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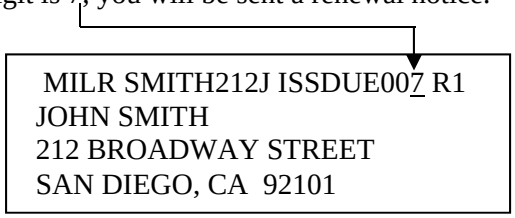

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MILITARY LAW REVIEW

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REBALANCING MILITARY SENTENCING: AN ARGUMENT TO RESTORE UTILITARIAN PRINCIPLES WITHIN THE COURTROOM

LIEUTENANT COLONEL BRADFORD D. BIGLER*

I. Introduction

Retribution is an almost instinctual response to injury caused by another. From the earliest times, the law has recognized the retributive concept—perhaps most famously expressed in the Mosaic law as an "eye for eye, tooth for tooth."[1] While the simplicity of retributive justice philosophy is attractive, building a system of justice that relies solely on retribution might miss another important end of sentencing—producing a benefit for society.

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[1] Exodus 21:22 (New International Version).

Utilitarian sentencing principles provide a focus on the future that counterbalances backward-looking retributive theory. These principles focus on a benefit for society, such as reduced crime in the future, the rehabilitation of the offender, or some other positive effect. The promise of utilitarian sentencing is that, unlike retribution, it is theoretically possible to determine through research just how much punishment is necessary to achieve whatever the desired end-state is.[2] Military sentencing expressly recognizes four utilitarian sentencing principles: rehabilitation of the accused, general deterrence of others, specific deterrence of the accused, and the preservation of good order and discipline.[3]

In recent years, an additional utilitarian tool—recidivism risk assessment—has entered the scene as a robust, evidence-based methodology to predict which criminals are likely to offend again. Several military cases, in particular *United States v. Ellis*,[4] have cracked open the sentencing door to recidivism tools, but have fallen short of either embracing recidivism principles or providing the robust procedures necessary to realize fully the potential of recidivism research.

In fact, a close comparative analysis of sentencing principles reveals that the military has not only failed to embrace recidivism principles, but that it is headed in the other direction, and has largely abandoned the utilitarian sentencing principles in favor of retribution. Part of this movement away from utilitarian principles has to do with how easy it is to admit retributive evidence in the military sentencing setting.[5] While the

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[2] *See infra* Section II.A. Utilitarian principles seek a 'good' for society. For our purposes, that "good" could be the prevention of future crime by that accused or by others, the rehabilitation of the accused, restoration of good order and discipline, or some other non-punitive end.

[3] *See, e.g.*, U.S. DEP'T OF ARMY, PAM 27-9, MILITARY JUDGE'S BENCHBOOK para. 2-5-21 (10 Sept. 2014) [hereinafter DA PAM 27-9]. Retribution is the fifth sentencing principle. *Id.* Good order and discipline will not be a focus of this paper. The National Defense Authorization Act for Fiscal Year 2017 made numerous changes to the Uniform Code of Military Justice (UCMJ), including an amendment to Article 56 UCMJ that adds explicit factors for a sentencing authority to consider. *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5301 [hereinafter FY17 NDAA]. While the amendment explicitly lays out additional sentencing factors, all of the factors still fundamentally relate to the underlying sentencing rationales discussed in this paper. The effective date of the amendments is no later than January 1, 2019, unless earlier specified by the President. *Id.* § 5542(b).

[4] United States v. Ellis, 68 M.J. 341 (C.A.A.F. 2010).

[5] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b) (2016) [hereinafter MCM]. *See also* discussion *infra* Section II.B.

sentencing rules—especially those concerning rehabilitative potential[6]—do not wholly abandon utilitarian principles, the rules apply such a stilted and outdated approach that it is nearly impossible to apply them, particularly with the intellectual rigor required to fulfill the promise of utilitarian-based sentencing.

As written, the procedural rules in sentencing largely deny utilitarian sentencing principles the opportunity to deliver on their empirical promise. This article proposes that a new sentencing rule be adopted to give recidivism risk an appropriately calibrated place in military court-martial sentencing.

II. Military Sentencing—A Primer

A. The Role of the Sentencing Authority

In the military, after a finding of guilt, sentencing proceedings begin almost immediately.[7] The sentencing authority can be either the military judge or a military panel,[8] and the Uniform Code of Military Justice (UCMJ) allows the accused an election between them.[9] Even in cases where the accused enters a guilty plea before the military judge, the accused can still request that the case be heard by a military panel for sentencing.[10] However, if the accused enters a not-guilty plea before a panel, that panel sentences the accused.[11]

The military sentencing scheme vests incredible discretion in the sentencing authority. Statutes—or Presidential orders—fix maximum

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[6] *See generally* MCM, *supra* note 5, R.C.M. 1001(b)(5) (2016).
[7] *See generally id.* R.C.M. 1001 (2016).
[8] The fiscal year (FY) 2017 National Defense Authorization Act (NDAA) includes a provision for all sentencing to be conducted by military judge alone, unless elected otherwise by an accused who has been tried before members. *See* FY2017 NDAA, *supra* note 3, § 5182. The changes are significant to the broader military justice practice, and several are directly relevant to the focus of this article.
[9] *See generally* MCM, *supra* note 5, R.C.M. 903 (2016). If the accused is enlisted, he has the further right to elect trial by a military panel composed of at least one third enlisted members. *See* UCMJ art. 25(c)(1)(1983); MCM, *supra* note 5, R.C.M. 503(a)(2) (2016). Ordinarily, the panel consists of members senior in rank to the accused. UCMJ art. 25(d)(1)(1983).
[10] *Id*. The 2017 amendments to the UCMJ no longer allow this option; however, those amendments may not take effect until January 1, 2019. FY17 NDAA, *supra* note 3, § 5236.
[11] *Id*.

sentences, but they are set sufficiently high that they rarely operate as a realistic ceiling.[12] In the sexual assault context, for example, maximum sentences range from one year, for the comparatively trivial crime of indecent exposure, to as much as life without parole, for rape.[13] No military offense has a mandatory minimum term of years.[14] In fact, no punishment is an acceptable sentence for all crimes, save more egregious sex crimes.[15] Even then, however, the mandatory minimum is a punitive discharge that must be part of the sentence.[16]

Other forms of punishment are also possible. Forfeiture of pay and allowances, as well as reduction in rank, are frequently a part of the sentence.[17] A range of other sentencing possibilities like reprimands, fines, restrictions on liberty, and hard labor are also available.[18]

Collateral consequences also form a part of the overall sentencing landscape, and may be imposed by either civil or military authorities. For example, civilian sex offender registration requirements follow military conviction of a sexual assault.[19] Other uniquely military consequences also may follow. For example, the recording of any adjudication of guilt

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[12] *See, e.g.*, Major Jody Russelberg, *Sentencing Arguments: A view from the bench*, ARMY LAW., Mar. 1986, at 50, 51 (stating, "Except in a few cases, neither the maximum punishment nor a sentence to no punishment is an appropriate sentence.").

[13] Coker v. Georgia, 433 U.S. 584 (1977). Notwithstanding *Coker*, death is an available sentence for rape offenses, under certain conditions. *See* Kennedy v. Louisiana, 554 U.S. 407 (2008)(containing a denial of petition for rehearing and modification of the Court's opinion to comment on the availability of the death penalty for rape in the military).

[14] MANUAL FOR COURTS-MARTIAL, UNITED STATES app. A12 (2012)

[15] *See* 10 U.S.C. § 856 (2013) (UCMJ) (requiring mandatory discharge for those found guilty of penetrative sexual offenses, or rape and sexual assault of a child).

[16] *Id*. Article 60 of the UCMJ allows a convening authority to disapprove a "mandatory" discharge, if it is a part of a pretrial agreement with the accused. 10 U.S.C. § 860 (b)(4)(C)(i)(2013).

[17] *See, e.g.*, RESULTS OF TRIAL, U.S. NAVY JUDGE ADV. GEN'S CORPS, http://www.jag.navy.mil/news/ROT.htm (last visited Feb. 20, 2017) (reporting results of Navy courts-martial from 2013 to present).

[18] *See, e.g.*, Major Joseph B. Berger III, *Making Little Rocks Out of Big Rocks: Implementing Sentences to Hard Labor*, ARMY LAW., Dec. 2004, at 1, 1 (discussing hard labor without confinement and proposing a model to make administration of the sentence easier). The 2016 changes to the UCMJ eliminated diminished rations, e.g., bread and water, as an authorized punishment. FY2017 NDAA, *supra* note 3, § 5141.

[19] *See, e.g.*, U.S. DEP'T. OF DEF., INSTR. 1325.07, ADMINISTRATION OF MILITARY CORRECTIONAL FACILITIES AND CLEMENCY AND PAROLE AUTHORITY encl. 2, app. 4 (listing offenses requiring sex offender processing and requiring registration with appropriate civilian jurisdictions).

is required administratively.[20] If the individual is not given a punitive discharge as part of the sentence for a crime of sexual assault,[21] regulations require the initiation and processing of an administrative discharge.[22]

Other collateral consequences may flow from the sentence itself. For example, a dishonorable discharge strips the accused of nearly all Department of Veteran Affairs benefits, while a bad conduct discharge precludes many, but not all, such benefits.[23] Another example: by operation of law, a sentence to more than six months in confinement or one that includes a punitive discharge automatically results in forfeiture of pay and allowances.[24]

Recent changes to the UCMJ have restricted some discretion by the sentencing authority. The National Defense Authorization Act for Fiscal Year 2017 includes a provision by which the government could appeal a sentence that violates the law or is "plainly unreasonable."[25] It is unclear what kinds of sentence might be "plainly unreasonable"; however, the provision likely relates to earlier proposals by the Military Justice Review Group which would have established sentencing guidelines and parameters.[26] Despite the changes, discretion in the military sentencing

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[20] *See, e.g.*, Military Personnel Message, 1070-170, U.S. Army Human Res. Command, subject: Documents Filed in the Permanent Personnel Record (22 Aug. 2002) [hereinafter MILPER Message 1070-170] (stating guidelines for the filing of nonjudicial punishment and court-martial conviction records); U.S. ARMY, *iPerms Required Documents*, HUMAN RES. COMM'D (Mar. 30, 2016), https://www.hrc.army.mil/Site/Assets/Directorate/tagd/iPerms_required_documents.pdf (specifying that records of all court-martial convictions and non-judicial punishment are to be filed in the soldier's permanent record).

[21] Dismissal or dishonorable discharge is a mandatory minimum punishment for conviction of certain sex offenses. *See* UCMJ art. 56 (2014).

[22] *See, e.g.*, U.S. DEP'T. OF DEF., DIR. 2013-21, INITIATING SEPARATION PROCEEDINGS AND PROHIBITING OVERSEAS ASSIGNMENT FOR SOLDIERS CONVICTED OF SEX OFFENSES (7 Nov. 2013); MILPERSMAN Message, 1910-142, 31 May 2013, Dep't of Navy, Subject: Separation by Reason of Misconduct–Commission of a Serious Offense; MILPERSMAN Message, 1910-233, 11 July 2013, Dep't of Navy, Mandatory Separation Processing (requiring discharge processing for certain kinds of sexual and other offenses).

[23] *See Applying for Benefits and Your Characterization of Discharge*, VET'S ADMIN., http://www.benefits.va.gov/benefits/character_of_discharge.asp (last visited Feb. 7, 2017).

[24] *See* UCMJ art. 58(a) (1960), UCMJ art. 58(b)(1996). The operation of these statutes has been greatly simplified here. For purposes of this article, it is enough to understand that statutorily imposed collateral consequences form an important—though not dominant—part of the sentencing landscape.

[25] *See* FY17 NDAA, *supra* note 3, § 5301.

[26] *See* Military Justice Review Group, *A Bill*, DEP'T OF DEF. (2016), http://www.dod.gov/dodgc/images/military_justice2016.pdf [hereinafter MJRG] (containing the Military Justice Act's proposed amendment to Article 56 of the UCMJ, which included "sentencing

proceeding still remains largely unconstrained.[27]

B. The Role of the Procedural Rules

Superimposed over this structural framework is a procedural one that effectively limits sentencing evidence to one of several well-defined categories. These categories can be loosely grouped into one of three categories: (1) evidence admitted during the merits portion of trial; (2) evidence presented by the prosecution during sentencing; and (3) evidence presented by the victim or defense during sentencing.[28]

1. Sentencing Evidence Introduced During the Merits

The first significant subset of evidence considered during the sentencing portion is that admitted during trial on the merits. An adept counsel will "start presenting [the] sentencing evidence during the findings portion of the case."[29] Under Rule for Courts-Martial (RCM) 1001(f)(2), evidence that is properly admitted during the merits can be considered during sentencing, even if the purpose for which it was admitted was a limited one.[30] Because of this rule, much useful sentencing evidence actually comes in during the trial on the merits. The evidentiary rules during trial allow almost any evidence to come in if it is relevant to an element of an offense charged. For example, the state of mind of the accused is usually relevant to findings, whether intent is a formal element or not. Evidence concerning the accused's state of mind is also highly relevant evidence for the sentencing authority.

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parameters and sentencing criteria" that were to be developed by a statutorily created "Military Sentencing Parameters and Criteria Board"). In addition to the appeal provisions included in the FY2017 NDAA, the Military Justice Review Group proposed an amendment to Article 56 that would have allowed for government appeal where the sentence reflected an improper application of a sentencing factor. *Id*.

[27] The Federal Sentencing Guidelines—even after *United States v. Booker* relaxed the mandatory application—seem highly structured by comparison the military system. United States v. Booker, 543 U.S. 220 (2005); *see generally* U.S. SENTENCING GUIDELINES MANUAL (2016). Whether such flexibility in military sentencing is a good thing is beyond the scope of this article.

[28] Evidence presented by the victim and the accused fall under separate procedures. *Compare* MCM, *supra* note 5, R.C.M. 1001(c) (2016) *with id.* R.C.M. 1001A (2016). However, for the purposes of this article, they will be analyzed together.

[29] Colonel Michael J. Hargis, *A View from the Bench: Findings, Sentencing, and the "Good Soldier"*, ARMY LAW., Mar. 2010, at 91, 91.

[30] MCM, *supra* note 5, R.C.M. 1001(f)(2) (2016).

Three different types of merits evidence relevant to sentencing are worthy of more detailed consideration. Those types of evidence are uncharged misconduct, character evidence, and propensity evidence. Additionally, this article will briefly consider evidence admitted in the context of a guilty plea.

Evidence admitted during the findings can include uncharged misconduct.[31] Military Rule of Evidence (MRE) 404(b) provides for the admissibility of "other crimes, wrongs, or acts . . . as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."[32] The rule provides that this is a non-exhaustive list: so long as the evidence has some non-character purpose, then the evidence is admissible.[33]

Because of the breadth of the rule, a clever prosecutor can frequently admit evidence of uncharged crimes for non-character purposes. While the value of the evidence hinges on a limited "non-character" purpose on the merits, at sentencing, RCM 1001(f) allows the sentencing authority to consider the evidence for any relevant purpose, only loosely cabined by the sentencing principles.[34] For obvious reasons, character evidence is highly relevant at sentencing.[35]

So-called propensity evidence is another form of evidence offered on the merits that has potential use during sentencing proceedings.[36] Military Rules of Evidence 413 and 414 allow evidence of similar crimes in sexual assault and child molestation cases to be admitted against an accused for "consider[ation] for its bearing on any matter to which it is relevant."[37]

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[31] *Id.* M.R.E. 404(a)(1) (2016) (allowing the prosecution to introduce evidence of "pertinent" character traits of the accused under certain limited circumstances).

[32] *Id.* M.R.E. 404(b) (2016).

[33] *Id.* M.R.E. 404(b)(2) (2016) ("This evidence may be admissible for another [noncharacter] purpose."); United States v. Castillo, 29 M.J. 145, 150 (C.M.A. 1989). *See also* Major Bruce D. Landrum, *Military Rule of Evidence 404(b): Toothless Giant of the Evidence World*, 150 MIL. L. REV., 271, 314-15 (1995).

[34] MCM, *supra* note 5, R.C.M. 1001(f)(2)(A) (2016).

[35] Lieutenant Colonel Tiernan P. Dolan, *A View from the Bench: Sentencing: Focusing on the Content of the Accused's Character*, ARMY LAW., Aug. 2012, at 34.

[36] *But see* United States v. Hills, 75 MJ 350, 356 (C.A.A.F. 2016) (limiting the use of propensity evidence where the evidence sought to be admitted for propensity purposes is charged misconduct). Trailer cases have continued to refine the meaning of *Hills* for military practice. *See, e.g.*, United States v. Guardado, 75 M.J. 889 (A.C.C.A. 2016).

[37] MCM, *supra* note 5, M.R.E. 413(a), 414(a) (2016); *but see* United States v. Dacosta, 63 M.J. 575 (A. Ct. Crim. App. 2006) (imposing duty to instruct panel members on purposes for which such evidence may be considered).

Thus, if the accused has previously committed similar crimes, evidence of those crimes can be presented during the prosecution case in chief. Importantly, the rule does not place any limits on the prosecution as to means of proof.[38] Even a prior acquittal of the alleged offense does not absolutely bar presentation of the evidence, though the evidence is subject to preliminary ruling by the military judge.[39] In some cases, the evidence may present a trail of damning evidence that significantly alters both the merits and sentencing landscape. For example, the government might bring in a string of witnesses to testify to uncharged but credible accusations that supplement a current strong case. In other cases, the government may be using the rules tactically.[40]

Propensity evidence may have a significant impact on the sentence, depending on how the sentencing authority views it. Perhaps because of that, the military judge has the special role of limiting the impact of the evidence—while such evidence is admissible, the government may not unnecessarily highlight it.[41]

Finally, it is worthwhile considering how evidence comes before the sentencing authority in the context of a guilty plea. While the sentencing

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[38] *Compare* MCM, *supra* note 5, M.R.E. 413(a) (2016) ("[T]he military judge may admit evidence that the accused committed any other sexual offense), *with* MCM, *supra* note 5, M.R.E. 405 (limiting the types of evidence that may be used to prove character generally).

[39] *See, e.g.*, United States v. Solomon, 72 M.J. 176 (C.A.A.F. 2012). In light of *Hills*, practitioners may wish to avoid using evidence of misconduct which has previously been prosecuted to an acquittal. *Hills*, 75 MJ at 356. Part of the reasoning in *Hill* found that charged propensity was problematic because it could confuse the fact finder and result in a reducing the burden of proof as to either (or all) charged offenses being used for propensity purposes. *Id.* ("[Military Rule of Evidence] 413 'would be fundamentally unfair if it undermines the presumption of innocence and the requirement that the prosecution prove guilt beyond a reasonable doubt.'") (quoting United States v. Wright, 53 M.J. 476, 481 (C.A.A.F. 2000). Note however, *Hills* did not call into question the fundamental constitutionality of the MRE 413. *Hills*, 75 MJ at 357-58. More importantly for purposes of this article, *Hills* did not restrict the use of propensity evidence on sentencing. *Id.*

[40] For example, the government might try to use the rules to blunt the spillover instruction in a child molestation case with two victims; however, this type of tactical use is very risky. While the explicit language of Rule for Courts-Martial (RCM) 413 and RCM 414 appears to authorize such use, recent cases have clamped down on the use of propensity evidence, particularly where the propensity evidence is also charged misconduct. *See, e.g.*, United States v. Hills, 75 MJ 350, 356 (C.A.A.F. 2016). *See also* DA PAM 27-9, *supra* note 3, para. 7-17 (requiring a panel instruction that "[t]he burden is on the prosecution to prove each and every element of each offense beyond a reasonable doubt" and that "[p]roof of one offense carries with it no inference that the accused is guilty of any other offense," even where the propensity evidence offered is uncharged).

[41] *See id.* at 7-13-1, n.5.1.

phase of trial is the same regardless of whether there is a guilty plea or a contest on the merits, there are significant differences in how evidence comes to the judge during a guilty plea. In general, the accused can mitigate much of what comes before the sentencing authority through a negotiated guilty plea. Unlike most civilian jurisdictions, which require only minimal inquiry into the "factual basis" for the crime, the military requires an extremely comprehensive plea inquiry to ensure that the accused actually committed the crime and believes he committed the crime.[42] Depending on the crimes alleged, this inquiry can take many hours. During this inquiry, the accused must provide sufficient facts detailing why he believes he is guilty of the crime—including every element of the offense—and why he is in fact guilty. While the plea inquiry may be quite searching, the accused still has an incentive to minimize the impact of the plea inquiry on the sentencing proceedings. Of course, if the accused makes exculpatory statements, then the judge cannot accept the plea.[43] The defense and government may seek to limit the risk of a failed providence inquiry by entering a stipulation of fact.[44]

A stipulation introduces new sentencing issues. While a plea inquiry is limited only to the offenses alleged, and the judge will not generally inquire as to other, uncharged misconduct unless it is directly relevant to an element of the offense,[45] a stipulation may contain aggravating facts, including uncharged misconduct. Because of this, government and defense counsel often vigorously negotiate over what—and how—uncharged misconduct will be included as a part of the stipulation.

2. Evidence Presented by the Prosecution During the Sentencing Phase

During the sentencing phase, evidence offered by the prosecution is much more closely controlled. Sentencing evidence must fit within one of

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[42] *See, e.g.*, United States v. Care, 40 C.M.R. 247 (C.M.A. 1967).

[43] MCM, *supra* note 5, R.C.M. 910(e) Discussion (2016) (requiring the military judge to inquire into and resolve "any potential defense . . . raised by the accused's account" before accepting the plea).

[44] *See, e.g.*, Colonel Thomas S. Berg, *A View from the Bench: A Military Judge's Perspective on Providency*, ARMY LAW., Feb. 2007, at 35, 36.

[45] For example, the military judge may ask how an accused knew that he was ingesting an illegal drug, which inquiry could result in a brief discussion of prior unlawful (and uncharged) use. Note, however, that such an inquiry would also conform to the evidentiary rules regarding uncharged misconduct. *See* MCM, *supra* note 5, M.R.E. 404 (2016).

five "pigeon holes."[46] These pigeon holes are: (1) service data of the accused on the charging document; (2) properly filed service records of the accused; (3) evidence of prior convictions; (4) evidence in aggravation; and (5) evidence of rehabilitative potential.[47] In practice, these pigeon holes can be quite narrow.

The first pigeon hole is service data of the accused, and consists of data such as name, rank, service number, unit, date of entry for current term of service, pay data, and pretrial confinement information. This information is basic and arguably adds very little to the sentencing calculus, except for perhaps information concerning any pretrial confinement and current pay data.

The second pigeon hole—service records of the accused—contains training records, awards, schooling, and other administrative information.[48] The records may also contain officially filed reprimands or records of non-judicial punishment.[49] The records may enable both the prosecution and defense to argue the accused's rehabilitative potential, though frequently the accused's records only contain evidence typical of any soldier with similar rank and specialty.[50] A service record containing negative information is valuable to a prosecutor, but in many cases, the

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[46] This term is common Army parlance for the sentencing categories. *See, e.g.*, Colonel Michael J. Hargis, *A View from the Bench: Military Rule of Evidence (MRE) 412 and Sentencing*, ARMY LAW., Mar. 2007, at 36, 36 (discussing different categories of sentencing evidence as "pigeon holes").

[47] *See* MCM, *supra* note 5, R.C.M. 1001 (2016).

[48] The key inquiry is that the record must relate to the manner of military service performed by the accused—not records predating her service. *Id.* R.C.M. 1001 (2016). A recent case found that a service record referring to misconduct committed by the accused before his entry into the military was not admissible under this rule. United States v. Ponce, 75 M.J. 630 (A. Ct. Crim. App. 2016).

[49] Training records and test scores can sometimes be relevant to the question of whether the accused had the capability to commit the crime. *See, e.g.*, Ellis v. Jacob, 26 M.J. 90 (C.M.A. 1988) (finding that provisions of the UCMJ regarding mental responsibility extended beyond the question of mental disease or defect to the question of whether the accused had the capability of forming the requisite intent); *see also* DA PAM 27-9, *supra* note 3, para. 5-17 (providing panel instructions on same).

[50] Administrative records are usually a significant part of the so-called Good Soldier Book defense counsel frequently admit as mitigation evidence. *See, e.g.*, Hargis, *A View from the Bench: Findings, Sentencing, and the "Good Soldier," supra* note 29, at 93 ("[T]he Soldier's Medal citation, . . . the APFT score, the weapons qualification scores, and the accused's noncommissioned officer evaluation reports are all admissible and are commonly submitted in the form of a "Good Soldier Book."). Note, however, that in this context, the records are being admitted under the broader evidentiary rules available to the defense. MCM, *supra* note 5, R.C.M. 1001(c) (2016).

accused may have no prior negative administrative or non-judicial record.[51]

The third pigeon hole—evidence of prior convictions—would indeed be helpful evidence in aggravation. However, this evidence rarely exists and is generally not a significant source of evidence in the sentencing context.[52]

Evidence in aggravation is the fourth pigeon hole. Under this category, evidence "directly relating to or resulting from the offenses of which the accused has been found guilty" may be admitted at trial.[53] This includes "evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of any offense committed by the accused."[54] Aggravation evidence also includes impact to a military unit, and can also include the fact that the accused intentionally selected the victim on the basis of "actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation."[55]

Although who qualifies as a victim under the rule is more broadly defined, to include both institutions and individuals, the requirement that the aggravating evidence have a "direct" link between the victim and the crime serves as a check on what is admissible.[56] This requirement has

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[51] Soldiers who commit minor offenses may be discharged administratively, eliminating many would-be recidivists from the pool of potential criminal soldiers. *See e.g.*, DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED SEPARATIONS para. 14-12(a), (b) (6 June 2005) (Rapid Action Revision 6 Sept. 2011) Additionally, some offenses require the initiation and processing of a proceeding leading to discharge (whether the proceeding is criminal or administrative does not matter). *See, e.g.*, DEP'T OF ARMY, REG. 600-85, THE ARMY SUBSTANCE ABUSE PROGRAM para. 10-6 (28 Dec. 2012) (mandating discharge for soldiers with drug related misconduct).

[52] This is true for reasons highlighted in the preceding footnote. Criminological studies have also empirically demonstrated this proposition. *See, e.g.*, A.J. Rosellini et. al., *Predicting non-familial major physical violent crime perpetration in the U.S. Army from Administrative data*, PSYCHOL. MED., JAN. 2016, at 3 (noting that the vast majority of Army personnel do not have prior criminal records).

[53] MCM, *supra* note 5, R.C.M. 1001(b)(4) (2016).

[54] *Id*.

[55] *Id*.

[56] The limitation here may roughly approximate the tort concept of proximate cause. The further removed the evidence sought to be admitted, the less likely the evidence is "directly related" to the alleged offense. *See* THOMAS G. SHEARMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE 48-50 (Robert G. Street ed., 6th ed.) (1913). Additionally, similar to the tort concept of an intervening cause, the introduction of an intervening event is not ordinarily evidence "directly related" to the offense. *See generally*

been interpreted to allow so-called "syndrome" evidence,[57] as well as evidence of the initial victimization in cases involving revictimization.[58] Additionally, evidence in aggravation is not admissible simply because it is relevant: "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."[59] This balancing test is not a difficult hurdle to overcome, but it must be overcome.[60]

The fifth and final prosecution pigeon-hole is evidence of rehabilitative potential. Rehabilitative potential is the "accused's potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society."[61] Evidence of rehabilitative potential is admitted in the form of opinion evidence, which must be offered through a witness after establishing a foundation for that opinion.[62] The foundational requirements for an opinion contemplate both lay and expert witness testimony,[63] though the "relevant information" listed in the rule tends to skew more toward the kind of information that a lay witness would possess: "information and knowledge about the accused's character, performance of duty, moral fiber, determination to be rehabilitated, and nature and severity of the offense or offenses."[64] Finally, the rule limits the scope of the opinion solely to "whether the accused has rehabilitative potential and to the magnitude or quality of any such potential."[65] According to the non-

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U.S. v. Rust, 41 M.J. 472 (C.A.A.F. 1995) (finding that a suicide note was admitted inappropriately in the sentencing case of an obstetrician whose criminal dereliction resulted in the death of an unborn child but caused neither the mother's murder nor the suicide of the child's father thereafter); U.S. v. Stapp, 60 M.J. 795 (Army Ct. Crim. App. 2004).

[57] U.S. v. Hammer, 60 M.J. 810 (A.F. Ct. Crim. App. 2004).

[58] This occurs in child pornography cases, where, though the identity of the victim may not be known, the government may seek to admit evidence of Senate findings of the negative victim impact of child pornography production and trafficking. U.S. v. Anderson, 60 M.J. 548 (A.F. Ct. Crim. App. 2004).

[59] United States v. Ashby, 68 M.J. 108 (C.A.A.F. 2008).

[60] In *United States v. Ashby*, the accused concealed a videotape of an accident in which a Navy airplane severed the cable supporting a gondola, sending the occupants to their deaths. *Ashby*, 68 M.J. at 108, 108. The family members testified at the trial of the officer who concealed the tapes as to the effect that it had on their ability to have closure. *Id.* On appeal, the court found that the judge's decision to allow the testimony of the family members in a case involving a conviction for conduct unbecoming an officer was not an abuse of discretion under the circumstances. *Id.*

[61] MCM, *supra* note 5, R.C.M. 1001(b)(5) (2016)..

[62] *Id*.

[63] MCM, *supra* note 5, R.C.M. 1001(b)(5)(B) discussion (2016).

[64] *Id.* 1001(b)(5)(B).

[65] *Id.* 1001(b)(5)(D).

binding discussion[66] to the rule, the witness may not "generally" elaborate on that conclusion.[67]

The value of rehabilitative evidence is minimal, particularly when the prosecution overreaches by eliciting opinions of "no rehabilitative potential." The problem may become even more acute when a lay witness has a poor foundation for their opinion, or in cases involving lesser or military-specific crimes where at least some rehabilitative potential may be presupposed.[68]

3. Evidence Presented by the Victim or the Accused During the Sentencing Phase

Evidence presented by the victim is new to the world of military justice.[69] It remains to be seen how or whether courts will limit the form or content of the testimony sought to be admitted by a victim. Under the rule, evidence can take the form of a sworn or unsworn statement to the court.[70] The victim can present matters either in mitigation or in aggravation, and has the aid of a Special Victim Counsel for doing so.[71] The definition of aggravation appears substantially similar to the rule governing the prosecution, and the definition of mitigation is parallel to

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[66] *Id.* preamble discussion para. 4. The supplementary materials in the *Manual for Courts-Martial*, to include discussion of the Rules for Courts-Martial, are not "binding on any person, party, or other entity." *Id.*

[67] MCM, *supra* note 5, R.C.M. 1001(b)(5)(D) discussion (2016).

[68] Email from a former military judge (name withheld), to author (Mar. 10, 2016 4:20 PM) (on file with author). ("I listen to rehab potential evidence, as I am required to do. And I "considered" it, as I was required to do. But that is an area that I gave very miniscule weight. For the Government, it's one of those things that often backfires on them when a witness says the accused has no rehab potential. Really? They lose []some credibility when they say that. Everyone has rehab potential—just varying degrees of it . . . .").

[69] *See generally* Exec. Order. No. 13696 80 Fed. Reg. 35783 (June 17, 2015) (amending Rules for Court-Martial to include certain victim rights). This article is focused primarily on how sentencing rules impact the prosecution, because that is where the procedural rules have the most limiting impact on the full expression of the sentencing principles. It will briefly cover evidence admissible by the victim and the accused. It does not focus extensively on the victim or accused here because: (1) evidence offered by the victim is a new and untested area of the law; while (2) evidence offered by the accused is more broadly admissible and subject only to a few caveats. For example, while the rules of evidence apply on sentencing, the accused can request that the judge relax them. MCM, *supra* note 5, R.C.M. 1001(c)(3) (2016).

[70] MCM, *supra* note 5, R.C.M. 1001A(a) (2016).

[71] *Compare* 10 U.S.C. §1044e (2013), *with* MCM, *supra* note 5, R.C.M. 1001(b)(4), *with* MCM, *supra* note 5, 1001(c)(1)(B) (2016).

the defense definition.[72] Presumably, a victim will seek only to relate his personal experience of victimization, and thus, taken together, these definitions should pose little in the way of limitation on what a victim may seek to admit.[73] Finally, according to the rule, the right to be heard exists whether or not the victim was previously called as a witness for the prosecution.

The defense has much broader latitude to present evidence to the court-martial at the end of the sentencing phase.[74] Three categories—evidence in rebuttal, evidence in extenuation or evidence in mitigation—form the basis for potential defense submissions.[75] Rebuttal evidence is fairly straightforward in that it must relate to evidence presented by the prosecution or the victim.[76] Extenuation evidence is anything that "serves to explain the circumstances surrounding the commission of an offense, including the reasons for committing the offense which do not constitute a legal justification or excuse."[77] Mitigation evidence is evidence that is "introduced to lessen the punishment to be adjudged . . . or to furnish grounds for a recommendation of clemency."[78] Mitigation evidence includes evidence of prior punishment for the same offense, such as non-judicial punishment under Article 15, UCMJ, and the potential loss of retirement pay.[79] Significantly, case law has limited the admissibility of sex offender registration requirements.[80]

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[72] A victim may not offer extenuation evidence, presumably because it is less clear where or how a victim might seek to offer evidence that "serves to explain the circumstances surrounding the commission of an offense, including the reasons for committing the offense which do not constitute a legal justification or excuse . . . ." MCM, *supra* note 5, R.C.M. 1001(C)(1)(A). However, given the non-exclusive wording of the rule, a victim could conceivably offer "extenuation" evidence as to other circumstances, such as uncharged misconduct by the accused, which "serves to explain the circumstances surrounding" the offense, that would not be aggravating under the technical definition, but could be highly relevant to a sentencing rationale such as retribution. *Id*. It remains to be seen whether this limitation will be significant.

[73] It remains to be seen whether courts will apply any balancing test to the victim's right to be heard. *See generally* MCM, *supra* note 5, M.R.E. 403 (2016).

[74] *See* MCM, *supra* note 5, R.C.M. 1001(c) (2016).

[75] *Id*.

[76] *Id*. R.C.M. 1001(c)(1) (2016).

[77] *Id*. R.C.M. 1001(c)(1)(A) (2016).

[78] *Id.* 1001(C)(1)(B) (2016).

[79] *See, e.g*., United States v. Washington, 55 M.J. 441 (C.A.A.F. 2001) (finding error when the military judge excluded defense evidence of loss of retirement pay which would result from an adjudged punitive discharge).

[80] United States v. Talkington, 73 M.J. 212 (C.A.A.F. 2013).

The accused may also present an unsworn or sworn statement, or a combination of both.[81] An unsworn statement may be given orally, in writing, or as a combination of the two.[82] The accused may be permitted wide latitude to say nearly anything; however, the military judge also can instruct the panel "essentially to disregard" problematic portions of the unsworn statement.[83] Additionally, the accused may not present evidence that impeaches or contradicts the verdict.[84]

III. Retributive Tendencies: A Theoretical Breakdown of Military Sentencing Principles

Now that we have an overview of the mechanics of the military sentencing procedure, we return to the more basic question of what purposes sentencing should seek to accomplish.

Military sentencing serves five principle purposes: rehabilitation of the accused, general deterrence of others, specific deterrence of the accused, retribution, and preservation of good order and discipline.[85] Using a specific focus on aggravation evidence and evidence of rehabilitative potential, this section will demonstrate that these principles intersect with the sentencing procedural rules in a way that favors the retributive principle disproportionately over the utilitarian[86] principles.

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[81] MCM, *supra* note 5, R.C.M. 1001(c)(2)(A) ("The accused may testify, make an unsworn statement, or both . . . .").

[82] *Id.* 1001(c)(2)(C) (2016)..

[83] *Talkington*, 73 M.J. at 212. A recent unpublished Army case suggests that a military judge could prohibit an accused from discussing sex offender registration; however, this rationale has not been treated by the Court of Appeals for the Armed Forces. *See* United States v. Feliciano, No. 20140766, slip op. (A. Ct. Crim. App.) (Aug. 22, 2016).

[84] United States v. Johnson, 62 M.J. 31 (C.A.A.F. 2005). In the case of a guilty plea, defense evidence that casts doubt on the providence of the guilty plea will result in the reopening of the plea and may result in the military judge rejecting the plea. *See* United States v. Phillippe, 63 M.J. 307 (C.A.A.F. 2006) (finding "if an accused sets up matter inconsistent with the plea at any time during the proceeding, the military judge must either resolve the apparent inconsistency or reject the plea").

[85] DA PAM 27-9, *supra* note 3, para. 8-3-21 (the five recognized principles of sentencing are "[r]ehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of his. . .crimes and his sentence . . . .")

[86] This article uses the terms utilitarian and instrumental interchangeably throughout to denote punishment theories that seek to maximize societal benefit in the present and future. Utility is "[t]he quality of serving some function that benefits society. *Utility*, BLACK'S LAW DICTIONARY (9th ed. 2009). An instrumentality is "a thing used to achieve an end or purpose." *Id. Instrumental*.

The effect is to pay lip service to utilitarian sentencing principles, while simultaneously limiting their impact. This section will briefly discuss the theoretical basis for the military's sentencing principles before demonstrating how procedural rules skew toward the retributive sentencing rationale and away from utilitarian principles.

A. Moral-Theoretical Underpinnings of the Sentencing Principles

The five sentencing principles group into one of two moral-theoretical camps: the deontological camp and the utilitarian/instrumentalist camp. When applied to sentencing, deontological thinking looks at rewarding the actor his just deserts.[87] Retribution fits cleanly in the deontological camp because of its backward-looking focus.[88] The goal of the sentence is to punish the offender for what he has done. This view of sentencing relies on an understanding of the offender's moral agency and the offender's capacity to understand society's censure of his behavior, though punishment does not necessarily need to be harsh to be effective.[89] In many ways, retributive theory is the easiest to understand because it relies on instinctive revulsion to fix moral blame.[90] "Eye for eye, tooth for tooth"[91] expresses the sense of moral balance retributive theory appeals to. However, there is a difference between understanding moral opprobrium and applying it in a criminal sentencing proceeding. That is because different individuals will value crimes differently.[92] For example, although most would agree that murder is worse than robbery, and that both are worse than double parking, there is likely to be wider divergence between individuals when it comes to fixing an appropriate sentence for a

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[87] *See, e.g.*, ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES (2005).

[88] *See, e.g.*, Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 CAMBRIDGE L. J. 145 (2008) (describing three distinct rationales for retributive theory—all of which focus on desert).

[89] *See generally* Andrew von Hirsh, *Proportionate Sentences: A Desert Perspective*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY (Ashworth & Von Hirsch eds., 2000).

[90] *See, e.g.*, Paul H. Robinson, *The Role of Moral Philosophers in the Competition Between Deontological and Empirical Desert*, 48 WM. & MARY L. REV. 1831 (Apr. 2007) (discussing different ways to affix retributive blameworthiness and suggesting that blameworthiness could be fixed through empirical research of the community punitive norms).

[91] Exodus 21:22 (New International Version).

[92] *See generally* MARVIN FRANKEL, CRIMINAL SENTENCES—LAW WITHOUT ORDER (1973) (proposing sentencing commissions which have the authority to set sentencing ranges as a way to overcome this problem).

given crime of which the accused has been convicted.[93]

Compared to retributivism, the attraction of utilitarian sentencing is that, at least in theory, the sentencing authority can determine with some specificity the type and amount of punishment necessary to accomplish the utilitarian goal.[94] Instrumental theories do not assign blame in the traditional sense. Instead, the focus is on producing a positive externality in the present or future.[95] Most commonly, the positive externality sought is the prevention of future crime.

A utilitarian might see the commission of a crime as a doorway that allows society to lawfully separate out those most at-risk for future crime,[96] and provides a utilitarian baseline against which to measure efforts to reduce crime.

Rehabilitation of the accused, general deterrence, specific deterrence,

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[93] This divergence seems to be a key argument for why the military justice system should make the judge the sole sentencing authority, as has been proposed in recent statutory amendments. *See, e.g*, MJRG, *supra* note 26 (containing a proposed amendment to Article 53, UCMJ which would have provided for "judicial sentencing for all non-capital offenses"). The argument is that judges are more capable, through repetition, to understand what a crime is worth than are military jurors who may sit on only one panel during the entirety of their career. *See, e.g*., Paul Larkin & Charles "Cully" Stimson, *The 2015 Report of the Military Justice Review Group: Reasonable Next Steps in the Ongoing Professionalization of the Military Justice System*, HERITAGE (Apr. 2016), http://www.heritage.org/research/reports/2016/04/the-2015-report-of-the-military-justice-review-group-reasonable-next-steps-in-the-ongoing-professionalization-of-the-military-justice-system. While it is a fact that judges may be more internally consistent in sentencing, sentencing guidelines—that were also proposed (though not adopted) in the amendments—may be necessary to ensure a degree of cross-jurisdictional normalization.

[94] *See, e.g*., John Monahan & Jennifer L. Skeem, *Risk Assessment in Criminal Sentencing*, *in* ANNU. REV. CLIN. PSYCH. (2016) ("Without at least some ability to validly estimate an offender's risk of recidivism[,] e.g., through the use of actuarial assessment instruments[,] and hopefully to reduce that level of risk[,] e.g., through the use of evidence-based psychological interventions, there would be few positive 'consequences' flowing from consequential theories of sentencing.").

[95] *See, e.g.*, PLATO, PROTAGORAS 139 (trans. W.R.M. Lamb 1952) ("No one punishes the evil doer under the notion . . . that he has done wrong, only the unreasonable fury of a beast acts in that way. But he who undertakes to punish with reason does not avenge himself for past offense, . . . he looks rather to the future, and aims at preventing that particular person and others who see him punished from doing wrong again.").

[96] Some utilitarian thinkers might even take the concept a step further, envisioning a *minority report*-like program that uses biological techniques to forecast and control criminal behaviors before they occur. *Compare* ADRIAN RAINE, THE ANATOMY OF VIOLENCE: THE BIOLOGICAL ROOTS OF CRIME (2013), *with* MINORITY REPORT (Dreamworks Pictures 2002).

and the maintenance of good order and discipline are utilitarian concepts that focus on future externalities, though in slightly different ways. Rehabilitation seeks to accomplish future crime prevention through reformation of the accused.[97] The hope is that the sentencing authority can determine the rehabilitative potential of the accused, and mete out punishment in the degree necessary to achieve rehabilitation. Specific deterrence seeks to preclude future crime by incapacitating the criminal for the future commission of crime.[98] General deterrence is less concerned with the individual criminal, and instead hopes to dissuade others from the commission of future crime through the punishment imposed in the current case.[99] Good order and discipline does not directly seek future crime reduction; rather, it seeks to produce a disciplined unit, with crime reduction being one of the many positive externalities.[100]

B. The Ascendancy of Retribution

Instrumental sentencing factors are four of the five recognized military sentencing principles. The recognition of a range of different instrumental sentencing theories at least suggests a heavier emphasis on forward looking sentencing principles. However, these principles intersect with the procedural rules in a way that actually emphasizes retribution over the utilitarian principles. This article focuses on a comparative analysis of rehabilitation and retribution both because they are the most frequently seen in sentencing,[101] and because none of the other principles have any supporting rule of evidence directly tied to them.

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[97] *See, e.g.*, H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF THE LAW 25-27 (2d ed. 2008).

[98] *See, e.g.*, Andrew D. Leipold, *Recidivism, Incapacitation, and Criminal Sentencing Policy*, 3 U. ST. THOMAS L.J. 536, 542 (2006) ("At the most basic level . . . those in prison don't commit any new crimes . . .and so by extending the periods of imprisonment . . .we extend the period where the inmate cannot re-offend.")

[99] *See, e.g.*, Pell v. Procunier, 417 U.S. 817, 822 ("The premise is that by confining criminal offenders in a facility where they are isolated from the rest of society, a condition that most people presumably find undesirable, they and others will be deterred from committing additional criminal offenses.").

[100] *See generally* Lieutenant Colonel Dru Brennerbeck, *Assessing Guidelines and Disparity in Military Sentencing: Vive La Difference*, 27 FED. SENT. R., 108 (2014) (discussing how the concept of good order and discipline sets apart military practice from federal practice).

[101] *See, e.g.*, Hargis, *A View from the Bench: Findings, Sentencing, and the "Good Soldier"*, *supra* note 29, at 92 ("[T]he two most frequently cited rules [are the rules admitting aggravation evidence and rehabilitative potential evidence]").

1. Trial Evidence Supporting the Retribution Principle

From a retributive perspective, the most inflammatory and damning sentencing evidence is likely to have been admitted during the trial on the merits. Evidence admitted for its relevance to an element of the offense, i.e., the crime, and evidence of other bad acts that were admitted at trial for a non-character purpose are highly relevant to the question of punishment. Not insignificantly, some of that evidence, e.g., propensity evidence, may have had peripheral relevance to the merits, but will be particularly probative for sentencing under a retributive theory.[102] The simple evidence of the offense is bound to be the most damning evidence there is, because it establishes the gravamen of the offense—i.e., the core conduct upon which society has focused moral opprobrium.[103] Considering that such evidence is bound to the offense *itself*, it is by definition backward looking, and thus most closely tied to retributive philosophy.

The evidentiary aperture mildly opens once a trial moves into sentencing, but the focus remains aggravation evidence. Although there is bound to be some variance in judicial thought about the importance of aggravation evidence in sentencing, the military judges discussed below who have written on the sentencing proceeding have expressed a preference for retributive philosophy. One judge comments on the effectiveness of sentencing argument, observing that "[a]n argument which merely states that what the accused did is bad, without any emphasis on why it was bad, does nothing more than state the obvious."[104] While the article does not discuss any of the principles underlying sentencing, the judge argues that a strong sentencing argument should leave the fact finder with an emotional reaction of some kind.[105] Sentencing on the basis of an emotional reaction approximates most closely a retributive sentencing rationale—the focus is on the crime itself, rather than on the more cerebral and less emotional goal of prospectively eliminating crime.

Another judge notes that while counsel "should focus their sentencing

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[102] Character evidence could also have rehabilitative connotations; however, the evidence only develops its full instrumental value if attached to a predictive tool. Otherwise, the value of the evidence has purely arbitrary sentencing value.

[103] This point is particularly true for traditional common law crimes because they are generally thought to be morally wrong in and of themselves.

[104] Russelberg, *supra* note 12, at 51.

[105] *Id.*

cases on the accused's character,"[106] the sentence ultimately must only be for "the offenses of which he has been convicted."[107] Although the message is more subtle here, the backward-looking focus effectively rips what would be rehabilitative evidence, i.e., the accused's character, out of the utilitarian construct and attempts to shoehorn it into a retributive theoretical framework. Even though the article champions the admission and use of character evidence to determine the rehabilitative potential of an accused, the entirety of this argument is couched in language ultimately mooring the sentence back to retributive theory—sentencing for acts done.[108] The net effect is to conjoin rehabilitative evidence with aggravation evidence. In essence, the focus is not on what kind of sentence the accused needs to rehabilitate himself and live a life free from crime, but rather on whether any aspects of his character aggravate or mitigate the criminal enterprise of which he was convicted.

A third judge observes more explicitly, "[a] trial counsel who fails to present cogent, material aggravation evidence usually presents a skeletal sentencing case, starkly devoid of the facts necessary to support a fair and appropriate sentence."[109] Further, "Military trial practitioners who understand the purpose and scope of aggravation evidence will help ensure that the fact finder gets not only the bones of the case, but also the flesh."[110] At least for this judge, no sentencing proceeding can result in a fair sentence unless the trial counsel has brought forth the available aggravation evidence. The message could hardly be any clearer: evidence in aggravation is the *sine qua non* of military sentencing.

2. Trial Evidence Supporting the Rehabilitation Principle

Despite the foregoing argument, it would not be accurate to claim retribution completely overcomes all other principles of sentencing. Notwithstanding the judicial interpretive lenses above, when viewed from the standpoint of support in the procedural rules, the next strongest sentencing principle is still rehabilitation.[111] After all, a whole pigeon hole

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[106] Dolan, *supra* note 35, at 34.
[107] *Id*. at 35 n.13.
[108] *Id*.
[109] Lieutenant Colonel Edye U. Moran, *A View from the Bench, Aggravation Evidence—Adding Flesh to the Bones of a Sentencing Case*, ARMY LAW., Dec. 2006, at 48, 48.
[110] *Id*. at 50.
[111] For the moment, this article sets aside the question of whether we may admit recidivism evidence under RCM 1001(b)(5) as "rehabilitation" evidence.

is devoted to the principle, providing very detailed procedural rules to shepherd admissible evidence before the sentencing authority.[112] And yet, if the value of a utilitarian theory is its ability to help a sentencing authority fix a more exact punishment, these very rules almost wholly gut rehabilitative evidence of that value.

The entire foundation laid prior to admitting evidence of rehabilitative potential results in a largely unhelpful ultimate opinion: high, medium, or low rehabilitative potential. As Judge Dolan, a former military judge, has argued, a trial counsel seeking to provide useful evidence in the rehabilitative context is better off trying to probe relevant questions while laying the foundation for the evidence than she is in asking the ultimate question.[113] The case must be rare indeed where laying the foundation for evidentiary admissibility is more probative of the ultimate fact than is the actual evidence itself. Of course, this suggested method is also fraught with error, for a discerning opposing counsel who sees that foundational questions are straying into substantive territory[114] will have a valid objection. Particularly in this context, the foundation should consist of evidence of *how* the witness knows the accused and not evidence of *what* the witness knows *about* the accused.[115]

The generally unhelpful nature of rehabilitation-focused evidence—at least as conceived in the rules—is ironic, given that utilitarian principles, if they are to be useful at all, should tell the court something about the future behavior of the accused.[116]

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[112] *See supra* part III.B.2.

[113] Dolan, *supra* note 35, at 35 (encouraging counsel to focus on foundational elements "even if these questions do not lead to an "ultimate issue" question").

[114] In this context, substantive evidence could include an opinion on a related rehabilitative potential question, such as an opinion as to the moral fiber of the accused. Note that this is substantively different from a question as to whether the witness has known the accused long enough or in enough contexts to have formed an opinion as to his moral fiber. In any event, evidence that is relevant to the sentence rather than the admissibility of the ultimate opinion is only masquerading as foundational evidence and should be excluded.

[115] *See, e.g.*, MCM, *supra* note 5, R.C.M. 1001(b)(5)(C) (2016). *See also* Hargis, *A View from the Bench: Findings, Sentencing, and the "Good Soldier"*, *supra* note 29, at 92-93 (observing that the foundational requirement requires the trial counsel to demonstrate "sufficient knowledge" of the accused).

[116] Ignoring for the moment the possibility of recidivism risk, perhaps the most useful rehabilitative sentencing evidence is opinion evidence as to whether the accused should be discharged from the military. The rules tightly control the admissibility of this evidence, with the accused himself holding the key. When the accused is seeking retention on active duty, the defense may offer evidence in the form of testimony that the witness would "serve with the accused again." *Id*. Once offered, this evidence opens the door for the prosecution

3. United States v. Ellis*: Recidivism Risk as Rehabilitation Evidence?*

The recent case of *United States v. Ellis*[117] involves recidivism evidence that purports to blow wide-open the rehabilitative potential pigeon hole, though as this section will discuss, this has not been the result. *Ellis* involved an airman who committed a number of sex crimes against a thirteen-year-old girl whom he met in an internet chat room.

During the sentencing proceedings, the prosecution sought to admit the testimony of an expert in recidivism as evidence of lack of rehabilitation potential.[118] At trial, the defense objected to the testimony, arguing that the expert "did not have sufficient factual basis to make a relevant opinion[, that] . . . the methodology from which [the expert based] his opinion . . . [did] not bear sufficient reliability to be admissible in this case[, and] that risk of recidivism was not proper testimony as to rehabilitation potential."[119] The military judge did not make a ruling on the admissibility of the evidence, but did allow the trial counsel to continue laying a foundation for the evidence.[120] The trial counsel then elicited testimony that "Ellis fell into the moderate high category for risk of recidivism [on the Static-99 assessment[121]], which reflected a thirty-eight percent chance of recidivism over a fifteen-year window of time."[122] The expert also explained how he scored each of the factors on the assessment.[123]

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to rebut with witnesses who can testify that this is not the consensus view of the command. *Id*. Such rebuttal evidence can be disastrous to an unwitting accused and his defense counsel. Considering that the command is responsible for reviewing, recommending, and forwarding the charges in the first place rebuttal evidence will usually be damning. *See generally* MCM, *supra* note 5, R.C.M. 306, 401. Moreover, the relevance of such testimony is also self-limiting. Because the intent of this testimony is to allow the defense to argue that the sentence should not include a punitive discharge, such evidence is most effective only in those borderline cases where the question of a punitive discharge is at issue.

[117] United States v. Ellis, 68 M.J. 341 (C.A.A.F. 2010).

[118] *Id.* at 343-44.

[119] *Id*. at 344.

[120] *Id.*

[121] The Static-99 "is a ten-item actuarial assessment instrument . . . for use with adult male sexual offenders who are at least [eighteen] year[s] of age at time of release to the community." *Static 99/Static 99R*, STATIC 99 CLEARINGHOUSE, www.static99.org (last visited Feb. 19, 2017). The instrument predicts recidivism risk.

[122] *Ellis*, 68 M.J. at 346.

[123] *Id.* at 344.

The Court of Appeals for the Armed Forces addressed the defense objections under a Military Rule of Evidence 702 framework: essentially examining the reliability of the data and its application in the case at hand.[124] The court found the military judge did not abuse his discretion in considering evidence of rehabilitation potential.[125]

While *Ellis* initially seems to cast wide-open the sentencing doors to evidence involving recidivism risk, a closer look at the opinion reveals the appeals court never decided the evidence was admissible under the sentencing procedural rules. Instead, the opinion focused on whether Static 99 was a valid scientific tool from a reliability perspective.[126]

According to the facts in the appellate court opinion, the trial court also never made any ruling on the ultimate admissibility of the expert's opinion.[127] Instead, the expert opinion apparently entered evidence as "foundational" evidence—i.e., as evidence providing the court with sufficient information to rule on whether the ultimate opinion would be admissible.[128]

Under standard evidentiary practice, a foundation must be laid for counsel to tender a witness as an expert.[129] Although this much is clear, *Ellis* is disturbing because it focused so much on whether there was an adequate evidentiary foundation laid for the witness to give an expert opinion,[130] that it never decided the related—and important—procedural question of whether the expert opinion sought to be offered fit under RCM 1001(b)(5).[131]

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[124] *Id.* at 344-45.
[125] *Id.* at 347.
[126] *Id.*
[127] *Id.* at 344.
[128] *Id.*
[129] MCM, *supra* note 5, M.R.E. 702 (2016).
[130] The analysis encompassed both the basis of the opinion—i.e., whether an interview of the accused was necessary to the opinion—as well as the scientific reliability of the opinion. *See* M.C.M., *supra* note 5, MIL. R. EVID. 702 (2016).
[131] In an interesting concurrence, Judge Baker stated that he would limit the holding narrowly to the facts of the case. A concern was that a military panel might be improperly swayed by the rehabilitation evidence, a risk that was attenuated in this case by the fact that a military judge sat as the court-martial. Judge Baker's major concern, however, was with the role of recidivism evidence in sentencing proceedings in general. After echoing Judge Posner's concerns that recidivism tools may under-report the risk of recidivism, Judge Baker then went on to criticize the usefulness of over-inclusive recidivism assessments in the individualized setting of military sentencing. *Ellis*, 68 M.J. at 347-48.

A plain reading of the procedural rule clearly shows that the expert opinion was not admissible. The rule holds that the scope of the opinion "is limited to whether the accused *has* rehabilitative potential and to the magnitude or quality of any such potential."[132] The discussion to the rule provides that the question of whether the accused has rehabilitative potential is a simple binary response, while the question of magnitude or quality of the potential must be met with a "succinct" opinion of "great" or "little," with no further elaboration.[133] Thus, the *Ellis* expert's opinion that an accused who falls into a certain risk recidivism group would have a certain likelihood of recidivating was far too specific to be admissible.

In some ways, *Ellis* was decided correctly—if the relevant question is only whether the expert opinion had an adequate basis. However, *Ellis* provides less than fulfilling guidance on how to admit a more precise evaluation of recidivism risk. Perhaps because it is a comparatively recent case, neither the facts nor the opinion in *Ellis* has been duplicated in other cases. Indeed, if a case's true holding can be measured by a review of its progeny, *Ellis* is not a sentencing case at all; rather, it is a case about laying an evidentiary foundation for expert witness testimony.[134] The clearest precedential value of *Ellis* appears to be only that vague but succinct expert opinions will be upheld.[135] Perhaps for that reason, one military

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[132] MCM, *supra* note 5, R.C.M. 1001(b)(5)(D) (2016) (emphasis added).

[133] *Id*., R.C.M. 1001(b)(5)(D) discussion. *See also* Hargis, *A View from the Bench: Findings, Sentencing, and the "Good Soldier"*, *supra* note 29 (offering a recommended foundational colloquoy).

[134] The majority of the cases citing *Ellis* do so for its holding concerning MRE 702, and not for its value in interpreting RCM 1001(b)(5). For a non-exhaustive list of cases citing *Ellis* for the former proposition, see, for example, *United States v. Henning*, 75 M.J. 187 (C.A.A.F. 2016) (citing Ellis in the context of admissibility of expert testimony under M.R.E. 702); *United States v. Bell*, 72 M.J. 543 (A. Ct. Crim. App. 2013) (same); *United States v. Walls*, 2013 WL 3972283 (A.F. Ct. Crim. App. 2013) (same); *United States v. Cannon*, 74 M.J. 746 (A. Ct. Crim. App. 2015) (same); *United States v. D.W.B.*, 74 M.J. 630 (N-M. Ct. Crim. App. 2015) (same); *United States v. Palma*, 2015 WL 6657365 (A.F. Ct. Crim. App. 2015) (same); *United States v. Stevenson*, 2015 WL 5737171 (A. F. Ct. Crim. App. 2015) (same); *United States v. Walters*, 2015 WL 4624880 (A. F. Ct. Crim. App. 2015) (same); *United States v. Bondo*, 2015 WL 1518987 (A.F. Ct. Crim. App. 2015) (same); and *United States v. Wright*, 75 M.J. 501 (A. F. Ct. Crim. App. 2015) (same). *United States v. Merritt*, 2015 WL 5737152 (A. F. Ct. Crim. App. 2015), is among the few that cites *Ellis* for its holding as to the admissibility of recidivism evidence.

[135] *See, e.g*., United States v. Scott, 51 M.J. 326 (C.A.A.F. 1999) (expert opinion that the accused was at "high risk for re-offense."); United States v. Merritt, 2015 WL 5737152 (A.F. Ct. Crim. App. 2016) (finding the trial judge did not abuse his discretion when he admitted as evidence of rehabilitative potential an expert's opinion that the accused's likely recidivism risk was "in his opinion, high." The court also upheld the trial judge's further

judge has recommended caution when relying on *Ellis*, warning of the related evidentiary pitfalls "of presenting profile evidence, and of presenting evidence that is merely generic and not necessarily applicable to the accused."[136]

IV. Moving Toward Balance: Fulfilling the Utilitarian Promise in Sentencing

Despite the obvious problems with *Ellis*, this article does not argue that it got the law wrong. Instead, *Ellis* simply did not get the law wrong enough to get it right. *Ellis* had the opportunity to say something about the law that would have been at once revolutionary and reconciliatory. By expressly delimiting the language of RCM 1001(b)(5), it could have simultaneously upended common military practice in sentencing while also reaffirming the utilitarian sentencing principles that the military has held dear for decades.[137] Instead, *Ellis* leaves the law a bit conflicted as to the admissibility of recidivism evidence.

Of course, given the limited language of RCM 1001(b)(5), it went about as far as it could. A new paradigm is necessary to enable consideration of utilitarian principles on equal footing with retribution principles.

A. A Modest Proposal

finding that any questioning regarding the significance of paraphilia evidence was admissible as aggravating evidence, and not evidence of rehabilitative potential); United States v. McDowell 2002 WL 341268 (A.F. Ct. Crim. App. 2002) (holding admissible evidence general that certain categories of offenders have a "higher rate of recidivism."), set aside and remanded for further proceedings on a separate issue by U.S. v. McDowell, 57 M.J. 471 (C.A.A.F. 2002).

[136] Lieutenant Colonel Tiernan P. Dolan, *A View from the Bench: Sentencing: Focusing on the Content of the Accused's Character*, ARMY LAW., Aug. 2012, at 34, 35 (citations omitted).

