not only on "force protection" in the limited sense explained above, but more broadly on capacity preservation:

> The protection function focuses on preserving the joint force's fighting potential in four primary ways. One way uses active defensive measures that protect the joint force, its information, its bases, necessary infrastructure, and LOCs from an enemy attack. Another way uses passive defensive measures that make friendly forces, systems, and facilities difficult to locate, strike, and destroy. Equally important is the application of technology and procedures to reduce the risk of fratricide. Finally, emergency management and response reduce the loss of personnel and capabilities due to accidents, health threats, and natural disasters. As the JFC's mission requires, the protection function also extends beyond force protection to encompass protection of US noncombatants; the forces, systems, and civil infrastructure of friendly nations; and inter-organizational partners. Protection capabilities apply domestically in the context of HD, CS, and emergency preparedness.

Id. at III-29.

[98] *See generally* U.S. DEP'T OF THE ARMY DOCTRINAL PUBLICATION 3-90, OFFENSE AND DEFENSE, para. 2 (Aug. 2012), http://armypubs.army.mil/doctrine/DR_pubs/dr_a/pdf/adrp3_90.pdf.

component of mission accomplishment, and may at times be decisive.[99] The history of warfare is replete with examples of the vital role capacity preservation plays in mission accomplishment.[100]

Every commander should plan and execute operations in a manner that mitigates the risk to friendly forces and preserves combat capability. Mitigation of friendly risk is not inconsistent with the LOAC obligations to endeavor to mitigate civilian risk, and indeed, friendly risk is a valid factor to consider when assessing military advantage to be gained from various attack options. Core Army warfighting doctrine emphasizes the unquestioned operational assumption that preserving friendly warfighting capability is itself a military advantage:

> Friendly forces compete with enemy forces to attain operational advantages within an operational environment. These advantages facilitate Army forces closing with and destroying the enemy *with minimal losses to friendly forces* as well as civilians and their property.[101]

Ultimately, it is operationally counter-intuitive to interpret the law as requiring a loss of combat power to advance humanitarian protection. Such an interpretation not only distorts the balance between military necessity and humanity, but it also provides an unjustified windfall to the enemy.

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[99] *See supra* note 95.

[100] One particularly compelling example of the importance of friendly risk considerations is the role personnel and equipment attrition played on U.K. capabilities during the Falklands War. *See The Atlantic Conveyor #Falklands30*, THINK DEFENSE (Apr. 3, 2012), http://www.thinkdefence.co.uk/2012/04/the-atlantic-conveyor-falklands30/ (discussing the loss of the Atlantic Conveyor to Argentine attack and the impact on subsequent U.K. operations in the Falklands); Argentine air attacks produced substantial U.K. logistics degradation, most significantly the loss of almost all heavy lift helicopters. *Id*. As a result, the artillery resupply rate during the final attack on Port Stanley was strained. *Id.* While it is impossible to assess the impact that losing indirect fire support from artillery would have had on the outcome of the battle for Port Stanley—the battle that resulted in Argentine capitulation—it is certainly plausible that had Argentine forces resisted for several hours longer and realized their U.K. enemy lost or was losing fire support capability, they may have been far less inclined to capitulate when they did. *Id.*; *see also* PETER PARET, MAKERS OF MODERN STRATEGY: FROM MACHIAVELLI TO THE NUCLEAR AGE 810 (1986).

[101] ADRP 3-0, *supra* note 60, at 1–7 (emphasis added).

Some criticize consideration of friendly risk as an aspect of military advantage by asserting that it values the lives of friendly forces over civilians.[102] While this may be an unfortunate outcome, it is not the motive. Instead, it is the preservation of operational capacity—which must be justified by military necessity—that allows for, if not demands, that risk to friendly forces is an aspect of the military advantage assessment. Indeed, it is hard to imagine a more necessary measure for bringing about the prompt submission of an enemy than preserving the resources needed to militarily dominate the enemy.

Accordingly, "same or similar" military advantage is best understood as a military advantage that will be achieved with analogous expenditure of finite resources among multiple alternative attack options. Even with such a definition, however, any assessment of compliance with this "lesser of two evils" obligation must acknowledge some rational margin of appreciation. Like any other operational judgment, assessing what qualifies as the "same or similar" military advantage during the conduct of hostilities will be influenced by a wide array of considerations and pressures. These considerations must be factored into any *post hoc* critique of compliance.

F. "Passive Precautionary" Measures

As should be apparent, the civilian risk mitigation effect of the range of precautionary measures enumerated in Article 57 all complement the principle of distinction. However, the protective effect of the distinction obligation, and the supplemental protection afforded by Article 57 precautions, is often substantially diluted by enemy tactics that increase risk to civilians. The AP I appears to recognize this relationship between "active and passive" distinction by including passive measures intended to enhance clarity in the targeting decision-making process by enhancing the attacking force's ability to implement active distinction. These measures are commonly referred to as, "passive precautions."[103]

Article 58 of AP I provides for these passive precautions. They provide a critical component in the precautions equation. The essence of

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[102] Bohrer & Osiel, *supra* note 94, at 752.

[103] AP I COMMENTARY, *supra* note 8, at 692 (From the beginning of its work the ICRC has felt the need to lay down provisions for "passive" precautions, apart from active precautions, if the civilian population is to be adequately protected.).

Article 58 is the obligation to refrain from defensive tactics that unnecessarily increases civilian risk by exposing civilians to the harmful consequences of combat operations. Thus, forces that anticipate they will be attacked must consider measures to mitigate civilian risk by avoiding, whenever feasible, comingling military objectives with the civilian population.[104]

The International Committee of the Red Cross Commentary characterizes Article 58 precautions as "passive precautions," because they are not part of the target selection and engagement process, but instead are measures taken in anticipation of being attacked.[105] In essence, these "passive precautions" are distinction and proportionality "enablers," obligating those expecting to be attacked to take affirmative measures to enhance, or at least not intentionally disrupt, the attacking force's ability to comply with these two essential civilian risk mitigation principles. This would include any situation where friendly forces prepare counter-measures against enemy attack: if the force is concerned enough about such an attack to prepare such counter-measures, it assumes a corresponding obligation to take measures to protect civilians and civilian objects from the risk of injury or damage that could result from the attack or the counter-measures.

Like Article 57, Article 58 includes enumerated measures to facilitate the distinction process and thereby enhance civilian protection.[106] Unlike Article 57, Article 58 does not specifically include a statement of a "constant care" obligation.[107] Nevertheless, it would be completely illogical to suggest that this overarching humanitarian obligation is only applicable to attacking forces and not forces anticipating being attacked. Accordingly, the enumerated provisions of Article 58 ought not be considered the exclusive list of passive measures to mitigate civilian risk, but only illustrative, and "constant care" should be considered to be part of the passive precautions obligation.

There are three compelling reasons why the "constant care" obligation must apply to all belligerents, regardless of whether they are attacking or

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104 AP I, *supra* note 7, art. 58.

105 AP I COMMENTARY, *supra* note 8, at 692.

106 *Id.*

107 *Compare* AP I, *supra* note 8, art. 57(1) ("In the conduct of military operations, *constant care* shall be taken to spare the civilian population, civilians and civilian objects.") (emphasis added) *with* AP I, *supra* note 8, art. 58 (lacking the "constant care" provision).

being attacked. First, attempting to draw any line between an "attacking" and "defending" force is often difficult, if not arbitrary, and does not necessarily accord with actual operational art. In many situations, military units will engage in a range of operational actions that involve elements of both "attack" and "defense," or some other mission that does not neatly fit within this dichotomy. Second, as noted above, the "constant care" obligation is a mandate to implement the core LOAC balance itself: to offset the civilian suffering produced by the necessary brutality of war through constant efforts to mitigate civilian risk whenever, wherever, and however operationally feasible. Limiting the obligation to only the attacking force would undermine this objective.

Finally, exempting forces anticipating attacks from the "constant care" obligation would inevitably dilute the efficacy of civilian risk mitigation efforts by the attacking force. Unless defending forces are also obligated to constantly endeavor to enhance the efficacy of distinction, the law would allow—and perhaps even encourage—the defending force to use, as a defensive measure, actions that expose civilians and their property to unnecessary risk. Article 58 unquestionably validates this latter concern, requiring

> [t]he Parties to the conflict shall, to the maximum extent feasible:
> (a) without prejudice to Article 49 of the Fourth Convention [establishing limits on the deportation or transfer of civilians in occupied areas], endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives;
> (b) avoid locating military objectives within or near densely populated areas;
> (c) take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.[108]

The thrust of Article 58 seems clear: enhance civilian risk mitigation efforts by, in essence, facilitating the attacking force's ability to comply with the principle of distinction.

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[108] *Id.*

Whether by evacuating civilians from an area where an attack is expected, or by refraining from locating military objectives in the midst of civilian populations (which would include transforming those areas into military objectives), the defending force's compliance with Article 58 will inevitably enhance the attacking force's ability to distinguish between military objectives and civilians and civilian objects. Perhaps more importantly, the defending force's failure to take such measures will force the attacking force to engage the enemy in the midst of civilians and their property, inevitably exacerbating civilian risk by complicating the attacking force's implementation of the distinction principle and the attacking force's ability to make reliable proportionality judgments. As a result, absent passive precautions, there will be an increased probability that attacks will produce unavoidable civilian casualties and destruction of civilian property. Even when such outcomes would be lawful if the attacking force applied the principles of proportionality and distinction as best it could under the circumstances, they are nonetheless tragic because the loss to civilians and civilian property may have been avoidable if passive precautionary measures had been applied by the defending forces.

There is, of course, a natural tension between military considerations related to effective defense and preparation to repulse an attack and implementation of these "passive precautions." Article 58 recognizes and accounts for this tension with its own feasibility qualifier. It is therefore logical that Article 58 was neither intended to, nor should in practice, provide an attacking force with an unfair tactical advantage by depriving a defending force of the ability to exploit advantages inherent in the area of operations. On the other hand, passive precautions may seem counterintuitive from a military perspective if by facilitating an attacking force's implementation of the distinction obligation, the defender necessarily renders its own forces and positions easier to target and therefore easier to destroy.

Use of built-up areas to impede an anticipated attack can be a highly effective tactic, and has frequently been used during conflicts.[109] This tactic will almost always increase risk to civilians, and almost automatically increase risk to civilian property. Nonetheless, Article 58 does not prohibit such tactics. The ICRC Commentary acknowledges this, and recognizes the relationship between military necessity and the scope

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[109] Alexandre Vautraver, *Military Operations in Urban Areas*, INT'L REV. RED CROSS (June 2010), https://www.icrc.org/eng/resources/international-review/review-878-urban-violence/review-878-all.pdf.

of the Article 58 obligation, noting that "a Party to the conflict cannot be expected to arrange its armed forces and installations in such a way as to make them conspicuous to the benefit of the adversary."[110]

But there is a marked difference between making your forces "conspicuous" and mitigating *unnecessary* civilian risk by avoiding co-mingling. This is particularly important in relation to the defensive use of urban terrain or other built-up civilian areas. It is probably impossible to identify situations where the exploitation of civilian populated areas is *per se* unlawful, and extremely difficult to condemn such tactics on a case-by-case basis. However, such tactics should be considered in the broader context of a military organization's overall commitment to LOAC compliance. This will often provide a useful indicator of whether co-mingling military assets with civilians and civilian property was legitimate and justifiable, or instead an effort to counter enemy combat power by deliberately complicating judgments on the legality of attacks. Assessing compliance with "passive precautions" should focus on whether a force defending itself from attacks in an urban environment or near civilians and civilian objects, or planning such a defense, had alternative viable options available. Where it is apparent that those planning the defense against attacks were aware such options existed, one could infer that the defending force has engaged in unlawful co-mingling of civilians with combatants in violation of Article 58.[111]

Ultimately, what Article 58 demands is not that forces never operate in urban areas or near civilians or civilian property, or never transform civilian property into military objectives. Instead, it demands that they do so only when such actions are justified by genuine military necessity.[112] Such military necessity would not include *exploiting* the presumptive protection of civilians or civilian property to impede an enemy attack or gain a tactical or strategic advantage. Accordingly, commanders are expected to avoid locating military assets in the midst of civilians or civilian property to the extent feasible, but may nonetheless do so if it is based on a legitimate military requirement.[113]

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[110] AP I COMMENTARY, *supra* note 8, at 693.

[111] *See, e.g.*, JINSA REPORT, *supra* note 80 (assessing Hamas tactics of embedding vital military assets in civilian areas).

[112] AP I COMMENTARY, *supra* note 8, at 693–94.

[113] DOD LAW OF WAR MANUAL, *supra* note 2, at 189–91, 248 (" [I]f a commander determines that taking a precaution would result in operational risk (i.e., a risk of failing to accomplish the mission) or an increased risk of harm to their own forces, then the precaution would not be feasible and would not be required.").

There are two additional important considerations related to implementation of the "passive precautions" obligation. First, as Article 58 indicates, the specific obligations imposed by Article 58 are not exclusive. Instead, commanders must consider other "passive precautions" that will mitigate risk to civilians and their property.[114] One such measure seems almost obvious: the requirement that belligerents—whether state or non-state—take some measures to effectively distinguish themselves from the civilian population by wearing a distinctive uniform or emblem.[115] Indeed, failing to implement this most basic, "passive precaution" creates immense risk to the civilian population by inevitably causing the other side's forces from questioning whether any civilian can be presumed to be inoffensive and therefore entitled to protection. When this risk is created deliberately in an effort to impede attack by forces committed to compliance with the distinction obligation, it is even more problematic, as it calls into question the value of such compliance and undermines the position of those advocating restraint based on the LOAC.

Second, the extent to which a military force implements these passive precautions in no way releases an attacking force from compliance with its precautionary obligations. Even if a failure to implement passive precautions is attributed to a deliberate attempt to use civilians or civilian property to gain an illicit tactical and/or strategic advantage, the attacking force remains obligated to do everything inherent in the constant care rule to minimize civilian risk.[116] This is an essential aspect of civilian risk mitigation, and it prevents "double victimization" of civilians—a victim of the defending enemy who is deliberately exploiting the presence of civilians to defend against attacks, and a victim of the attacking force who may claim an exemption from its "constant care" obligation due to illicit enemy tactics. In fact, while Article 51 of AP I explicitly prohibits exploitation of civilians in an effort to render a military objective immune from attack or to impede enemy operations, it also explicitly establishes that even in the case of such exploitation, the attacking force remains

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[114] AP I, supra note 7, art. 58(c) ("take the other necessary precautions . . . ").

[115] *Id.* art. 44(3) ("In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.").

[116] *See* JINSA REPORT, *supra* note 80, at 7 (finding despite clear evidence of Hamas's use of civilians and urban terrain as a force equalizer, the IDF was still obligated to follow precautionary measures.).

bound by its civilian risk mitigation obligations, specifically linking this rule to Article 57:

> 7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.
>
> 8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, *including the obligation to take the precautionary measures provided for in Article 57*.[117]

III. Back to the Beginning: A Precautions Rule, Principle, or Process?

Identifying the line between "principle" and "rule" can be perplexing. In LOAC parlance, both terms are often used interchangeably to identify the same obligation. For example, it is common to reference both the proportionality "rule" and the proportionality "principle." Such conflation

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[117] AP I, *supra* note 7, art. 51(7)–(8) (emphasis added). While an attacking force is never relieved of its obligation to comply with Article 57, it is an open question whether (i) a defending enemy's failure to comply with Article 58 influences how far the attacking force must comply with its Article 57 obligations, or (b) whether such failure should properly influence the assessment of lawful targets and the reasonableness of attacks that mistakenly target civilians and/or civilian objects. This is an especially complex and important issue when the failure to comply suggests a deliberate and illicit effort by the defending force to exploit the presence of civilians and civilian property to gain a tactical advantage (e.g., by complicating the attackers' decision-making and assessment of LOAC compliance.) It would be fundamentally inconsistent with Article 57 to suggest that such abusive conduct by a defending force deprives the defender's civilian population of the presumption of protection. However, it would also defy military common sense to refuse to acknowledge that by making the distinction between civilian and belligerent more complicated, the defender's conduct dilutes the civilian risk mitigation effect of the distinction and proportionality obligations. A comprehensive treatment of this issue is well beyond the scope of this article. However, this will remain a central issue in relation to assessing reasonableness in judgments about attacks against this type of enemy, and should be the focus of substantial inquiry.

is, however, misleading. A rule should be understood as relatively precise, applicable only to the specific contexts incorporated into its organic terms. A principle, in contrast, should be understood as a more general source of guidance, extending across a spectrum of activities to provide direction in the implementation of specific rules and to guide decision-making where regulatory gaps exist.

Definitions of these two terms confirm the difference between them. A "rule" is commonly defined as, "an authoritative, prescribed direction for conduct, especially one of the regulations governing procedure in a legislative body or a regulation observed by the players in a game, sport, or contest."[118] In contrast, a "principle" is commonly defined as "a moral rule or belief that helps you know what is right and wrong and that influences your actions."[119] These two definitions confirm that the notion of "principle" is much broader in scope and effect than a rule. Principles, in essence, provide a foundation for regulation through more precise and specific rules, a relationship that seems central to the understanding of LOAC principles.

A broad conception of LOAC principles was recognized by the International Court of Justice (ICJ) when it considered the legality of the use or threatened use of nuclear weapons.[120] In that seminal decision, the ICJ addressed what it considered to be the international legal foundation for conflict regulation, what it characterized as "cardinal principles."[121] The term "cardinal" reinforces the broad scope that should be accorded to a "principle," as it suggests that the LOAC principles included within that characterization function like cardinal directions of a compass. Military manuals and other sources of LOAC authority such as scholarly works use similar characterizations: "core" principles, "fundamental" principles, "foundational" principles.[122] All of these characterizations share a common thread: LOAC principles provide essential guidance for the more precise regulation provided by specific rules, and fill gaps that may arise as the result of the under-inclusiveness of these rules.

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[118] *Rule*, THE FREE DICTIONARY, http://www.thefreedictionary.com/rule (last visited Sept. 27, 2015).
[119] *Principle*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/principle (last visited Sept. 27, 2015).
[120] *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8), http://www.icj-cij.org/docket/files/95/7495.pdf.
[121] *Id.* at 257.
[122] *E.g.*, DOD LAW OF WAR MANUAL, *supra* note 2, 50–70 (addressing principles); JOINT SERVICES MANUAL OF THE LAW OF ARMED CONFLICT, UNITED KINGDOM (2004).

Curiously, there seems to be nothing close to a consensus that a general precautions obligation falls within the category of "core" or "cardinal" LOAC principles. In fact, quite the opposite seems to be suggested by a review of authoritative sources, including the ICJ's nuclear weapons opinion.[123] These sources routinely include, among LOAC principles, military necessity, distinction, proportionality, and the prohibition against unnecessary suffering, but tend to omit precautions.

This common omission probably reflects an understanding of precautions as a rule-based obligation, limited to the enumerated measures in Articles 57 and 58. But, this more limited or restrictive understanding of the scope and effect of precautions is unfortunate, for it fails to effectively recognize the overarching nature of the "constant care" obligation to mitigate civilian risk.[124] In contrast, elevating the precautionary measures to that of a core or cardinal LOAC principle alongside the other widely acknowledged principles will ultimately enhance civilian risk mitigation by emphasizing that "constant care" is expected at all times.

As treaty rules of international law, Articles 57 and 58 are obviously binding on states party to AP I. Furthermore, the precautionary measures enumerated in these articles are widely regarded as rules of customary international law, binding *any* party to *any* armed conflict.[125] Considered more broadly, the overall precautions obligation is of great significance in the mosaic of civilian risk mitigation. Indeed, one reason the precautions obligation holds such potential as a measure to mitigate civilian suffering is because it has elements of not just a rule, but a broader guiding principle that permeates the regulation of hostilities.

Why will treating precautions as a principle as opposed to a rule produce less civilian risk? Articles 57 and 58 define "constant care" as a rule implemented by specific enumerated measures, which is generally tracked by the DoD *Law of War Manual*.[126] This is certainly not insignificant. However, these measures are focused almost exclusively on attacks (precautions in the attack and against attacks), and as a result the

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123 *See id.*
124 *See* Corn, *supra* note 5.
125 HENCKAERTS & DOSWALD-BECK, *supra* note 6, at 51, 68.
126 DOD LAW OF WAR MANUAL, *supra* note 2, at 192.

notion of precautionary measures is not instinctively integrated into other aspects of military operations. But the "constant care" obligation can, and should, inform every aspect of these operations, influencing everything from training to personnel staffing. Such a conception of the precautions obligation would provide a foundation for greater commitment to balancing military necessity with civilian risk mitigation, the ultimate humanitarian objective of the LOAC. In short, Articles 57 and 58 are rules that reflect a broader "constant care" principle. Articles 57 and 58 should not be seen as the limit of the principle.

To illustrate this difference in scope and effect, consider a hypothetical policy debate over the legality of authorizing military personnel to infiltrate enemy positions wearing civilian clothing. If these forces are instructed to don a distinctive emblem recognizable at a distance prior to engaging in any hostilities against enemy personnel, it may be asserted that the *infiltration* in civilian clothing is not prohibited by the LOAC, but that instead it merely exposes the operatives to the risk of criminal sanction under the domestic law of the enemy state should they be captured. Uncertainty as to the relationship between operating in civilian clothing and the war crime of perfidy may contribute to arguments in favor of operating in civilian clothing. While there seems to be little doubt that *fighting* in civilian clothing would qualify as perfidy, it is less clear that any use of civilian clothing falls within this scope of this LOAC prohibition.

It is unlikely that the precautions *rule* as articulated in Articles 57 and 58 would have any influence on the legal analysis associated with resolving the issue of wearing civilian clothing in order to infiltrate. Nothing about this tactic involves a lethal targeting judgment with the potential to place civilians at risk. Accordingly, Article 57's enumerated obligations related to warnings, timing of attack, and choice of means or method of attack are inapposite. However, "constant care," if understood and applied as a general principle, and not merely a rule, could be relevant. As a general or overarching principle, the operational decision-making process would be constantly animated by an effort to mitigate risk to civilians whenever feasible. Accordingly, it would be necessary to consider whether the use of this tactic, even if not expressly prohibited by a LOAC rule, would increase risk to civilians and whether that risk that could be mitigated by refraining from the tactic.

On the question of wearing uniforms in a particular operation, one would need to consider the possibility that allowing members of the armed

forces to cloak themselves in civilian appearance in this operation undermines the protection of the distinction principle by diluting confidence in the objective indicia of combatant versus civilian status. Once the enemy even suspects the use of such tactics, civilians are inevitably subjected to a greater risk of mistaken attack. Indeed, under the precautions principle, planners would bear a heavy burden to show that uniforms or other distinctive markings are not required, since the use of uniforms and distinctive emblems in military operations is a key LOAC requirement. The fact that uniforms or other distinctive markings make military forces more easily identifiable is the very reason they are required, as they facilitate distinction and reduce civilian risk. A precautions-based analysis would require an assessment of the impact on civilian risk that may arise as a result of any deviation from this key norm even if the deviation arises outside the scope of an attack.[127]

There are other situations where application of a precautions principle would have a more pervasive—and therefore more protective—effect than a strictly rule-based application. For example, conceptualizing precautions as a principle instead of a rule will encourage integration of the "constant care" requirement into every aspect of military preparation, planning, execution, and even post-hoc assessment of military operations. In this sense, a "precautions principle" produces a strong humanitarian-driven counter-balance to the principle of military necessity: while necessity allows consideration of measures to bring about prompt submission of the enemy to accomplish the mission to be given considerable weight in military operations, a precautions principle requires constant consideration of concrete measures to mitigate the risk to civilians that those operations may create.

Admittedly, drawing a distinction between a rule and a principle is susceptible to criticism as an exercise in semantics. After all, even if considered as a rule, Article 57 could be interpreted quite expansively to extend beyond merely attacks to include tactical decisions such as the one highlighted above. But in the realm of conflict regulation, semantics matter. Law of armed conflict principles are understood as the foundation of conflict regulation, producing a powerful influence on military professionals in their thinking about the conduct of military operations. In essence, principles produce a more pervasive influence on the processes that influence LOAC compliance in military activities. This alone

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[127] *But see* W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4:2 CHI. J. INT'L L. 493 (2003).

provides a compelling justification for characterizing the precautions obligation as a principle rather than a rule.

IV. The Value of a Greater Objectivity in Civilian Risk Mitigation

Determining the applicability of LOAC obligations and how they impact the planning and execution of military operations is an obvious first step for mitigating civilian risk associated with armed conflict. However, effective implementation of the applicable principles and rules remains an enduring challenge that is often exacerbated by the range of situational variables that are an inherent aspect of military operations. Like other LOAC principles and rules that regulate the conduct of hostilities, precautions are intended to produce a rational balance between military necessity and humanity, specifically by mitigating civilian risk. However, the efficacy of all of these rules and principles is contingent on good faith implementation. For military forces committed to LOAC compliance, the logical symmetry between the law and tactical and operational practice will enhance support among operators for implementing the LOAC in all military operations.

The "contextual" or "situational" component of effective LOAC implementation is especially significant in relation to the principles and rules regulating the employment of lethal combat power: the targeting process. Implementing the principles of distinction and proportionality, and compliance with the more specific rules of military objective and the prohibition against indiscriminate attacks, is a constant challenge in any armed conflict, and especially challenging in conflicts against hybrid or unconventional enemies. This complexity illustrates how seemingly simple principles and rules in the abstract become far more complex in the context of actual operations. "Reasonableness" is the ultimate touchstone for compliance with these core LOAC principles and rules.[128] However, what is or is not reasonable is based on the situation informing each relevant decision. In the realm of targeting judgments, this includes a wide array of METT-TC factors. Thus, when implementing (and in many cases assessing compliance with) LOAC targeting law, context is essential.

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[128] *Command Knowledge: The Line of Fire in the IHL Principle of Proportionality*, HARV. LAW, http://pilac.law.harvard.edu/commanding-knowledge-the-line-of-fire-in-the-ihl-principle-of-proportionality/ (last visited Mar. 30, 2016).

This "contextual reasonableness" standard is central to legitimate LOAC compliance assessments; no commander can credibly be subjected to an "after the fact" assessment based on facts and circumstances that were not reasonably available to the commander at the time of the judgment. While this canon of LOAC implementation justifiably provides a fair margin of appreciation for operational decision-makers,[129] it also injects a substantial level of subjectivity into the implementation process.

A. Operational and Legal Symmetry: the Precautions Advantage

Effective LOAC implementation, and the civilian risk mitigation it produces, will almost inevitably be enhanced when the nature of a LOAC principle or rule is aligned with military operational logic. This aspect of LOAC implementation favors a more pervasive commitment to a "precautions principle," as the nature of most of the precautionary measures enumerated in Articles 57 and 58 results in an instinctive alignment with the military decision-making process for those planning or executing military operations. Because these measures, when translated into operational practice, involve concrete steps that commanders, planners and operators can implement at each step of a military operation, they hold tremendous potential for enhancing civilian risk mitigation and overall LOAC compliance.[130]

In this regard, it is essential to recognize that precautionary measures are inherently process-oriented, process that is central to planning and executing military operations. This is especially significant in relation to deliberate targeting, where commanders rely on subordinates to develop and implement processes to maximize the effective employment of combat power in a manner consistent with the LOAC. Consideration of precautionary measures—both passive and active—during this decision making process is both feasible and logical. To ensure LOAC compliance, commanders and planning staffs must be encouraged to integrate into their decision-making processes, considerations related to gathering better

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[129] Michael N. Schmitt & J. J. Merriam, *The Tyranny of Context: Israeli Targeting Practices in Legal Prospective*, 37:1 U. PA. J. INT'L L. 53, 124–25 (2015).

[130] *See* Corn, *supra* note 5. Of course, proportionality and distinction are linked with precautions, but precautions provide the guidance that military personnel need to implement these broad principles in actual operations. Further, because the measures enumerated in Articles 57 and 58 are not exclusive, the "constant care" theme of precautions encourages creativity at all levels of military operations to ensure LOAC compliance. *See* AP I, *supra* note 7

intelligence regarding presence of civilians in relation to enemy and friendly forces, the impact on civilians of attack timing and weaponeering, and the possible mitigation of civilian risk through evacuations and warnings.

These type of precautionary considerations are relatively concrete and less amorphous than the assessments of military advantage or excessiveness of incidental civilian losses that are required in a proportionality analysis. Indeed, by implementing precautions that reduce civilian risk, the proportionality assessment may become easier. Most of these precautionary measures involve assessing various tactical options and selecting the option that produces the desired military advantage while mitigating civilian risk. This is a natural aspect of course of action development and selection.[131]

Feasibility is, of course, a major aspect of precautions implementation, and inevitably injects an element of contextual judgment into this process. However, greater emphasis on precautions may reduce the complexity of feasibility judgments by encouraging commanders to constantly seek to develop multiple attack options, enabling them to more readily assess which option will produce required effects while mitigating civilian risk. Elevating the significance of precautions may lead to greater emphasis on precautionary *efforts* as an indicator of systemic LOAC compliance, which in turn will provide a powerful incentive for commanders and all military forces to increase efforts to develop and implement precautions. Ultimately, precautions must be understood as a procedural mechanism enhancing the effect of the substantive principles of distinction and proportionality. Fully integrating precautions considerations into the *process* of target selection and engagement will improve distinction and mitigate the complexity of proportionality judgments.

B. Thinking Deep: The Hybridization of Precautionary Process and Substantive Proportionality

As noted throughout this article, the precautionary measures enumerated in Articles 57 and 58 are neither intended to be, nor should be, considered exclusive. Instead, the "constant care" obligation requires

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[131] U.S. DEP'T OF ARMY, FIELD MANUAL 101-5, STAFF ORGANIZATION AND OPERATIONS, 5-12–5-13 (31 May 1997).

commanders and subordinates alike to constantly endeavor to identify other precautionary measures that contribute to civilian risk mitigation.

One such measure is the use of proportionality thresholds. Through ROE, commanders designate levels of approval for authorizing attacks based on levels of anticipated civilian casualties.[132] Subordinate commanders are thereby only permitted to make proportionality decisions within the range of their limited anticipated civilian casualty authority; when anticipated casualties exceed their designated limit, the targeting decision must be elevated to a higher level of command.[133]

This practice of aligning levels of command with permissible proportionality judgments is a procedural mechanism intended to enhance the efficacy of proportionality compliance.[134] But it is also unquestionably a precautionary measure: by imposing anticipated casualty limits on each progressively lower level of command, this procedure provides increased levels of command judgment, staff input, situational perspective, and deliberation time in relation to the increasing risk to the civilian population. While it is clear that the proportionality rule does not require use of such "anticipated casualty" limitations on attack authority,[135] use of this procedure reflects a commitment to the "constant care" obligation.

This hybridization of a precautionary process and proportionality compliance is the type of creative civilian risk mitigation that should be encouraged. But it also involves a certain degree of risk. Imposing authorization limits based on anticipated civilian casualties may lead to a misunderstanding that the law prohibits any attack creating a risk of casualties beyond the designated number. This is inaccurate; limiting authority to make proportionality judgments to certain levels of command based on anticipated casualty thresholds does not indicate that exceeding that threshold violates the proportionality principle. Instead, it indicates that the nature of the risk to the civilian population warrants increased scrutiny and a greater degree of command judgment.

Such practices should be encouraged and rewarded, but must also be clearly understood for what they are. If commanders believe that policy-based procedural precautions could ultimately become legally obligatory

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[132] *See* Corn, *supra* note 5.
[133] *Id.*
[134] *Id.*
[135] *Id.*

in all situations, there is a risk they will be reticent to use them. On the other hand, if commanders or their subordinates believe that such levels are already legal obligations, they may become confused as to what the law requires, which either will undermine their confidence in the compatibility of the law with military requirements or create a misapprehension about the potential legal liability associated with targeting.

V. Conclusion

Precautionary measures, which are measures intended to advance the obligation to take "constant care" to mitigate risk of military operations on civilians and civilian objects, hold tremendous promise to achieve the LOAC's primary objective of balancing military necessity with humanity. As such, they deserve greater stature in the lexicon of LOAC obligations, not just as rules, but as a core, stand-alone principle. Training commanders and their subordinates to constantly seek tactics, techniques, and procedures to mitigate civilian risk in a way that does not compromise legitimate military interests is central to developing ethically grounded warriors. Ultimately, inculcating the warrior with a deep and genuine commitment to mitigating the suffering of war is vital to LOAC implementation.

Precautionary measures feature prominently in the new DoD *Law of War Manual*. However, like Articles 57 and 58 in AP I, they appear to be conceived as rules limited in applicability to the lethal targeting process. While this is a logical focal point for precautions, there is no reason why the overall "constant care" obligation should be so limited. Precautionary measures should be conceived as a much broader obligation, influencing every aspect of operational training, planning, execution, assessment, and accountability in military operations.

It seems relatively clear that the nature of modern warfare will demand such an expansive conception of precautions, as well as a continuing commitment to "grow" ethically grounded warriors, and both military leaders and those interested in contributing to the credible evolution of the LOAC must recognize the inherent link between precautionary measures and LOAC compliance. Precautionary measures are increasingly central to successful combat operations and other military actions at the tactical, operational, and strategic level. Creativity in civilian risk mitigation efforts must be both encouraged and rewarded, even when these efforts do

not produce the ideal outcomes they were intended to achieve. Given the inherent value of these measures to ensuring LOAC compliance, precautions should become a core principle under the LOAC, and not simply a matter of policy or "best practice." If precautions are elevated to the status of a legal principle, all the processes applicable to military operations—including training, planning, combat operations and post-operations assessment—will require civilian risk mitigation measures. These measures, which are rationally aligned with the military decision-making process, in turn will ensure that LOAC compliance is deeply embedded in the mindset of all warriors, as a matter of military ethics, professionalism, and law. By the same token, it would be understood that commanders, planners, and operators who seek in good faith to fully comply with this principle, have met their obligations under the LOAC even where, notwithstanding their compliance efforts, military operations result in unintended harm to civilians and civilian objects.

OPERATION BILLY GOAT: THE TARGETING AND KILLING OF A UNITED STATES CITIZEN ON UNITED STATES SOIL

MAJOR E. PATRICK GILMAN*

> *It is possible, I suppose, to imagine an extraordinary circumstance in which it would be necessary and appropriate under the Constitution and applicable laws of the United States for the President to authorize the military to use lethal force within the territory of the United States.*[1]

I. Introduction

A. Abdul al Sad

Days later, witnesses would recount at approximately 2:00 a.m. on Tuesday, February 11, 2014, hearing a dull thumping from the sky in the Wrigleyville neighborhood of Chicago, as they watched what appeared to be armed men jumping out of helicopters onto the roof of a neighboring apartment building.[2] Who the men were and what they were doing was unclear to spectators, but a few things were certain: the helicopters

* Judge Advocate, United States Army. Presently assigned as Chief of Military Justice, 25th Infantry Division, Schofield Barracks, Hawaii. LL.M., 2015, The Judge Advocate General's Legal Center and School, United States Army, Charlottesville, Virginia; J.D., 2005, Chicago-Kent College of Law; B.A., 2001, University of Illinois at Chicago. Previous assignments include Student, 63d Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia; Battalion Judge Advocate, 3d Battalion, 1st Special Forces Group (Airborne), Joint Base Lewis-McChord, Washington, 2012–2014; Defense Appellate Attorney, Defense Appellate Division, U.S. Army Legal Services Agency, Arlington, Virginia and Fort Belvoir, Virginia, 2009–2012; Brigade Judge Advocate, 41st Fires Brigade, Fort Hood, Texas and Wasit Province, Iraq, 2007–2009; Operational Law Attorney/Trial Counsel, 1st Brigade Combat Team, 4th Infantry Division, Fort Hood, Texas and Taji, Iraq, 2006–2007. Member of the bars of Illinois, the Northern District of Illinois, the Court of Appeals for the Armed Forces, the 7th Circuit Court of Appeals, and the Supreme Court of the United States of America. This article was submitted in partial completion of the Master of Laws requirements of the 63d Judge Advocate Officer Graduate Course.

[1] Letter from Eric Holder, Attorney General of the United States, to Senator Rand Paul (March 4, 2013) [hereinafter Letter to Paul] (on file with the author).

[2] Abdul al Sad, the scenario depicting terrorist involvement, and all other characters introduced throughout this article are a creation of the author's imagination. Any similarities, either by name or actions, they may share with actual individuals living or dead, are coincidental.

remained in the area for anywhere between three to five minutes; depending on who was telling the story, there were no unusual sounds other than the dull thumping of the helicopters' rotor blades, and then the men and the helicopters were gone.

On February 11, 2014, at 5:00 p.m., the President of the United States called for a press conference at the White House. Speculation had been ongoing throughout the day about what he was going to say, but no one, not a single reporter, could speculate with any certainty about what was to come. And then, it happened; the President took the podium and explained that in the late evening hours of February 10, 2014, he had ordered special operations forces from the U.S. military to conduct an operation in Chicago, Illinois, to capture or kill Abdul al Sad, a known terrorist in the al-Qaeda network, who was planning an attack on U.S. soil, against U.S. citizens. The President explained the mission was a success. Abdul al Sad was killed, and no U.S. military personnel or civilians were injured. What the President did not mention, at least during the press conference, but what reporters discovered within a matter of days, was that Abdul al Sad—a senior operational leader in al-Qaeda—was born Jeremy Jeffries in Syracuse, New York.

Over the coming weeks, the melee that ensued in the media rivaled only that of the mission to capture or kill Osama bin Laden. "Talking heads" from every camp led the news hours with headlines such as, "*The President Orders an Attack on a U.S. Citizen in the United States*," and, "*Did the President Go Too Far?*" However, the White House remained silent. That was, until approximately three weeks later—when the Department of Defense, at the order of the President—released Abdul al Sad's shocking dossier to the press.

Abdul al Sad, also known as Jeremy Jeffries, was born on January 10, 1977, in Syracuse, New York. His parents, Steven and Joan Jeffries, were teachers; Steven, a math teacher at one of the high schools near Syracuse University, and Joan, a biology professor at Syracuse University. Jeremy, the middle of three children, had an older brother, Jonathan, and a younger sister, Jackie.

Growing up, Jeremy was a scrawny kid and not particularly athletic, but he was incredibly smart. He excelled at mathematics and science and his family fully expected him to be a doctor. Jeremy graduated from high school in 1995, first in his class, with a full scholarship from the Massachusetts Institute of Technology (MIT). Because of the advanced

placement classes Jeremy took while in high school, he entered MIT as a sophomore and graduated with a Bachelor of Science in mechanical engineering in the summer of 1998.

While in school, Jeremy excelled academically, but his social life was non-existent. Interviews with classmates revealed very few people remembered him, and no one claimed to be his friend. Indeed, it was his parents and his siblings that would later tell reporters that it was not until Jeremy was in graduate school that he ever mentioned having a friend. Though his family regularly encouraged him to get involved with social activities, Jeremy never did.

Immediately after graduating from MIT, Jeremy was recruited to work for major corporations and government entities, but he turned them all down because he wanted to continue his education. He began graduate school as a Ph.D. candidate in biomechanical engineering. While pursuing his Ph.D., he participated in an exchange program that sent him to the University of Oxford in Oxford, England. It was there that he met another exchange student, Fariq al Libby.

During the year that Jeremy was in England, he and Fariq became fast friends. For the first time in Jeremy's life, he had a "best friend," at least, that is how he would explain it to his mother over email and phone calls home. To this day, little is publicly known about Fariq al Libby, other than that he is Saudi-born, has strong ties to al-Qaeda, and is very good at disappearing for years at a time.

After leaving Oxford, Jeremy kept in close contact with his best friend, Fariq. Indeed, Jeremy visited him in London during almost every holiday and break in his schedule; Fariq always paid for the trips. After graduating from MIT, at the urging of Fariq, Jeremy moved to London in 2002.

Shortly after moving to London, Jeremy's correspondence home became less and less frequent. His family was not sure what, if anything, Jeremy was doing for work. Jeremy later told them that he had a job with an oil company which required him to travel. But beyond that, Jeremy did not share much information. What no one knew was that Fariq had been slowly recruiting Jeremy to become an al-Qaeda operative from the day they met. What even Fariq did not know was how easy it would be to not only recruit Jeremy, but also to turn him against his country.

Jeremy did get a job with an oil company—a job Fariq procured for him; though the job did not last very long. In fact, by the time the United States invaded Iraq in 2003, Jeremy was no longer working, although he was still on the oil company's books and being paid handsomely. Instead of working, he used his time with Fariq and their group of associates to travel throughout the Middle East. It was at Fariq's urging that Jeremy converted to Islam. For Jeremy, the choice was not particularly difficult. After all, all of his friends were Muslim and he was not raised practicing any religion. It was at Fariq's urging that Jeremy learn Arabic—a language, which it turns out, Jeremy had no problem grasping. Within 18 months, Jeremy was able to read and write at the level of a native–speaking 7th grader. Growing his beard, on the other hand, was a little more difficult for Jeremy. Jeremy was fair skinned and did not have a lot of facial hair to begin with. However, that did not stop him from trying, and after a couple of years he had a decent, albeit scraggly, beard.

By spring of 2006, Jeremy had accumulated quite a lot of money and experience travelling throughout the Middle East and Africa. He had spent time in Jordan, Saudi Arabia, Yemen, Pakistan, the United Arab Emirates, Iraq, Morocco, and Egypt—all under the guise of work. However, Jeremy was neither travelling on a U.S. passport nor "working" under his given name. In fact, Jeremy Jeffries, the U.S. Citizen with a British work visa, had not existed in some time. In his stead was Abdul al Sad, a Saudi national, with a Saudi passport.

As time passed, Jeremy's devotion to the jihadist cause grew stronger and stronger. His brilliant, though impressionable, mind was pumped full of anti-American, anti-western propaganda, and Jeremy ate it up. Fariq rose through al-Qaeda's recruiting ranks quickly, and took Jeremy with him at every stage. Before long, Jeremy was given the responsibility of developing new and inventive ways to plan, construct, and detonate explosive devices used in Iraq and Afghanistan, against U.S. soldiers and local nationals; he was good at it too. His degree in mechanical engineering, and Ph.D. in biomechanical engineering from MIT, was a pretty good stepping-off point for constructing weapons capable of inflicting mass casualties.

By 2009, Abdul al Sad was on several intelligence agencies' radars, and on the capture/kill lists of the United States, the United Kingdom, and Israel. Each knew he was a senior operational leader in al-Qaeda, but no one could seem to locate him, nor were there any good pictures of him. He operated from multiple locations, in multiple countries, and was

responsible for training hundreds of fighters in the art of bomb-making. In 2011, at the direction of Fariq, Abdul al Sad returned to his flat in London as Jeremy Jeffries, and continued the ruse of working for the Saudi oil company that had been paying him generously since 2002. Upon returning to London, Jeremy shaved his beard and cut his hair, so as to not draw suspicion. By late 2012, Fariq and Jeremy decided that Jeremy would soon return to the United States. They planned an operation requiring Jeremy's expertise.

In January 2013, Jeremy Jeffries resigned from his position at the oil company and returned to the United States. While in London, he purchased a dilapidated, four-unit apartment building in Chicago, Illinois, which he paid for in cash. Over the next six months, Jeremy renovated and rehabilitated the building, merging three of the units into one apartment, and the fourth into an office. The building was by all accounts magnificent. It would later be described as a "fortress," although from a passerby's perspective it was simply a run-down, old, Wrigleyville flat.

What no one knew was that by January 2014, Abdul al Sad, with his vast resources and using his extensive al-Qaeda network, had smuggled significant amounts of bomb-making materials into the United States, and his fortress was wired to disintegrate at the push of a button. Fariq al Libby was captured by U.S. officials in Pakistan near the Afghanistan-Pakistan border in 2014. What he would ultimately reveal to U.S. intelligence officials during the interrogation process later that same month, made the hair on the neck of his captors rise.

Al Libby spelled out, in great detail, the operation al Sad had planned to undertake. Al Sad, who over the course of the last decade had become quite a remarkable bomb maker, had been constructing multiple, low-intensity, high-yield, dirty bombs for the last six months. These bombs, when detonated in the Chicago subway system would not only wreak havoc and death throughout the subway tunnels, but would also take out the infrastructure below the two federal buildings on the corners of Jackson and Dearborn Streets in Chicago. One of those buildings housed the federal courthouse. The other housed multiple federal agencies, including the Federal Bureau of Investigation. Al Libby did not tell his interrogators was how many bombs; when the attack was to occur; and who had planned to deliver the devices.

As this information shot up the chain of command, it became clear to the White House that al Sad was operating without even the faintest

inkling by any U.S. intelligence or law enforcement agency. Everyone understood a response was necessary, and needed to happen fast. Whether the United States should respond with military action or law enforcement action was a hotly contested debate amongst the decision-makers. As there always are, a variety of opinions were put forth. In the end, because of the immediate and potentially catastrophic nature of the threat, the President ordered the commander of the military's special operations forces to either capture or kill al Sad, while minimizing collateral damage; and so they did.

On February 11, 2014, for the first time since the "War on Terror" began in 2001, the U.S. military targeted and killed a U.S. citizen-terrorist on American soil. Abdul al Sad was a senior operational leader of al-Qaeda, and a direct participant in hostilities against the United States. The team responsible for conducting the operation recovered three dirty bombs, all of the explosives wired throughout al Sad's office unit, along with other materials of significant intelligence value. Operation Billy Goat was a success. Al Sad's targeted killing was legal.

B. The Art of War

The topic of fighting and waging war has been the subject of countless debates and scholarly writings for hundreds of years.[3] The result has been a haze of misunderstanding, misapplication, and misrepresentation of the rules associated with armed conflict, and the targeting of those individuals involved in armed conflict. To be sure, questions of war are rarely easy, and are fraught with grave consequences. However, obscuring the legal principles of armed conflict transforms the idea of waging war into a discussion of what *should* be done vice a discussion of what is legally permissible. This in turn does two things; first, it largely ignores the vast body of treaties, customary international law, and domestic law on the subject; second, it shifts the debate from what is legally permissible, to what is acceptable from a policy perspective. In armed conflict, policy should never be the first consideration, because it is indefensible if the ultimate action violates of the law.

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[3] *See, e.g.*, SUN-TZU, THE ART OF WAR (1913).

C. What this Article is Not

This article does not seek to answer the "should we" question—that is, the policy question concerning whether the United States should use military action to target United States citizen "terrorists" domestically, nor does it analyze the ways various countries apply and interpret the law of armed conflict (LOAC). This article provides the legal justification, under both international law and U.S. domestic law, for the targeted killing of Jeremy Jeffries, a.k.a. Abdul al Sad. This article also discusses the legal framework that supports the accomplishment of this task within the bounds of both domestic and international law as they exist today. This article further analyzes and explains various doctrines of international law, domestic law, and the rights of both citizens and noncitizens as they pertain to being targeted by the United States vis-a-vis military action. This article will then develop the legal analysis necessary to provide a comprehensive understanding of how the law should apply to the hypothetical Abdul al Sad. Where differences in opinion exist between the United States' interpretation and/or application of a rule and/or law and another country's or non–governmental organizations'interpretation, the United States' interpretation will govern.[4]

Based on the intelligence available against Abdul al Sad, it would be within the Executive's power and legal authority to order Abdul al Sad's killing in Chicago. What follows is an analysis of *why*.

II. Lawful Use of Force (*Jus in Bello*)

Targeting and killing individuals in accordance with the LOAC during armed conflict is not new.[5] International law, to include Hague Conventions,[6] the Fourth Geneva Convention,[7] and the 1977 Additional

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[4] That is not to suggest this article ignores other bodies' interpretations. Contrary views are discussed throughout, as is analysis as to why the United States does not follow alternate views, insofar as an explanation is available.

[5] *See generally infra* notes 6-8 (The body of authorities that make up law of armed conflict (LOAC) are vast. A non-exhaustive list of authorities, however, includes: The Hague Regulations (Hague IV), 1907; Geneva Conventions I-IV (1949); Additional Protocols I-III (1977), Customary International Law (CIL), and domestic law.).

[6] Hague Convention IV, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. 539, 1 Bevans 631, 205 Consol. T.S. 277, 3 Martens Noveau Recueil 9 ser. 3) 461 (entered into force Jan. 26, 1910) [hereinafter Hague IV].

[7] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287 [hereinafter GCIV].

Protocols (AP I and AP II) to the Geneva Convention,[8] all contribute to the legal framework of lawful targeting of those who take direct part in hostilities. Though it has not ratified the AP I or AP II, the United States recognizes many of the protocols' provisions as customary international law (CIL)—those laws that develop through a consistent state practice and are followed out of a sense of legal obligation (*opinio juris*)[9]—and follows other CIL as a matter of policy.[10] Before getting too far into the legal issues surrounding the killing of a United States citizen in Chicago, however, it is important to understand the legal basis for the use of force—when force can be employed, against whom, and under what circumstances.

A. Laws Governing Armed Conflict, Generally

At the outset, it is important to understand that in international law, no universal definition of "war" exists.[11] Various sources posit different definitions and requirements necessary for a conflict to be categorized as "war." For example, the United States Army's Judge Advocate General's Legal Center and School suggests that four elements are necessary for war: 1) a contention, 2) between at least two nation-states, 3) wherein armed force is employed, 4) with an intent to overwhelm.[12] Other than official declarations of war by Congress, conflicts meeting these criteria are more aptly described as "armed conflicts,"[13] in that not every contention between at least two nation-states that include an armed force, with an

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[8] Protocol Additional to the Geneva Conventions of 12 Aug. 1949, *and* Relating to the Protection of Victims of International Armed Conflicts art. 51(3), Dec. 12. 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

[9] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102(2) (1987) [hereinafter RESTATEMENT].

[10] *See* Memorandum, W. Hays Parks, Lieutenant Commander Michael F. Lohr, Dennis Yoder, & William Anderson to Assistant General Counsel (International), OSD, subject: 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications (8 May 1986).

[11] Clausewitz presented the widely-accepted view of war, which was "an act of force to compel our enemy to do our will." CARL VON CLAUSEWITZ, ON WAR (Michael Howard & Peter Parrot, 1976).

[12] INT'L & OPERATIONAL LAW DEP'T., THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, LAW OF ARMED CONFLICT DESKBOOK 7 (2014) [hereinafter DESKBOOK].

[13] "Armed conflict" is a term of art with specific meaning and legal ramifications. The definitions of armed conflict are discussed *infra* in parts II.A.1. and II.A.2.

intent to overwhelm, carries with it the legal classification of "war." As such, the term "armed conflict" will be used throughout this article.[14]

1. International Humanitarian Law/Law of Armed Conflict

Also often referred to as International Humanitarian Law (IHL),[15] the Law of Armed Conflict is the primary body of international law applicable during armed conflict.[16] As a legal system or body of law, the LOAC is generally applicable to armed conflicts of both an international and non-international nature.[17] This continuously-evolving system of law is comprised of both treaties and customary international law.[18]

Treaties are essentially contracts between states that create binding, codified international law.[19] Customary international laws, on the contrary, often tend to be more open for interpretation than are codified international treaty law. Often referred to as "persistently objecting," if a

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[14] GARY D. SOLIS, THE LAW OF ARMED CONFLICT, INTERNATIONAL HUMANITARIAN LAW IN WAR 21 n.90 (Cambridge Univ. Press 2010) ("As the [International Committee of the Red Cross] (ICRC) notes, 'it is possible to argue almost endlessly about the legal definition of "war". . . . The expression "armed conflict" makes such arguments less easy.'").

[15] International Humanitarian Law (IHL) and the Law of Armed Conflict (LOAC) are often considered interchangeable, though debate exists as to whether that is accurate. For purposes of this article, however, the two are used interchangeably as the bodies of law applicable during armed conflict. For a more detailed discussion of the differences, *see generally* SOLIS, *supra* note 14.

[16] *See* Nils Melzer, *Int'l Comm. of the Red Cross, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (May 2009), http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-reportres/$File/direct-participation-guidance-2009-icrc.pdf [hereinafter Interpretive Guidance] (stating that some, including the ICRC, argue that International Human Rights Law (IHRL), which unquestionably exists during times of peace, also applies to armed conflict); *but see* SOLIS, *infra* note 14, at 24 (Solis argues the U.S. view is that "traditionally, human rights law and [law of war] (LOW) have been viewed as separate systems of protection. This classic view applies human rights law and LOW to different situations and different relationships respectively."); *and* U.S. DEP'T OF STATE: FOURTH PERIODIC REP. OF THE UNITED STATES OF AMERICA TO THE UNITED NATIONS COMM. ON HUMAN RIGHTS CONCERNING THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (11 Dec. 2011), http://www.state.gov/j/drl/rls /179781.htm#iii [hereinafter FOURTH PERIODIC REPORT] (explaining that the United States also holds the position that IHRL can apply to armed conflicts, and that the International Convention on Civil and Political Rights *can* apply during armed conflict; however, it recognizes that in times of armed conflict, under the doctrine of *lex specialis*, LOAC is usually the better of the legal paradigms).

[17] SOLIS, *supra* note 14, at 23 n. 101.

[18] *Id.*

[19] BLACK'S LAW DICTIONARY 1257 (8th ed. 2004).

state "consistently and unequivocally refuse[s] to accept a custom during the process of its formation,"[20] that state may argue that the CIL provision does not apply.[21]

There are certain fundamental international laws, known as *jus cogens*, considered to be so paramount to humanity that no amount of persistent objection absolves a nation from complying—prohibitions against genocide, slavery, and murder.[22] *Jus cogens* are universally prohibited as pillars of fundamental human rights law regardless of the body of law governing a conflict.[23]

2. Conflict Classification

For purposes of this article, two types of conflicts trigger LOAC: those described under Common Article 2 of the Geneva Conventions (International Armed Conflicts (IAC)) and those described under Common Article 3 of the Geneva Conventions (Non-International Armed Conflicts (NIAC)).[24] During an IAC, two or more states must be engaged in armed conflict against one another.[25] In armed conflicts of an international character, all four of the Geneva Conventions apply, as does AP I (for those states that have ratified AP I, which does not include the United States). Non-International Armed Conflicts however, generally involve "internal" armed conflict between states and non-state actors.[26] The only provision of the Geneva Conventions applicable during a NIAC is Common Article 3.[27] Examples of Common Article 3 NIACs include the United States' involvement in both Iraq and Afghanistan, following the initial invasions of both countries.[28]

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[20] [20] SOLIS, *supra* note 14 at 12, n. 53.

[21] *Id.*

[22] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 511-17 (5th ed., 1998).

[23] Barcelona Traction, Light and Power Company, Limited, Judgment, 1970 I.C.J. 3, ¶ 34 (Feb. 5); *see also* RESTATEMENT, *supra* note 9 at § 701.

[24] Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135 [hereinafter GCIII].

[25] *Id.* art. 2.

[26] SOLIS, *supra* note 14, at 152.

[27] *Id.* at 153.

[28] *Id.* at 154, 211. During the invasion of both Iraq in 2003 and Afghanistan in 2001, and during the United States' occupation of both countries following the initial invasions (essentially until such time as the United States was present in both countries at the request and consent of their respective governments), the United States was involved in Common Article 2 International Armed Conflicts (IACs) with each.

Inherent in any decision to use force up to and including targeted killing during armed conflicts (both international [29] and non-international),[30] is an analysis that must address four basic principles. The principles that form the foundation of the LOAC are military necessity, distinction (also known as discrimination), proportionality, and humanity (and arguably, honor).[31]

3. Principles of the LOAC

Military necessity is the principle that "justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible."[32] Put another way, military necessity permits the identification of a military objective and the subsequent elimination of that objective with urgency. Military necessity "limits those measures not forbidden by international law to legitimate military objectives whose engagement offers a definitive military advantage."[33] The military necessity analysis can be broken down into two questions: "[I]s there a 'military requirement' to take certain action?" and "[D]o the laws of war forbid that action?"[34] Determining what constitutes a valid military objective for purposes of targeting individuals often requires analysis beyond that which is conducted to target a tank or a building. A more detailed discussion of the status of persons involved in armed conflicts who constitute valid military objectives follows in parts II.A, B, and C. For purposes of military

[29] GCIV, *supra* note 7, art. 2.
[30] *Id.* art. 4.
[31] U.S. DEP'T OF DEF., DIR. 2311.01E, DOD LAW OF WAR PROGRAM para 3.1 (22 Feb. 2011) [hereinafter DoDD 2311.01E]; U.S. DEP'T OF DEF. LAW OF WAR MANUAL para. 2 (12 June 2015) [hereinafter LOW Manual] (The LOW manual included a fifth principle; honor. Honor refers to chivalry in war-making; it demands fairness and mutual respect between opposing forces. While honor is not a new concept, it is newly identified as in independent principle of the LOW. As such, it will not be discussed in detail throughout this article.).
[32] U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para 3a. (18 July 1956) [hereinafter FM 27-10]; LOW Manual, *supra* note 31, para. 2.2.
[33] JOINT CHIEFS OF STAFF, JOINT PUB. 3-60, JOINT TARGETING, Appendix E, para. E.3.b. (31 Jan. 2013) [hereinafter JP 3-60]. LOW Manual, *supra* note 30, para. 2.2.
[34] *See generally* SOLIS, *supra* note 14, at 258.

necessity, civilians are never valid military objectives until such time as they take a direct part in hostilities.[35]

Often referred to as discrimination, distinction is "the grandfather of all principles"[36] and requires that combatants are at all times distinguished from noncombatants (civilians).[37] Distinction requires that military operations be directed against combatants only, not against civilian targets.[38] "Combatant," however, is a term of art and has a very specific definition under the Geneva Conventions.[39] Discussed in greater detail throughout, "Combatant" refers generally to either (1) "the regular armed forces of a State Party to the conflict,"[40] or (2) "[m]ilitia, volunteer corps, and organized resistance movements belonging to a State Party to the conflict that are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the laws of war . . . ."[41] "Combatant" is a term limited to persons involved in Common Article 2 IACs.[42] Therefore, the vast majority of lethal targeting conducted by the United States, since its involvement in Afghanistan in 2001 and Iraq in 2003 has technically not been against "combatants" given the transition from IACs to NIACs in both theaters of operation in 2002 and 2003 respectively.[43]

The concept of distinction extends further than the idea of civilians versus combatants. It also distinguishes military property from civilian property and protected property and places from non-protected property and places.[44] For purposes of this article, the principle of necessity will be applied against persons exclusively.

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[35] Protocol I, *supra* note 8, art. 51(3). What constitutes "direct participation in hostilities" is highly controversial and discussed in greater detail later in this article. *See also* LOW Manual, *supra* note 31, para. 5.9.

[36] DESKBOOK, *supra* note 12, at 136.

[37] Protocol I, *supra* note 8, art. 48; LOW Manual, *supra* note 31, para. 2.5.

[38] Protocol I, *supra* note 8, art. 48.

[39] GCIII, *supra* note 24.

[40] *Id*. art 4; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 13, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GCI].

[41] GCI, *supra* note 39, art. 13; GCIII, *supra* note 23, art. 4.

[42] MICHAEL N. SCHMITT AND JELENA PEJIC, INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 335 (2007).

[43] *See* SOLIS, *supra* note 14, at 207.

[44] LOW Manual, *supra* note 31, para. 2.5.

The third principle of LOAC, proportionality, is akin to conventional notions of collateral damage. As it is applied to *jus in bello*, proportionality requires that "the anticipated loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained."[45] The principle of proportionality "provides a method by which military commanders can balance military necessity and civilian loss . . . when an attack may cause incidental damage to civilian personnel."[46] Like many legal concepts, proportionality involves a balancing test. One must weigh the importance of the military objective (person or place) in relation to the potential damage to civilians and civilian objects.[47] There is no fixed formula for this analysis that determines when collateral damage is excessive. Such determinations are often a judgment call by the on-scene commander or the person making the targeting decision.[48]

Also referred to as the principle of "unnecessary suffering," the fourth LOAC principle, humanity, forbids military forces from inflicting an amount of "suffering, injury, or destruction unnecessary to accomplish a legitimate military purpose."[49] There is no codified definition of what constitutes unnecessary suffering. However, the United States Department of Defense (DoD) employs a weapons review program in order to ensure that weapons included within the United States' arsenal comply with this principle, and when used properly, dispatch a humane death.[50]

B. Classification of Individuals Participating in Hostilities

In terms of international law and the use of force pursuant to the laws of armed conflict, two classifications of persons exist—combatants and civilians.[51] Several variations of "combatant" have been used by the

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[45] FM 27-10, *supra* note 32, para. 41. *See also* LOW Manual, *supra* note 31, para. 2.4.

[46] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 13 (2014) [hereinafter HANDBOOK].

[47] LOW Manual, *supra* note 31, para. 2.4.

[48] Protocol I, *supra* note 8, art. 51(5)(b) (A disproportionate attack is "[a]n attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.").

[49] LOW Manual, *supra* note 31, para. 2.3; Hague IV, *supra* note 6, art. 23(3).

[50] U.S. DEP'T OF DEF., 5000.69-M, JOINT SERVICES SAFETY WEAPONS REVIEW (JSSWR) PROCESS (30 July 2014) [hereinafter DoD 5000.69-M].

[51] SOLIS, *supra* note 14, at 207.

United States throughout the last decade and a half. "Unlawful combatant" was a de facto individual status "frequently employed by the United States."[52] The term "combatant" and its derivations "such as 'unlawful combatant,' 'enemy combatant,' and 'unprivileged combatant,' are germane only to Common Article 2 international armed conflict."[53] A person's classification in an IAC directly affects the protections afforded him under the Geneva Convention III (GCIII).[54] However, the United States has often demonstrated a tendency to use the term "combatant" more colloquially to refer to any persons engaging in armed conflict on behalf of parties to a conflict.[55]

Under the 1949 Geneva Conventions,[56] (lawful) combatants are generally classified as military personnel or the like who are engaged in hostilities in an IAC on behalf of a party to the conflict.[57] While engaged in international armed conflict, lawful combatants enjoy a combatant's privilege—"they bear no criminal responsibility for killing or injuring enemy military personnel or civilians taking an active part in hostilities, or for causing damage or destruction to property, provided their acts comply with the LOAC."[58] Combatants are legally permitted to carry out attacks

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[52] *Id*.
[53] *Id.*
[54] LOW Manual, *supra* note 31, paras. 4.3, 4.4.
[55] *See* SOLIS, *supra* note 14, at 206-07.
[56] GCIII, *supra* note 24, art. 4; GC I, *supra* note 39, art 13.
[57] *Id.* Combatants are defined as:

> (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
> (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
> (a) that of being commanded by a person responsible for his subordinates;
> (b) that of having a fixed distinctive sign recognizable at a distance;
> (c) that of carrying arms openly;
> (d) that of conducting their operations in accordance with the laws and customs of war.

[58] LOW Manual, *supra* note 31, para. 4.4; HANDBOOK, *supra* note 46, at 17.

against the enemy and, in turn, may legally be the target of attack by the enemy.[59]

Civilians not participating in hostilities are protected and may not legally be the target of attack by any party.[60] However, when civilians take up arms and directly participate in hostilities,[61] they lose any protected status they may have enjoyed and may be lawfully targeted.[62] When civilians directly participate in hostilities, they are no longer "civilians" and, under the United States' view, are classified as "unprivileged enemy belligerents" (formerly classified as "unlawful enemy combatants").[63] Unprivileged enemy belligerents—"a purported battlefield status in the war on terrorism,"[64] or armed conflicts generally,[65] are "persons not entitled to combatant immunity who engage in acts against the United States or its coalition partners in violation of the laws and customs of war during an armed conflict."[66] Synonymous with "unprivileged enemy belligerent," "unlawful enemy combatant" "include[s], but is not limited to, an individual who is or was part of or supporting Taliban or al-Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners."[67]

The United States invaded Afghanistan in response to al-Qaeda's attack on the World Trade Center on September 11, 2001, seemingly under the classification of an international armed conflict. It was the United

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[59] SOLIS, *supra* note 14, at 188.

[60] GCIV, *supra* note 7; Protocol I, *supra* note 8; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non–International Armed Conflicts, Dec. 12. 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

[61] Directly participating in hostilities is a highly controversial issue about which much disagreement exists. For a more detailed discussion, *see infra* Section II.C.

[62] LOW Manual, *supra* note 31, para. 5.9.

[63] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS (6 Sept. 2006) [hereinafter FM 2-22.3]. The two classifications are synonymous with each other. *See also* JOINT CHIEFS OF STAFF, JOINT PUB. JP 3-63, DETAINEE OPERATIONS, Summary of Changes. (13 Nov. 2014) [hereinafter JP 3-63]; DoDD 2311.01E, *supra* note 31.

[64] SOLIS, *supra* note 14, at 209 (Solis uses the term, "unlawful enemy combatant," not "unprivileged enemy belligerent."). However, the two are synonymous. *See* FM2-22.3, *supra* note 63.

[65] *See* Harold Hongju Koh, The Obama Administration and International Law, Address at the Annual Meeting of the Am. Soc'y Of Int'l Law, U.S. Dep't of State (Mar. 25, 2010), http://www.state.gov/s/l/releases/remarks/139119.htm (explaining that the United States is no longer engaged in a war on terrorism; it is instead engaged in armed conflict).

[66] FM 2-22.3, *supra* note 63, at vii.

[67] *Id*. *See also* The Authorization for the Use of Military Force, Pub L. No. 107-40, 115 Stat 224 (2001) [hereinafter AUMF].

States and its coalition partners against the government of Afghanistan—the Taliban.[68] So too, when the United States invaded Iraq in 2003, it did so under the classification of an international armed conflict—the United States and its coalition partners against Saddam Hussein and the country of Iraq.[69] However, those conflicts evolved such that in both theaters of operation, the conflicts transitioned into non-international armed conflicts, at least insofar as United States' involvement was concerned.[70]

But what of the classification of individual members of al-Qaeda and its associates? Terrorist organizations are most aptly defined as criminal organizations—at least until they overthrow a government and become the government of that state.[71] But, unless and until that happens, al-Qaeda and its associates are non-state actors, and any conflict that ensues with such an organization may not be classified as an International Armed Conflict under Common Article 2.[72] On the contrary, by default, armed conflict with organizations such as al-Qaeda constitute non-international armed conflicts, no matter how organized the groups or how organized the attacks. Classification of individuals matters because it affects the privileges that members of al-Qaeda and its associated forces enjoy—Common Article 3 privileges versus the full protections of the Geneva Conventions. As discussed in greater detail below, not only are members of al-Qaeda and its associated forces subject to criminal prosecution for their acts of terror under domestic criminal law, they are lawfully subject to targeting under the LOAC.[73]

It is a crucial legal distinction that combatants are specific to Common Article 2 IACs.[74] Under a Common Article 3 NIAC, combatant status

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[68] SOLIS, *supra* note 14, at 211.
[69] *Id.* at 154.
[70] *See* Geoffrey S. Corn, *Hamdan, Lebanon, and the Regulation of Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict*, 40 VAND. J. TRANSNAT'L L. 295, 308 (2007) (tracing the view that the category of non–international armed conflict was limited to intra–state civil wars).
[71] *See generally* SOLIS, *supra* note 14, § 5.2.
[72] *Id.*
[73] Afsheen John Radsan & Richard Murphy, *The Evolution of Law and Policy for CIA Targeted Killing*, 5 J. NAT'L SECURITY L. & POL'Y 439, 451 (2012) ("Under circumstances that include 9/11, American officials have reasonably concluded that the American conflict with the Taliban and al-Qaeda is not among states; it is a non-international armed conflict. This conclusion allows the United States to target and kill some members of these armed groups in some places under IHL's relatively relaxed rules on killing.").
[74] SCHMITT AND PEJIC, *supra* note 42, at 335.

(lawful or otherwise) does not exist.[75] Neither members of the Taliban nor al-Qaeda or its associates enjoy combatant status during an NIAC. They are instead unprivileged enemy belligerents.[76] Perhaps because doing so identifies al-Qaeda as an armed opposition group without a state, the United States uses this classification,[77] to avoid any misunderstanding that al-Qaeda's associates are civilians not subject to attack. The questions asked when attempting to determine whether a group receives combatant status under Article 4, GC III, do not apply to Common Article 3 conflicts.[78] Al-Qaeda is a terrorist organization, and its members are terrorists. Their actions almost certainly violate the domestic laws of every nation in which they operate and when they engage in combat, they lose any protections they would have enjoyed as civilians and therefore may be targeted. That is not to suggest that if captured they would not enjoy any protections. However, those protections would be limited to those provided by Common Article 3.[79]

In its Standing Rules of Engagement, the United States generally describes two broad categories of potential belligerents (hostile forces who may be targeted): status-based belligerents and conduct-based belligerents.[80] Status-based belligerents are those groups or individuals who, by virtue of their membership, affiliation, or continuous participation in hostilities, are declared hostile, and may be targeted at any time with immediacy, without a particularized showing of hostile intent or a hostile act, during the moment of targeting.[81] An example of a status-based target is Osama bin Laden, or in the instant case, Abdul al Sad. On the other hand, a conduct-based target describes an actor whose hostile conduct—act or intent—in a particularized moment in time would justify attack against that actor who otherwise would be a civilian, not subject to attack.[82] An example of a conduct-based target is a man resting on a hilltop, signaling enemy forces that U.S. forces are moving in a particular direction, for the purpose of facilitating an ambush on those U.S. forces.

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[75] SOLIS, *supra* note 14, at 207.
[76] *Id*. *See* FM 2-22.3, *supra* note 63, for discussion.
[77] 10 U.S.C. § 948(a)(1)(i) (2015).
[78] *See* SOLIS, *supra* note 14, at 212.
[79] See GCIV, *supra* note 7, art. 3; SOLIS, *supra* note 14, at 219.
[80] CHAIRMAN OF THE 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).
[81] *Id.*
[82] LOW Manual, *supra* note 31, para. 4.8.2.

Under the LOAC, that man's actions in that instance allow him to be targeted while he is engaged in hostilities.

All this is to say that while agreement may not be universal on this subject,[83] al-Qaeda fighters and its associates who participate in hostilities during a NIAC are unprivileged enemy belligerents, civilians taking a direct part in hostilities, who thereby forfeit their protection from being the lawful target of an attack—a protection they would have enjoyed as uninvolved civilians. As such, they are valid military targets.

C. Direct Participation in Hostilities

During all instances of armed conflict, attackers are obligated to follow the LOAC principle of distinction.[84] Distinction clearly prohibits attacks against civilians with one caveat—protected civilians may not take a direct part in hostilities.[85]

> In an international armed conflict, a party may attack enemy combatants who are not [out of the fight]. Thus, an attacker may bomb opposing forces in their barracks due to their status as enemy combatants. Civilians, however, may only be directly attacked if their conduct amounts to direct participation in hostilities.[86]

During non-international armed conflicts, however, identifying targetable actors is less straightforward. Under the LOAC as it applies to NIACs, the legal status of "combatant" does not exist. Instead, arguably everyone (outside of state actors) is a civilian—a person not associated with the military.[87]

Directly participating in hostilities (DPH) speaks to the level to which a civilian needs to participate in hostilities such that they lose civilian

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[83] SOLIS, *supra* note 14, at 164.
[84] LOW Manual, *supra* note 31, para. 2.5.
[85] Rasdan & Murphy, *supra* note 73, at 454-55.
[86] *Id*.
[87] NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 442-44 (2008); PHILIP ALSTON, REPORT OF THE SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS, ADDENDUM, STUDY ON TARGETED KILLINGS, at 58, U.N. Doc. A/HRC/14/24/ (May 28, 2010).

protection, and may be targeted.[88] Especially in the context of non-international armed conflicts, what constitutes that level of conduct (otherwise known as "DPHing") is highly controversial and hotly contested.[89] The two most widely accepted positions on "DPHing" are the United States' view and the ICRC's interpretative guidance.[90] These two viewpoints are at odds with each other.[91] The United States' interpretation of DPH, under which it operates, is more expansive than the ICRC's position.[92]

The idea that direct participation in hostilities results in the loss of civilian status such that a person—who would otherwise be a civilian but for his participation in hostilities—may be legally targeted using deadly force is found in Article 51(3) of AP I and Article 13(2-2) of AP II, among other sources.[93] The United States understands and applies direct participation in hostilities on a case-by-case basis to both organized armed groups and individuals.[94]

> [United States] forces use a functional DPH analysis based on the notions of hostile act and hostile intent as defined in the Standing Rules of Engagement, and the

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[88] LOW Manual, *supra* note 31, para. 5.9.

[89] The sheer volume of material on the subject-matter demonstrates just how unclear the definition of "directly participating in hostilities" really is. *Id.*; *see e.g.*, Melzer, *supra* note 16; sources cited *infra* note 83; Parks, *infra* note 104; DINSTEIN, *infra* note 129; sources cited *infra* note 172.

[90] *See generally* Melzer, *supra* note 16.

[91] *Id.*

[92] Rasdan & Murphy, *supra* note 73, at 455 ("Hina Shamsi, Director of the National Security Project of the ACLU, observes that 'whatever definition [of DPH] the United States is using . . . [it] is more expansive than that of the ICRC.'").

[93] The notion of requiring direct participation in hostilities during non-international armed conflict as a requisite to use deadly force is well-rooted in both treaty and customary international law (CIL). *See* Geneva Convention art 3, Aug. 12 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW rules 1, 2, and 7 (2005). States that are not party to the Additional Protocols nevertheless acknowledge their customary nature to some degree. *See, e.g.*, DEP'T OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M, § 8-2 (2007) [hereinafter NWP 1-14M]. *See, e.g.*, Rome Statute of the Int'l Criminal Court art. 8.2(b)(i), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON–INTERNATIONAL ARMED CONFLICT WITH COMMENTARY (2006), reprinted in 36 ISR. Y.B. HUM. R. (Special Supplement) § 2.1.1.1 (2006) [hereinafter NIAC Manual]; Prosecutor v. Tadic, Case No. IT-94-1-A, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 100–127 (Oct. 2, 1995).

[94] *See generally* Melzer, *supra* note 16.

> criticality of an individual's contribution to enemy war efforts. After considering factors such as intelligence, threat assessments, the conflict's maturity, specific function(s) performed and individual acts and intent, appropriate senior authorities may designate groups or individuals as hostile. Those designated as hostile become status-based targets, subject to attack or capture at any time if operating on active battlefields or in areas where authorities consent or are unwilling or unable to capture or control them.[95]

The ICRC, however, proposed a very narrow definition of DPH, which requires far more subversive conduct in order to constitute DPHing than the United States' application. Essentially, the test the ICRC propagated requires:

> (1) a threshold showing of harm or a likelihood of harm, (2) a direct causal link between the act in question and that harm, and (3) a belligerent nexus to the conflict [(membership in an armed group party to the conflict)], as shown by specific intent to help or harm one or more sides. The ICRC also proposed that those individuals engaged in "continuous combat functions" could be attacked at any time, but suggested that combatants should attempt to capture civilians first and use deadly force as a last resort.[96]

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[95] DESKBOOK, *supra* note 12, at 142-43; *See, e.g.*, U.S. Dep't of Justice, Attorney General Eric Holder Speaks at Northwestern University School of Law, Mar. 5, 2012, http://www.justice.gov/iso/opa/ag/speeches /2012/ag-speech-1203051.html ("[T]here are instances where [the U.S.] government has the clear authority—and, I would argue, the responsibility—to defend the United States through the appropriate and lawful use of lethal force. . . . [I]t is entirely lawful—under both United States law and applicable law of war principles—to target specific senior operational leaders of al-Qaeda and associated forces."). *See also* LOW Manual, *supra* note 31, para. 5.9.

[96] DESKBOOK, *supra* note 12, at 142. *See also* Melzer Interpretative Guidance, *supra* note 16; KENNETH ANDERSON, TARGETED KILLING IN U.S. COUNTERTERRORISM STRATEGY AND LAW: A WORKING PAPER OF THE SERIES ON COUNTERTERRORISM AND AMERICAN STATUTORY LAW, A JOINT PROJECT OF THE BROOKINGS INSTITUTION, THE GEORGETOWN UNIVERSITY LAW CENTER, AND THE HOOVER INSTITUTION 19 (May 11, 2009), https://www.law.upenn.edu/institutes/cerl/conferences/targetedkilling/papers/Anderson CounterterrorismStrategy.pdf. *See also* LOW Manual, *supra* note 31, para. 5.9.

Though examples of disagreement between both parties are plentiful, and extensive criticism of the ICRC's interpretative guidance exists,[97] both parties agree that a "concomitant obligation" exists on the part of a civilian not to use his otherwise protected status to engage in hostile acts. Both parties also agree that the concept of direct participation in hostilities is a concept that "applies only to civilians."[98]

What then constitutes a civilian directly participating in hostilities? "Direct participation must refer to specific hostile acts, and it clearly suspends a civilian's noncombatant protection."[99] To answer this question, the Commentary to Additional Protocol I to the Geneva Conventions provides some guidance. It states that direct participation refers to "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."[100] Another source posits, "Direct participation 'implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity takes place.'"[101]

Direct participation, however, is not limited to picking up a weapon and shooting. Direct participation includes preparatory acts as well. It includes "deployment to and from the location of the direct participation. It includes the preparatory collection of tactical intelligence, the transport of personnel, the transport and position of weapons and equipment, as well as the loading of explosives in, for example, a suicide vehicle."[102]

However, what about a Common Article 3 conflict, where a civilian unprivileged enemy belligerent is the norm? In a conflict between a state and a non-state armed group, the non-state armed group is the de facto armed force party to the conflict, although without the protections afforded combatants.[103] As such, the members of that armed group are generally targetable at any time and at any place. Their roles are such that they are never *not* directly participating in hostilities, much like a U.S. Army soldier engaged in conflict with non-state actors in Iraq or Afghanistan.

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97 *See* Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC. J. 5 (2010).
98 SOLIS, *supra* note 14, at 202.
99 *Id.* at 203.
100 Protocol I, *supra* note 8, op. cit. (note 10), Article 51(3); Additional Protocols: Commentary, op. cit. (note 21), para 1944.
101 SOLIS, *supra* note 14, at 203.
102 *Id.* at 204.
103 Melzer, *supra* note 16; SOLIS, *supra* note 14, at 205.

Unanswered by the aforementioned guidance is the question, "When and how much force may be applied against a civilian directly participating in hostilities during an NIAC?"[104] While this question seems complex in theory, aside from recognizing protections for civilians against attack, the LOAC does not create categories of people who may not be attacked while directly participating in hostilities, or who may be attacked but only slightly. On the contrary, LOAC permits the use of deadly force against all those "directly participating in hostilities."[105] This is where the United States' and the ICRC's view regarding DPH seem to diverge.[106]

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[104] W. Hays Parks, *Direct Participation in Hostilities: Perspectives on the ICRC Interpretive Guidance: Part IX of The ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769, 830.

[105] LOW Manual, *supra* note 31, para. 5.9.3.

[106] ANDERSON, *supra* note 96, at 5-6.

> In 2003, the International Committee of the Red Cross (ICRC), in cooperation with the T.M.C. Asser Institute, launched a major research effort to explore the concept of "direct participation by civilians in hostilities" (DPH Project). The goal was to provide greater clarity regarding the international humanitarian law (IHL) governing the loss of protection from attack when civilians involve themselves in armed conflict. Approximately forty eminent international law experts, including government attorneys, military officers, representatives of non-governmental organizations (NGOs), and academics, participated in their personal capacity in a series of workshops held throughout 2008. In May 2009, the ICRC published the culmination of this process as the "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law."
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> Although the planned output of the project was a consensus document, the proceedings proved highly contentious. As a result, the final product contains the express caveat that it is "an expression solely of the ICRC's views." Aspects of the draft circulated to the experts were so controversial that a significant number of them asked that their names be deleted as participants, lest inclusion be misinterpreted as support for the Interpretive Guidance's propositions. Eventually, the ICRC took the unusual step of publishing the Interpretive Guidance without identifying participants. This author participated throughout the project, including presentation of one of the foundational papers around which discussion centered . . . [and] withdrew his name upon reviewing the final draft.
>
> A common theme pervades the criticisms set forth below. International humanitarian law seeks to infuse the violence of war with humanitarian considerations. However, it must remain sensitive to the interest of states in conducting warfare efficiently, for no state likely

The ICRC seemingly creates limitations on the authority to use deadly force that are not found in the principles of the LOAC. For example, under the ICRC's interpretation of DPH, a member of a targetable non-state actor armed group must be performing a "continuous combat function" before employing deadly force against that member.[107]

To illustrate this divergence, if, during armed conflict, the United States identifies an enemy engaging in a hostile act against U.S. forces, depending on the scope of that hostile act, that person may or may not be targeted under the ICRC's interpretation of DPHing. Under the ICRC's guidance, that single act may be criminal under domestic law but not enough to use deadly force against the actor under principles of the LOAC.[108] However, if the United States has proof positive that the same person engaged in a hostile act against the United States a week earlier, under the U.S. view, that previous single incident is enough to lawfully target that individual for DPH.[109] The individual may be targeted regardless of whether the United States is able to identify whether that person's activities were continuous or isolated to a single or possibly subsequent hostile act.

Additionally, under the "continuous combat function"[110] principle, members of known armed groups are afforded greater protections than a state's military members. Under the ICRC's view, while a member of the military may be targeted and attacked at any time, a known member of a belligerent organized armed group may not be attacked unless he or she "directly participates and then only for such time as the participation

> to find itself on the battlefield would accept norms that place its military success, or its survival, at serious risk. As a result, IHL represents a very delicate balance between two principles: military necessity and humanity. This dialectical relationship undergirds virtually all rules of IHL and must be borne in mind in any effort to elucidate them. It is in this regard that the Interpretive Guidance falters.

Id.

[107] *See generally* Schmitt, *supra* note 97, at 21-23.

[108] *Id.* at 21-24.

[109] *Id*.

[110] Melzer, *supra* note 16, at 27, 33 ("Continuous Combat Function" (CCF) describes those members of individual non–state actor armed groups who, in a non–international armed conflict, continuously directly participate in hostilities. The intent was to distinguish those members from civilians who DPH on a "sporadic," "spontaneous," or "unorganized" basis. However, there is very little functional distinction between the notions of directly participating in hostilities and continuous combat function, as defined by Melzer.).

occurs."[111] This idea flies in the face of military necessity and distinction under a traditional analysis of the principles of the LOAC and creates an untenable revolving-door effect.[112]

Under the ICRC's view, while engaged in an armed conflict in Afghanistan, a U.S. soldier is lawfully targetable by the enemy while he is eating lunch in a dining facility on a Forward Operating Base. Likewise, a member of an armed group of a non–state actor may emplace an improvised explosive device (IED) in the morning and be immediately targeted. But, after he returns home for breakfast, he is no longer an unprivileged enemy belligerent DPHing and, therefore, may not be targeted for that act until he returns in the afternoon to command-detonate the IED he emplaced that morning (unless it can be established that he continuously engages in this type of activity).

This argument is *reductio ad absurdum*. For purposes of DPH, members of organized armed groups are "civilians continuously directly participating,"[113] and therefore may be targeted at any time (assuming proper application of the remaining principles of LOAC—namely proportionality and humanity).

There is certainly a difference, both functionally and legally, between direct and indirect participation, and what constitutes each—making a bomb, versus driving a commercial cargo truck full of food or supplies, being used to directly support an armed group. This article does not suggest (nor does the United States operate on the notion) that simply participating in hostilities to the extent that a cargo truck driver does, authorizes the use of deadly force against a person. While the cargo truck may be a valid military objective, the truck driver likely is not. But, whether participation is direct such that the participant may be targeted without further intelligence, or indirect such that more information about the individual may be necessary before making a targeting decision, is a question of fact.[114] The United States does not require the individual's actions be specifically designed to cause harm in support of a party to the

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111 *See* Schmitt, *supra* note 97, at 23.

112 Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y.B. INT'L HUM. L. 49 (2010).

113 *See* Schmitt, *supra* note 97, at 24. LOW Manual, *supra* note 30, para. 5.9.2.

114 UNITED KINGDOM MINISTRY OF DEFENSE, ON THE LAW OF ARMED CONFLICT §5.3.3. (2004).

detriment of another.[115] Nor does the United States adopt the revolving-door, "for such time" standard applicable to the ICRC's definition of DPH[116] and "continuous combat function."

The United States uses a functional analysis to distinguish lawful targets based on notions of hostile act and hostile intent, and the critical nature of that target's actions and his or her contribution to the enemy's efforts.[117] A soldier on the ground observing a person emplacing an IED may conduct this analysis over a long period of time or in a matter of moments. Either way, during armed conflict, facts inform that decision, not an IHRL-infused interpretation of the LOAC such as that found in the ICRC's guidance on direct participation in hostilities.[118] Again, the United States' interpretation of DPH is more expansive than that of the ICRC,[119] and it is the standard under which the United States operates.

III. Legal Basis for the Use of Force (*Jus ad Bellum*)

Once a state becomes involved in armed conflict, the LOAC applies. But where exactly does the authorization to engage in armed conflict come from? Where does the authority to target anyone, let alone citizens of the United States inside the United States, originate?[120]

Any decision to employ military force must be based upon the existence of a viable legal basis in both international law and domestic law.[121] Under international law (namely the United Nations Charter), the use of force, in particular violating another state's sovereignty, violates international law generally.[122] However, exceptions to this general rule do exist.[123] Some are well-established exceptions found within the U.N.

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115 *See* Melzer, *supra* note 16, at 49 (The ICRC's definition creates a prerequisite of specific intent.).

116 For a more detailed discussion of that standard, *see* Schmitt, *supra* note 97, at 35-38.

117 *See* Parks, *supra* note 104; Schmitt, *supra* note 97.

118 *See generally* Schmitt, *supra* note 97, at 41-42.

119 Rasdan & Murphy, *supra* note 73, at 455 ("Hina Shamsi, Director of the National Security Project of the ACLU, observes that 'whatever definition [of DPH] the United States is using . . . is more expansive than that of the ICRC.'").

120 The idea of a sovereign consenting to another's presence in its country and using force while present in that host country is not addressed in this article, but remains another possible legal basis for the use of force under *jus ad bellum.*

121 LOW Manual, *supra* note 31, para. 1.11.

122 U.N. Charter arts. 2(3)–(4).

123 *See infra* in part III.B.

Charter, while others are arguments to except the general rule, if not already CIL.[124]

A. Chapter VII of the United Nations Charter

Chapter VII of the U.N. Charter[125] authorizes the Security Council[126] to label aggression towards states by states and non-state actors as threats to peace, breach of peace, or acts of aggression.[127] Moreover, Article 42 of the same chapter authorizes military action for the purpose of "maintain[ing] and restor[ing] international peace and security."[128]

Article 42 actions prove difficult to carry out. The deficiency with Article 42 is that its mechanism of enforcement is the military action vested in Article 43—the creation of a U.N. military force.[129] But, the United Nations does not employ a military force under Article 43 of Chapter VII.[130] Because no standing United Nations force exists, Chapter VII actions are generally carried out by individual countries using their organic military assets, as they would for those actions undertaken based on a nation's inherent right to self-defense, as contemplated by Article 51 of the same chapter.

B. Inherent Right to Self-Defense

1. Article 51 of the U.N. Charter

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[124] *Id.*

[125] U.N. Charter ch. VII: Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression.

[126] *See* United Nations Security Council, U.N. Current Members: Permanent and Non-Permanent Members, http://www.un.org/en/sc/members (There are five permanent members on the United Nations' Security Council: China, France, Russia, the United Kingdom, and the United States, and ten non-permanent elected members.).

[127] U.N. Charter art. 39.

[128] *Id.* art. 42.

[129] *See generally* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE (Camb. Univ. Press 5th ed. 2012).

[130] U.N. Charter art. 43 is the framework under which the United Nations would create a military force. U.N. Charter, *supra* note 111, art.43. However, no agreement has been reached between the U.N. and its member states and therefore, the United Nations does not employ a military force. *Id.*

A state's inherent right to defend itself is well settled in CIL and certainly predates Article 51 of the U.N. Charter. Like Article 43 of the same chapter, Article 51 provides a mechanism for a state to employ those military assets necessary to ensure its defense. Article 51 says,

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.[131]

Article 51's implementation presents several pragmatic difficulties. First, Article 51 attempts to codify what is otherwise, under CIL, a nation's inherent right to self-defense.[132] This limits a nation's right to that which is defined by the Charter. A plain language reading of the Charter suggests a nation must wait until *after* it suffers from an armed attack to take action, and that such action may only continue until such time as the Security Council takes some affirmative, yet undefined, action.[133] The inherent tension between this solution and a nation's need for military action is that the Security Council is practically incapable of military action under Article 43 for the reason stated above: it does not have a military force it can deploy. Instead, it must rely completely on a country's willingness to use its own military.

Second, the language of the Article is *just vague enough* to subject it to extreme interpretations on both sides—overly restrictive or overly permissive. This is due in large part to the differences in the language between Article 51 of the Charter and interpretations associated with Article 2(4) of the Charter's language "threats or use of force" and the

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131 U.N. Charter, art. 51.
132 *See generally* DINSTEIN, *supra* note 129, at 193-200.
133 *Id* at 194.

ability for the Security Council to take action for "any threat to the peace" in Article 39.[134] Yet, as one author notes,

> [A]t-bottom, self-defence consonant with Article 51 implies resort to counter-force: it comes in reaction to the use of force by the other party. When a country feels menaced by a threat of an armed attack, all that it is free to do—pursuant to the United Nations Charter—is make the necessary military preparations for repulsing the anticipated attack should it materialize, as well as bring the matter fore with to the attention of the Security Council . . . .[135]

It is no wonder why the idea of self-defense is such a confusing and controversial issue under international law.[136]

2. Inherent Right to Self-Defense (outside the parameters of Article 51)

The United States interprets the right of self-defense differently than does the United Nations under Article 51 of its charter.[137] A plain language reading of Article 51 requires a nation to let the bombs drop on it—so to speak—before responding in kind.[138] The United States does not hold that position. The United States has consistently asserted it has the right to take military action preemptively in the exercise of its right of self-defense.[139] This is often referred to as anticipatory self-defense.[140] Whether calling it preemptive self-defense, anticipatory self-defense, or the Bush Doctrine,[141] the U.S. position is that it may use force to interdict

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134 Case Concerning Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161, 189 (Nov. 6).
135 DINSTEIN, *supra* note 129, at 200.
136 ANDERSON, *supra* note 96 (focusing on self-defense as a rationale for targeted killing of terrorists).
137 *Id. See also* W.M. Reisman, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AJIL 525, 527-30 (2006).
138 U.N. Charter art. 51. *See also* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 181 (June 27).
139 Reisman, *supra* note 137, at 527-30; ANDERSON, *supra* note 96.
140 *See* ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, 73 ILS 263 (A.R. Thomas and J.C. Duncan, eds., 1999).
141 DINSTEIN, *supra* note 129, at 195.

or stop imminent attacks before they occur.[142] This position certainly falls outside of a restrictive interpretation of the limited scope of the language of Article 51 as promulgated by the United Nations.[143]

Under the United States' view of self-defense, "imminence" does not necessarily mean immediate and does not require "the United States to have clear evidence that a specific attack on U.S. persons and [or] interests will take place in the immediate future."[144] On the contrary, the United States defines imminence far more broadly in that it "incorporate[s] considerations of the relevant window of opportunity, the possibility of reducing collateral damage to civilians, and the likelihood of heading off future disastrous attacks on Americans."[145] This view of a nation's inherent right to self-defense is certainly not new, nor is it simply a reaction to the attacks of September 11, 2001. On the question of the use of force in self-defense, at least since the 1980s—America has been consistent in its position—that the right of self-defense supports "direct attack on terrorist leaders when 'their actions pose a continuing threat to U.S. citizens or the national security of the United States.'"[146]

Nevertheless, even under the United States' view of self-defense, a license to inflict limitless destruction (be it through war or an unrelenting, overwhelming use of force), does not exist. International law demands necessity[147] and proportionality[148] in the decision to use force.[149] The main difference between the United States' justification of force in self-defense and that of others who subscribe to the strict language of Article 51 of the U.N. Charter, is that in the United States' view, the use of IHL

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[142] Use of Force and Arms Control: Preemptive Action in Self-Defense, 2002 DIGEST § 18, at 951-52. *See The Caroline Case of 1837* (also known as the Caroline Doctrine) (For a description of the *Caroline* incident, see Matthew Allen Fitzgerald, Note, *Seizing Weapons of Mass Destruction from Foreign-Flagged Ships on the High Seas under Article 51 of the UN Charter,* 49 VA. J. INT'L. L. 473, 477-79 (2009)).

[143] Nicaragua (Nicar v. U.S.) Judgment, 1986 I.C.J. 14 (June 27).

[144] Department of Justice White Paper, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa'ida of An Associated Force* (Nov. 8, 2011) [hereinafter White Paper], https://www.fas.org/irp/eprint/doj-lethal.pdf.

[145] *Id*.

[146] ANDERSON, *supra* note 96 (citing Hays Parks, Memorandum of Law: Executive Order 12333 and Assassination 7 n.16 (Dec. 1989), http://www.hks.harvard.edu/cchrp/Use %20of%20 Force/October%202002/Parks_final.pdf.).

[147] LOW Manual, *supra* note 31, para. 1.11, 2.1.

[148] *Id.* (describing the *jus ad bellum* notion of proportionality which is "limit[ng] the magnitude, scope, and duration of any use of force to that level of force which is reasonably necessary to counter a threat or attack").

[149] Rasdan & Murphy, *supra* note 73, at 450.

as a body of law does not necessarily require ongoing armed conflict as a trigger.[150] Instead, the United States' invocation of its inherent right to self-defense triggers IHL.[151]

IV. Targeting

In 2013, the United States policy regarding targeted killings generally and against United States citizens specifically, became clear. While discussing targeting of U.S. citizens abroad, Attorney General Eric Holder wrote to Senator Patrick Leahy,

> I am writing to disclose to you certain information that until now has been properly classified . . . the number of U.S. citizens who have been killed by U.S. counterterrorism operations outside of areas of active hostilities. Since 2009, the United States . . . has specifically targeted and killed one U.S. citizen, Anwar al-Aulaqi. The United States is further aware of three other U.S. citizens who have been killed in such U.S. counterterrorism operations over that same time period.
>
> . . . [I]t is clear and logical that United States citizenship alone does not make [those who have decided to commit violent attacks against their own country] immune from being targeted. Rather, it means that the government must take special care and take into account all relevant constitutional considerations, the laws of war, and other law with respect to U.S. citizens.
>
> In short, the Administration has demonstrated its commitment to discussing with the Congress and the American people the circumstances in which it could lawfully use lethal force in a foreign country against a U.S. citizen who is a senior operational leader of al-

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150 *See* ANDERSON, *supra* note 96, at 21.

151 *Id.* at 21 ("With respect to international law, therefore, the U.S. justification for the legality of a particular targeted killing should focus on self-defense as a basis, irrespective of whether or not there is also an armed conflict under IHL underway that might provide a further basis.").

> Qa'ida or its associated forces, and who is actively engaged in planning to kill Americans.[152]

Almost three months before his letter to Senator Patrick Leahy, Attorney General Eric Holder wrote to Senator Rand Paul,

> [C]oncerning the Administration's views about whether "the President has the power to authorize lethal force . . . against a U.S. citizen on U.S. soil, and without trial [,]" . . . [t]he question you have posed is . . . entirely hypothetical, unlikely to occur, and one we hope no President will have to confront. It is possible, I suppose, to imagine an extraordinary circumstance in which it would be necessary and appropriate under the Constitution and applicable laws of the United States for the President to authorize the military to use lethal force within the territory of the United States.[153]

What constitutes targeted killings, whether or not they are legal, under what authority, who may be killed, where, and how, are certainly controversial issues, and have been the subject of countless articles, op-ed pieces, congressional hearings, and television programs.[154]

Notwithstanding all of the commentary on the subject, suggesting that targeting United States citizens is illegal, while targeting foreign nationals is legal, is intellectually dishonest. Moreover, asserting that targeting United States citizens abroad is legal, but to do so in the homeland would

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[152] Letter from Eric Holder, Attorney General of the United States, to Senator Patrick J. Leahy, Chairman, Committee on the Judiciary (May 22, 2013) [hereinafter Letter to Leahy] (on file with the author).

[153] Letter to Paul, *supra* note 1.

[154] *See e.g*., Rasdan & Murhpy, *supra* note 73, at 463 n.2; MELZER, *supra* note 87, at 442-44 (2008); ALSTON *supra* note 87; ANDERSON, *supra* note 96; William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 749 (2003); Gabriella Blum & Philip Heymann, *Law and Policy of Targeted Killing*, 1 HARV. NAT. SEC. J. 145 (2010); Chesney, *supra* note 112; W. Jason Fisher, *Targeted Killing, Norms, and International Law*, 45 COLUM. J. TRANSNAT'L L. 711, 724 (2007); Amos Guiora, *Targeted Killing as Active Self–Defense*, 36 CASE W. RES. J. INT'L L. 319, 334 (2004); David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT'L L. 171 (2005); Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, 4 J. NAT'L SECURITY L. & POL'Y. 343 (2010); Gary Solis, *Targeted Killing and the Law of Armed Conflict*, 60 Naval War Coll. Rev. 127, 134-36 (2007).

violate domestic or international law, is also misguided. As hard as it may be for some to digest, if targeted killings are legal, which they are under both international and domestic law,[155] citizenship and geography are legally inconsequential.[156]

A. What is "Targeted Killing" Generally (and why is it Legal)?

Within the international community, no concrete definition of targeted killing exists. One author proposed a definition as "the intentional killing of a specific civilian or unlawful combatant who cannot reasonably be apprehended, who is taking a direct part in hostilities, the targeting done at the direction of the state, in the context of an international or non–international armed conflict."[157] This definition, however, places a burden on a state to demonstrate why a target cannot be apprehended—a requirement that does not exist under the LOAC, though it may exist under a law enforcement-type paradigm.[158] Another definition of targeted killing is: "[t]he use of lethal force attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them."[159]

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[155] Rasdan & Murhpy, *supra* note 73, at 446, (citing Medillin v. Texas, 552 U.S. 491, 504-05 (2008)).

> One should recall that international law binds American officials only if it is also U.S. law. This fact leads to the problem of determining just which international laws convert into U.S. law. Some cases are easy: a treaty approved by the Senate constitutes a type of U.S. law, although making it domestically enforceable may require additional legislation.

Id.

[156] It is important to distinguish between law and policy. Refraining from taking certain actions for policy reasons is far different than refraining to act because to take such actions violate the law.

[157] SOLIS, *supra* note 14, at 538 n.92. There are other definitions of targeted killing. An ICRC legal advisor defines targeted killing as "[t]he use of lethal force attributable to a subject of international law with the intent, premeditation and deliberation to kill individually selected persons who are not in the physical custody of those targeting them." MELZER, *supra* note 87, at 5. Another is the "premeditated killing of an individual by a government or its agents." *See* Banks & Raven-Hansen, *supra* note 154, at 671.

[158] *See generally* FOURTH PERIODIC REPORT, *supra* note 16.

[159] SOLIS, *supra* note 14, at 538 n.92.

Though the United States and other countries have a long history of striking military targets, targeting individuals as it is understood today came into common usage in 2000, when Israel made its policy of targeting terrorists throughout the West Bank and Gaza Strip public.[160] Since that time, the subject of using lethal force to respond to terrorism has been written about, argued, and litigated extensively.[161] However, with regard to targeted killing, the means and methods of killing are legally of little consequence. Though the policy implications may change depending on what means and methods are used to kill (i.e. a drone strike versus an infantry line platoon) the laws implicated—specifically the LOAC—do not. What matters to the targeting analysis is that "lethal force is intentionally and deliberately used, with a degree of pre-meditation, against an individual or individuals specifically identified in advance."[162]

Contrast targeted killing then with extrajudicial killing. Extrajudicial killing is far more apropos to a law enforcement paradigm, as it is defined as "deliberated killing[s] not authorized by a previous judgment pronounced by a regularly constituted court affording all of the guarantees which are recognized as indispensable by civilized peoples." [163] Extrajudicial killings are generally considered illegal but for two legal justifications: first, involvement in an armed conflict, and second, a nation's inherent right to self-defense.[164]

B. Targeting During an Internationally Recognized Armed Conflict

The United States' position is that it is involved in an armed conflict with those "organizations, or persons" determined to have "planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001"—essentially amounting to al-Qaeda and its

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[160] ALSTON, *supra* note 87, at 7-8.
[161] *See* Chesney, *supra* note 112.
[162] ALSTON, *supra* note 87, at 7-8.
[163] Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 3(a), 106 Stat. 73 (1991).
[164] ALSTON, *supra* note 87, at 8 ("The Legal Advisor to the Department of State outlined the Government's legal justifications for targeted killings. They were said to be based on its asserted right to self-defence, as well as on IHL, on the basis that the [United States] is 'in an armed conflict with al-Qaeda, as well as the Taliban and associated forces.'" *Id.* (citing Koh, *supra* note 65.).

affiliates.[165] In the context of armed conflict,[166] as stated above, targeted killing is lawful insofar as the LOAC is followed. If the target is a

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[165] AUMF *supra* note 67; Koh Speech, *supra* note 65; *See also* Rasdan & Murphy, *supra* note 73, at 451 ("Under circumstances that include 9/11, American officials have reasonably concluded that the American conflict with the Taliban and al-Qaeda is not among states; it is a non-international armed conflict. This conclusion allows the United States to target and kill some members of these armed groups in some places under IHL's relatively relaxed rules on killing.").