[137] *See, e.g.*, MCM para. 88b (1984); MCM para. 88b (1969 Revised edition) (discussing rehabilitation of the accused and deterrence as factors to be considered in approving a sentence); MCM para. 88b (1951) (discussing rehabilitation of the accused and deterrence as factors to be considered in approving a sentence). *See also* Major Evan R. Seamone, *Reclaiming the Rehabilitative Ethic in Military Justice: The Suspended Punitive Discharge as a Method to Treat Military Offenders with PTSD and TBI and Reduce Recidivism*, 208 MIL. L. REV. 1 (2011) (arguing that rehabilitation has been a staple of the military justice system since before World War II).

This article proposes that a new pigeon hole be added to the procedural sentencing rules—RCM 1001(b)(6)—which would govern admissibility and procedures when offering recidivism evidence. The addition of the new rule would not supplant any of the other rules, but rather supplement them. This article proposes that the government should be required to introduce an actuarial risk assessment into evidence where an actuarial tool exists, and seek to develop risk tools where none exist. Thus, for example, in the *Ellis* case, the government would have offered the expert opinion on the Static-99 assessment under RCM 1001(b)(6). Following the introduction of such evidence, the defense should then be given an opportunity to introduce clinical studies specific to the accused which might tend to refute the government's evidence. This article will now lay out how the proposed rule would work.

First, the proposed rule should require the government to introduce actuarial recidivism evidence in every case for which a scientifically validated assessment tool exists. Similar to authorities governing the appointment of a sanity board,[138] the convening authority or military judge will order a qualified psychologist to review the case file and provide a sentencing report which scores the offender according to validated actuarial risk models.[139] The intent of obtaining a report in as many cases as possible is consistent with balancing utilitarian and retributive concerns, and also consistent with the obligation to provide maximum information to the sentencing authority.

Although several statistically validated risk models exist, they currently do not cover a sufficiently broad range of offenses to encompass the spectrum of military offenses. However, the Static-99 is a statistically validated instrument that might be used in certain sexual assault cases.[140] This is an actuarial risk assessment that uses ten different variables to rate the risk of re-offense for an individual convicted of a sexual assault.[141] This was also the same actuarial model used in *Ellis* and is generally accepted in the scientific community.[142]

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138 *See, e.g.*, MCM, *supra* note 5, R.C.M. 706 *and* id., R.C.M. 909 (2016).

139 This could be ordered under the power of the court-martial to gather evidence, *see id.* R.C.M. 801(c) (2016) however, it would be better for the rule to specify procedures.

140 *See, e.g.*, A. Harris, A. Phenix, R. Hanson & D. Thornton, *Static-99 Coding Rules Revised*, STATIC 99 CLEARINGHOUSE, http://www.static99.org/pdfdocs/static-99-coding -rules_e.pdf (2003).

141 *Id.* at 13.

142 *See, e.g.*, *United States v. Shields*, No. CIV.A.07-12056-PBS, 2008 WL 544940, at *1 (D. Mass. Feb. 26, 2008) ("The actuarial risk assessments (RRASOR, STATIC-99, and

Second, the military should authorize, encourage, and fund—if necessary—criminogenic research to develop new actuarial models for use in the military. New computer modeling techniques have produced significant advancement in actuarial modeling that would help identify which risk factors are most relevant to a specific population. For example, Philadelphia has employed random forest modeling to predict two-year recidivism rates among its parolee population.[143] The model has been in development since 2001, and is capable of sifting through hundreds of variables to make a prediction as to low, medium, or high risk of recidivism.[144] The model has sufficient flexibility that researchers can even account for input variables that have political significance, for example, to weight the relative societal costs of false negatives with respect to false positives.[145] The model produces a known error rate of 66%, even when accounting for artificially inserted political variables.[146] Because such a model is transparent about both its strengths a weakness, there is little risk of unfair application by a sentencing authority.

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any adjusted actuarial approach, including the "guided clinical method" and the "adjusted actuarial method") are reliable under the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc*. Among other things, these assessments are generally accepted as a reliable methodology within the relevant scientific community and they have been subject to peer review.") (citations omitted). *Cf. United States v. Carta*, No. CIV. 07-12064-PBS, 2011 WL 2680734, at *14 (D. Mass. July 7, 2011), *aff'd*, 690 F.3d 1 (1st Cir. 2012) (finding that while "[t]he Static–99R is peer-reviewed actuarial instrument," the court would consider it as one of several factors in determining a sentence).

143 Nancy Ritter, *Predicting Recidivism Risk: New Tool in Philadelphia Shows Great Promise*, 271 NAT'L INST. OF JUST. J. 4 (Feb. 2013), https://www.ncjrs.gov/pdffiles1/nij/240695.pdf. Random forest modeling is a relatively recent algorithmic model for relating large numbers of input and output variables. *See generally* Leo Breiman, *Statistical Modeling: The Two Cultures*, 16 STAT. SCI. 1, 199 (2001). Random forest modeling is among the most accurate of a number of algorithmic methods. *See* Rich Caruana & Alexandru Niculescu-Mizil, *An Empirical Comparison of Supervised Learning Algorithms*, in PROCEEDINGS OF THE 23D INTERNATIONAL CONFERENCE ON MACHINE LEARNING 161 (2006).

144 *Id*.

145 Political factors may decrease the reliability of a recidivism instrument. For example, an instrument might demonstrate a high correlation between race or gender and recidivism risk. However, it may not be politically—or perhaps constitutionally—tenable to use such factors in determining recidivism risk. An ideal model must still have strong predictive value even if it excludes problematic classifications.

146 Ritter, *supra* note 143. In other words, the model gets it right 66% of the time--better than chance. In any event, the mere fact that a model can produce a known error rate helps the fact finder calibrate the appropriate weight to be given the model.

The development of new actuarial models should not be difficult. Research on the military population is relatively easy, given the extensive nature of military databases.[147] In fact, two recent studies have used Army administrative databases to perform comprehensive analyses of criminal perpetration and victimization in the Army. The first study, published in late 2015, studied 975,057 soldiers in the active Army between 2004 and 2009.[148] The study used a comprehensive database created as part of the Army Study to Assess Risk and Resilience in Servicemembers (Army STARRS) to build an actuarial model predicting non-familial major physical violent crime. The second study looked at victimization of Army soldiers to determine risk factors leading to victimization of sexual assault.[149] The same database is currently being used to present reports predicting familial violence, and also to predict sexual assault.[150]

Clearly, there may be challenges with validating recidivism risk tools because most military offenders are discharged upon completion of their sentence. Nevertheless, given the depth and breadth of DoD data, to include VA data, and the nationalization of criminal records,[151] identifying relevant risk factors and keeping track of later offenses should not prove too difficult. Additionally, the military's records of administrative and non-judicial punishment imposed could also enlarge the population pool

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[147] *See, e.g.*, Amy E. Street et. al., *Developing a Risk Model to Target High-risk Preventive Interventions for Sexual Assault Victimization among Female U.S. Army Soldiers*, 4 CLINICAL PSYCHOL. SCI. 939, 940 (2016) (discussing the "extensive series of administrative databases available" that were used to complete the study).

[148] A.J. Roselini et. al., *Predicting non-familial major physical violent crime perpetration in the US Army from administrative data*, 46 PSYCHOL. MED. 303 (2015).

[149] Amy E. Street et. al., *supra* note 147.

[150] A.J. Roselini et. al., *supra* note 148 (discussing follow-on studies to be conducted with the same databases).

[151] The National Crime Information Center contains centralized data maintained by the FBI in twenty-one different files.

> [S]even property files containing records of stolen articles, boats, guns, license plates, parts, securities, and vehicles. There are 14 persons files, including: Supervised Release; National Sex Offender Registry; Foreign Fugitive; Immigration Violator; Missing Person; Protection Order; Unidentified Person; Protective Interest; Gang; Known or Appropriately Suspected Terrorist; Wanted Person; Identity Theft; Violent Person; and National Instant Criminal Background Check System (NICS) Denied Transaction.

See National Crime Information Center, FED. BUR. OF INVEST., https://www.fbi.gov/services/cjis/ncic (last visited Apr. 20, 2017).

and improve the actuarial model.[152] For many offenses that are more frequently disposed of through non-judicial punishment than through trial, e.g., low-level drug offenses, such records could help create a statistically validated model, even without a large number of court-martial convictions.

The DoD presents a treasure-trove of information that would have value not only to military sentencing, but more broadly to the criminological research community. To the extent that military research funding is unavailable, the value of these databases could be leveraged as an inducement for private institutions to provide much of the research in exchange for access to the informational databases.

Third, regardless of which actuarial models are used, the defense must have the opportunity to rebut the risk assessment. Thus, the rule should provide an opportunity for the defense to submit a clinical assessment, if doing so would benefit the accused.[153] Studies have shown that actuarial assessments are highly accurate;[154] however, as a matter of fairness, the accused should have the opportunity to rebut them. Under current rules governing the employment of experts, the defense could request and receive approval for a recidivism expert who may then conduct a clinical evaluation of the accused.[155]

Fourth, the sentencing proceeding is not subject to the same confrontation rules as the merits, but both government and defense counsel should still receive prior notice of any expert opinion evidence to be entered, and also have the opportunity to challenge the facts behind the opinion together with the manner in which it was made. Telephonic

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[152] *See, e.g.*, Barun Kumar Nayak, *Understanding the Relevance of Sample Size Calculation*, 58 INDIAN J. OPTHALMOL. 469 (2010) (discussing the importance of sample size in scientific research and stating the ideal—and usually unattainable—research situation is one in which the entire population can be studied).

[153] *See, e.g.*, Christopher Slobogin, *Prevention as the Primary Goal of Sentencing: The Modern Case for Indeterminate Dispositions in Criminal Cases*, 48 SAN DIEGO L. REV. 1127, 1148-49 (2011) (proposing a "subject first" rule for the introduction of the less reliable clinical recidivism assessment).

[154] *See, e.g.*, Monahan & Skeem, *supra* note 94 ("[G]roup data theoretically can be, and in many areas empirically are, highly informative when making decisions about individual cases, including decisions about sentencing.").

[155] *See* MCM, *supra* note 5, R.C.M. 703(d) (2016).

testimony is routinely allowed during sentencing proceedings, and may suffice depending on the individual case.[156]

B. Dealing with The Drawbacks of Recidivism Evidence During Sentencing

While the above provisions would go a long way toward formally rectifying the current imbalance in sentencing proceedings, care must be taken to avoid several potential sticking points.

The first potential issue concerns developing statistically significant models that comport with notions of fairness and equal protection. For example, although certain studies have shown that young African American males are over nine-times more likely to be incarcerated than are young white males,[157] using factors such as race or gender to determine recidivism risk may not comport with contemporary notions of fairness, and may violate constitutional equal protection principles.[158] Policy makers might weigh the predictive value, if any, of the variable to make a judgment call as to whether it should be included. It is also possible that over time, causal relationships could be explored to determine whether a specific objectionable factor may be highly correlated, but mask more probative factors that are unobjectionable.[159] Another possible issue is determining which factors might be proxies for problematic classifications. For example, some view criminal history as a proxy for race.[160] The general concept is: because there is a high correlation between criminal history and race, using criminal history instead of race as a predictive factor merely cloaks the problematic classification in legitimacy.

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[156] *Id*. R.C.M. 1001(e) (2016) (detailing procedures for the production of sentencing witnesses).

[157] E. Ann Carson, *Bureau of Justice Statistics, Prisoners in 2013*, BUR. OF JUST. STAT'S BULL. 8 (Sept. 2014), https://www.bjs.gov/content/pub/pdf/p13.pdf.

[158] Inclusion of such factors may be less problematic than many might assume. *Compare* Sassman v. Brown, 99 F. Supp. 3d 1223 (2015) (finding an equal protection violation when gender was used inappropriately to determine eligibility for California's Alternative Diversion Program), *with* Michael Tonry, *Legal and Ethical Issues in Prediction of Recidivism*, 26 FED. SENTENCING R. 3, 167, 169 (finding few jurisprudence constraints on recidivism evidence).

[159] A causal risk factors is one that, by definition, may be changed through intervention. *See, e.g.*, Monahan & Skeem, *supra* note 94.

[160] *Id*.

Whether any of these factors are problematic within the context of the specific model constructed would need to be considered. Additionally, any negative impact to predictive value that removing specific factors might have would need to be captured for policy makers.

A second possible sticking point is philosophical discomfort some may have with using recidivism tools as a front-end sentencing tool. In essence, the issue is whether a recidivism tool is well-suited to capture recidivist risk before the accused has gone through the rehabilitative aspects of punishment. Front-end assessments are more controversial in sentencing than are recidivism tools used to determine early release in a parole or indeterminate sentencing context, or even in the front-end civil commitment context.

[161] Nevertheless, several states have incorporated front-end criminal assessments in other contexts. For example, Virginia uses such assessments to determine which criminals will be allowed to participate in pre-trial diversion programs.[162]

There are ways to mitigate issues with front-end assessments. The first way to mitigate the issue is to rely on fixed factor tools. For example, age at the time of the crime or prior criminal convictions, is fixed in that it does not change based on later developments.[163] Risk tools, such as the

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[161] *See, e.g.*, VA. CODE ANN. § 37.2-900 *passim* (2013) (Virginia Sexually Violent Predators Act). Similar statutes have been challenged but ultimately upheld in the Supreme Court. *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346 (1997).

[162] *See, e.g.*, *2014 Annual Report*, VIRG. CRIM. SENT'G COMM'N (2014), http://www.vcsc.virginia.gov/2014AnnualReport.pdf; *2014 Annual Report*, UTAH SENT'G COMM'N (2014), http://justice.utah.gov/Sentencing/AnnualReports/Sentencing2014.pdf; *Justice Reinvestment Initiative in Kansas*, KAN. SENT'G COMM'N (2015), http://www.sentencing.ks.gov/docs/default-source/publications-reports-and-presentations/ksc_jri_report.pdf?sfvrsn=2.

[163] *See, e.g.*, Monahan & Skeem, *supra* note 94

> A fixed marker is a risk factor that cannot be changed (e.g., early onset of antisocial behavior). In contrast, both variable markers and variable risk factors can be shown to change of time. Change can be rapid (e.g., substance abuse can change daily), or slow (e.g., criminal behavior and antisocial traits change over years). Variable markers (like age) cannot be changed through intervention, unlike variable risk factors (like employment problems). Causal risk factors are variable risk factors that, when changed through intervention, can be shown to change the risk of recidivism.

Id.

Static-99, rely on markers which are fixed at the time of conviction. Fixed factor tools do not necessarily yield inaccuracy—the Static-99 remains among the most accurate risk tools in common use.[164] Given that the assessment would yield the same calculations at the time of conviction as it would at the time of release, there seems to be little reason to foreclose its front-end use.[165] Certainly, a similar static factor tool could be developed using military databases.

Moreover, just because the evaluation is on the "front end" does not mean that the sentence recommendation will result in the sentence proposed. As proposed in this paper, the risk tool produces only one component of the whole sentencing case. Evidence in aggravation, mitigation, and extenuation will still be available to the sentencing authority. The risk tool is simply a way to capture and quantify the sentencing information in a way that comports with utilitarian sentencing goals. If the sentencing authority is ultimately persuaded more by retributive principles in the given case, the sentencing authority is still free to sentence according to those principles—without regard to whether such principles would yield a greater or a lesser sentence than the utilitarian model.

Changes to the UCMJ recently proposed by the Military Justice Review Group (MJRG)[166] would have enabled the military to embrace utilitarian sentencing within the context of "limited retributivism."[167] Under this theory, society should fix a sentencing range which accurately depicts the moral opprobrium of the offense (as opposed to driving political factors),[168] and that thereafter utilitarian concerns should prevail

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[164] *See* R. Karl Hanson & Kelly Morton-Bourgon, *The Accuracy of Recidivism Risk Assessments for Sexual Offenders: A Meta-Analysis of 118 Prediction Studies*, 21 PSYCHOL. ASSESSMENT 1 (2009) (concluding that actuarial risk assessments—including the Static-99—are the most reliable predictors of recidivism).

[165] Even assuming the convict commits new offenses while in confinement, those would go to a new risk assessment that could be performed at the time of sentencing for the new offense.

[166] The proposals, which were not adopted by the FY 2017 NDAA, would have resulted in the creation of a sentencing panel that would have determined guideline sentences. *See supra* note 26 and accompanying sources.

[167] *See, e.g.*, MODEL PENAL CODE § 305.7. The Model Penal Code is produced by the American Law Institute.

[168] One of the criticisms of the sentencing disparity between crack and cocaine offenses in the Federal Sentencing Guidelines has been that it was motivated by political considerations, and not criminological, or even moral ones. *Cf.* Michael Tonry, *Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass*

when determining where a particular criminal sits within that range. Although the proposed amendments to the UCMJ dealing with sentencing were not adopted, the proposal does hold merit in that it provides for a "range" within which the sentence will ordinarily fall.[169] The sentencing authority can then adjust the sentence based on relevant justice factors, including utilitarian principles. The recommended revisions, if they were to be adopted, would largely render moot any objections to the "front end" use of recidivism tools, because they are all couched within a limiting context.

The final method for dealing with any "front end" sentencing risks remains the parole and clemency process. If changed factors later counsel re-calibrating of the utility of continued confinement, then that process can occur through ordinary parole or clemency channels.

A third possible sticking point is the argument that the use of a recidivism tool based on "average" criminal behavior does not produce individual justice. There are two responses to this criticism. First, as Monahan and Skeem have argued, actuarial models are used in nearly every context where accuracy matters.[170] Why should sentencing be any different, particularly if we know that the most accurate possible prediction of future behavior is the actuarial model? A second response comes from this article's proposal: specifically, the accused would have the opportunity to rebut the actuarial prediction with a clinical assessment of his own. In that manner, both assessments would be subject to the crucible of cross examination and refinement where the individual case warrants.

It is also worthwhile considering that even if there are drawbacks or limitations on inherent in recidivism evidence, if we are truly serious about enabling the fullest expression of truth through an adversarial process, then it is better to enable the prosecution and the defense to give the sentencing authority the best available information upon which to decide the sentence.

Incarceration, 13 CRIM. & PUB. POL'Y, 8, 14-15 (noting the "ham fisted" nature of many mandatory minimum laws passed in the 1980s and 1990s).

[169] *See* MJRG, *supra* note 26, § 801(c)(2) ("[I]n a general or special court-martial in which the accused is convicted of an offense with a sentencing parameter . . . the military judge shall sentence the accused for that offense within the applicable parameter.").

[170] These contexts include weather forecasting, insurance, and even medical diagnosis and treatment. John Monahan & Jennifer L. Skeem, *supra* note 94.

V. Conclusion

Military sentencing, at least in theory, attempts to balance retributive and utilitarian philosophies to give the sentencing authority ample evidence upon which to base a sentence. However, unduly narrow procedural rules have largely minimized the potential impact of utilitarian principles and skewed sentencing toward retribution. At sentencing, the procedures nearly foreclose the possibility of admitting an evidence-based recommendation of what is necessary to accomplish utilitarian aims in a given case. As a result, military sentencing is largely a retributive affair, with sentencing authorities guided mostly by gut instinct.

Military sentencing needs a more fundamental overhaul to draw its procedural rules more closely into alignment with the competing theories of justice that the system purports to uphold. Sentencing will always remain "far more difficult than determining the finding of guilty or not guilty,"[171] but restoring equity between the principles will promote a fair and healthy court-room interchange to the benefit of the accused and society alike.

[171] Russelberg, *supra* note 12, at 50.

JUSTICE IN ENLISTED ADMINISTRATIVE SEPARATIONS

MAJOR LATISHA IRWIN*

Injustice anywhere is a threat to justice everywhere.[1]

I. Introduction

Specialist (SPC) Smith[2] sits in disbelief as his attorney tells him the bad news; he cannot believe what he is hearing. He thought he would be able to get back to his job when his attorney told him there would be no charges against him. Instead, SPC Smith's commander initiated an administrative separation board proceeding against him based on the substantiated allegation.[3] Despite SPC Smith and his attorney pleading his

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[1] Adri Nieuwhof, *The legacy of Martin Luther King: Injustice anywhere is a threat to justice everywhere*, ELECTRONIC INTIFADA (Mar. 25, 2007), https://electronicintifada.net/content/legacy-martin-luther-king-injustice-anywhere-threat-justice-everywhere/6829 (quoting a letter sent by Dr. King while he was in a Birmingham jail in 1963).

[2] Specialist Smith and Jenny are fictional characters who represent an accused soldier and an alleged victim and generalize a scenario in which an accused soldier is not tried at court-martial for an allegation of sexual assault, but is subject to an administrative separation.

[3] A substantiated allegations is also an allegation where probable cause exits to believe the accused committed the offense. Probable cause is "reasonable grounds to believe an offense was committed and the alleged offender committed it." Memorandum of Agreement between The Judge Advocate General and Commander, U.S. Army Criminal Investigation Command (CID), subject: Legal Coordination for Reports of Investigation March 2016.

case at his administrative separation board, the separation authority approved the administrative separation board's findings and its recommendation to separate him with an other than honorable (OTH) discharge. At the administrative separation board, the government presented very little evidence as to what happened on the night in question. The alleged victim did not even testify. Specialist Smith's attorney had no way to ask the alleged victim any questions because the government only offered the sworn statement she gave to investigators.

Dismayed, SPC Smith thinks back to how it all happened. He was at a party in the barracks when he met Jenny, and they started talking, drinking, and flirting. They both drank more than they probably should have, and one thing led to another. Specialist Smith thought Jenny liked him. She certainly gave no indication that she did not want to have sex with him. Jenny was the one who made the first move. He even asked her if she was sure, if she really wanted to have sex, and she said yes. Before she left, they shared a kiss at the door. Specialist Smith thought there might be a chance for them to have a relationship. He told all of this to the administrative separation board. However, the administrative separation board chose to believe what Jenny told investigators; Jenny claimed SPC Smith sexually assaulted her.

While fictional, SPC Smith's case is not an anomaly in the military. In fiscal year (FY) 2014, 111 military subjects, including eighty-one Army soldiers, received adverse administrative discharges for sexual assault-related misconduct.[4] Administrative separations often occur as an

[4] U.S. DEP'T OF DEF., REP., DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2014, app. A at 22, encl. 1 at 63 (22 Apr. 2015) [hereinafter SAPR FY14 Report]. The Sexual Assault and Prevention Response (SAPR) fiscal year (FY) 2014 report defines reports of sexual assault.

> [T]he term "sexual assault" [is used] to refer to a range of crimes, including rape, sexual assault, nonconsensual sodomy, aggravated sexual contact, abusive sexual contact, and attempts to commit these offenses, as defined by the Uniform Code of Military Justice (UCMJ). When a report is listed under a crime category in this section, it means the crime was the most serious of the infractions alleged by the victim or investigated by investigators. It does not necessarily reflect the final findings of the investigator(s) or the crime(s) addressed by court-martial charges or some other form of disciplinary action against a subject.

Id. at 1. In the same year, there were 1550 reports of sexual assault commanders could take action on in the military. *Id.* app. A. In 15% of those cases, the subjects received a

alternative to a courts-martial because administrative separation boards have a lower standard of proof and afford the respondent, less due process than a trial by court-martial.[5] As a result of these administrative separation board proceedings, soldiers may suffer negative consequences of an unfavorable characterization of service.[6]

The Army must change how it conducts enlisted administrative separation board proceedings arising from sexual assaults because they provide inadequate due process[7] and cause unjust results for soldiers. When an alleged victim does not testify, the soldier/respondent cannot cross-examine[8] a substantial, material witness[9] and the administrative separation board cannot make a fair determination as to separation or characterization of discharge.[10] The respondent does not have the opportunity to question the alleged victim's memory, truthfulness, and credibility.[11] When the alleged victim does not testify, the respondent

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discharge or other adverse action. *Id.* The Army also reported that 15% of Army soldiers received involuntary, administrative discharges from allegations of sexual assault. *Id.* at encl. 1, at 63.

[5] Administrative separations allow the Army to administratively separate those soldiers who do not maintain the necessary standard to remain in the Army. U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (19 December 2016) [hereinafter AR 635-200]; *see infra* Part III & IV for discussion of Administrative Separations and how Administrative Separations intersect with the courts-martial process. A court-martial is the Army's mechanism to administer military justice and is governed by the Uniform Code of Military Justice (UCMJ). MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012) [hereinafter MCM]. *See* infra Part II for a discussion of Court-Martial Procedures.

[6] U.S. DEP'T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS (4 Dec. 2015) [hereinafter DoDI 1332.14]. *See infra* Part III.A for discussion of enlisted separations, including the evidence needed and the procedures for an enlisted administrative separation.

[7] *E.g.*, AR 635-200, *supra* note 5, para. 2-4, 2-10 (offering the following due process protections: the right to confer with counsel, the right obtain documents supporting the proposed separation, the right to request witnesses but lacking in the right to compel live testimony appearances or the right to compel civilian witness.). Administrative separation boards are also governed by AR 15-6, which provide the respondent with the ability to call witness but the rules of evidence generally do not apply. Only MRE 401, MRE section V (privileged communications), and MRE 412 apply in administrative separation boards. U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (1 Apr. 2016) [hereinafter AR 15-6].

[8] *See* Coffin v. Sullivan, 895 F.2d 1206, 1212 (8th Cir. 1990); Wallace v. Bowen, 869 F.2d 187, 191–92 (3d Cir. 1989); Townley v. Heckler, 748 F.2d 109, 114 (2d Cir. 1984).

[9] AR 635-200, *supra* note 5, para. 2-10.

[10] *Id.*

[11] Doe v. United States, 132 F.3d 1430, 1434–35 (Fed. Cir. 1997).

does not have a fair opportunity to present a defense.[12] When soldiers are unable to cross-examine witnesses,[13] especially the alleged victim in a sexual assault case, the administrative separation board proceedings[14] fail to provide adequate due process. Furthermore, inadequate due process can lead to an unfavorable characterization of service for soldiers.[15]

Another area of concern is the Army's ongoing efforts to eradicate sexual assault, which create an environment of zero tolerance for sexual assault—even when it is only alleged sexual assault.[16] Those who allegedly commit sexual assault offenses suffer unjust results because of this environment.[17] Over the past few years, the Department of Defense (DoD) and the Army's focus has been on taking greater care of victims of

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[12] Weaver v. United States, 46 Fed. Cl. 69, 77 (2000).

[13] AR 635-200, *supra* note 5, para. 2-10. Soldiers can request the attendance of witnesses but they first must provide an explanation why recorded testimony would not be sufficient in providing a fair determination. The president of the board must first determine the witness testimony is not cumulative, written or recorded testimony is not adequate to accomplish the same objective, the personal appearance of the witness is essential in determining the issue fairly, and the need for live testimony is substantial, material, and necessary for the disposition of the case. *Id.*

[14] *See generally* AR 635-200, *supra* note 5; para. 2-10; AR 15-6, *supra* note 7.

[15] DoDI 1332.14, *supra* note 6, encl 4. Soldiers are notified of the worst characterization of service they might receive at a separation board, but the board makes a recommendation as to characterization of service to the convening authority. AR 635-200, *supra* note 5, para. 2-12. Over-reliance on potentially incompetent or irrelevant evidence may result in a recommendation of characterization of service lower than the soldier might truly deserve.

[16] *See, e.g.*, Sara E. Martin, *Sharp: No Tolerance for sexual harassment, sexual assault*, ARMY.MIL (Apr. 2 2014), http://www.army.mil/article/122809/; Steven A. Holmes, *Sharp decrease of sexual assault in military, study finds*, CNN (May 1, 2015 8:21 PM), http://www.cnn.com/2015/05/01/politics/military-sexual-assault-report/; *Will Military Sexual Assault Survivors Find Justice?*, NAT'L ORG. FOR WOMEN (Mar. 19, 2014), http://now.org/resource/will-military-sexual-assault-survivors-find-justice-issue-advisory/; Mary O'Toole, *Military Sexual Assault Epidemic Continues to Claim Victims As Defense Department Fails Females*, HUFF. POST (Oct. 6, 2012 9:36 AM), http://www.huffingtonpost.com/2012/10/06/military-sexual-assaultdefensedepartment_n_1834196.html; Lawrence Downes, *How the Military Talks About Sexual Assault*, N.Y. TIMES BLOG (May 26, 2013 9:00 PM), http://takingnote.blogs.nytimes.com/2013/05/26/how-the-military-talks-about-sexual-assault/?_r=0; *Department of Defense Press Briefing on Sexual Assault in the Military in the Pentagon Press Briefing Room*, DEFENSE.GOV (May 1, 2015), http://www.defense.gov/News/News-Transcripts/Transcript-View/Article/607047; George Zornick, *New Study Demands Zero-Tolerance for Military Sexual Assault*, NATION.COM (Mar. 26, 2013), http://www.thenation.com/article/new-study-demands-zero-tolerance-military-sexual-assault/. *See also infra* Part V.C. for discussion of the current environment, including a discussion of bias and unlawful command influence (UCI).

[17] Jonathan P. Tomes & Micheal I. Spak, *Practical Problems with Modifying the Military Justice System to Better Handle Sexual Assault Cases*, 29 WIS. J. L. GENDER & SOC'Y 377, 382 (2014).

sexual assault[18] at the expense of the rights of the accused soldier.[19] The effort to rid the Army of sexual assault includes not only courts-martial, but administrative separation board proceedings as well.[20] Unjust results stemming from inadequate due process occur when an administrative separation board relies on weak or incomplete evidence[21] that does not meet the burden of proof, feels pressure in a zero tolerance environment, and ultimately separates a soldier. This article will explore the Army's focus on eradicating sexual assault, how it leads to those merely accused of sexual assault receiving inadequate due process, and how this, in turn, causes unjust results for soldiers in administrative separation board proceedings.[22]

Because SPC Smith's hypothetical case is common, this article examines the enlisted administrative separation board process as a necessary way to understand the problem and explore possible solutions.[23]

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[18] Major Troy K. Stabenow, *Throwing the Baby out with the Bathwater: Congressional Efforts to Empower Victims Threaten the Integrity of the Military Justice* System, 27 FED. SENTENCING REP. 156 (2015). *See infra* Part II.B. for a discussion of how the process has changed to focus more on victim's rights rather than the rights of the accused.

[19] *Id.* at 169.

[20] Generally, commanders have much discretion regarding how he wants to handle violations of the UCMJ. The commander can take no action, the commander can take administrative action, the commander can administer nonjudicial punishment, or the commander can begin the court-marital process by preferring charges. MCM, *supra* note 4, R.C.M. 306-07. Allegations of sexual assault generally follow the same path as previously mentioned; however, there are some differences that limit the discretion commanders have over sexual assault allegations. For example, special court-martial convening authorities (SPCMCAs) in the rank of colonel (O-6) are the initial disposition authorities for allegations involving rape, sexual assault, forcible sodomy, or any attempts of the same. All Army Activities Message, 299/2013, 080700Z Nov 13, U.S. Dep't of Army, subject: Army Responsibilities, Roles, Procedures, and Authorities for Responding to Sexual Assault Allegations [herein after ALARACT 299/2013].

[21] AR 635-200, supra note 5; para. 2-11. The rules of evidence do not apply at a separation board proceeding; the rules state, "[r]easonable restrictions will be observed, however, concerning the relevance and competency of evidence." *Id*. *See also* MCM, *supra* note 5, MIL. R. EVID. (2012). Because boards are composed of officers and enlisted personnel who are not lawyers, there is wide discretion in what constitutes relevant, competent evidence. AR 635-200, *supra* note 5, para. 2-7.

[22] While the focus of this paper is administrative separations based on substantiated allegations of sexual assault, it should be noted the unjust results can happen for any administrative separation when there was probable cause to believe an offense occurred but there was no court-martial. This paper focuses on substantiated allegations of sexual assault because in the author's experience this is the most frequent type of separation when it has been determined there will be no court-martial.

[23] The focus of this article is enlisted separations, as they represent over 70% of the subjects accused of sexual assault in the military. SAPR FY 14, *supra* note 4, app. A.

The first section discusses the court-martial process, as many allegations of sexual assault begin with an eye towards trial by court-martial.[24] However, as this article will show, administrative separation boards often occur as an alternative to trial by court-martial.[25] The second section includes a brief history of the Uniform Code of Military Justice (UCMJ), along with recent developments that demonstrate a shift toward protecting victims' rights, to the detriment of the accused.[26] This shift creates an environment that leads to inadequate due process and may cause unjust results for soldiers in administrative separation board proceedings arising from sexual assault allegations.[27] Although in the example SPC Smith's case did not result in a trial by court-martial, an understanding of the evidentiary standard required to prove a sexual assault case at a trial by court-martial will provide insight into the decision to use administrative separation boards to dispose of some cases, and will also be discussed in this section.

The third section discusses the administrative separation board process. It explains the standard of proof and due process rights of the respondent.[28] It also briefly discusses some of the potential ramifications of administrative separations where the discharge results in an OTH service characterization

The fourth section addresses how and when administrative separation boards occur in lieu of courts-martial, and how this alternative disposition may lead to unjust results for soldiers. It delves into the number of soldiers facing administrative separation boards arising from sexual assaults, and

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Army enlisted separation make up 90% of those administratively separated as result of sexual assault. *Id.* encl. 1, at 74. Officer administrative separations do occur and are governed by AR 600-8-24. U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES (12 Apr. 2006) (RAR 13 Sept. 2011)

[24] As mentioned above only SPCMCA in the rank of O-6 is the initial disposition authority. ALARACT 299/2013, *supra* note 20. In addition, recent congressional changes require mandatory discharges for charges referred to a court-marital for penetrative offenses and attempts. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013) [hereinafter NDAA FY 14]. Finally, NDAA FY 14 also limited commanders in their discretion regarding whether or not to refer sexual assault cases. Id. § 1744.

[25] SAPR FY 14 Report, supra note 4, encl. 1. *See infra* Part IV.A. for a discussion of the use of administrative separations as an alternative to trials by Court-Martial.

[26] MCM, *supra* note 5. *See also* Stabenow, *supra* note 18. *See infra* Part V. for a discussion of due process, including military due process and inadequate due process.

[27] Major David S. Franke, *Administrative Separation from the Military: A Due Process Analysis*, ARMY LAW., Oct. 1990. *See infra* Part V for a discussion on military due process.

[28] *See infra* note 5 comparing administrative separations and UCMJ actions.

examines statistics from fiscal year (FY) 14, along with results from a survey conducted by the author for this article for FY15. This section examines additional potential causes of inadequate due process and unjust results for soldiers when administrative separation board proceedings arise from sexual assault allegations. This section looks at cases involving non-prosecution memorandums,[29] victims who are unwilling to testify, and weak evidence leading to a decision to adjudicate the case before an administrative separation board instead of at a trial by court-martial.

The fifth section explores the problems of inadequate due process. It explains due process and the implementation of due process protections in the military. It also discusses military cases defining due process in administrative separation board proceedings along with courts' views of a similar process used by collegiate tribunals attempting to deal with this issue at colleges and universities. Finally, this section explores unjust results for soldiers potentially caused by the Army's current environment of zero tolerance for sexual assault.[30] This zero tolerance environment has the potential to bias officers serving on separation boards and bolster potential unlawful command influence (UCI) claims. This section will explore how these issues together cause unjust results for soldiers in administrative separation board proceedings.

The final, sixth section proposes possible solutions. It includes simple solutions, such as elevating the separation authority for administrative separation boards resulting from sexual assaults to the Army's Human Resources Command (HRC), and raising the government's standard of proof to clear and convincing evidence. This section also considers having the Army Review Board Agency (ARBA) review *de novo* all administrative board separations arising from sexual assaults. A final, more drastic solution proposed is to have an independent judge hear all administrative separation board proceedings involving sexual assault. The proposed judge would replace the traditional board composed of noncommissioned officers (NCOs) and officers. A discussion of the problems with each proposed solution also follows.

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[29] *See infra* Part IV.B. for discussion.

[30] *See supra* note 16 and accompanying sources.

II. Courts-Martial

The UCMJ is the statutory framework for military justice.[31] It outlines criminal conduct in the punitive articles and sets out the rules and procedures for the services to administer military justice.[32] Within the UCMJ's statutory framework for military justice is the authorization for the President to establish procedures for conducting courts-martial.[33] The *Manual for Courts-Martial* (MCM) promulgated by executive order, establishes procedures for a trial by court-martial.[34] The MCM also contains the Rules for Courts-Martial (RCM), Military Rules of Evidence (MRE), punitive articles, and non-punitive articles of the UCMJ.[35]

The MCM governs court-martial procedure. This incluses disposing of misconduct, the Article 32 hearing,[36] and trial. All of these, discussed in more detail below, provide a background for the court-martial process prior to the congressional changes that afforded more rights to victims of sexual assault.[37] These changes, also discussed below, show the current environment of zero tolerance for sexual assault[38] that potentially leads to inadequate due process. Reasoning behind why administrative separation board proceedings occur in lieu of a court-martial will also be discussed.[39]

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[31] David A. Schlueter, *America Military Justice: Responding to the Siren Songs for Reform*, 73 A.F. L. REV. 193, 199 (2015).

[32] MCM, *supra* note 5, art. 88–139; THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, COMMANDER'S LEGAL HANDBOOK (Mar. 2015) [hereinafter COMMANDER'S LEGAL HANDBOOK]; *see* Jennifer Koons, *Sexual Assault in the Military: Can the Pentagon stem the rise in incidents?*, 23 CQ RESEARCHER 693, 702 (2013) (discussing Congress enacting the first UCMJ in 1950 as a response to concerns about the Articles of War and the execution of military justice during World War II).

[33] MCM, *supra* note 5, pt. I-1; *see also* Schlueter, *supra* note 31, at 199.

[34] MCM, *supra* note 5, R.C.M 202.

[35] *Id.* Some punitive articles are based in common law criminal offenses, with others based on the recognition that commanders need to maintain good order and discipline within their ranks. The common law articles include offenses like *rape, murder,* and *larceny*. *Id.* pt. IV, ¶ 45, ¶ 118, ¶ 46. The military disciplinary offenses include offenses like *desertion, failure to obey an order* and *disrespect of an officer*. *Id.* pt. IV, ¶ 9, ¶ 16, ¶ 13.

[36] MCM, *supra* note 5, art. 32.

[37] NDAA FY 14, *supra* note 24.

[38] *See supra* note 16 and accompanying sources.

[39] *See infra* Part IV for discussion.

A. Court-Martial Procedures

1. Disposing of Misconduct

In SPC Smith's hypothetical case, his commander had to decide how to dispose of his case. If a commander thinks a soldier has violated a punitive UCMJ article, he[40] has wide latitude and discretion.[41] His discretion may include deciding to take no action, initiating adverse administrative action, imposing nonjudicial punishment, or most seriously, beginning the court-martial process.[42] However, before the commander can dispose of a case, he must determine the facts and circumstances surrounding the allegation through an inquiry.[43] If the misconduct is serious, for example—an allegation of sexual assault, the commander must contact law enforcement to investigate the incident.[44] After the investigation is complete, the commander may choose to prefer court-martial charges.[45] After the commander has preferred charges, those charges go through the chain of command to be disposed of at the lowest appropriate level.[46] At that level, usually the special court-martial convening authority (SPCMCA) orders an Article 32 hearing if he believes the charges are serious enough to justify a trial by general court-martial.[47]

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[40] The author is using "he" or "his" throughout the article for either gender.

[41] MCM, *supra* note 5, R.C.M 401-04.

[42] *Id.*; *see also* Shelbi N. Keehn, *Striking a Balance Between Victim and Commanding Officer: Why Current Military Sexual Assault Reform Goes Too Far*, 48 COLUM. J. L. & SOC. PROBS. 461, 473 (2015).

[43] MCM, *supra* note 5, R.C.M. 303. The discussion of the RCM 303 states, "The inquiry should gather all reasonably available evidence bearing on guilt or innocence and any evidence relating to aggravation, extenuation, or mitigation." *Id.*

[44] *Id.* Recent congressional changes now require commanders to refer any sexual assault violations to the Criminal Investigation Command (CID). NDAA FY 14, *supra* note 24, § 1742. Furthermore, CID now works in conjunction with judge advocates to determine whether probable cause exists to believe that a subject committed the alleged sexual assault. U.S. DEP'T OF DEF., INSTR. 5505.03, INITIATION OF INVESTIGATIONS BY DEFENSE CRIMINAL INVESTIGATIONS ORGANIZATIONS encl. 2 (1 Dec. 15) [hereinafter DODI 5505.03].

[45] MCM, *supra* note 5, R.C.M. 307. Only a SPCMA in the rank of O-6 can initially dispose of allegations of sexual assault, rape, forcible sodomy, and attempts of the aforementioned offenses. ALARACT 299/13, *supra* note 20.

[46] MCM, *supra* note 5, R.C.M. 401.

[47] *Id.* R.C.M. 404.

2. Article 32 Hearing Prior to Congressional Changes

An Article 32 hearing,[48] also known as the RCM 405 pretrial investigation,[49] was part of the original UCMJ.[50] During the Article 32,[51] an accused is entitled to certain rights, such as the right to cross-examine witnesses, present evidence in defense or mitigation, and have the assistance of representation by a military defense counsel at no cost to the accused.[52]

The investigating officer (IO) at the Article 32 hearing is responsible for the procedural aspects of the investigation, including determining what evidence is needed to prepare a thorough and impartial investigation, and deciding which witnesses are "reasonably available" to appear at the hearing.[53] Prior to the National Defense Authorization Act (NDAA) for Fiscal Year 2014,[54] the IO was charged with inquiring "into the truth and form of the charges, and such other matters as may be necessary to make a recommendation as to the disposition of the charges."[55] The IO documented his findings and recommendations in a report of investigation.[56] As discussed in more detail below, the inquiry is now more limited, victims' rights have expanded, and the ability of an accused to use the investigation as a tool for discovery has also been limited.[57]

After the IO forwards the report of investigation to the commander who appointed the investigation, the general court-martial convening authority (GCMCA)[58] decides whether to refer any charges to a trial by

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[48] MCM, *supra* note 5, app. A2, ¶ 832.
[49] *Id.* R.C.M. 405.
[50] Jonathon Lurie, *The Transformation of Article 32: Why and What?*, 29 WIS. J. L. GENDER & SOC'Y 409, 410 (2014).
[51] The Article 32 hearing, often analogized to a civil grand jury hearing, does have some differences. *See, e.g.*, *id.* at 410; Brian C. Hayes, *Strengthening Article 32 To Prevent Politically Motivated Prosecution: Moving Military Justice Back to The Cutting Edge*, 19 REGENT U. L. REV. 173 (2006); Major Christopher J. Goewert & Captain Nichole M. Torres, *Old Wind Into New Bottles: The Article 32 Process After the National Defense Authorization Act of 2014*, 72 A.F. L. REV. 231 (2015).
[52] MCM, *supra* note 5, R.C.M. 405(f).
[53] *Id.* R.C.M. 405.
[54] NDAA FY 14, *supra* note 24.
[55] MCM, *supra* note 5, R.C.M. 405(e).
[56] *Id.* R.C.M. 405(j)(2).
[57] *See infra* Part II.B. for discussion.
[58] MCM, *supra* note 5, app. A2, ¶ 818. A general court-martial convening authority (GCMCA) is a commander authorized to convene a court-martial pursuant to the UCMJ. *Id.*

court-martial. A trial date is set by the military judge once the GCMCA refers the charge(s) to a trial by court-martial.[59]

3. Trial

If the accused pleads not guilty, he will be tried on the merits of the case.[60] The accused will decide whether to be tried by a court-martial panel—jury—or by a military judge alone.[61] The standard of proof for a trial by court-martial is proof beyond a reasonable doubt.[62] If convicted, the soldier faces sentencing immediately following any finding of guilt.[63] During sentencing phase, the accused can present witnesses and other evidence for the court's consideration.[64]

B. Changes to the Process

The UCMJ, and subsequently the MCM, have undergone many recent changes. These changes include recent definitional changes, the expansion of victims' rights, and procedural amendments.[65] When Congress began making these changes, the Army's environment also

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[59] *Id.* R.C.M. 601. The GCMCA selects the panel members but does not select the counsel or the military judge. Schlueter, *supra* note 31, at 199–202.

[60] *Id.*at 199–203.

[61] *Id.*

[62] MCM *supra* note 5, R.C.M. 918. The *Military Judges' Benchbook* defines proof beyond a reasonable doubt as:

> [P]roof to an evidentiary certainty, although not necessarily to an absolute or mathematical certainty. The proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair and rational hypothesis except that of guilt. The rule as to reasonable doubt extends to every element of the offense, although each particular fact advanced by the prosecution which does not amount to an element need not be established beyond a reasonable doubt.

U.S. DEP'T OF ARMY, PAM 27-9, MILITARY JUDGES' BENCHBOOK para. 2-5-12 (10 Sept. 2014).

[63] MCM, *supra* note 5, R.C.M. 1001b; *see also* Schlueter, *supra* note 30, at 202–03. The Military Rules of Evidence (MRE) applies during this phase of the proceeding. MCM *supra* note 5, M.R.E. 101.

[64] *Id.* R.C.M 1001.

[65] NDAA FY 14, *supra* note 24. Article 120 of the UCMJ originally encompassed rape and defined it as intercourse by force and without consent. MANUAL FOR COURTS-MARTIAL, UNITED STATES, art. 120 (2005); *see* also Koons, *supra* note 32, at 702.

changed,[66] culminating in the current environment where there is policy of zero tolerance for sexual assault.[67] While this may seem positive, this environment—where the focus is on victims' rights—is to the detriment of the accused.[68] The accused's due process rights diminish because of the focus on victim's rights throughout the legal process.

1. Definitions

In 2007, Congress adopted proposed changes from the Joint Service Committee (JSC) and began overhauling the article codifying rape and sexual assualt, changing the definition of rape and expanding Article 120 to include sexual assault.[69] The element *without consent* was no longer part of the definition of offenses like rape and sexual assault.[70] The 2007 version of Article 120 expanded the definition of sexual offenses into fourteen different offenses, including a new offense entitled *aggravated sexual assault*.[71] These changes were Congress's answer to sexual assault scandals that had erupted within the military.[72] Congress changed the law again in 2012, when it reorganized Article 120.[73] The 2012 version of the UCMJ outlined and defined rape, sexual assault, aggravated sexual

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66 Id.

67 *See supra* note 16 and accompanying sources.

68 Stabenow, *supra* note 18.

69 MCM, *supra* note 5, art. 120; *see also* Major Meridith L. Marshall, Perfect Storm: How Recent Congressional Interest and Influence Has Affected Sexual Assault Law and Policy in the Armed Services (Apr. 2013) (unpublished L.L.M. thesis, The Judge Advocate General's School, United States Army) (on file with the author). The Joint Service Committee (JSC) proposed changes to "clarify the differing degrees of gravity for each sexual offense and the proper correlation to the applicable punishment [and to] find a balance between conforming the format of the UCMJ and MCM to the format in Federal law." *Id.*

70 MCM, *supra* note 5, art. 120. Koons, *supra* note 32, at 702. This removed the burden from the victim of having to show that she said no or otherwise resisted the accused. *Id.*

71 MANUAL FOR COURTS-MARTIAL, UNITED STATES, art. 120 (2008). *See also* Michael Buchhandler-Raphael, *Breaking the Chain of Command Culture: A Call for an Independent and Impartial Investigative Body to Curb Sexual Assaults in the Military*, 29 WIS. J. L. GENDER & SOC'Y 341, 343 (2014).

72 Koons, *supra* note 32.

73 MCM, *supra* note 5, art. 120. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298, § 573 (2011). The 2007 version of Article 120 was found unconstitutional by the Court of Appeals for the Armed Forces. Through this amendment, Congress also resolved the constitutionality issue. United States v. Prather, 69 M.J. 338 (C.A.A.F. 2011) (holding that burden-shifting to the defense to *disprove* lack of consent was unconstitutional).

contact, and abusive sexual contact, and reorganized the offenses under one article.[74]

2. Victims' Rights

In 2013, Congress also overhauled the policies for treatment of victims after public outcry and dissatisfaction occurred with the way the military was handling sexual assault victims.[75] Some of the outcry came after the release of the film *The Invisible War*,[76] which harshly criticized the treatment victims were receiving.[77] The NDAA FY14 codified and expanded victims' rights, including rights in the pretrial, trial, and post-trial processes.[78] Congress mandated specific treatment for victims of sexual assault and prohibited retaliation against victims for reporting their crimes.[79] The NDAA FY14 statutorily incorporated the majority of the Crime Victims' Rights Act (CVRA) into military justice.[80] Victims gained many protections and rights, including the right to have trial counsel or victim counsel[81] present when being interviewed by the defense,[82] the right not to testify at a preliminary hearing,[83] and the right to submit post-trial matters for consideration by the convening authority.[84]

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[74] MCM, *supra* note 5, pt. IV, ¶ 45.

[75] Major Greg J. Thompson, *Victims' Rights in the Military: Empowering Sexual Assault Victims with Meaningful DOD Victims' Bill of Rights*, 21 VA. J. SOC. POL'Y & L. 421, 433 (2014).

[76] THE INVISIBLE WAR (Chain Camera Pictures 2012).

[77] *Id.*

[78] NDAA FY14, *supra* note 24.

[79] *Id.* § 1701, § 1709. Victims are entitled to certain treatment by the command, including for the command not to retaliate against victims for reporting allegations of criminal offenses. Retaliation is defined at a minimum as "taking or threatening to take an adverse personnel action, or withholding or threatening to withhold a favorable personnel action" and "ostracism and such of acts of maltreatment . . . committed by peers . . . or by other persons because the member reported a criminal offense." *Id.*

[80] *Id.* § 1701. This section extended the majority of the Crime Victims' Rights Act (CVRA) to the military, including providing victims of crimes actionable rights. Some of these rights include reasonable protection from the accused, notice of hearings and court-martial proceeding, and the opportunity to be heard during portions of the court-marital process. *Id. See also* Thompson, *supra* note 74.

[81] NDAA FY14, *supra* note 24, § 1716.

[82] *Id.* § 1704. If the victim does not want to testify at the preliminary hearing, she is unavailable for the hearing. *Id.*

[83] *Id.* § 1702.

[84] *Id.* § 1706.

3. Procedural Changes

In addition to enhancing victims' rights, the NDAA FY14 also procedurally changed how the military justice system works. Section 1744 added a check on the commander's authority when referring a charge to a trial by court-martial.[85] It established a new layer of review for sex-related offenses.[86] The process of review depends on the advice of the Staff Judge Advocate (SJA). When the SJA recommends and the convening authority agrees *not* to refer charges of a sex-related offense to a trial by court-martial, the next-higher commander authorized to convene a general court-martial reviews the case.[87] Conversely, if the SJA recommends referring charges of a sex-related offense to a trial by court-martial and the convening authority does *not* refer, then the Secretary of the Army reviews the case.[88] The expansion of victims' rights buttressed with the procedural changes in the court-martial process could encourage commanders to use administrative separation procedures for soldiers, which exposes them to limited due process rights at a hearing, rather than trial by court-martial.

The NDAA FY14 also significantly altered how the military conducts Article 32 hearings.[89] After the change, the preliminary hearing officer (PHO) should be a judge advocate (JA), rather than a line officer, and the PHO must determine: whether probable cause[90] exists to believe the offense occurred and the accused committed it, whether the convening authority has jurisdiction over the offense and the accused, and the form of the charges.[91] The PHO also makes a recommendation as to the

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[85] NDAA FY14, *supra* note 24, § 1744.

[86] *Id.* Prior to the NDAA FY14, when a commander declined to refer charges to a trial by court-martial the decision was final. MCM, *supra* note 5, R.C.M. 401.

[87] NDAA FY14, *supra* note 24, § 1744.

[88] *Id*.; *see* also Keehn, *supra* note 42, at 482–83.

[89] NDAA FY 14, *supra* note 24, § 1702; *see also* Goewert & Torres, *supra* note 51.

[90] Previously, Article 32 hearings were a thorough and impartial investigation requiring reasonable grounds to believe the offense occurred. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 405 (2008). The hearing had four main purposes; inquiring into the truth set forth in alleged offense, the form of charges, recommendations regarding the disposition of the cases, and discovery. *Id.* It also allowed the accused to "present anything in defense, extenuation, or mitigation for consideration by the investigation officer." *Id.* The current version requires the preliminary hearing officer to make a probable cause determination. NDAA FY 14, *supra* note 24, § 1702. It also limits the accused rights, in that the accused can only cross-examine witnesses and present matters in defense that are relevant to the limited scope and purpose of the investigation. *Id. See also* Goewert & Torres, *supra* note 51.

[91] NDAA FY 14, *supra* note 24, § 1702.

disposition of the case.[92] The new Article 32 also limits the evidence presented and examination of witnesses at the hearing to "matters relevant to the limited purposes of the hearing."[93] Finally, the new Article 32 allows PHOs to deem victims unavailable for the hearing, based on the victim's desires.[94] This means victims are not required to testify at the hearing.[95]

These changes are a significant departure from prior Article 32 procedures. Before the NDAA FY14 changes, the IO determined the availability of all witnesses.[96] Now, the victim decides whether he or she wishes to testify at the Article 32 hearing.[97] This change underscores the shift from an accused having the right to call witnesses to victims determining whether or not they will testify. Not only does the victim determine whether he or she will testify, but the victim can also choose to be present during the Article 32 hearing.[98] Again, this demonstrates an environment where the expansion of victims' rights begins to diminish the rights of the accused.

C. Specialist Smith's Case

Specialist Smith's case did not proceed to a trial by court-martial because there was insufficient evidence to prosecute.[99] As mentioned

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[92] *Id.*

[93] *Id.*

[94] *See supra* note 82 and accompanying text.

[95] U.S. DEP'T OF ARMY, PAM. 27-17 PROCEDURAL GUIDE FOR ARTICLE 32 PRELIMINARY HEARING OFFICER, para. 2-3 (18 June 2015). The preliminary hearing officer (PHO) looks at all the evidence, including witness statements and victim's statement, and will only hear or consider evidence if it is "relevant, not cumulative, and necessary to the limited scope and purpose of the hearing." Furthermore, if the government will incur an expense, the convening authority (who directed the hearing) determines mode of testimony, i.e., in person, telephone, or similar means of remote testimony. *Id.* para. 2-4.

[96] MCM, *supra* note 5, R.C.M. 405.

[97] NDAA FY 14, *supra* note 24, § 1702.

[98] U.S DEP'T OF ARMY, DIR. 2015-09, IMPLEMENTATION OF SECTION 1702 OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014—ARTICLE 32, UNIFORM CODE OF MILITARY JUSTICE PRELIMINARY HEARING (24 Feb. 2015). The directive states that the victim has a right not to be excluded from the hearing, unless the PHO determines the "testimony by the victim would be materially altered if the victim heard other testimony at the proceeding." *Id.* para. b(3).

[99] Before referral to a court-martial the Staff Judge Advocate (SJA) must determine the charges are warranted by the evidence. MCM, *supra* note 5, art. 34. This allows the SJA to advise the convening authority on the charges. The SJA is personally responsible for

above, the standard at a trial by court-martial is proof beyond a reasonable doubt.[100] As the scenario suggests, it might be difficult to meet the burden of proof because in the hypothetical, there was no corroborating physical evidence suggesting that SPC Smith committed sexual assault.[101] It is hard to meet the high standard of proof when there is little—or weak—evidence corroborating that an offense occurred, and cases based upon victim testimony alone are notoriously difficult to prosecute. Cases based on testimony alone are often referred to as "he said, she said" cases,[102] reflecting they generally pit one person's statement against another's, with little else to rely upon. It is similarly difficult to meet the standard of proof when victims do not want to testify at trial, and nearly impossible when they refuse.

Prior to referral or even preferral, when there is insufficient evidence to prosecute, the SJA will sometimes write a memorandum of non-prosecution, even though probable cause exists to believe an offense occurred.[103] This memorandum does not preclude the commander from taking administrative action.[104] In addition, the current environment of zero tolerance for sexual assault[105] potentially plays a role in the commander's decision about how to dispose of a case. In this environment, commanders often choose to initiate administrative separation board proceedings in cases like SPC Smith's, where there is insufficient evidence for a conviction at a trial by court-martial, and the victim does not want to testify.

III. Administrative Separation

The zero tolerance environment in the Army pressures commanders to eradicate sexual assault, an admirable, though nearly impossible

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ensuring advice and must make an "independent and informed appraisal of the evidence." *Id.* R.C.M. 406.

[100] *See supra* note 62.

[101] Cases with no physical evidence can result in a court-martial. Each case and the facts of the case are taken into consideration when determining how to dispose of the allegations.

[102] A "he said, she said" case refers to a case without additional evidence to corroborate victim testimony, which is contested by the accused. *See generally* Claudio Munguia, *How are "he-said/she-said" Cases Resolved in Courts of Law?*, QUORA (Jan. 26, 216), https://www.quora.com/How-are-he-said-she-said-cases-resolved-in-Courts-of-Law.

[103] *See infra* Part IV.B. for further discussion of non-prosecution memorandums.

[104] ALARACT 299/2013, *supra* 20.

[105] *See supra* note 16 and accompanying sources.

endeavor.[106] This is an important mission, but when allegations of sexual assault cannot meet the legal standard of proof beyond a reasonable doubt, or even when a soldier is exonerated, commanders might still feel the need to purge soldiers accused of sexual assault from their ranks. Consequently, commanders often initiate administrative separation board proceedings against an alleged offender.[107] This process, discussed below, employs a lower standard of proof and affords decreased due process protections to an alleged offender, despite the serious nature of accusations of sexual misconduct.

A. Enlisted Separations

Administrative separations[108] are the Army's force management tool; a way of maintaining readiness and competency.[109] There are two types of administrative separations, voluntary and involuntary.[110] The basis for involuntary separations is generally misconduct or unsatisfactory performance.[111] Army Regulation (AR) 635-200, Chapter 14 details the procedures for enlisted administrative separations based on misconduct.[112] Separations under Chapter 14 are broken down into separations for patterns of minor disciplinary infractions, separations for a pattern of misconduct, and separations for commission of a serious offense.[113] A serious offense is "a serious military or civil offense, if the specific circumstances of the offense warrant separation and a punitive discharge . . . ."[114]

A company-level-commander initiates the separation process through one of two procedures; through notification procedures, or through

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[106] *See infra* Part V. for further discussion.
[107] *Id.*
[108] Department of Defense Instruction (DoDI) 1332.14, outlines how the military conducts enlisted administrative separations. It is the basis for Army Regulation (AR) 635-200. DoDI 1332.14, *supra* note 6.
[109] AR 635-200, *supra* note 5, para. 1-1
[110] COMMANDER'S LEGAL HANDBOOK, *supra* note 32, at 169.
[111] *Id*. Other bases for separation exist, such as failure to meet height and weight standards, but only a few provide authority to impose a characterization of discharge other than honorable. *See generally id.*
[112] AR 635-200, *supra* note 5, ch. 4.
[113] *Id.* para. 14-12.
[114] *Id.* Some examples of serious misconduct include abuse of illegal drugs and any sexually violent crime. *Id.*

administrative separation board procedures.[115] The procedural process for administrative separations depends on the type of discharge, the basis for separation, and the number of years of service the soldier has completed.[116] Administrative board procedures take place if the soldier has more than six years of total active and reserve military service, or if the least favorable discharge contemplated by the commander is an OTH characterization of service.[117] Normally, cases involving serious misconduct warrant a board because the discharge contemplated is often an OTH.[118] The initiating commander must notify the soldier of his rights, just as in the notification procedures, but with some additional rights.[119] Additional rights include the following: the right to a hearing before an administrative separation board; the right to request the appointment of military counsel to represent the soldier; and the right to waive the board.[120]

An administrative separation board is composed of at least three commissioned officers, warrant officers, or NCOs chosen by the separation authority, who also is most likely the GCMCA.[121] Noncommissioned officers must be sergeant first class or above and at least one member of the board must be a major or above.[122] Board members should be experienced, unbiased, and cognizant of the applicable regulations or policies related to the proposed separation.[123]

The senior member serves as the president of the board and will notify the respondent when the board will meet, notify the respondent of expected witnesses, and ensure the respondent has a copy of the case file.[124] The formal procedures established in AR 15-6[125] set forth the process for the administrative separation board hearing not covered by AR

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[115] *Id.* ch. 2.
[116] *Id.*
[117] COMMANDER'S LEGAL HANDBOOK, *supra* note 32, at 177.
[118] AR 635-200, *supra* note 5, ch. 14.
[119] AR 635-200, *supra* note 5, para. 2-4.
[120] *Id.*
[121] *Id.* para. 2-7. The separation authority can also appoint a non-voting legal advisor and recorder. *Id.*
[122] *Id.* The majority of the members must be commissioned or warrant officers. *Id.*
[123] AR 6350-200, *supra* note 5, para. 2-7. If the respondent is female or a member of a minority group, the board, upon written request by the respondent, will have a voting member be female or a minority member, if reasonably available. *Id.*
[124] *Id.* para. 2-10.
[125] AR 15-6, *supra* note 7.