[166] *See* ALSTON, *supra* note 87, at 17.

> The tests for the existence of a non-international armed conflict are not as categorical as those for international armed conflict. This recognizes the fact that there may be various types of non-international armed conflicts. The applicable test may also depend on whether a State is party to Additional Protocol II to the Geneva Conventions. Under treaty and customary international law, the elements which would point to the existence of a non-international armed conflict against a non-state armed group are:
>
> (i) The non-state armed group must be identifiable as such, based on criteria that are objective and verifiable. This is necessary for IHL to apply meaningfully, and so that States may comply with their obligation to distinguish between lawful targets and civilians. The criteria include:
>
> • Minimal level of organization of the group such that armed forces are able to identify an adversary (GC Art. 3; AP II).
>
> • Capability of the group to apply the Geneva Conventions (i.e., adequate command structure, and separation of military and political command) (GC Art. 3; AP II).
>
> • Engagement of the group in collective, armed, anti-government action (GC Art. 3).
>
> • For a conflict involving a State, the State uses its regular military forces against the group (GC Art. 3).
>
> • Admission of the conflict against the group to the agenda of the U.N. Security Council or the General Assembly (GC Art. 3).
>
> (ii) There must be a minimal threshold of intensity and duration. The threshold of violence is higher than required for the existence of an international armed conflict. To meet the minimum threshold, violence must be:
>
> • "Beyond the level of intensity of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature" (AP II).

combatant or a civilian directly participating in hostilities, and the killing meets the threshold requirements of necessity, distinction, proportionality, and humanity, it is lawful. These legal standards apply regardless of the nature of the armed conflict—international or non-international.[167] If, however, "one contests the presence of an ongoing armed conflict, the lawfulness of any targeted killing" may be questionable, and certainly the subject of scrutiny by the international community.[168] Thus, alternatively, a state may need to rely on its inherent right to self-defense as a legal basis to use force, independent of the existence of an ongoing armed conflict.

C. Targeting Under a State's Inherent Right to Self-Defense

Conducting extraterritorial killings after a state invokes its inherent right to self-defense, thereby triggering LOAC, is lawful.[169] A common criticism of the United States conducting targeted killings is that when operating outside of the borders of Iraq or Afghanistan, absent consent, the United States is violating the territorial sovereignty of the nation in which

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> • "[P]rotracted armed violence" among non-state armed groups or between a non–state armed group and a State;
>
> • If an isolated incident, the incident itself should be of a high degree of intensity, with a high level of organization on the part of the non-state armed group;
>
> (iii) The territorial confines can be:
>
> • Restricted to the territory of a State and between the State's own armed forces and the non-state group (AP II); or
>
> • A transnational conflict, i.e., one that crosses State borders (GC Art. 3). This does not mean, however, that there is no territorial nexus requirement.

Id.

[167] *See generally* ALSTON, *supra* note 87. The application of International Human Rights Law (IHRL) to conflicts not amounting to armed conflict, but still demanding a non-law-enforcement response from a state is certainly worthy of discussion. For example, even under IHRL, targeted killings may be permissible under a very narrow set of circumstances notwithstanding that the idea of IHRL seems to suggest the opposite.

[168] SOLIS, *supra* note 14, at 135 (concluding that targeted strikes against civilians are legal only if: (a) the civilian is directly participating in hostilities, and (b) the attack was authorized by a senior military commander).

[169] *See generally infra* notes 171-72.

it conducts operations.[170] Nevertheless, the United States may lawfully conduct targeted killing operations in countries other than Iraq and Afghanistan. Insofar as the state in which a person is being targeted is responsible for an armed attack against the United States, the United States has a right under international law to use force in self-defense under Article 51 of the U.N. Charter. In the alternative, if that state is unwilling or unable to stop armed attacks by a non-state actor against it, the United States has a right to self-defense as long as such operations are conducted in accordance with the LOAC.[171] This proposition has been written on extensively and appears settled under international law.[172]

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[170] *See generally* U.N. Charter art. 2(3)–(4).

[171] *See generally* ALSTON, *supra* note 87. This proposition is not to suggest the United States should carry out strikes in countries such as Canada, the United Kingdom, Germany, or any other country that exercises control over their territories and are "unequivocally opposed to al-Qaeda." *See also* Ashley Deeks, *"Unwilling or Unable": Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, 487-88 (2012).

> The "unwilling or unable" test requires a victim state to ascertain whether the territorial state is willing and able to address the threat posed by the non-state group before using force in the territorial state's territory without consent. If the territorial state is willing and able, the victim state may not use force in the territorial state, and the territorial state is expected to take the appropriate steps against the non-state group. If the territorial state is unwilling or unable to take those steps, however, it is lawful for the victim state to use that level of force that is necessary (and proportional) to suppress the threat that the non-state group poses.

Id.

[172] *See, e.g.*, THOMAS BUERGENTHAL & SEAN D. MURPHY, PUBLIC INTERNATIONAL LAW 336 (4th ed. 2007); ANTONIO CASSESE, INTERNATIONAL LAW 354-55 (2d ed. 2005); LORI F. DAMROSCH ET AL., INTERNATIONAL LAW 1191 (5th ed. 2009); DINSTEIN, *supra* note 129, at 183-85, 204-06; JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 150 (2004); JOHN NORTON MOORE & ROBERT F. TURNER, NATIONAL SECURITY LAW 490 (2d ed. 2005); Deeks, *supra* note 171; Sophie Clavier, *Contrasting Perspectives on Preemptive Strike: The United States, France, and the War on Terror*, 58 ME. L. REV. 565, 571-72 (2006); Thomas M. Franck, *Editorial Comment, Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839, 840 (2001); Christopher Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*, 4 SAN DIEGO INT'L. L.J. 7, 16-18, 21-23, 37 (2003); Emanuel Gross, *Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights Versus the State's Duty to Protect Its Citizens*, 15 TEMP. INT'L. & COMP. L.J. 195, 211, 213-17 (2001); Amos Guiora, *Targeted Killing as Active Self-Defense*, 36 CASE W. RES. J. INT'L. L. 319, 323-26, 330 (2004); *John W. Head, Essay: The United States and International Law after September 11*, 11 KAN. J. L. & PUB. POL'Y. 1, 3 (2001).

V. Putting the Test to the Test: Targeting Abdul al Sad

A. United States Policy versus International Humanitarian Law When Targeting United States Citizens

The distinction between well-established international and domestic law with respect to LOAC—specifically targeting under LOAC—and the recent promulgation of United States *policy* on targeting U.S. citizens is certainly relevant for discussion.[173] Notwithstanding the wide latitude for targeting under the LOAC, the United States has limited its own authority, as a matter of policy, when targeting United States citizens by creating a test that limits when a U.S. citizen may be targeted in a foreign country.

In his May 22, 2013, letter to Senator Leahy, Attorney General Eric Holder outlined the criteria a United States citizen must meet before lethal force will be *considered* against a U.S. citizen in a *foreign country*.[174] Before considering the use of lethal force, a threshold showing of the following must take place: (1) the person being targeted must be "a senior operational leader of al-Qa'ida or its associated forces" and (2) that person must be actively engaged in "planning to kill Americans."[175] If those two factors are present, only then will the United States consider lethal targeting—but only after "a thorough and careful review" of whether the senior operational leader who is actively engaged in hostilities (1) poses an "imminent threat of violent attack against the United States," and (2) "capture is not feasible."[176] Under U.S. policy, imminence does not require "the United States to have clear evidence that a specific attack on U.S. persons and interests will take place in the immediate future."[177] Instead, imminence is a broader concept incorporating considerations of windows of opportunity, including "the possibility of reducing collateral damage to civilians, and the likelihood of heading off future disastrous attacks on Americans."[178]

Holder also said that such targeted killings would be conducted in accordance with the four principles of the LOAC: necessity, distinction,

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[173] *See* White Paper, *supra* note 144; Letter to Leahy, *supra* note 152; Letter to Paul, *supra* note 1.
[174] Letter to Leahy, *supra* note 152 (emphasis added).
[175] *Id.*
[176] *Id.*
[177] White Paper, *supra* note 144, at 7.
[178] *Id*.

proportionality, and humanity.[179] Later in the same letter to Senator Leahy, Holder explained that the Administration's policy is clear: "lethal force should not be used when it is feasible to capture a terrorist suspect."[180]

On the other hand, the LOAC is not necessarily as restrictive. It does not require senior operational leadership as a prerequisite to being the subject of a targeted killing, nor does it require actively planning an attack.[181] These factors are part of a necessity analysis, but LOAC does not require such affirmative findings prior to engaging in a LOAC analysis,[182] as appears to be the case under current U.S. policy laid out by Holder in the Department of Justice (DoJ) White Paper. Put another way, the LOAC does not create an affirmative duty to establish that al Sad is a senior operational leader in al-Qaeda as a prerequisite to determining whether al Sad is a valid military target under an IHL analysis.

Whatever the United States' reasons, political or otherwise, Holder makes it clear that killing a United States citizen-member of al-Qaeda on foreign soil is absolutely a last possible resort.[183] This policy seems more restrictive of targeting than is the prevailing law on the subject.

B. Targeting al Sad in Yemen or Pakistan

Is al Sad a lawful military target that may be targeted outside the United States in Yemen, for example?[184] The first question that must be answered is whether Abdul al Sad is a lawful target under international law, and if so, under which legal basis—IHL, International Human Rights Law (IHRL), or some complementary theory of self-defense which does not require an affirmative hostile act?[185] The answer depends, in large part, on the nature of the conflict and that person's involvement. Does a non-international armed conflict exist? If so, what is the target's relationship

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179 *Id.* at 8.

180 Letter to Leahy, *supra* note 152, at 4.

181 *See generally* LOW Manual, *supra* note 31, paras. 5.9, 17.5, 17.7.

182 *Id.*

183 Letter to Leahy, *supra* note 152, at 4.

184 Some argue that a stand-alone non-international armed conflict exists with Yemen as a result of increasing hostilities between the United States and Yemini governments. *See generally* Chesney, *supra* note 112. For purposes of this analysis, this article assumes the opposite; a non-international armed conflict does not exist between the United States and Yemen.

185 *See generally* ANDERSON, *supra* note 96; Chesney, *supra* note 112.

to that conflict and that non-state group? The limits of what constitutes an armed conflict have been addressed previously in this article.[186] The U.S. position is clear, and the objective evidence supports, that the United States is engaged in a non-international armed conflict with al-Qaeda,[187] the geographic boundaries of which extend to those areas where authorities either consent to U.S. action or "are unwilling or unable to capture or control hostile actors."[188] Once involved in a non-international armed conflict, the laws of armed conflict apply, and the U.S. may engage that enemy, subject to the LOAC, wherever he may be, inasmuch as the country in which he is being targeted consents, or is either unwilling or unable to capture or control the target.[189]

Once the targeting analysis is conducted under the LOAC's legal paradigm, the question becomes, "What is al Sad's status?" Is he an unprivileged enemy belligerent who may be targeted at any time? Is he a civilian who is directly participating in hostilities, or is he a civilian who may not be targeted? From the United States' perspective, unprivileged enemy belligerents and civilians directly participating in hostilities may be a distinction without a difference.[190] As stated throughout, generally speaking, belligerents do not enjoy any type of combatant status during NIACs.[191] "Unprivileged enemy belligerents" may be targeted at any time regardless of whether they, in that moment, are directly participating in hostilities.[192] Under the United States' view, when a civilian persistently and directly participates in hostilities, that civilian abandons his protected

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[186] Chesney, *supra* note 112.

[187] AUMF, *supra* note 67; Koh Speech, *supra* note 65. However, independent of Congressional enactment, and regardless of the position expressed by the United States, based on the intensity of the violence, the duration of the conflict, the methods used while fighting, and the organization of the enemy (notwithstanding those who have argued against it), the United States is involved in a non-international armed conflict with al-Qaeda and its associated forces. *But see* Letter from Anthony D. Romero, Executive Director, American Civil Liberties Union, to Barack Obama, President of the United States (Apr. 28, 2010), http://www.aclu.org/human-rights-national-security/letter-president-obama-regarding-targeted–killings [hereinafter ACLU Letter].

[188] DINSTEIN, *supra* note 129; Holder Speech, *supra* note 95; HANDBOOK *supra* note 46, at 7; *See* Deeks, *supra* note 171, at 477–78 and accompanying text (test for "unwilling or unable").

[189] *Id*.

[190] *See* LOW Manual, *supra* note 31, paras. 4.3.4, 5.9.

[191] Chesney, *supra* note 112, at 40.

[192] *See generally* DINSTEIN, *supra* note 129; HANDBOOK *supra* note 46, at 7. *See* SOLIS, *supra* note 14, at 334 (citing to Prosecutor v. Kunarac, et al., Case No. IT-96-23 & 23/1-A (12 June 2002)).

status and may be targeted at any time.[193] Therefore actions matter, and conduct matters. In any event, there is no doubt that based on all available intelligence, al Sad, is a valid military target under the principle of distinction. This is because he is a senior leader in al-Qaeda, the organized armed group participating in the conflict,[194] and is actively plotting an attack on United States soil—not *necessarily* requirements for al Sad to be a valid military target, but nonetheless facts in this scenario.

Some argue, albeit unconvincingly, that a duty exists under the LOAC to use lethal targeting only as a last resort.[195] Under this view, if the United States was capable of arresting al Sad, the United States is under an obligation to do so before executing his targeted killing. Such arguments fly in the face of customary IHL, and as a matter of law the United States generally does not subscribe to that point of view.[196] The IHL principle of distinction allows for the "kind and degree of force . . . which is reasonably necessary to achieve a legitimate military purpose with a minimum expenditure of time, life, and physical resources."[197] The Law of Armed Conflict, however, is not the only employable paradigm under which targeted killings are legal. Under limited circumstances, human rights law, also permits targeted killings, albeit under extraordinary circumstances.

C. Targeting Under an International Human Rights Law Analysis

For the sake of argument, what if IHRL—which unquestionably constrains states' abilities to kill compared to that of IHL—is the appropriate legal framework to analyze targeting al Sad in Yemen or Pakistan? The International Convention on Civil and Political Rights (ICCPR) holds an individual's right to life of paramount importance[198]—

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193 SOLIS, *supra* note 14, at 542-44; HANDBOOK, *supra* note 46, at 16, 21; *See also* ICRC, *Commentary on Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, at 478.

194 *See* Kretzmer, *supra* note 154, at 197-98.

195 *But see The Public Committee Against Torture v. Israel* (HJC 769/02), Judgment of 14 Dec. 2006.

196 MELZER, *supra* note 87, at 43 (citing the Government's Brief, Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 2010 U.S. Dist. LEXIS 129601 (D.D.C. 2010). *But See* White Paper, *supra* note 144, at 8; Letter to Leahy, *supra* note 152, at 4 (expressing as a matter of policy capture is preferable to killing).

197 Chesney, *supra* note 112, at 46 n.192 (citing Melzer, *supra* note 87, at 109).

198 Int'l Covenant on Civil and Political Rights, G.A. Res 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, art. 6 (Dec. 16, 1966) [hereinafter ICCPR].

certainly more so than does IHL. And though the United States "has long taken the position that the ICCPR has no extraterritorial application,"[199] that position appears to be in transition.[200]

In late December 2011, the United States established its position that the LOAC and IHRL are not mutually exclusive bodies of law.[201] They can and indeed do complement each other to some degree. However, during that same time period, the United States made clear that under the doctrine of *lex specialis*, the LOAC is the body of law that generally governs during armed conflict.[202]

Those who do evaluate the use of force under a "right-to-life" IHRL paradigm emphasize legality, proportionality, and necessity,[203] albeit differently than under an IHL paradigm. Legality is the foundation in domestic law for lethal targeting.[204] Under an IHRL legality analysis, a domestic authorization for the use of force must exist to be legal, lowering the risk of an arbitrary deprivation of life through the use of force.[205] As applied to al Sad, an operational leader in al-Qaeda who is planning an attack on U.S. soil, the United States has explicitly authorized the use of force through the Authorization for the use of Military Force[206] (AUMF), thereby fulfilling its domestic authorization for the use of force requirement under IHRL.

If Congress had not passed the AUMF, the use of force against al Sad would be lawful under the United States' inherent right to self-defense, recognized in CIL and codified in Article 51 of the U.N. Charter.[207] The U.N. Charter is a treaty to which the United States is a party.[208] Under the

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[199] Chesney, *supra* note 112, at 50.
[200] *See* FOURTH PERIODIC REPORT, *supra* note 16.
[201] *Id.*
[202] *Id.* para. 507.
[203] Chesney, *supra* note 112, at 50.
[204] *Id*.
[205] *Id.* (citing Melzer, *supra* note 87, at 174–75).
[206] *See* AUMF, *supra* note 67. As Chesney notes, the statute's "plain language suffices to convey domestic law authority to use lethal force without an implied precondition that such force be used only if there happens to be a preexisting state of armed conflict or the government is prepared to use force on such a sustained basis so as to generate one." Chesney, *supra* note 112, at 51.
[207] Gov. Brief at 4-5, *Al-Aulaqi*, 727 F. Supp. 2d 1 ("In addition to the AUMF, there are other legal bases under U.S. and international law for the President to authorize the use of force against al-Qaeda . . . , including the inherent right to national self-defense recognized in international law."); s*ee, e.g.*, U.N. Charter Article 51.
[208] *See generally infra* notes 122, 126.

Supremacy Clause of the Constitution, ratified treaties are the supreme law of the land[209] are as binding as federal statutes, and therefore would arguably provide a domestic authorization for the use of force.

Furthermore, the duty to repel attacks against the United States rests with the President under Article II of the Constitution.[210] When a decision is made to target an individual, that decision is the President's, operating in his roles as the Executive and Commander-in-Chief.[211] His decisions on military operations are based in military necessity, and courts lack competence to assess those decisions, including the dispatching of military resources.[212] When involved in matters of national security, the President acts with the maximum constitutional authority when engaged in armed conflict.[213] As the supreme law of the land, the Constitution is not limited by the terms of the AUMF. As Commander-in-Chief, and the Chief Executive, the President arguably has the ability to use force independent of Congressional authorization,[214] and certainly has the ability to use force—temporarily—without other express authorization under the War Powers Act.[215] Under either the AUMF, the President's inherent authority under Article II, or both, a legal basis for the use of force exists in domestic law to target under IHRL.[216]

Turning next to proportionality, in the IHRL context, the consideration is whether the "harm caused is proportionate to the sought objective."[217] In the context of al Sad, can it be said that the use of force by the government is necessary and proportionate because he is an actual threat

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209 U.S. CONST. art. VI, para. 2.

210 The Prize Cases, 67 U.S. 635, 647, 659–60 (1863).

211 *See generally infra* notes 209, 210; *See* Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

212 *See* Mike Dreyfuss, *My Fellow Americans, We Are Going to Kill You: The Legality of Targeting and Killing U.S. Citizens Abroad*, 65 VAND. L. REV. 249, 288, n. 235 Cf. El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 844 (D.C. Cir. 2010) (citing Gilligan v. Morgan, 413 U.S. at 10 (stating that courts lack the competence to assess the strategic decision to deploy force, or create standards to determine whether it was justified, because the control of military forces is essentially professional military judgments, subjected to civilian control by the legislative and executive branches); *see also Al-Aulaqi*, 727 F. Supp. 2d at 44-52 (holding that the executive order was unreviewable by any court under the political question doctrine).

213 *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 636 (1952); AUMF, *supra* note 67.

214 *Id.*

215 50 U.S.C. §§ 1541–48 (2015).

216 Gov. Brief at 4-5, *Al-Aulaqi*, 727 F. Supp. 2d 1.

217 Chesney, *supra* note 112, at 53.

to human life?[218] Based on the intelligence, al Sad posed a real and imminent—in the literal sense of the word—threat to American lives, and therefore lethally targeting him was proportional in relation to the risk of not eliminating him as a threat.

Also referred to as necessity, imminence asks whether the target may be "incapacitated" by the use of force "which may or may not have lethal consequences"[219] without a loss to life, and balances that against the risk to others.[220] In the case of al Sad, the use of lethal force passed the necessity test precisely because he was not just a "trigger puller"; he was also planning an imminent attack, and Yemen/Pakistan were arguably unwilling or unable to stop or control him.

Disagreement does exist on what constitutes imminence in this context.[221] About-to-kill is certainly different than will-likely-kill at an undetermined time and location. However, the U.S. view of imminence is not nearly so restrictive as to require a finger on the button, so to speak, as a predicate to authorize force, even in the context of IHRL.[222] Window of opportunity, thwarting future attacks against the United States, and limiting the loss of civilian lives, are all part of the IHRL imminence analysis.[223]

Therefore, international human rights law does not protect al Sad from lawfully being targeted. Under an IHRL targeting analysis, al Sad could also be targeted in Yemen and/or Pakistan. But what of targeting al Sad in Chicago, Illinois?

D. Targeting al Sad Domestically

The legal framework allowing al Sad to be lawfully targeted in the United States is rooted in the application of the LOAC. Aside from any legal justification, it is important at the outset to understand that a decision not to target al Sad in the United States is properly a policy decision, not one rooted in law. In fact, notwithstanding domestic constitutional concerns, the analysis required to target a United States citizen

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[218] *Id*. at 51.
[219] *Id.* at 53.
[220] *Id.* at 54-55.
[221] *See generally infra* Section II.C
[222] *See generally* White Paper, *supra* note 144.
[223] *See* Kretzmer, *supra* note 154, at 203.

domestically is simpler than that necessary to target that same citizen internationally. This is because neither legal nor policy considerations of other states' sovereignty are at issue.

In al Sad's case, the AUMF operates as the formal recognition by Congress that the United States is involved in an armed conflict with al-Qaeda, of which al Sad is a member.[224] The AUMF expressly authorizes the President to engage in hostilities and take all necessary measures against those responsible for the September 11, 2001, attacks.[225] However, Congressional authorization for the use of military force is not the only mechanism by which the President has the domestic authority to use force, thereby triggering IHL as the legal paradigm for targeting (domestically or internationally). There are other legal paradigms under which the use of force is appropriate, such that a United States citizen may be militarily targeted, self-defense being one of them.[226]

The United States has historically held the position that a claim of self-defense "has an existence as a doctrine apart from IHL armed conflict that can justify the use of force against an individual."[227] As Abraham Sofaer, then Legal Advisor to the State Department, stated in 1989, "[an] inherent right to self-defense potentially applies against any illegal use of force, and . . . extends to any group or State that can properly be regarded as responsible for such activities."[228]

That being said, a non-international armed conflict exists between the United States and al-Qaeda, of which al Sad is a member.[229] Beyond just his membership, al Sad is a senior operational leader and is planning an imminent—immediate—attack against the United States.[230] His position within al-Qaeda alone is enough to trigger the targeting analysis. Because al Sad is an enemy actor within a NIAC, the legal paradigm under which the targeting analysis takes place is IHL, and not formalized notions of due process.[231]

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[224] AUMF, *supra* note 67.
[225] *Id.*
[226] *See* ANDERSON, *supra* note 96, at 16. *See also* Chesney, *supra* note 112, at 51–52.
[227] *Id.*
[228] *Id.* (quoting Abraham D. Sofaer, *Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL L. REV. 89 (Fall 1989), at 117–18.).
[229] AUMF, *supra* note 67.
[230] *See supra* Section I.A.
[231] *See generally* Koh Speech, *supra* note 65.

The first step in the analysis is to determine if al Sad is a valid military target under the IHL principle of necessity. Based on his affiliation and his role within that organization, he qualifies as a status-based target who may be killed on sight.[232] If there is any doubt as to his status, his current and continuous direct participation in hostilities certainly qualifies him as a lawful conduct-based target pursuant to the United States' view, and a valid military target under CIL.

The next step in the analysis is distinction. For purposes of distinction, al Sad is an unprivileged enemy belligerent, not a civilian, and may be targeted within the United States under the LOAC.[233] Geography, from a legal perspective, is not relevant in distinguishing a civilian from an unprivileged enemy belligerent. [234]

The next step in the analysis is the proportionality of the strike. As stated above and throughout, proportionality is a balance between the necessity of the strike and the incidental damage to civilian life and property.[235] Under the principle of proportionality, the collateral damage expected may not be excessive in relation to the military advantage gained.[236] At the end of the day, the operational commander makes that decision.[237] In this case, based on the imminence of the attack planned by al Sad, and the amount of destruction that attack will cause, some loss of civilian life incident to targeting al Sad may be acceptable.

The final principle in the analysis is humanity. Insofar as the forces involved in the attack to do not inflict gratuitous violence on al Sad while killing him, or operate in a manner intent on creating undue suffering, the concept of humanity does not appear to be at issue under the facts presented.

Because al Sad is a United States citizen, there are other considerations which merit discussion beyond just that of a strict LOAC application. For

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[232] *See* LOW Manual, *supra* note 31, para. 5.9.
[233] *Id.* at 12, 22; *see also* Letter to Paul, *supra* note 1.
[234] *See generally Ex Parte* Quirin, 317 U.S. 1, 39 (1942); *see also* Jeh Johnson, Dean's Lecture at Yale Law School, *National Security Law, Lawyers, and Lawyering in the Obama Administration* (Feb. 22, 2012), http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school.
[235] LOW Manual, *supra* note 31, para. 2.4.
[236] *Id.*
[237] *See generally* LOW Manual, *supra* note 31, paras. 4.6.3, 5.1, 18.3.

example, why is the legal paradigm not IHRL? Does the use of military force not violate the Posse Comitatus Act[238]? Why is it not assassination? Does killing him in the United States not violate his Fourth or Fifth Amendment rights under the United States Constitution?

1. International Human Rights Law Does Not Protect al Sad from Targeted Killing?

Targeting and killing al Sad under an IHRL paradigm is legal. As stated above, until 2011, the U.S.'s view had traditionally been that IHL and IHRL treaty law do not coexist during armed conflict.[239] Nevertheless, the current U.S. policy seems to be that IHL and IHRL complement each other to some degree, and the ICCPR *does* apply to actions taken by the United States domestically.[240] Yet, as the *Fourth Periodic Report* notes, under the doctrine of *lex specialis*, IHL is the prevailing law on the subject of armed conflict.[241] Because al Sad is a status–based target pursuant to an ongoing armed conflict, IHL, not IHRL, is the proper legal paradigm. But targeting al Sad within the United States using military action raises several domestic concerns. One potential concern is the violation of the Posse Comitatus Act of 1878.[242]

2. Posse Comitatus

The Posse Comitatus Act does not apply to using military force pursuant to military action within the United States.[243] After the Civil War, Congress enacted Posse Comitatus to prevent "local civilian law enforcement from using military personnel and equipment."[244] Today, it stands for the proposition that the military will not be used to perform law enforcement functions—to police the civilian population.[245] Specifically,

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238 18 U.S.C. § 1385 (2015).

239 *See generally* Chesney, *supra* note 112, at 49–51; *but see* FOURTH PERIODIC REPORT, *supra* note 16, para. 507.

240 *See* FOURTH PERIODIC REPORT, *supra* note 16, para. 507.

241 *Id*.

242 18 U.S.C. § 1385 (2012).

243 *See generally* Tom A. Gizzo & Tama S. Monoson, *A Call to Arms: The Posse Comitatus Act and the Use of the Military in the Struggle against International Terrorism*, 15 PACE INT'L. L. REV. 149, 153–55 (2003).

244 Marshall Thompson, *The Legality of Armed Drone Strikes against U.S. Citizens within the United States*, 2013 B.Y.U. L. REV. 153, 167 (2013).

245 Gizzo & Monoson, *supra* note 243, at 153–55.

the Posse Comitatus Act says,

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.[246]

Targeted killing is a military action, not a law enforcement function. While terrorism may also be addressed by domestic law-enforcement, using military action pursuant to the LOAC is an inherently military function.[247] The fact that it occurs on U.S. soil is of no consequence, at least insofar as posse comitatus is concerned, because the military is not being used to carry out a law enforcement function; it is being used to carry out a military action.

3. Assassination

What of the ban on assassinations found in Presidential Executive Order 12333? Executive Order (EO) 12333 provides that "[n]o person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination."[248] What the EO does not do, however, is define assassination. Generally, assassinations are understood to involve killings that are politically motivated, whereas targeted killings are based strictly on national security concerns.[249]

If a viable argument exists that somehow EO 12333 does prohibit the military from engaging in domestic, targeted killings pursuant to IHL, two points are worthy of note. First, Executive Orders are not international law, and the President has the authority to modify and rescind them, including EO 12333.[250] As the President is also responsible for targeted killings, it would follow that if targeted killings did constitute a form of assassination, the EO would have been rescinded or modified. The United States is alleged to have conducted thousands of targeted killings over the

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246 18 U.S.C. § 1385 (2012).
247 Gizzo & Monoson, *supra* note 243, at 153–55.
248 Exec. Order No. 12, 333, 46 Fed. Reg. 59,941, 59, 952 (Dec. 4, 1981).
249 Dreyfuss, *supra* note 212, at 255.
250 *See generally* CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 7:31 (3d ed. 2010).

past decade by at least one non–governmental organization,[251] yet the EO has not been so rescinded.

Second, there is no statute in the United States Code that speaks to assassination—the closest reference is the prohibition on killing foreign officials.[252] Violations of the ban against assassinations within EO 12333 are punishable under the United States Code, specifically Chapter 51 of Title 18. Under 18 U.S.C. § 1111, murder of any kind requires the *unlawful killing* of another human being.[253] Targeting an individual under IHL in times of armed conflict is neither unlawful under domestic or international law, nor does it qualify as a politically motivated killing.[254] Therefore the assassination ban in Executive Order 12333 does not prohibit targeting al Sad on U.S. soil. What, however, of al Sad's constitutional protections?

4. Fourth and Fifth Amendments

Generally speaking, as a United States citizen, al Sad enjoys the protections afforded him by the United States Constitution. However, neither the Fourth nor Fifth Amendments to the Constitution prohibit killing al Sad using military action for committing acts of armed conflict against the United States.[255]

The Fourth Amendment to the United States Constitution reads,

> The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[256]

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[251] Human Rights Watch, *Q&A, U.S. Targeted Killings and International Law* (December 19, 2011), http://www.hrw.org/news/2011/12/19/q-us-targeted-killings-and-international-law.

[252] 18 U.S.C. §1116(a) (2014) ("Whoever kills or attempts to kill a foreign official, official guest, or internationally protected person shall be punished as provided under sections 1111, 1112, and 1113 of this title.").

[253] 18 U.S.C. §1111 (2014) (emphasis added).

[254] Dreyfuss, *supra* note 212, at 25 ("Based on the conduct of . . . the current administration . . . targeted killing is based strictly on security concerns; assassination is political.").

[255] White Paper, *supra* note 144, at 5.

[256] U.S. CONST. amend. IV.

The Fifth Amendment provides:

> No person shall be held to answer for a . . . crime, unless one presentment or indictment of a Grand Jury; . . . nor be deprived of life, liberty, or property, without due process of law . . . .[257]

There is no question al Sad is entitled to the same constitutional protections as any other United States citizen both domestically and abroad.[258] The question is, "Do those protections prevent his targeted killings under the circumstances?" The answer is no.

The Fourth Amendment does not protect al Sad from targeted killing. In fact, it does not speak to killing. It speaks to seizure—most commonly under a law-enforcement paradigm and not military action.[259] A seizure only occurs when, "by means of physical force or show of authority [an officer] has in some way restrained the liberty of a citizen."[260] If al Sad was detained instead of killed he would have a Fourth Amendment claim in addition to some formal due process.[261] However, as the discussion in this article pertains to targeted killings, he does not.[262]

The Supreme Court has never specifically addressed the Fourth Amendment implications associated with the President's decision to target and kill a United States citizen in accordance with IHL. Perhaps this is because the judiciary's role in national security and war–making is exceedingly limited.[263] Notwithstanding, under a domestic *law enforcement* analysis, the Supreme Court in *Tennessee v. Garner* seemingly acknowledged that seizure through use of deadly force implicates the Fourth Amendment, at least insofar as law enforcement is concerned.[264] However, implicating the Fourth Amendment in and of itself does not necessarily prohibit the use of deadly force. On the contrary, the Court held that deadly force may be used when it is necessary

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257 *Id.* amend. V.
258 Reid v. Covert, 354 U.S. 1, 5–9 (1957).
259 Terry v. Ohio, 392 U.S. 1, 19 (1968).
260 *Id.*
261 *See generally* Hamdi v. Rumsfeld, 542 U.S. 507, 528–35 (2004).
262 *See* Al-Aulaqi v. Panetta, 2014 U.S. Dist. Lexis 46689 (2014 WL 1352452) U.S. Dist. Ct. D.C. (Apr. 4, 2014).
263 *Id.* at 60.
264 Tennessee v. Garner, 471 U.S. 1, 7 (1985).

to prevent the escape of a suspect that law enforcement has probable cause to believe poses a "significant threat of death or serious physical injury to . . . others."[265] Ultimately, under the Fourth Amendment, the Court balanced the intrusion on the suspect's rights against the importance of the government's interests in justifying the intrusion.[266]

Under a *Garner* analysis, which does not contemplate a seizure outside the context of law enforcement and certainly did not address targeted killings during armed conflict, al Sad remains targetable. Under the balancing test promulgated in *Garner*, the government's interests in using deadly force to prevent al Sad from committing catastrophic attacks against the United States outweigh al Sad's individual right against seizure. Notwithstanding the Supreme Court deciding *Garner* in 1985, a more recent lower court decision dealing with the issue of targeted killing during armed conflict held that a targeted killing is not a seizure under the Fourth Amendment.[267]

In *Al-Aulaqi v. Panetta,* the U.S. District Court for the District of Columbia addressed whether the United States violated Anwar Al-Aulaqi's Fourth Amendment rights by targeting and killing him.[268] In doing so, the Al-Aulaqi court held the Fourth Amendment did not apply under these circumstances.[269] "While Plaintiffs assert that Defendants violated the Fourth Amendment right to be free from unreasonable seizure, in fact there was no 'seizure' of Anwar Al-Aulaqi, Samir Khan or Abdulrahman Al-Aulaqi as that term is defined in Fourth Amendment jurisprudence."[270] "Only when [an] officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."[271] The court makes it clear that none of the decedents' liberty interests were restrained; they were never taken into the control of the government, either by the use of force, show of force, or authority.[272] The decedents were simply targeted and killed by the United States for being actively engaged in an armed conflict

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265 *Id.* at 11.
266 *Id.* at 8.
267 *See Panetta*, 2014 WL 1352452, at *37.
268 *Id*.
269 *Id.* at 40.
270 *Id.*
271 *Id*. (citing Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968)).
272 *Id.*

with the United States and were at no point seized under the Fourth Amendment.[273]

The Fourth Amendment is not a bar against the targeted killing of al Sad. Whether a targeted killing is not a seizure under the Fourth Amendment as explained in *Panetta*,[274] or it is, the government's interest in killing al Sad outweighs his constitutional protection against seizure, because of the threat he bears to the United States. As explained in *Garner*, [275] al Sad may be killed without diminishing the Fourth Amendment. However, justifying the targeted killing of al Sad under the Fourth Amendment does not answer to what extent he is protected from a targeted killing under the due process clause of the Fifth Amendment.

In order for al Sad to be entitled to protection under the due process clause of the Fifth Amendment, the government would have to be so "deliberately indifferent" to his constitutional rights in its decision to target and kill him, that such indifference would "shock[] the conscience."[276] As the Supreme Court acknowledged, "[conduct that] shocks in one environment may not be so patently egregious in another," and "concern with preserving the constitutional proportions of substantive due process demands an exact analysis of the circumstances before any abuse of power is condemned as conscience shocking."[277] No court has ever examined the rights of a U.S. citizen-enemy who has been killed pursuant to the LOAC. However, the District Court in *Panetta* did hold that even if a substantive due process violation existed for deprivation of life without judicial process, there is no available remedy under United States law.[278] This is because the Supreme Court "has never applied a *Bivens* remedy[279] in a case involving the military, national security, or

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[273] *Id.* at 41.

[274] *See Panetta*, 2014 WL 1352452, at *40.

[275] *See generally Garner*, 471 U.S. 1. As explained above, the Court in *Garner* did not address lethal force constituting seizure outside the narrow scope of a law-enforcement paradigm. Al Sad is a United States citizen unprivileged enemy belligerent engaged in armed conflict against the United States, and as such falls squarely in line with the Court's reasoning in *Panetta*.

[276] *See Panetta*, 2014 WL 1352452, at *37 (citing County of Sacramento v. Lewis, 523 U.S. 833 (1998)).

[277] *Lewis*, 523 U.S. at 850–51.

[278] *See Panetta*, 2014 WL 1352452, at *48-49.

[279] In Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), the Supreme Court recognized a damages action in federal court against a federal officer for violating a plaintiff's clearly-established constitutional rights. *Id.* A

intelligence."[280] The court did state that in the "delicate area of war-making, national security, and foreign relations, the judiciary has an exceedingly limited role" and is "ill-equipped to question a suspected terrorist's relationship with that terrorist organization."[281]

In al Sad's case, he was a known senior leader in al-Qaeda, operating on American soil. The information concluding as much was highly classified and not available for public consumption. At the time of his targeted killing, al Sad was planning an extremely dangerous, deadly, imminent attack on United States soil. The bombs were made and ready to be deployed, and al Sad was hiding in a virtual fortress. The United States judicial system, and by extension federal law enforcement, was not equipped to deal with the national security threat al Sad posed. Al Sad was a United States citizen engaged in armed conflict against the United States and as such, was a valid military target under the LOAC. In targeting al Sad, the United States was not operating so indifferently to his constitutional rights as to shock the conscious. On the contrary, the United States was acting out of necessity and national security. For those reasons, al Sad fell outside the protections of the Fifth Amendment.

Assuming *in arguendo* (and despite his actions) al Sad falls within the parameters of protection the Fifth Amendment due process clause provides, targeting and killing him remains lawful.[282] In *Hamdi*, the United States Supreme Court acknowledged,

> *Mathews* dictates the process due in any given instance is determined by weighing the "private interest that will be affected by the official action" against the Government's asserted interest "including the function involved" and the burdens the Government would face in providing greater process."[283]

The *Mathews* test then "contemplates a judicious balancing of these concerns, through an analysis of 'the risk of an erroneous deprivation' of the private interest if the process were reduced and the 'probable value, if

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Bivens suit is the federal counterpart of a claim brought under 42 U.S.C. § 1983 against a state or local official for violation of constitutional rights. 42 U.S.C. § 1983.

[280] Doe v. Rumsfeld, 683 F. 3d 390, 394 (D.C. Cir. 2012).

[281] *See Panetta*, 2014 WL 1352452, at 60–61.

[282] White Paper, *supra* note 144, at 5.

[283] *Hamdi*, 542 U.S. at 529 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)) (decision based on the context of detention, not targeting).

any, of additional or substitute procedural safeguards.'"[284] In other words, the Court in *Mathews* balanced the government's interest in taking action against an individual's interest in being free from action.[285]

Contrasting the protections discussed in *Hamdi* afforded to a law of war detainee residing in U.S. custody (and posing no imminent threat to the United States) with that of al Sad (a terrorist waging war against the United States who poses a deadly, imminent threat to the United States and American lives), the balance shifts to the government's interest. Certainly, the deprivation of a person's life is significant, as is "a citizen's liberty in the absence of sufficient process"[286]; however, the realities of combat, and the threat al Sad poses render the use of force without due process necessary, appropriate, and legal.[287]

Although the Fourth and Fifth Amendments to the Constitution certainly apply to al Sad, as he is a United States citizen entitled to the full protections of his fellow citizens, neither Amendment protects him from being targeted and killed by the United States inside the United States pursuant to the LOAC.

VI. Choice of Law

This article discusses the legal authority under which al Sad, a U.S. citizen and terrorist member of al-Qaeda, may be targeted and killed under the laws of armed conflict within the United States. It sets the conditions, explains the analysis, and explores the legal paradigms, both domestically and internationally, necessary for carrying out the legal, targeted killing of a United States citizen domestically. However, targeting and killing al Sad, as with any other unprivileged enemy belligerent subject to the LOAC, is a choice. It is a policy decision made by those who make policy decisions. But, it is not the only choice, and in most, if not all, cases it may not be the best choice. The best choice may be to avail terrorists of the federal criminal justice system under a law enforcement model.

While policy reasons may dictate why the United States has chosen not to target terrorists using military force domestically, there is a crucial

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[284] *Hamdi*, 542 U.S. at 529.
[285] *See* Mathews, 424 U.S. at 335.
[286] *Id.* at 530.
[287] White Paper, *supra* note 144, at 6.

difference between policy and legal authority. Though policy may suggest it is not desirable to militarily target terrorists within the United States, policy does not, and indeed cannot, diminish the legal authority to do so.

VII. Conclusion

Since the homeland was attacked in September 2001, the United States has been in an unwavering, unforgiving, enduring "war" with those responsible, their affiliates, and their subsidiaries. Those responsible for perpetrating the attacks, and those who belong to those groups incorporated by reference under the AUMF, come in different shapes and sizes. They are not confined to specific borders, and those who join their ranks do not share commonality of citizenship. They are from nearly everywhere, and as the world has learned over the last decade and a half, they are indeed everywhere.

The United States' ability to fight and destroy then, cannot be confined to fighting *somewhere*. Under operation of law, the United States and its allies must be permitted to fight everywhere—everywhere that is, where the host nation consents, or is either unwilling or unable to address the threat itself, including on America's soil.

Neither the AUMF nor the President's inherent authority under Article II of the Constitution limit their grant of authority to target based on geography or nationality. The sole discriminators are membership or affiliation to that non-state actor group and conduct. Neither is the applicability of the LOAC limited by geography in its scope of application.

Al Sad was a senior operational member of al-Qaeda who was also a U.S. citizen living in Chicago. He was planning an attack on the homeland. He was a valid military target, an unprivileged enemy belligerent, not a protected civilian. In accordance with the LOAC, he was lawfully targeted. He was not entitled to the level of due process required under a domestic law enforcement paradigm. Of his own volition, he was an enemy of the state and an active participant in hostilities during an armed conflict. He could be and indeed was (at least under the facts of this article) targeted and killed by the United States military at the direction of the President. Doing so was legal.

JUDGING ALLEGED TERRORISTS: APPLYING THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE TO LETHAL DELIBERATE TARGETING

MAJOR DAVID C. COLLVER*

> *The sentence of a dispassionate judge would have inflicted severe punishment on the authors of the crime; and the merit of Botheric might contribute to exasperate the grief and indignation of his master. The fiery and choleric temper of Theodosius was impatient of the dilatory forms of a judicial [i]nquiry; and he hastily resolved, that the blood of his lieutenant should be expiated by the blood of the guilty people . . . . The punishment of a Roman city was blindly committed to the undistinguishing sword of the Barbarians; and the hostile preparations were concerted with the dark and perfidious artifice of an illegal conspiracy.*[1]

* Judge Advocate, United States Army. Presently assigned as Brigade Judge Advocate, 10th Mountain Division Sustainment Brigade, Fort Drum, New York. LL.M., 2015, The Judge Advocate General's School, United States Army, Charlottesville, Virginia. J.D., 2002, University of Detroit Mercy; B.A., 1998, University of Detroit Mercy. Previous assignments include Defense Counsel, Trial Defense Service, Southwest Region, Fort Bliss, Texas, 2013-2014; Command Judge Advocate, Combined Joint Task Force 101, Bagram Airfield, Afghanistan, 2013; Battalion Judge Advocate, 4th Battalion, 5th Special Forces Group, Fort Campbell, Kentucky, 2011-2013; Command Judge Advocate, Special Operations Task Force-Central and Special Operations Task Force-Iraq, Radwaniyah Palace Complex, Iraq, 2011; Defense Counsel, Trial Defense Service, Atlantic Region, Fort Lee, Virginia, 2009-2011; Trial Counsel, 1st Armored Division, Wiesbaden Army Airfield, Germany, 2008-2009; Trial Counsel, Multi-National Division-North, Combat Operating Base Speicher, Iraq, 2008; Operational Law Battle Captain, Multi-National Division-North, Combat Operating Base Speicher, Iraq, 2007-2008; Chief of Client Services, 1st Armored Division, Wiesbaden Army Airfield, Germany, 2007; Officer in Charge, Wiesbaden Tax Center and 1st Armored Division "Iron Tax" program, Wiesbaden Army Airfield, Germany, 2006-2007; Legal Assistance Attorney, 1st Armored Division, Wiesbaden Army Airfield, Germany, 2005-2006; Consumer Bankruptcy Attorney, Weik & Associates, Warren, Michigan, 2004-2005; Field Radio Operator, United States Marine Corps Reserve, 1997-2004; Public Defender, Flint, Michigan, 2003-2004; Assistant City Attorney, Hazel Park, Michigan, 2002-2003. Member of the bars of the State of Michigan, the United States District Court for the Eastern District of Michigan, the United States Court of Appeals for the Sixth Circuit, the Court of Appeals for the Armed Forces, and the Supreme Court of the United States. This article was submitted in partial completion of the Master of Laws requirements of the 63d Judge Advocate Officer Graduate Course.

> *It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.*[2]

I. Introduction

Theodosius I, the last emperor of the unified Roman Empire, reigned in the latter half of the fourth century from the palace at Constantinople.[3] He was one of the few Roman emperors given the appellation "the Great."[4] During his reign, the Empire extended from modern-day Turkey all the way west into Spain; and from the British Isles in the north, all the way to northern Africa.[5] In the Greek provinces, several hundred miles from the capital, was a large metropolis named Thessalonica, so beautiful that the Emperor himself resided there frequently and for long periods.[6]

Thessalonica "had been protected from the dangers of the Gothic War by strong fortifications and a numerous garrison."[7] Botheric, a Roman general of Barbarian ancestry, served the Empire at Thessalonica.[8] Against the wishes of the multitudes of Thessalonica, Botheric ordered a popular circus charioteer imprisoned for a salacious affair with one of his own slaves.[9] "[E]mbittered by some previous disputes," a mob arose, murdered Botheric and some of his staff, and dragged their "mangled bodies" through the streets of the city.[10]

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[1] EDWARD GIBBON, THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE, VOLUME THE THIRD 56 (David Wormersly ed., Penguin Classics 1995) (1781).

[2] United States v. Robel, 389 U.S. 258, 264 (1967) (referring specifically to freedom of association in the First Amendment; however, this comment could just as easily apply to Fifth Amendment Due Process).

[3] *See, e.g.*, Adolf Lippold, Theodosius I, http://www.britannica.com/biography/Theodosius-I (last visited Feb 16, 2016).

[4] *See, e.g.*, New World Encyclopedia, http://www.newworldencyclopedia.org/entry/Theodosius_I (last visited Feb 16, 2016).

[5] *Id.*

[6] GIBBON, *supra* note 1, at 57.

[7] *Id.* at 56.

[8] *Id.*

[9] *Id.*

[10] *Id.*

Theodosius, upon hearing of this outrage against his beloved general, ordered the destruction of Thessalonica.[11] His soldiers marched to the city, and in a ruse, invited the population to games at the circus.[12] Unable to resist the lure of the games, the masses swelled the arena.[13] Upon the "assembly," the soldiers began the unbridled massacre of the people.[14] "The apology of the assassins, that they were obliged to produce the prescribed number of heads, serves only to increase, by an appearance of order and design, the horrors of the massacre, which was executed by the commands of Theodosius."[15]

It is unknown how many perished at the command of the emperor that day, though various writers have estimated the number to be 7000 or perhaps greater than 15,000.[16] It is not clear how many of those actually guilty of Botheric's murder escaped, or how many of those innocent were punished with a violent death. It is also unclear whether Theodosius, aggrieved by the loss of a beloved general and the seeming betrayal at the hands of his own subjects, could even tell the difference between the guilty and the innocent. The emperor would have no judicial process determine the difference, and indeed there was no constitution or co-equal branch of the Roman government to restrain his whim.[17] By executive decree, Theodosius condemned his people to the very barbarism that Rome had for so long stood against.

The Founders of the United States of America created a government by Constitution to avoid the sort of executive abuses exhibited by Theodosius and countless other monarchs throughout history.[18] After all, they had just fought a bloody revolutionary war sparked by monarchical abuses, which they had memorialized in the Declaration of Independence.[19] After the ratification of the original Constitution, they proposed, and the states ratified, ten amendments to further clarify the limits of the federal government's power.[20] Nowhere is killing by

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[11] *Id.*
[12] *Id.*
[13] *Id.* at 57.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.* at 56.
[18] *See* U.S. CONST.
[19] THE DECLARATION OF INDEPENDENCE (U.S. 1776).
[20] H.R.J. Res. 1, 1st Cong. (1789) (enacted). Despite its title, the language of the Bill of Rights focuses its mandates on the conduct of the government, rather than on the rights of persons.

executive whim so clearly confronted as in the Fifth Amendment, which mandates that the federal government provide due process before depriving any person of life.[21]

The Fifth Amendment's Due Process Clause requires a judicial hearing for non-uniformed alien combatants subject to lethal deliberate targeting during armed conflict.[22] This article discusses this complicated issue, and its multiple sub-issues: (1) defining deliberate targeting and considering whether it poses a constitutional problem; (2) considering whether the Fifth Amendment applies to alien combatants outside of the United States; and (3) applying the Fifth Amendment to deliberate targeting. The first step is to define deliberate targeting and to consider whether there is a problem at all.

II. The Deliberate Targeting Process and Its Problems

A major component of the executive's war power is the ability to select a target, figure out where that target will be at a particular time, and strike that target from a distance.[23] Advancements in intelligence-gathering techniques overseas have allowed the government to pinpoint the location of persons with amazing geographic and temporal accuracy.[24] Advancements in aerial and munitions technology have allowed the government to kill threats to our national security from a considerable distance via missiles fired from unmanned aerial vehicles.[25] The Department of Defense (DoD) has developed a robust targeting process for selection and execution of missions.[26] However, it carries great opportunity for error and/or abuse, and correspondingly little opportunity for restraint if left unchecked by the judiciary.[27]

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[21] *See* U.S. CONST. amend. V.

[22] An analysis of the application of international law to deliberate targeting is beyond the scope of this paper.