635-200.[126] The administrative separation board hears relevant evidence. However, the rules of evidence for courts-marital do not apply.[127] The respondent also has certain rights at the administrative separation board. These rights include the right to appear at the hearing in person, with or without representation,[128] submit material for the board to consider, question any witnesses who appear before the board, challenge for cause any voting member, and present an argument before the board closes.[129] The respondent can also request the attendance of witnesses, but there is no guarantee they will be compelled to appear before the administrative separation board.[130]

At the conclusion of the proceedings, the board deliberates in a closed session on its findings and recommendations.[131] In its findings, the administrative separation board must determine whether a preponderance of the evidence supports each allegation.[132] The administrative separation board then makes a recommendation as to whether the misconduct warrants the respondent's separation.[133] If the administrative separation board recommends separation, it also recommends a characterization of service: honorable, general under honorable conditions, or other than honorable. The board can also recommend suspension of the separation for up to one year.[134] Finally, the board can recommend retaining the

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[126] AR 635-200, *supra* note 5, para. 2-10.

[127] *Id.* para. 2-11. Privileged Communications as defined by MRE 502 through 504 are still protected. AR 15-6, *supra* note 7, para. 3-7.

[128] The respondent is detailed military counsel at no cost to him, and may hire civilian counsel at no cost to the government. AR 635-200, *supra* note 5, para. 2-10.

[129] AR 635-200, *supra* note 5, para. 2-10.

[130] *Id.* The respondent must make a written request to the presiding officer outlining why the testimony is relevant and why "written or recorded testimony would not be sufficient to provide for a fair determination." *Id.* The presiding officer must then determine that the witness's testimony is not cumulative and that the witness's personal appearance is "essential to a fair determination on the issues of separation or characterization." *Id.* Furthermore, the presiding officer has to determine that the same objective cannot be adequately accomplished by written or recorded testimony. *Id.* Finally, the presiding officer must determine whether "[t]he need for live testimony is substantial, material, and necessary for a proper disposition of the case." *Id.*

[131] AR 15-6, *supra* note 7, para. 3-12.

[132] *Id.* para. 2-12. The preponderance of evidence, according to *Black's Legal Dictionary*, is "the greater weight of the evidence; superior evidentiary weight that though not sufficient to free the mind from all reasonable doubt, is still sufficient to incline a fair and impartial mine to one side of the issue rather than the other." BLACK'S LAW DICTIONARY (9th ed. 2009).

[133] AR 635-200, *supra* note 5, para 2-12.

[134] *Id.* (this recommendation is not binding).

respondent, even when it finds the allegation supported by a preponderance of the evidence.[135]

After reviewing a board's recommendation to separate, the separation authority[136] takes action.[137] The separation authority can approve the board's recommendation to separate and direct separation, disapprove the board's recommendation to separate and retain the respondent,[138] or approve the board's recommendation to separate and suspend execution of the separation for up to one year.[139] The separation authority cannot direct separation when the administrative separation board recommends retention, nor can the separation authority authorize a characterization of discharge that is less favorable than what the administrative separation board recommends.[140]

B. Specialist Smith

In the hypothetical posed at the start of this article, SPC Smith received an administrative separation and the Army discharged him with an OTH characterization of service. This means that SPC Smith received notice that an administrative separation board would decide: (1) whether the allegations of sexual assault occurred; (2) whether to separate him; and (3) if he were to be discharged, recommend the characterization of service. The administrative separation board had to determine, by a preponderance of the evidence, that SPC Smith committed the misconduct in his notification. In SPC Smith's case, the administrative separation board found he did commit the sexual assault against Jenny. To expand the hypothetical, in this instance, the administrative separation board made this determination despite the fact that Jenny did not testify, and there was no other evidence supporting the sexual assault allegation. The

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135 *Id.* (this recommendation is binding).

136 The Secretary of the Army has almost unlimited separation authority, as does a GCMCA. *Id.* para. 1-19. The GCMCA can approve all separations except those that specifically require Secretary of the Army approval. *Id.* The GCMCA is the separation authority who has the ability to appoint the administrative separation board and is empowered to separate soldiers with an OTH characterization of service. *Id.* Special court-martial convening authorities are more limited in their separation authority. *Id.*

137 *Id.* para. 2-6.

138 *Id.*

139 *Id.* A suspension can occur "when the respondent's record reflects potential for full effective duty." *Id.*

140 *Id.* When a soldier has more than eighteen years of active federal service, Human Resources Command (HRC) must approve an involuntary separation. *Id.* para. 1-19.

administrative separation board gave substantial weight to a sworn statement Jenny gave to investigators, rather than the in-person testimony of SPC Smith. Because Jenny did not testify, SPC Smith's defense counsel was unable to cross-examine her.[141] His defense counsel did not have an opportunity to present his case because he could not elicit additional extenuating facts from the witness, or show inconsistencies in her statement or bias in her motives.[142]

In the hypothetical, the administrative separation board also recommended separating or discharging SPC Smith with an OTH characterization of service. The separation authority later approved his discharge. This characterization of service will carry negative consequences for SPC Smith.[143] The characterization of service determines the post-service benefits a soldier receives and carries a potential stigma that attaches to an OTH discharge.[144] An OTH characterization of service may deprive SPC Smith of some of his veteran's benefits.[145] For example, SPC Smith will most likely lose his

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[141] "It appears to us contrary to all rules of evidence, and opposed to natural justice, that the evidence of one party should be received as evidence against another party, without the latter having an opportunity of testing its truthfulness by cross-examination." Allen v. Allen, L. R. P. D. (C. A.) 253 (1894) (quoting L.J. Lopes).

[142] The hypothetical does not go into details as to whether SPC Smith requested that Jenny be a witness. If SPC Smith did request Jenny as a witness, then the presiding officer would have had to determine whether Jenny's sworn statement was sufficient and adequate. AR 635-200, *supra* note 5, para. 2-10.

[143] *Id.* para. 3-6; *see also* U.S. DEP'T OF VET. AFFAIRS, *Veteran Benefits Administration*, http://www.benefits.va.gov/benefits/character_of_discharge.asp (last visited Mar. 20, 2017) [hereinafter U.S. DEP'T OF VET. AFFAIRS] (containing character of discharge requirements for various benefits administered by the department).

[144] AR 635-200, *supra* note 5, para. 17-1. The regulation states:

> The high rate of enlisted personnel receiving other-than-honorable [OTH] discharges is a concern of commanders at all levels. The consequences of receiving an other-than-honorable discharge can have a lasting adverse effect on the individual [s]oldier . . . . Many [s]oldiers gain the false impression that an unfavorable discharge can be easily recharacterized by petitioning the Army discharge review board. This is not the case, since only a small percentage of such actions have been acted upon favorably. Many [s]oldiers can be discouraged from conduct that warrants an unfavorable discharge.

Id.

[145] *Id.* para. 3-5.

education benefits.[146] The Montgomery G.I. Bill[147] and its progeny can only be utilized by those who are discharged with an honorable characterization of service.[148] Another area potentially affected by an OTH characterization of service is his transportation benefits.[149]

IV. Intersection Between Administrative Separation Board and Courts-Martial

A. Use of Administrative Separations in Lieu of Trials by Court-Martial

The DoD Annual Report on Sexual Assault in the Military Fiscal Year 2014 (FY14 SA Report) found in the Army, there were 2199 unrestricted reports of sexual assault and 1566 servicemember offenders under investigation for sexual assault.[150] Over 1050 subjects were considered for action by commanders and of these allegations, eighty-one resulted in involuntary, adverse administrative discharges of the subjects.[151] Of the 1054 subjects considered for action by commanders, 199 were disposed of through non-judicial punishment, including 37 that also resulted in administrative discharges.[152] Of the 1054 allegations, commanders took no action in forty-four of the allegations due to the victim refusing to cooperate in the military justice process.[153] Of the 1054 allegations, sixty-seven allegations were determined to have insufficient evidence to support a charge, meaning the allegations met the probable cause standard to title the offender, but there was insufficient evidence to prove sexual assault beyond a reasonable doubt.[154] In other words, in FY14, 15% of the subjects considered for action by commanders resulted in adverse

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146 Major Joshua Smith, *Staying Abreast of Separation Benefits*, ARMY LAW., Sept. 2013, at 17, 20.

147 The Servicemember's Readjustment Act of 1944, P.L. 78-346, 58 Stat. 284 (1944). The act contained the original authorization for "college or vocational education for returning World War II [v]eterans (commonly referred to as GIs), as well as one year of unemployment compensation." UNIV. OF COLORADO DENVER, *VA Education Benefits*, http://www.ucdenver.edu/life/services/Veteran/BenefitsInformation/Pages/default.aspx (last visited Mar. 20, 2017); *see also* U.S. DEP'T OF VET. AFFAIRS, *Education and Training*, http://www.benefits.va.gov/benefits/character_of_discharge.asp (last visited Mar. 20, 2017).

148 U.S. DEP'T OF VET. AFFAIRS, *supra* note 143.

149 *Id.*; *see also* MAJ Joshua Smith, *supra* note 146, at 20.

150 SAPR FY14 Report, *supra* note 4, encl. 1, at 63–4.

151 *Id.*

152 *Id.*

153 *Id.*

154 *Id.*

administrative separation actions.[155] A deeper look at the eighty-one soldiers involuntarily separated for allegations of sexual assault reveals there were cases in which victims refused to testify and cases that could not proceed to trial because of weak evidence. According to the FY14 SA Report, the Army separated ten soldiers in cases in which the victim refused to testify at a trial by court-martial, and five cases in which there was insufficient evidence to proceed to a court-martial.[156]

A survey sent to all chiefs of justice and regional defense counsel in the active Army produced quantitative evidence that soldiers are suffering inadequate due process because of unjust enlisted administrative separation boards.[157] Of the twenty individual responses received, fifteen provided information about administrative separation boards arising from sexual assault allegations.[158] Of those cases, ten resulted in discharges with an OTH characterization of service and five discharges with a general under honorable conditions characterization of discharge.[159] Boards retained soldiers in three cases, two cases resulted in discharges with an honorable characterization of service, and three officers requested resignations in lieu of other punishment, which were approved as separations.[160] At the time of the responses to the survey, there were also nine pending administrative separation boards for sexual assault-related offenses.[161]

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[155] *Id*. This is a 4% increase from fiscal year (FY) 2013 and a 3% increase from FY12 and FY11. *Id.*

[156] *Id.* encl. 1, tbl.7. These numbers could be much higher as the author, gleaned them from the synopsis of each case in table 7. *Id.* They are only as accurate as the amount of information gathered and put in the table from the units. Some entries are not clear as to why the case resulted in involuntarily separation. As the report noted, "FY14 is the first year that the disposition data is reported using DSAID. The Army continues to verify results with an aggressive quality control process." *Id.* encl. 1, at 63. Additionally unclear is whether or not the cases citing "insufficient evidence" reflects whether or not charges in an investigation was founded/unfounded or substantiated/unsubstantiated.

[157] Questionnaire from Major Latisha Irwin to chiefs of justice and regional defense counsel (Nov. 2, 2015) (unpublished survey) (on file with author). The surveys were sent to chiefs of justice (COJs) and regional defense counsel (RDC), asking them to disseminate the survey to their trial counsel (TC) and defense counsel (DC). Over 100 people received the survey. The author first went through the trial counsel assistance program (TCAP) and defense counsel assistance program (DCAP) to obtain the most up-to-date list of COJs and RDCs.

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.*

One theater support command (TSC) also responded to the survey as a group. Their numbers were similar to the individual responses.[162] The TSC had five administrative separation boards based on sexual assault; three discharges with an OTH characterization of service and two discharges with a general under honorable conditions characterization of service.[163]

B. Non-Prosecution Memorandums

There are many reasons why a sexual assault case might not proceed to a trial by court-martial. The victim can refuse to testify.[164] Weak evidence may lead the government to believe they cannot prove their case beyond a reasonable doubt, or a witness may lack credibility. In this situation, the government may produce a non-prosecution memo.[165] The non-prosecution memo usually states the government does not intend to go forward with charges against an accused because the government cannot meet its burden of proving the case beyond a reasonable doubt.[166] In surveys from the field, thirty-five sexual assault cases resulted in non-prosecution memoranda.[167] However, in eleven of those cases, the commander later initiated administrative separation actions.[168] This means although there was insufficient evidence to try the accused at a trial by court-martial in those eleven cases, the command still chose to initiate adverse administrative action against the soldier.[169]

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[162] *Id*.

[163] *Id*.

[164] NDAA FY14, *supra* note 24, § 1704.

[165] The non-prosecution memorandum is the converse of the prosecution (pros) memorandum (memo). The pros memo is not a requirement in the court-martial process, but is widely accepted in the field as a starting point. The pros memo usually contains the case's strengths, weakness, anticipated defense motions, and a proof/elements matrix for each contemplated charge and specification. CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GEN. LEGAL CTR. & SCH, U.S. ARMY, PRACTICING MILITARY JUSTICE (Apr. 2013).

[166] *Id.*

[167] Irwin, *supra* note 157. The SAPR FY14 Report did not address non-prosecution memos. The only data the author was able to gather came from the case synopsis. SAPR FY14 Report, *supra* note 4, encl. 1, tbl.7.

[168] Irwin, *supra* note 157.

[169] *Id.* While the survey did not specifically inquiry as to whether or not there were probable cause opines given in the actions that went to administrative separations, the assumption is such opines were given since probable cause is a lower standard than preponderance of evidence.

C. Victims Unwilling to Testify

A victim's unwillingness to testify at a trial by court-martial is a major factor that can lead commanders to initiate administrative separation board proceedings, rather than a court-martial.[170] As mentioned above, in the FY14 SA Report, ten victims refused to participate in trial, resulting in the latter's administrative separation board initiation.[171] The results from the survey support the conclusion that a victim's unwillingness to participate leads to the initiation of administrative separation boards.[172] The survey results revealed twenty-six cases in which the victim was unwilling to testify at trial.[173] Of the twenty-six cases, initiation of administrative separation proceedings occurred in eight cases.[174]

Of course, an uncooperative victim[175] poses potential problems for the government.[176] If a victim is unwilling to participate in the trial process, she or he will likely be unwilling to testify during the trial.[177] Without other evidence, the government will be unlikely to meet its burden. The government can do little if the victim, at any point in the process, becomes non-participatory.

Department of Defense Instruction (DoDI) 6495.02 states, "The victim's decision to decline to participate in an investigation or prosecution should be honored by all personnel charged with the investigation and prosecution of sexual assault cases, including, but not limited to, commanders, DoD law enforcement officials, and personnel in the victim's chain of command."[178]

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[170] SAPR FY14 Report, *supra* note 4, encl. 1, tbl.7; Irwin, *supra* note 157.

[171] SAPR FY14 Report, *supra* note 4, encl. 1, tbl.7. It could not be determined how many of these cases led to discharges with OTH characterization of service. The only indication that the victim did not want to participate was in the case synopsis, but the synopsis did not necessarily state the discharge characterization. *Id.*

[172] Irwin, *supra* note 157.

[173] *Id.*

[174] *Id.*

[175] Victims can choose to report the alleged sexual assault, then not want to participate any further in the trial process, meaning the victim does not want to be interviewed by CID, cooperate in the Article 32 hearing, or participate in the court-martial.

[176] A non-participating victim, according to Department of Defense Instruction (DoDI) 6495.02, is a "[v]ictim choosing not to participate in the military justice system." U.S. DEP'T OF DEF., INSTR. 6485.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES gloss., pt. II (7 July 2015) [hereinafter DoDI 6495.02].

[177] Irwin, *supra* note 157.

[178] DoDI 6495.02, supra note 176, encl. 4, para. 1.c(1).

The government has few options when a victim becomes non-participatory and no other evidence is available. That is arguably why commanders are willing to initiate administrative separation proceedings. Administrative separations have a lower burden of proof and a victim does not, in all circumstances, have to testify at the hearing.[179] The respondent can request the victim as a witness, but the board president is not required to grant the request.[180] If the victim does not testify, the respondent cannot cross-examine the individual who, in many situations, is the only other witness. This deprives the respondent of his due process rights at administrative separation board proceedings.[181]

D. Weak Evidence

Another potential reason for a case to move from a trial by court-martial to an administrative separation board is weak evidence.[182] This can result from a variety of situations. This can include no forensic evidence, a he-said-she-said situation where there is no corroborating evidence on either side, or other evidentiary issues.[183] In the FY14 SA Report, this happened five times[184] and in the surveys from the field, fifteen cases were described as having weak evidence.[185]

Weak evidence can result from deficient CID investigations.[186] When the criminal investigation is lacking, the government may not be successful in prosecuting its cases, including sexual assault cases.[187] If the government cannot prosecute, the command must decide among administrative options, or take no action at all.[188] The problem of weak evidence can result from the nature and quality of criminal investigations.[189] Because there must be sufficient evidence to prosecute

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179 AR 635-200, supra note 4, para. 2-10. *See supra* Part III for further discussion.
180 AR 635-200, supra note 4, para. 2-10.
181 *See infra* Part V for further discussion.
182 SAPR FY14 Report, *supra* note 4, encl. 1, tbl.7; Irwin, *supra* note 157.
183 *See supra* note 102.
184 SAPR FY14 Report, *supra* note 4, encl. 1, tbl.7.
185 Irwin, *supra* note 157.
186 Buchhandler-Raphael, *supra* note 70.
187 *Id.* at 344. *See id.* at 345 (discussing reform through challenging the investigative practices and changing the military culture).
188 *Id.*
189 *Id.*

and meet evidentiary burdens, investigations that do not meet this burden tie the hands of the government from the start.[190] Put another way:

> Obtaining . . . evidence requires a comprehensive investigation of the allegations made in the case. Without thorough investigation, criminal prosecutions are not possible, regardless of the identity of the official making the decision whether to prosecute the case. Therefore, reforms targeted solely at taking the authority to prosecute away from commanders, without additional changes in the military police's handling of sexual assault investigations, would likely fail to result in more prosecutions.[191]

Deficient investigations and investigative practices can include: a lack of thoroughness; failure to follow standard operating procedures; cursory investigations; blaming the victim; following rape myths and stereotypes; threatening the victim with prosecution for false statements; professional retaliation or demotion; investigating and prosecuting the victims themselves for collateral misconduct; and more.[192] Any or all of these practices can affect the strength of the evidence and have a negative effect on the outcome of the case.[193] It leads to weak evidence and can prevent a commander from disposing of a case in the manner in which he may have otherwise have done.[194] Weak evidence and deficient investigations can also taint the administrative separation board proceeding when a sworn statement is the only evidence introduced. If a victim does not testify at the administrative separation board hearing, often the initial statement will be the only evidence. If the investigator was not thorough, the respondent has no way to meaningfully challenge it at the later hearing.

In SPC Smith's case, this could have happened. He testified to what he believed happened, yet the administrative separation board gave greater weight to the statement Jenny gave to investigators. What if the investigator conducted a cursory investigation? What if the investigator did not ask follow-up questions from Jenny because he did not want to be insensitive or make her think he was blaming her? Is one statement

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190 *Id.* at 361.
191 *Id.* at 361–62.
192 *Id.* at 364.
193 *Id.*
194 *Id.*

enough to meet the preponderance of evidence standard? The weak evidence that led commanders to initiate an administrative separation action in lieu of a trial by court-martial is the same weak evidence that a board will have to evaluate by a preponderance of the evidence standard.[195] Combine weak and deficient investigations with the Army's current environment of zero tolerance for sexual assault,[196] and there is a troubling possibility that soldiers will receive unjust results.

V. Why Due Process Matters

Due process is guaranteed by Fifth and Fourteenth Amendments of the U.S. Constitution. Generally, the concept entails the state and federal government cannot deprive a person of "life, liberty, or property without due process of law."[197] Two distinct doctrines are derived from these clauses; substantive due process[198] and procedural due process.[199] In determining whether due process violations have occurred, one must answer three underlying questions: was there a loss or deprivation, was it a deprivation of a life, liberty, or property interest, and what procedures were required.[200]

The first question is: "is there a deprivation?"[201] This can be obvious because the person has lost "life, liberty, or property."[202] The second

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[195] *See supra* note 132 and accompanying text

[196] *See supra* note 16 and accompanying sources.

[197] U.S. Const. amend. XIV. *See also* Erwin Chemerinsky, *Procedural Due Process Claims*, 16 TOURO L.J. 871, 871 (2000).

[198] This article focuses on procedural due process. As Professor Chemerinsky points out, substantive due process "asks the question of whether the government's deprivation of a person's life, liberty or property is justified by a sufficient purpose." *Id.* at 1501 (1999). While this might sound like an easy task, substantive due process has been discredited by the Supreme Court and applies in two narrow areas. *Id.* at 1506–10. The first area is "the protection of unenumerated constitutional rights." *Id.* at 1509. However, in recent years the Court has made it difficult "to recognize any additional unenumerated rights . . . ." *Id.* at 1522. The second area where substantive due process comes into play involves police behavior. *Id.*

[199] U.S. Const. amend. XIV. *See also* Chemerinsky, *supra* note 197, at 871.

[200] Chemerinsky, *supra* note 197, at 871.

[201] *Id.*

[202] *Id.* When there is no obvious deprivation, then courts generally ask two questions; "what is the mental state required in order to have a deprivation?" and "[a]re the existence of state procedures sufficient to prevent a finding of deprivation?" *Id.* at 872, 875. The intent question is usually a question concerning substantive due process issues and beyond the scope of this article. The second question, also known as a *Parratt* issue, applies in

question, assuming there is a loss, is what type of loss occurred?[203] Prior to the 1960s, courts drew a distinction between rights and privileges when answering this question.[204] Courts recognized a legal right, but not a privilege, in determining due process cases.[205] For example, prior to the 1960s, courts considered government employment and the receipt of benefits from a government program a privilege.[206] Therefore, firing someone, or terminating someone's government benefits, required no due process.[207] The Supreme Court changed this in *Goldberg v. Kelly*,[208] when the Court held, "welfare benefits are property and . . . the government has to provide due process before it can terminate receipt of [such] benefits."[209] Courts have also maintained government employment is "a property interest so that a person has to be given notice and a hearing before being fired."[210] The third question is, "what procedures are required?"[211] A denial of procedural due process occurs only if there is a deprivation of life, liberty, or property *without* adequate procedures.[212]

The Court in *Mathews v. Eldridge*[213] articulated a three-part balancing test to determine the proper procedures when there is a deprivation of a life, liberty, or property interest.[214] The court must first balance the "private interest that will be affected by government action" when determining proper procedure.[215] The more important the individual's

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very limited circumstances where there is an allegation of post-deprivation remedy only. *Id.* at 877.

[203] *Id.* at 879.

[204] *Id.*

[205] *Id.*

[206] *Id*. at 880.

[207] *Id.*

[208] Goldberg v. Kelly, 397 U.S. 254 (1970).

[209] *Goldberg*, 397 U.S. at 264. The Court later clarified its approach in *Goldberg*. Chemerinsky, *supra* note 197, at 881. The Court in *Bd. of Regents of State Colleges v. Roth* stated that "no longer is the rights/privileges distinction to be used, instead the question is whether there is a reasonable expectation to continued receipt of a benefit." Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 569 (1972). When determining property or liberty interest, "look to the Constitution, federal statutes, state constitutions, and state law to determine if there is a reasonable expectation" of continued receipt of a benefit. Chemerinsky, *supra* note 197, at 882.

[210] Stone v. Fed. Deposit Ins. Corp., 179 F3d. 1368 (Fed. Cir. 1999). *See also* Chemerinsky, *supra* note 197, at 882.

[211] *Id.* at 888.

[212] *Id.*

[213] Matthews v. Eldridge, 424 U.S. 319 (1976).

[214] *Mathews*, 424 U.S at 335. *See also* Chemerinsky, *supra* note 197, at 888–89.

[215] *Mathews*, 424 U.S. at 335.

interest, the more protections the court will require.[216] The second balancing test weighed "the risk of any erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards."[217] In other words, "how likely is it that the additional procedures will reduce the risk of an erroneous deprivation?"[218] The final part of the test determines "the [g]overnment's interest, including . . . the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[219] This means the court will look at the government's interest in administrative efficiency.[220]

Because this is a three-part test, courts "have enormous discretion and[,] in all likelihood[,] different factors will point in varying directions."[221] Despite enormous discretion, the procedures remain a question of constitutional law for the judge.[222] "It is not for the government to decide what due process requires, it is for the courts in interpreting the Constitution."[223] However, the courts have given deference to the military in deciding their own procedural requirements because of its distinct nature.[224] Due to this deference, the military may make incursions on due process rights with limited recourse for the affected individual.[225] The discussion below outlines decisions regarding military cases involving due process.

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[216] Chemerinsky, *supra* note 197, at 888.
[217] *Mathews*, 424 U.S. at 335.
[218] Chemerinsky, *supra* note 197, at 889.
[219] *Mathews*, 424 U.S. at 335.
[220] Chemerinsky, *supra* note 197, at 889. "The government's interest in administrative efficiency is such that the more expensive the procedures would, the less likely it is that a court will require them." *Id.*
[221] *Id.* at 889.
[222] *Id.* at 890 (citing Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985)).
[223] Vitek v. Jones, 445 U.S. 480, 489 (1980).
[224] Daniels v. United States, 947 F. Supp. 2d 11 (D.D.D. 2013).
[225] Soldiers have limited rights to appeal. A soldier can appeal to the Army Board for Correction of Military Records (ABCMR), who corrects errors or removes injustices from a soldier's record. ARMY REVIEW BOARD AGENCY, http://arba.army.pentagon.mil/abcmr-overview.cfm (last visited Mar. 20, 2017). A soldier can also file a claim with the Court of Federal Claims to request monetary relief or back pay. ADMIN. & CIVIL LAW DEP'T., THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, GENERAL ADMINISTRATIVE LAW DESKBOOK para. C-13 (2015). Prior to filing a claim in the Court of Federal Claims, a soldier must petition the Army Discharge Review Board (ADRB), who examines the discharges of former soldiers to ensure the discharge was accomplished properly. ARMY REVIEW BOARD AGENCY, http://arba.army.pentagon.mil/adrb-overview.cfm (last visited Mar. 20, 2017).

A. Military Due Process

Due process is a necessary element in military administrative separation board proceedings, just as it is in civilian proceedings.[226] Servicemembers have a cause of action for deprivation of due process if they can show the deprivation of a property or liberty interest.[227] A property interest may arise when "the Army fails to comply with its own regulations in discharging a soldier."[228] A liberty interest may arise if "the government's action could impose a stigma or other disability on the individual that forecloses other employment opportunities."[229] As the court in *Weaver v. United States*[230] determined, "the imposition of a stigma on a servicemember in connection with his or her discharge from military service is not permitted without affording the servicemember due process in the nature of notice of the charges against him or her and a fair opportunity to present a defense."[231]

The court in *Weaver* likewise concluded that "notice and pre-discharge hearing[s] are only required if separation inflicts stigma or has some derogatory connotation that follows the servicemember."[232]

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[226] One court defined due process as: "[T]hat process that 'protects against the exercise of arbitrary governmental power and guarantees equal and impartial dispensation of law according to the settled course of judicial proceedings or in accordance with fundamental principles of distributive justice.'" H.E. Sargent, Inc. v. Town of Wells, 676 A.2d 920, 926 (Me. 1996) (citing Mutton Hill Estates, Inc. v. Town of Oakland, 468 A.2d 989, 993 (Me. 1983)).

[227] Major David S. Franke, *Administrative Separation from the Military: A Due Process Analysis*, ARMY LAW., Oct. 1990, at 11, 16. It should also be noted that a constitutional due process claim can stand alone in a federal court. However, it cannot be brought as a cause of action in the Court of Federal Claims because it is not money-mandating. *See, e.g.*, McClellan v. United States, 119 Fed. Cl. 494 (Fed. Cl. 2015). While it cannot be an independent cause of action, the Court of Federal Claims can review constitutional claims in conjunction with a determination of wrongful discharge. *See, e.g.*, Holley v. United States, 124 F.3d. (Fed. Cir. 1997).

[228] Franke, *supra* note 227, at 16 (citing Rich v. Sec'y of the Army, 735 F.2d 1220, 1226 (10th Cir. 1984)). Courts have found that they can review the military's compliance with a regulation for procedural error and "once a service-member has had recourse to a corrections board, the focus is both on the procedural infirmity alleged before the board, as well as on a review of the board's decision under the arbitrary and capricious standard." Miller v. United States, 119 Fed. Cl. 717, 731 (2015).

[229] Franke, *supra* note 227, at 16. In order to show a stigma for due process purposes the information must be actually stigmatizing, this includes the characterization of discharge. *Id.*

[230] Weaver v. United States, 46 Fed. Cl. 69 (2000).

[231] *Id.* at 77.

[232] *Id.* (citing Keef v. United States, 185 Ct. Cl. 454, 467 (1968)).

However, courts have established due process rights for respondents in administrative separations in the military setting are more limited and afford deference to the military process and its decisions.[233] Examples of this include failing to provide respondents with subpoena power in administrative separation board proceedings[234] and permitting a witness to testify telephonically.[235] Courts rely on the fact administrative hearings are to determine a servicemember's eligibility for continued military service and not to punish past wrongs.[236] The Ninth Circuit Court of Appeals in *Garrett v. Leham*[237] went so far as to say,

> There is a sharp and distinct delineation between the administrative process which has as its purpose the administrative elimination of unsuitable, unfit, or unqualified [m]arines, and the judicial process, the purpose of which is to establish the guilt or innocence

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[233] Doe v. United States, 132 F.3d 1430, 1434 (Fed. Cir. 1997). "To prevail[,] a plaintiff must 'overcome the strong, but rebuttable, presumption that administrators of the military, like other public officers, discharge their duties correctly, lawfully, and in good faith.'" (quoting Sanders v. United States, 219 Ct. Cl. 285, 594 (1979)); Adkins v. United States, 68 F.3d 1317, 1325 (Fed. Cir. 1995). "[P]laintiff bore 'the burden of demonstrating . . . that the correction board acted arbitrarily, capriciously, contrary to law, or that its determination was unsupported by substantial evidence.'" (quoting Arens v. United States, 969 F.2d 1034, 1037 (Fed.Cir. 1992)); Kendall v. Army Bd. For Corr. Of Military Records, 996 F.2d 362, 367 (D.C. Cir. 1993). "If the ABCMR's [Army Board for Correction of Military Records] decision is reviewable at all, the applicable standard of review is 'whether [the] action of the [the] military agency conforms to the law or is instead arbitrary, capricious or contrary to the statues and regulations governing that agency.'" (quoting Ridley v. Marsh, 886 F.2d 1526, 1528 (D.C. Cir. 1989)); Daniels v. United States, 947 F. Supp. 2d 11, 19 (D.D.C. 2013). "[T]he military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." (quoting Murphy v. United States, 993 F.2d 871, 872 (Fed.Cir.1993)); *Weaver*, 46 Fed. Cl. at 77. "The court should, therefore, give the 'widest possible latitude to military decisions, giving it special deference.'" (quoting Crager v. United States, 25 Cl. Ct. 400, 406 (1992)); Milas v. United States, 42 Fed. Cl. 704, 712 *aff'd*, 217 F.3d 854 (Fed. Cir. 1999). "Great deference is afforded to the BCNR's [Board of Corrections of Naval Records] decisions because 'Congress has entrusted the primary duty of correcting military records to the correction boards.'" (quoting Hoffman v. United States, 16 Cl. Ct. 406, 408(1989)).

[234] *Milas*, 42 Fed. Cl. at 704.

[235] *Weaver*, 46 Fed. Cl. at 79 ("Since administrative discharge hearings are not criminal proceedings, as previously discussed, plaintiff enjoys no Sixth Amendment protections.")

[236] *Id.* at 78. Although, commanders could potentially use the administrative separation process to punish those who are merely suspected of committing a sexual assault because of the current environment.

[237] 751 F.2d 997 (9th Cir. 1985).

> of a member accused of a crime and to administer punishment when appropriate. No evidence will be rejected from consideration solely on the grounds that it would be inadmissible in court-martial proceedings.[238]

Although the courts have limits for what it considers proper due process in administrative separation board proceedings,[239] some due process is available to respondents.[240] Courts have established that soldiers do not leave "constitutional safeguards and judicial protections behind when they enter military service."[241]

To that end, the courts have affirmed when admitting hearsay evidence in administrative separations, it must constitute substantial evidence.[242] To be substantial evidence, the court must examine the nature of the hearsay evidence to determine the credibility and veracity of it.[243] Courts have further emphasized the importance of cross-examining witnesses and held "hearsay is not substantial when there is no such opportunity to cross-examine the witnesses."[244] One court has even found a "claimant has a right to cross examine the author of an adverse report and to present rebuttal evidence."[245] Another court held, "[A]n opportunity for cross-examination is an element of fundamental fairness of the hearing to which a claimant is entitled . . . ."[246] Finally, another court determined that "[d]ue process requires that a claimant be given the opportunity to cross-examine . . . ."[247] Although courts have held due process requires the opportunity to cross-examine witnesses, this does not always happen in administrative separation boards.

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238 *Id.* at 1002 (citation omitted).
239 Kendall v. Army Bd. For Corr. Of Military Records, 996 F.2d 362, 367 (D.C. Cir. 1993).
240 AR 635-200, *supra* note 5, para. 2-10.
241 Doe v. United States, 132 F.3d 1430, 1434 (Fed. Cir. 1997) (quoting Weiss v. United States, 510 U.S. 163, 194 (1994)).
242 *Id.* at 1434–35 (citing Richardson v. Perales, 402 U.S. 389 (1971)).
243 *Id.* The court in *Doe* found that the appellant met his burden, and substantial evidence did not support his discharge. *Id.* at 1436.
244 *Id.* at 1435 (citing Richardson v. Perales, 402 U.S. 389 (1971)).
245 Townley v. Heckler, 748 F.2d 109, 114 (2d Cir. 1984).
246 Wallace v. Bowen, 869 F.2d 187, 191–92 (3d Cir. 1989).
247 Coffin v. Sullivan, 895 F.2d 1206, 1212 (8th Cir. 1990).

B. Inadequate Due Process

1. Inability to Cross-Examine Victims

When a victim refuses to testify in an administrative hearing he or she is deemed unavailable, and the government may then introduce a written statement from the victim—which the respondent cannot cross-examine; this violates the respondent's due process rights. Due process requires the respondent have the opportunity to cross-examine witnesses.[248] In sexual assault cases, the right to cross-examine alleged victims can be even more crucial. The credibility of the alleged victim is vital in determining whether an offense occurred.[249] The ability to cross-examine the alleged victim also gives the respondent a fair opportunity to present a case.[250]

Army Regulation 635-200 requires live testimony when "it is substantial, material, and necessary for the proper disposition of the case."[251] It also requires a witness to appear personally when the appearance "is essential to a fair determination on the issues of separation or characterization."[252] The live testimony of an alleged victim of a sexual assault is substantial, material, and necessary in determining whether the offense occurred. Moreover, an alleged victim's testimony is essential to a fair determination of separation and characterization, yet this right can be denied because of the contradictory rules in the regulation. The testimony of the victim is material, substantial, and necessary; however, under the amended regulations, such requests to present that testimony can be denied due to the recent incorporation of the victim rights act.

2. Weak Evidence as the Basis for Separation

When an administrative separation board relies only on hearsay evidence of an alleged victim to make findings that a sexual assault occurred, it is relying on unsubstantial evidence.[253] It cannot be substantial because of the nature of hearsay evidence. The hearsay evidence presented at a sexual assault administrative separation board is a

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[248] *See id.*; Wallace v. Bowen, 869 F.2d 187, 191–92 (3d Cir. 1989); Townley v. Heckler, 748 F.2d 109, 114 (2d Cir. 1984).
[249] *Doe*, 132 F.3d 1434–35.
[250] Weaver v. United States, 46 Fed. Cl. 69, 77 (2000).
[251] AR 635-200, *supra* note 5, para. 2-10.
[252] *Id.*
[253] *Doe*, 132 F.3d. 1434.

sworn statement alleging a sexual assault occurred. The respondent cannot show the administrative separation board the hearsay evidence lacks credibility or veracity without exercising the right of cross-examination.[254] When an administrative separation board uses unsubstantiated or uncorroborated evidence[255] as the basis for finding a sexual assault occurred, it is essentially finding a sworn statement alone is sufficient to meet the standard of proof.[256] Even when the military has legitimate interests that justify some limitation of constitutional rights, the respondent is denied due process when he is denied the substantial right of confrontation.[257]

A deprivation of the soldier's liberty may occur with the characterization of service, based on the facts. This separation can stigmatize the soldier, negatively impact employability, and limit access to veteran's benefits.[258] Therefore, a soldier is deprived of a liberty interest when an alleged victim of a sexual assault refuses to testify at an administrative separation board proceeding and that board relies on the alleged victim's hearsay statement as the basis for recommending a discharge with an OTH characterization of service.[259]

3. How Colleges Are Getting It Wrong

Unfortunately, the military is not alone. Colleges, in their zeal to eradicate sexual assault have implemented even more opaque and questionable procedures. When Amy Ziering, the producer of *The Invisible War*,[260] toured college campuses promoting the film, students

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[254] *Id.*
[255] *Id.*
[256] AR 635-200, *supra* note 5, para. 2-12.
[257] Despite courts giving special deference to military decisions, this does not negate constitutional safeguards and judicial projection for the respondent. Doe v. United States, 132 F.3d 1430, 1434 (Fed. Cir. 1997) (quoting Weiss v. United States, 510 U.S. 163, 194 (1994)).
[258] Weaver v. United States, 46 Fed. Cl. 69, 77 (2000).
[259] Even soldiers under the same circumstances who receive a general discharge are still being deprived of a liberty interest because the soldier has previously earned the education benefits that the soldier is then disqualified from receiving (with a general discharge). U.S. DEP'T OF VET. AFFAIRS, *Education and Training*, http://www.benefits.va.gov/benefits/character_of_discharge.asp (last visited Mar. 20, 2017).
[260] THE INVISIBLE WAR, *supra* note 76. It is a documentary movie highlighting the military's treatment of sexual assault victims.

approached her about sexual assault on campus.[261] Students told her about treatment by the administration and how college tribunals were handling sexual assault allegations.[262] This led to the production of the film *The Hunting Ground*,[263] which focused on sexual assault on college campuses and how colleges are doing little to fight it.[264]

Colleges and the military alike face problems, and both are struggling to handle the problem properly.[265] In 2011, the Department of Education addressed the issue by sending a "Dear Colleague" letter to colleges and universities.[266] The "Dear Colleague" letter provided guidance and requirements for handling sexual assault allegations and adjudicating those incidents.[267] However, colleges interpreted the guidance and requirements from the "Dear Colleague" letter differently, creating a lack of uniformity.[268] This led to enforcement problems for the Office for Civil Rights (OCR)[269] when upholding Title IX, which prohibits discrimination and provides protection to those attending schools that receive federal resources.[270] It also led to due process issues for those accused in college tribunals.[271] These tribunals are a type of administrative hearing because

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[261] Robert Scheer, *Scheer Intelligence: Discussing 'The Hunting Ground' With Director Kirby Dick and Producer Amy Ziering*, HUFF. POST (Dec. 26, 2015, 8:29 PM), http://www.huffingtonpost.com/robert-scheer/scheer-intelligence-rober_b_8879950.html.

[262] *Id.*

[263] THE HUNTING GROUND (CNN Films 2015).

[264] *Id.*

[265] Sara Ganim & Nelli Black, *An imperfect process: How campuses deal with sexual assault*, CNN (Dec. 21 2015, 4:38 PM), http://www.cnn.com/015/11/22/us/campus-sexual-assault-tribunals/.

[266] Matthew R. Triplett, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L. REV. 487 (2012). Congress enacted Title IX in 1972, prohibiting the "use of federal resources to support discriminatory practices and to provide individual citizens with effective protection against such practices." *Id.* at 495. Title IX prohibits sexual discrimination, which includes sexual harassment, and sexual violence falls within sexual harassment. *Id.* at 494–95.

[267] *Id.*

[268] *Id.* at 490–10.

[269] The Department of Education's Office for Civil Rights (OCR) enforces and administers Title IX. It is responsible for ensuring that schools receiving federal funding properly respond to sexual harassment, of which sexual violence is a subset. Triplett, *supra* note 266, at 489–507.

[270] *Id.* Title IX is the federal statue prohibiting sex discrimination in education. *Id.* 489. Sex discrimination includes sexual harassment, which also includes sexual assault. *Id.* at 489–507.

[271] *Id.* at 507–26.

they determine whether a sexual assault occurred and the consequences of an adverse finding.[272]

In a recent court case, *Doe v. Regents of University of California San Diego*,[273] the court addressed the accused's due process right to confront and cross-examine adverse witnesses.[274] The court held, "People involved in an administrative proceeding have a right to cross-examine witnesses. This right 'is considered as fundamental an element of due process as it is in court trials.'"[275] The court stated, "The right of cross-examination is especially important where findings against a party are based on an adverse witness's testimony."[276] This case is not the only case pending against colleges and universities for the way they are handling student claims of sexual assault.[277] In fact, "[t]he San Diego lawsuit is one of more than [twenty] such cases filed against universities in recent years. And what [is] happening at these disciplinary hearings is coming under increased scrutiny as judges across the country are overturning university decisions that punish those who are accused of sexual assault."[278] As the courts continue to deal with due process issues from college tribunals, the Army can use those tribunals' mistakes as a guide for what *not* to do.

C. The Current Environment

One can argue the current zero tolerance environment for sexual assault[279] creates potential due process issues and creates potential claims

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[272] *Id.*

[273] Doe v. Regents of U. Cal. San Diego, No. 37-2015-00010549 (Cal. Super. Ct. July 10, 2015) (order granting Writ of Mandamus and ordering the respondent to set aside its findings and sanctions issued against the petitioner).

[274] *Id.*

[275] Doe v. Regents of U. Cal. San Diego, No. 37-2015-00010549 (Cal. Super. Ct. July 10, 2015) (quoting McLeod v. Bd. of Pension Commissioners, 14 Cal. App.3d 23, 28. (Cal. Ct. App. 1970).

[276] *Id.* (citing Manufactured Home Communities, Inc. v. City of San Luis Obispo, 167 84 Cal. Rptr. 3d 367, 374 (Cal. Ct. App. 2008)). The court found the cross-examination in this case was essential, stating "The Student Conduct Review Report made findings regarding the credibility of Ms. Roe and the outcome turned on her testimony. The university unfairly limited petitioner's right to cross-examine the primary witness against him, Ms. Roe." *Id.*

[277] Ganim & Black, *supra* note 265.

[278] *Id.*

[279] *See supra* note 16 and accompanying sources.

of UCI.[280] As unattainable as an environment of zero tolerance for sexual assault is,[281] it sets the tone for everything that happens in the military. It can create an unfair environment for those accused of committing sexual assault because commanders are under pressure to take action—any action—in every sexual assault case.[282] This causes unfair, unjust results for those facing administrative separation boards when they might have received appropriate alternate disposition otherwise.

A comment made by the former commander-in-chief, President Barack Obama, established the tone for everyone in the military, especially commanders.[283] When the commander-in-chief states that dealing with sexual assault is as core to the mission as anything else,[284] it resonates. When the commander-in-chief states he has no tolerance for sexual assault and orders—or arguably even just suggests—the prosecution of anyone engaging in such behavior,[285] the message is clear. It tells commanders to take *some action* in every sexual assault case, despite weak evidence or other deficiencies.

Commanders at all levels are likewise ensuring they are tough on sexual assault and demonstrate they, too, have no tolerance.[286] In 2013,

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[280] Unlawful command influence derives from article 37 of the UCMJ. MCM, *supra* note 5, art. 37. The article outlines a commander's behavior with regards to court-martials. More specifically if prohibits commanders from reprimanding or admonishing those participating in the court-martial process. *Id.* The article goes on to prohibit anyone from attempting to coerce or use unlawful means to "influence the action of a court-marital or any other military tribunal or any member thereof." *Id.*

[281] *See supra* note 16 and accompanying sources.

[282] *President Obama's Remarks on Sexual Assault in Military: Summary of Meeting With Top Military Officers on Sexual Assault*, CONG. DIG. (May 16, 2013), http://www.CongressionalDigest.com.

[283] *Id*.

[284] *Id.*

[285] *Remarks by President Obama and President of South Korea in Joint Press Conference*, WHITEHOUSE.GOV (May 7, 2013, 1:44 PM), https://www.whitehouse.gov/the-press-office/2013/05/07/remarks-president-obama-and-president-park-south-korea-joint-press-confe. President Obama also made the comment that those who commit sexual assault in the military should be prosecuted, stripped of their positions, court-martialed, fired, and dishonorably discharged. Buchhandler-Raphael, *supra* note 71, at 385.

[286] *See supra* note 16 and accompanying sources; *see, e.g.*, Michael O'Brien, *Obama: 'No Tolerance' for military sexual assault*, NBC POL. (May 7, 2013), http://nbcpolitics.nbcnews.com/_news/2013/05/07/18107743-obama-no-tolerance-for-military-sexual-assault?lite; Jeremy Herb & Justin Sink, *Obama: 'I have no tolerance' for sexual assault in US military*, HILL (May 7, 2013), http://thehill.com/policy/defense/298173-study-military-sexual-assaults-on-the-rise; Jennifer Epstein, *Obama: 'No tolerance' for military sexual assault*, POLITICO (May 7, 2013), http://www.politico.com/story/2013/05/obama-no-

the Chief of Staff of the Army, General Raymond Odierno, led a video teleconference with top Army commanders addressing the issue of combating sexual assault in the Army through five imperatives, and everyone took notice.[287] These imperatives were set out to combat sexual assault within the ranks of the Army.[288] One imperative made combating sexual assault in the Army its number-one priority.[289] General Odierno also stated, "Commanders are ultimately responsible for ensuring [a]n environment of mutual respect, trust, and safety."[290] A commander potentially creates bias and commits UCI as a result of his actions after hearing this message.[291]

1. Bias

One could infer when everyone in the military hears from top leaders that he is responsible for eliminating sexual assault, it creates an environment where unjust results occur. This can occur because officers and NCOs selected as board members enter the administrative board thinking the respondent has committed the sexual assault. Members may also think it is their job to separate those who allegedly commit sexual assault from the Army, even if the only evidence of the crime is unsubstantial hearsay.

One could also infer bias occurs when a presiding officer emphasizes the rights of victims, even to the detriment of the respondent, including

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tolerance-for-military-sexual-assault-091021; Craig Whitlock, *Obama delivers blunt message on sexual assaults in military*, WASH. POST (May 7, 2013), https://www.washingtonpost.com/world/national-security/possible-military-sexual-assaults-up-by-33-percent-in-last-2-years/2013/05/07/8e33be68-b72b-11e2-bd07-b6e0e6152528_story.html.

[287] Raymond T. Odierno, *Pro & Con: Should Decisions Regarding the Prosecution of Sexual Assault Cases in the Military Be Removed from the Chain of Command?*, CONG. DIG., Sept. 2013, at 10, 13–15. General Odierno served as the 38th Chief of Staff of the Army. *Id.*

[288] *Id.*

[289] *Id.*

[290] *Id.* at 10, 15. General Odierno also stated that it was leaders who must take action "to establish and sustain standards at every level." *Id.*

[291] In recent years there are cases citing the appearance of UCI as opposed to actual UCI. United States v. Howell, 75 MJ 386 (2016) (finding the appearance of UCI led the court to reverse SSG Howell's conviction of sexual assault); United States v. Easterly, 2014 CCA Lexis 40, N-M Ct. Crim. App. Jan. 31, 2014) (deciding the military judge erred in failing to find the defense met the low burden of showing UCI but also finding there was no evidence of UCI actually affecting the court-martial).

allowing alleged victims to not testify at board proceedings despite their testimony being substantial, material, and necessary to the disposition.[292] This directly conflicts with the respondent's right to cross-examine and have a fair opportunity to present a defense.[293] However, a presiding officer serving in the current environment faces an untenable decision between focusing on the alleged victim's rights regarding whether or to participate in the process,[294] or providing due process to the respondent. Army Regulation 635-200 states, "Care will be exercised to ensure that . . . [t]he board is composed of experienced, unbiased officers . . . ."[295] Because a potential due process claim can arise when the Army fails to comply with its own regulation in discharging a soldier,[296] a commander who appoints biased board members creates a potential due process claim. Members, just like commanders, serve in the current environment, and may feel it is their responsibility to take action when they might otherwise appropriately dismiss a claim. They may do this even if it creates a potential due process claim and causes unjust results for the respondent.

2. Unlawful Command Influence

Poor leadership and mistakes generate unlawful command influence and raise another potential cause of action. Unlawful command influence occurs when a commander attempts "to coerce, or by any unauthorized means, influence the action of a court martial 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."[297] The military setting is unique in that it is within the commander's authority to dispose of sexual assault cases, and commanders have a direct interest in the outcome of cases.[298] For example, when sexual assault occurs within a commander's unit, it reflects poorly on his ability as a leader and potentially jeopardizes his career.[299]

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[292] AR 635-200 *supra* note 5, para. 2-10.
[293] Weaver v. United States, 46 Fed. Cl. 69, 77 (2000).
[294] DoDI 6495.02, *supra* note 176.
[295] AR 635-200, *supra* note 5, para. 2-7.
[296] *See supra* note 233 and accompanying sources.
[297] MCM, *supra* note 5, app. A2, ¶ 837.
[298] Buchhandler-Raphael, *supra* note 71.
[299] *Id.* at 355-60 (discussing the commander's role in the disposition of a sexual assault complaints gives the appearance of bias and prejudice).

A recent military justice case shows the extent to which UCI affects the military environment.[300] A military judge recently found:

> [E]vidence that political considerations had influenced the decision, particularly the political implications of a military grappling with sexual assault cases based in emails between the assistant judge advocate general for military and operational law and the deputy staff judge advocate . . . that expressed concerns about the message that the plea bargain would send across the military.[301]

In addition to political considerations, President Obama's past words led to substantiated allegations of UCI in military justice cases.[302] Since his remarks, UCI has affected at least a dozen sexual assault trials, according to military judges and defense counsel.[303]

Unlawful command influence can be raised in civilian court reviews of a servicemember's discharge, even though it generally applies to court-marital proceedings.[304] For the plaintiff to prevail on a UCI claim, he must show the following: "(1) a command relationship, (2) improper influence by virtue of that relationship, and (3) a nexus between the alleged influence and plaintiff's dismissal."[305] Furthermore, UCI may exist "if a reasonable citizen, knowing all the facts of a given case, would believe the military justice system to be unfair and, as such, lose confidence in the entire system."[306] This means a plaintiff may prevail at the mere appearance of UCI, even if there is not actual unlawful command influence in that case.[307]

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[300] Jonathan P. Tomes & Micheal I. Spak, *Practical Problems with Modifying the Military Justice System to Better Handle Sexual Assault Cases*, 29 WIS. J. L. GENDER & SOC'Y 377, 382 (2014) (discussing Brigadier General Jeffrey Sinclair, who was on trial for a sex-related offense).

[301] *Id.* at 382.

[302] Buchhandler-Raphael, *supra* note 71, at 385.

[303] *Id.* "Military law experts said that those cases were only the beginning and that the president's remarks were certain to complicate almost all prosecutions for sexual assault." *Id.*

[304] *See* Werking v. United States, 4. Cl. Ct. 101 (1983); Milas v. United States, 42 Fed. Cl. 704, 712 *aff'd*, 217 F.3d 854 (Fed. Cir. 1999); (N G) v. United States, 94 Fed. Cl. 375 (2010).

[305] *Milas*, 42 Fed. Cl. at 712.

[306] *(N G)*, 94 Fed. Cl. at 387.

[307] *Id.*

Because civilian courts have extended UCI to administrative hearings,[308] this extension might similarly be used to apply UCI to military administrative board proceedings. A potential argument would look at the current environment in the same way the courts have looked at the command climate in UCI cases. One court held "the command climate, atmosphere, attitude, and actions had such a chilling effect on members of the command that there was a feeling that if you testified for the appellant your career was in jeopardy."[309] The same court found, "[m]oreover, acts of this type infringe upon important constitutional and statutory rights of servicemembers."[310]

VI. Solutions

The solution to this problem is not an easy one. Potential solutions seem even less likely when one considers the current environment, where victims seem to have all the power, and when it is incumbent upon the respondent after his discharge to bring his claim to either the Army Review Board Agency (ARBA)[311] or the Court of Federal Claims.[312] Below are

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[308] *Id.*

[309] United States v. Gleason, 43 M.J. 69, 73 (C.A.A.F. 1995).

[310] *Id.*

[311] The Army Review Board Agency (ARBA) is the agency responsible for the ADRB. The ADRB mission is as follows:

> Review discharges of former soldiers, except those given by reason of a sentence of a General Court Martial or over [fifteen] years since discharge. The purpose of the review is to determine if the discharge was granted in a proper manner, i.e. in accordance with regulatory procedures in effect at the time, and that it was equitable, i.e. giving consideration to current policy, mitigating facts, and the total record.

ARMY REVIEW BOARD AGENCY, http://arba.army.pentagon.mil/adrb-overview.cfm (last visited Mar. 20, 2017). The ADRB will "examine an applicant's administrative discharge and . . . change the characterization of service and/or the reason for discharge based on standards of equity or propriety." *Id.* The ARBA also houses the ABCMR. The ABCMR is "the highest level of administrative review within the Department of the Army with the mission to correct errors in or remove injustices from Army military records." ARMY REVIEW BOARD AGENCY, http://arba.army.pentagon.mil/abcmr-overview.cfm (last visited Mar. 20, 2017).

[312] The Court of Federal Claims hears cases dealing with claims of monetary relief or back pay. If there is non-monetary relief, a U.S. District Court hears the cases. The abovementioned courts will only grant review when an action is "arbitrary, capricious or contrary to agency regulation or statute by weight of substantial evidence." ADMIN. & CIVIL LAW DEP'T., THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY,

some possible solutions changing how the Army conducts administrative separations and the Army's subsequent review. A discussion of potential consequences of each proposed solution is included as well.

A. A Higher Standard of Proof

Currently, preponderance of the evidence is the standard of proof.[313] This is no longer sufficient for administrative separation proceedings dealing with sexual assault allegations. The standard of proof should be raised to clear and convincing evidence.[314] Clear and convincing evidence requires "evidence indicating that the thing to be proved is highly probable or reasonably certain."[315] This standard would require stronger evidence due to the complexity of sexual assault allegations. It could also cause boards to more diligently consider each piece of evidence. At the present time, a board need merely conclude it is more likely than not that the evidence warrants a discharge to separate the respondent.[316]

Potential problems with increasing the evidentiary burden include how to change it, and what kind of separations should apply the increased standard of proof. First, there must be changes to the DoD instruction and Army regulation that establish the preponderance of the evidence standard.[317] This could be time-consuming, burdensome, and require a long time to implement. Full coordination and legal review must occur for changes to the DoDI to take effect,[318] which will also take time.[319] The current standard has been in place for over twenty years.[320]

GENERAL ADMINISTRATIVE LAW DESKBOOK para. C-13 (2015).

[313] AR 635-200, *supra* note 5, para. 2-12.

[314] *Clear and Convincing Evidence*, BLACK'S LAW DICTIONARY (9th ed. 2009).

[315] *Id*.

[316] *See supra* note 132 and accompanying text.

[317] Currently, the DoDI 1332-14 outlines how to conduct enlisted separations and establishes the burden of proof as a preponderance of the evidence. DoDI 1332-14, *supra* note 6, encl. 5 at 37. The Army regulations addressing enlisted separations also contain the preponderance of evidence standard. AR 635-200, *supra* note 5, para. 2-12.

[318] DOD ISSUANCES, http://www.dtic.mil/whs/directives/corres/writing/DOD_process_home.html (last visited Mar. 20, 2017).

[319] Since this is a substantive change a pre-coordination review, legal review, formal coordination, pre-signature review, legal sufficiency, and office of security review must all happen before the instruction can change. *Id.*

[320] U.S. DEP'T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS (4 Mar. 1994). In 1994, the DoDI 1332-14 added language that the soldier proves by a preponderance of evidence why the Army should retain him. However, as far back as 1983, preponderance of evidence remained the standard for findings. *Id.*

A change to the standard of proof for administrative separations involving sexual assaults could lead to confusion as to *when* the increased standard of proof applies. There can be situations in which multiple bases for separation exist and not all bases might include allegations of sexual assault. In a case like this, when to apply the higher standard could be convoluted. It would be easy for the administrative separation board to apply the higher standard for each finding. However, the updated regulation could explain this situation and others like it, eliminating this issue.

Sexual assault allegations constitute a serious offense,[321] and an administrative separation board should use a higher standard of proof in making its decision on findings and recommendations. The higher standard would deter administrative separation boards from relying on unsubstantial, hearsay evidence as the only evidence to make its findings. An allegation of sexual assault denotes a behavior of serious criminal misconduct[322] and requires careful evaluation. In a sexual assault case, there are often only two people involved, the alleged victim and the accused, thus credibility and veracity of each are essential in determining the facts of the case. An administrative separation board needs to be reasonably certain[323] that the evidence supports a finding that the respondent committed the offense. To be reasonably certain requires more than unsubstantiated hearsay evidence. Because an allegation of sexual assault is a serious offense with potentially negative consequences for the respondent, there should be a higher standard to prove it.

B. A Higher Separation Authority

A simple solution that would be relatively easy to implement is to require a higher separation authority. Currently, in most situations, the separation authority for serious offenses is the GCMCA.[324] The Army's HRC could become the separation authority for separations arising from sexual assault allegations. Administrative separations involving enlisted

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321 AR 635-200, *supra* note 5, para. 14-12(c).

322 *Id.*

323 *Clear and Convincing Evidence*, BLACK'S LAW DICTIONARY (9th ed. 2009).

324 AR 635-200, *supra* note 5, para. 1-19(a). Army regulation 635-200 states, "[C]ommanders who are General Court-Martial Convening Authorities . . . and their superior commanders are authorized to approve or disapprove separation per this regulation. This includes the authority to convene administrative separation boards when required by this regulation." *Id.*

soldiers with more than eighteen years of active, federal service already require HRC to approve the separation, so a system is already in place and only needs expansion.[325] A higher separation authority would allow a neutral, detached commander to review the evidence and ensure it met the requisite standard of proof. Because the higher separation authority would be a step removed from the process, there would be less likelihood for bias.[326]

A higher separation authority does not directly resolve the problem of a zero tolerance environment or lack of due process. However, a commander who is more objective and detached from the initial process could look at the separation action and determine if there was a lack of evidence—i.e., the victim refusing to testify or weak evidence—and determine if the government met its burden.[327] The commander could then choose from the range of options that the separation authority had, including retaining the soldier.[328]

C. *De Novo* Review

The Army Board for Correction of Military Records (ABCMR) reviews military records to correct errors or injustice.[329] Another possible solution to correct inadequate due process and unjust results that respondents face is to have the ABCMR review separations arising from sexual assault allegations *de novo*.[330] The ABCMR could act similarly to

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[325] *Id.* para. 1-14(b).

[326] Currently, the separation authority selects the board members and likely knows each of the panel members. AR 635-200, *supra* note 5, para. 2-7. When reviewing an administrative separation board's findings and recommendations, the separation authority might be persuaded merely by the panel he picked rather than evaluating the merits of the action. Is he required to make an independent determination, or is it proper for him to rely on the findings and recommendations?

[327] An objective commander could also be less likely to use the administrative separation process as a means to punish past wrongs.

[328] AR 635-200, *supra* note 5, paras. 2-6, 4-6.

[329] U.S. DEP'T OF ARMY, REG. 15-185, ARMY BOARD FOR CORRECTION OF MILITARY RECORDS para. 1-8 (31 Mar. 2006) [hereinafter AR 15-185].

[330] *De novo*, BLACK'S LAW DICTIONARY (9th ed. 2009). *De novo* comes from the Latin meaning "anew"; therefore, a *de novo* judicial review means "[a] court's nondeferential review of an administrative decision, usually through a review of administrative record plus any additional evidence the parties present." *Id.*

the board of review (BOR) with officer eliminations.[331] The ABCMR could examine the entire case to determine if the board met the evidentiary standard related to its finding and recommendation.[332] It would not merely accept the administrative separation board's findings, but instead look at all the evidence, without deference to the findings and recommendations of the board.

Currently, a respondent must show error or injustice in his military record, present the reason for the error or unjust record, and provide evidence of the error or injustice.[333] The burden is on the applicant, who must show, by a preponderance of the evidence there was an error or unjust record.[334] The ABCMR starts with the presumption of "administrative regularity."[335] By having the ABCMR review the case *de novo*, there is no such presumption. The respondent would obtain an independent review of the administrative separation board's findings and recommendations and the action taken by the separation authority. The review would occur outside the chain of command, and presumably the ABCMR would be neutral; therefore, it would properly evaluate the case to ensure there was sufficient evidence to meet the standard of proof.

The problem with the ABCMR conducting a *de novo* review is that it is not mandatory. Therefore, this solution would not reach every potentially affected respondent. This solution would also require action by the respondent. The respondent would have to apply to the ABCMR for relief after discharge. Even if there were a *de novo* review, the respondent would still have to meet the other requirements, including exhausting other administrative remedies and filing within the three-year window.[336]

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[331] U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES para. 4-17 (12 Apr. 2006) (RAR 19 Nov. 2008). The Board of Review (BOR) evaluates officers recommended for elimination by a Board of Inquiry (BOI). *Id.*

[332] AR 635-200, *supra* note 5, para 2-12.

[333] AR 15-185, *supra* note 329, para. 2-4.

[334] *Id.* para. 2-9.

[335] *Id.* However, there are some cases where the ABCMR will scrutinize the decision to discharge the soldier. The ARBA has guidance stating that when administrative separations results from an Article 15 turndown, it will scrutinize the application against the government in favor of the applicant, but does not change its standard of review. Email from Jan W. Serene, Legal Advisor, Army Review Boards Agency, to author (Jan. 21, 2016, 11:08 AM) (on file with author). This scrutiny occurs because the "action raises a suspicion that the [g]overnment couldn't prove the [s]oldier committed the misconduct." *Id.*

[336] AR 15-185, *supra* note 329, paras. 2-4, 2-5.

A *de novo* review by the ABCMR would provide the respondent an independent forum to determine whether a preponderance of the evidence supports an administrative separation board's findings and recommendations.[337] It could also ameliorate the use of unsubstantial hearsay as the only evidence supporting the administrative separation board's findings and recommendations. This could retroactively shape how administrative separation boards use hearsay statements, by later determining they are not, in fact, substantial evidence. The ABCMR could achieve this by publishing the results of its *de novo* reviews.

D. Independent Judges

A final solution is to permit an independent judge to hear administrative separation cases. This is a drastic solution, but it has the potential to solve the current problem. If an independent judge hears the evidence, he can use legal training to decide if the evidence meets the standard, whether it is preponderance of the evidence or clear and convincing evidence. The independent judge, because he has legal training, would be more likely to see and address due process issues that arise when there is weak evidence or when the victim does not testify. An independent judge would also be more aware of the risk of UCI.[338] Furthermore, an independent judge would not be chosen by the commander, who potentially has a vested interest in the action.

Independent judges could either be a military officer (a part of the Army Judge Advocate General's (JAG) Corps) or a civilian administrative judge (AJ); like those employed in the Merit System Protection Board (MSPB) system.[339] An independent military judge could potentially revitalize a program the Army JAG Corps started a few years ago.[340] In that program, a major who had aspirations of being a trial judge would handle motions and smaller cases, such as guilty pleas.[341] The judge in that program would be assigned either by installation or by area to handle cases.[342] Likewise, an independent judge's assignment could be regional or to a specific installation.

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337 *See supra* note 132 and accompanying text.
338 *See supra* note 16 and accompanying sources.
339 5 U.S.C. §§ 1201–06 (1978).
340 Telephone interview with LTC Stefan Wolfe, Associate Judge, U.S. Army Court of Criminal Appeals (Jan. 27, 2016).
341 *Id.*
342 *Id.*

An independent judge could also be civilian. In the federal employment system, when removal occurs, the person removed can file an appeal with the MSPB.[343] An AJ will then hear the appeal.[344] The AJ hears from both parties and issues a decision.[345] Either independent judge option would allow a commander to initiate separation, but instead of a board making findings and recommendations, an independent judge would do so. All of the other procedures would remain in place, including the separation authority's responsibilities and the respondent's appeal rights. A potential problem with this solution is the potentially prohibitive cost and the additional resources it would require to initiate and maintain the new system, especially if the independent judge is civilian.

Of these potential solutions, an independent judge deciding administrative separations may be the best possible solution. It is the surest way to eliminate due process issues for the respondent because an independent judge has legal training and can weigh the evidence to determine if it is sufficient to meet the standard of proof. Furthermore, an independent judge is detached and less likely to let the Army's current environment of zero tolerance for sexual assault affect his decision.

VII. Conclusion

The future of SPC Smith is unclear because one night he and Jenny drank, flirted, and had what he thought was consensual sex. Specialist Smith did not get his day in court. He did not get to cross-examine Jenny in a trial by court-martial or at his administrative separation hearing. He did not get to stay in the Army. Specialist Smith's future looks bleak. He does not have money for college, as he planned, and he has a stain on his military record because he received an OTH characterization of discharge. This will most likely stigmatize him and prevent him from getting a decent job forever. His attorney told him he could appeal to the ADRB or the ABCMR, but his attorney no longer represents him,[346] so SPC Smith does not know where to begin. It was all a big mistake, and SPC Smith thought

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343 5 U.S.C. §§ 7701–7703 (1978).

344 5 C.F.R. §§ 2423.30–.34 (1997).

345 *Id.*

346 Representation terminates when the separation action is terminated without separation or when separation action is complete. TDS Policy Memo 2015-01, Trial Defense Services, subject: Detailing of Defense Counsel and Formation of Attorney-Client Relationships Within the Trial Defense Service (TDS) (31 July 2015).

someone would see that he would not commit sexual assault after he testified at his separation board proceeding. No one did.

Although SPC Smith's experience is not like that of all soldiers, it is similar to some. The Army has a problem with the way it handles administrative separation proceedings arising from sexual assault allegations in an atmosphere of zero tolerance. A respondent faces an uphill battle to show why he should remain in the military when there is an accusation that he committed sexual assault, yet must present his case before members inculcated in the same culture of zero tolerance. The battle gets even more difficult when the evidence is weak or the alleged victim refuses to testify at the administrative separation hearing. A deprivation of a respondent's due process rights occurs when an alleged victim, a substantial, necessary, and material witness, refuses to testify and when the administrative separation board relies on weak, unsubstantial evidence to meet its burden of proof. There is currently no mechanism in place to guarantee this soldier adequate review of a decision fraught with error.

The solution to the problem can be as simple as increasing the standard of proof, elevating the separation authority, or as potentially complicated as appointing independent judges; but a solution must be found. At least eighty-one documented soldiers have experienced the injustice of the administrative separation board process. This undermines the faith and fairness of the process and has lasting effects on soldiers and the military justice system. Injustice anywhere is a threat to justice everywhere.[347] Separation board proceedings, although administrative in nature, threaten the notion of fairness to military members through inadequate due process; the Army must do more to protect their constitutional rights.

[347] Adri Nieuwhof, *supra* note 1.

THE END DOES NOT JUSTIFY THE MEANS: WHY DIMINISHED DUE PROCESS DURING REDUCTIONS IN FORCE IS UNJUST

MAJOR BRIAN D. ANDES*

We must draw down wisely to avoid stifling the health of the force or breaking faith with our soldiers, civilians and families. Excessive cuts would create high risk in our ability to sustain readiness. We must avoid our historical pattern of drawing down too much or too fast and risk losing the leadership, technical skills and combat experience that cannot be easily reclaimed. We must identify and safeguard key programs in education, leader development, health care, quality of life, and retirement—programs critical to retaining our soldiers.[1]

I. Introduction

You are a captain in the U.S. Army and have served honorably as a commissioned officer for seven years.[2] On a regular Friday morning in

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[1] The Honorable John M. McHugh, Secretary of the Army and General Raymond T. Odierno, Chief of Staff, United States Army, A Statement on the Posture of the U.S. Army 2012, submitted before the Committee on Armed Services, U.S. House of Representatives, Second Session, 112th Congress, 11 (Feb. 17, 2012) (on file with author) [hereinafter Statement on Army Posture 2012].

[2] This hypothetical is based on the Officer Separation Board (OSB) initiated by the Secretary of the Army in the summer of 2015 that included the following:

mid-June, 2015, you receive an Email telling you that "based on your date of rank . . . [you are] in the zone of eligibility for the upcoming Officer Separation Board (OSB)."[3] Seeing the phrase "Officer Separation Board" makes your stomach turn. After all, you have worked hard, deployed, done your job exceptionally well and you have the Officer Evaluation Reports (OERs) to show for it.

Being an officer is your career and, professionally, you feel it is all you are trained to do. You took classes in college to prepare for your life as an officer and then left your family and friends to go serve your country at various locations around the world. After pinning on your captain rank in late 2012,[4] the next board you were expecting was the promotion board to major in another two to three years.[5] Now, your official military

> Regular Army (RA) officers in the [Army competitive category] and on the active duty list in the grade of captain with a date of rank as outlined below [23 July 2012–22 July 2013] who have served at least one year of active duty in the grade currently held [here, O-3] as of the convene date of their board [22–25 September 2015], and who are not eligible to be retired under any provision of law and are not within two years of becoming so eligible as of the convene date of their board will be considered by an OSB if they are not on a list of officers recommended for promotion to the next higher grade.

Military Personnel Message, 15-175, U.S. Army Human Res. Command, subject: FY15 Officer Separation Board (OSB) and (Enhanced) Selective Early Retirement Board (E-SERB), Captain (CPT), Army Competitive Category (ACC) (11 June 2015) [hereinafter MILPER Message 15-175] (included as attachment to email sent to OSB officers in summer, 2015) (emphasis omitted). An "[A]rmy competitive category" is a "separate promotion category established by the [Secretary of the Army] . . . for specific groups of officers whose specialized education, training, or experience, and often relatively narrow career field utilization, make separate career management desirable." U.S. DEP'T OF DEF., INSTR. 1320.14, COMMISSIONED OFFICER PROMOTION PROGRAM PROCEDURES GLOSSARY para. 1.c (11 Dec. 2013) [hereinafter DoDI 1320.14]. *See also* 10 U.S.C. § 621. As a result of this OSB, 740 of the 4000 captains undergoing the OSB were involuntarily separated. Jim Tice, *20 percent of screened Army captains booted by retention board*, ARMY TIMES (Feb. 11, 2016), http://www.armytimes.com/story/military/careers/army/officer/2016/02/11/20-percent-screened-army-captains-booted-retentionboard/80242652/.

[3] Email from CPT Kristina N. Clark, Adjutant General (AG), Captains Assignment Officer (June 12, 2015) (on file with author).

[4] MILPER Message 15-175, *supra* note 2. The date of rank for captains considered during the OSB in summer 2015 was July 23, 2012, through July 22, 2013. *Id.*

[5] *See* U.S. DEP'T OF ARMY, PAM. 600-3, COMMISSIONED OFFICER PROFESSIONAL DEVELOPMENT AND CAREER MANAGEMENT para. 3-5.c. [hereinafter DA PAM. 600-3] (providing that "[n]ormally an officer within a cohort year group enters the primary zone of consideration for major around the 9th year of service").

personnel file (OMPF)[6] will be reviewed by a board several years earlier than you expected, in order to determine whether you should be removed from the service as part of a reduction in force (RIF).[7] All the board will have to determine the fate of your career are the documents in your OMPF.[8] The board members will never meet you face-to-face.[9] You cannot answer any questions the board members may have regarding documents in your OMPF, or provide any additional information about yourself.[10]

A flyer with frequently asked questions is included as an attachment to the Email you receive.[11] This flyer attempts to explain to you why this is happening.

> [Officer selection boards] and [Enhanced Selective Early Retirement Boards] are necessary to meet future force structure requirements. A reduction of officer billets in our future force structure combined with Captain Year Group[12] accessions to support a significantly larger force structure, high promotion selection rates, and high retention rates have caused officer imbalances and overages to support future requirements. The Army's drawdown plan is a balanced approach that maintains readiness while trying to minimize turbulence within the

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[6] U.S. DEP'T OF ARMY, REG. 600-8-104, ARMY MILITARY HUMAN RESOURCE RECORDS MANAGEMENT para. 3-8 (7 Apr. 2014) [hereinafter AR 600-8-104]. The official military personnel file (OMPF) is a file that is "reflective of a [s]oldier's permanent record." *Id.* A soldier's OMPF contains, among other things, folders relating to performance (evaluations, education, commendatory, and disciplinary), service (administration and compensation), and medical (health and dental). *Id.* tbl. 3-1. In some cases, the OMPF contains a "restricted folder." *Id.* Documents within a restricted folder "may normally be considered improper for viewing by selection boards or career managers." *Id.* tbl. 3-1.

[7] 10 U.S.C. § 638a (authorizing the Secretary of Defense to authorize the service secretaries to implement reductions in force through the use of OSBs). Reductions in force separate otherwise qualified officers from service based on the needs of the service. *See generally id.*

[8] *Id.*

[9] *See* DoDI 1320.14, *supra* note 2 (listing procedures followed by OSBs).

[10] *Id.*

[11] Human Resource Command, Headquarters Dep't of the Army, Frequently Asked Questions–FY15 Captain Army Competitive Category (ACC) Officer Separation Boards (OSB)/Enhanced Selective Early Retirement Boards (E-SERB) (10 June 2015) (unpublished information paper) (on file with author) [hereinafter OSB/E-SERB FAQs].

[12] DA PAM. 600-3, *supra* note 5, para. 3-3.*a*.(5). A "year group" is the fiscal year in which an officer was commissioned. *Id.* "Company and field grade officer groupings are termed cohort year groups." *Id.*

> officer corps. [Officer selection boards] and E-SERBs are integral parts of this plan and are based on congressionally mandated strength reductions and severely restricted budgets.[13]

The Email you receive tells you to "take all necessary steps to prepare your file for the applicable boards."[14] But you know there is so much more to you as an officer than the documents in your OMPF. You are concerned that this process will fail to protect you from being separated. Does the process adequately evaluate your "potential for future contribution to the Army?"[15]

Compare this scenario to that of another officer; one who has engaged in misconduct. Consider the case of a non-probationary officer[16] who receives a General Officer Memorandum of Reprimand[17] (GOMOR) for driving while intoxicated (DWI). If the Army wants to remove this officer from the service, the officer is entitled to a separation board, at which the officer can talk to board members directly, submit documents for their consideration, cross-examine witnesses against the officer, and otherwise

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[13] OSB/E-SERB FAQs, *supra* note 11.

[14] Clark, *supra* note 3.

[15] U.S. DEP'T OF ARMY, MEMO. 600-2, PERSONNEL—GENERAL POLICIES AND PROCEDURES FOR ACTIVE-DUTY LIST OFFICER SELECTION BOARDS, App. G, para. G-5. (25 Sept. 2006) [hereinafter DA MEMO 600-2].

[16] U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES para. 4-20.*b*.(1) (12 Apr. 2006) (RAR 13 Sept. 2011) [hereinafter AR 600-8-24]. A "probationary officer" is a regular Army commissioned officer with fewer than five years of active commissioned service. *Id.* In 2008, 10 U.S.C. § 630 was amended to increase the five years to six years. 10 U.S.C. § 630. However, this change is not reflected in AR 600-8-24. AR 600-8-24. "Non-probationary" officers—those with more than five years of active commissioned service—are entitled to a separation board prior to being separated under AR 600-8-24. *Id.*

[17] *See* FORT BENNING, *Administrative Letter of Reprimand Fact Sheet*, U.S. ARMY (Mar. 2012), http://www.benning.army.mil/mcoe/sja/content/pdf/Letter%20of%20Reprimand.pdf (providing a general explanation of the memorandum of reprimand and its repercussions).

make a case for retention.[18] This officer also has the right to counsel on his or her behalf[19] and the right to appeal the decision of the board.[20]

As shown in the second hypothetical above, when a non-probationary officer's "performance of duty has fallen below standards prescribed by the Secretary of Defense,"[21] that officer is guaranteed certain procedural rights.[22] However, as shown in the first hypothetical, during a RIF, these procedural rights are significantly reduced. Even a non-probationary officer can be separated without many of the protections guaranteed to non-probationary officers being considered for separation due to misconduct.[23]

The due process rights to which officers are entitled during RIF OSBs provide insufficient notice of the basis for separation and an inadequate opportunity to be heard.[24] This is unjust to the officers in which the nation has invested time—often many years—and money developing. The process of OSBs also compromises the Army's "number one priority"—readiness—by potentially separating officers otherwise worthy of retention who may pass muster on paper.[25] This article argues that a commission in the U.S. Army is a protected property interest under the

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[18] 10 U.S.C. § 1185.

[19] AR 600-8-24, *supra* note 16, para. 4-12.a. "A Judge Advocate or [Department of the Army] civilian attorney will be assigned to each Board of Inquiry as the respondent's counsel." *Id.* para. 4-12.a. "The respondent is also entitled to retain civilian counsel at own expense." *Id.* para. 4-12.b.

[20] *Id.* para. 4-11.k. Respondents "have the right to submit to the [General Officer Show Cause Authority] a statement or brief within [seven] calendar days after receipt of the Board of Inquiry report of proceedings of the case." *Id.*

[21] *Id.* Glossary, Section II, Terms, "Substandard performance of duty."

[22] *See, e.g.*, 10 U.S.C. §1185; AR 600-8-24, *supra* note 16.

[23] *See* AR 600-8-24, *supra* note 16, para. 4-2.a-c. (Reasons for Elimination). Note that 10 U.S.C. § 638a was amended by Section 502 of FY13 National Defense Authorization Act (NDAA) in order to allow for "Reinstatement of Authority for Enhanced Selective Early Retirement Boards and Early Discharges." 10 U.S.C. § 638a.

[24] *See* 10 U.S.C. § 638a. *See also* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546, 105 S. Ct. 1487, 84 L. Ed. 2d 494, 1985 U.S. LEXIS 68, 53 U.S.L.W. 4306, 118 L.R.R.M. 3041, 1 I.E.R. Cas. (BNA) 424 (1985) (citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)) (finding "[a]n 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") (internal quotations omitted).

[25] General Mark A. Milley, Chief of Staff of the Army, Military Services Challenges Meeting Readiness, Modernization, and Manning Under Current Budget Limits, submitted before the Committee on Armed Services, U.S. House of Representatives, Second Session, 114th Congress, 2 (Sept. 15, 2016) [hereinafter Statement on Challenges Under Current Budget Limits 2016] (on file with author).

Constitution and requires greater due process than that afforded by an OSB.[26] Boards unfairly deprive officers of a property interest—their career—by providing inadequate process.

This article first examines the development and historical use of past reductions in force.[27] The purpose and procedures of OSBs as a means to accomplish reductions in force will then be explained.[28] The OSB process will be compared to the procedural protections afforded to officers at traditional administrative separation boards convened under Army Regulation (AR) 600-8-24.[29] Next, the article will discuss why a commission is a protected property interest under the Due Process Clause of the Fifth Amendment, and how various rules and regulations create a minimum expectation of notice and an opportunity to be heard prior to separation of non-probationary officers.

The argument that OSBs provide insufficient due process protections is premised on the contention that, after serving as a commissioned officer for a certain number of years, or after achieving a certain rank, a greater expectation in continued employment is achieved. This expectation creates something more than at-will employment that entitles non-probationary officers to notice and a meaningful opportunity to be heard.[30] This argument is furthered by the Army's use of the terms "tenure"[31] and "career status"[32] with regard to officers with more than five years of active, commissioned service.[33] This article will explain the significance courts have given to these terms in the employment context in order to show that

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

[27] 10 U.S.C. § 638a (authorizing the Secretary of Defense to authorize the service secretaries to implement reductions in force through the use of OSBs).

[28] National Defense Authorization Act for Fiscal Year 2013, 112 Pub. L. No. 239, § 502, 126 Stat. 1632 (2013) [hereinafter FY13 NDAA]. Section 502 of fiscal year (FY) 13 National Defense Authorization Act (NDAA), entitled "Reinstatement of Authority for Enhanced Selective Early Retirement Boards and Early Discharges," expanded 10 U.S.C. § 638a to authorize the service secretaries to conduct OSBs through December 31, 2018. *Id.*

[29] AR 600-8-24, *supra* note 16.

[30] *See, e.g.*, Perry v. Sindermann, 408 U.S. 593, 600 (1973) (holding that rules and understandings created and fostered by a university may create de facto tenure in an otherwise non-tenured employee).

[31] DA PAM. 600-3, *supra* note 5, para. 5-5, tbl. 5-1.

[32] U.S. DEP'T OF ARMY, REG. 350-100, OFFICER ACTIVE DUTY SERVICE OBLIGATIONS para. 2-4 (8 Aug. 2007) (RAR 10 Aug. 2009) [hereinafter AR 350-100].

[33] *Sinderman*, 408 U.S. at 600.

officers who have obtained "tenure" and "career status" deserve the same level of protection as their civilian counterparts."[34]

Finally, this article recommends that the Army promptly address the gap in due process between the protections that typically apply to a commission and the minimal protections afforded by the OSB process. The proposed solution includes providing officers undergoing an OSB, at a minimum, (1) limitations on how far back in terms of rank and years the OSB can look into an officer's OMPF; (2) the opportunity for officers undergoing the OSB process to be heard in person at the OSB; and (3) notice of the reason(s) for separation. This remedy provides greater notice and an opportunity to be heard and protects both the individual officer undergoing the OSB process, as well as the national interest in not "drawing down too much or too fast."[35]

II. An Overview of Reductions in Force

The practice of expanding the size of the Army during conflicts, then later drawing down after those conflicts, has occurred throughout American military history.[36] These post-conflict force reductions are a necessary means by which the service secretaries manage personnel levels in order to meet current needs and requirements.[37] Yet the Army has a long "historical pattern of drawing down too much or too fast."[38] This has had a negative impact on both readiness and morale within the Army; and in the past has resulted in greater reductions than intended.[39]

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[34] Statement on Army Posture 2012, s*upra* note 1.
[35] *Id.*
[36] *See, e.g.*, ANDREW FEICKERT & CHARLES A HENNING, CONG. RESEARCH SERV. R42493, ARMY DRAWDOWN AND RESTRUCTURING (2012). *See also* Garry L. Thompson, Army Downsizing Following World War I, World War II, Vietnam, and a Comparison to Recent Army Downsizing (2002) (unpublished Masters thesis, U.S. Army CGSC) (on file with author).
[37] Joshua Flynn-Brown, Analyzing the Tension Between Military Force Reductions and the Constitution: Protecting an Officer's Property Interest in Continued Employment, 46 SUFFOLK U. L. REV. 1067, 1079 (2013).
[38] Statement on Army Posture 2012, s*upra* note 1.
[39] Flynn-Brown, *supra* note 37, at 1079.

A. A Brief History of Reductions in Force

Although this article focuses on the lack of due process afforded to individual officers who are subjected to OSBs, historically, reductions in force (RIFs) have also had a significant negative impact on the Army in terms of being ready to fight the next conflict. [40] Prior to addressing the impact on the individual officer, it is important to understand the impact such drawdowns have had on the Army in the past.

During the post-World War II (WWII) RIF, the Army went from a force of eight million soldiers and eighty-nine divisions in 1945, to just 591,000 soldiers and ten divisions by 1950, "a 93% reduction in manpower over five years."[41] "[T]he loss of many capable maintenance specialists resulted in widespread deterioration of equipment."[42] "The low personnel . . . readiness levels in 1950 became apparent during the initially weak U.S. military response when the Korean War broke out in June of that year."[43] For example, as a result of being poorly trained and inexperienced, the United States withdrew from its first engagement with North Korean Forces in the Battle of Osan on July 5, 1950.[44]

In early 1951, General Douglas MacArthur, in his post-WWII role as Commander in Chief of the Far East Command "notified Washington" of the need for "major reinforcement" in the region.[45] "At the time, however, there were no major reinforcements available."[46] In December of 1950, President Harry S. Truman declared a national state of emergency requiring, in part, "that the military . . . be strengthened as speedily as possible [in order to] repel any and all threats against our national security and to fulfill our responsibilities in the efforts being made through the

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[40] Statement on Army Posture 2012, *supra* note 1. The negative impact of RIF drawdown is in addition to other post-conflict military cuts.
[41] FEICKERT & HENNING, *supra* note 36; *see also* Thompson, *supra* note 36.
[42] FEICKERT & HENNING, *supra* note 36; *see also* AMERICAN MILITARY HISTORY, VOLUME II, THE UNITED STATES ARMY IN A GLOBAL ERA, 1917–2003, Ch. 7 (Richard W. Stewart et al., eds., 2005).
[43] *Id.*
[44] ALLAN R. MILLETT, THE WAR FOR KOREA, 1950–1951: THEY CAME FROM THE NORTH 138 (2010).
[45] AMERICAN MILITARY HISTORY, *supra* note 42, at 236.
[46] *Id.*

United Nations and otherwise to bring about lasting peace."[47] However, "these efforts could not produce ready units until mid-1951."[48]

After the Korean War, the Army reduced again in size, this time by 33%, primarily between 1953 and 1957.[49] First, in order to "meet officer reductions, the [A]rmy instituted early release programs."[50] "Although performance was the criterion used for separating officers, the [A]rmy purportedly lost many of its most capable 'warriors' because a college degree was seen as being more important for retention than performance in combat."[51] As a result, a career as a military officer "quickly los[t] its luster" during this time.[52] In an effort to combat low morale, poor recruitment, and low retention, the Army ended up "raising pay, introducing new uniforms, increasing educational opportunities, instituting a reenlistment bonus, and ensuring that officer promotion opportunity remained at or close to wartime rates."[53]

The Army again faced the consequences of a rapid drawdown at the outset of the Vietnam War.[54] United States involvement escalated in Vietnam in the early 1960s.[55] In 1961, there were 858,622[56] soldiers in the Army. By the beginning of 1965, that number was only slightly higher at 969,966.[57] In the summer of 1965, as fighting in the region grew, "President Johnson announced plans to deploy additional combat units [to Vietnam] and to increase American military strength in South Vietnam to 175,000 by year's end."[58] "To meet the call for additional combat forces, to obtain manpower to enlarge its training base, and to maintain a pool for rotation and replacement of soldiers in South Vietnam, the Army . . .

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[47] Harry S. Truman, Thirty-Third President of the United States (1945-53), Proclamation 2914—Proclaiming the Existence of a National Emergency (Dec. 16, 1950).
[48] AMERICAN MILITARY HISTORY, *supra* note 42, at 236.
[49] DAVID MCCORMICK, THE DOWNSIZED WARRIOR 10 (1998).
[50] *Id.*
[51] *Id*.
[52] *Id.* at 10–11
[53] *Id.*
[54] FEICKERT & HENNING, *supra* note 36 (citing AMERICAN MILITARY HISTORY, *supra* note 42, Ch. 12).
[55] *Id.*
[56] David Coleman, *U.S. Military Personnel 1954-2014*, HISTORY IN PIECES, http://historyinpieces.com/research/us-military-personnel-1954-2014 (last visited Mar. 21, 2017).
[57] *Id.*
[58] AMERICAN MILITARY HISTORY, VOLUME II, THE UNITED STATES ARMY IN A GLOBAL ERA, 1917–2003, Ch. 10, p. 305 (Richard W. Stewart et al., eds., 2005), http://www.history.army.mil/books/amh-v2/amh%20v2/chapter10.htm (last visited Mar. 21, 2017).

[necessarily] relied on larger draft calls and voluntary enlistments."[59] "In January 1965, 5400 young men were called for the draft."[60] "By December of [1965], more than 45,000 young men were called."[61] "[A]t the height of the Vietnam War in 1968, the Army grew to over 1,570,000 men and women."[62]

After the Vietnam War, "budget reductions translated into a smaller Army and the Army's end-strength declined from its Vietnam War high of 1.57 million in fiscal year (FY) 1968, to 785,000 in FY 1974."[63] "Issues related to limited Army end-strength versus requirements, poor recruit quality, budgetary constraints, and lack of public support in the mid-to-late 1970s led senior Army leadership to characterize the Army as being a 'hollow force.'"[64]

As in previous drawdowns, the focus during the post-Vietnam drawdown was again "primarily on immediate reductions in accessions and separating/discharging others as soon as possible."[65] "The rapid and poorly planned demobilization of Army forces degraded morale, terminated many aspiring military careers, and released significant numbers of military personnel with limited transition assistance."[66]

In 1987, at the peak of the Cold War, the active Army consisted of 780,815 personnel and eighteen divisions.[67] However, by 1989, with the demise of the Soviet Union, the United States again cut defense budgets and manpower.[68] By the end of the cuts, the total force was reduced more

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[59] *Id.*

[60] Katie McLaughlin, *The Vietnam War, Five Things You Might Not Know*, CNN (Aug. 25, 2014, 3:47 PM), http://www.cnn.com/2014/06/20/us/vietnam-war-five-things.

[61] *Id.*

[62] FEICKERT & HENNING, *supra* note 36 (citing AMERICAN MILITARY HISTORY, *supra* note 42, Ch. 12).

[63] ANDREW FEICKERT, CONG. RESEARCH SERV., R42493, ARMY DRAWDOWN AND RESTRUCTURING (2014).

[64] *Id.* "The term 'hollow force' refers to military forces that appear mission-ready but, upon examination, suffer from shortages of personnel and equipment, and from deficiencies in training." ANDREW FEICKERT & CHARLES A. HENNING, CONG. RESEARCH SERV., R42334, A HISTORICAL PERSPECTIVE ON "HOLLOW FORCES" (2012) [hereinafter HOLLOW FORCES]. This term was first used to characterize the state of U.S. military forces after the post-Vietnam drawdown of the mid-1970s and again, as will be explained *infra*, during the post-Cold War drawdown of the 1990s. *Id.*

[65] FEICKERT & HENNING, *supra* note 36.

[66] *Id.*

[67] *Id.*; *see also* Gary L. Thompson, *supra* note 36.

[68] *Id.*

than 30% to 535,000 active duty soldiers.[69] The drawdown following the Cold War, however, was substantially different from the post-WWII, post-Korean War, and post-Vietnam War drawdowns.[70] Here, Congress provided a number of voluntary and involuntary tools to shape the size of each rank within the force—officer, warrant officer, and enlisted.[71] Although "[v]oluntary separations were emphasized,"[72] one involuntary separation measure included expanding the Defense Officer Personnel Management Act (DOPMA)[73] in order to grant the service secretaries the authority to conduct officer separation boards.[74]

At the conclusion of the Gulf War, policy debates about reducing the size of the Army were once again renewed.[75] As part of the Clinton administration's efforts to cut defense spending, the Secretary of Defense initiated a "Bottom Up Review," intended to modify the military force structure based on current and projected threats to national security.[76] "This review recommended placing added emphasis on U.S. air power and a reduction of Army end strength to 495,000 soldiers while retaining the ability to fight two major theater wars simultaneously."[77] These recommendations were implemented in March 1994,[78] and Army end-strength in 1994 was 541,343.[79] By 1999, this number had dropped to 479,426.[80] This number was again increased to a post-9/11 high of 566,045.[81]

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[69] *Id.*
[70] FEICKERT & HENNING, *supra* note 36.
[71] *Id.*
[72] *Id. See also* U.S. GOV'T ACCOUNTABILITY OFF., MILITARY DOWNSIZING: BALANCING ACCESSIONS AND LOSSES IS KEY TO SHAPING THE FUTURE FORCE, GAO/NSIAD-93-241 (Sept. 1993). Although authorized to use RIF, a 1993 GAO report assessed that the "DoD has given priority to achieving voluntary reductions." *Id.*
[73] Defense Officer Personnel Management Act, 96 P.L. 513, 94 Stat. 2835, 96 P.L. 513, 94 Stat. 2835 (Dec. 12, 1980) [hereinafter DOPMA].
[74] 10 U.S.C. § 638a.
[75] HOLLOW FORCES, *supra* note 64.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] David Coleman, *supra* note 56.
[80] *Id.*
[81] *Id.*

B. An Overview of the Current Reduction in Force

In early 2012, the DoD announced that the active Army would again be reduced in size, beginning in 2012.[82] Officer separation boards were just one part of this plan, and were "based on congressionally mandated strength reductions and severely restricted budgets."[83] Initially, the size was to be reduced from a post-9/11 peak in 2010, of about 570,000 soldiers, to 490,000 soldiers by the end of 2017.[84] Recently, in November 2015, the Army's active component personnel strength was 487,134 soldiers.[85] The drawdown goal for 2016 was 475,000 soldiers, with a goal of 450,000 by the end of 2018.[86] Army leadership stated end-strength reductions would "follow a drawdown ramp that allows us to take care of soldiers and families while maintaining a ready and capable force."[87] Eliminating talented officers can hurt not only experience and knowledge, but also morale.[88] "Most officers expect to continue serving in the military until choosing to voluntarily separate or retire. By involuntarily imposing separation on officers, [OSBs] violate this expectation."[89]

III. The Officer Separation Board

A. The Process

Having established the historical need to reduce the size of the force after a conflict, this section will turn to OSBs, which are one way the Army is carrying out these reductions.[90] The statutory basis for OSBs is found in 10 U.S.C. § 638a.[91] Title 10 U.S.C. § 638a was first enacted in 1990,

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[82] FEICKERT & HENNING, *supra* note 36.
[83] OSB/E-SERB FAQS, *supra* note 11.
[84] FEICKERT & HENNING, *supra* note 36.
[85] Jim Tice, *Army Will Cut 12,000 More Soldiers to Hit 2016 Goal*, ARMY TIMES (Jan. 10, 2016), http://www.armytimes.com/story/military/careers/army/2016/01/10/army-cut-12000-more-soldiers-hit-2016-goal/78371352/.
[86] Jim Tice, *Drawdown update: More Involuntary Separations Needed*, ARMY TIMES (Oct. 27, 2015), http://www.armytimes.com/story/military/careers/army/2015/10/27/drawdown-update-more-involuntary-separations-needed/73374634/.
[87] FEICKERT & HENNING, *supra* note 36 (citing transcripts from Statement on Army Posture 2012, s*upra* note 1).
[88] *Id.*
[89] Thurman C.C. McKenzie, The Defense Officer Personnel Management Act—the Army's Challenge to Contemporary Officer Management (2011) (unpublished monograph, U.S. Army School of Advanced Military Studies (SAMS)) (on file with author).
[90] 10 U.S.C. § 638a.
[91] *Id.* § 638a.(b)(4).

as a means by which service secretaries could involuntarily separate officers with greater than five years of active duty, commissioned service.[92] As will be shown in the procedures subsection below, OSBs provide very little protection to officers who are subjected to them, particularly by comparison to the protections provided to non-probationary, commissioned officers.[93]

1. The Purpose of OSBs

Officer separation boards are just one of several methods used to reduce the size of the force during a RIF.[94] "[Officer separation boards] . . . are necessary to meet future force structure requirements."[95] "The Army's drawdown plan is a balanced approach that maintains readiness while trying to minimize turbulence within the officer corps."[96] Officer separation boards are just one part of this plan and "are based on congressionally mandated strength reductions and severely restricted budgets."[97]

Under 10 U.S.C. § 638a, the Secretary of Defense can authorize service secretaries to select officers for discharge "based on the needs of the service."[98] Specifically, OSBs expand the power of service secretaries to involuntarily separate non-retirement eligible officers.[99] Department of the Army Memorandum 600-2, "establishes policy and prescribes procedure" for OSBs.[100] This memorandum states, in part, "The board will recommend for involuntary separation the number of officers specified whose potential for future contribution to the Army is, in the

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[92] *Id.* § 638a. *See also* McKenzie, *supra* note 89.

[93] The protections offered by 10 U.S.C. § 638a will be compared to those provided to non-probationary officers at traditional separation boards convened under AR 600-8-24 in the next section. AR 600-8-24, *supra* note 16.

[94] *See, e.g.*, 10 U.S.C. § 1174, Temporary Early Retirement Authority (TERA); 10 U.S.C. § 638, Selective Early Retirement Boards (SERB); and 10 U.S.C. § 638a, Enhanced Selective Early Retirement (E-SERB) (providing other means of reducing the size of the force).

[95] OSB/E-SERB FAQs, *supra* note 11.

[96] *Id.*

[97] *Id.*

[98] 10 U.S.C. § 638a.(d)(5). "Selection of officers for discharge under this subsection shall be based on the needs of the service." *Id.*

[99] *Compare* 10 U.S.C. §§ 638, 638a, *with* note 94 and accompanying sources (1174, SERB, E-SERB, TERA) (allowing for separation of retirement-eligible officers).

[100] DA MEMO 600-2, *supra* note 15 ("Board members . . . will use this memorandum.").

judgement of the majority of members of the board, less than that of their contemporaries."[101]

2. The Officer Separation Board Procedure

The Secretary of Defense must first authorize the Secretary of the Army to convene OSBs.[102] Having done so, the Secretary of the Army can then use OSBs to recommend separation for up to 30% of the officers in a particular grade.[103] These officers receive very little notice of the basis for their separation,[104] and no opportunity to be heard in person at the board.[105] Beyond the general provision that OSBs ultimately separate officers whose "potential for future contribution to the Army is . . . less than that of their [retained] contemporaries," separated officers will never know specifically why the OSB chose them for separation.[106] These boards may consider previously hidden portions of an officer's OMPF, known as the "restricted" file.[107] Finally, there is no procedure by which

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[101] *Id*. App. G, para. G-5.

[102] 10 U.S.C. § 638a.(a).

[103] 10 U.S.C. § 638a.(d)(3). "[T]he Secretary of the military department concerned may submit to a selection board . . . the names of all officers . . . in a particular grade." 10 U.S.C. § 638a.(d)(1). "The Secretary concerned shall specify the total number of officers to be recommended for discharge by a selection board." 10 U.S.C. § 638a.(d)(2).

[104] DA MEMO 600-2, *supra* note 15, App. G, para. G-5. Generally, OSBs evaluate an officer's "potential for future contribution to the Army." *Id.* However, separated officers never receive notice of why, specifically, they were separated. *Id.*

[105] *See generally* 10 U.S.C. §638a. (as will be shown below, the due process rights of an officer being separated for misconduct are significantly greater than those afforded to an officer during and OSB conducted in accordance with 10 U.S.C. § 638a).

[106] *Id.*; DA MEMO 600-2, *supra* note 15, App. G, para. G-5. *See infra* App. A for a letter written by an Army major (O-4) separated pursuant to an OSB. Thomas E. Ricks, *A Letter from a Major Fired by the Army*, FOREIGN POLICY (Aug. 7, 2014), http://foreignpolicy.com/2014/08/07/a-letter-from-a-major-fired-by-the-army/. The letter shows a lack of notice regarding the reason for separating this officer as well as the inability to overcome past character mistakes even after the passage of eight years. *Id.*

[107] DA MEMO 600-2, *supra* note 15, para. 7.b.(4). During OSBs, limited portions of the restricted file will be provided, as outlined in appendix G. *Id.* Appendix G includes the following guidance related to accessing the restricted file during an OSB:

> *g.* Restricted file criteria are explained below.
>
> (1) Only those restricted file documents listed below that are accurate, relevant, and complete may be considered by the board.
> *(a)* Article 15 or other UCMJ actions received as an enlisted member or as an officer that have not been set aside by proper authority. However, punishment under Article 15 or other UCMJ actions in a

separated officers can appeal OSBs.[108] Even if there was an appeal process, such general findings would likely make forming a basis of an appeal difficult at best.

Department of the Army Memo 600-2 lists four phases for the conduct of an OSB.[109] The first phase is to establish an order of merit list (OML).[110] Next, the board identifies officers fully qualified in career

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> Soldier's early career (specialist/corporal and below with fewer than 3 years of service) will not be considered in deliberation.
> *(b)* DA Suitability Evaluation Board (DASEB) filing of unfavorable information.
> *(c)* Promotion list removal documents when the officer is removed from the list.
> *(d)* Punitive or administrative letters of reprimand, admonition, or censure.
>
> (2) The board will use this information as only one of the factors considered in making recommendations. When considering information on the restricted file, the board must recognize that it was placed on the restricted file by competent authority for a specific reason.
>
> (3) The restricted files of the officers being considered have been carefully screened to ensure that certain matters retained on the restricted file for historical record purposes only have been temporarily masked. Such matters include OERs that have been determined to be unjust or erroneous in whole or part, corrective actions taken by the Army Board for Correction of Military Records (ABCMR) or a Federal District Court, and so forth. Because these historical records reflect actions determined to be unjust or erroneous, they may form no part of the board's evaluation. Moreover, the board will draw no inference from the presence or number of "masked" areas on a document. "Masked" areas can result from a number of administrative reasons that do not relate to the individual officer.
>
> (4) The DCS, G–1 or a designee will ensure that a careful screen is conducted prior to placing the restricted file before the board. Any restricted file seen by the board will be retained as part of the board record for those officers recommended for early retirement.

Id.

[108] Military Personnel Message, 15-176, U.S. Army Human Res. Command, subject: Fiscal Year 2015 Officer Separation Board (OSB) and (Enhanced) Selective Early Retirement Board (ESERB), Captain (CPT), Army Competitive Category (ACC) (11 June 2015). The Secretary of the Army approval of the board report is final action. *Id.* para. 5.

[109] DA MEMO 600-2, *supra* note 15.

[110] *Id.* App. G, para. G-9.*a*.

fields or skills identified as requirements.[111] Third, the board identifies officers to meet Active Army/other than regular Army (OTRA) guidance.[112] Finally, the board identifies officers who are to be recommended for involuntary separation.[113] At the conclusion of the deliberation process, the board conducts a formal vote to ensure that no officer is recommended for involuntary separation unless he or she receives the recommendation of the majority of the members of the board.[114] Each member of the board has an equal vote in this process.[115] The board identifies those officers who will be involuntarily separated only for compelling manpower reasons.[116]

An officer who is recommended for discharge by an OSB and whose discharge is approved by the Secretary of the Army shall be discharged on a date specified by the Service Secretary.[117] The discharge or retirement of an officer pursuant to this section is considered to be involuntary for purposes of other provisions of law.[118]

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[111] *Id.* para. G-9.*b*.
[112] *Id.* para. G-9.*c*.

> (2) The board will review the OML to determine whether the number of Active Army officers tentatively recommended for involuntary separation exceeds 30 percent of the total number of Active Army officers considered. If the number of Active Army officers tentatively recommended for involuntary separation exceeds 30 percent of the total number of Active Army officers considered, the board will remove, in order of merit, a sufficient number of Active Army officers from the tentative recommended list for involuntary separation to ensure that the total number of Active Army officers recommended does not exceed [thirty] percent of the total number of Active Army officers considered. . .
>
> (3) The board will ensure that the list of officers tentatively recommended for involuntary separation contains the number specified minus any Active Army and possibly other than Active Army officers removed in accordance with procedures outlined above.

Id.
[113] *Id.* para. G-9.d.
[114] *Id.* para. G-9.d.(3).
[115] *Id.* para. G-9.d.(3)(b).
[116] *Id.*
[117] 10 U.S.C. § 638a (d)(4).
[118] 10 U.S.C. § 638a(e). *See also* U.S. DEP'T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION, vol. 7A, Ch. 35, para. 350301.A.1.a. (Oct. 2015). Involuntary separation may entitle the servicemember to separation pay in accordance with DoD

Under paragraph 7 of DA Memorandum 600-2, the OSB examines the following information for each officer under consideration:

> (1) The performance portion of the officer's Official Military Personnel File (OMPF).
>
> (2) Approved requests for voluntary retirement or separation and statements of notification of involuntary retirement or separation.
>
> (3) Documents [related to "access to restricted file,"[119] "additional information," and "personal knowledge"].[120]
>
> (4) Official photo, if available.
>
> (5) Written communications, which may include the opinion of third parties about the officer concerned, submitted to the board by eligible officers.
>
> (6) Declination and disenrollment statements of professional development training.
>
> (7) Officer record brief (ORB) . . . .[121]

It is worth noting that the procedure for conducting OSBs is the same procedure used to conduct promotion boards.[122] However, unlike promotion boards, OSBs can consider hidden portions of an officer's OMPF.[123] Despite protections afforded to non-probationary officers under traditional separation boards, convened for reason(s) such as separation for misconduct and inefficiency,[124] the procedure that is used in separating

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Financial Management Regulation if "[t]he member is on active duty . . . and has completed at least 6 years, but less than 20 years, of active service." *Id.*

[119] DA MEMO 600-2, *supra* note 15, para. 7.b.(4).

[120] *Id.* para. 7.*b*.(4)., App. G, para. 7, b-d.

[121] *Id.* para. 7.*a*.

[122] *See* DODI 1320.14, *supra* note 2 (specifying the rules governing the conduct of promotion boards and the actions of promotion board personnel). As a matter of policy, the guidance provided by DoDI 1320.14 is applicable to OSBs, and a copy of that directive is provided to OSB members. DA MEMO 600-2, *supra* note 15, para. 6.

[123] DA MEMO 600-2, *supra* note 15, paras. 7.a.(3), 7.b.

[124] AR 600-8-24, *supra* note 16.

most officers is that used for promotion boards.[125] Thus, the same criteria used to determine whether an officer is suited to serve in the next higher grade is also used to determine whether an officer is qualified to serve at all.[126]

B. The Process of a Traditional Separation Board

Officers undergoing OSBs have very limited involvement in the board process, as described above.[127] By contrast, there are greater due process protections afforded to non-probationary officers at traditional separation boards that are conducted in accordance with AR 600-8-24.[128] These protections include notice of the reasons for proposed separation, an opportunity to be heard, and an appeal.[129]

First, AR 600-8-24 requires that an officer recommended for involuntary separation receive notice of the proposed separation at least thirty days[130] prior to a board convening in order to "determine whether each allegation in the notice of proposed separation is supported by a preponderance of the evidence."[131] Generally, AR 600-8-24 lists the reasons a board may be convened as: "substandard performance of duty"; "misconduct, moral or professional dereliction, or in the interests of national security"; and "derogatory information."[132]

How much due process an officer being considered for separation under AR 600-8-24 will receive depends on whether that officer is in a

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125 DA MEMO 600-2, *supra* note 15. The manner, composition, and procedure for conducting promotion boards is substantially the same as for OSBs. *Id.*

126 *Id*.

127 *See generally* DA MEMO 600-2, *supra* note 15.

128 *See also* AR 600-8-24, *supra* note 16 (defining probationary and non-probationary officers). Note that when a probationary officer is recommended for separation with a proposed characterization of service of other than honorable (OTH), the case will be processed as if the officer were non-probationary. *Id*. para. 4-20.g. "If an Other Than Honorable Discharge is recommended, the case will be processed as if the officer was a non-probationary officer." *Id.*

129 AR 600-8-24, *supra* note 16.

130 *Id.* para. 4-11(b).

131 *Id.* para. 4-11.

132 *Id.* para. 4-2 (listing the reasons for separation, which include: (1) substandard performance; (2) misconduct, moral or professional dereliction, or in the interests of national security; or (3) derogatory information such as punishment under Article 15 or revocation of a Secret security clearance).

probationary versus a non-probationary status.[133] An officer reaches non-probationary status after having served as a commissioned officer for five years.[134] These officers are entitled to a board under AR 600-8-24, regardless of the characterization of the service recommended.[135]

Non-probationary officers[136] undergoing the separation process of AR 600-8-24 are entitled to be "present at all open sessions of the board,"[137] and are "provided with counsel . . . or . . . allowed to obtain civilian counsel of [their] own selection."[138] Such officers will also have "full access to the records of the hearings, including all documentary evidence referred to the board," and "[m]ay challenge for cause any member of the board."[139] Most significantly, officers recommended for separation under AR 600-8-24 are "allowed to appear in person and present evidence"[140] and "may submit documents to the Board of Inquiry from record of service, letters, answers, depositions, sworn or unsworn statements, affidavits certificates, or stipulations."[141] These officers may also "testify in person by sworn or unsworn statement, or elect to remain silent,"[142] and will "be asked before the hearing is terminated to state for the record whether he or she has presented all available evidence."[143] Finally, an officer at a separation board is "furnished a copy of the proceedings"[144] and "[has] the right to submit to the . . . General Officer Show Cause Authority [GOSCA] a statement or brief within [seven] calendar days after receipt of the Board of Inquiry report of proceedings of the case."[145]

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133 *Id.* para. 4-20.b.(1).

134 *See* National Defense Authorization Act for Fiscal Year 2008, 110 P.L. 181, 122 Stat. 3, 2008 Enacted H.R. 4986 (2008) [hereinafter FY08 NDAA]. Section 503 of FY08 NDAA authorizes the probationary period to be six years for an officer. *Id.* However, the Army has yet to update AR 600-8-24, so the five-year benchmark is still being used in Army actions. AR 600-8-24, *supra* note 16, para. 4-20.b.(1) (citing 10 U.S.C. § 630).

135 *Cf* AR 600-8-24, *supra* note 16, para. 4-20.*g*. With respect to probationary officers, "if an Other Than Honorable Discharge is recommended, the case will be processed as if the officer was a non-probationary officer." *Id.*

136 *See id.*

137 AR 600-8-24, *supra* note 16, para. 4-11.

138 *Id.*

139 *Id.*

140 *Id.* para. 4-11.e.

141 *Id.* para. 4-11.e.(2).

142 *Id.* para. 4-11.e.(4).

143 *Id.* para. 4-11.i.

144 *Id.* para. 4-11.j.

145 *Id.* para. 4-11.

If the board recommends elimination of a non-probationary officer, the case is forwarded to a Board of Review.[146] "The Board of Review is appointed by the Secretary of the Army, or his designee, and has the same board composition as the Board of Inquiry."[147] These boards review records of the case and then "make recommendations to the Secretary of the Army or his designee as to whether the officer should be retained in the Army."[148] A board of review may recommend elimination or retention.[149] However, appearance by the respondent, or the counsel, is not authorized at the board of review.[150]

Significantly, AR 600-8-24 provides that "an officer may not again be required to show cause for retention on [active duty] solely because of conduct that was the subject of the previous proceedings [that resulted in retention]."[151] This provision provides a retained officer with some degree of security. In contrast, 10 U.S.C. § 638a allows such an officer to again be "considered for elimination for . . . [that same] conduct."[152] The clear intent of this provision is to preclude later separation when a board recommended retention, yet 10 U.S.C. § 638a allows for just that.[153] Thus, the "final determination" language of AR 600-8-24, paragraph 4-4, is rendered anything but final during an OSB. The next section will argue the basis for providing non-probationary officers greater due process of law prior to being involuntarily separated.

IV. Procedural Due Process

The Fifth Amendment to the U.S. Constitution states, in relevant part, that "no person shall . . . be deprived of life, liberty, or property, without due process of law."[154] Courts analyze due process of law in terms of both

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146 *Id.* para. 4-17.
147 *Id.*
148 *Id.* 4-17.a.
149 *Id.* para. 4-17.
150 *Id.* para. 4-17.a.
151 *Id.* para. 4-4.d.(4) ("[U]nless the findings and recommendations of the Board of Inquiry or the Board of Review that considered the case are determined to have been obtained by fraud or collusion.") *See also* 10 U.S.C. § 1182 ("If a board of inquiry determines that the officer has established that he should be retained on active duty, the officer's case is closed.").
152 AR 600-8-24, *supra* note 16, para. 4-4.*b*.
153 *Compare* AR 600-8-24, *supra* note 16, para. 4-4.*b*., *with* 10 U.S.C. § 638a.
154 U.S. CONST. amend. V.

substantive and procedural due process.[155] "Substantive due process concerns whether the government has an adequate reason for taking away a person's life, liberty or property [w]hile procedural due process . . . concerns whether the government has followed adequate procedures in taking away a person's life, liberty or property."[156]

In a substantive due process case, the issue to consider is whether the government acted with adequate justification.[157] In the realm of federal employment rights, the purpose of the Fifth Amendment Due Process Clause is to protect federal employees "against arbitrary government action."[158] Procedural Due Process Clause violations generally include cases where an agency proposes to take some adverse action against an employee, but has not allowed the employee an "opportunity to present reasons, either in person or in writing, why proposed action should not be taken."[159]

The analysis of a procedural due process challenge can be broken down into three questions. The first question is whether there is "a deprivation."[160] If so, the next question is whether "there [is] a deprivation of life, liberty or property."[161] Finally, where there is such a deprivation, the question is "what procedures are required prior to that deprivation?"[162] Each of these three questions will be analyzed below.

A. Is There a Deprivation?

"Only if there is a deprivation does the court need to go any further in its procedural due process analysis."[163] Case law is clear that depriving

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[155] *See* Erwin Chemerinsky, *Practising Law Institute: Section 1983 Civil Rights Litigation Symposium: Procedural Due Process Claims*, 16 TOURO L. REV. 871 (2000).
[156] *Id.*
[157] *Id.*
[158] Bd. of Regent v. Roth, 408 U.S. 564 (1972) (holding that "when an application for public employment is denied or the contract of a government employee is not renewed, the government must say why, for it is only when the reasons underlying government action are known that citizens feel secure and protected against arbitrary government action").
[159] Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985).
[160] Chemerinsky, *supra* note 155.
[161] *Id*.
[162] *Id.*
[163] *Id.*

someone of employment is a deprivation.[164] As such, taking an officer's commission is a deprivation requiring due process of law.[165] The procedural due process inquiry turns on whether the procedures followed prior to the deprivation were adequate.[166] As such, the focus of this article will be on pre-deprivation process—and lack thereof—during an OSB. The next question is whether a military commission constitutes property.[167]

B. Is There a Deprivation of a Life, Liberty, or Property Interest?

Prior to 1970, the Supreme Court generally analyzed whether there was a deprivation of a liberty or property interest using traditional common law understandings of what liberty and property meant.[168] That is, whether a person was deprived of property or liberty turned on whether that person claimed a loss of something considered to be a right, as opposed to a mere privilege.[169] The Court found there was no recognized deprivation of property in cases claiming a deprivation of something deemed only to be a privilege.[170]

Goldberg v. Kelly is the seminal Supreme Court case involving a property interest in something considered to be a privilege.[171] In *Goldberg*, welfare recipients were denied their welfare benefits without first being afforded some type of due process.[172] The Court noted that the constitutionality of terminating welfare benefits cannot be decided based

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[164] *See, e.g.*, Perry v. Sindermann, 408 U.S. 593, 596 (1972); Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).
[165] *See, e.g.*, Weaver v. United States, 46 Fed. Cl. 69, 2000 U.S. Claims LEXIS 20 (Fed. Cl. 2000) (depriving an officer of a commission requires due process of law).
[166] *See* Chemerinsky, *supra* note 155, at 888. However, for due process protections to apply, it must be more than a mere request for a post-deprivation remedy. *Id.* at 874.
[167] *Id.* at 871.
[168] Goldberg v. Kelly, 397 U.S. 254, 263 (1970); *see also* Bd. of Regents v. Roth, 408 U.S. 564, 571 (1972) (noting "the Court has fully and finally rejected the wooden distinction between "rights" and "privileges" that once seemed to govern the applicability of procedural due process rights).
[169] *Bd. of Regents*, 408 U.S. at 571.
[170] *Goldberg*, 397 U.S. at 262 (citing Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969)).
[171] *See* Chemerinsky, *supra* note 155, at 888 (noting that *Goldberg* "is the key Supreme Court case that departs from [the rights/privilege] analysis").
[172] *Goldberg*, 397 U.S. at 258.

on whether such benefits were "a privilege and not a right."[173] In *Goldberg*, the Court held "due process requires an adequate hearing before termination of [a benefit]."[174]

The Court has previously found that employees with formal tenure, as well as those working under a contract, both had property interests in their employment that were protected by due process.[175] It was not until two years after *Goldberg* that the Court first addressed the creation of such a protected property interest in the realm of public employees who had not received formal tenure.[176] In order to determine whether a non-tenured employee has established a property interest in continued employment requiring due process protections today, "[y]ou have to look to the Constitution, federal statutes, state constitutions, and state laws to *determine whether there is a reasonable expectation*."[177]

The general principle that employment as an officer in the U.S. Army is a property interest has never been overtly stated in a judicial decision.[178] However, cases involving equal protection claims raised by officers separated pursuant to selective early retirement boards (SERBs) reflect that officers do have a protected property interest in their commission.[179]

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[173] *Id.* at 262 (citing *Shapiro*, 394 U.S. at 627 n.6) (noting constitutionality of terminating welfare benefits cannot be decided based on whether such benefits were "a privilege and not a right") (internal quotations omitted).

[174] *Goldberg*, 397 U.S. at 261.

[175] *See, e.g.*, Slochower v. Board of Higher Education, 350 U.S. 551, 76 S. Ct. 637, 100 L. Ed. 692, 1956 U.S. LEXIS 1137 (1956) (holding that a dismissed tenured public college professor held a protected property interest in continued employment); Wieman v. Updegraff, 344 U.S. 183, 73 S. Ct. 215, 97 L. Ed. 216, 1952 U.S. LEXIS 1430 (1952) (holding that college professors and staff members who were dismissed during the terms of their contracts had interests in continued employment that were safeguarded by due process).

[176] Perry v. Sindermann, 408 U.S. 593, 596 (1972); Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).

[177] Chemerinsky, *supra* note 155, at 882.

[178] *But see* Weaver v. United States, 46 Fed. Cl. 69, 2000 U.S. Claims LEXIS 20 (Fed. Cl. 2000) (applying Fifth Amendment analysis to an administrative discharge).

[179] *See, e.g.*, Christian v. United States, 46 Fed. Cl. 793, 2000 U.S. Claims LEXIS 110, 79 Empl. Prac. Dec. (CCH) P40, 321 (Fed. Cl. 2000) (finding, in part, "that the right to equal protection guaranteed by the Due Process Clause was infringed upon through the imposition [at a SERB] of 'unlawful gender and racially classified retention goals and selection consideration factors, and unlawful, gender and racially classified remedies for the possible disadvantages of societal discrimination.'"); *see also* Berkley v. United States, 45 Fed. Cl. 224, 1999 U.S. Claims LEXIS 266 (Fed. Cl. 1999) (finding that involuntary separation of Air Force officers was improper when based partly on race-based and gender-based criteria).

Also, cases involving challenges to agency actions against similarly situated federal and state employees, and even military cadets on their way to becoming officers, reflect that an officer's right to continued employment is a property interest that is protected by procedural due process.[180] The next section will address what is required to create a property interest on the part of employees without formal tenure.

1. Property Interest and the Expectation of Employment

On June 29, 1972, the Supreme Court, for the first time, addressed the issue of whether an interest in continued employment can exist without tenure or a formal contractual provision.[181] The Supreme Court held such an interest could arise through rules and understandings that create an interest in continued employment such that an employee could gain tenure rights, even where no formal tenure system exists.[182]

In *Board of Regents v. Roth*,[183] the respondent was hired as an assistant professor at a state university in Wisconsin.[184] He was hired for a fixed term of one academic year.[185] Under Wisconsin law, a state university teacher could acquire tenure as a permanent employee only after four years of year-to-year employment.[186] Having acquired tenure, a teacher was then entitled to continued employment "during efficiency and good behavior."[187] However, under Wisconsin law the respondent—having worked at the university for less than four years—was entitled to nothing beyond his one-year appointment.[188] Here, Roth completed the one-year

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[180] *See, e.g.*, *Bd. of Regents*, 408 U.S. at 571 (holding that lack of a contractual or tenure right to re-employment, taken alone, does not defeat college professor's claim that the nonrenewal of his contract violated the Fourteenth Amendment); *see also* Wasson v. Trowbridge, 382 F.2d 807, 811 (2d Cir. 1967) (holding that cadets have a property interest in remaining at the Merchant Marine Academy).

[181] *Perry*, 408 U.S. at 596; *Bd. of Regents*, 408 U.S. at 577.

[182] *See generally* note 180 and accompanying sources. Both cases arise under the Fourteenth Amendment of the U.S. Constitution. *Id.* The Supreme Court has interpreted the Fourteenth Amendment to make the Bill of Rights "obligatory on the states" making these portions enforceable against the state governments. Gideon v. Wainwright, 372 U.S. 335, 341–42 (1963) (citing Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 235–41 (1897); Smyth v. Ames, 169 U.S. 466, 522–26 (1898)).

[183] *Bd. of Regents*, 408 U.S. at 577.

[184] *Id.* at 566.