[23] *See* U.S. CONST. art. II, § 2

[24] *See, e.g.*, Karl Tate, *How Unmanned Drone Aircraft Work*, LIVE SCIENCE (June 27, 2013), http://www. livescience.com/37815-how-unmanned-drone-aircraft-work-info graphic.html.

[25] *Id.*

[26] JOINT CHIEFS OF STAFF, JOINT PUB. 3-60, JOINT TARGETING (31 Jan., 2013) [hereinafter JP 3-60].

[27] *Id.*

A. Deliberate Targeting Defined

While the Chairman of the Joint Chiefs of Staff's Joint Targeting Publication[28] does not directly define the term "deliberate targeting," its meaning can be gleaned from the context in which the publication discusses it: it is planned[29] and manages planned targets.[30] Targeting "normally supports the joint force's *future plans* effort,"[31] it tends to focus on operations twenty-four to seventy-two hours out,[32] it is contrasted with dynamic targeting,[33] and it may even begin prior to the commencement of hostilities.[34] The U.S. Army Field Manual on the Targeting Process adds that "[d]eliberate targeting prosecutes planned targets."[35] These targets are known to exist in an operational area and have actions scheduled against them."[36] Deliberate targeting, as its name implies, is neither immediate nor emergent.

While the current deliberate targeting process includes some measure of vetting and legal review,[37] it does not include due process for the targeted individual in any meaningful sense of the term. While the Joint Targeting Publication directs the staff judge advocate to provide legal advice on "domestic laws," terms such as "notice," "hearing," "due process," and "judicial" do not even appear.[38] The primary constitutional weakness of the targeting process thus emerges: all persons who execute each phase of the process answer to the commander and thus are dis-incentivized from taking a detached and neutral view of the evidence. From an operational perspective, deliberate targeting is one effective tool the President can use to wage armed conflict against the enemies of the

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[28] *Id.*
[29] *Id.* GL-8.
[30] *Id.* at II-2.
[31] *Id.* x (emphasis in original).
[32] *Id.* at III-12.
[33] *Id.* x.
[34] *Id.* at I-11.
[35] U.S. DEP'T OF ARMY, FIELD MANUAL 3-60, THE TARGETING PROCESS para. 1-10–1-12 (26 Nov. 2010).
[36] *Id.*
[37] *Id.*
[38] JP 3-60, *supra* note 14, x.

nation. However, the erratic nature of the asymmetric conflict waged against al-Qaeda became the soil that sprouted controversy.[39]

B. Controversy Arises

Deliberate targeting did not seem to cause a due process controversy until the Central Intelligence Agency (CIA) and Department of Defense (DoD) targeted a U.S. citizen, Anwar al-Aulaqi, with a deliberate lethal strike.[40] The federal government had accused al-Aulaqi of playing "a key role in setting the strategic direction for al-Qaeda in the Arabian Peninsula (AQAP)."[41] Nasser al-Aulaqi, father and personal representative of the estate of Anwar al-Aulaqi, sued several federal government officials for violating the Fifth and Fourteenth Amendments by targeting Anwar al-Aulaqi.[42] The U.S. District Court for the District of Columbia, addressing the question of "whether federal officials can be held personally liable for their roles in drone strikes abroad that target and kill U.S. citizens," granted the government's pre-trial motion to dismiss for a variety of reasons, including lack of standing on the part of the party bringing suit and the court's reluctance to encroach upon the war-making powers of the executive and legislature.[43] Consequently, there was no opportunity for trial on the merits or appellate review. While the court ultimately concluded that al-Aulaqi was in fact a member of AQAP, the court only reached this conclusion more than two years after the government killed al-Aulaqi.[44]

Nassar al-Aulaqi had originally brought suit against the federal government in 2010, in the U.S. District Court for the District of Columbia, as "next friend" of Anwar al-Aulaqi.[45] The court granted the government's motion to dismiss, finding that Nassar al-Aulaqi lacked standing to bring suit and deciding "that at least some of the issues raised

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[39] Complaint, Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56 (D.D.C. 2014) (No. 1:12-cv-01192-RMC) [hereinafter Complaint].

[40] *American Drone Deaths Highlight Controversy*, NBC NEWS (Feb. 5, 2013, 3:10 PM), http://usnews.nbcnews.com/_news/2013/02/05/16856963-american-drone-deaths-highlight-controversy?lite.

[41] Complaint, *supra note* 39, at 10.

[42] *See generally id.*

[43] Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56 (D.D.C. 2014).

[44] *Id.*

[45] *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1 (D.D.C. 2010).

were non-justiciable political questions."[46] Thus, there was no proper judicial inquiry into his status prior to the strike.

Perhaps more alarming is that the judiciary had plenty of time to inquire into the targeting of Anwar al-Aulaqi.[47]

> In late 2009 or early 2010, Anwar al-Aulaqi, an American citizen, was added to "kill lists" maintained by the Central Intelligence Agency (CIA) and the Joint Special Operations Command (JSOC), a component of the Department of Defense (DoD). On September 30, 2011, unmanned CIA and JSOC drones fired missiles at Anwar al-Aulaqi and his vehicle, killing him and at least three other people, including Samir Khan, another American citizen.[48]

Al-Aulaqi was on the kill list for well over a year before the CIA and JSOC killed him.[49] However, there is no evidence that they ever submitted their cause to any court for judicial review. Indeed, Nasser al-Aulaqi filed suit on August 30, 2010, in an attempt to prevent the killing.[50] While the court cited to "lack of judicially manageable standards,"[51] the court ultimately decided to "exercise its equitable discretion not to grant the relief sought."[52]

The court did consider Fifth Amendment Due Process, but primarily within the context of declining to find that al-Aulaqi's father could assert his standing as Next Friend to ask for due process for his son.[53] The court next reached the due process question in the context of whether it could intrude upon the powers of the executive, and concluded that judicially limiting the scope of deliberating targeting would too far intrude upon the executive's war-making power.[54] However, the court's reluctance to do so does not necessarily imply or establish that such a practice is generally

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[46] *See Al-Aulaqi*, 35 F. Supp. 3d at 56.
[47] Complaint, *supra* note 39, at 2.
[48] *Id.*
[49] *Id.*
[50] *Al-Aulaqi*, 727 F. Supp. at 1.
[51] *Id.* at 41. The court did not cite either Goldberg v. Kelly, 397 U.S. 254 (1970) or Mathews v. Eldridge, 424 U.S. 319 (1976).
[52] *Id.* at 42 (internal citations omitted).
[53] *Id.* at 28.
[54] *Id.* at 50-51 (internal citations omitted).

constitutional. Indeed, the Fifth Amendment was designed to protect against unrestrained executive action, to prevent the sorts of abuses—whether intentional or not—engaged in by Theodosius I or George III.[55]

Some have argued that targeted killing is a broad abuse of executive power generally.[56] However, merely appealing against dystopian futures lacks a framework for how and why deliberate targeting might become a vehicle for abuse of executive power, and fails to provide a solution. In looking at due process, one can analyze the problem and revise the targeting process to comply with the Constitution.

One may ask why any of this matters. It is unsettling to consider that the federal government, elected by the people, and beholden to the Constitution, might target the wrong individuals. But, consider the words of one journalist, "[g]overnment is made of people, and some people are creepy, petty, incompetent, or dangerous."[57] The Founders built the Fifth Amendment into the Constitution as protection against petty, incompetent, and dangerous people who wielded vast governmental power.[58] Having defined deliberate targeting and identified the controversy arising from its use, whether the Fifth Amendment Due Process Clause is applicable to deliberate targeting must now be considered.

III. The Boundaries of Fifth Amendment Due Process

The Constitution creates a government of enumerated powers, and focuses its language on the conduct of the government.[59] Enumerated rights are not created by the Constitution, but merely guaranteed by specific restraints on the government's conduct.[60]

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[55] *See* U.S. CONST. amend. V.

[56] Michael Ratner, Anwar al-Awlaki's Extrajudicial Murder, THE GUARDIAN (Sept. 30, 2011, 1:50 PM), http://www.theguardian.com/commentisfree/cifamerica/2011/sep/30/anwar-awlaki-extrajudicial-murder.

[57] Scott Shackford, *3 Reasons the 'Nothing to Hide' Crowd Should Be Worried About Government Surveillance*, REASON (June 12, 2013), http://reason.com/archives/2013/06/12/three-reasons-the-nothing-to-hide-crowd.

[58] *See* U.S. CONST. amend. V.

[59] *See* U.S. CONST. art. I, § 8; U.S. CONST. amend. X.

[60] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). *See also* United States v. Cruikshank, 92 U.S. 542, 553 (1875) ("[The right to keep and bear arms] is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence."); District of Columbia v. Heller, 554 U.S. 570, 592, 619-20 (2008)

The Declaration of Independence, the founding document of the United States, forcefully sets forth as policy and reason for rebellion the idea that rights are neither created by government, nor dependent on government.[61] Rather, governments are created to protect these rights.[62] One may conclude that the Founders were clear in the language of the Fifth Amendment that these restraints applied to the government's conduct relative to all persons. The due process protection applies to non-citizens, and it applies when the federal government acts outside the territorial jurisdiction of the United States.[63] It applies during times of armed conflict, and it even applies to non-citizens who are the subjects of deprivations by the federal government outside the territory of the United States during armed conflict.[64] The government cannot hide from it, or deny it, as it springs from the very source that authorizes the government any action at all. However, one must define due process before assessing whether it applies to deliberate targeting.

A. Due Process Defined

Due process requires notice of a proceeding against the accused, and a meaningful opportunity to be heard by a neutral decision-maker.[65] The Fifth Amendment reads, in part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . nor be deprived of life, liberty, or property, without due process of law . . . .[66]

(referencing constitutional language again, thus affirming the endurance of the principle that rights exist outside of the Constitution's framework).

[61] *Id.*

[62] *Id.*

[63] *See infra* subsections A–F.

[64] *Id*.

[65] *See e.g*., Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal., 508 U.S. 602, 617 (1993) ("Due process requires a 'neutral and detached judge in the first instance . . . .'").

[66] U.S. CONST. amend. V.

The Framers did not define "due process" in the original text of the Constitution.[67] Eventually, the Supreme Court clarified the term in case law.[68] In 1884, when considering how to interpret the Due Process Clause of the Fourteenth Amendment, the Court touched on the meaning of the nearly identical language of the Fifth Amendment's Due Process clause:

> Due process of law in the [Fifth Amendment] refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law.[69]

As subsequent Courts developed new case law, the definition of due process took shape. The Court held in 1891 "that law in its regular course of *administration through courts of justice* is due process."[70] Later, the Court held "[t]he essential elements of due process of law are notice and opportunity to *defend*. In determining whether such rights were denied we are governed by the substance of things and not by mere form."[71] "The fundamental requisite of due process of law is the opportunity to be heard. And it is to this end, of course, that summons or equivalent notice is employed."[72]

Alluding to Congress and the President, and then later English courts, Justice Frankfurter observed, "This Court is not alone in recognizing that the right to be heard before being condemned to suffer grievous loss of any kind . . . is a principle basic to our society."[73] Later in the same opinion, Justice Frankfurter, almost prophetically, crystallized the importance of the opportunity to be heard when he stated, "[t]he heart of the matter is that democracy implies respect for the elementary rights of

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[67] Perhaps the Framers thought they did not need to. The Framers did define terms they seemed to think necessary. *See, e.g.*, "Treason," U.S. CONST. art. III, § 3, Cl 1.
[68] Hurtado v. California, 110 U.S. 516, 535 (1884).
[69] *Id. See also id.* at 547 (Harlan, J., dissenting) (apparently including a grand jury indictment in capital cases, the right to remain silent, and the prohibition against double jeopardy as inherent in due process).
[70] Leeper v. Texas, 139 U.S. 462, 468 (1891) (emphasis added). *See also* Iowa C. R. Co. v. Iowa, 160 U.S. 389, 393 (1896).
[71] Simon v. Craft, 182 U.S. 427, 436 (1901) (emphasis added) (citing Louisville & N. R. Co. v. Schmidt, 177 U.S. 230 (1900)).
[72] Grannis v. Ordean, 234 U.S. 385, 394 (1914) (internal citations omitted).
[73] Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one–sided determination of facts decisive of rights."[74] The *Armstrong* v. *Manzo* Court acknowledged, "A fundamental requirement of due process is 'the opportunity to be heard,'" and added, "It is an opportunity which must be granted at a meaningful time and in a meaningful manner."[75] The *Ward* Court required "a neutral and detached judge in the first instance."[76]

Imagine if, in a criminal trial, the defense were not allowed a case-in-chief, had no opportunity to present its own evidence, no opportunity to cross-examine the prosecution's witnesses, and no opportunity to address the jury at the close of evidence. Then imagine the jury reaches a verdict of guilty and imposes a sentence of death. This procedure would undoubtedly violate the Constitution's guarantee of due process. The Fifth Amendment Due Process Clause exists to prevent this from happening, though this seems not far distant from what happened in the al-Aulaqi matter.[77] With due process defined, an assessment of the Due Process Clause's application to deliberate targeting must proceed with "first principles"[78] of constitutional interpretation.

B. First Principles

A core principle of American constitutional law is that the federal government may only exert action that is authorized by the Constitution.[79] The United States Supreme Court, speaking through the late Chief Justice William Rehnquist, once began an analysis of a statute by saying, "We start with first principles. The Constitution creates a Federal Government of enumerated powers."[80] This principle of American government is so well-settled that the Court spoke similarly, and forebodingly, through the late Chief Justice John Marshall a mere thirty-one years after the ratification of the Constitution itself.[81]

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[74] *Id.* at 170.
[75] Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (citing *Grannis*, 234 U.S. at 394).
[76] Ward v. Monroeville, 409 U.S. 57, 62 (1972).
[77] *See* Al-Aulaqi v. Panetta, 35 F. Supp. 3d 56 (D.D.C. 2014).
[78] *See* United States v. Lopez, 514 U.S. 549, 552 (1995).
[79] *See* U.S. CONST. amend. X.
[80] Lopez, 514 U.S. at 552.
[81] McCulloch v. Md., 17 U.S. (4 Wheat.) 316, 405 (1819).

> This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which it [sic] enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.[82]

While Chief Justice Rehnquist cited to the Constitution itself for his opinion, Chief Justice Marshall cited to no authority.[83] Justice Marshall implied that the doctrine of enumerated powers was so widely accepted that no one seriously questioned it at the time.[84]

The seeds of this first principle took root in the Declaration of Independence, which declared the political philosophy upon which the Constitution was based:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . . .[85]

Clearly, the Framers intended a government whose only authority manifested from those over whom it governed, via the Constitution, and from no other source.[86] Further, they clearly intended that the rights of the

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[82] *Id.*

[83] *Id.*; Lopez, 514 U.S. at 552.

[84] Even Chief Justice Taney, in his infamous *Dred Scott* opinion, recognized this principle of American government: "Certain specified powers, enumerated in the Constitution, have been conferred upon [the government]; and neither the legislative, executive, nor judicial departments of the Government can lawfully exercise any authority beyond the limits marked out by the Constitution." Scott v. Sandford, 60 U.S. (19 How.) 393, 401 (1857). *See also* Reid v. Covert, 354 U.S. 1, 5-6 (1957) ("The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.").

[85] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[86] *Id.*

people did not come from the government.[87] These rights existed independently of, and before, the creation of government.[88] Put another way, one's rights did not depend upon one's citizenship, but rather upon one's humanity.

Although the first ten amendments to the Constitution are often referred to as the Bill of Rights, the preamble to the Congressional Joint Resolution proposing the first amendments to the Constitution makes clear that this is not a list of rights the government grants to the people.[89]

> T[he] Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, *in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added*: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution.[90]

By its own language, the so-called Bill of Rights intended to prevent "misconstruction or abuse of" the Constitution's powers, not to list the rights of the people.[91] The Ninth Amendment removes all reasonable doubt on this point, stating, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[92]

The Constitution and its amendments merely authorize the government certain and specific powers, and provide specific restrictions on those powers.[93] It may not exercise any authority not specifically granted to it by the Constitution, and may only act when so authorized.[94] Though the Constitution recognizes rights of different categories of people, the Fifth Amendment specifically applies to persons,[95] who must now be defined.

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87 *Id.*
88 *Id.*
89 H.R.J. Res. 1, 1st Cong. (1789) (enacted).
90 *Id.* (emphasis added).
91 *Id.*
92 U.S. CONST. amend. IX.
93 *See* U.S. CONST. art. I, § 8; U.S. CONST. amend. X.
94 *Id.*
95 *See* U.S. CONST. amend. V.

C. Who Is a Person?

The Fifth Amendment curiously uses the unqualified term "person," rather than "citizen" or even "the people," when referring to the subjects of government actions.[96] Although the Founders used these three terms at various points throughout the text of the Constitution, they are not interchangeable, as they mean different things.[97] The Founders specifically chose those terms to use in the places in which they used them, for a specific intended effect.[98] The Court has long taken the view that the plain, ordinary meaning of the text ought to be the most accurate.[99] They also decided that they should not supply text where Congress had not.[100] Applying this view to the text of the Fifth Amendment yields the conclusion that "persons" protect by the Fifth Amendment includes a broader class than citizens and resident aliens.[101]

1. Constitutional Construction

The Supreme Court determined how it ought to interpret the text of the Constitution,[102] which can guide how one actually looks at the text. The long-standing rule of construction is that the Court views the text in its ordinary, plain meaning, as the Founders intended to create a document that the voters could understand.[103] As recently at 2008, the Supreme Court cited to an 1824 case for this seemingly minor, yet well-established point on constitutional interpretation.[104]

> In interpreting this text, we are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that

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96 U.S. CONST. amend. V.
97 *See e.g.*, District of Columbia v. Heller, 554 U.S. 570, 576–77 (2008).
98 *Id.*
99 *See infra* subsection 1.
100 *See e.g.*, FTC v. Simplicity Pattern Co., 360 U.S. 55, 67 (1959).
101 *See infra* subsections 1–2.
102 *See e.g.*, *Heller*, 554 U.S. at 576–77.
103 *Id.*
104 *Id.*

> would not have been known to ordinary citizens in the founding generation.[105]

The Court implied that the text does not contain hidden meanings, or even legal jargon that might differ from everyday ordinary meanings.[106] "In the first place, the words of statutes . . . should be interpreted where possible in their ordinary, everyday senses."[107] One divines the will of the Founders from reading what they wrote, and concludes that what they wrote is in fact what they chose to write.[108] They could have used other words, other terms, and yet chose not to.[109]

> The popular or received import of words furnishes the general rule for the interpretation of public laws as well as of private and social transactions; and wherever the legislature adopts such language in order to define and promulgate their action or their will, the just conclusion from such a course must be, that they not only themselves comprehended the meaning of the language they have selected, but have chosen it with reference to the known apprehension of those to whom the legislative language is addressed, and for whom it is designed to constitute a rule of conduct, namely, the community at large.[110]

The Court essentially found that Congress intentionally chose the language it used, specifically so that it has meaning for the general public—those to whom it would apply.[111]

Along this line of thinking, the Court stated simply in (serendipitously-named) *FTC v. Simplicity Pattern Company*, "[w]e cannot supply what Congress has studiously omitted."[112] Therefore,

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[105] *Id.* (internal citations omitted) (citing United States v. Sprague, 282 U.S. 716, 731 (1931) and Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1, 188 (1824)).

[106] *Id.*

[107] Crane v. Comm'r, 331 U.S. 1, 6 (1947) (citing Old Colony R. Co. v. Commissioner, 284 U.S. 552, 560 (1932)); *See also* Malat v. Riddell, 383 U.S. 569, 571 (1966) (citing Crane, adding, "As we have often said . . .").

[108] *See e.g.*, Maillard v. Lawrence, 57 U.S. (16 How.) 251, 261 (1854).

[109] *Id.*

[110] *Id. See also* Old Colony R. Co. v. Commissioner, 284 U.S. 552, 560 (1932).

[111] *Id.*

[112] FTC v. Simplicity Pattern Co., 360 U.S. 55, 67 (1959). *See also* United States v. Sprague, 282 U.S. 716, 731 (1931) (asserting that terms in the Constitution were written to be understood in a "normal and ordinary" meaning instead of a technical meaning). *Id.*

absent other clues in the actual text, one must read what is present, without reading in to the text words and phrases that are not present:

> In construing statutes, words are to be given their natural, plain, ordinary and commonly understood meaning unless it is clear that some other meaning was intended, and where Congress has carefully employed a term in one place and excluded it in another, it should not be implied where excluded.[113]

"And the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."[114] The Fifth Amendment uses the term "person," instead of "citizen" or "the people," and it means something different from those two latter terms.[115] The Founders must have intended this term, and therefore this term must be defined.

2. Rights of Persons

A person is, quite plainly, any human.[116] The text of the Fifth Amendment suggests it means any human subject to action by the federal government.[117] As demonstrated below, it covers a class much broader than merely "citizen" or "the people."[118] Consider the infamous Three-Fifths Representation Clause,[119] in which slave populations were calculated at three-fifths of their actual numbers for purposes of congressional representation.[120]

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[113] Pena-Cabanillas v. United States, 394 F.2d 785, 789 (9th Cir. 1968) (internal citations omitted).
[114] Lynch v. Alworth-Stephens Co., 294 F. 190, 194 (8th Cir. 1923). *See also* Lynch v. Alworth-Stephens Co., 267 U.S. 364, 370 (1925) (agreeing with the Circuit Court's articulation); *Old Colony R. Co.*, 284 U.S. 552, 560 (1932).
[115] *See* U.S. CONST. amend. V.
[116] *See e.g.*, U.S. CONST. art. I, § 2, cl. 3.
[117] *See* U.S. CONST. amend. V.
[118] *See e.g.*, Sugarman v. Dougall, 413 U.S. 634, 652 (1973). (Rehnquist, J., dissenting) (emphasis added) (discussing the term "person" in the Fourteenth Amendment, but arguably could just as easily apply to the same term in the Fifth Amendment).
[119] U.S. CONST. art. I, § 2, cl. 3.
[120] *Id.*

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free *Persons*, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other *Persons*.[121]

The Founders used the same noun ("person") to refer to both free persons and slaves, and thus declared that slaves, although not citizens, were in fact still "persons."[122] The Founders did not appear to grant citizenship to slaves by fiat in this section, so they must not have intended the terms "person" and "citizen" to be synonymous.[123] The fugitive slave provision of the Constitution corroborates this use of the term:

> No *Person* held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.[124]

"Person" is used again, clearly in reference to a slave.[125] Justice McLean, in his dissenting opinion in *Scott v. Sanford*, reached a similar conclusion: "In the provision respecting the slave trade, in fixing the ratio of representation, and providing for the reclamation of fugitives from labor, slaves were referred to as persons, and in no other respect are they considered in the Constitution."[126] The Constitution clearly and specifically refers to non-citizens as persons.[127]

Some years later, in a far less controversial case, the Supreme Court declared unlawful the deportation of an alien without a hearing.[128] Although the majority did not reach the constitutional question of the

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121 *Id.* (emphasis added).
122 *Id.*
123 *Id.*
124 U.S. CONST. art. IV § 2, cl. 3 (emphasis added).
125 *Id.*
126 Scott v. Sandford, 60 U.S. (19 How.) 393, 537 (1857) (McLean, J., dissenting).
127 *Id.*
128 Bridges v. Wixon, 326 U.S. 135 (1945).

application of the Fifth Amendment,[129] Justice Murphy discussed its application to aliens in his concurring opinion when he stated,

> [O]nce an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. *None of these provisions acknowledges any distinction between citizens and resident aliens*. They extend their inalienable privileges to all "persons" and guard against any encroachment on those rights by federal or state authority.[130]

Per Justice Murphy, the due process clause of the Fifth Amendment does not distinguish "between citizens and resident aliens."[131] However, he failed to explain how the Fifth Amendment distinguishes between resident aliens and non-resident aliens, while simultaneously implying that it does.[132] He then concluded that the Fifth Amendment's "inalienable privileges" extended "to all 'persons,'" which runs counter to the distinction he made previously.[133]

In *Sugarman v. Dougall*,[134] the Supreme Court considered the meaning of "person" within the 14th Amendment's Equal Protection Clause, which added a jurisdictional qualifier to the term, when it stated,[135] "[i]t is established, of course, that an alien is entitled to the shelter of the Equal Protection Clause."[136] In his dissent, Justice Rehnquist illuminated the Constitution's distinction between citizens and non-citizens:

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[129] *Id.* at 157.

[130] *Bridges*, 326 U.S. at 161 (Murphy, J., concurring) (emphasis added) (internal citations omitted).

[131] *Id.*

[132] *Id.*

[133] This arguable contradiction in Justice Murphy's reasoning can be reconciled by considering that the Fifth Amendment places a mandate on the conduct of the government, rather than conferring rights upon persons.

[134] Sugarman v. Dougall, 413 U.S. 634 (1973).

[135] "No State shall . . . deny to *any person within its jurisdiction* the equal protection of the laws." U.S. CONST. amend. XIV, § 1, cl. 2–3 (emphasis added).

[136] *Sugarman*, 413 U.S. at 641. *See also* Graham v. Richardson, 403 U.S. 365, 371 (1971); Truax v. Raich, 239 U.S. 33, 39 (1915); Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

> [T]he Constitution itself recognizes a basic difference between citizens and aliens. That distinction is constitutionally important in no less than [eleven] instances in a political document noted for its brevity. Representatives and Senators must be citizens. Congress has the authority "to establish an uniform Rule of Naturalization" by which aliens can become citizen members of our society; the judicial authority of the federal courts extends to suits involving citizens of the United States "and foreign States, Citizens or Subjects," because somehow the parties are "different," a distinction further made by the *Eleventh Amendment*; the *Fifteenth*, *Nineteenth*, *Twenty-Fourth*, and *Twenty-Sixth Amendments* are relevant only to "citizens." The President must not only be a citizen but "a natural born Citizen."[137]

Although the thrust of Justice Rehnquist's dissent seemed to be that aliens should not have the same rights and opportunities for employment as citizens, he made a salient point on the Constitution's textual distinction between "citizens" and others.[138] He elucidated this point further into his dissent, while discussing the Court's view of the Equal Protection Clause of the 14th Amendment:

> The language of that Amendment carefully distinguishes between "persons" who, whether by birth or naturalization, had achieved a certain status, *and "persons" in general*. That a "citizen" was considered by Congress to be a rationally distinct subclass of all "persons" is obvious from the language of the Amendment.[139]

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[137] *Sugarman*, 413 U.S. at 651-52 (Rehnquist, J., dissenting) (emphasis in original) (internal citations omitted). *See also* Fletcher v. Haas, 851 F. Supp. 2d 287, 295 (D. Mass. 2012) (including aliens in "the people" for purposes of the Second Amendment, and noting "[t]here is only one constitutional right that is exclusive to citizens: the right to hold federal public office"); District of Columbia v. Heller, 554 U.S. 570, 580 (2008) (holding "in all six other provisions of the Constitution that mention 'the people,' the term unambiguously refers to all members of the political community, not an unspecified subset"). "The People," therefore, is arguably a broader class than merely "citizens," and "persons" is arguably a broader class still than "the people."

[138] *Id.*

[139] *Sugarman*, 413 U.S. at 652 (Rehnquist, J., dissenting) (emphasis added).

The Equal Protection Clause of the 14th Amendment, by its own language, demands that each state "provide any person within its jurisdiction the equal protection of the laws,"[140] and distinguishes persons within the jurisdiction of the States from persons generally.[141] The future Chief Justice merely elucidated that the Constitution considered citizens a subset of persons in general, that although they may overlap, they are distinct.[142]

The Due Process Clause of the Fifth Amendment includes no jurisdictional qualifier when it uses the term "person."[143] Justice Rehnquist wrote at length about the substantive difference between citizens and aliens and why this matters.[144]

> Native-born citizens can be expected to be familiar with the social and political institutions of our society; with the society and political mores that affect how we react and interact with other citizens. Naturalized citizens have also demonstrated their willingness to adjust to our patterns of living and attitudes, and have demonstrated a basic understanding of our institutions, system of government, history, and traditions. It is not irrational to assume that aliens as a class are not familiar with how we as individuals treat others and how we expect "government" to treat us.[145]

Justice Rehnquist argued against extending to aliens the same rights as citizens, and his arguments are rational when considering who ought to determine the composition of the government.[146] However, while aliens might not know how Americans "expect 'government' to treat us," the government at all times ought to know how to treat others.[147] The government cannot hide behind alien ignorance of American institutions as a shield for failure to comply with Constitutional mandates. Hence, one

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[140] U.S. CONST. amend. XIV, § 2, cl. 4.
[141] Thus, the term "person," without the 14th Amendment's jurisdictional qualifier, must mean something different from "persons" with the jurisdictional qualifier. Therefore, "person," without the jurisdictional qualifier, must not include a jurisdictional requirement.
[142] *Sugarman*, supra note 139.
[143] U.S. CONST. amend. V.
[144] *Sugarman*, 413 U.S. at 661-62 (Rehnquist, J., dissenting).
[145] *Id.*
[146] *Id.*
[147] *Id.*

may infer from the future Chief Justice's dissent that the term "person," absent any such jurisdictional qualifier as that supplied by the Equal Protection Clause, includes not only aliens per se, but specifically non-resident aliens.[148]

The application of Fifth Amendment personhood does not stop at mere aliens. The Supreme Court has found that "persons" includes illegal aliens.[149]

> *[A]ll persons* within the territory of the United States are entitled to the protection guaranteed by [the Fifth and Sixth Amendments], and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law.[150]

The Court concluded that "person" includes illegal aliens, and that legislation that declared their crime "infamous" and punished them without due process, was outside of Congress's constitutional authority.

In the present day, few crimes are more infamous than terrorism. Congress has decreed criminal penalties for various acts of terrorism ranging from a term of imprisonment, to the death penalty.[151] One federal appeals judge, speaking at the James Madison Lecture of the New York University School of Law in 2012, summarized the Court's jurisprudence on the application of the Fifth Amendment to aliens.[152]

> Today, an alien's right to the full panoply of constitutional criminal trial protections is essentially beyond dispute,

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[148] This view seems consistent with the majority's view that the "any person within its jurisdiction" language of the Equal Protection clause includes resident aliens. *Sugarman*, 413 U.S. at 641.

[149] *See e.g.*, Wong Wing v. United States, 163 U.S. 228, 238 (1896). *See also* Zadvydas v. Davis, 533 U.S. 678, 690 (2001) ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment's Due Process Clause forbids the Government to 'deprive' any 'person . . . of . . . liberty . . . without due process of law.'").

[150] Wong Wing, 163 U.S. at 238 (1896) (emphasis added).

[151] 18 U.S.C. § 2332b. The death penalty would certainly invoke the capital offense provision of the Fifth Amendment.

[152] The Honorable Karen Nelson Moore, *Madison Lecture: Aliens and the Constitution*, 88 N.Y.U. L. REV. 3, 825 (2013).

> despite the fact that the Supreme Court has not explicitly held that aliens are entitled to each of the specific underlying rights, such as the right to a speedy trial.[153]

Put another way, an alien is entitled to full due process. As demonstrated above, the Founders intended that constitutional personhood specifically included non-citizens.[154] Further, the Supreme Court has subsequently interpreted the term "person" to include non-resident aliens.[155] Since the Supreme Court has determined that "person" means *all* persons, the question arises whether the Fifth Amendment applies outside of the geographic confines of the United States.

D. The Long Arm of the Supreme Law

The Fifth Amendment's mandate for due process, before taking life, applies at any geographical point at which the federal government chooses to act, even if that point lies outside the political and legal boundaries of the United States and its territories.[156] Or, as one former state judge wrote, "the Constitution . . . governs the government wherever it goes."[157]

The Department of Justice (DoJ) somewhat conceded this point when it stated, "The Department assumes that the rights afforded by the Fifth Amendment's Due Process Clause . . . attach to a U.S. citizen even while he is abroad."[158] However, a proper analysis of the application of the Fifth Amendment's Due Process Clause demonstrates that it applies abroad to everyone who is the subject of U.S. government action, not just U.S. citizens.

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153 *Id.* (citations omitted).
154 *See e.g.*, *Wong Wing*, supra note 150.
155 *See Wong Wing*, 163 U.S. at 237-38.
156 U.S. CONST. amend. V.
157 Andrew Napolitano, *All Torture is Criminal Under All Circumstances*, REASON (Dec. 11, 2014), http://reason .com/archives/2014/12/11/cia-and-its-torturers.
158 Department of Justice White Paper, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qai'da or An Associated Force* 5 (Nov. 8, 2011), http://www.lawfareblog.com/wp-content/uploads/2013/02/020413_DOJ_White_Paper.pdf [hereinafter DoJ White Paper]. The Department of Justice (DoJ) cites to Reid v. Covert, 354 U.S. 1, 5-6 (1957) for its assertion. (DoJ White Paper at 5). The Department of Justice's analysis of the application of the Fourth Amendment to lethal, deliberate targeting is beyond the scope of this article.

The Department of Justice cites to *Reid v. Covert*,[159] where the Supreme Court considered the application of Fifth Amendment Due Process to U.S. citizens accompanying members of the military abroad.[160] The *Reid* Court is clear about two things: the Constitution does not lose its effect merely because the action at issue is outside of the United States, and the concept of legal extra–territoriality is fundamental to the nature of government itself.[161]

> When the Government reaches out to punish a citizen who is abroad, the shield which the *Bill of Rights* and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. This is not a novel concept. To the contrary, it is as old as government.[162]

As an example of how this principle is as "old as government," the Court mentioned the Biblical Paul, invoking his citizenship as a Roman, in order to enjoy the rights of Roman citizenship.[163] In using the example of Rome, a nation not known for recognizing the concept of natural rights of non-citizens, the Court seemed to say that extra-territoriality is not so much an issue of rights as it is an issue of the government's authority to act at all.[164]

The *Reid* Court corroborated this view when considering the extra-territorial application of a different section of the Constitution, not included in the Bill of Rights.[165]

> The language of Art[icle] III, § 2 manifests that constitutional protections for the individual *were designed to restrict the United States Government when it acts* outside of this country, as well as here at home. After declaring that all criminal trials must be by jury, the section states that when a crime is "not committed within

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[159] Reid v. Covert, 354 U.S. 1 (1957) (holding that Fifth Amendment protections extended to spouses of servicemembers stationed in foreign countries.).

[160] The *Reid* Court did not consider the application of the Fifth Amendment to non-citizens abroad, because this issue was not presented by the parties.

[161] *Reid*, 354 U.S. at 6.

[162] *Id*.

[163] *Id.*

[164] *Id. See generally* Gibbon, *supra* note 1.

[165] *Reid*, 354 U.S. at 7–8.

> any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." If this language is permitted to have its obvious meaning, § 2 is applicable to criminal trials outside of the States as a group without regard to where the offense is committed or the trial held.[166]

The Court therefore confirmed that constitutional mandates are really about restricting the federal government's power, and also that the Founders intended that extra-territoriality not be a concern when discussing restraints on that power.[167]

The Court also addressed the notion that only fundamental rights are protected abroad.[168]

> This Court and other federal courts have held or asserted that various constitutional limitations apply to the Government when it acts outside the continental United States. While it has been suggested that only those constitutional rights which are "fundamental" protect Americans abroad, we can find no warrant, in logic or otherwise, for picking and choosing among the remarkable collection of "Thou shalt nots" which were explicitly fastened on all departments and agencies of the Federal Government by the Constitution and its Amendments.[169]

The Court confirmed two important points: (1) mere urgency of a fundamental right is not material to its extra-territorial application, and (2) "fundamental protections" are all restraints on the government's power that attach from the very source of its power.[170]

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[166] *Id.* (emphasis added) ("The *Fifth* and *Sixth Amendments*, like Article. III, § 2, are also all-inclusive with their sweeping references to 'no person' and to 'all criminal prosecutions.'") (citing 3 MADISON PAPERS 1441 (Gilpin ed. 1841)) ("According to Madison, the section was intended 'to provide for trial by jury of offences committed out of any State.'").

[167] *Id.*

[168] *Reid*, 354 U.S. at 8–9.

[169] *Id.*

[170] *Id.*

In *Balzac v. Porto Rico*,[171] thirty-five years earlier than *Reid*, the Court crystallized the issue of extra-territoriality.[172]

> [T]he real issue in the *Insular Cases*[173] was not whether the Constitution extended to the Philippines or Porto [sic] Rico when we went there, but which of its provisions were applicable by way of limitation upon the exercise of executive and legislative power in dealing with new conditions and requirements.[174]

Thus, the essential question is not whether constitutionally guaranteed rights extend to territory outside of the United States, but whether the Constitution guides and restrains the government's hand, wherever it acts.

Referring back to the *Insular Cases*, the Court more recently, in *Boumediene v. Bush*,[175] declared that neither Congress nor the President may determine when or whether extra-territoriality applies.[176]

> The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not "absolute and unlimited" but are subject "to such restrictions as are expressed in the Constitution." . . . To hold the political branches have the power to switch the Constitution on or off at will . . . [leads] to a regime in which Congress and the President, not this Court, say "what the law is."[177]

The point is not that the Constitution applies extra-territorially, but applies to government actors who operate extra-territorially.[178] Congress

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171 Balzac v. Porto Rico, 258 U.S. 298 (1922).
172 *Id.* at 312.
173 *See* Boumediene v. Bush, 553 U.S. 723, 757 (2008) (The *Insular Cases* were several cases wherein the Supreme Court held, *inter alia*, "that the Constitution has independent force in" territories outside of the States, and that force is "not contingent upon acts of legislative grace.")
174 *Balzac*, 258 U.S. at 312. *See also Boumediene*, 553 U.S. at 758.
175 *Boumediene*, 553 U.S at 128.
176 *Id*. at 765.
177 *Id*. (citing Murphy v. Ramsey, 114 U.S. 15, 44 (1885) and Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 177 (1803)).
178 *Boumediene*, 553 U.S. at 765.

and the President risk violating separation of powers and subverting constitutional law by asserting otherwise. Congress and the President may not exercise authorities in places where the very document granting those authorities does not apply.[179] While applicable extraterritorially, now comes the question of whether Fifth Amendment due process has its full force and effect during times of armed conflict.

E. Fifth Amendment Not Suspended During Armed Conflict

The Fifth Amendment Due Process Clause has full force and effect during armed conflict.[180] There is no war exception to this clause.[181] Congress and the President have historically been accorded broad latitude in their war-making powers, indeed so much latitude that "it has been possible to leave the outer boundaries of war powers undefined."[182] However, the Constitution does not grant the power to read-in a war-time exception to the Due Process Clause, and the Court went to so far as to declare of the Constitution that "[n]o doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."[183] Indeed, "[w]hat are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."[184]

In 1866, shortly after the end of the Civil War, the Supreme Court asserted that trying civilians by court-martial was unconstitutional while civilian courts were still open and operating.[185] They had occasion to consider the application of martial law generally.[186]

> If, in foreign invasion or civil war, the courts are actually closed, then, on the theater of active military operations, where war really prevails, as no power is left but the

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179 *Boumediene*, 553 U.S. at 765.
180 *See, e.g.*, *Ex Parte* Milligan, 71 U.S. (4 Wall.) 2 (1866). S*ee also* Reid v. Covert, 354 U.S. 1, 35 n.62, 77 S. Ct. 1222, 1240 (1957) ("Even during time of war the Constitution must be observed.").
181 *See* U.S. CONST. amend. V.
182 *Id*. at 797–98.
183 *Ex Parte* Milligan, 71 U.S. (4 Wall.) 2, 120–21 (1866).
184 Sterling v. Constantin, 287 U.S. 378, 401 (1932).
185 Ex parte *Milligan*, 71 U.S. (4 Wall.) at 127.
186 *Id.*

> military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.[187]

American courts certainly were not closed during the direst times of the Civil War,[188] and have never been since.[189] Indeed, even during America's recent wars in Afghanistan and Iraq, the Army tried full criminal cases with judges, jury-analogous panels, and defense counsel in the theaters of war.[190] Hence, there has been no cause to consider suspending due process at any time since the Court announced this principle, nor is there likely to be any such cause in the foreseeable future.

Congress may suspend the writ of habeas corpus during times of rebellion or invasion,[191] but there is no similar wartime exception to the Due Process Clause of the Fifth Amendment.[192] However, even during the Civil War, when the threat to public safety was perhaps more dire than at any other time since, the Court also recognized that the only safeguard of liberty that the federal government may suspend at any time is the writ of habeas corpus, and only because the text of the Constitution expressly authorizes such suspension.[193]

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[187] *Id.* at 127. S*ee also Boumediene*, 553 U.S. at 794.

[188] *See, e.g.*, Ex parte *Milligan*, 71 U.S. (4 Wall.) at 122.

[189] *See e.g.*, Justia, U.S. Supreme Court Opinions by Year, https://supreme.justia.com/cases/federal/us/. It appears the Supreme Court has rendered an opinion in every year since its inception.

[190] *See, e.g.*, Franklin D. Rosenblatt, *Non-Deployable: The Court-Martial System in Combat from 2001 to 2009*, *in* ARMY LAW., Sept. 2010.

[191] U.S. CONST. art. I, § 9, cl. 2. The language of this clause does seem not authorize Congress to suspend habeas corpus when the United States invades another country.

[192] U.S. CONST. amend. V.

[193] Ex Parte *Milligan*, 17 U.S. at 125; s*ee also* Home Bldg. & Loan Assoc. v. Blaisdell, 290 U.S. 398, 426 (1934).

> Thus, the war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties.

Indeed, the Fifth Amendment does contain a limited wartime exception, but only with regard to suspending the grand jury requirement for members of the militia "when in actual service in time of War or public danger."[194] The *Milligan* Court's opinion is clear that the phrase "when in actual service in time of War or public danger" applies specifically to those members of the militia who are in actual service, and not to imply that grand juries are generally suspended during times of war or actual danger.[195] There is no similar exception—or indeed any exception at all—in the Due Process Clause.[196]

Shortly after World War I, the Supreme Court considered the application of the Fifth Amendment to a Congressional Act prohibiting alcohol during a "war emergency."[197]

> The war power of the United States, like its other powers and like the police power of the States, is subject to applicable constitutional limitations; but the Fifth Amendment imposes in this respect no greater limitation upon the national power than does the Fourteenth Amendment upon state power.[198]

The Court implies that the Fifth Amendment has just as much force against the federal government's war powers in time of war as the Fourteenth Amendment does against the States' police powers in times of peace.[199] Indeed, the *Hamilton* Court did not announce any wartime exception to the Fifth Amendment.[200]

Id. See also Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004).

[194] U.S. CONST. amend. V cl. 1.

[195] *See* Ex Parte *Milligan,* 71 U.S. at 122-23 (The right of indictment by Grand Jury "is preserved to every one [sic] accused of crime who is not attached to the [A]rmy, or [N]avy, or militia in actual service.").

[196] U.S. CONST. amend. V cl. 3.

[197] Hamilton v. Ky. Distilleries & Warehouse Co., 251 U.S. 146 (1919).

[198] *Hamilton*, 251 U.S. at 156 (internal citations omitted) (citing *inter alia*, *Ex parte Milligan*, 71 U.S. at 121-27); s*ee also Hamilton*, 251 U.S. at 164 (holding the Eighteenth Amendment, prohibiting manufacture and sale of alcohol and in effect at the time, "is binding not only in times of peace, but in war"). The Eighteenth Amendment, like the Fifth Amendment Due Process Clause, lacks an express wartime exception. *See* U.S. CONST. amend. XVIII.

[199] *Id.*

[200] Hamilton v. Ky. Distilleries & Warehouse Co., 251 U.S. 146 (1919).

In 1931, as the seeds of World War I were just starting to sprout into something far more terrible, the Supreme Court had occasion to consider the particulars of the Amendment language of Article V of the Constitution.[201]

> The fact that an instrument drawn with such meticulous care and by men who so well understood how to make language fit their thought does not contain any such limiting phrase affecting the exercise of discretion by the Congress in choosing one or the other alternative mode of ratification is persuasive evidence that no qualification was intended.[202]

One could easily imagine this observation to encompass the Fifth Amendment as well, since the Bill of Rights was drawn by virtually the same men, with the same meticulous care.[203] The lack of a wartime exception to the Due Process clause persuasively evidences that no such exception was intended. At least, the *Reid* Court seemed to think so.[204]

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government. If our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes. *But we have no authority, or inclination, to read exceptions into it which are not there*.[205]

The Framers seemed to know that some exceptions were reasonable, for the proper function of government, and included those they believed

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[201] United States v. Sprague, 282 U.S. 716, 732 (1931).
[202] *Id.* (referring specifically to the language of Article V, though it could just as easily apply to the Fifth Amendment).
[203] *Id. See also* U.S. CONST. amend. V cl. 3.
[204] *Reid*, 354 U.S. at 14.
[205] *Id.* (emphasis added).

were necessary.[206] They could have included additional exceptions beyond the grand jury exception, but chose not to.[207] No branch of the government may make an exception by fiat.[208]

Although the Court affords significant latitude to Congress and the President during a time of war, that latitude is limited by the Constitution, and the Constitution contains no provision for the suspension of due process during war.[209] Had the founders intended war powers to be unlimited, no doubt they would have made this clear in the text of the Constitution. Indeed, then, any future leader with the power to make war could easily undo the entire Constitutional structure by making a war without end.

F. But Whither Alien Combatants?

Synthesizing the arguments and Court holdings previously discussed, and placed in the context of more recent Supreme Court decisions, one may conclude that the Fifth Amendment Due Process Clause applies to alien combatants outside the territory of the United States, who are subject to deprivations of life by the federal government.

The Supreme Court, in *Hamdi v. Rumsfeld*,[210] considered whether due process ought to apply to a natural-born citizen who left the United Stated as a child, and was later detained in Afghanistan while armed, and allegedly conceding his status as an enemy combatant.[211] The Court held "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker . . . . These essential constitutional promises may not be eroded."[212]

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206 *See, e.g.*, U.S. CONST. amend. V cl. 1.
207 *Id.*
208 *See e.g.*, Boumediene v. Bush, 553 U.S. 723, 757 (2008).
209 *See generally* U.S. CONST.
210 Hamdi v. Rumsfeld, 542 U.S. 507 (2004).
211 *Id.*
212 *Id.* at 533 (citing Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542 (1985)) ("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.'"); *see also* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950); *Concrete Pipe & Products of Cal., Inc.*, 508 U.S. at 617 ("Due process requires a 'neutral

When the government alleged that it could consider Hamdi a combatant, and thus subject to indefinite detention on the basis of an uncontestable hearsay affidavit, the Court concluded, "Plainly, the 'process' Hamdi has received is not that to which he is entitled under the Due Process Clause."[213] Although Hamdi was a U.S. citizen, the government apparently treated him as though he was an alien, deemed him an enemy combatant, and apparently considered his citizenship irrelevant.[214] The United States seemed now estopped from arguing that the Due Process Clause only protects citizens.[215] Regardless, the Court had now applied Fifth Amendment Due Process to an alleged enemy combatant.[216]

The Supreme Court considered a similar issue in 2008.[217] While not directly considering the issue of Fifth Amendment Due Process, non-citizen detainees at Guantanamo Bay sought habeas corpus relief.[218] Congress previously passed a statue barring the federal courts from considering habeas petitions by detainees at Guantanamo.[219]

> In deciding the constitutional questions now presented we must determine whether petitioners are barred from seeking the writ or invoking the protections of the Suspension Clause either because of their status, i.e., petitioners' designation by the Executive Branch as enemy combatants, or their physical location . . . . The Government contends that noncitizens designated as enemy combatants and detained in territory located

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and detached judge in the first instance . . . .'"); Ward v. Monroeville, 409 U.S. 57, 61–62 (1972).

213 *Id*. at 538.

214 *Id*. at 509, 559 (Scalia, J, dissenting) (Although alien combatants historically were held indefinitely until the end of hostilities, citizens who have historically taken up arms against their own nation are tried as traitors.) There was no indication that the government intended to bring a charge of treason against Hamdi, or otherwise consider him different from an alien combatant in any other way. In fact, the whole case came about because Hamdi challenged the government's characterization of him as an enemy combatant, not an appeal stemming from a charge of treason. *Id.*

215 *Id.* If citizenship is not relevant for constitutional war powers, why would it be relevant for constitutional due process?

216 *Id.* at 533.

217 Boumediene v. Bush, 553 U.S. 723 (2008).

218 *Id.*

219 *Id.* at 736.

> outside our Nation's borders have no constitutional rights and no privilege of habeas corpus. Petitioners contend they do have cognizable constitutional rights and that Congress, in seeking to eliminate recourse to habeas corpus as a means to assert those rights, acted in violation of the Suspension Clause.[220]

Interestingly, and importantly, the Court recognized that while none of the petitioners were citizens of the United States, neither were any citizens "of a nation now at war with the United States."[221] The Court noted that they all denied association with al-Qaeda, though their detainee review boards determined they were all enemy combatants.[222] While this does not equate to extension of Fifth Amendment protections to such individuals, the Court's summary is striking in its application of a constitutional privilege to alien combatants located outside of the United States.[223]. The *Boumediene* Court, after conducting an analysis of the British common law history of the writ, ultimately held that the writ ran to alien combatants held at Guantanamo Bay.[224]

While that fact alone is important to the current analysis, what distinguishes Fifth Amendment Due Process from habeas corpus is the dissimilar lack of ambiguity in to whom the Due Process Clause applies.[225] Where the habeas corpus clause does not state expressly who may avail themselves of the writ, the Due Process Clause, as demonstrated above, expressly applies to all persons.[226] Further, as noted above, while Congress may suspend habeas corpus "when in Cases of Rebellion or Invasion the public Safety may require it,"[227] the Due Process Clause grants Congress no such suspension authority under any circumstances.[228] Thus, the Due Process Clause's mandate is much broader and farther-reaching than is that of the Habeas Corpus Clause.

One argument against affording constitutional protections to alien combatants holds that the rights protected by Constitution do not apply to

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220 *Id.* at 739.
221 *Id.* at 734.
222 *Id.*
223 *Id.* at 771.
224 *Id*. at 771.
225 *See* U.S. CONST. art. I, § 9, cl. 2; U.S. CONST. amend. V.
226 *Id.*
227 U.S. CONST. art. I, § 9, cl. 2.
228 *See* U.S. CONST. amend. V cl 3.

aliens outside of the United States.[229] This view is not supported by either the Constitution's own language, or the philosophical foundation laid by the Declaration of Independence.[230] Despite its name, the Bill of Rights does not create rights for citizens.[231] Rather, it clarifies and restricts various government powers.[232] Therefore, this argument against foreign application is vain and must be discarded.