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] *Id.*

term he was hired for, but was not be rehired for the next academic year.[189] The Court found that Roth had no tenure rights to continued employment.[190]

In *Roth*, the Court noted that there were no statutory or administrative standards defining eligibility for re-employment.[191] Thus, state law clearly left the decision whether to rehire a non-tenured teacher for another year to the unfettered discretion of university officials.[192] As a matter of statutory law, a tenured teacher could not be "discharged except for cause upon written charges" and pursuant to certain procedures.[193] A non-tenured teacher was similarly protected, to some extent, during his one-year term.[194] However, the rules provided no real protection for a non-tenured teacher who was not re-employed for the next year.[195] The rules only required that he be informed by February 1, "concerning retention or non-retention for the ensuing year,"[196] but "no reason for non-retention need be given" and "[n]o review or appeal is provided in such case."[197]

In conformity with these rules, the university president informed the respondent that he would not be rehired for the subsequent academic year, but gave no reason for the decision, and no opportunity to challenge it at any sort of hearing.[198] The Supreme Court held that the respondent did not have a constitutional right to a statement of reasons or a hearing on the university's decision not to rehire him for another year.[199] However, the Court did note that if the respondent were entitled to such a hearing, "he would be informed of the grounds for his non-retention and [have the opportunity to] challenge their sufficiency."[200]

Compare *Roth* with *Perry v. Sindermann*,[201] which was decided the same day. In *Perry*, the Supreme Court recognized that a property interest can arise in cases where there is an expectation of continued employment,

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189 *Id.*
190 *Id.*
191 *Id.* at 566–67.
192 *Id.* at 567.
193 *Id.*
194 *Id.*
195 *Id.*
196 *Id.*
197 *Id.*
198 *Id.*
199 *Id.* at 568.
200 *Id.*
201 Perry v. Sindermann, 408 U.S. 593 (1972).

even in the absence of a contract.[202] The Court found that deprivation of such a property interest was constitutionally protected.[203] Citing *Board of Regent v. Roth*, the Court found "[a] person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support a claim of entitlement to the benefit . . . that he may invoke at a hearing."[204]

In *Perry*, the respondent was an untenured teacher in the state college system of the State of Texas who taught for four successive years under a series of one-year contracts.[205] However, after some controversy arose between the respondent and the college administration, the respondent's one-year employment contract was terminated, and the Board of Regents voted not to offer him a new contract for the following academic year.[206] The Regents provided no reason for the nonrenewal and did not allow the respondent any opportunity for a hearing to challenge the basis of the nonrenewal.[207]

The Court held that the respondent's lack of a contractual or tenure right to re-employment, taken alone, did not defeat his claim that the nonrenewal of his contract violated the Fourteenth Amendment.[208] The Court also found that although respondent's employment was not secured by a formal contractual tenure provision, it may have been secured by a no less binding understanding fostered by the college administration.[209] In particular, the respondent alleged that the college had a de facto tenure program, and that he had tenure under that program.[210] He claimed that he and others legitimately relied upon a provision that had been in the college's official faculty guide for many years:

> *Teacher Tenure*: Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory and as long as he

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202 *Id.* at 596.
203 *Id.*
204 *Id.* at 601 (citing Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)).
205 *Perry*, 408 U.S. at 594.
206 *Id.* at 594–95.
207 *Id.* at 595.
208 *Id.* at 596.
209 *Id.* at 599.
210 *Id.* at 600.

> displays a cooperative attitude toward his co-workers and his superiors, and as long as he is happy in his work.[211]

The *Perry* Court found that "[a] teacher . . . who has held his position for a number of years might be able to show from the circumstances of this service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure."[212] The Court held, "the rules and understanding 'promulgated and fostered by state officials,' justified respondent's 'claim of entitlement to continued employment' absent 'sufficient cause.'"[213] This does not mean the employee is required to be reinstated.[214] However, proof of the entitlement to continued employment "absent 'sufficient cause' . . . would obligate college officials to grant a hearing at [the respondent's] request, where he could be informed of the grounds for his

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[211] *Id.*

[212] *Id.* at 602. The Court also noted portions of a guideline, adopted by the Coordinating Board, which read, in part:

> A. Tenure
>
> Tenure means assurance to an experienced faculty member that he may expect to continue in his academic position unless adequate cause for dismissal is demonstrated in a fair hearing, following established procedures of due process.
>
> A specific system of faculty tenure undergirds the integrity of each academic institution. In the Texas public colleges and universities, this tenure system should have these components:
>
> (1) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period for a faculty member shall not exceed seven years, including within this period appropriate full-time service in all institutions of higher education. This is subject to the provision that when, after a term of probationary service of more than three years in one or more institutions, a faculty member is employed by another institution, it may be agreed in writing that his new appointment is for a probationary period of not more than four years (even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years). . . .
>
> (3) Adequate cause for dismissal for a faculty member with tenure may be established by demonstrating professional incompetence, moral turpitude, or gross neglect of professional responsibilities.

Id.

[213] *Id.* at 602–03.

[214] *Id.*

nonretention and challenge their sufficiency."[215] Establishing this claim to entitlement, however, required more than "a mere subjective 'expectancy'" on the part of the employee.[216]

Like the respondents in both *Board of Regents v. Roth* and *Perry v. Sindermann*, Army officers do not receive formal tenure.[217] However, there are rules and understandings created by the DoD that indicate a de facto tenure program similar to those in *Perry* when an officer is no longer probationary.[218] Non-probationary officers have served as commissioned officers for at least five years and are generally not involuntarily separated unless the provisions of AR 600-8-24 can be applied, and the separation is based upon sufficient cause.[219] Merely labeling an officer as non-probationary[220] creates something more than a subjective expectancy[221] on the part of the officer. Army regulation 600-8-24 lists the reasons a non-probationary officer might be subject to discharge, and defines the process by which a board may determine whether those reasons in fact took place, and whether discharge is warranted.[222] These understandings create a claim that non-probationary Army officers are entitled "to continued employment absent 'sufficient cause.'"[223] Other sources of such a property interest will be described below.

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[215] *Id.* at 603.

[216] *Id.*

[217] *But see* AR 600-8-24, *supra* note 16, para. 4-20.b.(1) (defining probationary officer); *see also id.* para. IV.B.2.*a*. *infra*, regarding the Army's use of the word tenure and career status, as applied to officers with more than five years of active commissioned service.

[218] *Perry*, 408 U.S. at 600 (using the phrase de facto tenure). These terms will be described in greater detail in the next two sections. AR 600-8-24, *supra* note 16, para. 4-20.b.(1) defines "probationary officer." The terms "probationary" and "non-probationary" as they relate to officers will be explained in greater detail below. *Id.*

[219] At a board convened in accordance with AR 600-8-24, the government has the burden to show why retention of an officer is not warranted. AR 600-8-24, *supra* note 16, para. 4-6.a. "[T]he board will determine whether each allegation in the notice of proposed separation is supported by a preponderance of the evidence." AR 600-8-24, *supra* note 16, para. 4-6.a.

[220] AR 600-8-24, *supra* note 16, para. 4-20.*b*.(1) defines probationary officer as a regular Army commissioned officer with fewer than five years of active commissioned service. In 2008, 10 U.S.C. § 630 was amended to change five years to six years. *See also* FY08 NDAA, *supra* note 134.

[221] *Perry*, 408 U.S. at 603.

[222] AR 600-8-24. *See also* FY08 NDAA, *supra* note 134 (changing the term probationary officer from one with less than five years to one with less than six years).

[223] *Perry*, 408 U.S. at 602–03.

2. Additional Sources of an Expectation in Continued Employment as a Commissioned Officer

There are two additional sources of an expectation of continued employment as a commissioned officer.[224] First, Army regulations that use the terms *career status* and *tenure* with regard to commissioned officers create an expectation of continued employment and opportunity for advancement similar to the de facto tenure[225] the Supreme Court found in *Perry v. Sindermann*.[226] Second, the selective continuation (SELCON) process creates an expectation in continued employment once an officer is within four years of retirement.[227] Although these additional sources would not entitle officers separated at an OSB to be reinstated,[228] they do create an expectation of minimum due process prior to separation. The source of that expectation will be addressed as well.

The DOPMA was enacted on December 12, 1980, in order "[t]o amend title 10, United States Code [U.S.C.], to revise and standardize the provisions of law relating to appointment, promotion, separation, and mandatory retirement of regular commissioned officers of the Army, Navy, Air Force, and Marine Corps . . . ."[229] Title 10 U.S.C, Chapter 32 establishes limitations on the number of officers who may serve in various grades in the military based upon the annually approved total officer authorization also referred to as "end-strength."[230] Title 10 U.S.C.,

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[224] AR 350-100, *supra* note 32, para. 2-4 (career status) and DA PAM 600-3, *supra* note 5, para. 5-5, tbl. 5-1 (tenure). U.S. DEP'T OF DEF., INSTR. 1320.08, CONTINUATION OF COMMISSIONED OFFICERS ON ACTIVE DUTY AND ON THE RESERVE ACTIVE-STATUS LIST, (Mar. 14, 2007) (C1 Apr. 11, 2012) [hereinafter DoDI 1320.08].

[225] *Perry*, 408 U.S. at 602–03 (finding de facto tenure may exist where "rules and understandings, promulgated and fostered by state officials . . . justify [an employee's] legitimate claim of entitlement to continued employment absent 'sufficient cause'").

[226] DOPMA, *supra* note 73.

[227] DODI 1320.08, *supra* note 224. On April 11, 2012, DoDI 1320.08 was changed to read that officers shall normally be "selected for continuation if the officer will qualify for retirement . . . within 4 years of the date of discharge," instead of six years. *Id*.

[228] *Perry*, 408 U.S. at 602–03 (1972) (noting that "the rules and understanding 'promulgated and fostered by state officials,' justified respondent's 'claim of entitlement to continued employment absent 'sufficient cause,'" but that this does not mean the employee is required to be reinstated).

[229] DOPMA, *supra* note 73.

[230] 10 U.S.C. Ch. 32, Officer Strength and Distribution in Grade. *See also* McKenzie, *supra* note 89, at 13 n.35 ("Each year, Congress authorizes the total military end strength and subsequently the total officer end strength based upon input from the DOD, historical data, and other factors."). *See also* 10 U.S.C. § 691. Permanent end-strength levels to support two major regional contingencies. *Id.*

Chapter 36 addresses the provisions of DOPMA that govern career expectation in the various grades and establishes limits on how long an officer can remain in a particular grade.[231] Under DOPMA, officers not selected for promotion to the next higher grade within these limits face separation from the Army unless selectively continued beyond certain cutoff times in grade.[232]

The DOPMA rules are seen by many as "tenure limits," as most officers expect to serve in their current grade until at least the time of their next promotion board.[233] Department of the Army Pamphlet 600-3 also uses the term tenure in paragraph 5-5 as follows: "The effect of the 10 U.S.C. [and] DOPMA . . . on the tenure and retirement opportunity for officers is shown in table 5-1."[234] Table 5-1, for example, states a captain (O-3) receives tenure until "[p]romotion consideration for major."[235] Additionally, under Army regulation, an officer attains career status at the completion of five years of active duty commissioned service.[236] Career status is defined as: "Active duty with an unspecified termination date: Regular Army (RA) officers with or without a service obligation,[237] and who have more than five years continuous service."[238]

As the Supreme Court found in *Perry v. Sindermann*, although employment is not secured by a formal contractual tenure provision, it may be secured by rules and understanding fostered by the employer that are no less binding.[239] The *Perry* Court found "[a] teacher[,] . . . who has held

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[231] 10 U.S.C. Ch. 36 (Promotion, Separation, and Involuntary Retirement of Officers on the Active-Duty List).

[232] Selective continuation will be addressed in the next section.

[233] McKenzie, *supra* note 89. *See also* Flynn-Brown, *supra* note 37, at 1079 (citing to DOPMA, *supra* note 73). Congress enacted DOPMA in 1980, and Flynn-Brown stated that in support of DOPMA, the House of Representatives openly declared that an officer, "on attaining permanent O-4 grade, has a career expectation of 20 years of service. At the completion of 20 years of service he is eligible for immediate retirement." *Id.* (citing H.R. Rep. No. 96-1462, at 12 (1980), reprinted in 1980 U.S.C.C.A.N. 6333, 6343); *see also* Flynn-Brown, *supra* note 37. Thus, according to Flynn-Brown, Congress "expressed a belief that officers have a career expectation in continued employment once a service member reaches the grade of O-4." *Id.*

[234] DA PAM 600-3, *supra* note 5, para. 5-5, tbl. 5-1.

[235] *Id.*

[236] AR 350-100, *supra* note 32, para. 2-4.

[237] *Id.* Glossary, Section II, Terms. An "active duty service obligation" is "[a] specific period of active duty in the Active Army that an officer must serve before becoming eligible for voluntary separation or retirement." *Id.*

[238] *Id.* para. 2-4.

[239] Perry v. Sindermann, 408 U.S. 593, 599 (1972).

his position for a number of years, might be able to show from the circumstances of this service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure."[240] The Court held "the rules and understandings promulgated and fostered by state officials[] justified respondent's claim of entitlement to continued employment absent sufficient cause."[241] Proof of such an entitlement "would obligate [an employer] to grant a hearing at [the employee's] request, where he could be informed of the grounds for his non-retention and challenge their sufficiency."[242] Further, the *Perry* Court found that establishing a claim to entitlement requires more than "a mere subjective expectancy" on the part of the employee.[243]

Non-probationary Army officers can point to Army regulation when arguing that they have acquired tenure,[244] and that they have attained career status.[245] These rules create more than subjective expectancies.[246] In addition to being told that they are no longer probationary, Army officers can point to these terms and show that they deserve to be "grant[ed] a hearing at [the officer's] request, where [the officer] could be informed of the grounds for . . . non-retention and challenge their sufficiency."[247]

In addition to being told that they have acquired tenure[248] and career status,[249] an additional rule that creates the understanding of continued employment once an officer is within four years of retirement is DoDI 1320.08.[250] This instruction relates to continuation selection boards (CSBs).[251] A CSB is "[a] board of commissioned officers convened . . . to recommend officers for continuation on the Active-Duty List."[252] Continuation selection boards are convened by the Secretary of the Army in order to extend officers in the grade of O-3 and O-4 on active duty

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[240] *Id.* at 602.
[241] *Id.* at 602–03 (internal quotations omitted).
[242] *Id.* at 603.
[243] *Id.* (internal quotations omitted).
[244] DA PAM 600-3, *supra* note 5.
[245] AR 350-100, *supra* note 32.
[246] *Perry*, 408 U.S. at 603 (noting "a mere subjective 'expectancy' is [not] protected by procedural due process").
[247] *Id.*
[248] DA PAM 600-3, *supra* note 5.
[249] AR 350-100, *supra* note 32.
[250] DODI 1320.08, *supra* note 224.
[251] *Id.*
[252] *Id.*

otherwise subject to discharge or retirement "when the needs of the [Army so] require."[253] "A commissioned officer on the Active-Duty List in the grade of O-4 who is subject to discharge . . . and will qualify for retirement . . . within [two to six] years of the date of discharge shall be given the opportunity to be considered by a [CSB]."[254] Under DoDI 1320.08, "Such an officer *shall normally be selected for continuation* if the officer will qualify for retirement . . . within [four] [255] years of the date of continuation."[256] This language creates another source of expectation in continued employment for officers who are within four years of retirement.[257] Although the 2012 version of DODI 1320.08 also added "there is no entitlement to continuation," a court may find this language does not negate the expectation.[258] This was seen in *Perry v. Sindermann*, for example, where the Supreme Court found an employee had de facto tenure despite a provision in the faculty guide that stated the college "has no tenure system."[259]

For the individual officer, DODI 1320.08, has the effect of creating "a property interest in continued employment" once that officer is within four years of retirement similar to that of the respondent in *Perry v. Sindermann*.[260] Not only does DoDI 1320.08 create this interest, but it is arguably designed to protect an officer's property interest in continued employment.[261] As in *Perry v. Sindermann*, "the existence of rules and understandings . . . may justify [a] legitimate claim of entitlement to continued employment absent sufficient cause."[262]

The next section will explore one additional source of the expectation of a property interest in a commission that warrants affording officers with

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[253] *Id.* para. 6.3 (Continuation of Officers Serving in the Grade of O-3 or O-4).
[254] DODI 1320.08, *supra* note 224, para. 6.3.1.
[255] *Id.* para. 6.3.1. (emphasis added). The 2007 version of DODI 1320.08 stated that "an officer shall normally be selected for continuation if the officer will qualify for retirement . . . within [six] years of the date of continuation." *Id.*
[256] *Id.*
[257] *Id. See also* Flynn-Brown, *supra* note 37, at 1079 (citing DODI 1320.08, *supra* note 224).
[258] DODI 1320.08, *supra* note 224, para. 6.3.1.
[259] Perry v. Sindermann, 408 U.S. 593, 599 (1972) (noting the faculty guide stated that the college "has no tenure system").
[260] *Id.* at 599 (internal quotations omitted).
[261] As shown, both DOPMA and DODI 1320.08, provide increased due process protections during a separation proceeding based on time in service. DOPMA, *supra* note 73; DoDI 1320.08, *supra* note 224.
[262] *Perry*, 408 U.S. at 599 (internal quotations omitted).

notice and an opportunity to be heard. As will be shown, cadets who are working toward earning a commission are afforded greater due process than officers separated at OSBs.

3. Property Interest Regarding the Opportunity to Gain a Commission

This section addresses the process of expelling cadets from the U.S. Military Academy (USMA) or from the Reserve Officer Training Corps (ROTC).[263] Cadets have a due process right to a fair administrative process prior to being expelled and, as such, officers deserve at least as much process prior to losing their commission.[264] Case law in this area establishes that cadets have a property interest in the opportunity to *gain* a commission, protected by the right to notice and opportunity to be heard prior to losing it.[265]

In *Andrews v. Knowlton*, cadets from the USMA brought a consolidated appeal seeking review of their expulsion for violating the cadet honor code.[266] The issue was whether the procedures followed by the USMA were "constitutionally sufficient."[267] The court held that appellants knew they would be expelled upon a finding of an honor code violation when they entered the USMA and that the penalty therefore did not violate due process.[268] Of note, the court in *Andrews* stated "it has been understood that the service academies are subject to the Fifth Amendment and that cadets and midshipmen must be accorded due process before separation."[269]

Compare *Andrews* with *Rameaka v. Kelly*.[270] In *Rameaka*, the petitioner completed his freshman and sophomore years as a ROTC

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[263] Wasson v. Trowbridge, 382 F.2d 807, 811 (2d Cir. 1967).
[264] *Id*.
[265] *See generally* Major Justin P. Freeland, *All The Process That is Due: An Article on Cadet Disenrollments From the United States Military Academy and the Army Reserve Officers' Training Corps*, ARMY LAW., Sept. 2015. *See also Wasson*, 382 F.2d at 811).
[266] Andrews v. Knowlton, 509 F.2d 898 (1975) U.S. App. LEXIS 16556 (2d Cir. N.Y. 1975). Article 16 of the Regulations for the United States Military Academy, promulgated by the Secretary of the Army, governs the separation of cadets. *Id.* at 901. Section 16.04 deals specifically with separations for Honor Code violations. *Id.*
[267] *Id.* at 903.
[268] Andrews v. Knowlton, 509 F.2d 898 (1975) U.S. App. LEXIS 16556 (2d Cir. N.Y. 1975).
[269] *Id.* at 903.
[270] Rameaka v. Kelly, 342 F. Supp. 303, 304 (1972) U.S. Dist. LEXIS 13877 (D.R.I. 1972).

student at the University of Rhode Island.[271] Prior to the commencement of his junior year, he signed an enlistment contract for advanced ROTC training.[272] Unlike the first two years, enrollment in this program included:

> [A] commitment to military service which requires completion of the course and the acceptance of a commission, if tendered, to be followed by two years of active duty and further service as a member of a Regular or Reserve component of the Army until the sixth anniversary of the receipt of the commission, unless sooner terminated.[273]

The petitioner was alleged to have failed to fulfill his ROTC obligation, which led to an administrative board hearing.[274] It was alleged that prior to the petitioner's senior year, he concluded that he could not complete the required advanced military training because of financial hardship and the fact that his wife was about to give birth.[275] Early in the fall of his senior year, the petitioner dropped the required military science course.[276] Though he immediately reenrolled in the course after he was contacted by the senior military instructor, he nevertheless became delinquent in a number of ways.[277]

> On November 9, 1970, the petitioner was advised by letter from his professor of Military Science that his performance had been . . . "markedly substandard" and that he was placed on probation. The letter additionally stated, "A further review of your record will be made at the end of the semester. If your performance has not improved to a level expected of a fourth year student in Military Science and a potential officer in the United States Army, you may be considered for dismissal from

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[271] *Id.*
[272] *Id.*
[273] *Id.*
[274] *Id.*
[275] *Id.*
[276] *Id.*
[277] *Id.* Between the period of September 30, 1970, and December 9, 1970, petitioner failed to attend seven out of twenty-eight classes; did not turn in eleven out of twelve homework assignments; did not give his only scheduled student presentation; of two one-hour examinations given, he failed both with marks of forty-four and eighteen points below average; and of six quizzes, he failed all of them. *Id.*

> the program and possible charges of willful violation of your contract."[278]

The petitioner appeared before a board of officers on December 14, 1970.[279] The board found that petitioner willfully evaded his contract.[280] The petitioner's Professor of Military Science then orally notified the petitioner of the board's decision and told him not to worry.[281] However, the board finding were then transmitted to the First Army, recommending disenrollment.[282]

In January 1971, the petitioner dropped out of the university to work full-time and take extension courses elsewhere.[283] In May of 1971, he re-enrolled in the university and received his degree on June 13, 1971.[284] In the summer of 1971, the Army notified petitioner that he was ordered to active duty for willful evasion of his ROTC obligations.[285] The petitioner argued that he misunderstood a conversation with his Professor of Military Science subsequent to November 9, 1970, which led him to believe that, among other things, sanctions for willful evasion would not be imposed.[286] He further contended he did not believe the board hearing was called to consider any willful dereliction on his part.[287]

The petitioner argued denial of due process in several respects.[288] Notably, he contended that prior to, and at, the December hearing, he was not notified that he was being charged with willful evasion and that there was no basis in fact to support the finding of the board with respect to willful evasion of his contract.[289] The federal district court held that the notice given by the government "lacked specificity."[290] Although the government provided notice to the cadet, stating that a board would consider his dismissal from ROTC, it did not identify any specific grounds

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[278] *Id.* at 305.
[279] *Id.*
[280] *Id.* at 305–06.
[281] *Id.* at 303.
[282] *Id.* at 306.
[283] *Id.* at 303.
[284] *Id.*
[285] *Id.*
[286] *Id.* at 306–07.
[287] *Id.* at 303.
[288] *Id.*
[289] *Id.*
[290] *Id.*

for the board to consider.[291] As a result, the court granted relief and ordered the Army to hold another hearing after first providing the cadet with the grounds that it was considering as a basis for disenrollment.[292]

Rameaka is an important case for the proposition that understandings and beliefs on the part of a cadet can form the basis of additional due process rights.[293] According to the Army's own regulations, the Army must provide notice to a cadet, stating specific grounds for disenrollment.[294] This ties into the principle that the government must afford a cadet, and therefore arguably an officer, the opportunity to be heard.[295] Due process affords notice and opportunity to be heard prior to losing the *mere opportunity* to gain a commission, therefore, it is evident that there is an expectation of due process protection once a commission is obtained.

The existence of a protected property interest in continued employment and even continued enrollment at the USMA/ROTC strongly suggests there is also a protected property interest in retaining a commission in the military. Although there are traditional rules applied to how an officer may lose a commission once it is earned, OSBs have operated as an exception to those traditional rules and therefore violate the expectation of de facto tenure.[296] Having established that depriving an officer of a commission is a deprivation of a property interest, the issue next becomes whether that deprivation was without the due process of law.[297]

C. Was the Taking Without Due Process of Law? The Application to Commissioned Officers[298]

> Employment is one of the greatest, if not the greatest, benefits that governments offer in modern-day life. When

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[291] *Id.*
[292] *Id.*
[293] *Id.* at 306–07.
[294] Andrews v. Knowlton, 509 F.2d 898, 903 (1975) U.S. App. LEXIS 16556 (2d Cir. N.Y. 1975).
[295] *Id.*
[296] 10 U.S.C. § 638a; Perry v. Sindermann, 408 U.S. 593, 600 (1972) (noting de facto tenure could be created despite lack of formal tenure).
[297] *See* Chemerinsky, *supra* note 155.
[298] *Id.*

> something as valuable as the opportunity to work is at stake, the government may not reward some citizens and not others without demonstrating that its actions are fair and equitable. And it is procedural due process that is our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action.[299]

The Due Process question in an OSB is whether the administrative procedures used to involuntarily separate a non-probationary officer during a RIF provide all the process that is due before depriving an officer of his or her commission.[300] In another case, *Garrett v. Leham*, the court noted "[i]n reviewing an administrative action, [the court will] apply the standard set forth in 5 U.S.C. § 706(2)(A): whether the administrative actions were 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.'"[301]

In another case, *Cleveland Board of Education v. Loudermill*, the Supreme Court stated "[a]n 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.'"[302] "We have described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.'"[303] "This principle requires 'some kind of a hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment."[304]

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[299] Bd. of Regent v. Roth, 408 U.S. 564 (1972).

[300] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546, 105 S. Ct. 1487, 84 L. Ed. 2d 494, 1985 U.S. LEXIS 68, 53 U.S.L.W. 4306, 118 L.R.R.M. 3041, 1 I.E.R. Cas. (BNA) 424 (1985) (citing Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1281 (1975)) ("The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.").

[301] Garrett v. Lehman, 751 F.2d 997 (1985) U.S. App. LEXIS 28599 (9th Cir. Cal. 1985) (citing Walker v. Navajo Hopi Indian Relocation Commission, 728 F.2d 1276, 1278 (9th Cir.), *cert. denied*, 469 U.S. 918, 105 S. Ct. 298, 83 L. Ed. 2d 233 (1984)).

[302] *Cleveland Bd. of Educ*., 470 U.S. at 546 (citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)).

[303] *Id.* (citing Boddie v. Connecticut, 401 U.S. 371, 379 (1971)); *see* Bell v. Burson, 402 U.S. 535, 542 (1971).

[304] *Cleveland Bd. of Educ*., 470 U.S. at 532, 546 (citing *Board of Regents*, 408 U.S. at 569–70 (1972), Perry v. Sindermann, 408 U.S. 593, 599 (1972)).

Officers separated at OSBs never know why they were separated.[305] The opportunity to be heard consists only of a review of an officer's OMPF.[306] As such, the process deprives non-probationary officers of at least notice and an opportunity for a hearing prior to being deprived of their commission, despite the Army having fostered an expectation of these rights prior to separation.[307] The next section will address what greater protections should be afforded to non-probationary officers during OSBs.

V. The OSB Process is Inadequate to Properly Protect an Officer's Property Interest

The Supreme Court set forth a three-part test in *Mathews v. Eldridge* in order to determine if procedural due process is adequate in a specific circumstance.[308] The test first considers "the private interest that will be affected by the official action."[309] Next, the test requires that courts look to "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."[310] Finally, the test considers "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[311]

Although the *Mathews* test has not yet been applied to evaluate the OSB process, the test has been applied to administrative government action in a variety of cases, ranging from the process required prior to detaining a juvenile in jail,[312] to regulating the control of guns.[313] The Supreme Court in *Hamdi v. Rumsfeld* applied the *Mathews* balancing test to the procedures due to citizens detained as enemy combatants.[314] As

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[305] *See also* Ricks, *supra* note 106.
[306] *See* DA PAM 600-2, *supra* note 15.
[307] *Perry*, 408 U.S. at 594.
[308] Mathews v. Eldridge, 424 U.S. 319, 339 (1976).
[309] *Id.* at 335.
[310] *Id*.
[311] *Id.*
[312] Schall v. Martin, 467 U.S. 253 (1984) (upholding New York's juvenile preventive detention statute).
[313] Spinelli v. City of New York, 579 F.3d 160 (2009) U.S. App. LEXIS 17640 (2d Cir. N.Y. 2009) (holding that suspending a gun shop owner's license, seizing firearms, and delaying a hearing for fifty-eight days violated the owner's due process rights).
[314] Hamdi v. Rumsfeld, 542 U.S. 507, 598 (2004).

such, if an officer were to challenge the OSB process, it is likely the reviewing court would apply the *Matthews* test in order to determine if procedural due process is adequate.[315]

The issue is whether adequate protection against arbitrary deprivation of a commission is provided during an OSB.[316] The existing process deprives officers of many of the protections they typically enjoy, including notice of the basis for separation; opportunity to be heard; and an opportunity to appeal.[317] Further, even if the opportunity to appeal a separation pursuant to an OSB were provided, any such appeal would be challenging, because separated officers never receive an explanation of the reasons for their separation,[318] and there is no record of the OSB procedures.[319]

Unlike termination of traditional government employees, expulsion of cadets from service academies, firing of a non-tenured school teacher, or even the denial of disability benefits, officers separated by way of an OSB have very little opportunity to be heard.[320] When examining the *Mathews* three-part test, the constitutional deficiencies of OSBs become even more apparent.

A. The *Mathews* Test

The Supreme Court in *Matthews* affirmed the proposition that the due process requirements for depriving an individual of property are "flexible and call for such procedural protections as the particular situation demands."[321] The *Mathews* Court held that a hearing was not required prior to the initial termination of disability benefits and determined that the respondent had not been denied his procedural due process rights when

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315 *Mathews*, 424 U.S. at 319, 339.
316 10 U.S.C. § 638a.
317 AR 600-8-24, *supra* note 16, para. 4-20.
318 *See generally* Ricks, *supra* note 106 (letter from Major Slider).
319 *Cf* AR 600-8-24, *supra* note 16, para. 4-6 ("the Board of Inquiry establishes and records the facts of the Respondent's alleged misconduct, substandard performance of duty, or conduct incompatible with military service").
320 *See* Slochower v. Board of Higher Education, 350 U.S. 551, 76 S. Ct. 637, 100 L. Ed. 692, 1956 U.S. LEXIS 1137 (1956); Andrews v. Knowlton, 509 F.2d 898 (1975) U.S. App. LEXIS 16556 (2d Cir. N.Y. 1975); and Perry v. Sindermann, 408 U.S. 593 (1972); Goldberg v. Kelly, 397 U.S. 254, 263 (1970).
321 Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

such benefits were initially terminated.[322] However, the Court found that "[s]ome form of hearing is required before an individual is finally deprived of a property interest."[323]

1. The First Mathews *Factor*

The private, individual interest an officer has in keeping his or her commission is strong.[324] The Supreme Court has "repeatedly recognized the severity of depriving someone of his or her livelihood."[325] Gaining a commission is an arduous process that, by itself, requires a significant investment of taxpayer money, as well as commitment on the part of the individual officer.[326] Further, once a commission is obtained, it is typically controlled by the procedures of AR 600-8-24.[327] "[P]rocedural due process is our fundamental guarantee of fairness, our protection against arbitrary, capricious, and unreasonable government action."[328] The right to due process "is conferred, not by legislative grace, but by constitutional guarantee."[329]

As such, the first *Mathews* factor weighs in favor of officers having notice and an opportunity to respond. As the Supreme Court noted in *Loudermill*, "[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."[330] The Court went on to say that requiring "more than this prior to termination would

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322 *Mathews*, 424 U.S. 319, 339.

320 *Id*. (citing Wolff v. McDonnell, 418 U.S. 539, 557–58 (1974)).

324 *Mathews*, 424 U.S. at 319, 335.

325 FDIC v. Mallen, 486 U.S. 230, 243, 108 S. Ct. 1780, 100 L. Ed. 2d 265 (1988) (citing Brock v. Roadway Express, Inc., 481 U.S. 252, 263, 95 L. Ed. 2d 239, 107 S. Ct. 1740 (1987)); *Cleveland Bd. of Educ*., 470 U.S. at 543.

326 *See, e.g.*, Scott Beauchamp, *Abolish West Point—and the other service academies, too*, WASH. POST (Jan. 23, 2015), https://www.washingtonpost.com/opinions/why-we-dont-need-west-point/2015/01/23/fa1e1488-a1ef-11e4-9f89-561284a573f8_story.html ("It officially costs about $205,000 to produce a West Point graduate.").

327 AR 600-8-24, *supra* note 16, para. 4-20.

328 Bd. of Regent v. Roth, 408 U.S. 564 (1972).

329 *Cleveland Bd. of Educ*., 470 U.S. at 546 (citing Arnett v. Kennedy, 416 U.S. 134, 167 (1973)).

330 *Id.* at 170–71 (opinion of Powell, J.); Goss v. Lopez, 419 U.S. 565 at 581 (1975) ("The essential requirements of due process . . . are notice and an opportunity to respond.").

intrude to an unwarranted extent on the government's interest in *quickly removing* an *unsatisfactory* employee."[331]

However, this is not the case with OSBs, as evidenced by Major (MAJ) Slider's letter. Even after he was separated at an OSB, he was still unsure of the basis.[332] He could only speculate that the OSB considered a GOMOR he had received in 2006 for driving while intoxicated.[333] However, he was never told this directly nor given any opportunity to respond.[334] Further, where the Court in *Loudermill* addressed the need to "quickly remov[e] an unsatisfactory employee,"[335] the Army already has a regulation for removing officers who are "unsatisfactory"—AR 600-8-24.[336] Where the purpose of OSBs is to involuntarily separate officers based on the needs of the service, and not "quickly removing an unsatisfactory [officer]," a *Loudermill*-type argument for the need to "quickly remov[e]" such officers cannot be made.[337]

2. The Second Mathews *Factor*[338]

The next question is whether the "risk of an erroneous deprivation" of a commission under the current OSB procedures outweighs "the probable value, if any, of additional or substitute procedural safeguards."[339] In *Hamdi*, the government argued that its "interests in reducing the process available to alleged enemy combatants [were] heightened by the practical difficulties that would accompany a system of trial-like process."[340] Despite this, the *Hamdi* Court held "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual

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331 *Cleveland Bd. of Educ*., 470 U.S. at 546 (emphasis added).
332 Ricks, *supra* note 106 (letter from Major Slider).
333 *Id.*
334 *Id.*
335 *Cleveland Bd. of Educ*., 470 U.S. at 546.
336 AR 600-8-24, *supra* note 16. These reasons are listed in AR 600-8-24, para. 4-2, and include: (1) substandard performance, (2) misconduct, moral or professional dereliction, or in the interests of national security, or (3) derogatory information such as punishment under Article 15 or revocation of a Secret security clearance. *Id.*
337 *Cleveland Bd. of Educ*., 470 U.S. at 546.
338 Mathews v. Eldridge, 424 U.S. 319, 335 (1976). *See also* United States v. Hamdi, 542 U.S. 507, 531 (2004) ("On the other side of the scale are the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States.").
339 *Mathews*, 424 U.S. at 319, 335.
340 *Hamdi*, 542 U.S. at 531.

basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker."[341]

Balancing the amount of money, time, and effort the United States expends on an officer who has served for several years, versus the relatively short and easy process of separating an officer at an OSB,[342] it is clear that the risk of erroneous deprivation of an officer's commission is high.[343] The burden of conducting a heightened separation procedure would be weighed against the benefit of retaining officers who otherwise deserve to be retained, and replacing them with officers better-suited to be separated. This is especially true considering that most officers who are subject to OSBs are non-probationary.[344] Major Slider is just one example of an officer who, after receiving a GOMOR, went on to serve for eight years—and receive the benefit of substantial advancements in his career in the form of attending Ranger School, resident ILE and SAMS, leading soldiers in combat, and being promoted—only to be separated without being given a reason.[345]

The risk of an erroneous deprivation of such skills and experiences that "cannot be easily reclaimed" is unacceptably high.[346] Officers who have served honorably deserve at least as much protection as the citizen-detainee in *Hamdi* prior to losing their commissions.[347]

3. The Third Mathews *Factor*[348]

The third *Mathews* factor examines "the Government's interest, including the function involved and the fiscal and administrative burdens

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341 *Id.* at 533.

342 *See, e.g.*, MILPER Message 15-175, *supra* note 2. The OSB convened in summer of 2015 was scheduled to take four days, from 22 to 25 September 2015. *Id. See also* Tice, *supra* note 2, noting that 740 of the 4000 screened officers were separated by the OSB. *Id.*

343 *See* Beauchamp, *supra* note 326. *Cf.* DA PAM. 600-2, *supra* note 15.

344 *See* MILPER Message 15-175, *supra* note 2. The OSB convened in summer 2015 considered captains with date of rank to captain between 23 July 2012 and 22 July 2013. *Id.*

345 Ricks, *supra* note 106 (letter from Major Slider).

346 Statement on Army Posture 2012, *supra* note 1.

347 *Cleveland Bd. of Educ.*, 470 U.S. at 532, 546 (citing Arnett v. Kennedy, 416 U.S. 134, 167 (1973)). United States v. Hamdi, 542 U.S. 507, 533 (2004) (citing *Cleveland Bd. of Educ.*).

348 Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

that the additional or substitute procedural requirement would entail."[349] The fact that an administrative process may be burdensome does not provide an exception to the constitutional requirements of the Due Process Clause.[350]

As stated in the opening quotation, the government has an interest in not "stifling the health of the force or breaking faith with our soldiers, civilians and families" during the current reduction in force.[351] Further, the Secretary of the Army sought to avoid "[e]xcessive cuts [that] would create high risk in our ability to sustain readiness . . . to avoid our historical pattern of drawing down too much or too fast and risk losing the leadership, technical skills and combat experience that cannot be easily reclaimed."[352]

As in *Mathews*, holding hearings prior to separating officers pursuant to OSBs would create the "visible burden" of the increased cost in terms of both time and money of conducting more thorough boards.[353] However, considering the government's interests, the "fiscal and administrative burden" [354] of augmenting OSBs with the additional procedural requirements of providing notice and an opportunity to be heard would be slight. During RIFs, where one potential goal is to avoid drawing down too fast, additional time for those quality officers being subjected to OSBs to remain in the force balances against this cost, especially in light of the great cost of making an officer.[355]

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[349] *Mathews*, 424 U.S. at 319, 335. *See also Hamdi*, 542 U.S. at 532 (addressing the third *Mathews* factor citing United States v. Robel, 389 U.S. 258, 264, 19 L. Ed. 2d 508, 88 S. Ct. 419 (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.").

[350] *See Cleveland Bd. of Educ.*, 470 U.S. at 532, 546.

[351] Statement on Army Posture 2012, *supra* note 1.

[352] *Id.*

[353] *Mathews*, 424 U.S. at 319, 337. The most visible burden would be the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision. *Id.*

[354] *Id.* at 319, 335.

[355] *See, e.g.*, Beauchamp, *supra* note 326 (noting the taxpayer cost for a USMA commission).

B. Proposed Solution

The minimum due process a non-probationary officer deserves prior to being separated by an OSB requires providing notice of the reasons for the separation and an opportunity to be heard.[356] The notice requirement must extend beyond the general provision that OSBs ultimately separate officers whose "potential for future contribution to the Army is . . . less than that of their contemporaries,"[357] and must include the specific factors the board considered in separating the officer. In this regard, OSBs should be limited in how far back they can look into an officer's history. Looking back to the probationary period of an officer's career, for example, warrants the OSB process "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law,"[358] because the Army already has a process for involuntarily separating probationary officers.[359] Reaching non-probationary status represents overcoming the probationary period and, as such, officers who have done so deserve to have the probationary period remain just that.[360] With regard to the opportunity to be heard, officers should be able to make an appearance before the board, if they so desire, in order to address any information the board is relying on in person.

Considering the requirements of the Constitution and the three *Matthews* factors, the process must also preclude the board from considering those portions of an officer's OMPF that the command has placed in the restricted portion.[361] Arguably, one purpose of having a restricted portion is to give officers the opportunity to overcome the

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[356] *Cleveland Bd. of Educ*., 470 U.S. at 546 (citing Arnett v. Kennedy, 416 U.S. at 170–71 (opinion of Powell, J.); Goss v. Lopez, 419 U.S. 565 at 581 (1975).

[357] Dep't Army Memo 600-2, App. G, para. G-5.

[358] Garrett v. Lehman, 751 F.2d 997, 1985 U.S. App. LEXIS 28599 (9th Cir. Cal. 1985).

[359] AR 600-8-24, *supra* note 16.

[360] *E.g.*, in MAJ Slider's case, the board considered a GOMOR he received eight years prior to the convening of the board. Ricks, *supra* note 106. Since that time, the Army had invested a great deal of time and money in developing MAJ Slider; yet because the OSB could look so far back, it could consider this GOMOR as a basis for his separation in spite of the significant investment both MAJ Slider and the Army have made in his career development. *Id.* Despite apparently having overcome the negative impact of the GOMOR, it was still used against him many years later. *Id.*

[361] *See* AR 600-8-104, *supra* note 6, tbl. 3-1 (stating that documents within a restricted folder "may normally be considered improper for viewing by selection boards or career managers").

information placed therein.[362] By allowing OSBs to consider such information, this purpose is negated.

VI. Conclusion

The endstate or purpose of an OSB is "to meet future force structure requirements."[363] The goal for meeting these requirement is a "balanced approach that maintains readiness while trying to minimize turbulence within the officer corps."[364] In light of the national interest in avoiding a drawdown that is too quick or too much,[365] OSBs serve as an improper means to achieve this goal because they result in a large number of separations[366] during a short period of time.[367]

A traditional separation board based on misconduct will consider only portions of an officer's service relating to that misconduct, creating a close temporal link between the conduct and separation.[368] However, an OSB can reach years back in order to determine what an officer's capability for future service is today.[369] There is no analogue in the law of federal employment to losing a job based on misconduct that occurred in the distant past.[370] In order to be a fair process, OSBs should consider only

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[362] *But see id.* para. 2-11.*e*.

> Review of the restricted folder and all evaluations is authorized in support of the Army's Personnel Suitability Screening Policy during post board screening processes to ensure the Army's interests are safeguarded when selecting a Soldier for select positions of leadership, trust, and responsibility and to prevent inappropriate reassignment, appointment, and/or promotion.

Id.

[363] OSB/E-SERB FAQs, *supra* note 11.

[364] *Id.*

[365] Statement on Army Posture 2012, *supra* note 1.

[366] *See* Tice, *supra* note 2 (noting that 20% of screened captains were separated at the 2015 captain OSB).

[367] *See* MILPER Message 15-175, *supra* note 2.

[368] *Id.*

[369] DA MEMO 600-2, *supra* note 15, para. 7.b.(4). During OSBs, limited portions of the restricted file will be provided, as outlined in Appendix G. *Id.*

[370] Although reductions in force do occur within the civilian federal employment system, separation actions pursuant thereto are not necessarily based upon "potential for future contribution to the Army [being] . . . less than that of their contemporaries." DA MEMO 600-2, *supra* note 15, App. G, para. G-5. In the law of civilian federal employment, a RIF is:

recent conduct as a basis for future capability. Further, although double jeopardy does not apply at administrative hearings, officers previously subjected to separation boards and subsequently retained should not be separated for the same underlying misconduct that formed the basis of the original separation board.[371] These greater protections would not only

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> [T]he release of a competing employee from his or her competitive level by furlough for more than [thirty] days, separation, demotion, or reassignment requiring displacement, when the release is required because of lack of work; shortage of funds; insufficient personnel ceiling; reorganization; the exercise of reemployment rights or restoration rights; or reclassification of an employee's position due to erosion of duties when such action will take effect after an agency has formally announced a reduction in force in the employee's competitive area and when the reduction in force will take effect within 180 days.

5 C.F.R. § 351.201(a)(2). The procedures for conducting a civilian federal employee RIF are similar to those for an OSB. However, unlike OSBs, the notice required by 5 C.F.R. § 351.802(a) requires an agency to give notice of:

> (1) The action to be taken, the reasons for the action, and its effective date;
> (2) The employee's competitive area, competitive level, subgroup, service date, and three most recent ratings of record *received during the last 4 years*;
> (3) The place where the employee may inspect the regulations and record pertinent to this case;
> (4) The reasons for retaining a lower-standing employee in the same competitive level under § 351.607 or § 351.608;
> (5) Information on reemployment rights, except as permitted by § 351.803(a); and
> (6) The employee's right, as applicable, to appeal to the Merit Systems Protection Board under the provisions of the Board's regulations or to grieve under a negotiated grievance procedure.

5 C.F.R. § 351.802 (emphasis added). Of note, civilian federal civilian RIFs also include appellate rights. *See, e.g.*, Knight v. Dep't of Defense, 332 F.3d 1362 (Fed. Cir. 2003) (holding the Merit System Protection Board (MSPB) has jurisdiction over an appeal where an agency's action in choosing to place a civilian employee in a vacant, lower-graded position after a RIF in lieu of separation fell under RIF regulations and the employee could appeal her demotion by RIF action to the MSPB). Although not all of the listed protections afforded to federal employees during RIFs are applicable to officers, the rights given to civilian federal employees during RIFs serves as another example of some of the greater levels of protections that could be afforded an officer being subjected to an OSB: namely, reasons for the action, an opportunity to be heard, limiting consideration of officer evaluation reports to those from the past four years, and a right to appeal. 5 C.F.R. § 351.802.

[371] AR 600-8-24, *supra* note 16, para. 4-4.d.(4) ("unless the findings and recommendations of the Board of Inquiry or the Board of Review that considered the case are determined to

benefit the individual officers subjected to OSBs, but would also protect the national security interest.

The right to adequate procedural due process "is conferred, not by legislative grace, but by constitutional guarantee."[372] Based on rules and understandings promulgated by the Army, non-probationary officers have earned de facto tenure requiring a minimum level of procedural due process. This must include notice and an opportunity to be heard prior to being separated.[373] As such, non-probationary officers undergoing the OSB process deserve minimum protections.[374] The ends do not justify the means; OSBs deny officers careers in which they have a "constitutional guarantee, and they deserve due process."[375]

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have been obtained by fraud or collusion"); *see also* 10 U.S.C. § 1182 ("If a board of inquiry determines that the officer has established that he should be retained on active duty, the officer's case is closed.").

[372] *Cleveland Bd. of Educ.*, 470 U.S. 532 at 546 (citing Arnett v. Kennedy, 416 U.S. 134, 167).

[373] Perry v. Sindermann, 408 U.S. at 600 (1972).

[374] AR 600-8-24, *supra* note 16, para. 4-20.b.(1) (defining probationary officers).

[375] *Cleveland Bd. of Educ.*, 470 U.S. at 546 (citing Arnett v. Kennedy, 416 U.S. 134, 167 (1973)).

Appendix A
Letter from a Soldier Subjected to a Reduction in Force

My name is Major Charles V. Slider III and I am currently stationed at Fort Leavenworth, Kansas. I am an African-American armor officer, proud father, and husband and graduate of Lincoln University in Jefferson City, Missouri. I was selected for the recently convened Officer Separation Boards for [*sic.*] the Department of the Army for a mistake over eight years ago. The mistake was a DUI in which I received a General Officer Memorandum [of Reprimand] in 2006. Since this incident, I strived for excellence in every job that I performed.

I trained soldiers for deployments to Iraq as part of the surge into theater from 2006-2008. From 2008-2011, I attended and completed Ranger School, Air Assault School and earned the Expert Infantryman Badge. I commanded troops in combat in Afghanistan where I earned the Bronze Star Medal, Army Commendation Medal for Valor, and the Purple Heart for actions against a determined enemy in [Regional Command] East. After the deployment, I was selected as the executive officer for the deputy commander for the Combined Arms Center of Training at Fort Leavenworth serving in the capacity as the daily assistant for a general officer. The following year I was selected among a field of majors to attend the Commanding General and Staff Officer College at Fort Leavenworth, as well as the school of advanced military studies [SAMS]. Both prestigious institutes serve as the educational nexus for field-grade officers. Upon graduating from SAMS in May 2014, I was notified that I would not receive an assignment due to being assessed as high risk [because of] the [GOMOR] in my restricted file. On August 1, I was notified of my removal from active duty service. Although I accept this fate, this is not justifiable due to the sacrifices that both my family and I have endured.

As a [SAMS] graduate, my interpretation of this entire process is that it involved no critical thinking about the types of officers maintained in the current military structure. In certain cases, specific skills, attributes, and character traits are required in order to provide a balance of the warrior scholar. To this end the board process chose individuals for elimination that met all of the requirements, but possessed one black mark. Instead of using judgment and common sense in determining the number of officers required for service, an arbitrary number was provided. This created a system in which officers were selected based on a mistake rather than their

overall contribution to the Army. One lapse in judgment does not constitute a pattern of misconduct, nor a judgment of overall character. These types of decisions [*sic.*] knee-jerk reactions within the Army have the potential to erode trust within the lower ranks.

As an officer, I believe that we should be judged on our body of work, not one isolated incident. Furthermore, this act to remove me from service serves as a blunt example of how stoic and regimented the board process is as a system. As a Purple Heart recipient and proud member of the service, my family and I have given the Army our never-ending faith and commitment. However, the Army has seen it fit to remove my services as an officer from its ranks. Although the details of the board instructions will remain hidden, this also serves as ironclad proof that these awards [*sic.*] are merely a method to provide credibility to a force that has integrity issues and morally barren [*sic.*] for true sacrifices. This letter is an attempt to highlight the issues residing within an unfair system and to provide context to others within the system. As a combat veteran of two theaters, Iraq and Afghanistan, I do not expect to be treated differently or to receive any sort of pat on the back. However, my actions after 2006 prove my family's enduring faith to an ever-evolving conflict and requirements to serve. I have served this great nation with distinction and honor and deserve a valid explanation of why its leaders choose to remove my services from the American people. I accomplished every mission presented to [*sic.*] and went above and beyond what is expected of an Army officer. I hope that this letter finds you in good faith.

Very respectfully,

MAJ Charles V. Slider[376]

[376] *See* Ricks, *supra* note 106.

COMPETING INTERPRETATIONS: THE UNITED STATES DEPARTMENT OF DEFENSE DIRECTLY PARTICIPATES WITH THE ICRC

MAJOR MARC R. TILNEY*

I. Introduction

In a recently established, coalition force office in Petoria,[1] both a U.S. judge advocate (JA) and coalition JA receive a targeting package for a person creating improvised explosive devices (IEDs) for a non-State armed group currently fighting in a non-international armed conflict (NIAC). The coalition force has not yet developed rules of engagement (ROE) addressing civilians who directly participate in hostilities (DPH). The U.S. JA reviews the *Department of Defense* (DoD) *Law of War Manual* (*Manual*).[2] The coalition partner likewise reviews the International Committee for the Red Cross (ICRC) *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (*Interpretive Guidance*), because his country has adopted its approach.[3] The U.S. JA performs the legal review of the targeting package and concludes that the bomb-maker is "functionally part of a non-State armed group that is engaged in hostilities" and is therefore

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[1] *See List of Fictional Countries*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_fictional_countries#C (last visited Jan. 26, 2017) (containing a fictional country from the television comedy *Family Guy*).

[2] U.S. DEP'T OF DEF., DOD LAW OF WAR MANUAL (12 June 2015) [hereinafter MANUAL].

[3] NILS MELZER, INTERNATIONAL COMMITTEE FOR THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 32 (May 2009) [hereinafter INTERPRETIVE GUIDANCE].

subject to attack.[4] The coalition partner performs the legal review on the same targeting package and determines that the bomb-maker does not serve in a continuous combat function within the non-State organized armed group, and thus is a civilian and not subject to attack until he directly participates in hostilities again.[5]

This simple comparison illustrates the differences in applying the *Manual* and the *Interpretive Guidance* approach to targeting under Paragraph 3, Article 13 of Additional Protocol (AP) II, which states, "[c]ivilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities."[6] The *Manual* and the *Interpretive Guidance* are consistent on the principle of civilians' direct participation in hostilities (DPH), but vary significantly in application, requiring U.S. military forces to have a collective understanding of the nuanced differences in order to work with coalition partners.

This article will examine these differences in approach between the *Interpretive Guidance* and the *Manual* in its first part. Additionally, it will analyze issues for JAs to consider when working with coalition force JAs in a specific targeting scenario.[7] However, this paper will not address the mechanics, nor the underlying details of targeting. Next, in Part II the article will discuss the *Interpretive Guidance's* "constitutive elements of

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[4] MANUAL, *supra* note 2, para. 5.8.3.

[5] INTERPRETIVE GUIDANCE, *supra* note 3, at 34.

[6] Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II]. Additional Protocol (AP) II does not define direct participation in hostilities. *See also* Protocol (I) Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

[7] Prior to its publication, Pomper had foreseen the friction between the *Manual* and the *Interpretive Guidance* when he stated:

> The parallels are there but frequently they are not as tidy as we want them to be, and operators will tell us that if we define categories too rigidly, we will impede their ability to meet the threat they are facing. Yet, if they are too loosely drawn, then there is a risk of sanctioning deprivations of life and liberty that will be criticized as illegitimate and arbitrary.

Stephen Pomper, *Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress through Practice*, 88 INT'L L. STUD. 181, 182 (2012).

direct participation in hostilities," the temporal nature of participation, and "the continuous combat function." Part III will discuss the newly published *Manual* and its expansion of the *Interpretive Guidance* approach, and how it provides greater flexibility in analyzing the status of civilians who DPH. Specifically, Part III will address: the non-exclusive considerations to determine if a person is DPH; status-based determinations within hostile non-State armed groups and; the rejection of the "revolving door."[8] Lastly, Part IV will review the need for U.S. JAs to understand the *Manual's* approach and examine how our coalition partners define, analyze, and apply the notion of civilians who directly participate in hostilities.

II. The Interpretive Guidance Approach

Over thirty years after Additional Protocols I and II were signed into law in 1977, and with a marked increase in "conduct of hostilities into civilian population centres," [9] the ICRC published its *Interpretive Guidance*[10] in order to address three questions:

> - Who is considered a civilian for the purposes of the principle of distinction?
> - What conduct amounts to direct participation in hostilities?
> - What modalities govern the loss of protection against direct attack?[11]

In answering those three questions, the *Interpretive Guidance* developed three elements to flesh out the distinctions between those entitled to protection and those who become lawful targets.

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[8] *See infra* section II. B.for more analysis on this topic.

[9] INTERPRETIVE GUIDANCE, *supra* note 3, at 11.

[10] The *Interpretive Guidance* emphatically states its recommendations and commentary "do not endeavor to change binding rules of customary or treaty IHL, but reflect the ICRC's institutional position as to how existing IHL should be interpreted." INTERPRETIVE GUIDANCE, *supra* note 3, at 9. However, courts and countries have cited to and implemented the *Interpretive Guidance's* recommendations and commentary. *See* Pub. Comm. Against Torture in Israel v. Gov't of Israel, HCJ 769/02; FEDERAL REPUBLIC OF GERMANY, FEDERAL MINISTRY OF DEFENCE, A-214/1 JOINT SERVICE REGULATION, LAW OF ARMED CONFLICT (May 2013) [hereinafter GERMAN MANUAL].

[11] *Id*. at 6.

A. Constitutive Elements of Direct Participation in Hostilities

The *Interpretive Guidance* states that DPH has three elements: threshold of harm, direct causation, and belligerent nexus.[12] The threshold of harm element applies only to acts that adversely affect or harm the enemy, military, or protected persons or objects.[13] This element does not address the advantage the specific act generates for a party to the armed conflict.[14] Critics state that the threshold of harm element is "under-inclusive," because it does not acknowledge the advantage a military force gains from a civilian's acts.[15] For example, there is no direct harm to

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[12] *Id.* at 46. The Interpretive Guidance elaborates on the three distinct elements:

> 1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and 2. There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and 3. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).

Id.

[13] *Id.*

[14] *Id.*

[15] *See* Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT'L L. & POL. 697, 719 (2010) (stating, "[c]learly, limitation to harm renders the threshold element under-inclusive"). Professor Schmitt highlights this under-inclusiveness:

> In the case of actions enhancing one side's capability, such a causal link to specific harm may not be apparent. For instance, consider the examples of building defensive positions at a military base certain to be attacked or repairing a battle–damaged runway at a forward airfield so it can be used to launch aircraft. Both actions affect the enemy's operations, but their causal relationship to the strengthening of one's own ability to engage in defensive or offensive operations is greater than to the weakening of the enemy in some tangible way. The deleterious effect of adopting the first element's harm notion is evident.

Id. at 720; *but see* Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 831, 859 ("[B]uilding defensive positions at a military base certain to be attacked . . . would clearly amount to direct participation in hostilities . . . because it is likely to directly and adversely affect the enemy's impending attack.") (internal citations omitted).

enemy military or military capacity when a civilian gathers the necessary components to build IEDs. However the recipient of the gathered components gains a distinct advantage via the capacity to build and use an IED.

The second element, direct causation, "should be understood as meaning that the harm in question must be brought about in one causal step."[16] This is a relatively simple concept for the marine or soldier on the ground who witnesses a "civilian" digging a hole in the ground and emplacing an IED; there is no doubt that the IED will have deadly consequences on the military operations or capacity of the opposing party. Further, the effect of the IED emplacement—an explosion—would occur without an intervening cause. Yet the individual who gathers the necessary IED components and delivers them to an IED-maker is not directly participating in hostilities under the *Interpretive Guidance*. That is because the causal link between the act of gathering and delivering the specific components and the likely harm of an IED explosion are too remote.[17]

In addition to the threshold of harm and direct causation elements, DPH requires a belligerent nexus.[18] This third element mandates that the "act must be specifically designed to directly cause the required threshold of harm in support of a party to an armed conflict and to the detriment of another."[19] The purpose of this element is to distinguish the acts of (1) an unaligned civilian acting in self-defense; (2) those engaging in purely criminal misconduct unrelated to the armed conflict; and (3) those participating in civil unrest, versus a civilian acting in a "manner specifically designed to support one party to the conflict by causing harm to another."[20] Critics argue this provision is too narrow in its application

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[16] INTERPRETIVE GUIDANCE, *supra* note 3, at 53.

[17] However, the *Interpretive Guidance*, through examples, expands the "one casual step" when it notes that "[t]he required standard of direct causation of harm must take into account the collective nature and complexity of contemporary military operations." *Id.* at 56. Accordingly, a nineteen-year-old female serving as a lookout for an impending ambush is directly participating in hostilities because she is transmitting immediate actionable information that "constitutes an integral part of a concrete and coordinated tactical operation that directly causes such harm." *Id.* at 54–55. Thus, the nineteen-year-old, by radioing in that the convoy passed her position, does not cause any harm on her own. However, the insurgents could not launch their ambush without her initiating the radio transmission detailing the convoy location.

[18] INTERPRETIVE GUIDANCE, *supra* note 3, at 58.

[19] *Id.* at 64.

[20] *Id.* at 61.

because it requires the act to "be in support of a party to the armed conflict *and* to the detriment of another."[21]

B. Temporal Nature of Participation

In determining when civilians are liable to attack, the *Interpretive Guidance* emphasizes the temporal nature of DPH. [22] Therefore, a civilian's protected status is "temporarily suspended" for "such time as" they are directly participating in hostilities.[23] This is the prelude to the "revolving door"[24] phenomenon where a "civilian's protection against direct attack" is restored "each time his or her engagement in a hostile act ends."[25] According to the *Interpretive Guidance*, as long as a civilian's hostile acts are "spontaneous, sporadic, or unorganized," they are protected from attack when not participating in hostilities.[26] Conversely, if the hostile acts are planned, regular, or organized, it becomes difficult to ascertain if or when a civilian's engagement in a hostile act ends and thus renders him subject to attack.[27] For non-State organized armed group (OAG) members, a "civilian starts *de facto* to assume a continuous combat function for the group" and is liable to attack "until he or she ceases to assume such function."[28]

C. Continuous Combat Function

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[21] *Id.* at 58; *but 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, 34 (2010) (emphasis added) ("For those who oppose the requirement . . . the belligerent nexus criterion should be framed in the alternative: an act in support or to the detriment of a party.").

[22] *See* INTERPRETIVE GUIDANCE, *supra* note 3, at 70. Recommendation VII states:

> Civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed groups belonging to a non-State party to an armed conflict cease to be civilians . . . and lose protection against direct attack, for as long as they assume their continuous combat function.

Id.

[23] *Id.* at 70.

[24] The revolving door allows "civilians [to] lose and regain protection against direct attack in parallel with the intervals of their engagement in direct participation in hostilities." *Id.* at 70.

[25] *Id.*

[26] *Id.* at 72.

[27] *See* INTERPRETIVE GUIDANCE, *supra* note 3, at 72.

[28] *Id.*

The *Interpretive Guidance* suggests a totality of the circumstances approach when determining when a member of an OAG of a non-State party ceases to assume a continuous combat function.[29] In addition to the conduct that makes a civilian liable to attack (satisfying the three DPH elements), the *Interpretive Guidance* examines when civilians gain a status that make them subject to attack. This status-based approach is for members of a non-State OAG operating in a continuous combat function (CCF).[30] During a NIAC, individual civilians retain their civilian status and are not considered an OAG member so long as they are not serving in a CCF.[31] Additionally, OAG members consist "only of individuals whose continuous function it is to take a direct part in hostilities."[32] Other individuals associated with the OAG, such as cooks, administrative staff, and water treatment specialists "are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities."[33]

Individuals affiliated with an OAG are not OAG members if the "individual['s] . . . function is limited to the purchasing, smuggling, manufacturing [or] maintaining of weapons and other equipment outside specific military operations."[34] The *Interpretive Guidance* views these

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[29] *See id.* The *Interpretive Guidance* states the "determination must therefore be made in good faith and based on a reasonable assessment of the prevailing circumstances" and depends on "criteria that may vary with the political, cultural, and military context." *Id.* at 72–73.

[30] The continuous combat function (CCF) is a subset within the DPH construct. Describing individuals in a CCF "distinguishes members of the organized fighting forces of a non-State party from civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative or other non-combat functions." *Id.* at 34.

[31] *See id*. at 36. Melzer states,

> [I]ndividuals whose function is limited to the purchasing, smuggling, manufacturing and maintaining of weapons and other equipment outside specific military operations or to the collection of intelligence other than of a tactical nature. Although such persons may accompany organized armed groups and provide substantial support to a party to the conflict, they do not assume continuous combat function and, for the purposes of the principle of distinction, cannot be regarded as members of an organized armed group.

Id. at 35 (internal citations omitted).

[32] INTERPRETIVE GUIDANCE, *supra* note 3, at 36.

[33] *Id*.

[34] *Id*. at 34–35.

individuals as too far removed;[35] consequently, there is no direct causal link between the purchasers, smugglers, and manufacturers of weapons and their eventual use in specific military operations against the opposing party.[36] Along that same line of reasoning, the ICRC finds that truck drivers hauling oil for an OAG are not OAG members, because they are not serving in a CCF, and are not DPH because there is no causal link between oil, its eventual use, and the harm to the opposing military force.[37]

In November 2015, the United States attacked Daesh[38] fuel trucks carrying oil.[39] Prior to deliberately striking the fuel trucks, the United States dropped leaflets warning the drivers that an airstrike was forthcoming.[40] Warning the drivers, rather than specifically targeting them, naturally leads to two possible conclusions.[41] First, under the *Interpretive Guidance*, the United States did not believe that the drivers were members of a hostile non-State OAG—Daesh—in a continuous combat function. Following the *Interpretative Guidance's* view, even if the drivers supported and sporadically directly participated in hostilities on behalf of Daesh, the drivers were not engaged in a continuous combat function. Second, if the drivers were not members of Daesh in a CCF, the

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[35] *Id*. at 56.
[36] *Id*. at 55.
[37] *Id*.
[38] *See Daesh*, DICTIONARY.COM, http://www.dictionary.com/browse/daesh (last visited Jan. 26, 2017). Daesh is "a name used to refer to ISIS/ISIL, the radical Sunni Muslim organization: use of this name is said to delegitimize the group's claim to be an 'Islamic state.'" *Id.*
[39] Oil is a central funding source for Daesh and has been labeled as a legitimate military target. *See* Scott Bronstein & Drew Griffin, *Self-funded and Deep-Rooted: How ISIS Makes its Millions*, CNN NEWS (Oct. 7, 2014, 9:54 AM), http://www.cnn.com/2014/10/06/world/meast/isis-funding/; *see also* MANUAL, *supra* note 2, para. 5.7.8.5 ("Oil refining and distribution facilities and objects associated with petroleum, oil, and lubricant products (including production, transportation, storage, and distribution facilities) have also been regarded as military objectives."). However, labeling oil refineries and transportation/distribution assets as war-sustaining activities has not been universally recognized as legitimate military objectives. *See* Aurel Sari, *Trucker's Hitch: Targeting ISIL Oil Transport Trucks and the Need for Advanced Warnings*, LAWFARE (Dec. 2, 2015, 2:12 PM), https://www.lawfareblog.com/truckers-hitch-targeting-isil-oil-transport-trucks-and-need-advanced-warnings ("If the trucks and their cargo . . . were merely travelling to a port to offload their cargo for revenue-generating export, their characterisation as a military objective becomes more contentious.").
[40] Gordon Lubold & Sam Dagher, *U.S. Airstrikes Target Islamic State Oil Assets*, WALL ST. J. (Nov. 17, 2015, 3:04 AM), http://www.wsj.com/articles/french-airstrikes-in-syria-may-have-missed-islamic-state-1447685772.
[41] The United States did not provide a public legal analysis for dropping the leaflets. The author performed this analysis without considering U.S. policy decisions.

United States may have determined that the drivers were not directly participating in hostilities.[42] The drivers were transporting oil, which would likely be converted into a funding source for weapons and ammunition.[43]

The ICRC analysis concluded that the mere act of driving oil from one location to another would not meet the threshold of harm element.[44] It would argue that in order for oil transportation to "reach the threshold of harm required to qualify as direct participation in hostilities, the [oil transportation] must be likely to adversely affect the military operations or military capacity of the [United States],"[45] concluding that the act of transporting oil, without more, in no way affects the military operations of the United States.[46] Further, under the direct causal link requirement, numerous intervening causes must occur in order to convert the oil to currency; using that currency to purchase weapons, and then for the weapons to be used in specific military operations.[47] Additionally, under the belligerent nexus element, one could argue that the drivers were merely minor criminals. Arguably, they were only trying to make money from transporting the oil—not supporting Daesh, and their actions were not to the detriment of the United States.

III. Department of Defense Law of War Manual

The United States did not review the fuel truck attack under the *Interpretive Guidance* because the DoD has its own law of war manual.[48] In 2015, The DoD General Counsel's Office promulgated the "all-Services law of war manual to reflect the views of all DoD components . . . . [It provides] not only the black letter rules, but also discussion, examples of

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[42] *See* Lubold & Dagher, *supra* note 40. It is fair to say that the fuel truck drivers were not delivering oil to the front lines to fuel Daesh as the stated purpose of the attack "was to help cripple ISIL's oil distribution capabilities, which will reduce their ability to fund their military operations." *Id.*

[43] *Id*.

[44] INTERPRETIVE GUIDANCE, s*upra* note 3, at 55.

[45] *Id.* at 50.

[46] *Id*. at 55.

[47] First, the drivers would deliver the oil to a storage facility/fueling station. Next, a sale or transaction would have to occur. Next, a purchase of ammunition and weapons would need to occur. Then, Daesh would have to transport the weapons and ammunition into the conflict zone. Lastly, Daesh would have to employ the weapons and ammunition for specific military operations against the United States.

[48] *See infra* Part III.B for a review of the deliberate strikes on fuel trucks under the *Manual*.

State practice and references to past manuals, treatises, and other documents to provide explanation, clarification, and elaboration."[49] The *Manual's* purpose is "to provide information on the law of war to DoD personnel responsible for implementing the law of war and executing military operations."[50] It unequivocally states, "[T]he United States has not accepted the ICRC's study on customary international humanitarian law nor its 'interpretive guidance' on direct participation in hostilities."[51]

A. Non-exclusive Considerations in Determining Direct Participation in Hostilities

The *Manual*, from the outset, declares the United States has not ratified a treaty defining directly participating in hostilities,[52] stating: "Taking a direct part in hostilities extends beyond merely engaging in combat and also includes certain acts that are an integral part of combat operations or that effectively and substantially contribute to an adversary's ability to conduct or sustain combat operations."[53] The non-exclusive considerations in determining if a civilian's act equates to directly participating in hostilities include:

> - the degree to which the act causes harm to the opposing party's persons or objects;
> - the degree to which the act is connected to the hostilities, the specific purpose underlying the act;
> - the military significance of the activity to the party's war effort; and
> - the degree to which the activity is viewed inherently or traditionally as a military one.[54]

A full reading of the first consideration states:

> [T]he degree to which the act causes harm to the opposing party's persons or objects, such as whether the act is the

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[49] MANUAL, *supra* note 2, at v.
[50] *Id.* para. 1.1.1.
[51] *Id.* para. 4.26.3.
[52] *Id.* para. 5.9.3 ("The United States is not a Party to a treaty with a comparable provision defining 'taking a direct part in hostilities' for the purpose of assessing what conduct renders civilians liable to being made the object of attack.").
[53] MANUAL, *supra* note 2, para. 5.9.3.
[54] *Id.*

> proximate or "but for" cause of death, injury, or damage to persons or objects belonging to the opposing party; or the degree to which the act is likely to affect adversely the military operations or military capacity of the opposing party[.][55]

This is nearly identical to the *Interpretive Guidance's* threshold of harm and direct causation elements.[56]

The second consideration enlarges the causal link within the *Interpretive Guidance*,[57] stating "the degree to which the act is connected to the hostilities, such as the degree to which the act is temporally or geographically near the fighting; or the degree to which the act is connected to military operations." [58] The nature of the second consideration enlarges the ICRC's causal link because it allows the decision-maker to establish the casual link if the act is temporally or geographically near the fighting *or* if the act is connected to the military operations.[59]

The third consideration, "the specific purpose underlying the act, such as whether the activity is intended to advance the war aims of one party to the conflict to the detriment of the opposing party,"[60] is analogous to the *Interpretive Guidance's* belligerent nexus element.[61] On its face, the *Manual's* fourth consideration expands the ICRC's threshold of harm analysis by adding the following:

> [T]he military significance of the activity to the party's war effort, such as the degree to which the act contributes to a party's military action against the opposing party; whether the act is of comparable or greater value to a party's war effort than acts that are commonly regarded

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55 *Id*.
56 INTERPRETIVE GUIDANCE, s*upra* note 3, at 46.
57 *Id.* at 61 ("[T]he element of direct causation must be determined by reference to the harm that can reasonably be expected to directly result from a concrete act or operation.").
58 MANUAL, *supra* note 2, para. 5.9.3.
59 *Id*.
60 *Id*.
61 *See* INTERPRETIVE GUIDANCE, s*upra* note 3, at 61 ("In order to meet the requirement of belligerent nexus, an act must be specifically designed to directly cause the required threshold of harm in support of a party to an armed conflict and to the detriment of another.").

> as taking a direct part in hostilities; whether the act poses a significant threat to the opposing party[.][62]

The fourth consideration's expansion of the ICRC's threshold of harm element addresses under-inclusiveness concerns,[63] raised by Professor Schmitt above, because it specifically considers the distinct military advantage gained by the supported military force, as opposed to solely focusing on the likely harm to result on the opposing force.[64] Also, it seems to allow "indirect participation" activities, which the *Interpretive Guidance* eschews.[65]

Lastly, the *Manual's* final consideration in determining direct

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[62] MANUAL, *supra* note 2, para. 5.9.3 (internal citation omitted).
[63] *See* Schmitt, *supra* note 15, at 697.
[64] *See* MANUAL, *supra* note 2, para. 5.9.3..
[65] *See* INTERPRETIVE GUIDANCE, s*upra* note 3, at 51. Melzer states:

> [T]here can also be "indirect" participation in hostilities, which does not lead to such loss of protection. Indeed, the distinction between a person's direct and indirect participation in hostilities corresponds, at the collective level of the opposing parties to an armed conflict, to that between the conduct of hostilities and other activities that are part of the general war effort or may be characterized as war-sustaining activities.

Id. at 51; *but see* MANUAL, *supra* note 2, para. 5.9.3, n.232 (quoting W. Hays Parks).

> Finally, one rule of thumb with regard to the likelihood that an individual may be subject to lawful attack is his (or her) immunity from military service if continued service in his (or her) civilian position is of greater value to a nation's war effort than that person's service in the military. A prime example would be civilian scientists occupying key positions in a weapons program regarded as vital to a nation's national security or war aims. Thus, more than 900 of the World War II Project Manhattan personnel were civilians, and their participation in the U.S. atomic weapons program was of such importance as to have made them liable to legitimate attack. Similarly, the September 1944 Allied bombing raids on the German rocket sites at Peenemunde regarded the death of scientists involved in research and development at that facility to have been as important as destruction of the missiles themselves.

Memoradum from W. Hays Parks, Chief, International Law Branch, Office of the Judge Advocate General, Department of the Army, subject: Executive Order 12333 and Assassination (Nov. 2, 1989), https://www.law.upenn.edu/institutes/cerl/conferences/targetedkilling/papers/ParksMemorandum.pdf (last visited Mar. 21, 2017).

participation in hostilities is:

> [T]he degree to which the activity is viewed inherently or traditionally as a military one, such as whether the act is traditionally performed by military forces in conducting military operations against the enemy (including combat, combat support, and combat service support functions); or whether the activity involves making decisions on the conduct of hostilities, such as determining the use or application of combat power.[66]

The *Manual's* consideration addresses another criticism of the *Interpretive Guidance* by treating civilians who execute duties in combat support or combat service support roles within an OAG similarly to service members in State armed forces executing the same duties.[67]

The method for determining whether a person is DPH under the *Manual* is permissive and flexible. First, the *Manual* states that the determination of DPH is highly contextual.[68] It constructs the DPH test by first suggesting "[t]he following considerations may be relevant,"[69] which is followed by the five considerations discussed above. Using qualifying language provides flexibility to the decision-maker, rather than constraining him to the listed considerations. Additionally, the individual considerations have their own qualifying language, further providing the

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[66] MANUAL, *supra* note 2, para. 5.9.3.

[67] *See* Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct participation in Hostilities" Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641 (2010). Watkin explains:

> Other individuals who may be carrying out substantial and continuing integrated support functions for such [organized armed] groups are considered to be civilians even though the functions they perform are the same ones for which members of state armed forces can be attacked. As "civilians" these support personnel are protected from attack. In this sense they enjoy a form of impunity from attack not provided to similarly situated persons serving on behalf of regular state armed forces.

Id. at 644; *see* MANUAL, *supra* note 2, para. 4.18.4.1 ("[I]ndividuals may be regarded as constructively part of the [organized armed] group" if they "participate sufficiently in the activities of the group or support its operations substantially . . . .").

[68] MANUAL, *supra* note 2, para. 5.9.3 ("Whether an act by a civilian constitutes taking a direct part in hostilities is likely to depend highly on the context . . . .").

[69] *Id.*

decision-maker flexibility in applying the DPH test.[70]

It also appears by the DPH test's construction that not one consideration is dispositive to the analysis. In contrast to the *Interpretive Guidance*, where all three elements are necessary for finding DPH,[71] there is no such mandate within the *Manual*, allowing for a more expansive view of directly participating in hostilities. In addition to this expansive view, the *Manual* extends the ability to engage OAG members who not in a CFF.

B. Status-Based Determinations Within Hostile Non-State Armed Groups

Unlike the *Interpretative Guidance*, the *Manual* does not distinguish, for the purposes of being subject to attack, between OAG members in a CCF, and persons affiliated with an OAG in sustainment roles.[72] The *Manual* states, "Like members of an enemy State's armed forces, individuals who are formally or functionally part of a non-State armed group that is engaged in hostilities may be made the object of attack because they likewise share in their group's hostile intent."[73]

Similar to the *Interpretive Guidance's* approach, formal membership within a non-State Armed group may include: "using a rank, title . . . ; taking an oath of loyalty . . . ; wearing a uniform or other clothing, adornments, or body markings that identify members of the group; or documents issued or belonging to the group that identify the person as a member . . . ."[74] Less conspicuous "information that might indicate that a

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[70] Three of the five considerations are flexible in their own right because they have an implied scale marked by the language: "the degree to which." *Id.*

[71] *See* INTERPRETIVE GUIDANCE, *supra* note 3, at 64 ("Applied in conjunction, the three requirements of threshold of harm, direct causation and belligerent nexus permit a reliable distinction between activities amounting to direct participation in hostilities and activities . . . [that] are not part of the conduct of hostilities . . . .").

[72] MANUAL, *supra* note 2, para. 5.9.3, explaining:

> The following may indicate that a person is functionally a member of a non-State armed group: following directions issued by the group or its leaders; taking a direct part in hostilities on behalf of the group on a sufficiently frequent or intensive basis; performing tasks on behalf of the group similar to those provided in a combat, combat support, or combat service support role in the armed forces of a State.

Id. (internal citations omitted).

[73] *Id*. para. 5.8.3.

[74] *Id*. para. 5.8.3.1.

person is a member of a non-State armed group" includes:

> [A]cting at the direction of the group or within its command structure; performing a function for the group that is analogous to a function normally performed by a member of a State's armed forces; taking a direct part in hostilities, including consideration of the frequency, intensity, and duration of such participation; accessing facilities, such as safehouses, training camps, or bases used by the group that outsiders would not be permitted to access; traveling along specific clandestine routes used by those groups; traveling with members of the group in remote locations or while the group conducts operations.[75]

The *Manual* imputes the OAG's hostile intent to the members, regardless of formal or functional membership and irrespective of individual duties within a non-State OAG.[76] This is in stark contrast to the *Interpretive Guidance*, which "distinguishes members of the organized fighting forces of a non-State party from civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative or other non-combat functions."[77]

Distinguishing civilian contractors from OAG members is a criticism of the *Manual*.[78] Unlike State armed forces, contractors often do not wear the same servicemember uniforms, insignia, or other identifiers that help distinguish them on the battlefield as civilians. Conversely, OAG members who purposely manifest their outward appearance to mirror the civilian population may be indistinguishable from the civilian contractors who provide services to the OAG. When civilian contractors take on a

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[75] *Id.*

[76] *See id.* para. 5.8.1.

> Membership in the armed forces or belonging to an armed group makes a person liable to being made the object of attack regardless of whether he or she is taking a direct part in hostilities. This is because the organization's hostile intent may be imputed to an individual through his or her association with the organization.

Id.

[77] INTERPRETIVE GUIDANCE, s*upra* note 3, at 33-34.

[78] *See* Melzer, *supra* note 15, at 849.

quasi-military role, such as transporting fuel, it further compounds the opposing party's inability to distinguish the contractor from an OAG member.[79]

Returning to the fuel transportation example in Part II.B., under the *Manual's* approach, the United States may have the legal authority to target drivers under its non-exclusive considerations in determining direct participation in hostilities.[80] In examining the first consideration, transporting oil does not cause direct harm to the United States. The act of driving oil is not the proximate cause for death, injury, or damage to the United States. If the drivers were a part of the conversion of oil to weapons—which would likely adversely affect military operations of the United States—it would indicate that drivers were more likely directly participating in hostilities. Reviewing the second consideration, the degree to which the act is connected to the hostilities,[81] transporting oil is limited in its connection to the hostilities, even though it is temporally and geographically near the fighting. Drivers were transporting oil away from fighting so Daesh could generate revenue to fund their military operations. In analyzing the third consideration ("the specific purpose underlying the act"),[82] there is no doubt the underlying purpose of transporting oil is to convert it to money or materials to advance Daesh's war aims, to the detriment of the United States. In examining the fourth consideration ("the military significance of the activity to the party's war effort"),[83] there is indisputable military significance in transporting oil for sustaining Daesh's warfighting capability.

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[79] *See* Melzer, *supra* note 15, at 849. Melzer clarifies:

> Certainly, as far as regular State armed forces are concerned, the distinction between "non-combatant" members (e.g., administrative personnel or cooks) and civilian contractors or employees assuming the same function generally does not pose a conceptual or practical problem. However, the informal, fluctuating, and often clandestine membership and command structures of most irregularly constituted armed groups make it not only practically impossible, but also conceptually meaningless to distinguish between "non-combatant" members of such groups and civilian supporters accompanying them without taking a direct part in the hostilities. (internal citations omitted).

Id. at 849.

[80] MANUAL, *supra* note 2, para. 5.9.3.

[81] *Id.*

[82] *Id*.

[83] *Id*.

As previously noted,[84] illicit sales of oil fund Daesh's operations.[85] Without transporting the oil, Daesh would lack the ability to pay for food, salaries, and would significantly limited. However, the death of the truck drivers cannot be considered as important as the destruction of oil or fuel trucks.[86] However, from a targeting standpoint, the destruction of the fuel trucks was the primary target, and the death of the drivers was seen as collateral. Concerning the last listed consideration—the degree to which the activity is viewed inherently or traditionally as a military one[87]—transporting oil could be viewed traditionally as a military function if the oil was transported to the front lines, or to a storage depot for redistribution (i.e., consumed for military operations), but civilian contractors can be hired to fulfill that role.[88]

The news article covering the U.S. airstrikes on the Daesh oil trucks was silent on driver membership in Daesh.[89] Gathering intelligence on the drivers in order to determine membership in Daesh may have been impossible. However, if there was knowledge of membership for each driver, Daesh's hostile intent would have been imputed to the truck drivers and the drivers would have been legitimate targets like the fuel trucks.[90] Even if the drivers were not Daesh members, but directly participated in hostilities consistently, they would have been subject to attack, because

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[84] *See infra* section II.C. of this article.

[85] Bobby Shields, *ISIS Has the Capacity to Strike U.S. Critical Infrastructure*, INT'L AFF. REV. (Feb. 19, 2016), http://www.iar-gwu.org/content/isis-has-capacity-strike-us-critical-infrastructure.

[86] This is wholly distinguishable from the Manhattan Project scientists or the German rocket scientists in Peenemunde. The drivers transporting oil were not of such importance as to have made them liable to legitimate attack. Driving a truck is not as advanced or rare as building an atomic bomb or developing rockets at Peenemunde. *See supra* note 65 (quoting W. Hays Parks).

[87] MANUAL, *supra* note 2, para. 5.9.3.

[88] *See* U.S. MARINE CORPS, MCWP 4-11.3, TRANSPORTATION OPERATIONS para. 2-5 (5 Sept. 2001) (describing that one of the tasks assigned to a Motor Transport Company is to "[p]rovide line haul and distribution of bulk water (Class I) and bulk fuel (Class III and III[A]) for the [Combat Service Support Element]."). However, "The commander may use organic, attached, *contracted* or supporting motor transport assets to support operations." (emphasis added). *Id.* para. 1-1.

[89] Lubold & Dagher, *supra* note 40.

[90] The trucks and oil were legitimate targets. *See* MANUAL, *supra* note 2, para 5.7.8.5. Presumably, the U.S. government viewed the drivers as civilians, and were therefore concerned about collateral damage. Even if the drivers were viewed as collateral damage, the noncombatant and civilian casualty cutoff value may have been too high for the rules of engagement (ROE) to permit attacking the trucks with the drivers inside of them. *See* CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3160.01B, NO-STRIKE AND THE COLLATERAL DAMAGE ESTIMATION METHODOLOGY App. E to Encl. E, para. 2.a.(3) (11 Dec. 2015).

the *Manual* does not support the *Interpretive Guidance's* "revolving door."

C. Rejecting the "Revolving Door"

The *Manual* states, "Persons who take a direct part in hostilities, however, do not benefit from a 'revolving door' of protection" and are liable to attack until "they have permanently ceased their participation."[91] In adopting both Watkin's critique[92] of the ICRC's interpretation that the "revolving door of civilian protection is an integral part, not a malfunction, of IHL [(International Humanitarian Law)]" [93] the *Manual's* plain language:

> [G]ives no revolving door protection; that is, the off-and-on protection in a case where a civilian repeatedly forfeits and regains his or her protection from being made the object of attack depending on whether or not the person is taking a direct part in hostilities at that exact time.[94]

The *Manual* also rejects the revolving door notion because it "would operate to give the so-called 'farmer by day, guerilla by night' greater protections than lawful combatants [and] adoption of such a rule would risk diminishing the protection of the civilian population."[95] The Israeli Supreme Court rejected the revolving door proposition when it stated:

> On the other hand, a civilian who has joined a terrorist organization which has become his "home," and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack "for such time" as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility.[96]

It is vitally important then, for the decision-maker to analyze "whether the

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[91] MANUAL, *supra* note 2, para. 5.9.4.
[92] *See supra* note 67 and accompanying text.
[93] INTERPRETIVE GUIDANCE, s*upra* note 3, at 70 (internal quotations omitted).
[94] MANUAL, *supra* note 2, para. 5.9.4.2 (internal citation omitted).
[95] *Id.*
[96] Pub. Comm. Against Torture in Israel v. Gov't of Israel, HCJ 769/02 ¶ 39.

nature and frequency of the direct participation is such that the loss of protection lasts only for the duration of specific acts, or is sufficiently persistent that the individual is liable for attack for a wider period, including the periods between the specific acts."[97]

With the noted differences between the *Interpretive Guidance* and the *Manual*, it is of paramount importance for the U.S. judge advocate to understand how its coalition partners determine if, when, and for how long civilians or OAG members are directly participating in hostilities, are targetable, or are subject to capture. The following section will more thoroughly discuss this issue.

IV. Understanding How U.S. Coalition Partners Define, Analyze, and Apply the Notion of Civilians Directly Participating in Hostilities

A. The United Kingdom

The United Kingdom Ministry of Defence's *Joint Service Manual on Law of Armed Conflict* (*UK Manual*) publication pre-dated the ICRC's *Interpretative Guidance*, and contains no comprehensive analysis of paragraph 3, Article 13, AP II.[98] The *UK Manual* briefly states, "A civilian is a non-combatant. He is protected from direct attack and is to be protected against dangers arising from military operations. He has no right to participate directly in hostilities. If he does so he loses his immunity."[99] Similar to the *Interpretive Guidance* and the *Manual*, the *UK Manual* analyzes DPH on a case-by-case basis. The *UK Manual* provides two DPH examples that are too simple to determine if a civilian's conduct is an "integral part of a combat operation."[100] The *UK Manual* states,

> Whether civilians are taking a direct part in hostilities is a question of fact. Civilians manning an anti-aircraft gun or engaging in sabotage of military installations are doing so. Civilians working in military vehicle maintenance depots or munitions factories or driving military transport vehicles are not, but they are at risk from attacks on those

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[97] Pomper, *supra* note 7, at 190.
[98] U.K. MINISTRY OF DEFENCE, JSP 383, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT (2004) [hereinafter UK MANUAL].
[99] *Id*. para. 5.3.2.
[100] MANUAL, *supra* note 2, para. 5.9.3.

> objectives since military objectives may be attacked whether or not civilians are present.[101]

Because the *UK Manual* is devoid of a particular test—and vague, such as the text within paragraph 3, Article 13, AP II—the United Kingdom could theoretically implement the *Interpretive Guidance* or the *Manual* when examining a factual scenario involving a civilian directly participating in hostilities. The definition of CCF or a functional equivalent within an OAG is similarly absent within the *UK Manual*.[102] This is where the U.S. judge advocate could effectively advocate to a UK counterpart to adopt the more expansive *Manual* approach to the DPH issue. Implementing the *Manual* approach would offer the United Kingdom greater operational flexibility to determine if a civilian is DPH or an OAG member. However, given the pressure on the application of the law of armed conflict on the United Kingdom by the European Court of Human Rights in areas such as detention, it may be that the United Kingdom would take a less aggressive approach in applying the U.S. views of DPH in targeting analyses.[103]

B. Germany

Whereas the *UK Manual* pre-dated the Interpretive Guidance, the Federal Ministry of Defence of the Federal Republic of Germany published its *Joint Service Regulation on the Law of Armed Conflict* (*German Manual*) in May 2013, nearly four years after the appearance of

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[101] U.K. MANUAL, *supra* note 98, para. 5.3.3 (internal citations omitted). The *UK Manual's* Internal Armed Conflict (also referred as a NIAC) chapter, also discusses civilians directly participating in hostilities, but it refers the reader back to previously cited materials within the Conduct of Hostilities chapter. *See id.* para. 15.49.c.

[102] It would be beneficial to remind a U.K. counterpart that the original commentary to AP II, stated, "Those who belong to armed forces or armed groups may be attacked at any time." Int'l Comm. for the Red Cross, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, § 4789 (Yves Sandoz et al. eds., 1987). *See* U.K. MANUAL, *supra* note 98, para. 15.34 ("Additional Protocol II applies to all armed conflicts which meet the threshold [armed conflicts within a state between its armed forces and dissident armed forces or other organized armed groups] but fall outside Additional Protocol I.").

[103] *See* Wells Bennett, *The Extraterritorial Effect of Human Rights: The ECHR's Al–Skeini Decision*, LAWFARE (July 12, 2011, 10:33 AM), https://www.lawfareblog.com/extraterritorial-effect-human-rights-echrs-al-skeini-decision. This pressure may very well transfer to targeting decisions if the United Kingdom does not formally adopt a detailed methodology for determining DPH.

the *Interpretive Guidance*.[104] Similar to the *UK Manual*, the *German Manual* states, "civilians lose their special protection when and for such time as they take a direct part in hostilities."[105] In NIACs, "[a]s long as persons on the side of a nongovernmental party to a conflict participate directly in hostilities, they lose their protection as civilians and may be attacked by military means."[106] Absent a manifest adoption of the *Interpretive Guidance*, the *German Manual* seems similar to the *Interpretive Guidance*, because it specifically cites to the CCF terminology within its test.[107] Additionally, as a possible expression of state practice, the German Federal Prosecutor General has adopted additional *Interpretive Guidance* language in a decision regarding drone attacks.[108] This does not necessarily mean that Germany has adopted the *Interpretive Guidance* in its entirety, but it does suggest that an executive department within Germany has embraced portions of the *Interpretive Guidance*, validating the ICRC's ability to shape and interpret how nations

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[104] GERMAN MANUAL, *supra* note 10.

[105] *Id*. para. 518 (internal citations omitted). The *German Manual* uses inflexible language when it explains,

> [C]ivilians who perform *concrete* actions that constitute direct participation in hostilities (e.g. conducting military operations, transporting weapons and ammunition to combat units, operating weapon systems, transmitting target data that leads immediately to the engagement of a military objective, etc.) can be engaged as military objectives while performing such actions.

Id. (emphasis added). Using the term "concrete" suggests that the *German Manual* favors a non-expansive view on conduct that equates to DPH.

[106] *Id*. para. 1308.

[107] *See id*. The *German Manual* explains:

> It is thus decisive when, how, and up to what point in time a person is directly participating in hostilities and is as a consequence a legitimate target of direct military force. This applies to persons for the duration of their participation in specific acts which can be considered participation in the hostilities. It also applies to persons who, as a result of their role and function within the enemy forces, are continuously participating in hostilities (continuous combat function) and thus are a legitimate military target, even outside of their participation in specific acts of hostility.

Id.

[108] *See* DER GENERALBUNDESANWALT BEIM BUNDESGERICHTSH, OFFENE VERSION [Decision of the German Federal Prosecutor] (June 20, 2013),www.general bundesanwalt.de/docs/drohneneinsatz_vom_04oktober2010_mir_ali_pakistan.pdf (translation on file with author).

apply international humanitarian law. More importantly, it implicitly requires U.S. judge advocates to understand and apply the tests within the *Interpretive Guidance* when working with Germany on targeting scenarios. Thus, when working with the German military in a NIAC involving OAG members, the U.S. judge advocate would apply the conduct-based DPH and the status-based CCF tests under the *Interpretive Guidance.* Additionally, the U.S. judge advocate would have to apply the status-based test under the *Manual* to properly interact with his German counterpart on whether an individual is directly participating in hostilities.[109]

B. NATO

The North Atlantic Treaty Organization (NATO), consisting of twenty-eight member States from Europe and North America, exists in order to cooperate in defense and security.[110] Notably, NATO has been involved in numerous IACs/NIACs in recent years in Iraq, Afghanistan, and Libya.[111] Civilian DPH remains a prominent issue within the Afghanistan and Iraq conflicts.[112] Nonetheless, NATO has not issued formal guidance or interpretation regarding civilians directly participating

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[109] *See* MANUAL, *supra* note 2, para. 5.9.2.1. The *Manual* explains:

> The U.S. approach has been to treat the status of belonging to a hostile, non-State armed group as a separate basis upon which a person is liable to attack, apart from whether he or she has taken a direct part in hostilities. Either approach may yield the same result: members of hostile, non-State armed groups may be made the object of attack unless they are placed *hors de combat*. However, practitioners, especially when working with coalition partners, should understand that different legal reasoning is sometimes applied in reaching that result.

Id. (internal citations omitted) (emphasis added).

[110] *What is NATO*, NATO (Apr. 29, 2015, 11:06 AM), http://www.nato.int/cps/en/natohq/topics_82686.htm?.

[111] *See NATO and Afghanistan*, NATO (Dec. 8, 2015, 10:00 AM), http://www.nato.int/cps/en/natohq/topics_8189.htm; *NATO's Relations with* Iraq, NATO (Oct. 26, 2015, 3:26 PM), http://www.nato.int/cps/en/natolive/topics_88247.htm; *NATO and Libya (Archived)*, NATO (Nov. 9, 2015, 11:22 AM), http://www.nato.int/cps/en/natolive/topics_71652.htm.

[112] *See* Michael N. Schmitt, *"Direct Participation in Hostilities" and 21st Century Armed Conflict*, FESTSCHRIFT FÜR DIETER FLECK 505 (Horst Fischer et al. eds., 2004), http://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/schmitt_direct_participation_in_hostilties.pdf.

in hostilities.[113] Absent formal NATO guidance or interpretation, "a NATO member nation's commanding officer has an obligation to adhere to his state's national laws."[114] Thus, a NATO member nation's commanding officer, within his specific area of operations, will make deliberate targeting decisions based on his nation's interpretation of civilians directly participating in hostilities.[115] Without NATO consensus on civilians directly participating in hostilities, and given significant U.S. involvement in NATO operations, a U.S. judge advocate must understand not only the U.S. view, but also the ICRC view, which at least one member nation—Germany—has partially implemented.

V. Conclusion

Even though the essential and temporal boundaries of DPH are not in total agreement, the *Manual* and the *Interpretive Guidance* methodologies share the same principal concept of a civilian directly participating in hostilities; if you DPH, you are liable to attack. However, the differences between the analytical tools of the two vary widely in scope and application. The U.S. judge advocate must be able to analyze targeting scenarios under both approaches when working with a coalition JA who provides advice using the *Interpretive Guidance*. If the restrictive and rigid *Interpretive Guidance* allows a State to target a civilian under its conduct-based, three-part DPH test (threshold of harm, direct causation, and belligerent nexus), or under the status-based CCF analysis, then that civilian would certainly qualify as a legitimate military target under the more expansive *Manual* framework. When it appears that the *Interpretive Guidance* may limit the ability to target the individual, the analysis under the *Manual* may in fact render the civilian subject to targeting. Thus, the lingering question does not become *which* DPH test is better, but how can both analyses coexist in a multinational military operations?

As multinational military operations increase, understanding the analytical tools will enable JAs to effectively advocate for the *Manual*'*s* methodology, or at least adequately rebut findings in an analysis under the

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[113] Interview with Mr. Jan Bartels, Operational Law Attorney (Multinational Operations), Center for Law and Military Operations, The Judge Advocate General's Legal Center and School, Exchange Officer Legal Service German Armed Forces (former Assistant Legal Advisor at the Supreme Headquarters, Allied Powers Europe) in Charlottesville, Va. (Feb.16, 2016) (notes on file with author).

[114] *Id*.

[115] *Id*.

Interpretive Guidance. Failure to understand a coalition force's "organizational and national culture" differences will likewise cause a failure to understand their methodology and analytical tools, which will undermine the "overall operational effectiveness of the multinational force."[116] This failure is both costly and avoidable.

[116] Angela R. Febbraro et al., *Multinational Military Operations and Intercultural Factors*, ES-1, N.A.T.O. Doc. RTO-TR-HFM-120 AC/323(HFM-120)TP/225 (Nov. 2008), https://www.cso.nato.int/pubs/rdp.asp?RDP=RTO-TR-HFM-120.

TAKING NO PRISONERS: THE NEED FOR AN ADDITIONAL PROTOCOL GOVERNING DETENTION IN NON-INTERNATIONAL ARMED CONFLICTS

MAJOR BRITTANY R. WARREN*

It is not enough for the direct application of human rights law to internal armed conflicts to be appropriate and desirable; it must also be possible . . . . Human rights law must be realistic in the sense of not . . . otherwise making compliance with the law and victory in battle impossible to achieve at once.[1]

War appears to be as old as mankind, but peace is a modern invention.[2]

I. Introduction

The deprivation of liberty is a reality of armed conflict,[3] deeply

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[1] Willliam Abresch, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 EURO. J. OF INT'L L. 750 (2005).

[2] HENRY SUMNER MAINE, INTERNATIONAL LAW: A SERIES OF LECTURES DELIVERED BEFORE THE UNIVERSITY OF CAMBRIDGE 8 (1888).

[3] *See* Int'l Comm. of the Red Cross, *Strengthening International Humanitarian Law Protecting Persons Deprived of Liberty: Thematic Consultation of Government Experts on Grounds and Procedures for Internment and Detainee Transfers*, 32IC/15/XX, at 10 (June, 2015) [hereinafter *Detention Concluding Report*] ("Torture, extra-judicial killing, forced disappearance, arbitrary or unlawful-detention, isolation and neglect are only a few of the harms that can result from abuse of this relationship or failure to live up to the obligations it entails.").

rooted in[4] the history of warfare.[5] This reality is an uncomfortable one, acknowledging the key role it plays in lawful military operations[6] while also recognizing the potential for abuse of those individuals detained.[7] Analysis of wartime detention is particularly complicated because it sits at the intersection between an understanding that individuals have the right to protection from arbitrary deprivation of liberty,[8] and an appreciation that detention is a "necessary, lawful and legitimate means of achieving the objectives of international military operations."[9]

The body of international law that governs armed conflict—International Humanitarian Law (IHL)—is a critical starting point to understanding the allowable scope of security detention in an armed conflict. However, scholars and international courts over the last half-century have questioned IHL's interplay with International Human Rights Law (IHRL). These two regimes are in tension in many ways, but even in tension, they share a common thread: both allow for the piercing of State sovereignty and regulation of State conduct, in certain circumstances, in order to promote global humanitarian aims.[10] The IHL realm concerns the

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[4] *See* Brief of Respondent at 14, Hamdi v. Rumsfeld, 542 U.S. 507 (2003) (No. 03-6696) (citing G. LEWIS & J. MEWHA, U.S. DEP'T OF ARMY, PAM. NO. 20-213, HISTORY OF PRISONER OF WAR UTILIZATION BY THE UNITED STATES ARMY 1776-1945 (1955) [hereinafter DA PAM. 20-213]. Though the pamphlet largely focuses on the utilization of prisoners of war as a labor force, it carefully traces the history of such prisoners from the American Revolution. DA PAM. 20-213 at 1-40.

[5] *See* 1 ALEXANDER GILLESPIE, A HISTORY OF THE LAWS OF WAR (2011).

[6] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality) (calling detention a "fundamental and accepted" incident to war).

[7] *See Detention Concluding Report*, *supra* note 3, at 10.

[8] *See, e.g.*, International Covenant on Civil and Political Rights art. 9(1), Dec. 19, 1966, 999 U.N.T.S. 171, 175 [hereinafter ICCPR] ("Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.").

[9] *See The Copenhagen Process on the Handling of Detainees in International Military Operations: Principles and Guidelines* ¶ 3 (2012), *reprinted in* 51 INT'L LEGAL MATERIALS 1368 (2012), http://um.dk/en/~/media/UM/English-site/Documents/Politics-and-diplomacy/CopenhangenProcessPrinciplesandGuidelines.pdf [hereinafter *Copenhagen Process*].

[10] *See* discussion *infra* Section II.B; *see also* Louis Henkin, *Sibley Lecture, March 1994 Human Rights and State "Sovereignty"*, 25 GA. J. INT'L & COMP. L. 31, 34 (1996).

> Thus, 1945 saw a small but clear, firm, bold step from state values toward human values, a small but clear derogation from state "sovereignty." The condition of human rights became a subject of international concern in principle, as well as, in fact, to an increasing extent. Slowly, imperceptibly, how any state treated any human being

"protection of human values even in the most inhuman environment of warfare,"[11] while IHRL focuses on ensuring a certain minimum standard of treatment of people by their own governments.[12] Though these legal principles were originally conceived as two separate rubrics for governing State action under fundamentally opposing circumstances—peacetime and armed conflict—the philosophical underpinnings of IHRL have increasingly been grafted onto analysis and interpretation of IHL norms.[13] Known as "convergence," this is the assumption that IHRL always applies to individuals in their relationships to the State and that it continues to apply during armed conflict, though it may be limited or refined by IHL.[14] Convergence as an analytical doctrine has an enormous impact on the perceived legitimacy of detention during non-international armed conflicts (NIACs). In particular, it has an impact that is keenly felt in some of the most recent international court decisions. These decisions, such as *Serdar Mohammed v. Secretary of State for Defence*,[15] have largely concerned themselves with searching for a State's authority to detain during NIACs under IHL and concluding that IHL itself does not provide positive authority to conduct detention operations.

In *Serdar Mohammed*, the United Kingdom's Court of Appeals upheld the lower court's judgment that the 110 days an alleged Taliban commander was held in a U.K detention facility in Afghanistan without being either released or transferred to Afghan authorities violated his rights under the European Convention on Human Rights (ECHR).[16]

> became, in principle and to some extent in fact, "of international concern," *everybody's* business. The international law of human rights penetrated the state monolith beyond repair.

Id.

[11] Christopher Greenwood, *Human Rights and Humanitarian Law—Conflict or Convergence*, 43 CASE W. RES. J. INT'L L. 491, 496 (2010).

[12] *See* GERALD DRAPER, REFLECTIONS ON LAW AND ARMED CONFLICTS 128 (Michael A. Meyer & Hilaire McCoubrey eds., 1998).

[13] *See, e.g.*, INTERNATIONAL COMMITTEE OF THE RED CROSS, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, 313 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter ICRC STUDY VOL. 1] (referencing IHRL treaties in explaining the customary international humanitarian law prohibition on murder).

[14] *See* Naz K. Modirzadeh, *The Dark Side of Convergence: A Pro-civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict*, 86 INT'L L. STUD. 349, 354 (2010).

[15] Serdar Mohammed v. Sec'y of State for Defence (2015) EWCA (Civ) 843.

[16] *Id.* at 9. In earlier cases, the European Convention on Human Rights (ECHR) was held to apply extraterritorially in three circumstances: (1) when a State exercises public power

Finding no authority under IHL for Mohammed's detention, the Court turned to IHRL, specifically Article 5 of the ECHR, for the applicable rule, concluding that because Afghan law and coalition policy required a detainee to be turned over to Afghan authorities within ninety-six hours of capture, detention past this timeframe violated Article 5's prohibition on arbitrary detention.[17] The United Kingdom's supreme court partially reversed this decision, holding that Serdar Mohammed's detention was authorized by the applicable United Nations Security Council Resolutions (UNSCR) for imperative reasons of security,[18] but finding a breach of the ECHR because detainees did not have an effective means to challenge their detention.[19] While the U.K. Supreme Court recognized that "detention is inherent in virtually all military operations of a sufficient

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normally reserved to a government or otherwise asserted authority over an individual under its control; (2) where a State exercises effective control over an area; or (3) where the territory of one Convention State is occupied by the armed forces of another Convention State. *See* Al-Skeini and Others v. The United Kingdom, App. No. 55721/07 Eur. Ct. H.R., at 134-42 (2011). Detention of individuals by the United Kingdom triggered application of the ECHR because U.K. soldiers exercised authority and control over them. *Id.*

[17] *See* Serdar Mohammed v. Sec'y of State for Defence (2015) EWCA (Civ) 843, at 9. A more full discussion and critique of the basis for the *Serdar Mohammed* decision both at the trial level, Serdar Mohammed v. Ministry of Defence (2014) EWHC (QB) 1369, and the U.K. Court of Appeals, will be found *infra* Section II.C.

[18] *See* Serdar Mohammed v. Ministry of Defence (2017) UKSC 2, at 30, 89; *see also* Shaheed Fatima Q.C., U.K. Supreme Court Judgment on Extra-Territorial Detention in Iraq and Afghanistan, JUST SEC'Y (Jan. 17, 2017, 7:58 AM), https://www.justsecurity.org/36407/uk-supreme-court-judgment-extra-territorial-detention-iraq-afghanistan/. As Shaheed Fatima writes in explanation of the Court's reasoning:

> The Iraq UNSCR (1546) identified, in the annexed letter of Colin Powell, the power to detain (internment) where necessary for imperative reasons of security. The Afghanistan UNSCRs (1386, 1510, 1890) were interpreted as including a similar power to detain, since the mandate of ISAF (the International Security Assistance Force) was to take "all necessary measures" to assist the Afghan authorities "in the maintenance of security"; it was apparent from recitals to UNSCR 1890 that the Security Council was particularly concerned about violence and terrorist activities and the mission for troop-contributing nations involved not just operations ancillary to ordinary law enforcement but also armed combat against an organised insurrection.

Id.

[19] *See* Serdar Mohammed v. Ministry of Defence (2017) UKSC 2, 99-111.

duration and intensity to qualify as armed conflicts,"[20] its thorough and considered analysis depended on the premise that IHL is a source of positive law that confers onto States the right to detain.[21]

The analysis by the courts overlooks one fundamental premise: States have inherent authority to conduct security detentions in armed conflicts as part of their larger inherent authority to conduct hostilities.[22] This inherent authority allows a State to take whatever actions are necessary to successfully wage war, so long as its authority has not been explicitly restricted by IHL.[23] Far from providing a positive source of authority, IHL rules merely regulate a State's exercise of that inherent authority it already possesses.

The current misunderstanding of a State's authority to conduct security detentions in NIACs has left the state of the law fractured and unclear. This dissonance will severely hamper the United States' ability to conduct detention operations with coalition partners.[24] In order to address the lack of clarity, the international community should clarify IHL through an Additional Protocol to the Geneva Conventions. This new protocol would recognize States' inherent authority to conduct security detentions in NIACs.[25]

This article proceeds in four parts. Part I served as this introduction. Part II focuses on a thorough explanation of the IHRL and IHL regimes, as well as the debate over where each regime displaces the other; a discussion of legal frameworks that apply during NIACs under both IHL and IHRL; and an analysis of the current debate over the authority to detain in NIACs. This Part ultimately concludes that IHL does, in fact, reflect an

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[20] *Id.* at 15.
[21] *See, e.g.*, *id.* at 12-16.
[22] *See infra* Part II.D. for a thorough discussion of this inherent authority.
[23] *See infra* notes 99-103 and accompanying text.
[24] *See* Caroline Wyatt, *Legal claims 'could paralyse' armed forces*, BBC (Oct. 18, 2013), http://www.bbc.com/news/uk-24576547 (discussing a pamphlet published by the conservative think-tank Policy Exchange arguing that "the fog of law" has degraded British military ability); Charles Moore, *Civilian lawyers have put Britain and its Armed Forces in danger*, TELEGRAPH (Oct. 18, 2013, 8:08 PM), http://www.telegraph.co.uk/news/uknews/defence/10389075/Civilian-lawyers-have-put-Britain-and-its-Armed-Forces-in-danger.html (same).
[25] A discussion of the text of this proposed Additional Protocol IV (AP IV) can be found *infra* Section III. While drafting AP IV would be the full-time job of a team of diplomats, a suggested text for the provisions that such an instrument should contain may be found *infra* Appendix A.

authority to detain that displaces the application of IHRL, relying on both a structural analysis of the two bodies of law and pre-Geneva understanding of State authorities during armed conflict.

Part III recommends Additional Protocol IV (AP IV) to the Geneva Conventions governing security detentions in NIACs and discusses the provisions this additional protocol should contain. This Part offers that the most important provisions for this treaty are procedures for legal detention reviews, as well as procedures for the transfer of detained persons to sovereign authorites. Part IV considers several counterarguments to a treaty-based solution to the problem of security detentions in NIAC. Finally, Part V concludes with a proposal of a new additional protocol.

II. Background and Analysis

It is useful to evaluate the differences between and convergence of IHL and IHRL before examining the legal basis for detention in a NIAC. The distinctions between and triggering points for IACs and NIACs, and the types of security detentions that can occur in armed conflicts will also be examined. The laws applicable to detention in armed conflicts "of a non-international character" must also be evaluated for a thorough analysis.[26] This examination, particularly of the structure of IHL and IHRL, leads to the conclusion that these regimes are prohibitive and regulatory in design, and that States retain their inherent authorities during armed conflicts unless those authorities have been specifically taken away by operation of a treaty or customary international law.

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[26] This language is found, among other places, in Common Article 3 (CA3) of the Geneva Conventions. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]. Additional Protocol II (AP II) references CA3 in its preamble, but applies in slightly different circumstances. It applies "to all armed conflicts which are not covered by Article I of the Protocol Additional to the Geneva Convention of 12 August 1949" (i.e., International Armed Conflicts), but only when certain preconditions are met. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II]. A further discussion of the differences between the application of CA3 and AP II may be found *infra* Section II.B.2.

A. International Human Rights Law and International Humanitarian Law: A Framework

As commentators like Theodor Meron, the President of the International Criminal Tribunal for the Former Yugoslavia (ICTY), have pointed out, "it has become common in some quarters to conflate human rights and the law of war/international humanitarian law,"[27] but IHRL and IHL arose from very different sets of historical circumstances[28] and have very different theoretical underpinnings[29] that often put the two in conflict.[30] Despite the tension inherent between the two systems, scholars, courts, and policymakers have increasingly intertwined the two over the last half-century as the pendulum has swung in favor of a robust international human rights framework.[31]

1. Basic Frames of Reference

These two bodies of public international law are intended to address conduct within two very different relationships: in IHRL, the individual's unequal relationship with the State; in IHL, the reciprocal relationship between co-belligerents.[32] Both legal corpuses consist of a series of relevant treaties as well as duties arising from consistent State practice combined with a sense of legal obligation, or what is known as customary

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[27] Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 240 (2000).

[28] *See* Karima Bennoune, *Towards a Human Rights Approach to Armed Conflict: Iraq 2003*, 11 U.C. DAVIS J. INT'L L. & POL'Y 171, 179-80 (2004); *see also* Major Michelle A. Hansen, *Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law into Armed Conflict*, 194 MIL. L. REV. 1 (2007) (explaining the development of IHRL as a response to the atrocities of World War II); Meron, *supra* note 27, at 242-47 (discussing the historical underpinnings of IHL and its roots in chivalric practice).

[29] *See* Meron, *supra* note 27, at 240.

[30] *See* Bennoune, *supra* note 28, at 179-81 (referencing commentators who oppose any intrusion of the norms of one system of law into the practice of the other). *But see* Greenwood, *supra* note 11, at 494-95 (arguing that commentators who believe the two systems are mutually exclusive are incorrect).

[31] *See* Bennoune, *supra* note 28, at 179-80 (discussing both the trend to "cross-pollinate" the two systems of law as well as the arguments for keeping them separate and distinct). Scholars have argued that it was the 1968 International Conference on Human Rights in Tehran that led to a "renaissance" and greater interaction between IHRL and IHL. *See, e.g.*, SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 86 (2014).

[32] *See* Meron, *supra* note 27, at 240.

international law.[33] While IHRL and IHL possess some similarities in the abstract,[34] commentators also point out that they have markedly divergent and often diametrically opposed core concepts and philosophies.[35] Though the degree to which IHRL and IHL are fundamentally at odds may be overstated in the literature,[36] a comparison of their core principles is a useful analytical starting point.

As discussed, IHRL is the body of international law designed to promote and protect human rights at the international, regional, and domestic levels.[37] Most generally, it is the body of law designed to protect individuals from the arbitrary actions of their own governments.[38] In considering IHRL, three principles are immediately apparent. The first principle is that IHRL provides the backdrop for international law,

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[33] *See* I RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES 24, § 102(2) (1987).

[34] They have some purposes in common, as both bodies of law are concerned with "respect for, and dignity of, the human person." SIVAKUMARAN, *supra* note 31, at 86.

[35] As an example of scholarship that argues the two regimes are fundamentally opposed, G.I.A.D. Draper has written:

> [A]t the end of the day, the law of human rights seeks to reflect the cohesion and harmony in human society and must, from the nature of things be a different and opposed law to that which seeks to regulate the conduct of hostile relationships between states or other organized armed groups, and in internal rebellions.

G.I.A.D. DRAPER, HUMANITARIAN LAW AND HUMAN RIGHTS, ACTA JURIDICA 193, 199 (1979), quoted in Bennoune, *supra* note 28, at 179-81.

[36] Sir Christopher Greenwood, a Judge on the International Court of Justice, has argued that IHRL and IHL, rather than being mutually exclusive, are actually mutually reinforcing:

> Let me put my cards on the table at the start and say that both these bodies of law are, in my view, part of international law as a whole. Neither is a self-contained entity and their keenest proponents do themselves a disservice by pretending that the two bodies of law are mutually exclusive and must always be in conflict. If you are a human rights lawyer—and I hope that all of you have aspirations to be a human rights lawyer—you should be a humanitarian lawyer as well. Similarly, if your subject is the laws of war and, in particular, if you are a military lawyer, you cannot today overlook the dimension of the international law of human rights. It's a matter of being a good lawyer rather than being a human rights lawyer or a humanitarian lawyer.

Greenwood, *supra* note 11, at 495.

[37] GARY D. SOLIS, THE LAW OF ARMED CONFLICT 24-26 (2010).

[38] *See* SIVAKUMARAN, *supra* note 31, at 85.

sketching the basic—though in some cases aspirational[39]—parameters of an individual's relationship with the State. While IHRL as a component of international law is only as old as the second half of the 20th century,[40] the idea that human beings have rights that should be safeguarded both by and from governments is far older.[41] The adoption of the Universal Declaration of Human Rights (UDHR) in 1948, seen as the starting point for the development of human rights law as an *international* legal corpus,[42] represented a merging of various strands of democratic and liberal thought[43] that had been percolating among philosophical, legal, and moral thinkers for centuries.[44] The second principle is that IHRL, in providing content to fill in the contours of the Individual-State relationship, is fundamentally concerned with that relationship's balance of power.[45] Sir

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[39] The adoption of the Universal Declaration of Human Rights (UDHR) in 1948 is often cited as the beginning of IHRL's ascension on the world stage. *See* SIVAKUMARAN, *supra* note 31, at 85. While unanimously understood at the time of its passage to be purely aspirational, *see, e.g.*, Myles S. McDougal & Gertrude C. K. Leighton, *The Rights of Man in the World Community: Constitutional Illusions versus Rational Action*, 59 YALE L. J. 60, 69 (1949) (describing the Universal Declaration of Human Rights as a declaration of past achievement and future aspiration); Bennoune, *supra* note 28, at 200 (describing the initial U.S. position that the Universal Declaration of Human Rights was aspirational in nature), the UDHR's influence on modern IHRL instruments cannot be overstated. *See generally* Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287 (1996).

[40] *See* Hansen, *supra* note 28, at 1 (discussing the development of IHRL as a response to the atrocities of World War II).

[41] *See* McDougal & Leighton, *supra* note 39, at 60. As McDougal and Leighton point out:

> It is for values such as these that men have always framed constitutions, established governments, and sought that delicate balancing of power and formulation of fundamental principle necessary to preserve human rights against all possible aggressors, governmental and other.

Id. at 61. Professor Radin, in his 1950 article on the sources of natural rights, summarized the scholarship on the subject going back four centuries. *See* Max Radin, *Natural Law and Natural Rights*, 59 YALE L.J. 214, 235-37 (1950).

[42] *See* Bennoune, *supra* note 28, at 199.

[43] *See, e.g.*, HUGO GROTIUS, DE JURE BELLI AC PACIS (Richard Tuck ed., trans., 2005) (1636); RICHARD CUMBERLAND, DE LEGIBUS NATURAE (John Parkin ed., trans., 2005) (1683-94); J.J. BURLAMAQUI, PRINCIPES DU DROIT NATUREL (Petter Korkman ed., Thomas Nugent trans., 2006) (1762); S. PUFENDORF, DE JURE NATURAE ET GENTIUM (Ian Hunter & David Saunders eds., Andrew Tooke trans., 2002) (1672).

[44] *See* McDougal & Leighton, *supra* note 39, at 60.

[45] *See* Andrew Kent, *Disappearing Legal Black Holes and Converging Domains: Changing Individual Rights Protections in National Security and Foreign Affairs*, 115 COL. L. REV. 1029, 1064 (2015).

Christopher Greenwood, a judge on the International Court of Justice, described the conceptual basis of IHRL this way:

> These human rights treaties represent a fundamental rejection of the notion that the way a state treats its own people, however bestial that treatment might be, is no business of anybody else and no business of international law.[46]

An individual in the hands of his or her government is in a vulnerable position given the respective disparities in power and authority.[47] Though this has been understood for centuries[48]—and in fact can be seen as one of the animating principles undergirding IHL protections for prisoners of war[49]—individual rights were, until mid-century, seen as national business.[50] What the UDHR and subsequent IHRL treaties have done is recognize a base set of rights that are fundamental to all people and,

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[46] Greenwood, *supra* note 11, at 497.

[47] As the court in Prosecutor v. Kunarac, Case Nos. IT-96-23-T & IT-96-23/1-T, Trial Judgment, (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001), pointed out, "Human rights law is essentially born out of the abuses of the state over its citizens and out of the need to protect the latter from state-organized or state-sponsored violence." *Id.* at ¶ 520. Recognizing this risk to individuals is what informed the drafting of the U.S. Bill of Rights, particularly—and appropriately, given this article's purposes—the amendments concerning the rights of an accused. As Thomas Jefferson wrote to a friend upon learning that the newly proposed Constitution did not contain a bill of rights, these fundamental liberties were "fetters against doing evil, which no honest government should decline." Thomas Jefferson to Alexander Donald, Feb. 7, 1788, cited in RICHARD BEEMAN, PLAIN HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION 342 (2009).

[48] The right to a jury in particular—enshrined in three amendments to the U.S. Constitution—played a particular role in protected individuals against the specter of government overreach. *See* AKHIL REED AMAR, THE BILL OF RIGHTS 84 (1998).

[49] *Cf.* Sandra Krahenmann, *Protection of Prisoners of War*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 359-77 (Dieter Fleck ed., 3d ed. 2013) (explaining the obligations on a State to safeguard prisoners of war and treat them humanely, contrasting the rules with historical examples of failures to protect prisoners or treat them humanely).

[50] *See* Henkin, *supra* note 10, at 32 (discussing this as a relic of state sovereignty). International law arose in order to govern the interactions between the independent members of the international community of States; the very idea that there may be binding customs of the law of nations is predicated upon the existence and recognition of State sovereignty and the legal equality between such sovereign States. *See* Amos S. Hershey, *The History of International Relations During Antiquity and the Middle Ages*, 5 AM. J. INT'L L. 901, 901 (1911).

through the adoption of the treaties themselves, made those rights affirmative obligations on States enforceable at the international level.[51]

The third principle is that IHRL is primarily prohibitive in nature, in that it bars States from acting to deprive individuals of certain fundamental freedoms. For what this article identifies as "fundamental rights"—life, liberty, property[52]—IHRL is not a source, but a guarantor.[53] It is a set of obligations placed on States to limit their sovereignty in order to protect particular fundamental rights that human beings inherently possess as a consequence of being human.[54] A State possesses these obligations regardless of whether it has consented to be bound by a particular IHRL instrument;[55] the source of the right is the dignity of the human person.[56] Fundamental rights are the irreducible core of IHRL protections. While many IHRL instruments contain provisions allowing States to assert sovereign power in times of emergency, there remains a core set of rights that are not disposable.[57] Relevant to this article's ultimate discussion of detention, these fundamental rights include the prohibition on arbitrary deprivation of life and on arbitrary detention, among others.[58] It is not a coincidence that these rights are present and protected under both IHRL and IHL, though the protections have different interpretations, depending on the legal regime at play.[59] These three principles inform the content

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[51] *See* Henkin, *supra* note 10, at 41-43 (discussing some of IHRL's enforcement mechanisms).

[52] These are the rights identified as fundamental during the debates on the ratification of the Fourteenth Amendment—rights which existed "anterior to and independently of all laws and Constitutions." *See* Douglas G. Smith, *Citizenship and the Fourteenth Amendment*, 34 SAN DIEGO L. REV. 681, 684 n.7 (1997) (quoting Representative William Lawrence). This particular formulation of "absolute," or as used in this article, "fundamental," rights was widely accepted by Enlightenment jurists, particularly by John Locke and William Blackstone, both of whom were hugely influential on human rights theorists. *See id.* at 700-01.

[53] *See* Radin, *supra* note 41, at 219. Professor Radin pointed out, "Law originally does not create rights. It is merely the summation of a great number of miscellaneous rights that were created by life in the community." *Id.*

[54] International Committee of the Red Cross, *International Humanitarian Law and International Human Rights Law: Similarities and Differences* (01/2003).

[55] *See* Henkin, *supra* note 10, at 38 (explaining how IHRL norms bind States even without their consent).

[56] *See* ICCPR, *supra* note 8, pmbl.

[57] *See* International Committee of the Red Cross, *International Humanitarian Law and International Human Rights Law: Similarities and Differences* (Jan. 2003). These are the rights found in Common Article 3 of the Geneva Conventions and Additional Protocol II, discussed *infra* Section II.B.2.a.

[58] *See* ICRC STUDY VOL. I, *supra* note 13, at 344.

[59] *See generally supra* note 40.

and contours of IHRL. International Humanitarian Law share some similarities and several distinct differences.

International Humanitarian Law, also known as the law of war (LOW) or the law of armed conflict (LOAC), is the legal framework applicable to situations of armed conflict and occupation.[60] As a set of rules governing both the act of going to war and the conduct of war itself, it aims to provide guidance for the military in order to mitigate the brutality of armed conflict.[61] Several guiding principles are immediately apparent. The first of which is also the first difference between IHL and the human rights regime: Because IHL's trigger is armed conflict, it applies in a narrower and more specialized set of circumstances than IHRL.[62] Thus, IHL is far older than IHRL; codes of law designed to govern the conduct of Soldiers on the battlefield go back millennia.[63] As Henry Sumner Maine wryly observed in his seminal Cambridge lecture series on international law, "Man has never been so ferocious or so stupid as to submit to such an evil as war without some effort to prevent it."[64] Up until the latter part of the 19th century, codes of conduct in war were largely *ad hoc*, taking the form of military regulations dictated by a sovereign to its own forces, such as the Lieber Code, [65] or short-term bilateral agreements between belligerents, such as the agreement between General George Washington and various British commanders concerning the treatment of prisoners captured during the Revolutionary War.[66] In the period following the

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[60] *See* Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49 (1994) for a thorough accounting of the development of IHL—and a decided criticism thereof.