Another argument appeals to the great exigencies of war.[233] The *Reid* Court discards this argument as well.[234]

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government.[235]

Wartime exigency as an excuse for suspending due process deteriorates the very thing the war was meant to protect.[236]

Shortly after World War II, the Supreme Court considered the habeas corpus petition of a Japanese general, whom the United States had tried and convicted of war crimes in the Pacific Theater.[237] In considering whether the Fifth Amendment's Due Process Clause restrains the federal government's hand against a non–resident alien–belligerent who engaged in armed aggression against the United States, at least one Supreme Court Justice thought it applied.[238]

> The answer is plain. The Fifth Amendment guarantee of due process of law applies to "any person" who is accused of a crime by the Federal Government or any of its

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229 *See e.g.*, *Boumedeine*, 553 U.S. at 841 (Scalia, J., dissenting).
230 See U.S. CONST.; THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
231 H.R.J. Res. 1, 1st Cong. (1789) (enacted).
232 *Id.*
233 *See e.g.*, *Reid*, 354 U.S. at 14.
234 *Id.*
235 *Id.*
236 *Id.*
237 In re *Yamashita*, 327 U.S. 1 (1946).
238 *Id.* at 26–27 (Murphy, J., dissenting).

> agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world, can ever destroy them. Such is the universal and indestructible nature of the rights which the due process clause of the Fifth Amendment recognizes and protects when life or liberty is threatened by virtue of the authority of the United States.[239]

If the Fifth Amendment Due Process Clause has any meaning at all, then it must mean what it says. By its own language, it must apply to enemy combatants who are subject to deliberate deprivations by the federal government. Now that it is clear that Fifth Amendment due process applies to deliberate targeting, consideration must be given to what the Fifth Amendment requires of it.

IV. The Fifth Amendment Applied to Deliberate Targeting

The Fifth Amendment demands that the government provide due process to subjects of deliberate targeting. This premise necessarily entails legal analysis of particular government actions to ensure compliance with the Fifth Amendment's mandate. The Department of Justice (DoJ), while attempting to incorporate constitutional interpretation into their analysis of deliberate targeting, fatally errs in its basic understanding of the Constitution. The DoJ mistakenly believes that the Fifth Amendment

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[239] *Id.*

applies only to citizens, and not foreigners.[240] Substantial compliance with the Due Process Clause requires a neutral magistrate, and a meaningful opportunity to rebut the government's allegations.[241] The DoJ's solution provides neither. These considerations must call into question whether the DoJ's procedure is sufficient.

A. A Critique of the Department of Justice's Analysis

When considering the legality of a particular instance of lethal deliberate targeting, the DoJ applies the wrong test, misconstrues the text of the Fifth Amendment, disregards other relevant case law, and thus reaches an erroneous conclusion.

1. The Department of Justice Announces Its Method

In a memorandum (Baron Memorandum) dated July 16, 2010, and signed by David J. Baron, Acting Assistant Attorney General,[242] the DoJ appealed to the Supreme Court's balancing test in *Matthews v. Eldridge*[243] to conclude that such a targeted killing does not violate the Fifth Amendment due process mandate.[244] Much of Mr. Baron's Fifth Amendment analysis is redacted in the publicly available version of the memo, and thus much of his analysis appears to be missing.[245] However, he assesses that "a decision-maker could reasonably decide that the threat posed by al-Aulaqi's activities to United States persons is 'continued' and 'imminent.'"[246] Mr. Baron seems to think that his analysis satisfies the Fifth Amendment due process clause.

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[240] *See e.g.*, David J. Baron, *Memorandum for the Attorney General Regarding Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shaykh Anwar al-Alauki*, 38 (July 16, 2010), https://www.aclu.org/sites/default/files/assets/2014-06-23_barron-memorandum.pdf [hereinafter Baron Memorandum]. DoJ asserts "*Because* al-Aulaqi is a U.S. citizen, the Fifth Amendment's Due Process Clause . . . likely protects him in some respects . . . ." *Id.* (emphasis added) Why assert that due process applies because he is a citizen, unless they believe that is the triggering mechanism for its application?

[241] *See e.g.*, *Ward*, 409 U.S. at 62.

[242] Baron Memorandum, *supra* note 240.

[243] Mathews v. Eldridge, 424 U.S. 319 (1976).

[244] Baron Memorandum, *supra* note 240, at 39.

[245] *Id.* at 38–40.

[246] *Id.*.

In 2011, the DoJ issued a separate opinion on the matter in an unsigned white paper (DoJ White Paper), and concluded that killing al-Aulaqi was legal.[247] The paper seems to conclude that all the process due is:

> (1) an informed, high level official of the U.S. government has determined that the targeted individual poses an immediate threat of violent attack against the United States; (2) capture is infeasible, and the United States continues to monitor whether capture becomes feasible; and (3) the operation would be conducted in a manner consistent with applicable law of war principles.[248]

U.S. Attorney General Eric Holder wrote a letter to Senator Patrick Leahy (AG Letter), in which he advised of the same three-pronged test. [249]

> Such considerations allow for the use of lethal force in a foreign country against a U.S. citizen who is a senior operational leader of al-Qa'ida or its associated forces, and who is actively engaged in planning to kill Americans, in the following circumstances: (1) the U.S. government has determined, after a thorough and careful review, that the individual poses an imminent threat of violent attack against the United States; (2) capture is not feasible; and (3) the operation would be conducted in a manner consistent with applicable law of war principles.[250]

The Department of Justice appears to invent these three prongs out of whole cloth, tacking it onto their *Matthews* analysis.[251] Additionally, the test fails to define the term "high level official."[252] It further neglects to identify the nature, quality, amount, and legal sufficiency of the information required to make said official "informed" enough to make a

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[247] DoJ White Paper, *supra* note 158.
[248] *Id.* at 1.
[249] Letter from Eric H. Holder, Jr., Att'y Gen. of the U.S., to Patrick Leahy, U.S. Sen. (May 22, 2013) (on file with author) [hereinafter AG Letter].
[250] *Id.*
[251] DoJ White Paper, *supra* note 158, at 6.
[252] *Id.* at 1.

determination that another individual ought to be targeted.[253] Consequently, the risk for error and/or abuse is extreme.

The Department of Justice memoranda appear to be *the* legal basis upon which the federal government conducts these operations. As the memoranda specifically address the issue of targeting a citizen, they are unhelpful to determine if the DoJ would apply the *Matthews* test when targeting non-citizens. The *Matthews* test must now be explained, and thought given to its applicability.

2. Matthews *Is the Wrong Test*

The Baron Memorandum and the DoJ White Paper cite *Matthews v. Eldridge* for their Due Process analysis.[254] The *Matthews* Court, while considering the lawfulness of termination of Social Security disability benefits prior to an evidentiary hearing,[255] announced its balancing test as follows:

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[256]

The *Matthews* Court acknowledged, "Only in *Goldberg*[257] has the Court held that due process requires an evidentiary hearing prior to a *temporary* deprivation,"[258] and ultimately announced:

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253 *Id.*
254 Baron Memorandum, *supra* note 240, at 39; DoJ White Paper, *supra* note 158, at 2, 6.
255 *Mathews*, 424 U.S. at 326.
256 *Id.* at 334-45 (citing *Goldberg*, 397 U.S. at 263–71).
257 Goldberg v. Kelly, 397 U.S. 254 (1970).
258 *Mathews*, 424 U.S. at 340 (emphasis added).

> Procedural due process rules are shaped by the risk of error inherent in the truthfinding [sic] process as applied to the generality of cases, not the rare exceptions. The potential value of an evidentiary hearing, or even oral presentation to the decisionmaker [sic], is substantially less in this context than in *Goldberg*.[259]

The Department of Justice contemplates permanent deprivation of life through targeting.[260] By the *Matthews* Court's own analysis, it seems reasonable that an evidentiary hearing for deliberate lethal targeting would have more potential value than *Goldberg*, let alone *Matthews*.[261] It appears the *Matthews* Court points to the *Goldberg* analysis when contemplating any substantial deprivation.[262]

In *Goldberg*, the Supreme Court considered whether a state may discontinue welfare benefits (specifically, Aid to Families with Dependent Children, or AFDC) without an evidentiary hearing.[263] Quoting the District Court's ruling, the Court concluded,

> [T]he stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal.[264]

The Court ordered "that when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process."[265] It explained the urgency of the subject matter by stating,

> For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. . . . [T]ermination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he

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259 *Id.* at 344–45.
260 *See e.g.*, Baron Memorandum, *supra* note 240.
261 *Mathews*, 424 U.S. at 344–45.
262 *Id.*
263 *Goldberg*, 397 U.S. at 266.
264 *Id.* (internal citation omitted).
265 *Id.* at 264.

> waits. Since he lacks independent resources, his situation becomes immediately desperate.[266]

The *Goldberg* Court held that because welfare was essential to sustaining life, only an evidentiary hearing prior to termination of benefits satisfies due process.[267] It seems obvious to observe that *not shooting someone with a missile* would be likewise essential to sustaining life. The *Goldberg* Court was cognizant of the "sustaining life" threshold for a judicial hearing.[268]

> The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication.[269]

The *Matthews* Court distinguished its case from that of *Goldberg* in two critical ways. First, the type of public benefits at issue in *Matthews* was not of the type that is likely to "deprive an eligible recipient of the very means by which to live while he waits."[270] Second, the administrative procedures in *Matthews* provided "the disability recipient's representative full access to all information relied upon by the state agency."[271]

Deliberate targeting is a means by which to deprive an individual of life itself. Further, the government does not present the person being targeted or his/her representative with access to information relied upon to make the targeting determination.[272] For these reasons, when considering lethal deliberate targeting, the *Matthews* Court appears to point to the *Goldberg* Court for more applicable guidance.[273] There is arguably no more grievous loss than of one's own life. Once lost, it can be neither reversed nor compensated for. Accordingly, when contemplating permanent deprivation of life, a pre-deprivation judicial hearing must be

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[266] *Id.* (emphasis in original).
[267] *Id.* at 261.
[268] *Id.* at 264.
[269] *Id.* at 262–63 (internal citations omitted).
[270] *Matthews*, 424 U.S. at 340 (citing *Goldberg*, 397 U.S. at 264).
[271] *Id.* at 345–46.
[272] See JP 3–60, *supra* note 26.
[273] *Mathews*, 424 U.S. at 344–45.

mandatory. Because the DoJ chose the wrong test, they necessarily reached an erroneous conclusion.

3. The Department of Justice's Erroneous Conclusion

One can perhaps understand why the DoJ chose the *Matthews* test. In 2004, the Supreme Court announced a preference for it as the go-to balancing test for due process.[274]

> The ordinary mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not "deprived of life, liberty, or property, without due process of law," is the test that we articulated in *Mathews v. Eldridge*.[275]

However, the *Hamdi* Court analyzed the question of detention, not lethal deliberate targeting, and certainly not any permanent deprivation (their quote of all three rights enumerated in the Due Process Clause notwithstanding).[276] This makes the *Hamdi* Court's seeming support for the DoJ's approach somewhat problematic. Further review of the *Hamdi* case only appears to undermine the DoJ's approach to lethal deliberate targeting.

The Government in *Hamdi* proposed that any due process inquiry terminate with a mere affidavit.[277] This affidavit would be filed by a government official alleging knowledge of the status of the detainee, without the detainee having an opportunity to challenge that status.[278] The *Hamdi* Court conducted a *Matthews* balancing test and held:

> With due recognition of these competing concerns, we believe that neither the process proposed by the Government nor the process apparently envisioned by the District Court below strikes the proper constitutional balance when a United States citizen is detained in the

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[274] *Hamdi*, 542 U.S. at 528–29.
[275] *Id.* (2004) (internal citations omitted).
[276] *Id.*
[277] *Hamdi*, 542 U.S. at 512–14.
[278] *Id.*

> United States as an enemy combatant. That is, "the risk of an erroneous deprivation" of a detainee's liberty interest is unacceptably high under the Government's proposed rule . . . .[279]

The Department of Justice essentially tries the same circumvention of due process with their proposed balancing of interests in deliberate targeting when they refer to "an informed, high level official of the U.S. government" who has "determined that the targeted individual poses an immediate threat of violent attack against the United States."[280] The only apparent difference is, instead of detaining someone, they contemplate killing them.[281] Further, they ignore the holding of the *Hamdi* Court, which conducted a *Matthews* balancing test and concluded that a hearing in front of a neutral decision maker was required.[282]

Even if the *Matthews* analysis is the correct one, as the DoJ asserts,[283] they err in arriving at who ought to perform the balancing test. The executive has every incentive to invariably conclude that its decision complies with *Matthews*. The person in the executive role is not detached from his/her desired end state, and thus cannot be unbiased in his/her balancing of the government's interests versus the interests of his/her intended target. The executive has no organic incentive to permit the targeted individual to present evidence in his/her own defense, cross-examine the executive's witnesses, or otherwise contest the executive's case in any meaningful way, because the executive is simply not neutral regarding the outcome. This is the very antithesis of due process. "[O]ne is entitled as a matter of due process of law to an adjudicator who is not in a situation which would offer a possible temptation to the average person as a judge that might lead that person not to hold the balance nice, clear, and true . . . ."[284] Further, even the *Matthews* Court concluded that a hearing is essential to due process, as it only ruled on the question of whether benefits could be terminated *before* review, not *without* review.[285]

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[279] *Id.* at 532-33 (citing *Matthews*, 424 U.S. at 335).
[280] DoJ White Paper, *supra* note 158, at 1.
[281] *Id.*; Baron Memorandum, *supra* note 240.
[282] *Hamdi*, 542 U.S. at 533; *see also id.* at 530 (asserting "the importance to organized society that procedural due process be observed," and emphasizing that "the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions") (quoting Carey v. Piphus, 435 U.S. 247, 266 (1978)).
[283] Baron Memorandum, *supra* note 240, at 39; DoJ White Paper, *supra* note 158, at 2, 6.
[284] Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602, 605 (1993); *see also Hamdi*, 542 U.S. at 538.
[285] *Mathews*, 424 U.S. at 333.

> This Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Eldridge agrees that the review procedures available to a claimant before the initial determination of ineligibility becomes final would be adequate if disability benefits were not terminated until after the evidentiary hearing stage of the administrative process.* The dispute centers upon what process is due prior to the initial termination of benefits, pending review.[286]

The *Goldberg* test solves these problems, and is arguably mandatory given the gravity of permanent deprivation of life. Although the DoJ should have applied the *Goldberg* test, the Court's guidance in *Hamdi* implies that even a *Matthews* analysis should result in a judicial hearing. Thus, the DoJ reached an erroneous conclusion primarily by failing to apply the *Goldberg* test, and secondarily by applying the *Matthews* test incorrectly. As the DoJ's test fails the Fifth Amendment's mandate, it must be replaced by more robust due process.

B. Expeditionary Judicial Due Process

The Fifth Amendment clearly requires notice and a hearing before the government may deliberately deprive a person of life.[287] The hearing must take place before a neutral decision maker, and the person must have a meaningful opportunity to rebut the government's assertions before the deprivation occurs.[288]

War admittedly presents obstacles to affording due process to individuals alleged to be enemies of the state, not the least of which is

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[286] *Id.* (emphasis added) (internal citations omitted).
[287] U.S. CONST. amend. V; *Simon*, 182 U.S. at 436.
[288] *Concrete Pipe & Products of Cal., Inc.*, 508 U.S. at 617; *Ward*, 409 U.S. at 62.

popular opinion as to who might deserve process. What some may see as "giving the terrorists what they deserve," others might see as a struggle for the very soul of the nation.[289]

> It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.[290]

During a conventional, declared war, Congress provides notice to the opposing state through a public declaration of war.[291] Individual actors of the enemy state publicly and openly admit their part in the war by wear of the enemy uniform, and by acting as part of enemy formations.[292] Enemy status is evident and admitted to by the person. No further due process analysis is required, as the purpose of due process—to use evidence to find the truth—is fulfilled by such public declarations.

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[289] *Hamdi*, 542 U.S. at 532.

[290] *Id.* (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 164-165 (1963)).

> The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action.

Id. (citing United States v. Robel, 389 U.S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.")).

[291] *See* U.S. CONST. art. I, § 8, cl. 11. The United States has declared war eleven times. *Official Declarations of War by Congress*, http://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/WarDeclarationsbyCongress.htm (last visited Feb. 16, 2015). Presumably, all such resolutions were passed after public debate.

[292] *See* Geneva Convention Relative to the Treatment of Prisoners of War arts. 4, 27, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Article 4 defines "prisoners of war" and does not expressly indicate that members of the regular armed forces wear uniforms. *Id.* It does define the militia and other volunteer corps as having, *inter alia*, "a fixed distinctive sign recognizable at a distance." *Id.* Article 27 states, "Uniforms of enemy armed forces captured by the Detaining Power should, if suitable for the climate, be made available to clothe prisoners of war." *Id.* Juxtaposed to Article 4, it seems that the authors merely assumed that members of the regular armed forces of a nation would wear some distinctive uniform.

The advent of asymmetric war, which often lacks such public and open declarations, makes identifying enemies and potential allies much more difficult. This difficulty in identifying the enemy goes to the core of due process. Due process can help determine the enemy in the first place, so that innocents are not targeted out of negligence or willfulness. An environment in which the enemy is hard to determine is also most in need of due process, to protect the liberty of the innocent. Further, commanders can use due process to assist in that identification through compliance with the Fifth Amendment's mandate.

Congress ought to make a declaration of war against any state or transnational organization it wishes to engage in armed conflict.[293] While this would not provide perfect notice to all individuals who eventually are contemplated for targeting, this public declaration of intent would substantially comply with the notice component of due process. Additionally, forward-deployment to a theater of combat operations should not bar the application of due process. The Department of Defense's current practice of deploying military judges and military defense counsel to combat zones should ease compliance with the Fifth Amendment, as evidentiary hearings could take place in theater within close geographic and temporal proximity to deliberate targeting packages.

There are several ways to provide a judicial hearing. For example, Congress could empower these forward-deployed military judges to conduct evidentiary hearings as part of the deliberate targeting process. The judges could determine, based on evidence and argument of counsel, whether the proposed person is in fact who the government says s/he is. As military judges already have security clearances,[294] classified evidence should not hinder their deliberations. Military judges would be neutral arbiters of the facts because they obey a chain-of-command that is separate

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[293] As noted above, Congress has declared war eleven times. Official Declarations of War by Congress, *supra* note 292. The nation against whom the declaration was made was clearly named in each declaration. *Id.* By contrast, the Authorization for Use of Military Force (AUMF), dated September 18, 2001, does not name the enemy. Authorization for Use of Military Force PL 107–40, Sep. 18, 2001. Instead, it authorizes the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines" were involved in the September 11, 2001, attacks. *Id.* Arguably, this does not publically provide either notice of lethal force, or notice of whom it might be used against. The October 16, 2002, AUMF authorizing military force against Iraq likely provides sufficient notice of both lethal force and against whom it will be used. Authorization for Use of Military Force, PL 107-243, Oct. 16, 2002.

[294] U.S. DEP'T OF ARMY, REG. 601-100 APPOINTMENT OF COMMISSIONED AND WARRANT OFFICERS IN THE REGULAR ARMY para. 1-8 (21 Nov. 2006).

and distinct from operational commanders.[295] The military defense bar could appoint forward-deployed defense counsel to represent proposed targeted individuals *in absentia* during the evidentiary hearings. Although an *in absentia* hearing may not strictly comply with due process, requiring presence may be so unworkable as to prevent any due process at all. As military defense counsel also obey a separate and distinct chain-of-command from operational commanders,[296] they would be free to zealously represent their appointed clients and oppose the commanders' trial counsel during evidentiary hearings.

Similarly, in cases concerning unmanned drones piloted by individuals located within the continental United States, federal civilian courts could hold an evidentiary hearing. The federal defense bar could represent the proposed targeted individual *in absentia*. In this case, the Article III courts would be independent and neutral of the executive and its war goals. Alternatively, Congress could appoint special courts who specialize in armed conflict cases. They could take special care to protect classified information by holding closed hearings and vetting defense counsel security credentials.

Perhaps none of these examples perfectly comport with the Founders' vision of due process, and there may be other, better solutions as well. However, they preserve the most important element of due process: a meaningful opportunity to oppose the government's assertions. Therefore, they would satisfy both *Goldberg* and *Hamdi*, and come substantially and significantly closer to the Founders' ideals than the DoJ's non-adversarial, unilateral-executive paradigm.

V. Conclusion

Lethal, deliberate targeting is an important and powerful tool for the executive to use in the defense of the nation during times of armed conflict. As the federal government derives its war-making powers from the Constitution, these powers must also conform to the Constitution's restrictions. The Founders embedded the Fifth Amendment's Due Process Clause in those restrictions, intending to constrain possible abuse of the

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[295] *See, e.g.*, Dept. of Law, USMA, *Balancing Order and Justice: The Court-Martial Process* 8 (Apr. 2012), http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac_2012/01-1_court_martial_process. authcheckdam.pdf.

[296] *Id.*

powers granted by the Constitution. The Fifth Amendment not only applies to deliberate targeting, it requires due process for alien combatants subject to lethal deliberate targeting during armed conflict.

The federal government may do only what the Constitution authorizes, and no more.[297] The Fifth Amendment mandates due process for all persons whom the government intends to deprive of life.[298] The Founders intended, and the Supreme Court has interpreted, that Fifth Amendment personhood includes non-citizens.[299] As the Constitution authorizes the federal government to act abroad, it also constrains the federal government when it does so. To separate the authority from its essential constraints is in vain and breaks the boundaries of rational thought.

Although the Fifth Amendment does contain a limited wartime exception to its grand jury requirement, there is no wartime exception to the Due Process Clause.[300] The lack of any such exception evidences the Founders' desire that no such exception exist. Indeed, the Supreme Court has not read any such exception into the language.

Perhaps no one has come as close to succinctly stating the Founders' political philosophy as the late Boston attorney and Democratic activist Moorfield Storey, when he "cautioned that 'power is always used to benefit him who wields it.'"[301] History has provided numerous exhibits of the veracity of this maxim, not the least of which was the Roman emperor Theodosius's massacre at Thessalonica.[302]

James Madison, Secretary of the Constitutional Convention and fourth President of the United States, wrote almost 1400 years after the massacre of Theodosius I, "[n]ot the less true is it, that the liberties of Rome proved the final victim to her military triumphs; and that the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of her military establishments."[303] Knowing full-well the danger of unchecked

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297 *See e.g.*, *McCulloch*, 17 U.S. (4 Wheat.) at 405.
298 U.S. CONST. amend. V cl 3.
299 *See supra* Section III C.
300 U.S. CONST. amend. V cl 3.
301 Damon Root, *The Party of Jefferson: What the Democrats can learn from a dead libertarian lawyer*, REASON (Dec. 2007), http://reason.com/archives/2007/11/27/the-party-of-jefferson.
302 *See* GIBBON, *supra* note 1.
303 James Madison, *The Federalist Papers Federalist No. 41* para. 3, http://thomas.loc.gov/home/histdox/fed_41.html (last visited May 7, 2015).

military power in the hands of the executive, the Founders decisively added the Bill of Rights to the Constitution to further clarify and restrict the authorities of government.[304]

The Department of Justice steadfastly maintains that the *Matthews* balancing test is appropriate to consider what process applies to deliberate targeting, and therefore no judicial inquiry is necessary.[305] However, the *Matthews* Court itself refers back to the *Goldberg* Court's mandate of judicial inquiry prior to a substantial deprivation.[306] Further, *Hamdi* strongly implies that even a *Matthews* analysis requires a neutral decision maker to conduct an evidentiary hearing.[307] The DoJ, therefore, has reached an erroneous conclusion that the executive may unilaterally determine how much process is due a person whom the government has targeted for a lethal strike.

Although some may argue that emergent crises must supersede seemingly antiquated notions of philosophical liberty, the Supreme Court sees danger in this view.[308] "Throughout history many transgressions by the military have been called 'slight' and have been justified as 'reasonable' in light of the 'uniqueness' of the times. We cannot close our eyes to the fact that today the peoples of many nations are ruled by the military."[309]

Finally, "The Founders envisioned the [A]rmy as a necessary institution, but one dangerous to liberty if not confined within its essential bounds. Their fears were rooted in history. They knew that ancient republics had been overthrown by their military leaders."[310] Important as civilian leadership of the military is to that constitutional framework, no less important are the checks imposed on that civilian leadership by separation of powers. The Court has long been content to defer to Congress and the President in matters of defining the scope of their war powers.[311] However, if they cannot—or will not—confine themselves to the boundaries of the Constitution, the Court may have to do it for them.

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304 H.R.J. Res. 1, 1st Cong. (1789) (enacted).

305 *See* Baron Memorandum, *supra* note 240; DoJ White Paper, *supra* note 158; AG Letter, *supra* note 249.

306 *Mathews*, 424 U.S. at 340, 344–45.

307 *Hamdi*, 542 U.S. at 530, 533.

308 *See e.g.*, *Reid*, 354 U.S. at 40.

309 *Id.*

310 *Id.* at 23–24.

311 *See e.g.*, *Boumediene*, 553 U.S. at 797–98.

> Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury.[312]

Relinquishing some oversight of war-making to the courts in the short term could prevent a much broader judicial curtailment of those powers in the long term. However, if Theodosius's example is any indication, no executive will likely make that trade voluntarily.

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312 *Id.*

NEW WINE IN OLD WINESKINS: A CASE FOR BAIL UNDER GHANA'S MILITARY JUSTICE SYSTEM

LIEUTENANT COMMANDER NAA AYELEY AKWEI-ARYEE*

I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the time.[1]

The different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for the imposition of discipline, may render permissible within the military that which would be constitutionally impossible outside it.[2]

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* Masters Candidate (Defense and International Politics), Ghana Armed Forces Command and Staff College, 2016. U.S. Army Judge Advocate General's Legal Center and School, LL.M., 2014; University of Ghana, Legion, LL.B., 2001; Barrister-at-Law and Solicitor, 2003; Post-Graduate Diploma in International Military Law, 2010; Defense Institute of International Legal Studies, Newport, Rhode Island, 2010; International Maritime Law Institute, Malta, LL.M., 2012; Ghana Armed Forces Command and Staff College, Diploma in Public Administration, J.S.C., 2013; Ghana Institute of Management and Public Administration, 2014. Previous assignments include Acting Deputy Director of Naval Legal Affairs, Navy Headquarters, Burma Camp, Accra, Ghana, 2015; Assistant Director of Legal Services, General Headquarters, Burma Camp, Accra, 2008–2011 with additional duties as Battalion Legal Advisor, United Nations Interim Force in Lebanon, 2008–2009, Civil-Military Cooperation Officer, United Nations Interim Force in Lebanon, 2008–2009, and Battalion Legal Officer, United Nations Mission in Liberia, 2010–2011; Service Legal Advisor, Naval Headquarters, Burma Camp, Accra, 2012–2014; Facilitator, Legal Regimes for Maritime Security, Kofi Annan International Peacekeeping Training Center 2013; Member of the Ghana Bar Association and the Supreme Court of Ghana. This article was submitted in partial completion of the Master of Laws requirements of the 63d Judge Advocate Officer Graduate Course.

[1] THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 42-43 (Paul L. Ford ed., 10th ed. 1899). *See also Letter from Jefferson to H. Tompkinson*, THE JEFFERSON MONTICELLO, https://www.monticello.org/site/jefferson/quotations-jefferson-memorial (last visited Feb. 17, 2016).

[2] Parker v. Levy, 417 U.S. 733, 758 (1974).

I. Introduction

The statement above highlights the divergent opinions that are espoused by the proponents on the reformation of the military and military justice system in Ghana. In March 2009, the 1962 Armed Forces Act (AFA), and specifically the military justice system, suffered a setback in the judgment delivered by Justice Utter Dery of the Human Rights Division of the High Court of Ghana.[3] In the case of *Nikyi v. Attorney General*,[4] the plaintiff argued that his detention of ninety days prior to his court-martial violated the Ghanaian Constitution. Under Article 14(3)(b) of the Ghanaian Constitution, an accused person must appear before court within forty-eight hours of arrest or be released.[5] In his opinion, the learned Justice noted that the length of detention of military accused before trial contrasts sharply with Article 14(3) of the Constitution. He stated,

> Section 61, Act 105 is inconsistent with the Constitution, especially Article 14(1) and 14(3)(b), in that it permits the military authorities to detain a suspect for up to [ninety] days without trial. Section 61 of Act 105 is therefore void. The Plaintiff's right to personal liberty has been violated. He suffered unnecessarily as a result of the misconception and misapplication of the laws of Ghana and as a result of outdated military laws.[6]

"New wine"[7] must be introduced to the military justice system in Ghana to comply with the Constitution. Dery's attack served as notice

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[3] Nikyi v. Att'y Gen., Suit no. HRC/6/09 (Ghana). The 1992 Constitution of Ghana designated the High Court as the Human Rights Court. GHANA CONST. 1992, Ch. 011, art. 140 (2) [hereinafter GHANA CONST.]. It states, "The High Court shall have jurisdiction to enforce the Fundamental Human Rights and Freedoms guaranteed by the Constitution." *Id.* S*ee also* GHANA CONST. 1992, Ch. 011, art. 33, 130, 140; Courts Act 1993 (Act 459), section 15(1)(d), as amended by Courts (Amendment) Act 2002 (Act 620) (Ghana).

[4] *Nikyi*, Suit no. HRC/6/09.

[5] Article 14 of the 1992 Constitution is listed under Chapter Five on Fundamental Human Rights and Freedoms of the 1992 Constitution. GHANA CONST. 1992, Ch. 11, art. 14. The Constitution states, "[T]he fundamental human rights and freedoms shall be respected and upheld by the Executive, Legislature and Judiciary and all other organs of government and its agencies." *Id.*

[6] *Nikyi*, Suit no. HRC/6/09.

[7]

> To put fresh wine into an old wineskin, is asking for trouble. The old wineskin has assumed a definite shape and is no longer pliable. It is fixed and somewhat brittle. The activity of new wine will stress it

that there are deficiencies in the administration of justice within the military concerning the concept of due process. It has brought to light the fact that civilian courts in Ghana will ignore the established principles of the military justice system, providing bail to a military accused for non-capital offenses.[8]

Indeed, the AFA must be reformed. However, changes within the military are usually slow due to the perceived fear of their future effects on the military objective of having well-disciplined soldiers.[9] "However, if change is inevitable, what changes should be made? Why should change occur?"[10] Any considered changes must be critically assessed before change is implemented.

There is no simple formula for determining whether the critics of the military justice system are on target. However, "the military must adopt a new philosophy and policy in the treatment of the military accused awaiting trial for a non-capital offense."[11] Courts-martial under Ghana's military justice system are not permitted to try rape, murder, or manslaughter cases.[12] These cases are handed over to the civilian courts

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> beyond its ability to yield. And so both the wine and the skin are lost. We can't put new ideas into old mind-sets. We can't get new results with old behaviors.

Reverend Wayne Manning, *How to Stop Putting New Wine into Old Wineskins*, UNITY, http://www.unity.org/resources/articles/how-stop-putting-new-wine-old-wineskins (last visited Feb. 17, 2016); *see also* CRAIG S. KEENER, A COMMENTARY ON THE GOSPEL OF MATTHEW 300-01 (1999). The author uses this description to show that the "new wine" cannot be sustained by the "old wineskin" of the Armed Forces Act. The Armed Forces Act must be reformed in order for it to withstand the "new wine" of the introduction of a bail system and other systemic changes under the military justice system in Ghana.

[8] Under the military justice system in Ghana, bail is not provided to military accused in either capital or non-capital cases. In the opinion of the court in the *Nikyi* case, bail must be given to military accused once the offense committed is determined not capital, and if the circumstances permit. *Nikyi*, Suit no. HRC/6/09.

[9] The Judge Advocate Gen.'s Legal Ctr. and Sch., Criminal Law Division, *Magistrates Program*, ARMY LAW., Nov. 1974, at 18.

[10] William Moorman, *Fifty Years of Military Justice: Does the Uniform Code of Military Justice Need to Be Changed?*, 48 A.F. L. REV. 185 (2000).

[11] I.S. STOUFFER, THE AMERICAN SOLDIER: ADJUSTMENT DURING ARMY LIFE 379 (1949).

[12] Article 79 of the Armed Forces Act (AFA) provides in part that a service tribunal shall not try any person charged with the offense of murder, rape, or manslaughter committed in Ghana. ARMED FORCES ACT, § 57 (1960) (Ghana) [hereinafter 1960 AFA]. *See also* GHANA ARMED FORCES REG. vol II, Article 102.23 (C.I.12) (1969) [hereinafter AFR]. Military members accused of such offenses are referred to civilian authorities and courts to be tried under the Criminal Code of Ghana. *Id.*

to be tried. However, for those cases that are properly under the military's jurisdiction, the AFA must be reformed in order to comply with the constitution. It is an undeniable fact that the military justice system in Ghana has evolved from what it was in the 1960s and 1970s.[13] However, constitutional rights enjoyed by the Ghanaian citizens must be extended to military personnel absent compelling justification.[14] Justice and fairness have an effect on morale and discipline in command,[15] and there is a compelling need for the military to introduce changes that would enhance fairness in the military justice system.

The first part of this paper analyzes the concept of pre-trial release and the factors that are taken into consideration in granting bail as it pertains under the Constitution of Ghana and the Criminal Procedure Code of Ghana. The second part of this paper discusses pre-trial detention under the military justice system in Ghana and explores the merits of the military arguments made for the exemption from the bail system. Thirdly, this paper discusses the relevance of recent developments from the judiciary and the Constitution Review Commission regarding reform of the AFA to protect service persons' individual rights. Fourthly, the paper reviews the applicability of international and regional human rights treaties and laws in support of the reform of the AFA and proposes some remedial changes within the military justice system in Ghana to facilitate the introduction of the "new wine."[16] Finally, this paper discusses the mechanisms for changing Ghana's military justice system and the impact that the introduction of the "new wine"[17] will have on the administration of justice.

II. Pretrial Release under the 1992 Constitution of Ghana and the Criminal Procedure Code

A. The 1992 Constitution

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[13] Prior to the amendment of the AFA through the Armed Forces (Amendment) Law of 1983, a commanding officer could try an accused alone; the change introduced the Disciplinary Board. PROVISIONAL NATIONAL DEFENSE COUNCIL LAW, 63, 1983 (Ghana) [hereinafter PNDCL]. This was a welcomed change to the military justice system as it was perceived to be a fairer system of justice.

[14] Micheal I. Spak, *Military Justice: the Oxymoron of the 1980's*, 20 CAL. W.L REV. 436, 438 (1984).

[15] Richard R. Boller, *Pre-trial Restraint in the Military*, 50 MIL. L. REV. 71, 72 (1970).

[16] Manning, *supra* note 7.

[17] *Id*.

The constitution is the fundamental law of the land, and all other laws and regulations must necessarily derive their validity from it.[18] Therefore, a discussion of due process must begin with the constitution. The Constitution of Ghana was approved in a national referendum on April 28, 1992. It was promulgated by the Constitution of the Fourth Republic of Ghana (Promulgation) Law 1992 (PNDCL282).[19] It is the fifth Constitution of the Republic since March 6, 1957, which is when Ghana obtained its independence from the British.[20] Under Article 19 of the 1992 constitution, the right to fair trial for an accused is clearly articulated.[21] The constitution states that a person shall be presumed innocent until he is proved or has pleaded guilty.[22]

Furthermore, "a person who is arrested, restricted or detained upon reasonable suspicion of having committed or being about to commit a criminal offense under the laws of Ghana and who is not released shall be brought before a court within forty-eight hours after the arrest, restriction or detention."[23] In addition, the Constitution states that a person may be deprived of his liberty and called before the court to answer an order of the court or in execution of a sentence ordered by the court.[24]

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[18] Article 1(2) of the Constitution stipulates that any other law found to be inconsistent with any provision of the Constitution shall be void. *See* GHANA CONST., *supra* note 3, art. 1(2) (1992).

[19] *See* PNDCL, *supra* note 13. Provincial National Defense Council (PNDCL) was the name adopted by the military Junta at the time. Law 282 of the PNDCL was amended by the Constitution of Republic of Ghana (Amendment) Act of 1996 (Act 527). GHANA CONST., *supra* note 3.

[20] The First Ghana Constitution was in 1957; the second Constitution was in 1960; the third was in 1969; and the fourth was in 1979. *Constitution of the Republic of Ghana*, WORLD INTELLECTUAL PROP. ORG., http://www.wipo.int/wipolex/en/details.jsp?id=9414 (last visited Jan. 29, 2015).

[21] *See* GHANA CONST. art. 19 (1992).

[22] *Id.* art. 19(2)(c).

[23] *Id.* art. 14(3).

[24] *Id.* art. 14(1). Other instances when a person can be deprived of his liberty include the execution of a court order punishing him for contempt of court, a person suffering from an infectious or contagious disease, a person of unsound mind, a person addicted to drugs or alcohol, for the purpose of his care or treatment or the protection of the community. *Id.* art. 14(1) a–g.

B. The Criminal Procedure Code

The Criminal Procedure Code of 1960[25] contains the criteria used by the court to grant or refuse bail to a person who is charged with an offense before it. The Act contains important general provisions as well as specific criteria for the granting of bail and the discharging of suspects in custody.[26] The conditions for the release of an accused in non-capital cases prior to trial are also discussed under the Criminal Procedure Code:

> The basic purpose of bail from the society's point of view has always been and still is to ensure the accused's reappearance for trial . . . . Pretrial release allows a man accused of a crime to keep the fabric of his life intact, to maintain employment and family ties in the event he is acquitted or given a suspended sentence of probation . . . . It permits the accused to take active part in planning his defense with his counsel . . . .[27]

The Criminal Procedure Code of Ghana allows for release in non–capital cases prior to trial, and it provides that a court shall refuse to grant bail if it is satisfied that the accused:

> (a) may not appear to stand trial;
> (b) may interfere with any witness or evidence, or in any way hamper police investigations;
> (c) may commit a further offence when on bail; or
> (d) is charged with an offence punishable by imprisonment exceeding six months which is alleged to have been committed while on bail.[28]

Furthermore, to determine the condition or conditions that must be taken into consideration to assure the court of the accused's presence in future court proceedings, the magistrate must also consider the nature of the accusation[29] and the nature of the evidence in support of the

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[25] CRIMINAL PROCEDURE CODE Act 30 (1960) (Ghana) [hereinafter CPC]. The Criminal Procedure Code of Ghana was enacted by the First Republic in 1960. *Id.* It was amended by the Criminal Procedure Code (Amendment) Decree, 1975, N.R.C.D 309.
[26] *Id.* § 98.
[27] STUART S. NAGEL, THE RIGHTS OF THE ACCUSED IN LAW AND ACTION 177-78 (1972).
[28] *See* CPC, *supra* note 25, § 96(5).
[29] *Id.* § 96(6).

accusation.[30] Also, the magistrate shall consider the severity of the punishment that conviction will entail.[31] In addition, the court shall take into consideration whether the defendant, having been released on bail on any previous occasion, has willfully failed to comply with the conditions of any recognizance entered into by him on that occasion.[32] Other factors include whether the defendant has a fixed place of abode in Ghana, is gainfully employed,[33] and whether the sureties are independent, of good character, and of sufficient means.[34]

III. Military Justice in the Ghana Armed Forces

A. Historical Context of the Armed Forces Act of Ghana

The military justice system in Ghana owes its birth to the British military justice system[35] and has been modeled after the British military justice system.[36] Prior to the attainment of independence from the British in 1957, the British Army Act of 1955 was used to administer the armed forces in the Gold Coast.[37] In 1962, the AFA was enacted by the existing Parliament to regulate and administer the military.[38] The purpose of the Act is to ensure that good order and discipline is preserved.

The last major change to the military justice system in Ghana occurred in 1983 with the introduction of trial by a disciplinary board instead of by

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[30] *Id.* § 96 (6)(b).
[31] *Id.* § 96 (6)(c).
[32] *Id.* § 96 (6)(d).
[33] *Id.* § 96 (6)(e).
[34] *Id.* § 96 (6)(f).
[35] Ghana, then the Gold Coast, was a colony of Britain until she gained independence in 1957 and achieved Republican status in 1960. *Political History*, GHANA WEB, http://www.ghanaweb.com/GhanaHomePage/republic/polit_hist.php (last visited Feb. 17, 2016).
[36] Thomas Allotey, Comparative Study: The Military Justice System in Ghana and the United States (Pre-trial through Post-trial): Need For Reforms in Ghana's Military Justice System 3 (2001) (unpublished thesis, The Judge Advocate General's Legal Center and School) [hereinafter Allotey Thesis].
[37] *See* AFR, *supra* note 12, art. 112.04. Though the British Act of 1955 is no longer in use, reference is still made to it in relation to court–martial procedures. "The rules of the British Army Act, 1955 shall apply to the Armed Forces Regulations, unless the provisions of these Rules or any part thereof are included in or inconsistent with the provisions of these Regulations." This regulation is also known as Constitutional Instrument 12 (CI 12).
[38] *See* AFA, *supra* note 12.

a sole commanding officer.[39] This change was a major improvement to the system, and it was instituted to right previous wrongs in the system. Such reform shows that some injustices that existed have been rectified, though it left untouched the pre-trial detention system under the military justice system in Ghana.

B. The Practice of Pre-trial Detention under Ghana's Military Justice System

In Ghana, servicemembers are subject to the Armed Forces Act (Act 105) and the Armed Forces Regulations;[40] they are the primary sources of criminal law within the military. Under the AFA, custody prior to trial is a matter of command discretion. A person against whom a charge has been preferred need not necessarily be placed under arrest.[41] The

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[39] THE PROVISIONAL NATIONAL DEFENSE COUNCIL (ESTABLISHMENT) PROCLAMATION §§ 9, 10 (1981) [hereinafter P.N.D.C. PROCLAMATION] states:

> 9(1) Notwithstanding the suspension of the 1979 Constitution and until provision is otherwise made by law—
>
> (a) all courts in existence immediately before the 31st day of December, 1981, shall continue in existence with the same powers, duties and functions under the existing law subject to this Proclamation and laws issued thereunder . . . .
>
> 10(1) Notwithstanding the provisions of section 9 of this Proclamation, there shall be established independently of the said courts, Public Tribunals for the trial and punishment of offenses specified by law.
>
> 10(2) Notwithstanding the provisions of section 9 of this Proclamation the Public Tribunals established under subsection (1) of this section shall not be subject to the supervisory jurisdiction of any court and accordingly it shall not be lawful for any court to entertain any application for an order or writ in the nature of habeas corpus, certiorari, mandamus, prohibition, *quo warranto* injunction or declaration in respect of any decision, judgment, finding, ruling, order or proceeding of any such Tribunal.

Id. Another notable change was the inclusion of an enlisted servicemember to sit on the disciplinary board in a case in which the accused was also an enlisted servicemember. *See* AFA, *supra* note 12, Act 105, § 63 (1).

[40] The Armed Forces Regulations (AFRs) contain the trial procedures under the military justice system, and the rules of evidence. *See generally* AFR, *supra* note 12, art. 105.

[41] *Id*. art. 105.01 (stating that the expression "arrest" relates to the apprehension of an alleged offender and also to his custody from the time of the apprehension until the case has been disposed of).

circumstances surrounding each case are considered when determining whether arrest is appropriate.[42] Also, an officer may arrest a person without warrant or order if the person has committed or is suspected of committing a crime. In addition, if the person has been charged under the AFA for committing a service offense, he may be arrested without a warrant.[43]

It is the responsibility of the arresting officer to provide to the accused a written signed account stating the reasons the accused is held in custody.[44] In any case, where the accused is not provided with an account in writing within twenty-four hours, the officer or man in whose custody the accused has been committed shall discharge him from custody.[45] It is also the duty of the person who receives the accused to report the arrest to superior authority.[46]

The pre-trial custodial provisions under the AFA are further expanded in the Armed Forces Regulations Vol.II (Discipline) (CI.12).[47] Under Article 105.13 (When Close Custody Advisable),[48] it is provided that when practical, an alleged offender who has been arrested should be held in close custody if:

> 1. the offense is of a serious nature;
> 2. the offense is accompanied by drunkenness, violence or insubordination;
> 3. it is likely that he would otherwise continue the offense or commit another offense; or
> 4. close custody is considered necessary for his protection or safety.[49]

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[42] *Id*.
[43] *See* AFA, *supra* note 12, § 57.
[44] *Id.* § 60.
[45] *See* AFR, *supra* note 12, art. 105.19.
[46] *See* AFA, *supra* note 12, § 60(3).
[47] *See* AFR, *supra* note 12, art. 105.
[48] *Id*. art 105.01 (Close custody involves restraint under escort or guard, whether in confinement or not.).
[49] *Id.* art. 105.13.

In addition, every alleged offender who is under arrest in open custody[50] shall continue to be in open custody until he is placed in closed custody or discharged from custody.[51]

1. Protections Listed in the Armed Forces Act

Under the AFA, officers are to be held accountable for placing anyone in pretrial confinement arbitrarily.[52] Section 35 of the AFA provides,

> Every person subject to the Code of Service Discipline who unnecessarily detains any other person subject thereto in arrest or confinement without bringing him to trial, or fails to bring that other person's case before the proper authority for investigation, shall be guilty of an offence . . . .[53]

The Armed Forces Act provides additional protections to service members in pre-trial confinement by mandating a pre-trial processing timeline. Where the arrested person remains in custody for eight days without a summary trial or court-martial, the commanding officer shall submit to the appropriate superior authority a report necessitating the delay.[54] This report shall be sent out every eight days until the accused is tried. In any case, if there is no trial after the expiration of twenty-eight days from the time of custody, the accused shall be entitled to send to the President (or his appointee) a petition to be freed from custody or for a disposal of the case against him.[55]

Finally, upon the expiration of a period of ninety days of continuous custody without trial, the accused shall be released.[56] Section 61(3) of the AFA provides that a person released from custody shall not be subject to re–arrest for the same offence except on the written orders of an authority having power to convene a court-martial for his trial.[57] The purpose is to

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[50] *Id*. art. 101.01 (Open custody involves curtailment of privileges but not restraint under escort or guard.).
[51] *Id.* art. 105.30.
[52] *See* AFA, *supra* note 12, § 61.
[53] *Id*.
[54] *Id*. § 35.
[55] *Id*.
[56] *Id.* § 61(2).
[57] *Id*. § 61(3).

ensure that the accused enjoys the right to a speedy trial and to place the onus on the commander to prepare the case with a sense of urgency.

2. The Reality of the Armed Forces Act

It is a tough burden, however, for the defense attorney to prove arbitrary pre-trial confinement. The onus lies on the prosecutor to prove the facts that would either show or enable the service tribunal to infer that the accuser could have brought the person in arrest or confinement to trial, or brought his case before the proper authority for investigation without ordering the person into pre-trial confinement.[58]

Despite the protections extended to the accused under the AFA, as it stands today, the AFA is prone to abuse. Our commanding officers are not trained legally and are often not neutral and detached from the case. Furthermore, although pre-trial confinement is not usually required in cases for summary trial, there have been cases when an accused has been thrown into pre-trial confinement. When it is utilized, the accused may serve more time in pre-trial confinement than his maximum exposure from the summary trial. Invariably, the accused ends up suffering unnecessarily. The AFA must remove the commanding officer as the one to order pre-trial confinement; invariably, he is not detached from the case.[59]

In a system that does not make provision for bail, trials must be carried out expeditiously. The number of people in pre-trial detention must be kept at a minimum. However, this unfortunately has not been the case on some occasions. For example, in 2013 two naval ratings[60] were accused of engaging in the sale of illegally acquired fuel.[61] This was after a report was made that one rating had been found with some gallons in his car suspected to contain fuel. The ratings were put into pre-trial confinement

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[58] *See* AFR, *supra* note 12, art. 103.28.

[59] The commander usually has an interest in the case as the conduct of the accused in the unit mirrors the ability of the commander to ensure discipline is maintained. The bias is generally seen because the commander is the same person to decide whether or not the accused will be placed in pre-trial confinement. *Id.*

[60] "Ratings" are sailors who hold neither commissioned nor warrant rank, akin to the enlisted soldier in the U.S. Army. *See* ASK ME GHANA, http://askmeghana.com/487/Ranks-ghana-army (last visited Feb. 17, 2016).

[61] The author is familiar with this unreported case and this citation is based on that professional experience.

for almost three months before they were released after an investigation found they had not engaged in any wrongdoing. They had been unnecessarily detained and punished for a crime they had not committed. Such conditions affect the career and reputation of those concerned and can raise morale issues in the unit. As in the above referenced case, the accused ends up suffering unnecessarily, and the risk of arbitrary pre–trial confinement substantially outweighs the risks of implementing reform.

Another concern is the time spent in preferring charges and taking the summary and abstract of evidence.[62] This is usually a long and detailed procedure and the accused is left to unjustly languish in custody through this time period. Also, because commanders are not legally trained, the accused suffers unjustly when decisions are made which are totally devoid of any legal backing.

Though the AFA provides for preferral of charges against an officer who improperly recommends confinement of an accused as a potential remedy, confinement itself cannot act as a justification or serve as a presumption to keep an accused in pre-trial confinement.[63] The remedy, despite its existence, is more theoretical than practical; to date no one has been prosecuted for failure to bring an accused person in pre-trial confinement to trial.[64]

Furthermore, if the accused indicates that he desires to be removed from pre-trial detention, the request has to be done when the case is referred to trial. The accused would already have suffered unjustly if he is removed eventually from pre-trial detention.

The advocates of maintaining the "old wine" have put forth several objections to the introduction of the bail system into the military justice

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[62] A summary of evidence provides the facts to support the ingredients in a charge. *See* AFR, *supra* note 12.

> [A] summary of evidence as distinct from an abstract of evidence shall be taken if the maximum punishment with which the accused is charged is death, or the accused person at any time before the charge against him is referred to higher authority, requires in writing that a summary of evidence be taken.

Id. art. 109.02 (C.I 12).

[63] *See* United States v. West, 12 U.S.C.M.A. 670, 673 (1962).

[64] This author has not seen a single prosecution for the failure to bring an accused in pre-trial confinement to trial.

system, including that it will have severe repercussions on discipline and the general administration of the armed forces.[65]

C. Military Justification for Pre-trial Detention

> No court-martial, military commander, or other military authority is empowered to accept bail for the appearance of an arrested party or to release a prisoner on bail. Bail is wholly unknown to the military law and practice; nor can a court of the United States grant bail in a military case.[66]

The above quote, though not made by a Ghanaian court, depicts the current view on bail under the military justice system in Ghana.[67] In the military, a person who is charged with a crime does not enjoy the privilege of being released on bail even if the offense is not capital. This is the source of conflict between the pundits for change and the military advocates who believe that the AFA must not be changed to include the "new wine."[68] Various arguments have been put forward by the military advocates on the need to preserve the AFA without the introduction of the "new wine."[69] Some of the arguments include the fact that it shall be a compromise on discipline, military operational needs, the "unique" nature of the military, and the need to have a law that is applicable even in deployment theaters.

1. Compromise of Discipline?

Rules are designed to instill and enforce discipline within an organization, such as the military, that has the special need to preserve cohesion, integrity, and credibility. The U.S. Army has defined discipline as a "state of mind which leads to a willingness to obey an order no matter

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[65] *See* Manning, *supra* note 7.

[66] U.S. ARMY, OFFICE OF THE JUDGE ADVOCATE, A DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY, 481 (1912).

[67] In the *Nikyi* case this concept was forcefully argued by the military; however, the Human Rights Court disregarded the notion and held that the military practice of refusing bail was in contrast with the 1992 Constitution. Nikyi v. Att'y Gen., Suit no. HRC/6/09 (Ghana).

[68] Manning, *supra* note 7.

[69] *Id.*

how unpleasant or dangerous the task to be performed."[70] Discipline is necessary to preserve the integrity, discipline, and coherence of the Ghana Armed Forces (GAF), without which there may not be a credible armed force capable of fulfilling its constitutional mandate—ensuring the defense of Ghana. There have always been rules regarding the pre-trial custody of members of the force.

The military's concern for discipline is one obstacle on the path to change in the area of pre-trial detention. There is an inherent conflict between individual freedoms and the military's objective of discipline and control.[71] However, the Ghanaian military, especially during the current democratic dispensation, must demonstrate that it is ready and willing to make great improvements in the military justice system. One notable area where change can be made is pre-trial detention with the introduction of the "new wine." [72] This will move the pre-trial detention to a higher degree of due process.[73]

The argument by the military that discipline will be compromised in the grant of bail in non-capital offenses is unjustified. Discipline and justice cannot be detached from each other. The grant of bail will not compromise discipline in the unit. Furthermore, the services of those military accused awaiting trial can be utilized by the military instead of keeping them in guardrooms to be fed at public expense.[74]

2. Operational Needs Argument

Advocates against the AFA reform assert that when GAF members are conducting operations (internal and external operations), the conditions are such that it would prove difficult to constitute disciplinary boards or courts-martial, before which persons arrested and detained may be arraigned. They argue that where the Commanding Officer (CO) has deployed elements of his unit to monitor or provide security for an operation, such as elections, the CO cannot turn his attention from the sensitive duties placed on his shoulders to constitute a court to hear the

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[70] R. RIVKIN, GI RIGHTS AND ARMY JUSTICE: THE DRAFTEE'S 350 (N.Y. Grove Press, 1970).
[71] *See* Captain Eloy Sepulveda, A Case for Bail in the Military (1975) (unpublished thesis, The Judge Advocate Gen.'s Legal Ctr. and Sch.) [hereinafter Sepulveda Thesis].
[72] Manning, *supra* note 7.
[73] Sepulveda Thesis, *supra* note 74, at 8.
[74] *Id*.

case against a soldier suspected of committing an offense. Normally, the accused will be kept in custody until such time that there would be a lull in operations to permit administrative issues such as trials to be carried into effect; in such situations, security of the state often becomes an overriding concern.

Also, advocates against the AFA reform point out that during external operations, where soldiers commit offenses beyond the jurisdiction of the CO, the CO has to keep such soldiers in custody until a time that the appropriate authorities can attend to the issue. Their position is that military discipline and integrity (institutional and national) and national reputation in an international environment mandate that such a soldier be held immediately accountable in order to ensure mission accomplishment (although the forty-eight hour rule might be breached).

3. The Military: A Society Apart

The pundits of maintaining the status quo have argued that "the rights of men in the armed forces must meet certain overriding demands of discipline and duty that cannot be determined by civilian courts."[75] Pundits advocating for the non-reform of the AFA seem to rely on the position stated in *Parker v. Levy*, where the Court noted,

> [It] has long recognized that the military is by necessity a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."[76]

Further, these pundits assert that many of the problems of the military society are, in a sense, alien to the problems with which the judiciary is trained to deal.[77] Under the Armed Forces Act, offenses like

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[75] Burns v. Wilson, 346 U.S. 137, 140 (1953); *see also* Solorio v. United States, 483 U.S 435 (1987); Chappell v. Wallace, 462 U.S 296 (1983) (holding that military personnel are not barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service).

[76] Parker v. Levy, 417 U.S. 733, 743 (1974).

[77] Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962).

malingering, [78] desertion, [79] mutiny, [80] and Absence Without Leave (AWOL)[81] are unique to the military and unknown to the civilian courts. Consequently, "the adjudication of guilt or innocence and the assessment of appropriate punishment may require experience and knowledge not commonly possessed by civilian judges and jurors."[82] In the view of the military, advocates for change fail to consider that the military is unique; therefore, it must be considered whether a proposed change will have an adverse effect on discipline. "The military should support change if, and only if, the change improves the delivery of justice and preserves discipline essential for military success."[83]

Although the military has strongly emphasized its uniqueness, the military cannot be allowed to rely on its uniqueness alone to infringe on the rights of military accused by denying them the right to bail unless compelling reasons exist. As detailed further below, this paper acknowledges that any structural changes within the military must be mirrored in the AFA.

4. World-Wide Deployment and Constitutional Reach

> *The military has argued for a separate system primarily grounded on the rationale that world-wide deployment of large numbers of military personnel with unique disciplinary requirements mandates a flexible, separate jurisprudence capable of operating in times of peace or conflict.*[84]

According to the advocates against reforming the AFA, soldiers may be stationed outside Ghana, where constitutional protections cannot be extended to them. They may also commit crimes that are outside the jurisdiction of Ghanaian civilian courts.[85] Consequently, there is a need

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[78] *See* AFA, *supra* note 12, § 34.
[79] *Id*. § 27.
[80] *Id*. § 19.
[81] *Id*. § 29.
[82] Professor Joseph W. Bishop Jr., *Perspective: The Case for Military Justice*, 62 MIL. L. REV. 219 (1973).
[83] Moorman, *supra* note 10, at 190.
[84] DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE (6th ed., 2004).
[85] Ghana has troops on United Nation Peacekeeping duties in Congo, Lebanon, Liberia, and Sudan. *Peacekeeping Contributor Profile: Ghana*, PROVIDING FOR PEACEKEEPING,

for a justice system that can go wherever the troops go. Under the AFA, "every person subject to the Code of Service Discipline[86] alleged to have committed a service offence may be charged, dealt with, and tried under the Code of Service Discipline, whether the alleged offence was committed in Ghana or out of Ghana."[87] This is the justification used to prevent the introduction of the "new wine."[88] According to objectors, bail cannot be enforced in operational theaters. However, this reason does not justify their call for non-reform of the AFA, as exceptions may be made during emergencies and deployment.

Despite the views posited by military pundits, recent developments in Ghana highlight the need for reformation of the AFA. Discussion of the reformation of the AFA from the judiciary and the Constitution Review Commission shall be considered next.

IV. Recent Developments on the Need for Reformation of the Armed Forces Act

The Judiciary and the Constitutional Review Commission have identified defects in the administration of justice under the military justice system and called for the reform of the AFA. This highlights the fact that they are ready to take strides to rectify the problem. The opinions of the "reform movement" on the injustices suffered by accused persons point to the need to a reform of the AFA. However, some conflicting opinions exist within the judicial system on the need for AFA reform.

A. The Judicial Reform Movement

As provided in the *Nikyi v Attorney General* opinion, the High Court seemed to echo,

> When a court finds that the Constitution prohibits a particular practice, neither the agency nor Congress has the power to alter the text on which the conclusion rests.

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http://www.providingforpeacekeeping.org/2014/04/03/contributor-profile-ghana/ (last visited Feb. 17, 2016).

[86] CODE OF SERVICE DISCIPLINE (Nov. 1, 1999) (Ghana). *See also* AFA, *supra* note 12.

[87] *See* AFR, *supra* note 12, art 102.20.

[88] Manning, *supra* note 7.

> The decision therefore denies the agency the power to alter the text on which the conclusion rests. The decision therefore denies the agency power to infringe on an individual interest in pursuit of its own purposes, even if authorized to do by statute, and vests in the courts the final say on what circumstances, if any, warrant infringement of that interest.[89]

Nikyi was deployed as the finance officer to the Ghanaian Battalion with the United Nation's Mission in Congo in July 2008.[90] On his return to Ghana, an audit report found that he could not account for the funds he had been given as the finance officer for the battalion. He was arrested and placed into custody in accordance with service regulations, and he was subsequently charged and put before a court-martial. The Plaintiff, through his counsel, applied for bail, which was refused by the General Court-Martial. He subsequently applied for bail under Article 14(4) of the Constitution at the Human Rights Division of the High Court and was released.[91]

The Attorney General and the GAF applied to the High Court for a review of its decision on the grounds, *inter alia*, that the Plaintiff, being a military officer, was subject to military law and so could be held in custody in accordance with military regulations.[92] The court, however, held that

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[89] James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 180 (1983-1984). Though this quote cannot be found in the judgment delivered by the court in the *Nikyi* case, the author uses it to highlight the conclusion of the learned justice in the *Nikyi* case that the military cannot be allowed to follow their own procedure when the Constitution which is the supreme law of the land expressly prohibits it. Nikyi v. Att'y Gen., Suit no. HRC/6/09 (Ghana). Article 1(2) of the Constitution of Ghana states that "the Constitution shall be the supreme law Ghana and any other law found to be inconsistent with any provision of the Constitution shall, to the extent of the inconsistency be void." GHANA CONST., *supra* note 3.

[90] *Nikyi* Suit no. HRC/6/09.

[91] Article14(4) of the Constitution states,

> Where a person arrested, restricted or detained under . . . this article is not tried within a reasonable time, then without prejudice to any further proceeding that may be brought against him, he shall be released, either conditionally or unconditionally or upon reasonable conditions, including in particular conditions reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

GHANA CONST., *supra* note 3, art. 14 (4) (1992).

[92] *Nikyi* Suit no. HRC/6/09.

according to the constitution, the maximum period a person may remain in custody without a trial is forty-eight hours.[93]

The Human Rights Division of the High Court noted that the 1992 Constitution of Ghana makes it clear that "the fundamental human rights and freedoms enshrined in the constitution shall not be interfered with in any manner, and shall be respected and upheld by the Executive, Legislature, and Judiciary and all other organs of government and its agencies."[94] The military was therefore not exempt from this requirement. "A decision that a practice is unconstitutional prevents the armed forces from exercising a particular power over their members despite their own conclusion that it furthers the performance of their legitimate functions."[95]

Typically, the courts are experts in constitutional law, and their view of the proper constitutional balance must therefore prevail.[96] The recognition in *Nikyi v. Attorney General*[97] that military personnel are entitled to constitutional due process, which is a fundamental protection, carries with it the message that the courts are prepared to intervene in cases with human rights dimensions, even when a military accused is involved.

Despite the finding in *Nikyi v. Attorney General*,[98] there are differing opinions within the judiciary with respect to extending constitutional protections to military servicemembers. For example, in the case of *The Republic v. The Chief of Defense Staff and Attorney General*,[99] the applicant filed an application in the High Court for a writ of habeas corpus. The issue was whether the applicant was entitled to the relief of habeas corpus taking into consideration the fact that he was a service member and subject to military discipline. The Judge refused the application stating that the application of the AFA constituted an exception to the forty-eight hour rule in the Constitution.[100] It was the opinion of the Court that "the detainee could always rely on the procedures in the AFA on delays in trials and not resort to the issue of a writ of habeas corpus."[101]

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[93] *Id.*
[94] GHANA CONST., *supra* note 3, art. 12(1).
[95] Hirschhorn, *supra* note 89, at 180.
[96] *Id.*
[97] *Nikyi* Suit no. HRC/6/09.
[98] *Id.*
[99] The Republic v. The Chief of Defense Staff and Attorney General, Suit No. AP 44/07 (Ghana).
[100] GHANA CONST. art. 14(3) (1992).
[101] *The Republic* Suit No. AP 44/07. *See also* Republic v. Edmund Mensah Suit No.1/2009 (Ghana). Though this case does not relate to bail but fraternization, the court held that the

B. The Constitution Review Commission

Constitutionalism has become a critical issue in today's world.[102] Consequently, it is "considered necessary to articulate elaborate provisions in Constitutions, which guarantee the basic human and peoples' rights of the citizenry."[103] In particular, human rights issues have, since the establishment of the 1992 Constitution in Ghana, taken center stage in the political, economic, and social lives of Ghanaians.[104] This is more so because after Ghana's independence from colonial rule, the country witnessed cases of abuse and blatant disregard of human rights.[105]

In light of the above, the Constitution Review Commission (CRC)[106] was established on January 11, 2010, to review the current Constitution of

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prevention of marriage between an officer and an enlisted by the regulations of the Armed Forces did not constitute discrimination or a breach of fundamental liberties. *Id. See also* EMMANUEL KWABENA QUANSAH, THE GHANA LEGAL SYSTEM (2011) ("A High Court judge may refuse to follow a judgment of another High Court, being a judge of co-ordinate jurisdiction. However, in order to maintain certainty of judicial decisions, this refusal to follow a previous judgment of a colleague will normally be resorted to where there is a compelling reason for doing so.") In *Asare v. Dzeny*, the Court of Appeal noted that "a judge of the High Court is not bound to follow the decision of another judge of co-equal jurisdiction; he may do so as a matter of judicial comity." *Asare v. Dzeny*, 1976 1 GLR (Ghana).

[102] A. Kodzo Paaku Kludze, *Constitutional Rights and Their Relationships with International Human Rights in Ghana*, 41 ISR. L. REV. 678 (2008), http://ssrn.com/abstract =1333634.

[103] *Id*.

[104] CONSTITUTIONAL REVIEW COMMISSION OF INQUIRY, REPORT OF REVIEW (2011) [hereinafter CRC REPORT].

[105] Human rights abuses in Ghana were widespread after independence and included unlawful and arbitrary arrest; unlawful detention; confiscation of property; executions; torture; and open flogging, amongst others. *2010 Human Rights Report: Ghana*, U.S. DEPARTMENT OF STATE, http://www.state.gov/j/drl/rls/hrrpt/2010/af/154349.htm (last visited Feb. 17, 2016). For example, three Judges were abducted from their homes and murdered during the era of the Armed Forces Revolutionary Council (AFRC). *Ghana: Rawlings & Tsikata Cannot Escape Blame for Murders So Foul*, ALL AFRICA, http://allafrica.com/stories/201307031575.html (last visited Feb. 17, 2016). They adjudicated cases in which they ordered the release of persons who had been sentenced to long terms of imprisonment, during the rule of the AFRC. *Id.*

[106] The Constitution Review Commission of Inquiry Instrument 2010 (C.I. 64) created the Commission. CRC REPORT, *supra* note 104. The Constitutional Instrument makes provision for the membership of the CRC, the appointment of its members, terms of reference and mode of operation. *Id. See also* Rep. of the Constitution Review Commission (2011), presented to the President of Ghana by Professor John Evans Atta

Ghana, its related laws, and the continued advancement of jurisprudence in Ghana. The CRC found that the 1992 Constitution created a framework for "the nurturing of a vibrant democracy in Ghana" which had been denied by military overthrows of previous constitutional democracies.[107] Furthermore, during the review process, the Commission identified that there is an urgent need for the reformation of the military justice system and called for an amendment to the AFA to bring it in tune with the constitution.

In its deliberations, the CRC noted the High Court's decision in the *Nikyi* case and submitted that "the much glorified right to liberty upheld by the Constitution, which is the supreme law of the land, cannot be diminished by the military justice system or the AFA."[108] The CRC looked at this through the aperture of human rights. In their opinion, Article 61 of the AFA has "an impact on the rule of law, access to justice and adherence to human rights standards."[109] Consequently, the AFA by its own provisions must be in sync with the constitution and its human rights provisions.

The Commission further pointed out that "human rights are not gifts provided by the state, but rather the most fundamental values of democracy."[110] It is therefore not a surprise that Chapter 5 of the constitution is titled "Fundamental Human Rights and Freedoms" and has detailed provisions which run from Article 12 to 33. In addition, Chapter 6 of the Constitution is titled "Directive Principles of State Policy." These directives "expand the human rights and freedoms by linking to international obligations of Ghana pursuant to treaties, protocols and

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Mills, Executive Summary. The Constitution Review Commission is a presidential Commission of Inquiry set up in January 2010 to consult with the people of Ghana on the operation of the 1992 Constitution and on any changes that need to be made to the Constitution. *The Constitution Review Commission*, CONSTITUTION, http://www.constitutionnet.org/vl/item/constitution-review-commission-final-report. The Commission was also tasked to present a draft bill for the amendment of the Constitution in the event that any changes are warranted. *Id.*

[107] CONSULTATIVE REVIEW OF THE OPERATION OF THE 1992 CONSTITUTION OF GHANA (October 2009).

[108] CRC REPORT, *supra* note 104.

[109] *Id*.

[110] Lazlo Keleman, Restriction of Human Rights in the Military: The Standard of Legitimacy 34 (1996) (unpublished thesis, The Judge Advocate Gen.'s Legal Ctr. and Sch.).

agreements and those arising from membership of regional and other international groupings."[111]

The Commission further identified that the failure to provide bail under the military justice system and the detention of an accused person for a period up to ninety days without trial is of a penal nature because it deprives a person of his freedom, which is a denial of a fundamental human right as enshrined in the constitution.[112] The concept of bail, in the context of the presumption of innocence, is a human right.[113]

According to the CRC, the most commonly repeated adage in modern criminal justice system is the presumption of innocence, or in other words, accused persons are deemed innocent until proven guilty.[114] Therefore, in the view of the CRC, the bail system and its procedures must, as a matter of necessity, be assessed and applied to the military justice system in light of the overall constitutional legal framework consisting of fundamental principles of criminal justice and human rights values entrenched in the constitution. [115] Furthermore, the CRC posits that the AFA, and specifically Article 61, must be amended to meet the requirements of the constitution. [116]

The Commission indicated that determining the proper role assigned to the military in a democratic society has been a troublesome problem for every nation which has aspired to a free political life.[117] It acknowledged that "the military establishment is a necessary organ of government; however, the reach of its power must be carefully limited lest it upsets the delicate balance between freedom and order."[118]

Under the Commission's direction, a Bill was prepared for introduction in Parliament for the start of bail in the military. This reflects the current environment in Parliament that it is prepared to go to any extent

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111 Kludze, *supra* note 102, at 684.
112 CRC REPORT, *supra* note 104, at 577.
113 Tafara Goro, *Restoring the Right to Bail and the Presumption of Innocence*, UNIV. OF ZIMBABWE STUDENT J., June 2013.
114 *Id*.
115 *Id*.
116 CRC REPORT, *supra* note 104, at 578.
117 Warren, *supra* note 77, at 181-82.
118 *Id*.

to ensure that the interests of justice are served without concern that military good order and discipline will be compromised.[119]

Furthermore, the Commission noted that it is critical that "various agencies of state and individuals must devise and adopt innovative procedures that at once ensure fidelity to the constitution."[120] In the view of the CRC, there is no express provision in the Constitution of Ghana that bar military personnel from enjoying the human rights guaranteed in the constitution. Since Ghana has ratified several international and regional human rights treaties, the CRC believes the country must strive to meet internationally accepted standards on human rights.

V. International and Regional Law on Human Rights

A. Introduction

> *One right recognized in human rights jurisprudence as pivotal in the promotion of a criminal justice system that satisfies international human rights standards is a fair trial, which includes the right to bail. The institution of bail traces its origins to international conventions that protect and guarantee the fundamental rights of the individual to the presumption of innocence and due process of the law.*[121]

Human rights advocacy has received attention in the international and regional arena with much concern over the potential for abuse of individual rights by the state security apparatus and law enforcement agents in the enforcement of penal laws.[122] The international community has been dedicated to the intervention in potential abuse of individual rights through international instruments such as the Universal Declaration

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[119] Sepulveda Thesis, *supra* note 74, at 11.
[120] CRC REPORT, *supra* note 104, at 577.
[121] Amoo S.K., *The Bail Jurisprudence of Ghana, Namibia, South Africa and Zambia*, FORUM ON PUBLIC POLICY, Summer 2008.
[122] *Id*.; Goro, *supra* note 113, at 1.

for Human Rights,[123] the International Convention on Civil and Political Rights,[124] and the African Charter on Human and People's Rights.[125]

1. The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) is a milestone document in the history of human rights.[126] It was adopted by the United Nations (UN) General Assembly on December 10, 1948,[127] and is generally agreed to be the foundation of international human rights law.[128] It has inspired a rich body of legally binding international human rights treaties, and represents the universal recognition that basic rights and fundamental freedoms are inherent to all human beings.[129] The International Bill of Human Rights[130] consists of the Universal Declaration of Human Rights (UDHR); the International Covenant on Economic, Social, and Cultural Rights; and the International Covenant on Civil and Political Rights.[131] A part of the preamble of the UDHR states:

> As a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive

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123 *History of the Universal Declaration of Human Rights*, UNITED NATIONS, http://www.un.org/en/documents/ udhr/history.shtml [hereinafter UDHR].

124 The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols. *Fact Sheet No. 2*, U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf (last visited Feb. 16, 2016) [hereinafter ICCPR].

125 *Understanding the African Charter on Human and Peoples' Rights, How does the African Charter interact with or enrich the international law project?*, THINK AFRICA PRESS, http://thinkafricapress.com/international-law-africa/african-charter-human-peoples-rights (last visited 15 Feb. 2016) [hereinafter African Charter]. *See also* FATSAH OUGUERGOUZ, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: A COMPREHENSIVE AGENDA FOR HUMAN DIGNITY AND SUSTAINABLE DEMOCRACY IN AFRICA 46 (2003).

126 UDHR, *supra* note 123.

127 *Id.*

128 *Id.*

129 *Id*.

130 *See* ICCPR, *supra* note 124.

131 *Id*.

> measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.[132]

Specifically, the UDHR states that no one shall be subjected to arbitrary arrest, detention or exile.[133] Therefore, Ghana must strive to live up to the expectations of the Declaration.

2. The International Convention on Civil and Political Rights

The International Convention on Civil and Political Rights (ICCPR) was adopted and opened for signature, ratification, and accession by General Assembly resolution 2200A [XXI] of December 16, 1966 and entered into force on March 23, 1976.[134] According to the ICCPR, "each State Party must undertake to respect and ensure that all individuals within its territory and subject to its jurisdiction are afforded the rights recognized under the convention without any discrimination whatsoever." [135] Furthermore, where it is not already provided for by existing legislative or other measures, "each State Party to the present Covenant must undertake to take the necessary steps, in accordance with its constitutional processes and with the provisions of the Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the Covenant."[136] A key provision within the ICCPR is that everyone has the right to liberty and security of person and no one shall be subjected to arbitrary arrest or detention.[137]

The Convention also states that it shall not be the general rule that persons awaiting trial shall be detained in custody.[138] An accused may be released subject to guarantees to appear for trial, at any other stage of the

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[132] *See* UDHR, *supra* note 123; *see also Universal Declaration of Human Rights*, UNITED NATIONS, G.A. Res. 217, pmbl, http://www.un.org/en/documents/udhr/ (last visited Feb. 15, 2016) [hereinafter Universal Declaration].
[133] Universal Declaration, *supra* note 132, art. 9.
[134] *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI) U.N. GAOR, 21st Sess., Supp. No. 9, U.N. Doc. A/6309 (Mar. 23, 1976) [hereinafter International Covenant].
[135] *See* International Covenant, *supra* note 134, art. 2(1).
[136] *Id.* art. 2(2).
[137] *Id.* art. 9(1).
[138] *Id.* art. 9(3).

judicial proceedings.[139] Ghana ratified the convention on September 7, 2007, and accordingly must adhere to it.[140] Therefore, the ban on arbitrary pre-trial detention must be the rule rather than the exception in Ghana.

B. The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (ACHPR) also known as the Banjul Charter is an international human rights instrument that is intended to promote and protect human rights and basic freedoms in the African continent.[141] It was adopted by the 18th Assembly of Heads of State and Government of the Organization of African Unity (now the African Union) on June 27, 1981, in Nairobi, Kenya, and entered into force on October 21, 1986, after the ratification of the Charter by twenty-five States.[142]

The need for the Charter has been questioned in light of the already universal application of United Nations instruments for upholding human rights. However, its creation follows in the footsteps of other regional bodies in the creation of their own unique regional human rights systems, notably the European Convention on Human Rights (ECHR).[143]

Since its creation, the Charter has had significant normative impact on the status of human rights on the African continent.[144] The Charter states that "member states who are parties to the Charter shall recognize the

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[139] *Id.*

[140] Ghana ratified the ICCPR on 7 September 2000. ICCPR, *supra* note 124.

[141] *African Charter on Human and People's Rights*, AFRICAN COMMISSION ON HUMAN AND PEOPLE'S RIGHTS, http://www.achpr.org/instruments/achpr/ (last visited Feb. 17, 2016). Ghana is a member of the African Union and signed and ratified the treaty in September 2000. *Id.*

[142] *Id.*

[143] The Council of Europe dedicates a website to discuss rights and landmark judgments.

> The European Convention on Human Rights is the first Council of Europe's convention and the cornerstone of all its activities. It was adopted in 1950 and entered into force in 1953. Its ratification is a prerequisite for joining the Organization. The Convention established the European Court of Human Rights (ECtHR).

A Convention to protect your rights and liberties, COUNCIL OF EUROPE, http://human-rights-convention.org/ (last visited Feb. 16, 2016).

[144] *See* African Charter, *supra* note 125.

rights, duties, and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them."[145]

Specific to individuals, the ACHPR specifies that all people shall have the right to liberty and to personal security of his person including freedom from arbitrary arrest or detention.[146] To ensure a fair trial, every individual shall be presumed innocent until proved guilty by a competent court or tribunal.[147]

Finally, member states are charged with the responsibility and duty to promote human rights.[148] This further emphasizes the point that Ghana must implement reform of the AFA that is also consistent with this Charter. Since Ghana has ratified the Charter, it must endeavor to uphold the rights guaranteed to individuals under the Charter, ensuring application of international and regional human rights law.

C. The Constitution and Application of International Treaties and Law.

The constitutions of many modern states, such as Ghana, now seek to incorporate International Human Rights as enforceable constitutional rights to make them cognizable by the domestic courts and tribunals.[149] Since Ghana attained independence in 1957, she has become party to numerous international, African, and regional human rights instruments.[150] In the 1992 Constitution of Ghana, the provisions of the Universal Declaration of Human Rights and the African Charter on Human and People's Rights are entrenched as constitutional provisions. Since the drafters and framers of the constitution relied on the principles of the international human rights law enshrined in treaties and declarations, there are many similarities between the domestic law and some principles of international human rights law.[151]

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[145] African Commission on Human and Peoples Rights, *African Charter on Human and People's Rights*, art. 1 (1987).
[146] *Id*. art. 6.
[147] *Id*. art. 7(b).
[148] *Id.* art. 25.
[149] Kludze, *supra* note 102, at 677.
[150] Emmanuel K Quansah, *An examination of the use of International law as an interpretative tool in human rights litigation in Ghana and Botswana*, *in* INT'L L. AND DOM. HUM. RIGHTS LITIGATION IN AFRICA 27, 30 (2010).
[151] Kludze, *supra* note 102, at 677.

The 1992 Constitution of Ghana does not expressly define the relationship between international law and national law.[152] Furthermore, in Ghana, treaties are not self–executing[153] such as may exist in other countries, and therefore not a standalone legal basis to enforce rights in the domestic law. Ghana subscribes to the dualist approach,[154] to the incorporation of international law into national law.[155] Consequently, to enforce obligations, Parliament must adopt the provision of the treaty in question to make it part of laws of the land.[156] In other words, if a treaty is to affect the municipal laws of Ghana, there must be an enabling legislation that specifically declares the treaty provision to be a law of the land.[157] In the celebrated case of *NPP v. Attorney General*,[158] the court held:

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[152] Quansah, *supra* note 150, at 37.

[153] U.S CONST. art VI, clause 2.

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby . . . .

Id.

[154] As a dualist state, the Republic is required to ratify a treaty internationally and then proceed to ratify the treaty in accordance with the Constitution. *See* GOV'T OF GHANA, REPUBLIC OF GHANA TREATY MANUAL, http://legal.un.org/avl/documents/scans/Ghana TreatyManual2009.pdf?teil=II&j (last visited Feb. 17, 2016). Two steps are required: the international intervention followed by the domestic process in order to transform the treaty from international law to domestic legislation. *Id.*

[155] Quansah, *supra* note 150, at 37.

[156] Article 11 of the Constitution of Ghana does not mention international law as part of the laws of Ghana.

> The hierarchy of laws established by article 11 of the 1992 Constitution does not expressly mention international law as part of the laws of Ghana. However, the article includes amongst such laws, "enactments made by or under the authority of parliament; any orders, Rules and Regulations made by any person or authority under a power conferred by this Constitution . . . ."

GHANA CONST., s*upra* note 3, art. 11.

[157] Article 75(2) of the 1992 Constitution of Ghana states that the president is vested with the power to execute or to cause to be executed treaties, agreements, or conventions in the name of Ghana, subject to ratification by an Act of Parliament supported by the votes of more than one-half of all members of parliament. GHANA CONST., s*upra* note 3, art. 75(2).

[158] NPP v. Attorney General (1996-97 SCGLR 729) (Ghana).

> Laws, municipal or otherwise, which are found to be inconsistent with the Constitution, cannot be binding on the state whatever their nature. International law, including infra African enactments, are not binding on Ghana until such laws have been adopted or ratified by municipal laws . . . . This is a principle of public international law which recognizes the sovereignty of State as prerequisite for international relationship and law.[159]

The constitution, however, does not totally disregard treaties and agreements entered into by Ghana.[160] Article 37(3) of the constitution states,

> In the discharge of the obligations stated in clause (2) of this article, the State shall be guided by international human rights instruments which recognize and apply particular categories of basic human rights to development processes.[161]

Furthermore, article 40 of the 1992 Constitution on international relations stipulates, among other things, that the government "shall promote respect for international law, treaty obligations and the settlement of international disputes by peaceful means."[162] In the case of *NPP v. Inspector General of Police*,[163] Archer CJ stated,[164]

> Ghana is a signatory to this African Charter and member states of the [Organization of African Unity] and parties to the Charter are expected to recognize the rights, duties and freedoms enshrined in the Charter and to undertake to adopt legislative and other measures to give effect to the rights and duties. I do not think that the fact that Ghana

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159 *Id*.
160 Kludze, *supra* note 102, at 682.
161 GHANA CONST. art. 37(3) (1992).
162 *Id.* art. 40(c).
163 NPP v. Inspector General of Police (1993-94) 2 GLR 459, also reported in AHRLC 138 (GhSC 1993).
164 Justice Archer was the Chief Justice of Ghana at the time of this judgment. GNA, *State Burial for Archer*, MODERN GHANA (June 4, 2002), http://www.modernghana.com/news/23162/1/state-burial-for-archer.html.

> has not passed specific legislation to give effect to the Charter means that the Charter cannot be relied upon.[165]

The above cases show that the courts of Ghana are inclined to consider international treaties even if they have not been incorporated into the domestic law of Ghana.

VI. Proposals for Change to Implement Due Process

The introduction of "new wine"[166] into the military justice system of Ghana for non-capital offenses will be hollow unless systemic changes are made within the military justice system. These include increase in manpower, the addition of military defense counsel and magistrates/judges, and checks against undue command influence. Undoubtedly, these systemic issues constitute hurdles that may obstruct the reform of the AFA. Nevertheless, they are not insurmountable and must be made in order to properly align the AFA with the constitution.

A. Increase in Manpower

Manpower is needed for the successful attainment of the mission and vision of the armed forces. The legal directorate of the Ghana Armed Forces is no exception. Presently, the legal directorate is woefully understaffed and is responsible for providing legal advice to the army, navy, and air force.[167] In addition, legal officers carry out prosecutorial duties, prepare contracts, and lecture on military law and rules of engagement to troops preparing for deployment, among other responsibilities.[168]

In addition to its own national security requirements, the Ghana Armed Forces contributes troops to United Nations Peacekeeping Operations.[169] Each of these missions requires a legal officer (judge advocate). This further compounds the manpower issue, as the entire Armed Forces boasts less than fifty legal officers.[170] The roles and

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165 NPP v. Inspector General of Police (1993-94) 2 GLR 459.
166 Manning, *supra* note 7.
167 Based upon the author's experience as a legal officer in the Navy of Ghana.
168 Allotey Thesis, *supra* note 36, at 7.
169 *See Peacekeeping*, *supra* note 85.
170 Based upon the author's experience as a legal officer in the Navy of Ghana.

functions of the armed forces require legal officers who are well motivated. It is important that this situation is remedied as the pressure on the few legal officers affects the output of the legal officers.

B. Introduction of Defense Counsel

> Representation by counsel is crucial to the effectuation of all the other procedural protections which the legal system offers to the defendant. If those protections are to be meaningful and not merely a sham, it is essential that each defendant have legal assistance to realize their intended benefits.[171]

The 1992 Constitution of Ghana, in Article 19 on Fundamental Human Rights, states that one vital ingredient to ensure a fair trial is that "the accused must be permitted to defend himself before the court in person or by a lawyer of his choice."[172] As far back as 2007, Parliament recognized this, and recommended that defense counsel be provided for military accused.[173] Unfortunately, this goal has not been realized.

As it stands, the burden rests with the accused to make vital decisions regarding pleas and what evidence is relevant without the guarantee of counsel. Under the AFA, a summary of evidence[174] or an abstract of

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[171] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROVIDING DEFENSE SERVICES 13 (Approved Draft 1968).

[172] GHANA CONST. art 19 (1992).

[173] GHANA PARLIAMENTARY DEBATE (4th ser.) 1997.

> It was noted by a Member of Parliament, Joseph Darko Mensah that the punishments for offenses established under the Armed Forces Act range from the death penalty, life imprisonment, two to ten years imprisonment amongst others. Therefore, there is an urgent need to establish a Ghana Armed Forces Defense Counsel office to undertake the defense of all those who are subject to the code of service discipline. In his opinion, there is a need to put measures in place to engage defense counsel in the Armed Forces to defend those who require such services to avoid miscarriage of justice.

Id. *See also* Allotey Thesis, *supra* note 36.

[174] AFR, *supra* note 12, art 109.02. The Regulation states that a summary of evidence shall be taken if:

evidence[175] must be taken before trial. A summary of evidence provides the facts that will support the necessary ingredients in a charge.[176] After all the evidence against the accused has been given, the accused shall be asked:

> Do you wish to say anything? You are not obliged to do so, but if you wish, you may give evidence on oath, or you may make a statement without being sworn. Any evidence you give or statement you make will be taken down in writing and may be given in evidence.[177]

Despite the implications a sworn statement would have, the accused is not given the facilities to prepare his defense adequately.[178] The commanding officer may permit counsel or an officer who assisted the accused to be present to advise the accused.[179] The defense counsel simply serves as an advisor, but is not permitted to cross-examine witnesses.[180] Under the AFA, the accused is the one allowed to cross-examine the witnesses.[181] The importance of cross-examination in any case cannot be over emphasized. A great disservice is done to the accused, and justice may elude him.

Furthermore, during a summary trial, an accused servicemember is not represented by counsel and has no right of appeal. Though he is entitled to an adviser, "the function of the adviser is to assist the accused, both before and during trial in respect of any technical or specialized aspect of

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> (a) the maximum punishment for the offence with which the accused is charged is death, or
> (b) the accused, at any time before the charge is referred to higher authority, requires in writing that the summary of evidence be taken, or
> (c) the commanding officer is of the opinion that the interests of justice require that a summary of evidence be taken.

Id.

[175] The AFA states, among other things, that that the abstract shall consist of signed statements by such witnesses as are necessary to prove the charge. AFA, *supra* note 12, art. 109.03.

[176] Allotey Thesis, *supra* note 36, at 67.

[177] AFA, *supra* note 12, art. 109.02.

[178] Allotey Thesis, *supra* note 36, at 67.

[179] AFA, *supra* note 12, art. 108.26.

[180] *Id.* art. 109.02.

[181] *Id.* art. 109.02 (b).

the case. He is not permitted to take part in the proceedings before the court."[182]

In a trial by court-martial, the accused is also not provided with defense counsel, though he is given the opportunity to secure the services of a civilian counsel.[183] The fees charged are usually high, and many service members cannot afford the fees. Furthermore, an accused may be in custody far away from the reach of counsel, and it may be difficult, if not impossible, to secure these services. Furthermore, military law is unique, and a civilian defense counsel who is not familiar with military law may not be able to provide the requisite defense to aid his client. Indeed, "the denial of counsel to a member of the armed forces charged with a serious crime finds justification neither in the necessity nor the practice of the military and assuredly not in concepts of 'fair trial' fundamental to our way of life."[184]

It is therefore important that the right to defense counsel for a military accused be codified to ensure that charges can be preferred against any commander who disregards regulations. This provision would go a long way to ensure that the fight towards the attainment of due process is achieved.

The introduction of defense counsel will also improve the perception of the defense function in the Army.[185] An accused will be content to know that he can rely on the service to provide the requisite assistance at no cost to him when the need arises. The introduction of military judges will also contribute immensely towards the attainment of due process under the military justice system in Ghana.

C. Introduction of Military Judges/Magistrates

Introducing military judges/magistrates into the military justice system of Ghana is required in order to implement the proposed restructuring of the pre-trial confinement procedure. Military magistrates or judges will be required in order to ensure judicial efficiency and protect

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[182] *Id.* art. 111.60.
[183] *Id.*
[184] Chester J. Antieau, *Courts-Martial and the Constitution*, 33 MARQ. L. REV. 35 (1949).
[185] Lieutenant Colonel John R. Howell, *TDS: The Establishment of the U.S. Army Trial Defense Service*, 100 MIL. L. REV. 1, 46 (1983).

against unlawful command influence. Although this may not be sufficient to remove the appearance of command control or influence the decision of whether an individual should continue in pre-trial confinement, it would be a positive step towards making bail workable under the military justice system in Ghana.[186] It will also be an effort to restructure the pre-trial confinement procedure through regulatory procedures.[187] The "decision to keep a military accused in confinement should be a judicial function and not a prosecutorial function to be carried out by the commanding officer."[188] It is envisaged that command influence in decisions may be greatly reduced if soldiers are tried by independent military judges.

Under the current military justice system in Ghana, an application is made to the chief justice who is empowered to appoint a person to officiate as judge advocate at a General Court-Martial.[189] Although the judges nominated by the chief justice are protected from the unlawful command influence of the military, it is usually very difficult to procure their services immediately. Assigned courts-martial judges from the civilian courts would usually want to dispose of their cases in the civilian courts, further delaying the time for trial of the accused.[190] This leads to a delay in the disposal of cases, and the accused may still be in pre-trial confinement during this period. It is also impossible for civilian judges to travel to areas of operation outside the country to try cases.[191]

Introducing military judges would guarantee availability of judges and increase the proficiency of adjudicating cases. The decision to place a military accused in confinement must be made by a military judge who is not responsible for the prosecution of the case. These judges would remain independent of the commander and responsible only to the judge advocate general. Furthermore, this would remove from the commander the burden of making legal decisions that should properly be in the hands of persons who are trained in law.[192]

Another option could be that military magistrates hold power that would allow an accused to be released on bail, or to impose any restrictions

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186 *See* O' Callahan v Parker, 395 U.S 258 (1969).
187 U.S. DEP'T. OF ARMY, REG. 27-10, MILITARY JUSTICE 16-3 (September 1974).
188 Sepulveda Thesis, *supra* note 74, at 39.
189 GHANA ARMED FORCES REG. vol. II, art. 111.22; *See also* Armed Forces Act § 68.
190 Allotey Thesis, *supra* note 73, at 73.
191 *Id*.
192 Henry B. Rothblatt, *Military Justice: The Need for Change*, 12 WM. & MARY L. REV. 463 (1971).

on the accused in lieu of bail, if he determines it necessary to reasonably ensure the presence of the accused at trial. An exception to this could be provided in the case of military exigencies, such as units in a combat situation. In those cases, this exception could mirror the current system empowering commanders to make pre-trial confinement determinations.[193] However, this should be the exception and not the rule.

D. Checks on Undue Command Influence

Another factor that bears heavily on the perception of fairness in military justice is the role played by commanders. Unlawful command influence is the "mortal enemy of military justice."[194] In Ghana, although substantial changes have been made over the years in a bid to limit the influence of the commander in the trial process,[195] the specter of unlawful command influence raises its ugly head every few years.[196] Commanders historically have been attacked as an obstruction to fair implementation of the various phases of the military justice system.[197]

> Anyone with the authority to confine at his disposal and who is also given the responsibility to maintain order and discipline will find it difficult not to easily dispose of an accused by confining him rather than granting him his liberty for the period prior to the trial date of his case.[198]

It is indeed "ironic that the positive attributes of command and control which ensure the military justice system works smoothly, quickly, and justly can become the bane of the system." [199] Under the AFA, commanders can preside over the disciplinary boards they appoint.[200] Consequently, the commander can directly or indirectly exercise undue

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[193] *Id*.
[194] Moorman, *supra* note 10, at 203.
[195] One notable change was the introduction of the Disciplinary Board who will make a decision based on majority as compared to the commanding officer making the decision alone. *See* AFA, *supra* note 12.
[196] SCHLUETER, *supra* note 84, at 6. *See also* The State v. LTC John Ackon, GCM (1986) (unreported) (Ghana). In this case, the commanding officer found unacceptable the punishment meted out to the accused—and released all members of the court-martial from the armed forces without reason. *Id.*
[197] Sepulveda Thesis, *supra* note 74.
[198] *Id*.
[199] SCHLUETER, *supra* note 84, at 374.
[200] AFA, *supra* note 12, § 63(1).

influence on the very panel that he has appointed. In fact, command influence can be a threat even before an accused reaches the courtroom.[201] The convening authority could also influence the court-martial in the selection of court members.[202] It is the court-martial members, not the commander, who will determine whether or not the accused is guilty,[203] and if found guilty, what sentence to impose.[204]

Command influence is not isolated to the court-martial selection process.[205] The commanding officer may directly or indirectly exercise undue influence on the panel by any statement that he makes.[206] "The fear that the commander will unduly influence the results of a given trial is founded in part upon the patently contradictory nature of his multifaceted functions and upon empirical evidence that some commanders do indeed try to exert such influence."[207] Post-trial comments by commanders or other senior officers on how a particular case has been determined are also likely to impact potential court members of disciplinary boards.[208] Comments from commanders may result in a subordinate taking steps that he feels the general wants implemented.[209]

Furthermore, commanders are advised to exercise discretion in the determination of pre-trial custody. It has been opined that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. The absence of procedural rules based upon constitutional principle has not always produced, fair, efficient, and effective procedures."[210]

Consequently, commanders must be removed as decision-makers insofar as the determination of pretrial confinement is concerned.[211] The decision to retain an accused in pre-trial detention must be a judicial function, not to be carried out by the commander who would usually place his personal interests above that of the accused. It is appropriate that

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201 Spak, *supra* note 14, at 461.
202 AFA, *supra* note 12, art. 111.06.
203 *Id*. art. 112.49.
204 *Id*.
205 Spak, *supra* note 14, at 461.
206 Allotey Thesis, *supra* note 36, at 7.
207 Rothblatt, *supra* note 192, at 461.
208 Allotey Thesis, *supra* note 36, at 7.
209 SCHLUETER, *supra* note 84, at 6.
210 ReGault, 387 U.S. 1, 18 (1967).
211 Sepulveda Thesis, *supra* note 74.

commanders are guided by objective evaluation mechanisms to ensure that pre-trial detention is not unnecessarily arbitrary.

Most commanders are cognizant enough to avoid open attempts to influence a court-martial;[212] however, this is not so in all cases.[213] In Ghana, unlawful command influence is not specifically codified under the AFA.[214] Though a commander can be charged for conduct prejudicial to good order and discipline under section 54 of the AFA,[215] it is important for such an offense to be specifically codified in the AFA.

VII. Mechanism for Changing Ghana's Military Justice System

The Constitution of Ghana contains a provision for the establishment of the Armed Forces Council.[216] Among the responsibilities and functions of the Council is the making of regulations for the performance of its functions and for the effective and efficient administration of the Armed Forces.[217] Consequently, in order to effect any proposed changes to the Armed Forces Act and Regulations, any such changes must be submitted to the Chief of Staff.[218]

The Chief of Staff must also submit a memorandum to the Chief of Defense Staff.[219] The Minister of Defense, who is a member of the Armed Forces Council, will be informed of the proposed changes to be forwarded

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[212] SCHLUETER, *supra* note 84, at 375.

[213] *See* Allotey Thesis, *supra* note 36. In one instance the military lawyer prosecuted a Lieutenant Colonel of the Ghana Army for fraudulent misapplication of military property under section 52 of the Armed Forces Act and to the prejudice of good order and discipline under section 54 of the Armed Forces Act. *Id.* The officer was convicted and awarded the punishment of "loss of seniority." Two days later all the panel members were administratively discharged from the service for no stated reason. However, this was during the revolutionary era in Ghana. *Id.*

[214] *See generally* AFA, *supra* note 12.

[215] AFA, *supra* note 12, §54.

[216] GHANA CONST. art. 210 (1992). This article directs that the Armed Forces Council shall consist of the Vice-President, who shall be chairman; the Ministers responsible for defense, foreign affairs and internal affairs; the Chief of Defense Staff; The Service Chiefs; a senior Warrant Officer or its equivalent in the Armed Forces; and two other persons nominated or appointed by the President acting in consultation with the Council of State. *Id.*

[217] GHANA CONST. art. 214(2) (1992).

[218] Frederich Ebert Stifung, *The Law-making Process in Ghana: Structures and Procedures* (Jan. 2011), http://library.fes.de/pdf-files/bueros/ghana/10506.pdf.

[219] *Id.*

to the Council for deliberation.[220] If the statute is to be amended, the Legal and Constitutional Committee in Parliament responsible for deliberations on the change will be given a copy of the proposals for the initiation of the appropriate Parliamentary process.[221]

A. Statutes and Regulations Needing Amendment

The Armed Forces Act must be amended to introduce significant changes to aid in the attainment of due process. The proposed statutes and regulations requiring amendment are the appointment of a prosecutor for general and disciplinary courts-martial; addition of defense counsel; introduction of an unlawful command influence offense; and procedures for pretrial confinement review, with a few proposed exceptions.

1. Appointment of Prosecutor for General and Disciplinary Courts-Martial

Article 111.23 of the Armed Forces Regulations states that "a prosecutor shall be appointed for each general court-martial." This article should be amended to read, *"Appointment of Prosecutor and Defense Counsel for General Court Martial."* Article 111.42 of the Armed Forces Regulations also states that "a prosecutor shall be appointed for each disciplinary court-martial."[222] This article should be amended to read, "*Appointment of Prosecutor and Defense Counsel of Disciplinary Court-Martial."*

2. Introduction of the Offense of Unlawful Command Influence

To prevent the problem of unlawful command influence under the military justice system in Ghana, a section relating to the offense of unlawful command influence must be specifically codified under the AFA. The proposed amendment should read as follows:

> (1) No convening authority or commander may censure, reprimand, or admonish a court-martial or other military

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220 *Id.*
221 *Id.*
222 AFR, *supra* note 12, art 111.42.

> tribunal or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court-martial or tribunal, or with respect to any other exercise of the functions of the court-martial or tribunal or such persons in the conduct of the proceedings.[223]
> (2) No person subject to the code may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case or the action of any convening, approving or reviewing authority with respect to such authority's judicial acts.[224]

4. Procedures for Review of Pretrial Confinement

Furthermore, it is proposed that a section be introduced under the AFA to review the necessity for an accused to remain in pre-trial confinement for a non-capital offense. Since the Constitution of Ghana states that an accused shall be brought before court within forty–eight hours, it is proposed that save military exigencies, military magistrates must review pre-trial confinement. The proposed section would read:

"A military magistrate shall, within forty-eight hours of pretrial confinement, determine the appropriateness or otherwise of continued detention and lay down conditions for the release or otherwise of the accused person."[225]

5. Exceptions

The following are proposed exceptions that may address the objections advocates against change have made:

(a) Operational Necessity:

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[223] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 104 (2012). The author believes that the specific charge of unlawful command influence, if introduced under the military justice system in Ghana as it pertains in the United States, will help minimize the problem as it would make commanders aware of the repercussions of their acts.
[224] *Id.*
[225] *Id*. R.C.M. 305.

> A military accused may remain in pretrial confinement when operational exigencies exist, thereby rendering it impracticable for the accused to come before a military magistrate within forty-eight hours of being ordered into pretrial confinement.[226]
>
> (b) At Sea:
>
> In the case of pretrial confinement at sea, the rule of appearing before a military magistrate within forty-eight hours shall not apply. In such situations, confinement on board the vessel at sea may continue only until the person can be transferred to a confinement facility ashore. Such transfer shall be accomplished at the earliest opportunity permitted by the operational requirements and mission of the vessel.[227]

B. General Law and Procedure Proposed

The amended statutes and the regulations of the AFA and the Armed Forces Regulations would introduce responsibilities on the part of the Armed Forces. It shall ensure that an accused is afforded due process with the introduction of "new wine,"[228] which is greatly advocated for by the constitution. Furthermore, the powers that commanders wield in their discretion to impose pretrial custodial sentences on accused persons will be considerably whittled down, as military magistrates shall have that authority.

VIII. Impact of Change

The overall impact of change in the military justice system will align the military justice system to the democratic principles prescribed by the constitution. Although the Ghana armed forces are an all-volunteer force,[229] joining the military should not result in the forfeiture of rights granted under the constitution. Justice and fairness ultimately effect

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[226] *Id*.
[227] *Id*.
[228] Manning, *supra* note 7.
[229] PETE ROWE, THE IMPACT OF HUMAN RIGHTS LAW ON THE ARMED FORCES 68 (2006).

command discipline. Therefore, the introduction of the "new wine"[230] will greatly contribute to military effectiveness.

In addition, the introduction of defense counsel will go a long way to provide for a fair trial as prescribed by the Constitution. The checks and balances to be placed on undue command influence will insure that military lawyers and magistrates are given the statutory protection they need, and motivate them to work without any fear of repercussions from commanders prone to disregard instructions. Moreover, the introduction of military judges and magistrates will not only shield the process of pretrial confinement from unlawful command influence, but will make the process of pre-trial confinement more efficient, and insure that legal decisions are made by those who are legally trained.