[61] *See* Greenwood, *supra* note 11, at 496; *Cf.* YORAM DINSTEIN, NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL LAW 3 (2014).

[62] This is known as the *lex specialis* principle, and will be further developed *infra* Section II.A.2.

[63] *See generally* Major Scott R. Morris, *The Laws of War: Rules for Warriors by Warriors*, ARMY LAW., DEC. 1997, at 4, for fascinating accounts of the historical development of the laws of war; GILLESPIE, *supra* note 5.

[64] *See* MAINE, *supra* note 2, at 11, quoted in Hershey, *supra* note 50, at 901 n.1.

[65] E. D. Townsend, Assistant Adjutant General, *General Orders No. 100, art. 14, Instructions for the Government of Armies of the United States in the Field*, Apr. 24, 1863, *reprinted in* INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (Government Printing Office, 1898) [hereinafter Lieber Code]. The Lieber Code, officially titled General Order 100, was drafted by Dr. Francis Lieber on the order of President Lincoln when it became apparent that a code of regulations explaining the state of the law of war and governing the Union Army's conduct during hostilities was necessary. *See* JOHN FABIEN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY (2012).

[66] *See* SIVAKUMARAN, *supra* note 31, at 23-29 (discussing the drafting of the Lieber Code as well as bilateral agreements executed between belligerents during the Revolutionary

United States' Civil War, a movement arose to regulate armed conflict at the international level through a series of conferences and treaties designed to diminish the effects of war on the victims of the hostilities, beginning with the 1864 Geneva Convention convened by the Swiss Federal Council.[67] While earlier bilateral agreements and diplomatic conventions had recognized the need to regulate NIACs,[68] the movement toward a more systematic regulation of NIACs began in earnest with the 1949 Geneva Conventions and the two 1977 Additional Protocols.[69] In addition to treaty law, customary international law[70] informs some of the basic principles of IHL.

This leads to IHL's second principle and second point of divergence from IHRL, the principle of equality of obligation.[71] Unlike IHRL, IHL is not solely concerned with protecting the individual from the overwhelming authority of the State.[72] International Humanitarian Law is

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War and the Columbian war of independence in 1820). One example of an *ad hoc* agreement concerning the treatment of prisoners of war is the series of letters exchanged between General George Washington and various commanders of the British Forces during the Revolutionary War. For example, on August 11, 1775, General Washington wrote to Lieutenant General Thomas Gage: "My duty now makes it necessary to apprize you, that for the future I shall regulate my Conduct toward those Gentlemen, who are or may be in our Possession, exactly by the Rule you shall observe towards those of ours, now in your Custody." LEWIS & MEWHA, *supra* note 4, at 2. In 1776, the Commander-in-Chief of the British forces, Sir James Robertson, wrote back urging both sides to agree to "prevent or punish any violations of the rules of war, each within the sphere of our command." *See* SIVAKUMARAN, *supra* note 31, at 25. This exchange demonstrates the principle of reciprocity at play at the time. *See generally* WITT, *supra* note 65 for a deep dive into the drafting of the Lieber Code, its influences, and its ultimate impact on IHL. *See* Mary Ellen O'Connell, *Historical Development and Legal Basis*, THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 15-26 (Dieter Fleck ed., 3d ed. 2013) for a lengthy discussion of the development of IHL from the Lieber Code to the modern era.

[67] *See* SIVAKUMARAN, *supra* note 31, at 30-53, 85.

[68] *See id.* at 27, 40-53.

[69] *See* Bennoune, *supra* note 28, at 199.

[70] Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation. *See* I RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES 24, § 102(2) (1987).

[71] This principle is perhaps the most important foundation of IHL. Its earliest appearance came in the writings of Hugo Grotius and Alberico Gentili, where they insisted that "the obligation to comply with some rules of warfare must be divorced from the justness of the war's cause, or, in other words, that the justness of the resort to force under jus ad bellum was immaterial to the just prosecution of the war under jus in bello." *See* Gabriella Blum, *On A Differential Law of War*, 52 HARV. INT'L L.J. 163, 168 (2011).

[72] This is, of course, a concern of IHL, as evidenced by the language in the Fourth Geneva Convention, which serves to regulate interactions between Parties to the Conflict (States) and individuals who find themselves "in the hands of a Party to the conflict." *See* Geneva

intended to govern relationships between co-belligerents while IHRL is designed to control a State's behavior with respect to those under its control.[73] This differing obligations on the actors—States or States/Co-Belligerents—is evidenced when one considers who is bound under each regime. Where IHRL's obligations are binding only on States, IHL's rules and principles are equally applicable to all parties to the conflict, whether they be State or non-State actors.[74]

There are four key norms in IHL that function as interlinked and reinforcing parts of a larger system: military necessity, humanity, proportionality, and distinction.[75] The Department of Defense Law of War Manual explains in brief how these norms interact to form a coherent whole:

> *Military necessity* justifies certain actions necessary to defeat the enemy as quickly and efficiently as possible. Conversely, *humanity* forbids actions unnecessary to achieve that object. *Proportionality* requires that even when actions may be justified by *military necessity*, such actions not be unreasonable or excessive. *Distinction* underpins the parties' responsibility to comport their behavior with *military necessity*, *humanity*, and *proportionality* by requiring parties to a conflict to apply certain legal categories, principally the distinction between the armed forces and the civilian population.[76]

Some of these norms, particularly those to do with distinction, evince the same concerns for the rights of the individual under the control of a State as IHRL. The key difference between the two regimes is primarily in the interpretation of State obligations under each framework. Take the

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Convention Relative to the Protection of Civilian Persons in Time of War art. 4, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

[73] *See* Jens David Ohlin, *The Duty to Capture*, 97 MINN. L. REV. 1268, 1273 (2013).

[74] *See* Ohlin, *supra* note 73, at 1332. The practical effect of this equality of obligation is that an adversary's violation of IHL does not justify the other side also disregarding the law. *See* O'Connell, *supra* note 66, at 12. The principle of equality of obligation is one of the foundational principles of IHL. *Id.*

[75] *See* U.S. DEP'T OF DEFENSE, LAW OF WAR MANUAL 51 (2015) [hereinafter DOD LOW MANUAL]. Distinction, or requiring that armies direct hostilities towards belligerents rather than civilian populations, was one of the first principles recognized by early writers on the law of war. *See* O'Connell, *supra* note 66, at 19-20 (describing the work of John-Jacques Rosseau in the mid-1700s as articulating this key norm).

[76] DOD LOW MANUAL, *supra* note 75, at 51-52.

non-derogable prohibition on arbitrary deprivation of life as an example, which under IHRL is the "supreme right on which all others are built."[77] This prohibition exists in IHL, but it is translated differently. Under IHL, the killing of combatants by the military arm of the State is privileged,[78] and even the killing of civilians under limited circumstances may be consonant with IHL's key norms.[79] Using IHRL's language, under the circumstances of IHL, these killings are not arbitrary.[80] This interpretive difference takes into account the relative power differentials of the parties. Under normal circumstances, a State may not bring the full weight of its authority down onto an individual absent specific protections for that individual;[81] under the abnormal circumstances of an armed conflict where the co-belligerents are presumed to exist on a plane of legal equality, killing in order to achieve victory over the armed forces of a State is privileged so long as it does not violate some other portion of IHL such as the requirement to protect those *hors de combat*.[82] Thus, unlike IHRL, IHL's concern for human dignity is tempered by the counterweight of military necessity.[83] It is important to note that the concept of necessity in

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[77] *See* SIVAKUMARAN, *supra* note 31, at 85.

[78] *Id.* This is known as combatant immunity. *See* DOD LOW MANUAL, *supra* note 75, at 108. This springs from the recognition—a conceptual revolution in law of war thinking—that the purpose of using force is to overcome an enemy State, and this force may be directed against combatants as the State's military representatives. *See* O'Connell, *supra* note 66, at 19-20.

[79] *See* SIVAKUMARAN, *supra* note 31, at 85.

[80] *See* David S. Goddard, *Applying the European Convention on Human Rights to the Use of Physical Force: Al-Saadoon*, 91 INT'L L. STUD. 402, 422 (2015); *Cf.* Advisory Opinion, The Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, para. 25 (July 8)

> Thus[,] whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

Advisory Opinion, para. 25.

[81] These protections are what render a particular deprivation of life non-arbitrary. Professor Bennoune notes that "much then turns on the international law meaning of the concept of 'arbitrary.'" Bennoune, *supra* note 28, at 208. One example of a non-arbitrary, peacetime deprivation of life would be the imposition of the death penalty following a fair judicial proceeding. *Id.*

[82] DOD LOW MANUAL, *supra* note 75, at 109-10. This combatant immunity arises out of a State's sovereignty, because only a State has the right to wage war. *Id.*

[83] Professor Naz Modirzadeh, Director of the Harvard Law School Program on International Law and Armed Conflict, calls this an "often brutal balance between military necessity and humanity." Naz K. Modirzadeh, *Folk International Law: 9/11 Lawyering*

IHL is not the same as the concept of necessity under IHRL. Under IHRL, necessity is wedded to the concept of self-defense, so that the use of lethal force by State actors is only permissible when "absolutely necessary."[84] Under IHL, military necessity is the principle that justifies the use of all measures—consistent with the laws of war—needed to defeat the enemy as quickly and efficiently as possible.[85] These differences are rooted in the relationships at issue under each rubric—State vs. Individual and State vs. Co-Belligerent.

The first and second principles of IHL illustrate some of its points of divergence from IHRL. The third principle of IHL, however, is where this legal corpus most resembles IHRL. Like IHRL, IHL is a largely restrictive schema of rules and principles that aims to preserve and protect human dignity to the greatest extent possible during armed conflict.[86] As Sir Hersch Lauterpacht, who later went on to be a judge at the International Court of Justice, once wrote,

> [A] very considerable part of the laws of war is an attempt to mitigate the unscrupulousness and brutality of force by such considerations of humanity, morality, and fairness as are possible and practicable in a relationship in which the

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and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance, 5 HARV. NAT'L SEC. J. 225, 228 (2014).

[84] This was part of the rationale for the decision in McCann v. United Kingdom, 21 Eur. Ct. H.R. (ser. A) (1995). In that case, the European Court of Human Rights found a violation of Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms when U.K. soldiers used lethal force against three terrorism suspects in Gibralter when it was feasible to have detained them instead. Notably, the Rules of Engagement the soldiers were operating under said the following:

> You and your men may only open fire against a person if you or they have reasonable grounds for believing that he/she is currently committing, or is about to commit, an action which is likely to endanger your or their lives, or the life of any other person, and if there is no other way to prevent this.

Id. ¶ 97.

[85] *See In re List, 11 War Crimes Comm'n, U.N. Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* 759, 1253-54 (1950) ("Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money.").

[86] *See* SIVAKUMARAN, *supra* note 31, at 86.

> triumph of physical violence is the supreme object and virtue.[87]

Ultimately, both IHRL and IHL are primarily regulatory regimes aimed squarely at restraining State sovereignty. A review of the structure of IHL illustrates this commonality. International Humanitarian Law encompasses two related concepts: *jus ad bellum*, which is the law concerning the resort to a use of force—i.e., pre-conflict, and *jus in bello*, which is the law of concerning the conduct of war—i.e., conflict.[88] Modern *jus ad bellum* is often viewed as a treaty-based source of positive authority to wage war, in that the use of force is only lawful in one of three circumstances: an authorization from the UN Security Council; a State's inherent right of self-defense; or consent from a State to conduct military operations within its territory.[89] A better way to look at it is as an example of the restriction of State sovereignty[90] through State consent. Historically, States understood that they had a right to wage war that arises out of their sovereignty,[91] a right voluntarily restricted through submission

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[87] Hersch Lauterpacht, *Preface to the Fifth Edition* of INTERNATIONAL LAW: A TREATISE BY L. OPPENHEIM (H. Lauterpacht ed., 5th ed. 1935), quoted in Greenwood, *supra* note 11, at 496.

[88] *See, e.g.*, WILLIAM O'BRIEN, THE CONDUCT OF JUST AND LIMITED WAR 9 (1981) (defining *jus ad bellum* as the "doctrines concerning permissible recourse to war" and *jus in bello* as "the just conduct of war"); MICHAEL WALZER, JUST AND UNJUST WARS 21 (1977) ("Medieval writers made the difference a matter of prepositions, distinguishing *jus ad bellum*, the justice of war, from *jus in bello*, justice in war."), cited in DOD LOW MANUAL, *supra* note 75, at 39 n.179.

[89] *See* DOD LOW MANUAL, *supra* note 75, at 45. There may also be a use-of-force exception which would allow for State intervention for humanitarian purposes, but that is beyond the scope of this article. *See id.* at 45-46.

[90] The concept of sovereignty as this paper envisions it goes back to the Treaty of Westphalia and the rise of the modern nation-state. Westphalian sovereignty holds that within its boundaries, the state is master of its own affairs, exercising its inherent authority as a State. *See* Michael J. Kelly, *Pulling at the Threads of Westphalia: "Involuntary Sovereignty Waiver"—Revolutionary International Legal Theory or Return to Rule by the Great Powers?*, 10 UCLA J. INT'L L. & FOREIGN AFF. 361, 364 (2005)

[91] *See, e.g.*, Commander Roger D. Scott, *Getting Back to the Real United Nations: Global Peace Norms and Creeping Intervention*, 154 MIL. L. REV. 27, 33 (1997) ("The right to conduct war, without regard to justice or distinctions between aggression and defense, was seen as an attribute of sovereignty."). The idea that States-as-sovereigns had the right to make war is an old one, reflected in the writings of early commentators such as Hugo Grotius and Emer de Vattel. *See* EMER DE VATTEL, THE LAW OF NATIONS 235 (Joseph Chitty ed., 1834) (1758) ("It is the sovereign power alone, therefore, which has the right to make war."); HUGO GROTIUS, ON THE LAW OF WAR AND PEACE 97 (Stephen C. Neff ed., 2012) (1625) ("War may be waged only under the authority of him who holds the sovereign power in the state."). William Blackstone explained that individuals gave up their own natural right to make war to a sovereign once they entered society. 1 WILLIAM

to the UN charter and related treaties.[92] The whole of a State's sovereign power to go to war[93] was restricted via these instruments, leaving only the right of self-defense untouched.[94]

Similarly, with respect to the conduct of war under *jus in bello*, IHL is "prohibitive law" in the sense that is lays down a series of rules prohibiting certain "manifestations of force."[95] Prior to the rise of international treaties addressing *jus in bello*, the only limitation on a State's conduct of

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BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *249. In his commentaries on the Constitution, Justice Joseph Story called the war power "the highest sovereign prerogative." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 570, at 410-11 (1987) (1833). State practice confirms the general recognition of this right. "Prior to World War I, States "regularly asserted their sovereign right to wage war, even if at times they couched their claims in the language of 'self-preservation and the related tangle of doctrine concerning necessity and intervention.'" Heinz Klug, *The Rule of Law, War, or Terror*, 2003 WIS. L. REV. 365, 370 (2003) (quoting IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 48 (1963)).

[92] The first attempt at limiting a State's sovereign authority to go to war came with 1928's Kellogg-Briand Pact, which outlawed "aggressive" war. *See* Robert J. Delahunty, *Paper Charter: Self-Defense and the Failure of the United Nations Collective Security System*, 56 CATH. U. L. REV. 871, 897 (2007) (adding that the Kellogg-Briand pact and the Nuremburg Tribunal were the two most important sources of pre-Charter limitations on a State's right to make war). The UN Charter supplemented the earlier Kellogg-Briand pact by restricting the ability of a State to wage war to one of several discrete circumstances. *See* Detlev Vagts, *International Law and the Use of Force by National Liberation Movements*, 84 AM. J. INT'L L. 981, 983 (1990) (explaining that the right to wage war was abolished by the UN Charter and force is prohibited except in self-defense); *see also* Matthew Lippman, *The History, Development, and Decline of Crimes Against Peace*, 36 GEO. WASH. INT'L L. REV. 957, 957 (2004) (explaining the post-World War I movement to restrict State sovereignty arose out of the earlier "Just War" tradition).

[93] As Professor Michael Ramsay notes, there were some conceptual limitations on the sovereign's power to wage war even prior to the restrictions imposed by international instruments. For a war to be "just" it had to be undertaken for a just cause and under proper—read: sovereign—authority. Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1572 (2002) ("By the late Middle Ages a war waged on the authority of the prince. . . was presumed to be a 'just war.'"). This theory lost some cache during the 18th and 19th centuries, when war itself was presumed to be legally neutral, and only the conduct of war subject to restriction. *See* Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus Ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE J. INT'L L. 47, 63 (2009).

[94] U.N. Charter art. 51. Self-defense as a concept predates even the rise of the law of nations; it was seen as springing from the medieval conception of natural law. *See* STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS 60-61 (2005).

[95] *See* Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerillas, and Saboteurs*, 28 BRIT. YEARBOOK OF INT'L L. 323, 324 (1951) ("The law of war is, in the descriptive words of a war crimes tribunal, 'prohibitive law' in the sense that it forbids rather than authorizes certain manifestations of force.") (quoting United States v. List, *et al.* (The Hostage Case), XI TRIALS OF WAR CRIMINALS BEFORE THE NMT 1252)).

hostilities were concepts of chivalry and humanity,[96] reflected in the provisions of the Lieber Code,[97] which is generally understood to have embodied the customary law of war at the time of its drafting.[98] States began consenting to general, treaty-based limitations on the conduct of hostilities in the mid-19th century; additional limitations have further restricted State action in the conduct of hostilities over the last 150 years via treaties and the development of customary international law.[99] While some have argued that IHL instruments, such as the Geneva Conventions, must specifically authorize a particular action for a State to be able to take it, this argument gets it "exactly backwards."[100] Treaty-based *jus in bello* is not a source of positive authority to take action; rather, it restricts a State's inherent authority as a sovereign actor in the conduct of hostilities.[101] This concept of inherent authority to conduct hostilities is closely related to the concept of military necessity; once a State finds itself in an armed conflict, it has the inherent authority to take whatever actions

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[96] *See* O'Connell, *supra* note 66, at 1-41. Vattel argued in his treatise The Law of Nations that the natural law principle of necessity, which allowed all actions required for the defeat of the enemy and forbidding anything beyond that, was insufficient to govern conduct during hostilities. Nations must come together to create a code of conduct that would apply generally to both sides and would be independent of any consideration of the principle of necessity. *See* NEFF, *supra* note 94, at 62-65. This demonstrates an Enlightenment understanding that *jus in bello* was limited only by natural law principles absent restrictions imposed by treaty obligations. *Id.* at 131-40 (discussing the various theorists who espoused these views, such as Hobbes and Pufendorf).

[97] *See* Lieber Code, *supra* note 65, art. 30 ("the law of war imposes many limitations and restrictions on principles of justice, faith, and honor"). The Lieber Code, while generally understood to be incredibly important in the overall development of IHL, also expressed an exalted view of military necessity that allowed for such acts as the starvation of belligerents. *See* SIVAKUMARAN, *supra* note 31, at 23.

[98] *See* Louise Doswald-Beck & Sylvain Vité, *International Humanitarian Law and Human Rights Law*, INT'L REV. OF THE RED CROSS, No. 293, 94-113 (1993). These were seen primarily as moral rather than legal limitations—as Lieber himself announced: "The more vigorously wars are pursued, the better it is for humanity." WITT, *supra* note 65, at 12; Captain James G. Garner, *General Order 100 Revisited*, 27 MIL. L. REV. 1, 8 (1965) ("Custom, not convention, contained the rules at the time Lieber was writing.").

[99] *See* O'Connell, *supra* note 66, at 1-41.

[100] Gherebi v. Obama, 609 F. Supp. 2d 43, 65 (D.D.C. 2009) (rejecting appellant's argument that his detention in a NIAC was impermissible because the Geneva Conventions did not explicitly provide a source of authority to detain in NIACs).

[101] *Cf.* Baxter, *supra* note 95, at 324. The main point here is that States have certain authorities to act inherent in the conduct of war—such as using lethal force, building operating bases, establishing supply lines, conducting intelligence gathering activities, and detention—that are available to the State unless those authorities have been restricted by IHL. The question of whether a State's actions are authorized by its own domestic law is a separate and parallel inquiry.

"are indispensable for securing the ends of war,"[102] as long as its authority has not been restricted by the rules and principles of IHL.[103] In this way, IHL and IHRL are similarly situated in that neither are sources of positive authority or individual rights though both act to protect certain fundamental rights through the restriction of State action.

Having considered the basic principles of IHRL and IHL and how those principles illustrate their similarities and differences, it is appropriate to consider how these two regimes interact in the context of an armed conflict.

2. Coordinating Principles—When Does Each Regime Apply?

The application of IHRL to armed conflicts is of relatively recent vintage.[104] The classical position—and the one for which the United States until very recently advocated—was the Displacement view, wherein IHL displaced IHRL entirely during times of armed conflict.[105] The idea was that IHRL was the "law of peace" and IHL was the "law of war," and the two operated in mutual exclusive spheres.[106] Under the Displacement view, IHRL cannot be applied in a context where a normal peacetime relationship between an individual and her State is disrupted by the mechanics of war.[107] During an ongoing war, IHL is the only

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[102] *See* Lieber Code, *supra* note 65, art. 14.

[103] Enlightenment theorists like Thomas Hobbes argued that war as a state could only be governed by natural law, and the sole natural law limitation was the principle of necessity. *See* NEFF, *supra* note 94, at 148. The nineteenth century understanding was that treaty-based codes of conduct would displace the principle of necessity with a list of specific rules. *See id.* at 186. This was the understanding that led to the Hague and Geneva Conventions. *Id.* at 186-91. As will be discussed below, IHRL plays a role in further restricting State sovereignty in the face of non-derogable human rights, such as prohibited the arbitrary deprivation of life.

[104] *See* SIVAKUMARAN, *supra* note 31, at 84.

[105] This view was once the prevailing one in the international community. *See* Modirzadeh, *supra* note 14, at 352. The George W. Bush Administration is generally held to have strongly advocated for the displacement view, while the Barack Obama Administration took a more moderate position. *See* Ashika Singh, *The United States, The Torture Convention, and Lex Specialis: The Quest for a Coherent Approach to the CAT in Armed Conflict*, 47 COLUM. HUMAN RIGHTS L. REV. 134, 134-47 (2016) (explaining the historical context for the shifting U.S. position on the application of IHRL, specifically the Convention Against Torture, to armed conflict).

[106] *See id.*

[107] *See id.* at 352.

framework regulating an individual's relationship to belligerent actors until hostilities end and peace is restored.[108]

In what has become the majority viewpoint among international law scholars and in the international court system, the Displacement view has been rejected.[109] In contrast, the doctrine of convergence holds that IHRL continues to apply even in times of armed conflict. Under the maxim *lex specialis derogat legi generali*,[110] convergence holds that IHRL may be limited by the application of IHL, but IHRL as a whole continues to apply unless it conflicts with a more specific rule from IHL.[111] A State is thus bound by all its IHRL treaty obligations during armed conflict, such as the United Nations Convention Against Torture (UNCAT) or the ICCPR, "except insofar as particular obligations are altered or limited by the function of IHL."[112] Even in cases where the IHL rule prevails, however, IHRL does not fall away entirely. It may be used as interpretive guidance for IHL rules that are unclear, and, in cases where IHL contains no guidance, IHRL operates to provide the rule.[113] As Professor Ohlin has argued, the application of one body of law over another is chiefly governed by the role a State is playing: Is the State acting as a sovereign, in which case the norms of IHRL should apply, or is the State acting as a belligerent,

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[108] *See id.* at 353-54.

[109] *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, para. 106 ("the protection offered by humans rights conventions does not cease in the case of armed conflict") [hereinafter Wall Opinion].

[110] The basic point of the principle is to provide a basis for resolving any conflicts between two rules that deal with the same subject matter by holding that, when two rules regulating the same subject-matter conflict, priority is to be given to that which is more specific. *See* Silvia Borelli, *The (Mis)-Use of General Principles of Law: Lex Specialis and the Relationship Between International Human Rights Law and the Laws of Armed Conflict*, *in* 46 IUS GENTIUM 265, 289 (Laura Pienschi ed., 2015).

[111] *See* Modirzadeh, *supra* note 14, at 353-54. This appears to command a majority view in the literature based on the International Court of Justice's (ICJ) reference to the principle of *lex specialis* in two advisory opinions. *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, 177-78 (July 9); Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 240 (July 8). As several commentators have argued, however, the ICJ may not have intended to use the term *lex specialis* in that sense and that the maxim is the inappropriate conception for the interaction between the two regimes. *See* Borelli, *supra* note 110, at 289. Professor Sivakumarian argues that the entire corpus of IHL and IHRL are not *lex specialis* or *legi generali*; instead, the analysis must come down to the individual rule being applied. If that rule is more specific, it should apply, regardless of which body of law it is taken from. SIVAKUMARAN, *supra* note 31, at 91-92.

[112] *See* Modirzadeh, *supra* note 14, 353-54.

[113] *See* SIVAKUMARAN, *supra* note 31, at 87-90.

in which the State's conduct should be governed by IHL?[114] When in an armed conflict, and not merely an internal disturbance, a State is acting as a belligerent—thus, the State's detention regime will be regulated by IHL, unless IHL is silent or its guidance inadequate. As Professor Dinstein has written:

> When the [IHL] has gaps, it can only profit from their being filled by human rights law. . . . Yet the existence of a gap must be determined not only on the basis of treaty law (e.g., AP/II) but also in light of customary international law. . . . Once customary rules solidify, [IHL] no longer leaves the gate open for the application of inconsistent general norms of human rights law.[115]

The key question for detention is thus whether IHL, after considering all aspects of IHL in light of a State's inherent authority to conduct armed conflict, is silent or inadequate to a degree that it must be supplemented by IHRL in NIACs. More basically, one must determine whether IHL can answer the question of whether a detention is or is not arbitrary and, as will be discussed below, it can.

B. International Law and Non-International Armed Conflicts

This section aims to explain the laws from each applicable regime, IHL and IHRL, of relevance to any discussion of the authority to detain in NIACs. First, however, it is necessary to scope the dimensions of the problem by defining the conditions that separate peacetime from armed conflict, and IACs from NIACs.

1. Definitions

According to CA3 of the Geneva Conventions, a NIAC is an armed conflict "not of an international character."[116] Understanding what this

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[114] *See* Ohlin, *supra* note 73, at 1332-42.

[115] *See* DINSTEIN, *supra* note 61, at 229.

[116] *See* GC III, *supra* note 26, art. 3. There are at least three different types of NIACs—armed conflict between two non-state actors (NSA) in a particular State's territory; armed conflict between a State and an NSA; or armed conflict between a State and an NSA with a third State's intervention. *See* Els Debuf, *Expert Meeting on Procedural Safeguards for*

means is foundational to any analysis, but this phrase is undefined in the Geneva Conventions,[117] in large part because of State concerns about potential IHL regulation of entirely internal matters that would otherwise have been subject to State sovereignty.[118] Scholars have acknowledged that parsing this term can be extraordinarily difficult,[119] not in the least because it took until the *Prosecutor v. Tadić* 1995 decision in the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) to get a working definition of "armed conflict." *Tadić* defined it thusly:

Security Detention in Noninternational Armed Conflict, 91 INT'L REVIEW OF THE RED CROSS 867 (2009), https://www.icrc.org/eng/assets/files/other/irrc-876-expert-meeting.pdf [hereinafter *Chatham House*].

[117] The Commentaries on the Geneva Conventions suggest that leaving this term vague was deliberate on the part of the drafters.

> What is meant by "armed conflict not of an international character"? That was the burning question which arose again and again at the Diplomatic Conference. The expression was so general, so vague, that many of the delegations feared that it might be taken to cover any act committed by force of arms—any form of anarchy, rebellion, or even plain banditry. For example, if a handful of individuals were to rise in rebellion against the State and attack a police station, would that suffice to bring into being an armed conflict within the meaning of the Article? In order to reply to questions of this sort, it was suggested that the term "conflict" should be defined or, which would come to the same thing, that a certain number of conditions for the application of the Convention should be enumerated. The idea was finally abandoned—wisely, we think.

See INT'L COMM. OF THE RED CROSS, COMMENTARY: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD *in* COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 49 (Jean S. Pictet ed., unknown trans. 1952).

[118] The Diplomatic Conference of 1949 exhaustively discussed the issue of NIACs, and while several States—including the United Kingdom—vociferously objected to the application of any IHL regulation to NIACs, ultimately, the vote to draft CA3 was nearly unanimous. *See* SIVAKUMARAN, *supra* note 31, at 40-41. The argument then became how to define a NIAC, and ultimately that question was unresolved as States could not agree on the appropriate level of belligerency, though discussions at the time indicate "the level of violence at issue was akin to the notion of an insurgency." *Id.* at 41. Though the terminology is somewhat opaque, a "rebellion," which would not fall within the ambit of IHL, is typically a relatively short-lived insurrection against the authority of the State, while an insurgency is a rebellion that has risen to the level of "sustained conflict" that is beyond the abilities of the State's police force to address. *See* ANTHONY CULLEN, THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW 9 (2010).

[119] *See* SIVAKUMARAN, *supra* note 31, at 154.

> [A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.[120]

A NIAC sits somewhere between a purely internal conflict, where only domestic law applies,[121] and a fully international armed conflict, between two "High Contracting Parties," that triggers the full panoply of IHL rules and principles.[122] The *Tadic* definition focuses on two key criteria to distinguish a NIAC from internal disturbances like "banditry, unorganized or short-lived insurrection, or terrorism": the organization of the parties and the level of hostilities.[123] These terms have been subject to further refinement in the years since the decision was handed down,[124] but the definition laid out by the court has been widely accepted.[125] Importantly, commentators have suggested that the key criterion separating NIACs from purely internal conflicts is "recognition"[126] that the armed revolt has reached a level where the State is unable to "maintain public order and exercise authority,"[127] affecting the *de jure* government or a third party State's interests to such a degree that relations must be established with the insurgent group.[128] To recall Professor Ohlin's point in this context, a State's use of its armed forces rather than its law enforcement elements indicates that it has recognized the nature of the threat to its security and has stepped into the role of a belligerent rather

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120 Prosecutor v. Tadić, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

121 *See* DINSTEIN, *supra* note 61, at 23.

122 *See id.*

123 Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 562 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997).

124 For example, Prosecutor v. Boskoski, Case No. IT-04-82-T, Judgment, ¶ 177 (Int'l Crim. Trib. for the Former Yugoslavia Jul. 10, 2008), considered what factors should be used to assess the intensity of the conflict, including the seriousness of attacks, the spread of clashes over territory and over a period of time, and any increase in the number of government forces. *Id.* Prosecutor v. Dordevic, Case No. IT-04-82-T, Judgment, ¶ 1526 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 23, 2011), outlined the factors relevant to an assessment of an armed group's organization, including the presence of a command structure, organized operations, logistics, discipline and the ability to implement CA3, and the ability to speak with one voice. *Id.*

125 *See* SIVAKUMARAN, *supra* note 31, at 166.

126 Recognition is an indication that the recognizing State regards the insurgents as "legal contestents, and not as mere lawbreakers." HERSCH LAUTERPACT, RECOGNITION IN INTERNATIONAL LAW 270 (1947).

127 ERIK CASTREN, CIVIL WAR 212 (1966).

128 *See* CULLEN, *supra* note 118, at 11.

than a sovereign.[129] Any violence below this threshold would be classified as an internal disturbance outside the scope of IHL entirely.[130]

What separates a NIAC from an IAC is the identity of the parties to the conflict. This is the sole measure for determining whether an IAC is occurring or has occurred. Unlike a NIAC, there is no need to assess any of the factors listed in *Tadic* or subsequent cases. For an IAC, an armed conflict exists "whenever there is resort to armed force between States."[131] In a NIAC, by contrast, at least one of the parties to the conflict is a non-State actor.[132] The bulk of the historical development of IHL has surrounded IACs, but its essential principles are likewise relevant to NIACs: basic human dignity must be respected in order to mitigate the horrors of war for the victims of armed conflict.[133] To that end, a NIAC triggers CA3 of the Geneva Conventions and Additional Protocol II (AP II), which may be understood as essential baseline protections, though the scope of their application is not precisely equivalent.[134] The application of these two instruments to security detentions in NIACs will be further explored below. First, it is useful to analyze what is meant by the term "security detention."

There are three typical types of detentions that can occur during armed conflicts: status-based security detention; conduct-based security detention; or criminal detention. It is helpful to first define what is meant by "security detention." There is no official definition in existing international law instruments,[135] a generally agreed upon definition is an administrative measure taken to deprive an individual of his or her liberty,

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[129] *See* Ohlin, *supra* note 73, at 1332-42.

[130] *See* DINSTEIN, *supra* note 61, at 37.

[131] Prosecutor v. Tadic, Case No. IT-94-1-A, ¶ 70, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (Int'l Crim. Trib. for the Former Yugoslavia 2 Oct. 1995). This definition is also somewhat simplistic, as there are three exceptions that would allow an armed conflict that would otherwise be classified as a NIAC to be subject to the fully panoply of IHL. The first is if the State government recognizes the belligerency; the second is if the conflict is a war of national liberation; and the last is if a third State intervenes on the side of the armed group against the State. *See* SIVAKUMARAN, *supra* note 31, at 234.

[132] *See* DINSTEIN, *supra* note 61, at 50-51.

[133] *See* Dieter Fleck, *The Law of Non-International Armed Conflict*, THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 586 (Dieter Fleck ed., 3d ed. 2013).

[134] *See infra* Section II.B.2.

[135] One of the proposed terms for Additional Protocol IV (AP IV) is to incorporate the following definition, and to define what constitutes the beginning and the end of such a detention.

ordered by a State's executive branch rather than via judicial processes, for reasons of the State's security during an armed conflict.[136] As commentators have noted, security detention "is a preventive, rather than punitive, measure,"[137] taken only in "exceptional circumstances"[138] when an individual has been determined by an administrative process to represent a threat to the State.[139] Criminal detention, by contrast, is the detention via established judicial processes of a person who has broken the domestic laws of the host nation.[140] These two types of detention have distinct aims. Security detention's primary goal is to prevent an individual who has been determined to be a threat to the State during an armed conflict from engaging in future hostilities. Criminal detention's primary goals are condemnation of a bad actor and deterrence of future law breaking.[141] As Professors Robert Chesney and Jack Goldsmith have pointed out, the fundamental differences between these two types of detention lie in their triggering criteria and in their procedural safeguards, with criminal detention stricter on both than security detention.[142] These differences come from the legal frameworks applicable to each, which will be further developed below.

Security detention may be further broken down into two types: detention based on an individual's status and detention based on an individual's conduct. International Humanitarian Law traditionally prioritizes its protections as status-based over conduct-based detentions, as evidenced by the treatment of such detentions under IACs.[143] Under the Third Geneva Convention, for example, the definition of Prisoners-of-War (POW) is largely status-driven, hinging security detentions on such

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136 *See* Alice Debarre, *Security Detention: The Legal Uncertainties of an Underdeveloped Framework*, HUMANITY IN WAR BLOG (Apr. 1, 2015), http://humanityinwarblog.com/2015/04/01/security-detention-the-legal-uncertainties-of-an-underdeveloped-framework/; *see also Chatham House*, *supra* note 116, at 860. Requiring, as it does, the triggering condition of an armed conflict, this definition excludes the sort of administrative or preventative detention that occurs during situations that do not meet the criteria for an armed conflict. *See id.*

137 *See* Debarre, *supra* note 136.

138 *See id*.

139 *See* Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1082 (2008).

140 *See Chatham House*, *supra* note 116, at 860.

141 *See* Chesney & Goldsmith, *supra* note 139, at 1082.

142 *See id.* at 1080.

143 *See id.* at 1084; Ohlin, *supra* note 73, at 1270 ("Combatants open themselves up to the reciprocal risk of killing, and the lawfulness of killing combatants is based entirely on their status as combatants.").

criteria as membership in a State's armed forces.[144] In contrast, the Fourth Geneva Convention, while it was apparently intended to contemplate status-based detentions,[145] more explicitly allows for conduct-based detentions of otherwise protected persons. This Convention allows for detention of civilians if "the security of the Detaining Power makes it absolutely necessary,"[146] but notably, also allows for derogation from the rights and privileges accorded to otherwise protected persons "definitely suspected of or engaged in activities hostile to the security of the State."[147] The laws applicable to NIACs similarly parse differences between an individual's status and that individual's conduct by distinguishing between individuals who are members of an Organized Armed Group (OAG) and individuals directly participating in hostilities, or a civilian who has otherwise been determined to be a security threat under applicable law.[148]

The paper argues that a detention, for security purposes, during an armed conflict, of an individual determined to be a threat to the State via his or her status or conduct is an inherent power of a State involved in an armed conflict. This paper will now analyze the bodies of law applicable to NIACs and what each has to say about security detention in this context.

2. Applicable Law

As discussed above, IHL applies in narrower and more specialized circumstances than IHRL.[149] There are three components of IHL that are relevant to detention in a NIAC: CA3; AP II; and customary international law.[150] To the extent that IHRL applies, the relevant provisions of law

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[144] *See* Chesney & Goldsmith, *supra* note 139, at 1084. As Professors Chesney and Goldsmith explain, even in the context of civilian detentions under the Fourth Geneva Convention, the commentary to the Fourth Geneva Convention assumes that such detentions will in some cases be driven by the membership of such individuals in dangerous organizations. *See id.* at 1085.

[145] The commentary to the Fourth Geneva Convention assumes that such detentions will in some cases be driven by the membership of such individuals in dangerous organizations. *See* Chesney & Goldsmith, *supra* note 139, at 1085.

[146] *See* GC IV, *supra* note 72, art. 42.

[147] *Id.* art. 5.

[148] INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 72 (2009) [hereinafter INTERPRETIVE GUIDANCE].

[149] *See supra* Section II.A.

[150] The United States is not a party to AP II but most of AP II's provisions are considered customary international law. *See* O'Connell, *supra* note 66, at 29.

come from the ICCPR and the ECHR. Each of these components will now be considered in turn.

Common Article 3 is the true baseline protection in an armed conflict, and was one of the most important provisions of the original Geneva Conventions[151] because it set out in black-letter law that a State must continue to respect the fundamental rights of the human person even during NIACs.[152] Often referred to as a "convention in miniature," it "ensures the application of the rules of humanity which are recognized as essential by civilized nations."[153] A review of the *travaux preparatoires* associated with the drafting of CA3 demonstrate that it was initially intended to have a narrower scope than it actually does in the modern era. At the time of the Diplomatic Conference, NIACs were understood to be essentially IACs in miniature, with armed forces engaged in hostilities entirely within a single State's territory.[154] This understanding has evolved and expanded beyond this original meaning to include all armed conflicts that meet the *Tadic* factors outlined above,[155] so CA3 is now viewed as a baseline set of protections that come into play once an armed conflict has been triggered.

By its terms, CA3 applies to persons detained in NIACs, as its jurisdictional paragraph explicitly demands humane treatment without adverse distinction for "[p]ersons taking no active part in the hostilities," a category that includes both members of armed forces who have laid down their arms, as well as those individuals who have been placed *hors de combat* by detention.[156] The concept of humane treatment is further fleshed out by a series of specific prohibitions on violence to life and

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[151] For an account of the drafting of CA3, see CULLEN, *supra* note 118, at 25-51.

[152] The applicability of the laws of war to what were then called "internal" conflicts was a topic of great debate following the 1864 Geneva Convention. The International Committee for the Red Cross (ICRC) initially considered its activities restricted to large-scale wars between European Powers. Beginning with the Ninth International Conference of the International Red Cross in 1912, however, the ICRC began advocating for formalized protections under IHL for victims of civil wars. Until the Diplomatic Conference of 1949, which led to the adoption of Common Article 3, these proposals were not favorably received. *See* SIVAKUMARAN, *supra* note 31, at 30-39 (discussing the various conferences and positions of the ICRC pre-1949).

[153] JEAN S. PICTET, VOL. 1 COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 47 (1958).

[154] *See* CULLEN, *supra* note 118, at 50-51.

[155] *Id.*

[156] *See* GC III, *supra* note 26, art. 3(1). This indicates that the individual detained is not necessarily a member of an armed force.

person, which includes murder, cruel treatment, and torture; hostage taking; outrages upon personal dignity; and the passing of sentences and carrying out executions without a regularly constituted court judgment.[157] Aside from these specific prohibitions, CA3 is silent about the authority, basis, conditions, or procedures for security detention in NIAC.[158] This silence was, in part, a concession to the need during a NIAC to balance the protection of the rights of the individual—a main concern for the proponents of CA3—against the rights of a State.[159] These concerns were raised again in 1977 during a period of major revision and updating of the Geneva Conventions—the drafting and adoption of an additional protocol[160] intended to expand on the protections provided by CA3.[161]

Additional Protocol II was intended to put "flesh on the bare bones" of CA3, and was the first attempt to regulate the means and methods of war during NIACs.[162] It does elaborate on the rules applicable to NIACs, but as a threshold matter, AP II applies in more narrow circumstances than does the modern conception of CA3. Article 1 of AP II sets out the material field of application for the protocol, and states that the provisions of AP II apply to all armed conflicts which take place in the territory of a High Contracting Party between its armed forces and "dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to

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157 *See id.* art. 3(1)(a)-(d).

158 *See Strengthening International Humanitarian Law Protecting Persons Deprived of Liberty in Non-International Armed Conflicts*, *Regional Consultations 2012-13, Background Paper*, INT'L. COMM. OF THE RED CROSS 8 (2013), https://www.icrc.org/eng/assets/files/2013/strengthening-legal-protection-detention-consultations-2012-2013-icrc.pdf [hereinafter *Regional Consultations*].

159 It was originally proposed that all four Geneva Conventions apply in full, even in situations of a NIAC. *See* CULLEN, *supra* note 118, at 28 (citing the draft conventions prepared at the 1948 Stockholm conference in preparation for the 1949 Diplomatic Conference which led to the adoption of the four Geneva Conventions). This was seen by many of the delegates as "excessive," with the French Delegate stating, "It was impossible to carry the protection of individuals to the point of sacrificing the rights of States." FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA 1949, VOL. 11-B, SUMMARY RECORDS OF THE JOINT COMMITTEE, 1ST MEETING, 26 April 1949, at 10.

160 Additional Protocol I applied to IACs while AP II provides additional regulation for NIACs. *See* AP II, *supra* note 26, art. 1.

161 *See* CULLEN, *supra* note 118, at 87.

162 Christopher Greenwood, *A Critique of the Additional Protocols to the Geneva Conventions of 1949*, THE CHANGING FACE OF CONFLICT AND THE EFFICACY OF INTERNATIONAL HUMANITARIAN LAW 3 (Helen Durham & Timothy McCormack eds., 1999).

implement this Protocol."[163] Additional Protocol II, then, does not apply to all NIACs, but only to those NIACs in which the parties to the conflict—OAGs[164]—sufficiently resemble a State's armed forces.[165] The required elements for an OAG[166] include: (1) responsible command; (2) control of territory; (3) sustained and concerted military operations; and (4) ability to implement the Protocol.[167] Element (4) appears to require an OAG both to control over territory and to exercise governmental authority over that territory. Article 4 of AP II requires, for example, care for children via education, medical examinations for detained persons,[168] which implies that an OAG must be able to provide those services via their effective control of a territory.

As an interpretive matter, there is some controversy over what is required for a group of individuals to be labeled an OAG. In its interpretive guidance on the concept of direct participation in hostilities, the ICRC analogizes OAGs with the armed forces of a State and states that individuals within the OAG must exert "a continuous combat function" (CCF) in order to lose civilian protections.[169] A CCF is further defined as involving the "preparation, execution, or command of acts or operations

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[163] *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), art. 1, June 8, 1977, 611 U.N.T.S. 1751*, UNITED NATIONS, https://treaties.un.org/doc/publication/unts/volume%201125/volume-1125-i-17513-english.pdf.

[164] The ICRC's interpretive guidance uses the term "organized armed group" to refer to both dissent armed forces as well as other organized armed groups. *See* INTERPRETIVE GUIDANCE, *supra* note 148, at 31.

[165] The eventual language of AP II's jurisdictional provision strongly resembles early proposals for differentiating a NIAC from an IAC, when countries like France and the United States set out proposed criteria which would have required a rebel group "to have asserted itself with enough strength and coherence to represent several of the features of a State." *See* FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA 1949, VOL. 11-B, SUMMARY RECORDS OF THE JOINT COMMITTEE, 1ST MEETING, 26 APRIL 1949, at 129, https://www.loc.gov/rr/frd/Military_Law/pdf/Dipl-Conf-1949-Final_Vol-1.pdf; *see also* CULLEN, *supra* note 118, at 89.
State armed forces, moreover, are presumed to meet the required level of organization for application of AP II. *See* SIVAKUMARAN, *supra* note 31, at 170.

[166] Organized armed groups must, *a fortiori*, be organized. Sufficient indicia of organization the presence of a command structure, organized operations, logistics, discipline and the ability to implement CA3, and the ability to speak with one voice. *See* Prosecutor v. Dordevic, Case No. IT-04-82-T, Judgment, ¶ 1526 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 23, 2011).

[167] *See* SIVAKUMARAN, *supra* note 31, at 184-92.

[168] *See* AP II, *supra* note 26, art. 1.

[169] *See* INTERPRETIVE GUIDANCE, *supra* note 148, at 20.

amounting to direct participation in hostilities."[170] With this definition, the ICRC explicitly equates an OAG as a whole as being a member of a belligerent State, and a person exercising CCF within that OAG as being a member of that belligerent pseudo-State's armed forces.[171] The whole of the OAG is a stand-in for the State, the OAG plus CCF is a stand-in for a State's armed forces, and only this stand-in for the armed forces is targetable. The United States, on the other hand, sees the OAG-as-a-whole as analogous to a State's military, and the OAG plus CCF as the combat arms portion of that military. Conceptually, the U.S. position makes more sense because a State's armed forces are made up of more than what is typically thought of as "combat arms"—infantry and armor—but also those who provide a combat support or combat service support function, such as logistics personnel, cooks, or administrative personnel.[172] These individuals would be targetable in an armed conflict were they members of a State's armed forces; it makes logical sense for individuals serving the same role in an OAG to be likewise targetable.[173]

In its narrower field of applicability, AP II discusses detention with slightly more specificity than CA3. With respect to the conditions of detention, AP II sets out both conditions which are to be respected at a minimum,[174] which include humane treatment, food and water, and religious practice, as well as conditions which are to be respected "within the limits" of the detaining entity's capabilities, such as housing women separately from men and under the supervision of women.[175] Like CA3, however, AP II is silent on the question of initial authority or basis to detain, as well as both grounds and procedures for security detention.[176] In considering whether IHL provides any additional clarity into detention in a NIAC, we turn now to customary international law.

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[170] *See id.* at 34.
[171] *See id.* at 20.
[172] *See* Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641, 691 (2010).
[173] Of course, this question of status is separate and apart from the IHL requirement that these individuals be able to be distinguished from civilian personnel.
[174] Minimum conditions for detainees include protections for the wounded and sick; general terms about the provision of food and water, the safeguarding of health and hygiene, and protection against the armed conflict; terms regarding the receipt of individual or collective relief and religious practice, and, if they are made to work, working conditions and safeguards "similar to those enjoyed by the local civilian population." *See* AP II, *supra* note 26, art. 5.
[175] *See* SIVAKUMARAN, *supra* note 31, at 184-92.
[176] *See Regional Consultations*, *supra* note 158, at 12.

One of the most important roles for CIL in IHL is as a gap-filler.[177] The most authoritative statement of CIL is the ICRC's landmark 2005 study, which spent ten years evaluating State practice and outlining 161 different rules operative during armed conflict and recognized as CIL.[178] As commentators have noted, three critical rules of detention exist within this paradigm—the requirement for humane treatment, imported wholesale from CA3, AP II, and earlier writings on the laws of war;[179] the prohibition against arbitrary detention as expressed in Rule 99 of the ICRC study;[180] and the principle of non-refoulement, which prohibits a State from returning a detainee to a country where there are substantial grounds for believing he or she would be subject to torture.[181] Importantly, the first two of these CIL rules significantly flesh out the law with respect to the conditions[182] and procedures[183] of detention in a NIAC that were left vague in both CA3 and AP II.

Like CA3 and AP II, CIL, as expressed in the ICRC study, is silent on the source of the authority for or basis[184] of detention in a NIAC. Some

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[177] *See* Major Robert E. Barnsby, *Detention as Customary International Law*, 202 MIL. L. REV. 53, 60-61 (2009).

[178] *See generally* INTERPRETIVE GUIDANCE, *supra* note 148.

[179] *See supra* Section II.A.1. and Section II.B.2.

[180] *See* Barnsby, *supra* note 177, at 80-81; INTERPRETIVE GUIDANCE, *supra* note 148, at 344-52. The ICRC study explained that State practice confirmed humane treatment as CIL, citing both the Lieber Code and U.S. military manuals as evidence of such consistent practice. *Id.* at 307-08.

[181] *See* Barnsby, *supra* note 177, at 81-82.

[182] The ICRC Study includes several other provisions under this rubric of "humane treatment," including ICRC visits, the safeguarding of detainees in a combat zone, the segregation of both women and men, and children and adults, and the requirement to respect religious practices. *See* Barnsby, *supra* note 177, at 79; INTERPRETIVE GUIDANCE, *supra* note 148, at 428-51.

[183] The ICRC study identified the following procedural requirements for detention in a NIAC as CIL: (1) informing a detainee of the reasons for the detention; (2) providing the detainee with a lawyer; and (3) providing the detainee with an opportunity to challenge the lawfulness of the detention. *See* INTERPRETIVE GUIDANCE, *supra* note 148, at 349-52.

[184] Based on State practice, grounds for detention in a NIAC may include: posing a threat to the security of the military operation; participating in hostilities, or belonging to an enemy organized armed group. *See* DOD LOW MANUAL, *supra* note 75, at 503 n.94 (citing *Chairman's Commentary to the Copenhagen Process: Principles and Guidelines* ¶ 1.3). Between 2007 and 2012, the United States and twenty-three other States and international organizations participated in a collaborative process led by the Government of Denmark, intended to establish principles to guide the interpretation of existing obligations under international law for the treatment of detainees in military operations. *Id.* at 491; Adam R. Pearlman, *Meaningful Review and Process Due: How Guantanamo Detention Is Changing the Battlefield*, 6 HARV. NAT'L SEC. J. 255, 283-94 (2015). Though the Copenhagen Principles are drawn from international legal instruments and State practice and may, in

commentators have argued that the source of authority is itself CIL,[185] an argument which will be explored in more detail below, but now this article turns to evaluate key IHRL provisions on detention.

Two specific treaties are relevant to any discussion of detention in a NIAC: the ICCPR and ECHR, the ICCPR because the United States is a party, and the ECHR because most of our coalition partners belong to the European Union.[186] There are two main questions concerning the applicability of these IHRL treaties: the first is extraterritoriality, or "whether a given State carries its human rights obligations abroad on the backs of its military forces;"[187] and the second is if so, what level of control is required to be exerted over a particular territory before IHRL's applicability is triggered.[188] For the United States, both of these questions are moot points: the U.S. view is that the ICCPR is explicitly non-extraterritorial,[189] and as a non-European Union member the United States is obviously not a party to the ECHR. For our partner nations, however, the analysis is very different. Recent court decisions by international tribunals have affirmed the extraterritorial application of the ECHR,[190] and

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some cases, reflect CIL, mere inclusion of a principle in the document was not intended as a definitive statement that such a principle was itself CIL. *See* John Bellinger, *Completion of Copenhagen Process Principles and Guidelines on Detainees in International Military Operations*, LAWFARE (Dec. 3, 2012), http://perma.cc/3WN5-VCTX. The article argues instead that authority and basis to detain are intertwined in NIACs and that States have the inherent authority to detain for security purposes.

185 This argument was considered by the U.K. Supreme Court in the most recent *Serdar Mohammed* decision, *see* Serdar Mohammed v. Ministry of Defence (2017) UKSC 2, 16, but ultimately remains undecided. The court in that case appears to believe that the authority to detain will eventually be a part of CIL, but that CIL does not yet contain such an authority. *Id.* As this article argues, the authority arises from a State's sovereignty rather than any particular branch of IHL. *See infra* notes 224-231 and accompanying text.

186 *See* DOD LOW MANUAL, *supra* note 75, at 51.

187 *See* Modirzadeh, *supra* note 14, at 355.

188 *See id*. A recent High Court of Justice of England and Wales decision, Al-Saadoon and Others v. Sec'y of State for Defence (2015) EWHC (Admin) 715, determined that the U.K.'s obligations under certain IHRL provisions—in this case, the ECHR—were triggered by the mere use by State agents of physical force against an individual.

189 Mary McLeod, *U.S. Department of State, Acting Legal Advisor, Statement to U.N. Human Rights Committee*, GENEVA (Mar. 13, 2014), https://geneva.usmission.gov/2014/03/13/u-s-opening-statement-at-presentation-of-the-fourth-periodic-report-of-the-u-s-on-implementation-of-the-iccpr/.

190 Al-Saadoon and Others v. Sec'y of State for Defence, (2015) EWHC (Admin) 715, https://www.judiciary.gov.uk/wp-content/uploads/2015/12/r-al-saadoon-v-secretary-of-state-for-defence-2015-ewhc-715-admin.pdf (affirming an ECHR is extraterritorial upon application of force by a State actor abroad against a particular person). This article does not have the room to fully discuss the arguments for and against the extraterritoriality of the ECHR or to opine on the reasoning evinced in the line of cases leading to this

the U.S. view with respect to the ICCPR has long been the minority view within the international community.[191]

As discussed earlier, both the ICCPR and the ECHR prohibit arbitrary detention.[192] If IHL rules are unclear as to security detention, which in the context of convergence means that IHL rules are unable to answer whether a particular detention is arbitrary, the question becomes whether IHRL provides adequate answers on both grounds and procedures for detention as *legi generali*. As to procedure, both the ICCPR and the ECHR specifically require that any deprivation of liberty be in accordance with procedures established by law.[193] As far as grounds, the ICCPR is open-ended, requiring only that the grounds for deprivation of liberty also be established by law in order to be non-arbitrary.[194] The ECHR, by contrast, lists out the acceptable grounds for detention, which has the effect of prohibiting deprivation of liberty for any reasons not listed.[195] Though the more open-ended provision of ICCPR leaves the door open for security detention in armed conflict, security detention is not among the enumerated grounds under the ECHR.[196]

The practical effect of these provisions is this: If IHL does not provide the necessary authorization for detention, then relying solely on IHRL, security detention in a NIAC would likely not be authorized.[197] This was the fundamental holding of *Serdar Mohammed*.

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conclusion, but the debate produced a great deal of very interesting commentary for the dedicated scholar to study. *See, e.g.*, Barbara Miltner, *Revisiting Extraterritoriality After Al-Skeini: The ECHR and Its Lessons*, 33 MICH. J. INT'L L. 693, 695 (2012) (outlining the contours of the debate).

[191] *See, e.g.*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9) (explaining that the ICCPR applies extraterritorially).

[192] *See* ICCPR, *supra* note 8, art. 9; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 5, *opened for signature* Nov. 4, 1950, Eur. T.S. No. 5, 213 U.N.T.S. 221 [hereinafter European Convention].

[193] *See* ICCPR, *supra* note 8, at art. 9; European Convention, *supra* note 192, art. 5. This practically requires judicial supervision of detention and the right of *habeas corpus*. *See Regional Consultations*, *supra* note 158, at 12.

[194] *See* ICCPR, *supra* note 8, art. 9.

[195] *See Regional Consultations*, *supra* note 158, at 12.

[196] European Convention, *supra* note 192, art. 5

[197] In 2011, The European Court of Human Rights held that absent an overriding international legal obligation such as a UN Security Council Authorization mandating detention, or perhaps derogation under the applicable provisions of the ECHR, security detention was not authorized. *See* Al-Jedda v. The United Kingdom, App. No. 27021/08, July 7, 2011.

Having laid the foundation for the applicable law in a NIAC, the next section will discuss the various arguments for and against international legal authority to detain in a NIAC, ultimately concluding that the authority to detain in a NIAC comes from a State's sovereign authority to conduct hostilities.

C. Detention in NIACs

Some commentators have forcefully argued that IHL does not in and of itself provide authorization for a power to detain in NIACs and that any authority to detain must come from domestic law of the host nation or from a UN Security Council resolution authorizing the use of force.[198] Taking the opposing view, other commentators argue that the authority to detain is CIL or inherent in the authority to kill. For reasons discussed below, both of these views are incorrect for precisely opposite reasons: IHL is not a source of positive authority to detain though it does recognize that authority, which arises out of a State's inherent authority to conduct hostilities during a period of armed conflict.

1. The View That There Is No International Authority to Detain in a NIAC

Commentators who have come out against IHL authority to detain in a NIAC do so for two primary reasons: the first is an argument that IHL is too vague a framework to establish any positive authority for detention; and the second is an argument that if IHL authorizes detention, then because IHL is premised on equality of the parties, OAGs would have the right to detain as well. Ultimately, neither of these arguments is persuasive.

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[198] Serdar Mohammed v. Sec'y of State for Defence [2015] EWCA (Civ.) 843. *See also* Ryan Goodman, *Authorization Versus Regulation of Detention in Non-International Armed Conflicts*, 91 INT'L L. STUD. 155, 158-59 (2015). Professor Goodman argues that IHL does not prohibit detention in NIACs, it simply does not authorize it. *Id.* The authorization to detain must be found in some other specific grant of authority. In Professor Goodman's view, the entirely of IHL must be viewed as a prohibitory legal regime, and should not be understood as conferring affirmative authorization on States to take a particular action. *See id.* at 159-60. The author of this article agrees with this premise, but disagrees that the IHL must provide positive authority. As discussed in Section II, IHL is not a source of positive authority, and the positive authority to detain comes from a State's sovereignty. *See supra* Section II.

As the U.K court of appeals in *Serdar Mohammed* held, because CA3 and APII do not give any clear guidance as to "who may be detained, on what grounds, in accordance with what procedures, and for how long," they cannot fairly be interpreted as providing a power to detain.[199] To Professor Gabor Rona, a proponent of this position, this means that AP II and CA3 must presume that grounds and procedures for NIAC detention are purely a matter of affirmative domestic law.[200] This article takes the positions that there is no such presumption, and agrees with the critiques proposed by other commentators that the court in *Serdar Mohammed* conflated two related concepts, the *authorization* to detain, and the *regulation* of detention.[201]

As far as regulation, contrary to the U.K. court of appeals' holding of *Serdar Mohammed*, CA3, AP II, and CIL together create a framework that regulates detention.[202] As Professor Ryan Goodman has pointed out, the structure of IHL shows that the IHL in an IAC is the outer boundary of permissible state action. Simply put, if an action is lawful in an IAC, it is *a fortiori* lawful in a NIAC because the rules governing IACs are more restrictive than the rules that govern State action in internal conflicts. As NIAC is on a continuum between these two points, the rules governing it must be more restrictive than internal conflicts and less restrictive than IACs.[203] This question of regulation is a separate inquiry from the question of authorization. As this paper has argued, the structure of international law *in general* illustrates that IHL is a prohibitive, primarily regulatory regime that acts to restrict State authority rather than provide a positive source of it.[204]

The authorization for detention itself is inherent in IHL, which is reflected in the fact that both CA3 and AP II contain references to detention.[205] Much like self-defense is a carve-out from the overall prohibition on the use of force, a carve-out that arises from a State's

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[199] Serdar Mohammed v. Ministry of Defence (2014) EWHC (QB) 1369 ¶ 246.
[200] Gabor Rona, *Is there a Way Out of the Non-International Armed Conflict Detention Dilemma*, 91. INT'L L. STUD. 32, 37 (2015).
[201] *See generally* Goodman, *supra* note 198.
[202] *See id.* at 160-67.
[203] *See id.*
[204] *See* Lawrence Hill-Cawthorne & Dapo Akande, *Does IHL Provide a Legal Basis for Detention in Non-International Armed Conflicts?*, EJIL: TALK! (May 7, 2014), http://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/.
[205] *See also* Chesney & Goldsmith, *supra* note 139, at 1085-87.

sovereign authority to act to protect itself, the authority to detain in armed conflicts is a right that States have as a fundamental and necessary part of armed conflict.[206] The fact that the applicable IHL provisions merely attempt to regulate the exercise of this detention authority is evidence that it, like self-defense, is a carve-out that has not been superseded by UN agreements. As discussed above, once an armed conflict exists, States have authority to "wage war" until that authority has been specifically restricted by their consent to a treaty or the development of CIL. Though it is true that, for example, the United States points to domestic law, particularly the 2001 Authorization for the Use of Military Force (AUMF), as a source of detention authority,[207] the AUMF does not explicitly authorize detention; it merely gives the President the power to use "all necessary and appropriate force."[208] If the main argument against finding a detention authority in IHL is the lack of specificity in IHL instruments, domestic law is no more helpful on that score.