IX. Conclusion

> *I know, however, of no system of criminal justice system [that] does not have great room for improvement, and the military system is, in this regard, certainly no exception*.[231]

The introduction of "new wine"[232] into the military justice system in Ghana is espoused with the full realization that there are differences between the military and civilian community. However, those differences do not negate the need for reform. "Institutions have a natural tendency to resist calls for change, especially when these calls come in the form of accusations that the institution is systematically violating the Constitution."[233] Though discipline is important for the military, authority can be abused.[234] Different standards may be justified, but it becomes too easy to rely on general arguments of military necessity to rationalize what may be essentially arbitrary.[235]

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[230] Manning, *supra* note 7.
[231] Rothblatt, *supra* note 192, at 456.
[232] Manning, *supra* note 7.
[233] Steven J. Mulroy, *Hold On: The Remarkably Resilient, Constitutionally Dubious "48-Hour Hold"* (Univ. of Memphis Working Paper), http://ssrn.com/abstract=2101137.
[234] Captain Jack E. Owen Jr., *A Hard Look at the Military Magistrate Pretrial Confinement Hearing: Gerstein and Courtney Revisited*, 88 MIL. L. REV. 3, 47 (1980).
[235] *Id*.

The practice of pre-trial confinement without bail has continued with the least justification, save that of the military's fear that it would result in the downfall of discipline.[236] Indeed, "when the authority of the military has such sweeping capacity for affecting the lives of the citizenry, the wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts almost inevitably is drawn into question."[237] The administration of justice under the military justice system of Ghana must be efficient, fair, and constitutional. "It must accommodate both the commander's legitimate need to promote good order and discipline and the service member's right to be free of illegal or unnecessary pretrial incarceration."[238]

Overall, the rational basis of any bail system is to promote and protect the interests of society as well as the constitutional rights of the individual. Of course, a balance must be struck to reconcile the two competing interests, and there should not be any unnecessary recognition of one of the interests to the prejudice of another.[239]

The military has come under criticism from the courts and the Constitution Review Commission because of the divergent standards between the military and the civilian requirements for justice and a fair trial. Therefore, it is only appropriate to furnish those in uniform with the same rights accorded to a civilian, especially in granting bail for a non-capital offense. Military law is dynamic and must adapt to fit the needs of the changing society from which the military draws its most precious resource, the human resource.[240]

The *Nikyi* case must be a constant reminder of the perception of unfairness that is attributed to the military justice system in Ghana. The case has brought to light that the Human Rights Court will not hesitate to apply constitutional safeguards as outlined in the Constitution, irrespective of whether the affected persons are military or civilian. The military must therefore be in line with the practice and procedure that is used in the civilian courts in granting bail for non-capital offenses. The opportunity to be granted bail is a vital step towards the attainment of due process in accordance with the constitution. The history of Ghana, with blatant

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236 RIVKIN, *supra* note 70, at 4.
237 Warren, *supra* note 77, at 181-82.
238 Owen, *supra* note 234, at 55.
239 Goro, *supra* note 113.
240 Owen, *supra* note 234, at 54-55.

disregard of human rights, must not be written again. Ghana must strive to follow the rules of international and regional human rights law that it has ratified.

Equally important to reforming the AFA so that it is constitutionally compliant is the need to make organizational changes, such as an increase in manpower, introduction of defense counsel, military magistrates, and checks on undue command influence. Without these changes, the introduction of the "new wine"[241] in the military justice system in Ghana will fail.

There is room for reform before the point is reached when change would present a substantial threat to military discipline and efficiency.[242] It is hoped that this article has brought to light the need to carry out some pertinent changes in a bid for the military to meet the due process requirements under the constitution. The preamble to the 1992 Constitution reads in part:

> We the People of Ghana, in exercise of our natural and inalienable right to establish a framework of government which shall secure for ourselves and posterity the blessings of liberty, equality of opportunity and prosperity . . . and in solemn declaration and affirmation of our commitment to . . . the protection and preservation of Fundamental Human Rights and Freedoms, Unity and Stability for our nation, enact and give to ourselves this Constitution.[243]

Embedded in these words are the values underpinning Human Rights. Liberty, equality, and prosperity represent their concerns for human dignity and the wellbeing of the people.[244]

The old gospel song asks: "Will there be any stars in my crown when at evening the sun goeth down?"[245] When the history of Ghanaian military law is written, will there be any stars in its crown? Yes, there must!

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[241] Manning, *supra* note 7.
[242] Bishop, *supra* note 82, at 221.
[243] GHANA CONST. pmbl. (1992).
[244] Peter Atudiwe Atupare, Judicial Review and the Enforcement of Human Rights: The Red and Blue Lights of the Judiciary of Ghana (July 2008) (unpublished LL.M. thesis, Queen's University) (on file with the Queen's University Library system).
[245] ALISON KRAUSS, WILL THERE BE ANY STARS (Rounder 1994).

OLD SOLDIERS NEVER DIE: PRIOR MILITARY SERVICE AND THE DOCTRINE OF MILITARY DEFERENCE ON THE SUPREME COURT

SHANNON M. GRAMMEL*

I. Introduction

One summer afternoon in 1942, a field telephone posted on the side of a tree in Fort Benning, Georgia rang to announce a call for Lieutenant Colonel Frank Murphy.[1] The caller requested that he take temporary leave from his military training exercises to report to the Supreme Court, which had convened during its summer recess to rule on the validity of a military tribunal assembled to prosecute eight Nazi spies.[2] Duty was calling upon Frank Murphy, and it was doing so not in his capacity as an officer of the United States Army Reserve, but rather as a Justice of the Supreme Court of the United States.[3]

Any observer would have been hard pressed to distinguish these two functions when Justice Murphy returned to the Court. He ascended its

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* J.D. Candidate, June 2017, Stanford Law School, A.B., Government, 2010, Harvard College. Many thanks to Professor Daniel Carpenter for his guidance and to Colonel Timothy Grammel for his expertise. Thank you, also, to Tammy Grammel, Dan Zangri, Madeline Gray, and Amy Alemu for their masterful editing.

[1] Sidney Fine, *Mr. Justice Murphy in World War II*, 53 AM. J. LEGAL HIST. 90, 98 (1966) (citing N.Y. TIMES, July 28, 30, 1942).

[2] Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59, 70 (1980). This special session ultimately heard the case of *Ex parte* Quirin, 317 U.S. 1 (1942).

[3] Justice Murphy had previously served in the Army for a year during World War I. *See* J. WOODFORD HOWARD, MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY 14 (1968). After the Japanese attack on Pearl Harbor, Justice Murphy asked General George C. Marshall if he could serve in the United States Army once again. *Id.* General Marshall denied the request, concerned with Justice Murphy's age. *Id.* Justice Murphy, however, relentlessly persisted in his pleas until General Marshall finally agreed to allow him to undergo training as a lieutenant colonel in the Army Reserve during the Court's summer recess. *Id.* He became the first acting Justice to accept a commission from and undergo training with the military. *See* Fine, *supra* note 1, at 93-95. Murphy, proud of his ability to rough standard Army conditions and thrilled to be wearing the uniform again, fancied himself once again one of the boys. "I am a field soldier, and I am not immodest when I tell you I stood up under the drive and the sleepless nights better than the young officers." *Id.* at 99 (quoting Letter from Frank Murphy to Frank Parker (Aug. 9, 1942), Frank Murphy Papers (Michigan Historical Collections, Ann Arbor)).

marble steps in July dressed not in black robes, but rather in his United States Army Reserve uniform.[4] This unprecedented sartorial statement "served but to dramatize the peculiar status of the Michigan jurist."[5] And this status did not go unchallenged. Many of the other Justices expressed misgivings about having an officer of the Army Reserve hear a case calling the legitimacy of a military body into question.[6] Alerted of these misgivings and wishing to avoid any criticism of the Court, Justice Murphy ultimately elected to recuse himself from the case.[7]

This symbolic image of a uniformed officer in the United States Army Reserve sitting alongside eight robed Supreme Court Justices evokes important questions of the relationship between the military and the Court by way of a unique set of intermediaries: Supreme Court Justices with prior military experience. How does firsthand insight into the mechanics of the military apparatus impact the approach Justices take toward the military when the issue of military deference is at hand? How do these Justices view their current roles on the Court in relation to their prior roles on the battlefield?[8] What does the military composition of the Court mean for both the present and future of the doctrine of military deference?

These questions have been asked, but never answered.[9] It is precisely this conspicuous void in research that this article aims to fill.

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[4] Fine, *supra* note 1.

[5] *Id.*

[6] A. Christopher Bryant & Carl Tobias, Quirin *Revisited*, 2003 WIS. L. REV. 309, 322 (noting that Justice Felix Frankfurter, himself a veteran of the First World War, expressed such misgivings).

[7] Belknap, *supra* note 2, at 78 ("[A]fter 'some remarks were passed in Conference' about the propriety of his participation, Murphy elected to withdraw, 'lest a breath of criticism be leveled at the Court.'" (quoting Note to Ed (Kemp), Sep. 10, 1942, Box 47, Frank Murphy MSS, Michigan Historical Collections, University of Michigan)).

[8] Justice Frank Murphy served *simultaneous* roles on the Court and in the military.

[9] *See, e.g.*, Steven B. Lichtman, *The Justices and the Generals: A Critical Examination of the U.S. Supreme Court's Tradition of Deference to the Military, 1918-2004*, 65 MD. L. REV. 907, 949 (2006) ("Later research will . . . place Justices' military case voting record within a biographical context, paying close attention to the military case voting records of the [men and women who] have sat on the Supreme Court while having previously served in the military."); John F. O'Connor, *Statistics and the Military Deference Doctrine: A Response to Professor Lichtman*, 66 MD. L. REV. 668, 671 (2006) [hereinafter O'Connor, *Statistics and Deference*] (suggesting research into how the composition of the Court has changed and how such change will affect the future development of the doctrine); *cf.* Gregory C. Sisk et al., *Charting the Influences on the*

While the doctrine of military deference, the impact of service in the military, and the process of judicial decision-making have all been studied in their own right, the overlap between the three has heretofore been neglected in the literature. This article aims to correct that neglect, illuminating, at the level of the individual Justice, the relationship between prior military service and judicial behavior in military deference cases. By way of statistical analysis, and contrary to intuition, it finds that Justices with prior military service who served on the Supreme Court between 1942 and 2008 tended to be less deferential in military deference cases than those without.

This article proceeds in four parts. After the introduction in Part I, Part II provides the background and context necessary to understand the analysis conducted in this article and its greater stakes. Part III then investigates the impact of military service on the doctrine of military deference by the numbers, continuing the newly emerging trend in statistical analysis of the military deference doctrine. Through analyzing a catalog of sixty-eight military deference cases and the corresponding voting record,[10] this article finds that the Justices with prior military service who served on the Supreme Court between 1942 and 2008 tended to be less deferential toward the military than those without. This analysis also finds strong evidence of an association between military service and a more liberal judicial ideology, which is a statistically significant predictor of deferential voting behavior. Part IV, in conclusion, reflects on the scope and implications of these findings and sets the stage for further inquiry into the nuanced interplay between military service and judicial cognition.

II. The Military and the Court: A Background

When Justice John Paul Stevens—a World War II veteran with three years of naval intelligence experience—retired from the Supreme Court in 2010, he left behind a bench, the likes of which had not been seen since 1936: not a single Justice on the Court had any military

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Judicial Mind: An Empirical Study of Judicial Reasoning, 73 N.Y.U. L. REV. 1377, 1478 (1998) ("Military experience has received little attention in empirical studies as a potential influence on judicial behavior.").

[10] This record contains votes cast by thirty-six Justices, twenty of whom are military veterans.

experience.[11] This dearth of military insight persists to this day.[12] Regarding this conspicuous gap that he would leave behind, Justice Stevens remarked, "Somebody was saying that there ought to be at least one person on the Court who had military experience . . . . I sort of feel that it is important. I have to confess that."[13]

The background and analysis discussed in this article lend credence to Justice Stevens's confession. It first provides a working definition of the Court's doctrine of military deference, before surveying the current state of research on the topic. This initial analysis is then followed by a second, limited exploration—setting the stage for Part III—of the myriad ways in which military service shapes the way veterans think.

A. Defining the Military Deference Doctrine

The military has forever occupied a unique place in American society, and this is no less true in the context of the judiciary. Indeed, the Supreme Court has historically afforded the United States military an unprecedented level of deference when the military is involved in the case at bar.[14] This doctrine of military deference is exemplified in the case of *Goldman v. Weinberger*,[15] in which Justice Rehnquist,[16] writing for the majority, noted that the Court's "review of military regulations challenged on First Amendment grounds [was] far more deferential than constitutional review of similar laws or regulations designed for civilian society."[17] When it comes to the military, he instructed, "courts must

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[11] *See* Andrew Cohen, *None of the Supreme Court Justices Has Battle Experience*, THE ATLANTIC (Aug. 13, 2012), http://www.theatlantic.com/national/archive/2012/08/none-of-the-supreme-court-justices-has-battle-experience/260973.

[12] While it is true that Justices Breyer and Alito served in the Unites States Army Reserve and Justice Kennedy served in the California National Guard, none of these men ever saw combat. *Id.*

[13] Jeffrey Toobin, *After Stevens*, THE NEW YORKER (Mar. 22, 2010), http://www.newyorker.com/magazine/2010/03/22/after-stevens.

[14] Lichtman, *supra* note 9, at 910 ("While all litigants are granted presumptions of subject-matter expertise, only the military's subject-matter expertise is habitually shielded from rigorous constitutional evaluation.").

[15] Goldman v. Weinberger, 475 U.S. 503 (1986).

[16] Justice Rehnquist was himself a veteran of the United States Army Air Corps and served abroad during World War II. Charles Lane, *Head of the Class*, STAN. MAG. (July/Aug. 2005), http://alumni.stanford.edu/get/page/magazine/article/?article_id=33966.

[17] *Goldman*, 475 U.S. at 507.

give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."[18] The Court has employed four primary rationales in *Goldman* and like cases to justify its unparalleled deference to the military: the separation of powers, institutional competence, military necessity, and the separateness of the military community.[19]

1. The Separation of Powers

The Supreme Court's doctrine of military deference has often been tethered to the Constitution's separation of powers.[20] Perhaps the most obvious grant of military power in the Constitution is Article II's christening of the President as the "commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States."[21] Congress, likewise, is granted a host of military powers in Article I. It may "declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."[22] It may "raise and support armies"[23] and "provide and maintain a navy."[24] It may "make rules" for governing these forces[25]; "call[] forth the militia to execute the laws of the union, suppress insurrections and repel invasions"[26]; and "provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States."[27] Any search for a similar charge among the judiciary's responsibilities, however, will come up short, as Article III contains absolutely no mention of the military.[28]

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[18] *Id.*

[19] *See, e.g.*, Kelly E. Henriksen, *Gays, the Military, and Judicial Deference: When the Courts Must Reclaim Equal Protection as Their Area of Expertise*, 9 ADMIN. L. REV. AM. U. 1273, 1276-79 (1995) (listing three historical justifications for the doctrine of military deference: "separation of powers," "the military as a 'separate community,'" and "the perceived limits of the courts' competence in dealing with the complex aspects of the military establishment").

[20] *See id.*

[21] U.S. CONST. art. II, § 2.

[22] U.S. CONST. art. I, § 8, cl. 11.

[23] U.S. CONST. art. I, § 8, cl. 12.

[24] U.S. CONST. art. I, § 8, cl. 13.

[25] U.S. CONST. art. I, § 8, cl. 14.

[26] U.S. CONST. art. I, § 8, cl. 15.

[27] U.S. CONST. art. I, § 8, cl. 16.

[28] U.S. CONST. art. III.

This separation of powers rationale maintains that, given the constitutional allocation of military powers, the Court should leave it to the political branches to make those military decisions the Constitution placed exclusively in their hands. Chief Justice Rehnquist, the purported father of the military deference doctrine,[29] famously noted in *Rostker v. Goldberg*[30] that "judicial deference to [any] congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."[31] The Court likewise declared in *United States v. O'Brien*[32] that "[t]he constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping."[33] With respect to the military authority of the Commander in Chief, the majority in *Loving v. United States*[34] "[gave] Congress the highest deference in ordering military affairs. And it would be contrary to the respect owed the president as commander-in-chief to hold that he may not be given wide discretion and authority."[35]

2. Institutional Competence

Logically following the rationale that Congress and the President were granted constitutional powers to lead and regulate the armed forces is the argument that the Supreme Court lacks the necessary expertise to decide on military matters. This logic is epitomized in the majority opinion for *Gilligan v. Morgan*:[36]

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[29] O'Connor, *Statistics and Deference*, *supra* note 9, at 703 ("That being said, however, the modern military deference doctrine is very much the brainchild of Chief Justice Rehnquist, in that he authored virtually every majority opinion since 1974 in which the Court has applied the military deference doctrine.").

[30] Rostker v. Goldberg, 453 U.S. 57 (1981) (holding that requiring only males to register for the draft did not violate Fifth Amendment equal protection guarantees).

[31] *Id.* at 67.

[32] United States v. O'Brien, 391 U.S. 367 (1968) (finding no constitutional defect in jailing an anti-war protestor for burning his draft card).

[33] *Id.* at 377.

[34] Loving v. United States, 517 U.S. 748 (1996) (granting the president, as commander-in-chief, deference in declaring aggravating factors that allow for capital punishment in courts-martial).

[35] *Id.* at 768.

[36] Gilligan v. Morgan, 413 U.S. 1 (1973). While this case, involving the governor of Ohio's employment of the National Guard in quelling a student demonstration, is not itself a military deference case, its language has been adopted as one of the doctrine's

> [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.[37]

The Court similarly noted in *Chappell v. Wallace*[38] that "courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have."[39] Put succinctly,[40] "neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people."[41]

3. Military Necessity

In the words of Chief Justice Earl Warren, "the action in question [in military deference cases] is generally defended in the name of military necessity, or, to put it another way, in the name of national survival."[42] This argument of military necessity stands as perhaps the quintessential justification of military deference. Courts should be reluctant to interfere in military matters, the argument goes, lest they hinder the effectiveness of our fighting force and leave our nation and the liberties it embodies vulnerable to outside attack.[43] The Court accordingly opined in *Chappell*

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most cited justifications. *See, e.g.*, Winter v. NRDC, Inc., 555 U.S. 7, 24 (2008); United States v. Shearer, 473 U.S. 52, 58 (1985); Chappell v. Wallace, 462 U.S. 296, 301-02 (1983).

[37] *Gilligan*, 413 U.S. at 10.

[38] Chappell v. Wallace, 462 U.S. 296 (1983) (holding that enlisted military personnel cannot sue their military superiors for damages over alleged constitutional violations).

[39] *Id.* at 305 (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962)) (internal quotations omitted).

[40] Boumediene v. Bush, 553 U.S. 723, 797 (2008) (holding that detainees at the military prison at Guantanamo Bay have a constitutional right to habeas corpus).

[41] *Chappell*, 462 U.S. at 797.

[42] Earl Warren, *The Bill of Rights and the Military*, 37 N. Y. U. L. REV. 181, 183 (1962).

[43] *See* Parker v. Levy, 417 U.S. 733, 758 (1974) ("[T]he fundamental necessity for obedience, and the consequent necessity for discipline, may render permissible within the military that which would be constitutionally impermissible outside it."); WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 205 (2001) ("Judicial

that "[t]he inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection."[44] In *Wayte v. United States*,[45] Justice Powell likewise noted that "[f]ew interests can be more compelling than a nation's need to ensure its own security . . . . Unless a society has the capability and will to defend itself from the aggressions of others, constitutional protections of any sort have little meaning."[46]

But these same protections can be robbed of their meaning by the very argument Justice Powell espouses to safeguard them. Should the Court lean too heavily on the crutch of military necessity, it risks allowing the nation to fall prey to equally ruinous forces at home. This is, regrettably, exactly what happened in *Korematsu v. United States*.[47] In what is perhaps the Court's most notorious military deference case, it upheld an exclusion order demanding internment of Japanese Americans. The Court held: "because the properly constituted military authorities feared an invasion of our West Coast . . . they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily."[48] This outcome highlights the inherent danger in the quasi-balancing approach to deference the Court employed in *Korematsu*: it is always possible for the balance to tip in the wrong direction.

4. The Separateness of the Military Community

Finally, in a variation on the military necessity argument, the Supreme Court has often noted the unique nature of the military

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inquiry, with its restrictive rules of evidence, orientation towards resolution of factual disputes in individual cases, and long delays, is ill-suited to determine an issue such as 'military necessity.'"); Stanley Levine, *The Doctrine of Military Necessity in the Federal Courts*, 89 MIL. L. REV. 3, 23-24 (1980) ("Supreme Court decisions of the past six years have contributed to the formation of a significant, even controlling, doctrine of military law that overrides constitutional considerations whenever there is a significant governmental interest in upholding command discipline and authority.").

[44] *Chappell*, 462 U.S. at 300.

[45] Wayte v. United States, 470 U.S. 598 (1985) (holding that "passive enforcement" of draft registration laws did not violate the First and Fifth Amendments).

[46] *Id.* at 611-12.

[47] Korematsu v. United States, 323 U.S. 214 (1944).

[48] *Id.* at 223.

community in applying the doctrine of deference. The military apparatus is built on a foundation of strict order and obedience that has no exact analogue in civilian society. This foundation is *so* different, the Court argues, that it justifies a different application of the Constitution within the military's ranks. The Court famously made this argument in *Parker v. Levy*,[49] deeming the military, "by necessity, a specialized society separate from civilian society."[50] This uniqueness rationale cropped up again in *Schlesinger v. Councilman*[51]: "To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline . . . are founded on unique military exigencies as powerful now as in the past."[52] The Court, in *Orloff v. Willoughby*,[53] presented what some consider an extreme twist on this uniqueness justification.[54] Recognizing that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian," it concluded that "the judiciary [need] be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."[55]

B. Studying the Military Deference Doctrine

The Court's application of the military deference doctrine has been the subject of intense debate both within the Court and among legal scholars. Before delving into this debate, this article will highlight two of its most prominent voices. First, is Steven Lichtman, author of a groundbreaking statistical analysis of the military deference doctrine.[56]

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[49] Parker v. Levy, 417 U.S. 733 (1974) (upholding the conviction of an Army doctor who not only criticized American involvement in Vietnam, but also urged soldiers to refuse orders to deploy to Vietnam, himself refusing orders to train special forces soldiers).

[50] *Id.* at 743.

[51] Schlesinger v. Councilman, 420 U.S. 738 (1975) (finding that federal courts should refrain from involvement in the military criminal process until all military appeals options have been exhausted).

[52] *Id.* at 757.

[53] Orloff v. Willoughby, 345 U.S. 83 (1953).

[54] *See* Darrell L. Peck, *The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities*, 70 MIL. L. REV. 1, 1 (1975) ("Military intervention in judicial matters in the United States is so unthinkable it is difficult to believe the Supreme Court seriously intended to put judicial interference with military matters in the same category.").

[55] *Orloff*, 345 U.S. at 94.

[56] *See* Lichtman, *supra* note 9, at 907.

Second is John O'Connor, who is perhaps Lichtman's most vocal critic. These two voices stand as the foremost pioneers of statistical analysis of the military deference doctrine.

In the last few decades, research into the origins and application of the military deference doctrine has increased dramatically. In a comprehensive study on the origins of the doctrine, John O'Connor outlines the history and development of the tradition of military deference as consisting of three distinct phases.[57] The noninterference phase, during which the Court generally stayed out of military matters entirely, lasted until the mid-1950s.[58] From the 1950s to the 1960s, in the era of the much more skeptical Warren Court, the jurisdiction of the military courts was interpreted very narrowly as the Court increased its scrutiny of military activities.[59] Since that time, according to O'Connor, the Court has been less skeptical and come to embrace the doctrine of military deference as we know it today.[60]

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[57] John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161, 164 (2000) [hereinafter O'Connor, *Origins and Application*].

[58] *Id.* at 165 (During this period, "[i]f a court-martial properly had jurisdiction over the person tried, then the Court summarily would reject the petitioner's constitutional challenge."); *see also* Hiatt v. Brown, 339 U.S. 103, 111 (1950) ("In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision."); Kurtz v. Moffitt, 115 U.S. 487, 500 (1885) ("Courts-martial form no part of the judicial system of the United States, and their proceedings, within the limits of their jurisdiction, cannot be controlled or revised by the civil courts."); Stanley Levine, *The Doctrine of Military Necessity in the Federal Courts*, 89 MIL. L. REV. 3, 4 (1980) ("During the 19th and early 20th centuries, federal court review of military decisions was strictly limited to jurisdictional issues.").

[59] O'Connor, *Origins and Application*, *supra* note 57, at 197-214; *see also* O'Callahan v. Parker, 395 U.S. 258, 265 (1969) ("[C]ourts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."), *overruled by* Solorio v. United States, 483 U.S. 435 (1987); United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 22-23 (1955) ("There are dangers lurking in military trials . . . . [C]onsiderations of discipline provide no excuse for new expansion of courts-martial jurisdiction at the expense of the normal and constitutionally preferable system of trial by jury.").

[60] This approach toward the military "charts a middle course between, on the one hand, the extreme anti-military-justice views of the Warren Court and, on the other, the early Court's extreme laissez-faire attitude toward military matters." O'Connor, *Origins and Application*, *supra* note 57, at 214-61; *see also* Schlesinger v. Councilman, 420 U.S. 738, 758 (1975) ("[W]hen a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal district courts must refrain from intervention."); Parker v. Levy, 417 U.S. 733, 758 (1974) ("The fundamental necessity for obedience, and the consequent necessity for

In 2006, Steven Lichtman published what is to date the most comprehensive empirical study of the military deference doctrine.[61] Deviating from the norm of organizing and analyzing decisions by date,[62] Lichtman grouped cases according to the specific issues involved and ultimately finds this a much more useful method of studying the nuance of the Court's deferential trends. What further differentiates Lichtman's study from others is its statistical nature. Rather than examining the language of the cases, Lichtman analyzes the win/loss record of the military in all military cases.[63] His findings indicate that "the military stands the most risk of Supreme Court defeat when the question at bar can be boiled down to the following core: Does the military have authority over this person?"[64] This article adopts the same, relatively new, statistical approach to the military deference doctrine.

John O'Connor provides a critical response to Lichtman's research, in which he takes issue with a number of perceived flaws in Lichtman's analysis.[65] The primary target of O'Connor's criticism is Lichtman's one-dimensional approach to analyzing the doctrine. A mere statistical analysis of "wins" and "losses," O'Connor argues, fails to consider the source from which the doctrine originates: the logic and arguments of

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imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.").

[61] *See* Lichtman, *supra* note 9, at 907. Published six years after O'Connor's history, this study followed by just two years the prominent deference cases of *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Rasul v. Bush*, 542 U.S. 466 (2004), both of which dealt with the contemporary issue of military enemy detainees, both American and foreign.

[62] *See, e.g.*, Peck, *supra* note 54, at 4-5 ("To fully appreciate the current state of the law, a careful examination of the origin and development of this so-called doctrine of non-reviewability is necessary.").

[63] Lichtman defines a "military case" as a case in which

> any one of two factors [is] present: (1) questions of military policy or procedure were before the Court or (2) the military was present as a party to the litigation *in some sort of official capacity*. In other words, a soldier accused of murdering a civilian does not satisfy the military-as-party requirement, but a military tribunal attempting to try Nazi saboteurs most definitely does.

Lichtman, *supra* note 9, at 912 (emphasis in original).

[64] *Id.* at 939.

[65] O'Connor, *Statistics and Deference*, *supra* note 9.

the cases themselves.[66] Were he to examine this logic, according to O'Connor, Lichtman would realize that his catalog contains primarily cases in which the doctrine of deference was not at all considered.[67]

A statistical analysis akin to Lichtman's has yet to be conducted using cases in which the language of the opinions invokes or actively chooses not to invoke the doctrine of military deference. Part III aims to conduct such an analysis, using a narrower catalog of strictly military deference cases.

C. Influencing the Judicial Mind

While they do illuminate trends in the Court's overall usage of the doctrine of military deference, studies like Lichtman's and O'Connor's pay little attention to one of the most important characteristics of the Court: its ever-rotating composition of nine individual Justices. Each new Justice brings with her new experiences and modes of thinking, which in turn affect her voting behavior and shape the trends of the Court as a whole. The life experiences of individual Justices, including pre-judicial careers, shape their experiences on the bench.[68] An investigation into the demonstrated impacts of military service both on and off the Supreme Court, then, will elucidate the more specific mechanisms through which military service may impact Justices' thinking in military deference cases.

Prior to this investigation, it is worthwhile to outline a few models scholars have suggested to explain judicial decision-making. To begin, the widely accepted attitudinal model of judicial decision-making maintains that it is not merely the letter of the law that guides judges' decisions.[69] Rather, it is their ideological beliefs and values.[70] Jeffrey

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[66] *Id.* at 670.
[67] *Id.* at 668.
[68] *See* Christopher E. Smith, *Justice John Paul Stevens and Prisoners' Rights*, 17 TEMP. POL. & CIV. RTS. L. REV. 83, 83 (2007) ("Justices' life experiences, including familial influences, political socialization, formal education, and pre-judicial careers can undoubtedly help to shape judicial attitudes, policy preferences, strategic thinking, and intended audiences.").
[69] For further discussion of the attitudinal model of judicial decision-making, see JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 86-97 (2002).

Segal and Harold Spaeth, two prominent scholars of the attitudinal model, describe the model in a nutshell: "Rehnquist vote[d] the way he [did] because he [was] extremely conservative; Marshall voted the way he did because he was extremely liberal."[71] Given that military service has been shown to explain, at least in part, an individual's values and priorities,[72] this model provides a useful lens through which to consider this article's findings.

Two other models are worth noting here. Standing in contrast to the attitudinal model, the legal model of judicial decision-making contends that it is the strict letter of the law, not personal values and preferences,

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[70] *Id.* at 86 ("The attitudinal model . . . holds that the Supreme court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices."). Segal and Spaeth emphasize that measures of judicial ideology—including "partisanship and appointing president—. . . are useful for predicting [judicial] attitudes, but are of less help in explaining them." JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 232 (1993); *see, e.g.*, CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 17-18 (2006) (finding statistically significant differences in the voting behavior of Democratic and Republican circuit court judges); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2175 (1998) ("Partisanship clearly affects how appellate courts review agency discretion."); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1718-19 (1997) ("[I]deology significantly influences judicial decision-making on the D.C. Circuit."); Christopher E. Smith, *Polarization and Change in the Federal Courts: En Banc Decisions in the U.S. Court of Appeals*, 74 JUDICATURE 133, 137 (1990) (noting differences in Republican-appointed and Democrat-appointed judges' decisions).

[71] SEGAL & SPAETH, *supra* note 70, at 65.

[72] *See, e.g.*, Jeremy M. Teigen, *Enduring Effects of the Uniform: Previous Military Experience and Voting Turnout*, 59 POL. RES. Q. 601, 604 (2006) (finding that veterans have a higher turnout rate than nonveterans do, but noting a break in this trend among veterans of the Vietnam War); M. Kent Jennings & Gregory B. Markus, *The Effect of Military Service on Political Attitudes: A Panel Study*, 71 AM. POL. SCI. REV. 131, 146 (1977) (finding modest evidence of attitudinal and political differences between veterans and nonveterans); Elizabeth G. French & Raymond R. Ernest, *The Relation Between Authoritarianism and Acceptance of Military Ideology*, 24 J. PERSONALITY 181, 185-87 (1955) (finding support for the contention that the authoritarian personality does—to an extent—correlate with military service, but not for the contention that those with authoritarian personalities prior to service are more likely than those without to opt to serve in the military); Donald T. Campbell & Thelma H. McCormack, *Military Experience and Attitudes Toward Authority*, 62 AM. J. SOC. 482, 488 (1957) (finding evidence that authoritarianism decreases with increased length of military service).

which guides judges in their legal decisions.[73] Prior precedent, naturally, plays a role in predicting behavior in accordance with this model.[74] One could also see military service playing a role in this model, coloring a Justice's interpretation of law as it relates to the military. Alternatively, the rational choice model holds that judges are rational actors who are able to order their preferences and, as such, choose the alternative that will bring them the greatest satisfaction.[75] The incidence of military service may also play a role in predicting judicial decision-making under this model, as identification with the military could reasonably influence the preferences of Justices in military deference cases.

Bearing these models in mind, scholars have identified many factors that influence judicial behavior on the Supreme Court.[76] Among these is military service. In a comprehensive study of biographical influences on the judicial mind, scholars found military service statistically significant in predicting decision-making in cases involving the realignment of the Sentencing Commission with another branch of the government, as requested by the Department of Justice.[77] According to their analysis, this may be a display of recognition by former soldiers of direct orders.[78] Some studies have investigated social factors, finding evidence that agricultural origins, southern origins, father's service as a government official, and prosecutor/judicial service are impactful in predicting

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[73] *See* Howard Gillman, *What's Law Got to Do With It? Judicial Behavioralists Test the "Legal Model" of Judicial Decision Making*, 26 LAW & SOC. INQUIRY 465, 468-70 (2001).

[74] *See* Michael J. Gerhardt, *The Role of Precedent in Constitutional Decision-making and Theory*, 60 GEO. WASH. L. REV. 68, 139 (1991) ("The gloss added to the Constitution in the form of precedents is an integral part of most dialogues among the Justices about the Constitution.").

[75] Judges may consider, for example, the impact of their votes on their reputations. *See* Thomas J. Miceli & Metin M. Coşgel, *Reputation and Judicial Decision-Making*, 23 J. ECON. BEHAV. & ORG. 31, 32 (1994). For more on the rational choice model, see Segal and Spaeth's discussion in SEGAL & SPAETH, *supra* note 69, at 97-110.

[76] *See infra* Part III (including many of these variables in its analysis).

[77] Sisk et al., *supra* note 9, at 1479 (finding the prior military service variable insignificant when cases are merely divided in terms of constitutional ruling, but strongly correlated with Justices' resistance to realigning the Sentencing Commission with another branch of government).

[78] *Id.* ("Given that the statute does clearly designate the entity as 'an independent commission in the judicial branch of the United States,' we might conclude that a former soldier recognizes a direct order when he hears it." (quoting 28 U.S.C. § 991(a) (1994))).

judicial voting behavior in civil rights, civil liberties, and economics.[79] Still another factor is the amount of time a Justice has served on the bench.[80] There is evidence that newcomers to the Court may undergo an "acclimation effect."[81] In particular, scholars have shown that Justices who serve longer on the bench are more likely to vote preferentially as opposed to strictly adhering to established precedent.[82] Further, public opinion may also impact judicial preferences, thereby influencing voting behavior on the bench.[83] This brief list amounts to just the tip of the iceberg.

Numerous distinguishing qualities of prior military service make it a rich characteristic for analysis in the context of judicial decision-making. First, while certain factors—for instance, institution of legal education and place of residence—limit other influences on the judicial mind, these factors play no role in keeping American citizens from military service. Additionally, military service necessarily predates a Justice's behavior on the bench, easily sidestepping the problem of strict endogeneity.[84] Further, the occurrence of prior military service is measured easily and clearly with little room for discrepancy. Finally, analysis of military service on the Supreme Court will also hint at the more generalizable effects of such service beyond the bench. An experience shared by

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[79] *See* C. Neal Tate & Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916-88*, 35 AM. J. POL. SCI. 460, 474 (1991).

[80] *See, e.g.*, Timothy M. Hagle, *'Freshman Effects' for Supreme Court Justices*, 37 AM. J. POL. SCI. 1142, 1153 (1993) ("Acclimation effects do exist. Nine of the [thirteen] Justices examined revealed significant voting instability in at least one major issue area.").

[81] *Id.*

[82] *See* Mark S. Hurwitz & Oseph V. Stefko, *Acclimation and Attitudes: 'Newcomer' Justices and Precedent Conformance on the Supreme Court*, 57 POL. RES. Q. 121, 127 (2004) ("Preferential votes become far more prominent as a Justice's tenure grows, while the likelihood is much greater for a Justice to comply with precedent during the early years on the bench as Justices acclimate to their new institution.").

[83] *See, e.g.*, David G. Barnum, *The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period*, 47 J. POL. 652, 662 (1985) ("[T]he Supreme Court on [post-New Deal minority rights] issues could decide in favor of the rights of minorities and still enjoy the support of an existing majority or at least a growing minority of Americans."); Micheal W. Giles et al., *The Supreme Court in American Democracy: Unraveling the Linkages Between Public Opinion and Judicial Decision Making*, 70 J. POL. 293, 303 (2008) ("Our results suggest that the most likely explanation for the direct linkage between public mood and justices' liberalism observed in past studies is through the mechanism of attitudinal change.").

[84] Nonrandom assignment, however, remains a problem.

millions of diverse Americans, military service serves as a beneficial avenue of analysis in bettering our understanding of both our Supreme Court Justices and the greater American population.

D. The Veteran on the Bench

Of the 112 Justices who have served on Supreme Court, thirty-nine have served in the military in some capacity.[85] For the purpose of this article, military service is defined as service in the Army, Navy, Air Force, National Guard, or Army Reserve. The frequency with which Justices who have served in the military are appointed to the bench has increased dramatically in the last half-century. Between 1851 and 1880, just 14.3% of Justices appointed to the court had served in the military, all in the Army. Since 1953, however, nearly half (48%) of the Justices on the Court have served in the military.[86] Three members of the contemporary Supreme Court—Justices Alito, Kennedy, and Breyer—have served in the military, though none has seen combat.[87]

Linking Supreme Court jurisprudence with the military composition of the bench, the findings of this article have important implications on our understanding of the consequences of Supreme Court nominations. Today, for the first time in nearly eighty years, the Supreme Court is devoid of wartime military experience. What does this mean for the future of the military deference doctrine, or the future of American justice in general? And what has it already meant?[88] As this article illustrates, prior military service is an important characteristic to consider when filling future vacancies on the Supreme Court.

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[85] SUSAN NAVARRO SMELCER, CONG. RESEARCH SERV., R40802, SUPREME COURT JUSTICES: DEMOGRAPHIC CHARACTERISTICS, PROFESSIONAL EXPERIENCE, AND LEGAL EDUCATION, 1789-2010, at 12 (2010).

[86] *Id.* at 25-27.

[87] Cohen, *supra* note 11. "Combat" here refers to "active, wartime military experience." *Id.*

[88] *Id.* ("Just think for a moment about what a [combat] perspective at the Court might have offered the terror-law debate over the past decade . . . . The Court still needs more diversity in many ways, but none more so than diversity of background and experience.").

III. The Statistics of Deference and Prior Military Service

Few would deny that military service leaves its mark. Justice John Paul Stevens, for example, told the Chicago Bar Association that his brush with the assassination of Japanese General Yamamoto, while he was working as a Navy code breaker in World War II, impacted his views on capital punishment.[89] Similarly, scholars believe that "Civil War duty led Justice Holmes to esteem conflict and abhor human rights. More recently, Justices who had served in uniform divided on whether the Constitution forbids criminal punishment for burning the American flag."[90] Fueled by such stories from the bench, this Part endeavors to shed light on the precise nature of the mark military service has left on the Justices of the Supreme Court.

A. The Model

To test whether Justices with prior military experience are more or less likely to defer to military authorities, this article conducts an analysis of the voting behavior of Justices in military deference cases. It seeks to find a statistically significant trend in the way Justices with prior military service vote in cases that involve the doctrine of military deference, specifically whether or not the opinions they author or join tend to defer to military judgments and necessity. An analysis of this behavior versus that of Justices with no service experience will shed light on the relationship between prior military service and military deference on the United States Supreme Court.

The probability of a deferential vote is modeled in the following form:

$$\Pr(v_i = \mathrm{D}) = f(\alpha + \beta_{service} x_i)$$

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[89] Diane Marie Amann, *John Paul Stevens, Human Rights Judge*, 74 FORDHAM L. REV. 1569, 1583 (2005) ("Appearing before the Chicago Bar Association decades later . . . Stevens affirmed that the Yamamoto incident led him to conclude that '[t]he targeting of a particular individual with the intent to kill him was a lot different than killing a soldier in battle and dealing with a statistic . . . .'" (quoting Telephone Interview with Justice John Paul Stevens, United States Supreme Court (June 22, 2005))).

[90] *Id.* at 1598.

where

$$f(t) = 1 / (1 + e^{-t})$$

This model, where f is the logistic function, represents the probability that a Justice's vote (v_i) will be deferential (D) based on the incidence of prior military service (x_i). Then, it poses the following hypotheses to test the significance of $\beta_{service}$:

$$H_{0_1}: \beta_{service} = 0$$
$$H_1: \beta_{service} \neq 0$$

In other words, this article expects to find an association between prior military experience and judicial voting behavior in military deference cases. This is a two-sided hypothesis test. But how does this association manifest itself? Does prior military experience make Justices more likely or less likely to defer to the military?

One could make the case that $\beta_{service}$ should be positive, implying that military service increases the likelihood of a Justice deferring to the military in military deference cases. This intuitively stems from the insight and loyalty to the military former members may carry. Soldiers have firsthand insight into that institution of duty and discipline that is the last line of defense between our nation and its enemies. They know exactly what it takes to command the troops and the problems an intervening legal body could pose in the execution of orders crucial to our national security. Further, the lifelong commitment to patriotism and respect of the service that Justices with prior military experience have demonstrated in their opinions may seem to point to their favoring this institution that they so deeply admire and respect.[91] This, too, would

[91] *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503, 509 (1986) ("The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment."); Duncan v. Kahanamoku**,** 327 U.S. 304, 325 (1946) (Murphy, J., concurring) ("[Those who founded this nation] shed their blood to win independence from a ruler who they alleged was attempting to render the 'Military independent of and superior to the Civil power.' . . . This supremacy of the civil over the military is one of our great heritages."). These sentiments are especially apparent in Justice Stevens's dissents in the flag-burning cases. *See* United States v. Eichman, 496 U.S. 310, 323 (1990) (Stevens, J., dissenting) ("The symbolic value of the American flag is not the same today as it was yesterday. . . . [S]ome now have difficulty understanding the message that the flag conveyed to their parents and grandparents—whether born abroad and naturalized or

indicate that justices with prior military experience may be more likely to allow the military more constitutional latitude than would those Justices without this sense of personal loyalty to the military.

However, a far more convincing case exists for the argument that $\beta_{service}$ should be negative, indicating that Justices who have served in our nation's armed forces are less likely to defer to the military in military deference cases.[92] One reason for this may be the professional confidence of Justices with firsthand experience in the military in deciding military deference cases, which often involve somewhat specialized military knowledge. A sense of understanding and familiarity with the military apparatus may cause those Justices with prior military experience to feel better qualified to question the judgments of military commanders and policymakers.[93] Those Justices without military experience, on the other hand, boast no such bank of military knowledge to use in challenging the decisions of military authorities and those who regulate them. Eugene Fidell puts it nicely: "Justices (and judges generally) without active military experience may be (or may feel, which can amount to the same thing) at a disadvantage when dealing with cases that involve military matters."[94]

Further, one may expect that the military instills in its personnel an unwavering dedication to the protection of American freedom and ideals, both in the courtroom and on the battlefield. Indeed, Justice Stevens is remembered as relentlessly pursuing his "enduring quest to uphold

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native born."); Texas v. Johnson, 491 U.S. 397, 439 (1989) (Stevens, J., dissenting) ("If [liberty and equality] are worth fighting for—and our history demonstrates that they are—it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration.").

[92] Smith, *supra* note 68, at 85 ("It also is possible that a Justice's judicial performance is, in effect, counterintuitive when viewed in light of the presumptive values and policy priorities that might have emerged from a particular set of life experiences."); *see also* Eugene R. Fidell, *Justice John Paul Stevens and Judicial Deference in Military Matters*, 43 U.C. DAVIS L. REV. 999, 1018 (2010) ("Counterintuitive though it may seem, judges with real military experience may be less likely to defer, at least around the edges, than those with none.").

[93] Justice Stevens—himself a veteran—hinted at this potential impact of military service while concurring in *Goldman v. Weinberger*, 475 U.S. 503 (1986), when he cautioned that "personal experience or admiration for the performance of the 'rag-tag band of soldiers' that won us our freedom in the Revolutionary War might persuade us that the Government has exaggerated the importance of [uniformity]." *Id.* at 512 (Stevens, J., concurring).

[94] Fidell, *supra* note 92.

American values, at home and abroad."[95] Such a quest captures the sense that the myriad sacrifices and hardships service members have endured through the ages would all be for naught should the Court undermine the very freedoms and liberties those men and women fought to defend. In the words of Justice Frank Murphy, unconstitutional and immoral behavior on the part of the military "is unworthy of the traditions of our people or of the immense sacrifices that they have made to advance the common ideals of mankind."[96] The military, by this reasoning, is all the more obligated to uphold the Constitution it is defending on the battlefield.

Bearing these arguments in mind, this article proposes another hypothesis. Despite their feelings of respect for, and loyalty to, the armed forces, Justices with prior military service may be less hesitant to curb the military's governing authorities. The Justices with prior military service considered in this analysis would thus prove less likely to defer to the military than those Justices with no firsthand military experience. As such, an alternative one-sided hypothesis test is proposed:

$$H_{0_2}: \beta_{service} = 0$$
$$H_2: \beta_{service} < 0$$

B. The Data

The first step in testing these hypotheses was identifying the Supreme Court's corpus of military deference cases. Lichtman's 2006 catalog of 178 military cases heard by the Supreme Court between 1918 and 2004 served as the starting point.[97] Additional cases mentioned or cited in other prominent studies on the military deference doctrine, such as those by O'Connor, were then added. Also added were cases decided after 2004—the cut-off point of Lichtman's catalog—that involve military policy or the military as party to the litigation.

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[95] Toobin, *supra* note 13.

[96] Murphy is speaking about the military tribunal that was convened to try Japanese General Yamashita in *In re Yamashita*, 327 U.S. 1, 28 (1946) (Murphy, J., dissenting).

[97] This catalog can be found in Appendix A of Steven B. Lichtman's *The Justices and the Generals: A Critical Examination of the U.S. Supreme Court's Tradition of Deference to the Military, 1918-2004*, *supra* note 9, at 950. Lichtman compiled this catalog using a series of *Lexis* searches. *Id.* at 911.

As O'Connor noted in his response to Lichtman's study, not all "military cases" are "deference cases."[98] Given this article's pointed interest in the Court's doctrine of military deference, all cases that were not deference cases were removed from the master list.

Defining "deference case" is no easy task. Legal scholars have offered an array of definitions. As Steven Lichtman explains, "While other litigants are often required to submit proof of whatever assertions they are making before the Court, the Justices invariably accept arguments put forth by the military without subjecting them to constitutional scrutiny."[99] In his criticism of Lichtman's analysis, O'Connor argues that "the Court's military deference jurisprudence recognizes that constitutional rights appropriately may apply differently in the military context than in civilian society as a whole."[100] In other words, only those cases in which the Court weighs the needs of the military against the guarantees of the Constitution have the potential to be decided by the doctrine of military deference. Other scholars refer to the military deference doctrine as a "dilemma of reconciling our constitutional aspirations toward civil liberty with the demands of military need,"[101] a recognition "that the military necessity for order and discipline may outweigh the need for constitutional safeguards for service members."[102]

A number of elements run as common threads through these proposed definitions. First, a tension between constitutional guarantees and the needs of the military is highlighted. Given this tension, it is the duty of the Supreme Court to decide which of the two forces is stronger: the longstanding constitutional guarantees backed by American tradition and history, or the military instrument that protects and defends our nation so that those guarantees may continue to exist. The Supreme Court, acknowledging the military as a separate society under the control of the political branches, accepts its non-expert status in the realm of

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[98] O'Connor, *Statistics and Deference*, *supra* note 9, at 672 ("[T]he military deference doctrine has no application in the vast majority of the 'military' cases that come before the Court.").

[99] Lichtman, *supra* note 9, at 907.

[100] O'Connor, *Statistics and Deference*, *supra* note 9, at 673.

[101] Stephanie A. Levin, *The Deference That Is Due: Rethinking the Jurisprudence of Judicial Deference to the Military*, 35 VILL. L. REV. 1009, 1012 (1990).

[102] Levine, *supra* note 43, at 6.

military affairs and bows to the determinations of Congress and the President in ruling and regulating the armed forces. In short, and as per the doctrine's name, the Court defers to the military's powers that be. Thus, there are three primary identifiers of military deference cases:

> (1) the weighing of military necessity against constitutional liberties and protections, as contained in the Constitution;
> (2) a questioning of the special nature and unique place of the military in American society; and,
> (3) a consideration of the unique application of the law in the military context due to the military's critical role and special needs.

A case in which the Court grants deference is a case in which the needs of the military and the constitutional powers of the political branches (with regard to the military) are deemed worthy of deference over whatever rights or liberties happen to be at stake. To say that a case involves the doctrine of deference, however, is not to say that the Court ultimately defers. Rather, the Court may also choose to reject the opportunity to apply the doctrine as presented in these cases. This definition guided the textual analysis of the Court's opinion in each case included in the master catalog. Any case in which the Court invoked any number of the various deference rationales—including those listed above and those outlined in Part II—was deemed a "deference case" and included in the data set.[103]

The data set included both cases in which the Court ultimately and explicitly deferred to the military,[104] and those in which they explicitly

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[103] This determination was conducted by reading in full the opinion of the Court in each of the nearly 200 cases in the master list. If the rationale of deference was explicitly mentioned in the Court's opinion, it was included as a deference case. There was no assumption that the military deference doctrine was used or considered without explicit indicators in the text of the opinion. In short, the three requirements identified above had to be met for inclusion, though the Court could have used any number of arguments to meet them. These arguments included mention of a separate society, military necessity, the military powers of Congress and the president, institutional competence, or any of the other commonly used rationales for the military deference doctrine.

[104] *See, e.g.*, Parker v. Levy, 417 U.S. 733, 758 (1974) ("[T]he fundamental necessity for obedience . . . may render permissible within the military that which would be constitutionally impermissible outside it."); Burns v. Wilson, 346 U.S. 137, 140 (1953)

opted to reject the doctrine of military deference,[105] for these are the cases in which the Court's tradition of deference played an apparent role. The majority of these cases 73.5% fell into the former, deferential category.

Given that cases were selected through content analysis and coded based on the fit of their content with an established set of requirements for selection, a certain degree of discretion was necessary. As previously noted, different legal scholars and authorities have varying definitions of military deference. As such, these different scholars might hold slightly different views on certain cases and their identification as deference cases. However, this sort of discretion and interpretation cannot be totally avoided while considering the full content and meaning of the opinions. It can be largely accounted for, though, with strict adherence to an accurate definition and comprehensive set of requirements, which, as described above, is exactly what has been done in this study.

The final case list consists of sixty-eight deference cases.[106] The subject matter of these cases range from the rights of detained enemy combatants[107] to official lysergic acid diethylamide (LSD) testing conducted by the military.[108] Another cluster of cases deals with the construction, jurisdiction, and execution of courts-martial and other military courts, both at home and abroad.[109] Another large subset of the deference cases are those cases involving the treatment of Japanese American citizens by the United States government during the Second

("[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty."); Whelchel v. McDonald, 340 U.S. 122, 127 (1950) ("The right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial or military commissions.").

105 *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 624 (2006) ("[E]xigency lent the commission its legitimacy, but did not further justify the wholesale jettisoning of procedural protections."); Reid v. Covert, 354 U.S. 1, 35 (1957) ("[W]e reject the Government's argument that present threats to peace permit military trial of civilians accompanying the armed forces overseas in an area where no actual hostilities are under way. The exigencies which have required military rule on the battlefront are not present in areas where no conflict exists.").

106 See *infra* Appendix A for the full catalog of deference cases.

107 *See* Boumediene v. Bush, 553 U.S. 723 (2008); Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

108 *See* United States v. Stanley, 483 U.S. 669 (1987).

109 *See In re* Yamashita, 327 U.S. 1, 25 (1946) (holding that a military commission convened to try a Japanese General for war crimes was lawful and thus had the necessary authority to try the general).

World War, the most prominent of which is *Korematsu v. United States*.[110] Also included in the data are a number of deference cases involving the First Amendment rights of servicemembers, and others, who reside on military installations.[111] These clusters of cases by no means account for the entire catalog, but they do represent those topics that arise relatively frequently in military deference cases.

A number of case groupings are also conspicuously absent from the final catalog. First and foremost among them are cases related to the Selective Training and Service Act of 1940. While a couple of these cases do involve weighing constitutional guarantees against military necessity and expediency, most amount to little more than statutory interpretation. When the Court is merely parsing the text of a congressional statute, the unique nature and needs of the military are absent from consideration, as are the spirit and protections of the Constitution. The Court is neither deferring to nor refusing to defer to the military; it is merely interpreting the letter of the existing law. As such, these cases are not deference cases. For similar reasons, cases involving the Freedom of Information Act are also excluded from the final catalog. Additionally, cases in which the Court determined that it lacked jurisdiction were removed, since this determination involves no recognition of the military as a unique institution, where constitutional protections may be applied differently.

It would be fruitful to elaborate upon the time bounds of the catalog of deference cases used in this analysis. For a variety of reasons, the earliest case included is that of *Ex parte Quirin*.[112] First, a large number of Justices with military service experience were appointed to the Court in the late 1930s. Between the years of 1937 and 1940, all five of the Justices appointed to the Court were veterans.[113] This influx of veteran

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[110] *See* Korematsu v. United States, 23 U.S. 214 (1944).

[111] *See e.g.*, Goldman v. Weinberger, 475 U.S. 503, 509-10 (1986) ("[T]he First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations."); Greer v. Spock, 424 U.S. 828, 838 (1975) (holding that political candidates "had no generalized constitutional right to make political speeches or distribute leaflets at Fort Dix," and that the regulation allowing commanders to exclude people from the base was constitutional); United States v. O'Brien, 391 U.S. 367, 396-72 (1968) (reinstating the conviction of a man for burning his draft certificate).

[112] *Ex parte* Quirin, 317 U.S. 1 (1942).

[113] These are Justices Hugo Black, Stanley Forman Reed, Felix Frankfurter, William O. Douglas, and Frank Murphy. *See infra* Appendix B.

Justices coincides with two important beginnings, as 1941 saw both America's entry into World War II, and the appointment of Harlan Fiske Stone as Chief Justice of the Supreme Court of the United States. Further, as many scholars of the doctrine would agree, the military deference doctrine, as understood and applied today, did not emerge until the latter half of the twentieth century.[114] Before this time, the Court's treatment of the military and its command structure was dominated by an attitude of noninterference.[115] After the end of the Second World War, however, this changed. The Court briefly took a more active stance toward the military before moving on to craft the modern doctrine of deference in the 1970s.[116] Given these changes in the Court's attitude, the deference cases heard before World War II were few and far between, let alone vaguely related to the military deference doctrine as studied in this article. As such, including cases prior to the advent of the Stone Court and Second World War rings inappropriate. *Ex Parte Quirin* thus provides a natural lower bound for this study. In terms of the upper bound, this study includes all deference cases decided between 1942 and 2009. This represents an extension of the cases Lichtman considered and adds timeliness to this study.

Having compiled a catalog of cases, the next step was to construct a record of the voting behavior of the individual Justices in each of these cases. The binary voting behavior variable (v_i) serves as the primary dependent variable in this study. For each case, the votes of all participating Justices are considered, yielding a comprehensive deferential voting record of 588 votes. These votes were coded as either in favor of deferring to the military (D) or against deferring to the military (N).[117] The language and arguments used in each of the opinions guided this determination. Only votes for opinions that explicitly deferred to the military, for any of the reasons listed above, were coded as deferential votes.

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[114] O'Connor, *Origins and Application*, *supra* note 57, at 215; Diane Mazur, *Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L.J. 701, 704 (2002) (calling the modern military deference doctrine "only a creation of the post-Vietnam, all-volunteer military").

[115] *See* sources cited *supra* note 58.

[116] *See* sources cited *supra* notes 59–60.

[117] In coding the binary variable of military service, a vote of D was denoted with a (1), while a vote of N was recorded as (0). Of the 588 votes cast, 376 were deferential and 212 were non-deferential.

Meanwhile, those Justices who determined that the needs of the military were not so great or unique as to justify robbing servicemembers, or others affiliated with the military, of their constitutional guarantees are coded as having cast non-deferential votes. Also coded as having cast non-deferential votes are those Justices who, in the face of deferential arguments, opted to decide the case on statutory or jurisdictional grounds and not acknowledge the military as a unique body to which the Constitution may be applied differently.

A total of thirty-six Justices voted in the sixty-eight deference cases considered.[118] Of these Justices, twenty (or approximately 56%) had served previously in either the Army, Navy, Army Air Force, National Guard, or Army Reserve.[119] Of those Justices who had served in the military, just 70% served as officers. Many of them spent their time in the military working in intelligence or with the Judge Advocate General's Corps, the legal organization within each branch of the military. The branch with the most representation on the bench is the Army, accounting for half of those Justices who are also military veterans. All but three of the twenty Justices—Justices Alito, Kennedy, and Breyer—served during wartime. The only armed conflicts represented in the Court's overall record of wartime service are the First and Second World Wars. None of the Justices on the Court served in conflicts in Vietnam, Korea, the Persian Gulf, Iraq, or Afghanistan, conflicts markedly different in nature from the World Wars.[120]

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[118] *See infra* Appendix B for a full list of these Justices and their military affiliations. This list of Justices does not account for all Justices appointed to the bench since 1942. Because he did not participate in any of the cases included in the catalog, Justice Arthur Goldberg, who served on the Court from 1962 to 1965, is not included. Goldberg was a two-time veteran of the armed forces with service in the Army during World War II and in the Air Force in 1976, after he retired from the bench.

[119] Also included in the data, in addition to those with personal military experience, are a number of Justices with extra-personal military ties. Justice O'Connor, for example, is the wife of an Army veteran; her husband was a Judge Advocate. Dennis Hevesi, *John J. O'Connor III, Husband of Former Justice, Is Dead at 79*, N.Y. TIMES (Nov. 11, 2009), http://www.nytimes.com/2009/11/12/us/12oconnor.html. Justice Scalia was the father of a West Point graduate and lieutenant colonel in the Army. *See* JOAN BISKUPIC, AMERICAN ORIGINAL: THE LIFE AND CONSTITUTION OF SUPREME COURT JUSTICE ANTONIN SCALIA 324 (2009).

[120] The nature of warfare has changed significantly since World War II. *See* JONATHAN MALLORY HOUSE, TOWARD COMBINED ARMS WARFARE: A SURVEY OF 20TH-CENTURY TACTICS, DOCTRINE, AND ORGANIZATION 187-88 (1984) ("Since 1945, the atomic bomb has called into question the entire role of land combat and has certainly made massing on the World War II model quite dangerous."); MARTIN VAN KREVELD, TRANSFORMATION OF

In terms of representing this service in the data, another binary variable was introduced, this one independent. The service variable is coded as either having served (1) or never having served (0). Service here refers to any length of time of service in any branch of the United States military, its Reserves, or the National Guard. The branches represented in this data set include the Army, Navy, Army Air Force, National Guard, and Army Reserve.

A number of other variables that could potentially aid in illuminating this military–Court relationship, as noted below,[121] were also considered. First among these is ideology, a characteristic many contend is intimately linked to a Justice's voting behavior.[122] The gender of each Justice is also noted. Time-related independent variables are similarly accounted for. Acknowledging that the deferential tendencies of Justices may change as they gain more experience and confidence in their roles on the Court,[123] the time spent on the bench in years before each vote was cast is examined. For similar reasons, this article considers the amount of experience a Justice has in deference cases. This experience is measured by the number of deference cases a Justice had heard prior to the casting of each vote. As a nation currently engaged in war may feel the passions and fears of wartime and the military effort differently than a nation in peacetime, another factor considered is whether each case was decided in wartime. The official beginning and termination dates provided in the Code of Federal Regulations were used to decide which periods

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WAR 11 (1991) ("[T]he effect of nuclear weapons . . . has been to push conventional war into the nooks and crannies of the international system."); Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 677 (2004) ("Shifts in the nature of security threats have broken down once clear distinctions between armed conflict and 'internal disturbances' . . . ; between states and non-state actors; between combatants and noncombatants; between spatial zones in which conflict is occurring and zones in which conflict is not occurring."); John Yoo, *War, Responsibility, and the Age of Terrorism*, 57 STAN. L. REV. 793, 816 (2004) ("Threats [of war] now come from at least three primary sources: the easy availability of the knowledge and technology to create weapons of mass destruction, the emergence of rogue nations, and the rise of international terrorism of the kind practiced by the al Qaeda terrorist organization.").

121 *See infra* Part III.C.

122 *See* sources cited *supra*, note 70.

123 *See* Hagle, *supra* note 80; Hurwitz & Stefko, *supra* note 82.

constitute wartime.[124] Finally, the year of decision for each case is also noted.

C. Results

First, a summary statistic for the relationship between prior military service and votes for military deference is provided.[125] Whereas the Justices contained in this data set with military service deferred to the military at a rate of 61.7%, those Justices with no prior military experience deferred at a rate of 69.1%. This 7.4% difference in rates of deference hints at a contrast between the deferential behavior of Justices with military service and those without.

A binary logistic regression analysis further elucidates the association between the dependent variable of deference (v_i) and military service (x_i)[126]:

$$\Pr(v_i = \mathrm{D}) = f(0.805 - 0.328x_i)$$

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[124] *See* BARBARA SALAZAR TORREON, CONG. RESEARCH SERV., RS21405, U.S. PERIODS OF WAR AND DATES OF CURRENT CONFLICTS (2012).

[125] For this cross tabulation, the Pearson Chi-Square value of 2.943 bears a likelihood ratio of 2.984 and a significance of 0.086, indicating statistical significance at the 0.1 level. The results of this cross tabulation are:

			Deference		Total
			0	1	
Military Service	0	Count	55	123	178
		% within Military Service	30.9%	69.1%	100%
	1	Count	157	253	410
		% within Military Service	38.3%	61.7%	100%
Total		Count	212	376	588
		% within Military Service	36.1%	63.9%	100%

[126] The results of this binary logistic regression analysis are:

	B	S.E.	Wald	Df	Sig.	Exp(B)
Service	-.328	.191	2.931	1	.087	.721
Constant	.805	.162	24.619	1	.000	2.236

As indicated in this regression, Justices with prior military service are roughly one-third less likely to defer, where $\beta_{service} = -0.328$, in military deference cases. In the two-sided hypothesis test, this result bears a significance of $p = 0.087$, which is statistically significant at the 0.1 level. Given these findings, the data provide modest support for the rejection of H_{0_1} in the two-sided test, testing if military service is associated with deferential voting behavior of Supreme Court Justices in military deference cases. Seeing the results of the two-sided test, we then turn to the one-sided test and find that the p-value is statistically significant at the 0.05 level. This allows for the rejection of H_{0_2}, that the likelihood of deference for Justices with military experience is no different than that for Justices without, in favor of H_2.[127] With 95% confidence, this finding indicates that Justices with military experience who served on the Court between 1942 and 2008 were typically less deferential than those without.[128]

Six additional covariates were then added into the regression: ideology as captured in the Segal-Cover scores ($x_{i,ideology}$), the length of time that a Justice has served on the bench ($x_{i,time}$), the amount of experience a Justice has with deference cases ($x_{i,experience}$), the issuance of the decision during wartime ($x_{i,wartime}$), the year the case was issued ($x_{i,year}$), and the biological sex of a Justice ($x_{i,gender}$).[129] Each of these variables is included for its potential impact upon the decision of a Justice to defer to the military or not.

Ideology. As explained above, the contention that Justices vote according to their own values and policy preferences is widely accepted by scholars.[130] These Justices arrive at the Court with their own sets of personal preferences, values, and beliefs, and it would only be natural to acknowledge that these beliefs could color their behavior on the bench,

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[127] Though this one-sided test is easier to prove, it remains important to this study as the side of the relationship between service and deference with which the author is primarily concerned.

[128] *See supra* note 126.

[129] Although the logistic regression does not assume anything about the distribution of the covariates, it generally assumes independence between them. Here, the author reasonably assumes independence between all of the covariates, with the exception of service and ideology, the association between which is explored later in this Part. Because of the ultimate strength of the correlation between service and ideology, the model should not be sensitive to this association.

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

in military deference cases just as in other cases.[131] The ideological scores calculated by Jeffrey Segal and Albert Cover,[132] which have fast become "the disciplinary standard for measuring the political ideology of Supreme Court Justices," supply a measure of ideology.[133]

Years on the bench. Scholarship on the Supreme Court suggests that the length of time a Justice has been on the bench may influence his or her voting behavior, as well.[134] Given this evidence that acclimation effects do, in fact, exist,[135] the length of time a Justice has served on the bench stands as a potential factor in judicial decision-making in military deference cases as well as in others.

Prior deference experience. In the same way that the number of years a Justice has served on the bench may impact that Justice's judicial ideology, it may be that the amount of experience a Justice has with deference cases, as measured by the number of deference cases a Justice has previously heard, influences that Justice's deferential behavior and attitude toward the military.

Decided in wartime. Whether or not a decision was made in wartime, amidst the fears and passions that hang over a nation at war, is a

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131 *See supra* note 70 and accompanying sources.

132 Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 560 (1989). Unlike other measures of judicial behavior that rely on past voting records, the Segal-Cover score is calculated based on an analysis of the content of newspaper editorials published in leading newspapers during the time between a Justice's nomination and her confirmation. *Id.* at 559. This analysis yields a score between most conservative (0) and most liberal (1) for each Justice. *Id.* at 559. As a result of Segal and Cover's updating and backdating of these scores, a Segal-Cover score exists for every Justice included in this study with the exception of Owen Roberts. *See* Jeffrey A. Segal et al., *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 57 J. POL. 812, 814 (1995); Jeffrey A. Segal, *Perceived Qualifications and Ideology of Supreme Court Nominees, 1937-2012*, at 1, http://www.stonybrook.edu/commcms/polisci/jsegal/QualTable.pdf (last visited Jan. 25, 2016). As such, he is regrettably excluded from the data set when considering ideology in the regression. This removes just four votes from the data set.

133 Christopher Zorn & Gregory A. Caldeira, *Measuring Supreme Court Ideology* 4 (2006), http://www.adm.wustl.edu/media/courses/supct/ZC2.pdf (containing the paper presented at the Annual Meeting of the Southern Political Science Association).

134 *See* Hagle, *supra* note 80; Hurwitz & Stefko, *supra* note 82, at 127 ("Preferential votes become far more prominent as a Justice's tenure grows.").

135 Hagle, *supra* note 80, at 1147 ("Of the [thirteen] justices examined, six experienced significant acclimation effects . . . . [S]even justices experienced a significant acclimation effect in the criminal procedure issue area.").

factor the Court itself has identified as a potential motivator to defer to national security via military necessity. In *Hamdi v. Rumsfeld*,[136] Justice O'Connor addressed the danger of this impact of wartime conditions when she wrote "that a state of war is not a blank check."[137] Sixty years earlier, the Court noted that "when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger," again hinting at the impact of a state of war on the judicial decision–making process.[138] As the Court itself is willing to recognize, the passions and priorities of wartime may very well factor into judicial decisions.

Year of decision. Scholars of the military deference doctrine, most notably John O'Connor, have identified a change in the Court's deferential behavior in military cases over time.[139] This change in the general attitude of the Court toward military deference may also account, at least in part, for the deferential voting behavior of the individual Justices.

Gender. Two of the Justices included in the data—Justice Sandra Day O'Connor and Justice Ruth Bader Ginsburg—are women. Neither of these female Justices served in the military in any capacity. In fact, as of today, no female Supreme Court Justice has ever served in the military. Although not enough data exists to draw meaningful conclusions about the gender variable, gender is included in the model to detect if female or male Justices are more inclined to defer to the military.

Running a binary logistic regression with these added covariates yields the model:

$$\Pr(v_i = \mathrm{D}) = f(38.903 - 0.091x_{i,service} - 3.344x_{i,ideology} - 0.065x_{i,time} + 0.029x_{i,experience} + 0.143x_{i,wartime} - 0.018x_{i,year} + 0.050x_{i,gender})$$

In this updated model, the service variable is no longer statistically significant in explaining judicial voting behavior in military deference

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136 Hamdi v. Rumsfeld, 542 U.S. 507 (2004).
137 *Id.* at 535.
138 Korematsu v. United States, 323 U.S. 214, 220 (1944).
139 O'Connor, *Origins and Application*, *supra* note 57, at 215; *see supra* Part II.B.

cases.[140] The only covariates that prove statistically significant in this model are ideology, the number of years a Justice has sat on the bench, and the year the decision was issued, all of which bear a statistical significance of $p < 0.01$.[141] Given these results and the inconsistency in the significance of the military experience explanatory variable, one would suspect that the change in deference may be better explained using one or more of the covariates that proved meaningful in the second model.

Correlating the military service variables with each of the covariates that proved useful in the second model can begin to answer this question.[142] The relationship between the year an opinion is issued and the incidence of prior military experience would reveal little more than the military composition of the Court over time. Similarly, the relationship between the occurrence of past military experience and the amount of time a Justice has spent on the Court when votes are cast

[140] The results of this binary logistic regression analysis are:

	B	S.E.	Wald	df	Sig.	Exp(B)
Service	-.091	.250	.133	1	.715	.913
Year	-.018	.008	4.999	1	.025	.982
Time on Bench	-.065	.031	4.433	1	.035	.937
Wartime	.143	.219	.427	1	.514	1.154
Segal Cover	-3.344	.414	65.269	1	.000	.035
Gender	.050	.522	.009	1	.924	1.051
Number Case	.029	.030	.929	1	.335	1.030
Constant	38.903	16.152	5.801	1	.016	7.858E + 16

[141] The variables for prior military service, prior deference experience, the issuance of a decision during wartime, and gender fail are not statistically significant in this model.

[142] The correlation coefficients between these variables are:

Variables Correlated	Pearson Correlation Coefficient	2-Tailed Significance
Military Service Ideology (Segal-Cover)	0.201	0.000
Military Service Time on the Bench	0.160	0.000
Military Service Year Opinion Issued	-0.274	0.000

seems an unproductive relationship to explore. On the other hand, as mentioned in Part II, military service has been shown to impact the values and ideology of service members, even after their time in the military.[143]

Given this established relationship, this article refocuses its analysis on the ideology variable. A correlation of military service and ideology yields a Pearson correlation coefficient of 0.201, statistically significant at the 0.01 level. This correlation suggests a positive association between prior military service and judicial ideology. Given that higher Segal-Cover scores indicate liberal leanings, this correlation suggests that the occurrence of military service is associated with a more liberal judicial ideology.

In order to better understand the magnitude of this association, a linear regression analysis that focuses on military service (x_i) as an independent variable and ideology (y_i) as the dependent variable is used.[144] It finds a linear relationship of the form:

$$y_i = 0.463 + 0.143x_i .$$

These results indicate that prior military service, as captured in this data set, explains a 0.143 higher Segal-Cover score for those Justices who had served in the military and were on the Court between 1942 and 2008. This result is both impactful and statistically significant, with a significance of $p < 0.001$, and thus provides strong support for the contention that military service does not make Justices less liberal. Rather, it suggests that military service is at least correlated with a more liberal judicial ideology.

[143] *See supra* note 72 and accompanying sources.

[144] The results of this linear regression analysis are:

	Unstandardized Coefficients		Standardized Coefficients	t	Sig.
	B	Std. Error	Beta		
Constant	.463	.024	.201	19.154	.000
Military Service	.143	.029		4.942	.000

D. Discussion

This analysis provides support for the hypothesis (H_2) that, on the level of the individual Supreme Court Justice, prior military service is associated with less deferential voting behavior in the military deference cases included in the data. Other significant relationships that came to light in the course of analysis suggest that this link may not be direct. First, this analysis provides strong evidence that the Justices included in this data set with military service tended to be more liberal on the Segal-Cover scale than those Justices with no prior military service. Additionally, strong evidence is found that judicial ideology was a strong indicator of deferential voting behavior in the cases included in this study.

These findings immediately provide two potential relationships between service, ideology, and deference. It is important to remember that, as the active military service performed on the behalf of the Justices necessarily preceded the judicial ideology exhibited on the bench in all of these cases,[145] the problem of strict endogeneity is avoided. As per the first potential relationship, it may be that military service directly impacts ideology, which then acts as a reliable predictor for deference. Second, this impact may be mixed with the influence of some unknown factor that also affects whether or not one serves in the military. These potential relationships suggest a more complicated mechanism through which prior military service via ideology has an impact on the deferential voting behavior of Supreme Court Justices.

E. Avenues for Future Research

The stage is thus set for further investigation into the rich and nuanced relationship between military service, military deference, and judicial ideology. To begin, future studies may flesh out the relationship between military service and judicial ideology, exploring the causal link between these two variables and the reasons therefor. Second, while this study looks at the catalog of military deference cases as a whole, future research may break this catalog into topic-based categories to determine

[145] The only case worth noting in this discussion of strict endogeneity is that of Justice Frank Murphy, who served in the military both before and while on the Court. This service, though, still preceded any of his votes that were considered in this study.

whether deferential tendencies vary across areas of the law. Further, military service means something different to everyone who serves, and thus affects people in different ways.[146] Though beyond the scope of this note, such divergent impacts are ripe for future research that would look closely for parallels or patterns among them, specifically as they cut through the field of military deference.

IV. Conclusion

As Justice Murphy once wrote in a letter to a friend, "A soldier is trained for action and for him action never ceases. In a sense we have never put our uniforms away."[147] This article suggests that, contrary to popular intuition, military veterans on the Supreme Court may wear this metaphorical "uniform" in their "enduring quest to uphold American values, at home and abroad."[148] Particularly, it suggests that these veteran Justices are less deferential in military deference cases than those Justices with no prior military experience. As those Justices with military experience also proved more liberal in their judicial ideologies, it also suggests that military service may, in one way or another, impact deferential voting behavior via judicial ideology.

On today's military-dominated political stage, this inverse association between prior military service and deferential voting behavior is particularly salient. With the nature of warfare, and the military, undergoing significant changes, both new and old legal and constitutional concerns are rising to the level of the Supreme Court. The recent lift of all gender-based military service restrictions will unearth old questions of a male-only draft.[149] The need to work ever more

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[146] Amann, *supra* note 89, at 1598 ("But while military service is formative, it does not set everyone on the same path. Civil War duty led Justice Holmes to esteem conflict and abhor human rights. More recently, Justices who had served in uniform divided on whether the Constitution forbids criminal punishment for burning the American flag." (internal citation omitted)).

[147] HOWARD, *supra* note 3, at 272 (quoting Letter from Frank Murphy to Harry Levinson (Dec. 25, 1941), Box 100, Frank Murphy Papers (Michigan Historical Collections, Ann Arbor)).

[148] Amann, *supra* note 89, at 1573.

[149] *See* Dan Lamothe, *Why the Pentagon Opening All Combat Roles to Women Could Subject Them to a Military Draft*, N.Y. TIMES (Dec. 4, 2015), https://www.washington

closely with foreign nationals in today's age of unconventional warfare raises questions of trying foreign national employees of the United States military in courts-martial.[150] Trying enemy combatants and suspected terrorists detained at Guantanamo Bay has proven similarly problematic.[151] Paradoxically, were the Court to welcome an old soldier into its ranks today, in this time of great social scrutiny of military practices, it might just be welcoming a challenge to its tradition of military deference.

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post.com/news/checkpoint/wp/2015/12/04/why-the-pentagon-opening-all-combat-roles-to-women-could-subject-them-to-a-military-draft. For the Court's stance on an all-male draft, see *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981).

[150] *See* United States v. Ali, 71 M.J. 256, 259 (C.A.A.F. 2012) ("[T]he congressional exercise of jurisdiction . . . [over] a non-United States citizen Iraqi national, subject to court-martial outside the United States during a contingency operation, does not violate the Constitution.").

[151] *See, e.g.*, Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 274 (2002) ("In 2001, Bush's Order to establish military commissions was widely viewed (at least among elites) to be illegitimate, inappropriate, unprecedented, unauthorized, unconstitutional, undemocratic, violative of basic civil liberties, harmful to the war effort, and self-defeating.").

Appendix A: Catalog of Deference Cases

Table 1: Catalog of Deference Cases

Case	Citation	Year	Deferential
Ex Parte Quirin	317 U.S. 1	1942	1
Hirabayashi v. United States	320 U.S. 81	1943	1
Korematsu v. United States	323 U.S. 214	1944	1
Falbo v. United States	320 U.S. 549	1944	1
Gibson v. United States	329 U.S. 338	1946	0
Duncan v. Kahanamoku	327 U.S. 304	1946	0
In re Yamashita	327 U.S. 1	1946	1
Patterson v. Lamb	329 U.S. 539	1947	1
Wade v. Hunter	336 U.S. 684	1949	1
United States ex rel. Hirshberg v. Cooke	336 U.S. 210	1949	0
Feres v. United States	340 U.S. 135	1950	1
Whelchel v. McDonald	340 U.S. 122	1950	1
Johnson v. Eisentrager	339 U.S. 763	1950	1

Case	Citation	Year	Deferential
Hiatt v. Brown	339 U.S. 103	1950	1
United States v. Caltex (Philippines) Inc.	344 U.S. 149	1952	1
Madsen v. Kinsella	343 U.S. 341	1952	1
Burns v. Wilson	346 U.S. 137	1953	1
United States v. Nugent	346 U.S. 1	1953	1
Orloff v. Willoughby	345 U.S. 83	1953	1
United States v. Reynolds	345 U.S. 1	1953	1
United States ex rel. Toth v. Quarles	350 U.S. 11	1955	0
Kinsella v. Krueger	351 U.S. 470	1956	1
Wilson v. Girard	354 U.S. 524	1957	1
Reid v. Covert	354 U.S. 1	1957	0
Trop v. Dulles	356 U.S. 86	1958	0
Lee v. Madigan	358 U.S. 228	1959	0
McElroy v. United States ex rel. Guagliardo	361 U.S. 281	1960	0

Case	Citation	Year	Deferential
Grisham v. Hagan	361 U.S. 278	1960	0
Kinsella v. United States ex rel. Singleton	361 U.S. 234	1960	0
United States v. O'Brien	391 U.S. 367	1968	1
Noyd v. Bond	395 U.S. 683	1969	1
O'Callahan v. Parker	395 U.S. 258	1969	0
Schacht v. United States	398 U.S. 58	1970	0
Gillette v. United States	401 U.S. 437	1971	1
Relford v. Commandant	401 U.S. 355	1971	1
Laird v. Tatum	408 U.S. 1	1972	1
Flower v. United States	407 U.S. 197	1972	0
Parisi v. Davidson	405 U.S. 34	1972	0
Gosa v. Mayden	413 U.S. 665	1973	1
Parker v. Levy	417 U.S. 733	1974	1
McLucas v. DeChamplain	421 U.S. 21	1975	1

Case	Citation	Year	Deferential
Schlesinger v. Councilman	420 U.S. 738	1975	1
Schlesinger v. Ballard	419 U.S. 498	1975	1
Middendorf v. Henry	425 U.S. 25	1976	1
Greer v. Spock	424 U.S. 828	1976	1
Stencel Engineering Corp. v. United States	431 U.S. 666	1977	1
Secretary of the Navy v. Huff	444 U.S. 453	1980	1
Brown v. Glines	444 U.S. 348	1980	1
Rostker v. Goldberg	453 U.S. 57	1981	1
Chappell v. Wallace	462 U.S. 296	1983	1
United States v. Shearer	473 U.S. 52	1985	1
United States v. Albertini	472 U.S. 675	1985	1
Wayte v. United States	470 U.S. 598	1985	1
Goldman v. Weinberger	475 U.S. 503	1986	1

Case	Citation	Year	Deferential
United States v. Stanley	483 U.S. 669	1987	1
Solorio v. United States	483 U.S. 435	1987	1
United States v. Johnson	481 U.S. 681	1987	1
Department of the Navy v. Egan	484 U.S. 518	1988	1
Perpich v. Department of Defense	496 U.S. 334	1990	1
Weiss v. United States	510 U.S. 163	1994	1
Loving v. United States	517 U.S. 748	1996	1
Hamdi v. Rumsfeld	542 U.S. 507	2004	0
Rasul v. Bush	542 U.S. 466	2004	0
Hamdan v. Rumsfeld	548 U.S. 557	2006	0
Rumsfeld v. Fair	547 U.S. 47	2006	1
Winter v. Natural Resources Defense Council	555 U.S. 7	2008	1
Munaf v. Geren	553 U.S. 674	2008	1

Case	Citation	Year	Deferential
Boumediene v. Bush	553 U.S. 723	2008	0

Table 2:
Number of Military Deference Cases Decided
Deferentially by Each Court

	Cases	Deferential	%
Stone	6	5	83.3%
Vinson	14	12	85.7%
Warren	12	4	33.3%
Burger	22	19	86.4%
Rehnquist	9	7	77.8%
Roberts	5	3	60%
Total	68	50	73.5%

Appendix B: List of Justices Considered

Table 3:
Justices Considered

Justice Name	Years on the Court	Prior Military Service?	Branch	War Served In	Years of Mil. Serv.	Percentage of Votes Deferential
Harlan F. Stone	1925 - 1946	No				83.33%
Owen Roberts	1930 - 1945	No				75.00%
Hugo Black	1937 - 1971	Yes	U.S. Army	World War I	2	40.00%
Stanley Forman Reed	1938 - 1957	Yes	U.S. Army	World War I	1	86.36%
Felix Frankfurter	1939 - 1962	Yes	U.S. Army	World War I	5	66.67%
William O. Douglas	1939 - 1975	Yes	U.S. Army	World War I	2	31.71%
Frank Murphy	1940 - 1949	Yes	U.S. Army	World War I, World War II	2	22.22%
James F. Byrnes	1941 - 1942	No				100.00%
Robert H. Jackson	1941 - 1954	No				76.47%

Justice Name	Years on the Court	Prior Military Service?	Branch	War Served In	Years of Mil. Serv.	Percentage of Votes Deferential
Wiley Blount Rutledge	1943 - 1949	No				44.44%
Harold Hitz Burton	1945 - 1958	Yes	U.S. Army	World War I	2	85.71%
Fred M. Vinson	1946 - 1953	Yes	U.S. Army	World War I	2	85.71%
Tom C. Clark	1949 - 1967	Yes	TX Natl. Guard	World War I	1	78.95%
Sherman Minton	1949 - 1956	Yes	U.S. Army	World War I	2	100.00%
Earl Warren	1953 - 1969	Yes	U.S. Army	World War I	1	25.00%
John Marshall Harlan II	1955 - 1971	Yes	U.S. Army Air Forces	World War II	2	73.33%
William J. Brennan, Jr.	1956 - 1990	Yes	U.S. Army	World War II	4	21.62%
Charles Evans Whittaker	1957 - 1962	No				66.67%

Justice Name	Years on the Court	Prior Military Service?	Branch	War Served In	Years of Mil. Serv.	Percentage of Votes Deferential
Potter Stewart	1958 - 1981	Yes	U.S. Navy	World War II	5	62.50%
Byron White	1962 - 1993	Yes	U.S. Navy	World War II	4	76.67%
Abe Fortas	1965 - 1969	No				100.00%
Thurgood Marshall	1967 - 1991	No				23.08%
Warren E. Burger	1969 - 1986	No				86.36%
Harry Blackmun	1970 - 1994	No				85.19%
Lewis F. Powell, Jr.	1972 - 1987	Yes	U.S. Army Air Forces	World War II	4	95.00%
William Rehnquist	1972 - 2005	Yes	U.S. Army Air Forces	World War II	3	96.30%
John Paul Stevens	1975 - 2010	Yes	U.S. Navy	World War II	3	52.17%
Sandra Day	1981 - 2006	No				71.43%

Justice Name	Years on the Court	Prior Military Service?	Branch	War Served In	Years of Mil. Serv.	Percentage of Votes Deferential
O'Connor						
Antonin Scalia	1986 - 2016	No				92.86%
Anthony Kennedy	1988 - Present	Yes	CA Army Natl. Guard		1	60.00%
David Souter	1990 - 2009	No				44.44%
Clarence Thomas	1991 - Present	No				100.00%
Ruth Bader Ginsburg	1993 - Present	No				44.44%
Stephen Breyer	1994 - Present	Yes	U.S. Army Res.		8	37.50%
John G. Roberts	2005 - Present	No				100.00%
Samuel Alito	2006 - Present	Yes	U.S. Army Res.		8	100.00%

ARMY DIPLOMACY[1]

REVIEWED BY FRED L. BORCH III*

> *Of all the services, the [A]rmy had the most influence over early Cold War policy, primarily because of its occupational duties in Germany, Japan, and elsewhere. Generals such as Lucius Clay in Germany, Douglas MacArthur in Japan, Mark Clark in Austria, and John Hodge in Korea presided over occupied territories as American viceroys.*[2]

This important and thoroughly researched book deserves to reach a wide audience in our Corps and our Army. *Army Diplomacy* is the first comprehensive study of the Army's role in the planning and implementation of military government in the aftermath of World War II. As professional soldiers, lawyers in uniform will find the book's discussion of various policy issues involving the post-war occupation of Austria, Germany, and Korea to be fascinating reading. Judge advocates will also find the book instructive because the development of Army doctrine on military occupation in the early 1940s (and the implementation of an occupation policy in liberated and conquered territories after 1943) was largely influenced by lawyers and the law. Finally, those interested in our Corps' history will want to read *Army Diplomacy* because Major General Allen W. Gullion, the senior Army officer in charge of all military

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* Fred L. Borch is the Regimental Historian and Archivist for the U.S. Army Judge Advocate General's Corps. He graduated from Davidson College (A.B., 1976), from the Univ. of North Carolina (J.D., 1979), and from the Univ. of Brussels, Belgium (LL.M, *magna cum laude*, International and Comparative Law, 1980). Mr. Borch also has advanced degrees in military law (LL.M, The Judge Advocate General's School, 1988), national security studies (M.A., *highest distinction*, Naval War College, 2001), and history (M.A., Univ. of Virginia, 2007). From 2012 to 2013, he was a Fulbright Scholar to the Netherlands and a Visiting Professor at the University of Leiden's Center for Terrorism and Counterterrorism. He was also a Visiting Researcher at the Netherlands Institute of Military History. Fred Borch is the author of a number of books and articles on legal and non-legal topics, including JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI (2001); JUDGE ADVOCATES IN VIETNAM: ARMY LAWYERS IN SOUTHEAST ASIA (2004); FOR MILITARY MERIT: RECIPIENTS OF THE PURPLE HEART (2010); and MEDALS FOR SOLDIERS AND AIRMEN (2013).

[1] WALTER M. HUDSON, ARMY DIPLOMACY (2015).

[2] *Id.* at 1.

government matters from 1941 to 1944, formerly served as The Judge Advocate General of the Army.

At the height of the United States' "responsibilities, more than 300 million people around the world were under some form of U.S. military government authority."[3] Since the population of the United States in 1945 was about 140 million, this was a remarkable situation. While historians today view the Army's role in the post-war reconstruction of Germany and Japan to be a key factor in the emergence of democracy in both nations, the idea of a beneficial military government was not the prevailing view in Washington, D.C., in the early 1940s. President Franklin D. Roosevelt "thought the idea of military government was 'strange' and even 'abhorrent,'"[4] and other senior civilian leaders in his war-time cabinet also opposed military governance.[5] Secretary of the Interior Harold L. Ickes, a New Deal progressive, was convinced that if the Army were in charge of any post-war occupation, then "military men would grab power and refuse to give it up."[6] Moreover, as the Interior Department during this period was responsible for the governance of the American territories of Guam and the Philippines, Ickes believed that civilian officials in the U.S. government were best suited for the post–war administration of any liberated or conquered territory,[7] rather than the employment of military officials. Vice President Henry Wallace, another New Dealer, likewise envisaged a future in which civilians from the Interior, State, and Treasury Departments would be in charge of post-war occupations.[8] Even senior Army officers did not like the idea; General George C. Marshall thought having the military preside over newly liberated Axis territory might "damage the high regard in which the professional soldiers in the Army" were held by the American people.[9]

As *Army Diplomacy* discusses in its opening chapters, the Army had considerable experience in the post-conflict governance of civilians. During the Mexican War (1846–1848), the Army had established martial law in Mexican territory, and maintained good order and discipline through the use of military commissions and provost courts.[10] During the

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[3] *Id.*
[4] *Id.* at 100.
[5] *Id.*
[6] *Id.* at 101.
[7] *Id.* at 102.
[8] *Id.* at 102–04.
[9] *Id.* at 2.
[10] *Id.* at 28.

Civil War and the Reconstruction that followed, Union forces ran military governments in former Confederate states and in the years following the Spanish–American War, the Army had "established civil governments in Puerto Rico, Cuba and the Philippines 'with great success.'"[11] After World War I, U.S. troops occupied a 12,000 square-mile area of Germany, and the lessons learned in this so-called "Rhineland" occupation were published by the Fort Leavenworth School Press as a manual entitled *Military Government*,[12] in 1920.[13] Finally, as the fighting raged in Europe and the Pacific, the Army was fully immersed in running a military government in Hawaii because martial law had been declared in the territory on December 7, 1941.

The past history of successful post-war governance meant that, unlike civilian departments and agencies in the Roosevelt administration, the Army had a wealth of practical experience in planning for and implementing an occupation policy. Additionally, the Army of the day was full of politically savvy officers who were able to represent the Army's interest in the bureaucratic realm, not only with other U.S. agencies but also with organizations in Allied governments.

The Army also had a very powerful supporter whose stature in the Roosevelt cabinet was unchallenged: Secretary of War Henry L. Stimson. A Harvard Law graduate and "paragon of the American [White Anglo-Saxon Protestant] (WASP) establishment,"[14] Stimson served as an artillery colonel in World War I and was positive about his Army experience; in fact, he was called "The Colonel" by those who worked with him.[15] Stimson was also politically astute and, despite being a Republican, was trusted by Roosevelt for his sage advice. Stimson previously served as Secretary of War under President William Howard Taft, and had been President Herbert Hoover's Secretary of State. Consequently, he had much more experience than other officeholders in the Roosevelt administration. Perhaps more importantly, Stimson served as governor–general of the Philippines in the 1920s.[16] As a result, he was a strong proponent of military government's necessity—and was convinced that the Army must play the key role in any post-war occupation.[17]

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[11] *Id.* at 36.
[12] H.A. SMITH, MILITARY GOVERNMENT (1920).
[13] HUDSON, *supra* note 1, at 38.
[14] *Id.* at 99.
[15] *See* GODFREY HODGSON, THE COLONEL (1990).
[16] HUDSON, *supra* note 1, at 99.
[17] *Id.*

Finally, there was one practical reason that the Army ultimately took charge of all post-war occupation efforts: it was the only American institution with sufficient manpower, discipline, and unified command structure necessary to successfully implement a military occupation. Even if a civilian agency in war-time Washington wanted to take charge of all post-war occupation efforts, that agency was simply no match for the Army.[18] The final result: the Army became "the dominant U.S. government actor in postwar occupation policy."[19]

As *Army Diplomacy* shows, it was one thing to determine as a policy matter that the Army should take the lead role in the post–war occupation of conquered and liberated Axis territories, but quite another to decide upon the nuts-and-bolts of any occupation. Luckily for the Army, the Provost Marshal General who was tasked with developing a military occupation doctrine and determining how that doctrine should be implemented in practice was Major General Allen W. Gullion. A 1905 graduate of the U.S. Military Academy, Gullion served twelve years as an Infantry officer and saw combat in the Philippines. Then, three years after obtaining a law degree from the University of Kentucky, Gullion was appointed to the rank of major in the Judge Advocate General's Department.[20] He had a remarkable career as an Army lawyer, culminating in his appointment as The Judge Advocate General (TJAG) in 1937.[21] While it would have been expected for TJAG to retire and enter civilian life, Gullion was too valuable an asset. This explains why, some months before retiring as TJAG in December 1941, Gullion was appointed by General George C. Marshall as the Army's Provost Marshal General, a position Gullion held from July 1941 until April 1944.[22]

As Provost Marshal General, Gullion and his staff formulated the policies for military governance adopted by Roosevelt, including an important 1943 revision to Field Manual (FM) 27-5, *Military Government*

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[18] *Id.* at 115-17.
[19] *Id.* at 3.
[20] Edmund A. Gullion, *Allen W. Gullion 1905*, WESTPOINTOAG.ORG, http://apps.westpointaog.org/emorials/Article/4430/ (last visited Nov. 19, 2015).
[21] *Id.*
[22] Dr. Ronald Craig, *Evolution of the Provost Marshal General*, WOOD.ARMY.MIL, http://www.wood.army.mil/engrmag/PDFs/April%2004%20pdfs/Craig-evolution%20PMG%20office.pdf (last visited Nov. 19, 2015); HUDSON, *supra* note 1, at 77-78.

and Civil Affairs.[23] This manual ultimately emerged as the bible for all those involved in military occupation duties because "it provided guidance on how to train, plan, and eventually implement military government."[24] Gullion recognized, however, that having a doctrine was insufficient; there must also be education and training for those who would use FM 27-5.[25] As a result, Gullion established a Military Government School at the University of Virginia that trained officers (some of whom were judge advocates) for possible military occupation duties.[26] Later, again on Gullion's recommendation, the Army created a Civil Affairs Division (as part of the War Department General Staff) to utilize the military personnel being educated in Charlottesville, Virginia.[27]

Whatever fears Roosevelt and others might have had about Army officers as military governors—men who might be Old World imperialists with colonialist attitudes[28] or simply a new type of Nazi *gauleiter*[29]—these misgivings almost certainly were allayed by the fact that then Lieutenant Colonel Gullion had shown unwavering support for the New Deal and the President's progressive politics while serving as the National Recovery Act administrator in Hawaii in 1935.[30]

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[23] U.S. DEP'T OF ARMY, FIELD MANUAL 27-5, UNITED STATES ARMY AND NAVY MANUAL OF MILITARY GOVERNMENT AND CIVIL AFFAIRS (22 Dec. 1943).
[24] HUDSON, *supra* note 1, at 72.
[25] *Id.* at 77.
[26] *Id.* at 78, 85.
[27] *Id.* at 135–55.
[28] *Id.* at 108
[29] *Id.* at 111.
[30] HUDSON, *supra* note 1, at 77. In 1933, the Congress passed legislation designed to stem the deflation of the Great Depression (which had begun in October 1929) and stimulate the U.S. economy. See *U.S. monetary and fiscal policy in the 1930s*, 26 OXFORD REV. OF ECON. POL'Y 385 (2010). Part of this legislation included the establishment of a National Recovery Administration (NRA), which adopted a blue eagle as its symbol and "We Do Our Part" as its slogan. *See, e.g.*, *"We Do Our Part"*, GEORGE MASON UNIV., http://historymatters.gmu.edu/d/6697/ (last visited Mar. 9, 2016). The goal of the NRA was for the government to bring industry and labor together to create codes of "fair practice" and set prices that would raise consumer purchasing power and increase employment. *The National Recovery Administration*, UNIV. OF HOUSTON (2016), http://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=2&psid=3442. Hugh S. Johnson, who had been a member of the Judge Advocate General's Department in World War I, was the first Director of the NRA. *Id.* He selected administrators—like Gullion, who Johnson knew from his years as a judge advocate—to implement NRA goals. Interview with General Thomas S. Moorman (Retired) United States Air Force, grandson of Major General Gullion (Aug. 20, 2015). The NRA legislation included: a minimum wage of between twenty and forty-five cents per hour and a maximum work week of thirty-

After setting the stage for the Army's emergence as the prime mover in the post-war occupation of liberated and conquered lands, *Army Diplomacy* devotes its remaining pages to reviewing the planning and implementation of military government in Germany, Austria, and Korea.[31] Germany at this time was a conquered nation, and Korea was ostensibly liberated. Austria existed in an "unusual gray area"[32] in that it was a victim (of German annexation), yet was also criminally liable for the war crimes committed by its citizens while part of the Third Reich.

The military occupation of Germany and Austria was generally successful, if for no other reason than the Germans and Austrians recognized that having lost the war, they must accept military governance as part of losing. But the occupation was not without its challenges, especially concerning "denazification."[33] While a laudable goal, it was simply not practical to eliminate all Nazis from economic and social life, and it was difficult to determine who was an "active" Nazi, as opposed to a German who joined the Party only because it was required in order to obtain employment. Those readers who know of the de-Ba'athification efforts by the Coalition Provisional Authority in the aftermath of the 2003 Iraq invasion will find the discussion of denazification in Germany most interesting and instructive, especially as the decision to remove the Ba'ath Party from Iraqi life has produced decidedly mixed results.[34]

Army Diplomacy sees the occupation's success in Austria as especially noteworthy, and argues persuasively that General Mark Clark's apolitical and relatively amicable relationship with the Soviets, combined with an endorsement of a provisional Austrian government headed by a civilian, as the catalyst for an early end to the four-zonal military occupation of

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five to forty-five hours. *See* Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, DEP'T OF LABOR, http://www.dol.gov/general/aboutdol/history/flsa1938 (last visited Mar. 9, 2016). While the NRA was popular with labor, it faced considerable resistance in the business community. *Id.* The U.S. Supreme Court declared the NRA unconstitutional in Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). For more on the NRA, *see* JOHN K. OHL, HUGH S. JOHNSON AND THE NEW DEAL (1985).

[31] HUDSON, *supra* note 1, at 157.

[32] *Id.* at 3.

[33] *Id.* at 192–99.

[34] *See, e.g.*, Miranda Sissons & Abdulrazzag Al-Saiedi, *A Bitter Legacy: Lessons of De-Ba'athification of Iraq*, https://www.ictj.org/sites/default/files/ICTJ-Report-Iraq-De-Baathification-2013-ENG.pdf (last visited November 9, 2015).

Austria.[35] But from the beginning, the Austrians saw the Americans very much as saviors: there were 750,000 displaced persons and 200,000 refugees, and the U.S. Army provided these starving men, women, and children with "the basic necessities of life."[36] As a result, there was "a relatively placid population with whom the U.S. occupiers had good relations,"[37] and a smooth transition to a centralized—and civilian—government. The occupation of Austria ended in 1955, with the peaceful withdrawal of all occupying forces.[38]

As for Korea, *American Diplomacy* demonstrates that this occupation was a failure. While the Army began detailed planning for the post–war occupation of Germany and Japan as early as 1942, little thought was given to Korea until 1945, likely due to the Pentagon's expectation that the Pacific War would continue into 1946 and even longer.[39] From the beginning, the "control machinery" for the Korean peninsula went awry. The first problem was the artificial division of Korea at thirty-eight degrees north latitude. Initially, the thirty-eighth parallel was only applicable to surrender provisions: Japanese forces south of the parallel would surrender to U.S. troops while those north of the line would surrender to Soviet troops.[40] But this dividing line, which paid no respect to Korean political boundaries and "passed through streams, rivers, roads, highways, and rail lines with total arbitrariness,"[41] hardened within a short period of time—and remains in place today. From a historical perspective, this zonal split "wounded the collective consciousness of the Koreans,"[42] as Korea had been an independent and united country for centuries before the brief Japanese occupation of the World War II era.

From the outset, military governance in Korea was fraught with geographical problems. A culturally savvy officer who understood Asia and Asian culture might have done a better job, but this was not to be. On the contrary, Lieutenant General John Hodge, in charge of military government efforts, "lacked the civil-political experience for the occupation."[43] Unfortunately for Hodge, the Korean occupation was the

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[35] HUDSON, *supra* note 1, at 227–28.
[36] *Id.* at 217.
[37] *Id.* at 227.
[38] *Id*.
[39] *Id.*
[40] *Id.* at 236.
[41] *Id*. at 239.
[42] *Id.* at 243.
[43] *Id.*

most difficult of any mission carried out by U.S. troops after World War II, and he was simply not up to the task. As a result, the Soviets conducted their occupation north of the thirty-eighth parallel without any coordination with the Americans to the south of that artificial dividing line.[44] The result was the rapid establishment of two entirely dissimilar governmental systems—and trouble that would later explode into a full-scale conventional war in June 1950,[45] and a persistently problematic division that continues to the present.

Army Diplomacy is a first-rate piece of scholarship that belongs on the shelf of every judge advocate with an interest in World War II in general, and the legal and policy issues surrounding post-war planning in particular. The author, an active Army lawyer who has a Ph.D. in military history from Kansas State University,[46] is to be commended for authoring this excellent and highly informative book.

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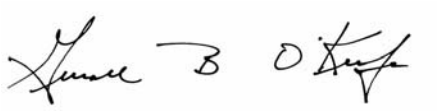
[44] *Id.* at 253.
[45] *Id.* at 260.
[46] *Id.*

By Order of the Secretary of the Army:

MARK A. MILLEY
General, United States Army
Chief of Staff

Official:



GERALD B. O'KEEFE
Administrative Assistant to the
Secretary of the Army