Moreover, nothing in any of the Geneva Conventions explicitly grants the authority to detain even in IACs. Under the view of *Serdar Mohammed*, even in a declared war between two High Contracting parties, States would have to find the authority to detain in a UN Security Council Resolution or in domestic law. It does not appear that this was the intent of the drafters, and this reading of the Geneva Conventions is unduly restrictive. What this view does not take into account is that the prohibitions of IHL merely restricts traditional State power. If the authority has not been taken away from a State via treaty law, the State retains that authority in the appropriate circumstances (e.g., the ability to conduct security detentions as an essential part of armed conflicts). Furthermore, the fact that CIL fleshes out the detention rules referenced in CA3 and AP II demonstrates that IHL's guidance on security detention is not inadequate such that reference to IHRL rules would be required.

The second major argument typically raised as a reason why there is no affirmative authorization to detain in NIACs under IHL is the concern about the potential conferral of an equivalent power on OAGs. This argument is ultimately concerned with the possibility of recognizing a combatant's privilege for fighters associated with repudiated OAGs like

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[206] *See Hamdi v. Rumsfeld*, 542 U.S. 507, 518-19 (2003) ("detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war").

[207] *See* Harold Hongju, *Remarks at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law*, DEP'T OF STATE (Mar. 25, 2010), http://www.state.gov/s/l/releases/ remarks/139119.htm).

[208] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

the Islamic State of Iraq and the Levant (ISIL) or Boko Haram,[209] and reflects the historical fears that the extension of IHL rules into internal conflicts would grant the appearance of legitimacy to criminals and terrorists.[210] Because this argument could be raised to object to the recognition of an inherent authority to detain during armed conflicts as well, it is addressed now. It is true that, as discussed above, IHL is fundamentally premised on equality of obligation between the parties.

Though this article takes the position that inherent authority to detain is an incident of State sovereignty, pre-existing any restrictions emplaced by the Geneva Conventions, it is at least arguable that the authority to detain may be inherent to belligerents regardless of whether they are States, so long as they are sufficiently "State-like."[211] For this reason, Professor Ohlin has argued that the combatant's privilege should be recognized as existing in those NIACs that functionally operate as IACs—in other words, "two independent entities engaged in a military contest,"[212] or perhaps more succinctly, the type of conflict to which APII applies. Historical practice suggests that Professor Ohlin's view is correct, at least so far as the criteria for "lawful belligerency"[213] were met, but even assuming that combatant's privilege operates in a NIAC between a State and an OAG, the privilege would be unavailable to the vast majority of OAGs that currently dominate the news cycle, such as ISIL and Boko

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[209] The Islamic State (ISIL) is a transnational Sunni Islamist insurgent and terrorist group that controls large areas of Iraq and Syria while also conducting terror attacks outside of this territory. *See* CHRISTOPHER M. BLANCHARD & CARLA E. HUMUD, CONG. RESEARCH SERV., R43612, ISLAMIC STATE AND U.S. POLICY 1 (Feb. 9, 2016). *Boko Haram* (meaning "Western education is forbidden") is the colloquial name for *Jama'a Ahl as-Sunna Li-da'wa wa-al Jihad* (roughly translated as "People Committed to the Propagation of the Prophet's Teachings and Jihad," a Sunni extremist group in Nigeria that pledged allegiance to ISIL in March 2015). *See id.* at 11-12. Like ISIL, Boko Haram is a foreign terrorist organization engaging in terror attacks against a mainly civilian population, though its activities are primarily focused on its home territory in northern Nigeria. *See generally* LAURA PLOCH BLANCHARD, CONG. RESEARCH SERV., R43558, NIGERIA'S BOKO HARAM: FREQUENTLY ASKED QUESTIONS (2014).

[210] *See* Rona, *supra* note 200, at 38.

[211] This would essentially be an analysis of whether the OAG met the conditions of lawful belligerency as this term was understood pre-Geneva. *See supra* notes 164-173 and accompanying text. *Cf.* Jens David Ohlin, *The Combatant's Privilege in Asymmetric and Covert Conflicts*, 40 YALE J. INT'L L. 337, 339-40 (2015).

[212] *See* Ohlin, *supra* note 211, at 339-40.

[213] The criteria for lawful belligerency as understood pre-Geneva are: a civil war accompanied by a state of general hostilities; occupation and administration of substantial territory by the armed group; observance of IHL by the armed group acting under responsible authority; and the need of third States to practically address the civil war. *See* SIVAKUMARAN, *supra* note 31, at 11 (internal quotations omitted).

Haram. These OAGs do not meet the requirements for lawful belligerency because they do not follow the laws of war:[214] among other violations, they use child soldiers,[215] they target civilians,[216] and they do not separate themselves from the civilian populace.[217] Even assuming that an inherent authority to detain during armed hostilities inures to all lawful belligerents, modern terrorist groups do not fit the necessary criteria.

2. The View That There is International Authority to Detain in a NIAC

Other commentators have looked at the silence on authorization in IHL and have raised two main arguments for why IHL does in fact authorize detention: first, the authorization to detain is CIL; and second, detention authority in a NIAC flows logically from the authority to kill. While these arguments mistakenly conclude that IHL is a source of positive authority to detain, both are correct to the extent that they implicitly rest on the inherent authority of States to detain during armed conflict.

Major Robert Barnsby argued in a 2009 *Military Law Review* article that the authorization to detain had risen to the level of CIL because it was the "logical predicate" of detention regulations identified as CIL by the ICRC in their 2005 study.[218] Pointing to State practices which appear to rest on the existence of an authority to detain in NIACs, Major Barnsby concluded that recognition of the authority to detain is supported by both State practice and *opinio juris* such that the authority itself was part of CIL.[219] Major Barnsby's ultimate conclusion is flawed, however, because the structure of IHL leads to the conclusion that it is not a source of positive authority for a State; nevertheless, it is indeed true that the existence of CIL rules regulating the conditions and procedures for

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[214] *See* Ohlin, *supra* note 211, at 370-71.

[215] *See, e.g.*, Louisa Loveluck, *English-Speaking Child beheads Syrian Rebel in Latest ISIL Video*, TELEGRAPH (Feb. 4, 2016), http://www.telegraph.co.uk/news/worldnews/islamic-state/12141368/English-speaking-child-beheads-Syrian-rebel-in-latest-Isil-video.html.

[216] *See, e.g.*, Andrew Walker, *What is Boko Haram?*, U.S. INST. PEACE (May 30, 2012), http://www.usip.org/publications/what-boko-haram (explaining that Boko Haram targets churches and schools as part of their efforts to establish an Islamic state).

[217] *See, e.g.*, U. N. Human Rights Council, Report of the Independent Int'l Comm'n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/31/68, at 7-8 (Feb. 11, 2016), http://www.ohchr.org/ Documents/HRBodies/HRCouncil/CoISyria/A-HRC-31-68.pdf.

[218] *See* Barnsby, *supra* note 177, at 60-61.

[219] *See id*.

detention lead to the conclusion that the authority to detain exists in NIACs.[220]

Another argument raised in favor of detention authority in a NIAC is the idea that detention authority flows logically from the authority to kill. The U.K. Court of Appeals in *Serdar Mohammed* rejects this reasoning because the category of those persons who may lawfully be detained is broader than the category of people who may be lawfully targeted with lethal force,[221] therefore the authority to detain is not a necessary subset of the authority to kill.[222] Sean Aughey and Aurel Sari challenge this assumption, arguing that there are two categories of persons who may be targeted in a NIAC—Civilians Directly Participating in Hostilities (DPH), and members of an OAG. As discussed *supra*, this latter group is functionally the armed forces of a non-state actor, such as ISIS, and are proper *status* rather than *conduct*-based targets.[223] Aughey and Sari conclude that the power to detain status-based targets is coextensive with the power to target them. While this makes intuitive sense, it is not necessary or advisable to conceptualize these two powers as concentric circles with one nested inside the other. The war power necessarily contains a whole host of powers aside from the authority to use deadly force against combatants.[224] The power to detain and the power to kill are two separate—though in some cases overlapping—components of a State's right to use force during armed conflict, and one is not dependent on the other for its existence.[225] Once a person has been identified as a

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[220] The U.K. supreme court in *Serdar Mohammed* considered but did not decide if CIL was a source of the authority to detain in a NIAC, "concluding that this was an evolving area of state practice, including the view that the Court did not want to unduly influence developments in this arena." Fionnuala Ní Aoláin, *To Detain Lawfully or Not to Detain: Reflections on UK Supreme Court Decision in Serdar Mohammed*, JUST SEC'Y (Feb. 2, 2017, 8:01 AM), https://www.justsecurity.org/37013/detain-lawfully-detain-question-reflection-uk-supreme-court-decision-serdar-mohammed/.

[221] *See* Goodman, *supra* note 198, at 169.

[222] Serdar Mohammed v. Sec'y of State for Defence (2015) EWCA Civ. 843 ¶ 253.

[223] *See* Sean Aughey & Aurel Sari, *Targeting and Detention in Non-International Armed Conflict:* Serdar Mohammed *and the Limits of Human Rights Convergence*, 91 INT'L L. STUD. 60, 105 (2015).

[224] *See* DEP'T OF THE ARMY, FIELD MANUAL 3-60, THE TARGETING PROCESS para. 1-7 (Nov. 2010) (discussing lethal and nonlethal methods of targeting); *cf.* Brig Amy Warwick, 67 U.S. 635, 670 (1863) (1862) (upholding President Lincoln's blockade of southern ports following the firing upon Fort Sumter and pointing out that "what degree of force the crises demands" will be determined by the facts and circumstances of the particular case).

[225] *Cf* Brief of Respondent at 14, Hamdi v. Rumsfeld, 542 U.S. 507 (2003) (No. 03-6696) (noting that the war power includes the ability to use the armed forces "in the manner [the

member of an OAG or as DPH, that person may be targeted for military force, which could mean, *inter alia*, lethal force or detention. The power to conduct war—to conduct military operations—is not merely the power to kill: it is the power to subdue the enemy.[226] That power is limited by the regulatory framework of IHL, and as discussed above, IHL is not intended to unduly restrict State sovereignty in this respect.[227] Because the power to detain in NIACs has not been explicitly taken away, States retain their inherent authority to detain those who are DPH or combatants during an armed conflict. The Court of Appeals in *Serdar Mohammed* considered and rejected the idea that the absence of a prohibition could be interpreted as positive authority to take a particular action,[228] and while it may overstate the case to argue that anything not prohibited by international law is *a fortiori* permitted,[229] that is not this article's argument. Restrictions on State authority should not be presumed absent explicit language,[230] but the State must possess the authority to act in the

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President] may deem most effectual to harass and conquer and subdue the enemy" (citing Fleming v. Page, 50 U.S. 603, 614)).

[226] JOINT CHIEFS OF STAFF, JOINT PUB. 1, DOCTRINE FOR THE ARMED FORCES OF THE UNITED STATES, at I-13 (25 Mar. 2013) [hereinafter JP 1] puts it this way:

> The ultimate purpose of the US Armed Forces is to fight and win the Nation's wars. Fundamentally, the military instrument is coercive in nature, to include the integral aspect of military capability that opposes external coercion. Coercion generates effects through the application of force (to include the threat of force) to compel an adversary or prevent our being compelled.

Id.

[227] A 1922 treatise on foreign relations agreed that the power to conduct war was limited only by international law. David M. Golove, *The Commander in Chief and the Laws of War*, 99 PROC., AM. SOC. INT'L. L. 198, 200 (2005) (citing QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 169, 169 n.47, 85 n.59 (1922)).

[228] Serdar Mohammed v. Sec'y of State for Defence [2015] EWCA Civ. 843 [¶ 195-97].

[229] This is generally known as the *Lotus* principle, after a famous Permanent International Court of Justice case from 1927, which held that states generally enjoy in their exercise of powers a "wide measure of discretion, which is only limited in some cases by prohibitive rule." *See* S.S. Lotus (Fr. v. Turk.) 1927 P.C.I.J. (ser. A). No 10 (Sept. 7, 1927) at 18-19. This principle has received some criticism for being overbroad. *See, e.g.*, Hugh Handeyside, Note, *The Lotus Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?*, 29 MICH. J. INT'L L. 71, 72-73 (2007). *But see, e.g.*, Yuval Shany, *Toward A General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907, 940 (2005).

[230] *See* S.S. Lotus (Fr. v. Turk.) 1927 P.C.I.J. (ser. A). No 10 (Sept. 7, 1927) at 18-19.

first place—in the case of detention, States possess the authority to act pursuant to their sovereign authority to conduct war.[231]

Not only is the contrary view entrenched in the high courts of our coalition partners, but merely finding the source of authority will be insufficient to allow partner nations, bound by the ECHR, to avoid violations of that Convention. It is also necessary to enact a standardized set of procedures "to specify the conditions on which [a State's] armed forces may detain people in the course of an armed conflict and to make adequate means available to detainees to challenge the lawfulness of their detention under [that State's] own law."[232] Because multinational operations are a feature of the modern battlefield,[233] and because clarity is vital to the application of the law, the United States must enact a treaty in order to ensure the ongoing effectiveness of military operations in a multinational context.[234]

III. Proposal for Additional Protocol IV

The ICRC noted in 2009 that a treaty-based solution would be the most authoritative fix for the ambiguities in IHL's application to detention in NIACs.[235] Such an instrument would set standards that would be "beyond dispute" in future conflicts involving ratifying States.

A. The Material Field of Application—NIACS Like IACs

This paragraph limits the application of AP IV to those NIACs that are sufficiently IAC-like, in order to address only those circumstances where the State is detaining as a belligerent party to a conflict.[236] As with the material field of application limitation in AP II, AP IV's field of application should be "precisely limited [so] that it could only be invoked

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[231] The contours of the authority have been limited by CA3, AP II, and CIL, but the existence of the authority itself has not been altered. *See supra* Section II.B.2.

[232] Serdar Mohammed v. Ministry of Defence (2017) UKSC 2, 67.

[233] *See* U.S. DEP'T OF DEF., JOINT PUB. 3-16, MULTINATIONAL OPERATIONS I-1 (July 16, 2013) ("U.S. commanders should expect to conduct military operations as part of a multinational force (MNF).").

[234] *See supra* note 24 and accompanying text.

[235] *See Regional Consultations*, *supra* note 158, at 17.

[236] As opposed to those scenarios where a State is detaining pursuant to a violation of domestic criminal law, or where a State chooses to respond to unrest with its police rather than its armed forces. *See supra* note 114 and accompanying text.

in clearly defined civil conflicts."[237] Additionally, the terms used in this paragraph are defined so as to provide maximum clarity to the circumstances in which AP IV will apply.[238] Article 1 of AP IV will read:

> This Protocol shall apply to all non-international armed conflicts taking place between State armed forces and other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations, to exercise some measure of governmental authority, and to implement this Protocol.[239]

Several features of AP IV are immediately apparent. First, rather than taking the approach of CA3 and AP II and defining application of this protocol in the negative,[240] AP IV explicitly applies to NIACs and goes on to incorporate the definition for such conflicts laid down by the *Tadic* judgment,[241] which focuses on the intensity of the conflict[242] and the organization of the parties. Additional Protocol IV deletes APII's requirement for the armed conflict to occur in the territory of a High Contracting Party; this is intended to demonstrate that AP IV's requirements apply in transnational and cross-border NIACs and that the requirements of AP IV attach to State military action regardless of where it takes place.

Second, because the inherent authority to detain flows from State sovereignty during armed conflicts, government forces must be involved

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[237] HOWARD S. LEVIE, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT: PROTOCOL II TO THE 1949 GENEVA CONVENTIONS 3 (1987).

[238] While defining terms may lead to increased resistance on the part of States to the adoption of this proposal, during the diplomatic conferences that led to the adoption of AP II, States complained about the difficulty in parsing the meaning of various terms in CA3 and requested that the terms in AP II be defined. *See* LEVIE, *supra* note 237, at 34-35 (1987). The purpose of AP IV is to lend clarity to a confusing area of the law, thus definitions are proposed. In order to ensure that these definitions are acceptable to the States, they have been taken from relatively settled case law of respected international tribunals.

[239] *See infra* Appendix A, at A-1.

[240] Common Article 3 and AP II define the scope of their application by reference to the definition of an IAC contained either in Article 2 of the articles common to the Geneva Conventions of 1949 or to Article 1 of AP I.

[241] *See supra* notes 120-125 and accompanying text.

[242] *See supra* notes 126-128 and accompanying text.

in the armed conflict for AP IV to apply.[243] Unlike AP II, however, there is no requirement that the government forces be the forces of the State in whose territory the armed conflict occurs.[244] The requirement of organization and responsible command, territorial control so as to enable sustained military operations,[245] to exercise some measure of governmental authority, and the ability to implement the protocol will require OAGs to be sufficiently "State-like" in order to fall under this protocol instead of IHRL.[246] This is appropriate if one thinks of NIAC-related IHL as a series of layers of increasing complexity depending on the goal of the instrument. Common Article 3 operates as a general baseline intended to protect all victims of armed conflict at all times, regardless of any additional instruments in place. Additional Protocol II increases the obligations on the Parties to the conflict in a measure commensurate with the intensity of the conflict and the organization of the parties and, as with CA3 these obligations are primarily intended to address *civilian* victims of the conflict. Finally, AP IV acts as a measure primarily focused on protections for the representatives of the Parties themselves; in this way it is more similar to the Third Geneva Convention than it is to either CA3 or AP II.

B. The Basis for Detention—Security

Article 3 of AP IV addresses the authority and basis for detention, and, as such, is the most critical piece of the proposed Protocol. It is here that the Protocol acknowledges that the authority to detain arises from a State's inherent authority to conduct hostilities during an armed conflict. This Article also defines security detention as an administrative measure taken for reasons of the State's security during an armed conflict. This is intended to demonstrate that detention is not intended to punish the

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[243] *See supra* notes 100-103 and accompanying text.

[244] This is intended to cover transnational and cross-border conflicts.

[245] The phrasing "such control over a part of its territory as to enable them to carry out sustained and concerted military operations" is a reflection of the seriousness and intensity of the conflict rather than a quantitative measure of the amount of territory the OAG controls. This mirrors the language from AP II and the interpretations of that language by commentators. *See* SIVAKUMARAN, *supra* note 31, at 185-87.

[246] Despite mirroring the standard for lawful belligerency, the language of AP IV intentionally falls short of that definition. *See supra* notes 211-213 and accompanying text. The intention here is to avoid conferring legitimate status on an OAG. This concern is also addressed by Article 2 of AP IV, which states that nothing in the Protocol is intended to affect the legal status of the belligerents. *See* Appendix A, at A-3.

individual for a past act and must be explicitly non-punitive in character.[247] Moreover, detention under this Protocol must be necessary for security reasons; detention for intelligence gathering or the mere convenience of the detaining authority would be impermissible.[248] This limitation on security detention is well recognized by both States and international bodies like the ICRC.[249] As the ICRC persuasively argued,

> [A]rticulation of the acceptable grounds for internment must be broad enough to allow internment where necessary to prevent future imperative threats from materializing, but narrow enough to exclude internment of persons whose detention would go beyond what is militarily necessary.[250]

It is clear that in order for this instrument to be able to answer the fundamental question of whether a particular detention is arbitrary, it must explicitly outline the acceptable bases for detention under this Protocol. Too wide of a definition could lead to abuse; too narrow would render the Protocol useless to the Parties. For this reason, Article 3 of AP IV states the following: "Security detention may be undertaken if necessary for imperative reasons of security directly related to the armed conflict."[251]

This language was modified from the general agreement during the Chatham House initiative of the appropriate standard for detention in a NIAC, given the "exceptional nature" of internment under both IHL and IHRL.[252] This definition also avoids distinguishing between "status-based" detainees and "conduct-based" detainees; this is to avoid any conflict between States' differing interpretations of these terms as well as to recognize that both types of detainees can present a security threat to a State during armed conflict.

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[247] *See Detention Concluding Report*, *supra* note 3, at 29.

[248] *Chatham House*, *supra* note 116, at 865. Note the U.K. supreme court likewise concluded that detention for intelligence gathering purposes would be impermissible. *See* Serdar Mohammed v. Ministry of Defence (2017) UKSC 2, 80 (citing various cases from the European Court of Human Rights).

[249] *Id.* ("What is clear is that internment must be necessary for security reasons, and not just convenient or useful for the interning power. A concrete example is that internment for the sole purpose of obtaining intelligence is impermissible.").

[250] *Detention Concluding Report*, *supra* note 3, at 27.

[251] *See* Appendix A, at A-3. This is consonant with the U.K. supreme court's holding in *Serdar Mohammed*. *See* Serdar Mohammed v. Ministry of Defence (2017) UKSC 2, 44, 65.

[252] *Chatham House*, *supra* note 116, at 863.

C. The Conditions of Detention—Humane Treatment Is the Standard

Article 4 and Article 5 of AP IV concern fundamental guarantees for detainees and the standards of detention. Article 4 is intended to supplement the requirements of CA3 and AP II, both of which continue to apply under an AP IV regime. The fundamental guarantees listed in AP IV are protections from the types of abuses to which detainees are particularly vulnerable: violence, torture, corporal punishment, forced disappearances, extrajudicial killings, sexual violence, and threats to commit these acts.

At a minimum, the provisions of Article 5 require compliance with the standards of both CA3 and AP II. Article 5 makes detaining authorities responsible for providing "adequate conditions of detention," including food and drinking water, clean and serviceable clothing, and protection against the climate. As this Article makes clear: What will be "adequate" will, by necessity, depend on the resources available in the area, the standard of living of the local populace, and the local cultural context including relevant religious considerations.[253]

Article 5 also mandates the application of established medical triage principles to wounded and sick detainees. Article 4 and Article 5 are not intended to provide an exhaustive list of standards in the care and protection of detainees, but rather are intended to reinforce and reference the minimum standards in CA3, AP II, and CIL by creating a floor upon which States are free to improve.

D. Review of Detention—The Right to Challenge

The major issues addressed by this portion of the proposed Protocol are the right to be informed promptly of the basis for detention, legal assistance for detainees, legal review of the basis for detention, and the right to challenge the legal and factual basis of continued detention. Of note, these key elements were identified as among those which are "essential to any fair process of adjudication" by the U.K. Supreme Court in *Serdar Mohammed*.[254] Articles 6-8 govern these provisions, and will

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[253] *See* Appendix at A-3.

[254] *See* Serdar Mohammed v. Ministry of Defence (2017) UKSC 2, 107. The failure of the British Army's detention process to include these provisions formed the basis of that court's opinion in favor of Mr. Mohammed. *Id.* at 99-109.

ensure that the need to protect intelligence gathering sources is balanced with a detainee's right to see the information forming the basis for the detention. The review process consists of two steps: the first is an administrative review of the necessity for continued detention, conducted at least every sixth months, while the second is a challenge of the legal and factual basis for the detention argued before a competent tribunal.[255] The essential rationale for the process is to ensure maximum flexibility for battlefield review while also acknowledging the need for effective oversight of such detentions.[256]

E. Transfer of Detainees—Non-Refoulement

This portion of AP IV is concerned with the transfer of detainees to another authority, and in order to comply with principle of non-refoulement specifically prohibits transfer of a detainee to another State or power that may subject that detainee to torture or persecution. This section of AP IV requires that all transfers be registered and reported to the ICRC, and allows for the challenge of transfers by the detainee before a competent tribunal.

Additional Protocol IV is intended to clarify the source of the detention authority during armed conflicts and adopt provisions of CIL to provide a regulatory framework for such detentions. In order to strike a balance between respect for State sovereignty and cabining that sovereignty in order to protect individuals, AP IV intentionally does not address every aspect of detainee treatment, administration, or procedure. In this way, the proposed Protocol provides the baseline guidance upon which additional *ad hoc* agreements, several of which are discussed below,

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[255] Review by this "competent tribunal" is intended to mirror *habeas*-type review by a judicial body. The UN Working Group on Arbitrary Detention considers *habeas* review a non-derogable right under IHRL instruments like the ICCPR. *See* UN Human Rights Council, Report of the Working Group on Arbitrary Detention, ¶ 21-25, U.N. Doc. A/HRC/22/44 (Dec. 24, 2012), http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.44_en.pdf [hereinafter Working Group Report]. The wording using in AP IV recognizes that not all jurisdictions agree with the UN Working Group's interpretation. *See, e.g.*, Maqaleh v. Gates, 605 F.3d 84, 99 (D.C. Cir. 2010) (holding that "the jurisdiction of the courts to afford the right to habeas relief and the protection of the Suspension Clause does not extend to aliens held in executive detention in the Bagram detention facility in the Afghan theater of war"). The wording of AP IV mandates the availability of a procedure to challenge the detention but does not require that this challenge take place via the particular pathway of *habeas* review.

[256] *Detention Concluding Report*, *supra* note 3, at 50-52.

may build. While a treaty-based solution as outlined in the proposed Protocol would be the most appropriate method for addressing the confusion in the law, there have been several counterarguments raised by commentators and international bodies which this paper will now address.

IV. Counterarguments

The main arguments against the enactment of an international instrument governing detention are a belief that the political will is insufficient to get such an instrument through the treaty process; the belief that *ad hoc* legal instruments such as UN Security Council Resolutions or bilateral agreements are sufficient to authorize detention during NIACs; and the belief that States should rely on domestic law in order to detain during NIACs. Ultimately these arguments are unpersuasive.

A. Treaties Are Too Hard

The idea that international political obstacles are currently too great to pass a new treaty or Protocol is the main argument against this article's proposal.[257] Some commentators argue that the political obstacles to passing such a treaty would be enormous, and further speculate that any attempt to do so could disrupt the balance between IHL and IHRL.[258] The problem with this viewpoint is that the balance between IHL and IHRL has already been fundamentally disrupted by recent court decisions.[259] The increasing convergence of IHL and IHRL, and the grafting of IHRL norms onto an IHL framework, has drawn criticism from experts who are concerned at the impact such a persistent linkage will have on the interpretation of both bodies of law.[260] In order to ensure continued respect for the very idea of "law in war,"[261] the obligations of IHRL must not be read to so frustrate the operation of IHL during armed conflict that the effective conduct of military operations is impeded.[262] Given the

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[257] *See Detention Concluding Report*, *supra* note 3, at 10 ("However, in light of the feedback given during the consultations, there appears to be a lack of sufficient political support for embarking on a treaty negotiation process at this stage.").
[258] *See* Rona, *supra* note 200, at 37.
[259] *See* Aughey & Sari, *supra* note 223, at 65-66.
[260] *See* Bennoune, *supra* note 28, at 180-81 (discussing the objections from both camps).
[261] *See* Aughey & Sari, *supra* note 223, at 65-66.
[262] *Id*.

recent spate of decisions from courts and international bodies[263] and the escalating calls for a multinational military ground intervention against ISIL,[264] the need for an international instrument confirming a State's inherent power to detain during armed conflict is more apparent than ever. Unlike *ad hoc* legal instruments, moreover, a general Protocol would be enacted before a particular conflict escalates tensions to the point of creating political deadlock.

B. Reliance on *Ad Hoc* Legal Instruments

Commentators and court decisions have suggested that the authorization and regulation of detention should be sought in *ad hoc* legal instruments like a UN Security Council Resolution or a bilateral agreement between States. The U.K. supreme court's *Serdar Mohammed* decision, for example, found the authority to detain implicit in the language of various UN Security Council Resolutions allowing members to take "all necessary measures" to fulfil the UN Security Council Resolution's mandate.[265] Early commentary on this decision suggests that this will encourage reliance on the implied powers contained in such resolutions, while also noting that if UN Security Council Resolutions are a source of authority to detain, they are silent on the very procedural safeguards deemed vital to compliance with Article 5 of the ECHR.[266] For a variety of reasons, relying on UN Security Council Resolutions or other agreements is hardly an effective solution, as such instruments would only be effective for the duration of a particular conflict or operation, and would require States to renegotiate procedures every time military operations are contemplated. Even assuming that the vagaries of the political processes

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[263] *See, e.g.*, Serdar Mohammed v. Ministry of Defense (2015) EWCA Civ. 843; Working Group Report, *supra* note 255, ¶ 21-25. As Professor Michael Schmitt points out, these bodies are not neutral in their interpretation of IHL, often lack military experience, and often give short shrift to the principle of military necessity in assessing military operations that result in civilian casualties or other types of collateral damage. *See* Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 795, 824 (2010).

[264] *See, e.g.*, Josh Wood, *Turkey Calls for International Coalition to Intervene on Ground in Syria*, NAT'L (Feb. 16, 2016), http://www.thenational.ae/world/middle-east/turkey-calls-for-international-coalition-to-intervene-on-ground-in-syria.

[265] Serdar Mohammed v. Ministry of Defence (2017) UKSC 2, 21–25.

[266] Fionnuala Ní Aoláin, *To Detain Lawfully or Not to Detain: Reflections on UK Supreme Court Decision in Serdar Mohammed*, JUST SEC'Y (Feb. 2, 2017, 8:01 AM), https://www.justsecurity.org/37013/detain-lawfully-detain-question-reflection-uk-supreme-court-decision-serdar-mohammed/.

at the level of the Security Council[267] or between States would allow for such negotiations as active conflicts are taking place within their territories, such a course of action would make setting consistent policy very difficult as the rules would change with each conflict. Matters become even more complicated in the case of transnational NIACs where operations might cross borders. This would insert a lack of predictability into the process—the protections for a detained individual should not change, depending on the hands in which the individual finds him or herself.

C. Reliance on Domestic Law

Several questions are immediately apparent, the most complicated being which State's domestic law could provide the authority to detain—the sending nation or the host nation? From a sovereignty perspective, it would seem that only the host nation's law could authorize such detentions as very few domestic laws are given extraterritorial application. The problem, however, is the same as for the *ad hoc* legal instruments. When dealing with an OAG like ISIL, whose operations cross borders from Iraq to Syria, would a coalition attempting to conduct detention operations as part of military intervention against ISIL need to rely on the domestic law of the nation in which a particular combatant was captured? If so, the protections for a detained individual would again depend on where he or she was captured, which would inject a great deal of uncertainty into these types of operations. Several commentators, including Professor Rona, advocate for the amendment of domestic law to seat the protections against arbitrary detention within the derogation framework of IHRL itself.[268] This would attempt to create a minimum floor of protections against arbitrary detention, much in the same way that this article's proposed AP IV is intended to operate. That said, attempts to pass identical domestic legislation in each of the over 180 separate States would suffer from the same political difficulties as negotiating on an *ad hoc* basis as with bilateral agreements.

While certainly difficult, passing the proposed Protocol, which outlines only those baseline protections States have already largely recognized and

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[267] *See id.* (calling the UN Security Council "an often dysfunctional, highly partisan body").
[268] *See* Rona, *supra* note 200, at 58.

agreed on,[269] allows for a degree of uniformity and predictability in the age of multinational coalitions that other methods for addressing the problem do not possess.

V. Conclusion

Historical practice and pre-Geneva understanding of States' sovereignty demonstrates that States have inherent authority to conduct security detentions during military operations in armed conflicts. Far from providing a positive source of authority, IHL rules merely regulate a State's exercise of that inherent authority it already possesses. The power to wage war consists of several components that are separate and apart from each other—the power to detain is a power that must be considered separately from the power to kill, but it is a power that is a fundamental part of a State's sovereign authority to wage war. Absent a specific prohibition on the basis for or conduct of detention, the authority to conduct detention operations for security purposes remains and is regulated by CA3, AP II, and CIL. Because IHL is able to answer the questions of whether are particular security detention in a NIAC is or is not arbitrary, there is no need to look to IHRL to provide the applicable rules.

As States themselves recognize, detentions are necessary and legitimate components of armed conflict that assist in the achievement of lawful military objectives while ultimately saving lives.[270] The current misunderstanding of a State's authority to conduct such detentions requires an international instrument, such as this paper's proposed AP IV, to ensure the appropriate balance between military and operational necessity and the rights of the detained individual. Without the clarity that such an instrument would provide, the United States is likely to stand alone as the sole detaining authority during multinational military operations. The political obstacles standing in the way of AP IV are surmountable in light of the very real benefits such an instrument would bring in terms of clarity to the grounds and procedures for security detentions in NIACs.

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[269] *See supra* notes 235-257 and accompanying text.
[270] *See Copenhagen Process*, *supra* note 9.

Appendix A.
Text of Proposed Additional Protocol IV

Preamble

The High Contracting Parties,

Recalling that the humanitarian principles enshrined in Article 3 common to the Geneva Conventions of 12 August 1949, constitute the foundation of respect for the human person in cases of armed conflict not of an international character,

Recalling furthermore that international instruments relating to human rights offer a basic protection to the human person,

Reiterating that international humanitarian law remains as relevant today as ever in non-international armed conflict (NIAC) and continues to provide protection for all persons deprived of their liberty in relation to such conflicts;

Emphasizing the need to ensure humane and uniform treatment for those individuals detained in armed conflicts not of an international character;

Recognizing that the authority to conduct security detentions in armed conflict is a fundamental incident of waging war;

Have agreed on the following:

Part I: Scope of this Protocol

Article 1—Material Field of Application

1. This Protocol shall apply to all armed conflicts not of an international character taking place between armed forces and other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations, to exercise some measure of governmental authority, and to implement this Protocol.

2. The following definitions apply to the terms used in this protocol:

(a) "Armed conflict not of an international character" means protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.[271]

(b) "Armed forces" means all the armed forces of a State, including those which under some national systems might not be called regular forces, constituted in accordance with national legislation under some national systems. This term does not refer to other government agencies who may be armed, such as the police, customs, or similar organizations, unless they are formally or functionally incorporated into the armed forces.[272]

(c) "Organized armed group" means armed forces belonging to a non-State party to an armed conflict. This term includes dissident armed forces under responsible command that have taken up arms against the legitimate government. A finding that an organized armed group "belongs to" a non-State party to the conflict requires at least a *de facto* relationship between the non-State party and the organized armed group as indicated by the fact that the organized armed group carries out hostilities on behalf of the non-State party and with its agreement.[273]

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[271] This is the *Tadic* definition. *See supra* note 127 and accompanying text.

[272] This definition is taken and synthesized from various proposals during the diplomatic conferences and working groups prior to the adoption of AP II. *See* HOWARD S. LEVIE, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT: PROTOCOL II TO THE 1949 GENEVA CONVENTIONS 67-71 (1987). The requirement that the police be formally or functionally incorporated into the armed forces takes into account situations where police forces fight alongside regular military forces.

[273] This definition comes in part from the ICRC DPH study. Whether a group is sufficiently organized has been expanded further by case law, but it is not advisable to put discrete indicia of organization into AP IV. This will ensure maximum flexibility for application of the Protocol. The elements "sustained and concerted military operations" and "some measure of governmental authority" place qualitative limitations on this principle; not every OAG will meet these criteria. Organization of the group is an important factor because it indicates the violence being carried out is of a "collective character" rather than acts carried out by isolated or random individuals; this differentiates the violence from criminal or terrorist activities. *See* Prosecutor v. Delalic, Case No. IT-96-21-T, Judgment, (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1999. The tribunal in Boskoski determined that in order to be "organized," an armed group needed "some hierarchical structure and its leadership requires the capacity to exert authority over its members." *See* Prosecutor v. Boskoski, Case No. IT-04-82-T, Judgment, ¶ 195 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008).

(d) "Responsible command" means that the organized armed group is subject to effective authority and control,[274] which indicates a sufficiently firm discipline that will ensure respect, in the conduct of the hostilities, of the provisions laid down in the Protocol.[275]

(e) "Sustained and concerted military operations" refers to continuous and planned hostilities in support of a unified objective.[276]

(f) "Some measure of governmental authority" refers to an attempt by the organized armed group to conduct orderly administration of controlled territory.[277]

3. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

4. The foregoing provisions do not modify the conditions governing the application of Article 3 common to the Geneva Conventions of 12 August 1949 or the conditions governing the application of Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol II).

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[274] This language mirrors Article 28 of the Rome Statute, which describes the responsibilities of commanders and subordinates for criminal acts committed by their subordinates.

[275] This comes from the ICRC commentary on the draft Additional Protocol. *See* SIVAKUMARAN, *supra* note 31, at 174. This is not intended to imply a hierarchical structure like in the military, though military structure would certainly fit the definition of responsible command. This is intended to require only that there be some sort of relationship between individual A and individual B whereby B may direct, prevent, or punish A's acts. *See id.* at 175.

[276] This language is taken from Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Judgment, ¶ 626, (Int'l Crim. Trib. for Rwanda 2 Sep. 1998). This is intended to be an evaluation of the intensity of the conflict. Based on case law, this evaluation includes an analysis of the number of individuals involved, the types of weapons used, and the geographical spread of the violence. *See, e.g.*, Prosecutor v. Boskoski, Case No. IT-04-82-T, Judgment, ¶ 214-34 (Int'l Crim. Trib. for the Former Yugoslavia Jul. 10, 2008). As with the indicia of organization, it is not advisable to spell out these indicia in AP IV itself.

[277] This concept is also taken from nineteenth-century requirements for recognition of belligerency. From a modern perspective, this also relates to the organization of the armed group and differentiates such a group from a loose configuration of individuals carrying out isolated or random acts of violence.

Article 2—Legal Status of the Parties to the Conflict

The application of this Protocol shall not affect the legal status of the Parties to the conflict. Neither the occupation of a territory nor the application of this Protocol shall affect the legal status of the territory in question.[278] Neither the detention of an individual nor the application of this Protocol shall affect a State's ability to apply its domestic criminal law to the conduct in question.

Article 3—Basis for Detention

1. States have inherent authority to conduct security detentions during armed conflict. This authority arises from a State's sovereign ability to conduct hostilities during armed conflict.

2. Security detention is an administrative measure taken to deprive an individual of his or her liberty, ordered by a State's executive branch rather than via judicial processes, for reasons of the State's security during an armed conflict.[279]

3. Security detention may be undertaken if necessary for imperative reasons of security directly related to the armed conflict.[280]

Part II: Humane Treatment

Article 4—Fundamental Guarantees

1. All detained persons are entitled to respect for their person, honor, convictions, and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction.

2. The following acts against detained persons are and shall remain prohibited at any time and in any place whatsoever:

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[278] This is modified from a similar provision in AP I, art. 4.

[279] *See* Debarre, *supra* note 136; *see also Chatham* House, *supra* note 116, at 860. Requiring as it does the triggering condition of an armed conflict, this definition excludes the sort of administrative or preventative detention that occurs during situations that do not meet the criteria for an armed conflict.

[280] This language was modified from the general agreement during the Chatham House initiative of the appropriate standard for detention in a NIAC, given the "exceptional nature" of internment under both IHL and IHRL. *See Chatham House*, *supra* note 116, at 863.

(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) forced disappearances;

(c) extrajudicial killings;

(d) sexual violence, in particular rape, enforced prostitution and any form of indecent assault;

(e) threats to commit any of the foregoing acts.

Article 5—Conditions of Detention

1. In addition to the provisions of Article 4 the following provisions shall be respected as a minimum with regard to persons deprived of their liberty for reasons related to the armed conflict:

(a) The minimum standards of detention must comport with those requirements laid out in Article 3 common to all the Geneva Conventions of 1949, Article 5 of the Protocols Additional to the Geneva Conventions of 1949 (Protocol II), and customary international law.

(b) Detaining authorities are responsible for providing detainees with adequate conditions of detention including food and drinking water, accommodation, access to open air, safeguards to protect health and hygiene including clean and serviceable clothing appropriate for the climate, and protection against the rigors of the climate and the dangers of military activities. What will be "adequate" will, by necessity, depend on the resources available in the area, the standard of living of the local populace, and the local cultural context including relevant religious considerations. Detaining authorities are responsible for safeguarding the physical and psychological health of detainees.[281]

(c) Wounded and sick detainees are to receive to the fullest extent practicable under the circumstances and with the least possible delay, the medical care and attention required by their condition, without any

[281] This language is adapted from section 9 of the Copenhagen Process. *See Copenhagen Process*, *supra* note 9, at 14.

distinction among them except on medical grounds based on generally accepted medical ethical standards.[282]

(d) Persons detained shall be promptly registered and, to the extent feasible, their next of kin will be notified.[283] Registration includes notification of the International Committee of the Red Cross and other impartial humanitarian organizations as relevant.

(e) All detaining authority are to provide the ICRC with access to the detainees. This requirement does not prevent a detaining authority from taking action to ensure the security and good order and discipline of the detention facility, such as requiring physical searches of all visitors.

2. To the extent feasible and within the limits of their capabilities, detaining authorities will respect the following provisions:

(a) Detained persons are to have contact with the outside world as soon as reasonably practical. Such contact includes the sending and receipt of mail and in-person visits at the detention facility.

(b) This contact includes, as appropriate under the circumstances, family members, legal advisors, spiritual advisors, and impartial humanitarian organizations. Such contact is subject to reasonable conditions relating to maintaining security and good order in the detention facility and other security considerations.

Part III: Procedures for Detention

Article 6—Procedures for Detention

1. As soon as practicable after initial capture or apprehension a commander is to promptly make a decision as to whether to hold, release or transfer the detainee.

2. A person detained under this Protocol must be promptly informed, in a language he or she understands, of the reasons for the detention, the consequences he or she might face, and the procedures for challenging that detention. The information provided on the reasons for the detention must

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[282] This language is a modification of Article 7, AP II.
[283] Registration of detainees guards against allegations of secret detentions.

be sufficient to allow the detainee to meaningfully challenge the legality of his or her internment and its continued necessity.

2. A person detained under this Protocol must, where feasible, be provided access to legal counsel for assistance. If necessary, this will include access to an interpreter.

Article 7—Review of Detention[284]

1. As soon as practicable following the initiation of detention, a competent tribunal must conduct an independent and impartial review of the basis of and the necessity for the detention.[285]

2. On a periodic basis no less than twice per year, the tribunal must review the basis for the detention and any additional information presented to it to determine whether continued detention is warranted for imperative reasons of security related to the armed conflict.

3. A detainee should, to the greatest extent practicable, be given the opportunity for personal appearance before the tribunal.

Article 8—Challenge of Detention[286]

1. A detainee must be given the opportunity to challenge legal sufficiency and factual basis of his or her detention before a tribunal competent to adjudicate such challenges.

2. To the extent practicable, this challenge should be via the mechanism of *habeas corpus* review by a judicial body in the civil courts of the detaining authority.

3. A detainee should, to the greatest extent practicable, be given the opportunity for personal appearance before the tribunal.

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[284] This is intended to be a review by an administrative tribunal.

[285] As the Chatham House experts agreed, "Independent and impartial review of the necessity of internment is the most important procedural safeguard against arbitrary detention." *See Chatham House*, *supra* note 116, at 877.

[286] *See supra* note 255 and accompanying text.

Article 9—Transfers of Detainees

1. Transfers of detainees shall be carried out humanely. As a general rule, such transfer shall be carried out by rail or other means of transport, and under conditions at least equal to those used by the forces of the detaining authority in their changes of station. The detaining authority shall take all suitable precautions to safeguard their health and safety during transfer. All transfers shall be registered and reported to the ICRC.

2. Sick, wounded or infirm detainees shall not be transferred if the journey would be seriously detrimental to them, unless their safety or security imperatively demands.

3. A detaining authority must ensure that any transfer is carried out in accordance with its obligations under international law. Transfer is precluded where there are substantial grounds for believing that the detainee would be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment. Where appropriate, transfers should be monitored by the ICRC or other neutral international organization.

4. The detainee may challenge the basis for transfer before a competent tribunal.

Part IV: Final Provisions

[Omitted; administrative provisions intended to be identical to those following AP II]

WILL THE REAL MULTINATIONAL ELEPHANT IN THE ROOM PLEASE STAND UP? THE NEED FOR NATO ASSISTANCE IN EUROPE'S MIGRANT CRISIS

MAJOR MICHAEL TOWNSEND JR.*

This is not a mission of choice, but of necessity. The Allies neither invented nor desired it. Events themselves have forced this mission upon them. Nation-state failure and violent extremism may well be the defining threats of the first half of the 21st century. Only a vigorously coordinated international response can address them. This is our common challenge. As the foundation stone of transatlantic peace, NATO must be ready to meet it.[1]

I. Introduction

In the wake of the Paris terror attacks of November 2015,[2] an interview took place with a representative manager of a government

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[1] North Atlantic Treaty Organization Public Diplomacy Division, *A Short History of NATO*, NATO, http://www.nato.int/nato_static/assets/pdf/pdf_publications/20120412_ShortHistory_en.pdf (2012) [hereinafter *NATO Short History*].

[2] Eric Randolph & Simon Valmary, *Gunmen Kill More Than 120 in Wave of Attacks Across Paris*, YAHOO NEWS (Nov. 14, 2015), http://news.yahoo.com/least-120-dead-paris-attacks-investigation-source-pta-013205822.html?soc_src=copy.

> Gunmen killed more than 120 people in a wave of attacks across Paris, shouting "Allahu akbar" as they massacred scores of diners and concert-goers and launched suicide attacks outside the national stadium. Four black-clad gunmen wearing suicide vests and wielding

agency in a major European city. At one point, the manager leaned forward and stated, "of course it [is] not accepted, but the factual point is that all the terrorists are basically migrants. The question is when they migrated to the European Union."[3] It was a brusque and simple assessment, bordering on xenophobia, and symptomatic of the complicated and divisive points at issue in the current migrant crisis affecting Europe.[4]

In recent years, Europe has been subject to thousands of migrants[5] from war-torn Syria and other troubled North African and Middle Eastern countries.[6] The migrants come by foot and by rail from Turkey, or by boat over the Mediterranean, seeking shelter and a better life.[7] According to some international organizations monitoring the crisis, upwards of 700,000 persons have come through European borders in 2015 alone.[8] Not all are claiming asylum, but estimates of those who are total at least 500,000.[9] Germany is leading the way, with asylum-seekers at over 200,000.[10] Migrants fleeing conflict in Syria appear to be the largest

> AK-47s stormed into the Bataclan venue in eastern Paris and fired calmly and methodically at hundreds of screaming concert-goers. At least 120 people were killed and 200 injured across six locations around the French capital, which is still reeling from jihadist attacks in January. Investigators said at least eight attackers were dead by the end of the violence—the bloodiest in Europe since the Madrid train bombings in 2004—with seven of them having blown themselves up.

Id.

[3] Matthew Kaminski, *All the Terrorists Are Migrants: Interview with Viktor Orban*, POLITICO (Nov. 23, 2015), http://www.politico.eu/article/viktor-orban-interview-terrorists-migrants-eu-russia-putin-borders-schengen/.

[4] *Id.*

[5] For this article, the term "migrant" is used to describe all persons traversing Europe's borders for either asylum, employment, or other reasons for movement from another country of origin. The precise definition of a migrant is not well-settled in political and legal discussions. *See* Somini Sengupta, *Migrant or Refugee? There is a Difference with Legal Implications*, N.Y. TIMES (Aug. 27, 2015), http://www.nytimes.com/2015/08/28/world/migrants-refugees-europe-syria.html?_r=1.

[6] *Migrant Crisis: Migration to Europe Explained in Graphics*, BBC.COM (Oct. 27, 2015), http://www.bbc.com/news/world-europe-34131911 [hereinafter *Migration in Graphics*].

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

portion.[11] Kosovo is second, followed by Afghanistan, Albania, and Iraq.[12]

As the investigation into the Paris attacks widened, the status of migrant treatment for those entering Europe was complicated when French authorities found questionable Syrian passports allegedly used by the attackers.[13] Links to people moving in and out of Belgium who allegedly aided the suspects added to criticisms of the European Union's[14] border security and its historically favorable migrant policies.[15]

The well-dressed man interviewed at the outset of this article, generalizing that "all the terrorists are basically migrants," is Viktor Orban; the government agency is Hungary, and he is the Prime Minister.[16] As of July 2015, Hungary has taken in the second-highest number of migrants in the EU, with nearly an estimated 100,000.[17] In proportion to its national population, Hungary surpasses Germany in terms of the number of migrants entering its borders. That has raised concerns of many conservative political elements in the country and as a result, Hungary is

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[11] *Id.*

[12] *Id.*

[13] Ishaan Tharoor, *Were Syrian Refugees Involved in the Paris Attacks? What We Know and Don't Know?*, WASH. POST (Nov. 17, 2015), https://www.washingtonpost.com/news/worldviews/wp/2015/11/17/were-syrian-refugees-involved-in-the-paris-attacks-what-we-know-and-dont-know/.

[14] *The EU In Brief*, EUROPA, http://europa.eu/about-eu/basic-information/about/index_en.htm (last visited Mar. 6, 2017).

> The [European Union (EU)] is a unique economic and political partnership between [twenty-eight] European countries that together cover much of the continent. The EU was created in the aftermath of the Second World War. The first steps were to foster economic cooperation: the idea being that countries who trade with one another become economically interdependent and so more likely to avoid conflict. The result was the European Economic Community (EEC), created in 1958, and initially increasing economic cooperation between six countries: Belgium, Germany, France, Italy, Luxembourg and the Netherlands. Since then, a huge single market has been created and continues to develop towards its full potential.

Id.

[15] *Id.*

[16] Kaminski, *supra* note 3.

[17] *Migration in Graphics*, *supra* note 6.

leading a revolt against EU border and asylum policies.[18] Tensions within the EU on how to address the migrant crisis are at a fever pitch, with some commentators pondering that the EU may fracture over this very issue.[19] The attacks in Paris could not have come at a worse moment.

Just as previous large-scale terror attacks have had dramatic effects on the foreign and domestic policies of victimized states, so have the Paris attacks had a dramatic effect on established EU border security policies that promote the free movement of people.[20] The Paris attacks, in conjunction with the migrant crisis, threaten the multinational cooperation required for the EU to work effectively. A more recent threat to the EU's existence came in the form of a referendum in the United Kingdom (UK) that voted to withdraw from the EU.[21] Concerns over control of migrants entering the UK became a major political argument for supporters of leaving the EU.[22] Is there a way forward that can get the EU through the migrant crisis? A plan of action that preserves the EU's multinational source of strength via interstate cooperation?

The answer surfaced one month before the attacks in Paris, when Hungary announced it would allow EU or North Atlantic Treaty Organization (NATO) forces to help defend its borders as the migrant crisis intensified.[23] Hungary's call for assistance in particular to NATO holds the key to potentially improving Europe's migration crisis.

The North Atlantic Treaty Organization supports member nations, like Hungary, in civil, non-military, and military efforts, and is a real capability that has been preparing for just such an intervention since its founding.[24] If successful, NATO may help ease the migration crisis and strengthen European cooperation. For NATO to support Hungary and other members dealing with increasing migrant numbers is not a new or groundbreaking

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[18] Chris Morris, *Migrants Crisis: Hungary's Orban Lays Bare EU East-West Split*, BBC (Sept. 3, 2015), http://www.bbc.com/news/blogs-eu-34144554.
[19] *Id.*
[20] Kaminski, *supra* note 3.
[21] EU Referendum, *Eight Reasons Leave Won the UK's Referendum on the EU*, BBC (June 24, 2016), http://www.bbc.com/news/uk-politics-eu-referendum-36574526.
[22] *Id*.
[23] Pablo Gorondi, *Hungary Authorizes EU or NATO Forces to Help Defend its Borders amid Migrant Crisis*, USNEWS (Oct. 8, 2015), http://www.usnews.com/news/world/articles/2015/10/08/hungary-oks-nato-eu-troops-to-help-guard-border.
[24] Judy Dempsey, *NATO's Absence in the Refugee Crisis*, CARNEGIE EUROPE (Oct. 22, 2015), http://carnegieeurope.eu/strategiceurope/?fa=61710.

operational concept.[25] NATO has a history of assisting in migrant disruptions caused by instability in the Balkans and has even provided support for natural disaster relief to the United States.[26]

Now is the time for NATO to assist in Europe's migration crisis. NATO could assist member states like Hungary, struggling with large numbers of migrants, through its robust system of support to civil authorities as well as through its security capabilities. NATO has historical precedent, logistical experience, command and control infrastructure, and organizational muscle that goes beyond military operations. NATO also has a powerful security incentive to get involved. Its success would bring the likes of Prime Minister Orban to the negotiating table with leaders that are more moderate in the EU, and encourage both sides to cooperate over border security and assistance to migrants. NATO's involvement potentially aids in securing a more balanced international response to the crisis, while also securing the very existence of the EU multinational system. Europe desperately depends on the security cooperation of its members that are in the grips of the migration crisis.

This article will first review the historical development of NATO's non-military support capabilities. Second, it will address the regulatory and legal authorities that are at issue in order for NATO to offer effective military and non-military assistance to the migrant crisis. Third, the article will examine what current capabilities NATO has to offer in terms of assistance. Fourth, it will analyze the complex NATO and EU strategic relationship that must work if any form of robust NATO assistance in Europe materializes. Finally, it will assess new developments announced in the global community concerning specific NATO action in support of the migrant crisis.

II. Historical Development of NATO Military and Non-Military Support Roles in Non-Conflict

NATO is an extensive military and political alliance that currently consists of twenty-eight nations ranging from Europe to North America.[27]

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[25] *Id.*

[26] *Id.*

[27] The NATO member states are: Albania, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Italy, Latvia,

The alliance was born out of post-World War II cooperation between the United States and certain Western European nations seeking to prevent another global war in Europe, given the rise of Soviet communism.[28] As concerns continued to mount in the late 1940s, a small group of western nations, namely the United Kingdom, France, Belgium, Luxembourg, and the Netherlands, came together for talks on greater economic and military cooperation.[29] Ultimately, "it was determined that only a truly transatlantic security agreement could deter Soviet aggression while simultaneously preventing the revival of European militarism."[30] With U.S. involvement, the North Atlantic Treaty was signed on April 4, 1949, and NATO was born.[31] The treaty is famous for its Article 5 collective defense clause for members, stating, "an armed attack against one or more of them . . . shall be considered an attack against them all and that following such an attack, each Ally would take such action as it deems necessary, including the use of armed force in response."[32]

Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, United Kingdom, and United States. *See* NATO, http://www.nato.int/cps/en/natolive/nato_countries.htm (last visited Mar. 8, 2016).

[28] *NATO Short History*, *supra* note 1.

> The aftermath of World War II saw much of Europe devastated in a way that is now difficult to envision. Approximately 36.5 million Europeans had died in the conflict, 19 million of them civilians. Refugee camps and rationing dominated daily life. In some areas, infant mortality rates were one in four. Millions of orphans wandered the burnt-out shells of former metropolises. In the German city of Hamburg alone, half a million people were homeless. In addition, Communists aided by the Soviet Union were threatening elected governments across Europe. In February 1948, the Communist Party of Czechoslovakia, with covert backing from the Soviet Union, overthrew the democratically elected government in that country. Then, in reaction to the democratic consolidation of West Germany, the Soviets blockaded Allied-controlled West Berlin in a bid to consolidate their hold on the German capital. The heroism of the Berlin Airlift provided future Allies with some solace, but privation remained a grave threat to freedom and stability.

Id.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id*.

A. The "Report of the Three Wise Men" Laying Groundwork for Future NATO Non-Military Support Roles

Since NATO's inception, the organization has been laying the foundation for its ability to go beyond the scope of conventional military operations in Europe: "Significantly, Articles 2 and 3 of the Treaty had important purposes not immediately germane to the threat of attack. Article 3 laid the foundation for cooperation in military preparedness between the Allies, and Article 2 allowed them some leeway to engage in non-military cooperation."[33] Article 2 of the NATO Treaty states:

> The Parties will contribute toward the further development of peaceful and friendly international relations by strengthening their free institutions, by bringing about a better understanding of the principles upon which these institutions are founded . . . . They will seek to eliminate conflict in their international economic policies and will encourage economic collaboration between any or all of them.[34]

Even though Article 2 focused on economic collaboration, the foundation was set for building upon non-military cooperation in other policy areas. This collaborative spirit within NATO would only intensify in the coming years.

By 1956, with increasing anxiety over how smaller NATO members like Belgium or Luxembourg could cooperate with larger ones like the United States in international events, the need for greater collaborative efforts developed.[35] Then U.S. Secretary of State, John Foster Dulles,

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[33] *Id.*

[34] PUBLIC DIPLOMACY DIVISION, NATO HANDBOOK 371 (2006) [hereinafter NATO HANDBOOK].

[35] Lawrence S. Kaplan, *Report of the "Three Wise Men": 50 years On*, NATO REVIEW (2006), http://www.nato.int/docu/review/2006/issue1/english/history.html.

> The incentive for improving the conditions for consultation in the Alliance was long in the making. From its beginnings, the smaller Allies had felt that their voice was too seldom heard or heeded. Indeed, the Benelux countries had difficulty pressing France and the United Kingdom to make them more equal partners in the Brussels Pact of 1948. As negotiations for an Atlantic alliance proceeded in 1948, the United States' positions prevailed in almost all the issues—from overcoming European reluctance to admit such "stepping-stone" nations as Norway and Portugal as charter members[—]to the

paved the way for a NATO committee of three representatives to look at areas beyond the scope of military operations ripe for NATO involvement that could strengthen the treaty alliance.[36] The committee consisted of three distinguished persons[37] from NATO member states, tasked to draft a

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> establishment of a Standing Group composed of France, the United Kingdom and the United States, after the treaty was signed, to make the key decisions for the Military Committee. The Truman administration intervened in Korea without consulting any of its NATO Allies. That the Supreme Allied Commanders appointed after the Korean War were American, not European, was a logical consequence of [U.S.] dominance of the Alliance in the 1950s. Europe's dependence in those years on [U.S.] economic support and its military ability to inhibit Soviet aggression accounted for the smaller Allies' reluctant acceptance of a lesser role vis-a-vis the United States . . . . In 1956, the issue was the continuing exclusion of the smaller Allies from the decision-making process . . . . The other members of NATO were left on the sidelines.

Id.

[36] *Id.*

> It was [U.S.] Secretary of State John Foster Dulles who opened the way for the Committee of Three in April[,] when he issued a number of statements indicating that the United States was anxious to expand NATO's functions in the non-military spheres. The Cold War was a major factor in his thinking. His proposed shift in NATO's emphases was motivated in large part by a need to meet the apparent change in Soviet strategy under Nikita Khrushchev away from military intimidation. Consultation on non-military areas could be an effective way of countering the growing Soviet economic and social offensives. The result was the North Atlantic Council's appointment of a committee "to examine actively further measures which might be taken at this time to advance effectively their common interests."

Id.

[37] *Id.*

> Halvard Lange, Gaetano Martino, the chairman, and Lester B. Pearson all had histories of strong affiliation with NATO. Lange had arguably been the most influential figure in Scandinavia arguing for Norway and Denmark to join NATO in 1949, rather than participating in a Nordic alliance with Sweden. Pearson had signed the North Atlantic Treaty for Canada and headed the Canadian delegation to the United Nations from 1948 to 1957. He proposed the UN Emergency Force to control the Suez crisis, and won the Nobel Peace Prize in 1957. Together with Professor Martino, a leading advocate of European unity (and father of Italy's current defence minister, Antonio Martino), they were impressive representatives of the smaller nations.

report officially titled the *Report of the Committee on Non-Military Cooperation in NATO*, informally known as the "Report of the Three Wise Men." [38] The report recommended "[m]ore robust consultation and scientific cooperation within the Alliance, and the report's conclusions led, inter alia, to the establishment of the NATO Science Programme."[39] More importantly, the report emphasized "the right and duty of member governments and of the Secretary General to bring to its attention matters which in their opinion may threaten the solidarity or effectiveness of the Alliance."[40]

The Report of the Three Wise Men was groundbreaking for NATO, in that it formalized the idea that NATO members should always seek to consult with each other over important non-military matters.[41] To be sure, the report did not have any immediate impact on NATO policy and procedures in 1956.[42] However, the seeds for NATO non-military support roles were planted. As the Cold War progressed, and relations with Soviet Russia thawed, NATO's involvement in non-military activity would grow.[43] Another major area of both non-military and military support important for NATO in succeeding years was its development of civil

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Id.

[38] *Id.*

[39] *NATO Short History*, *supra* note 1.

[40] Kaplan, *supra* note 35.

[41] *Id.*

[42] *Id.*

> A Committee of Political Advisers was set up in 1957 in accordance with a recommendation from the Wise Men. But how seriously did the larger powers take account of advice from the smaller members? But it took a decade to be heard, and then not because there was sudden conversion on the part of the major powers. Rather, the changing environment of the Cold War in the 1960s helps to account for a different relationship among the Allies. Soviet failure to win its objectives in Berlin and Cuba in 1961 and 1962 induced many Europeans to believe that the Soviet Union had abandoned its provocative behaviour toward NATO and had adjusted to the role of a normal if adversarial neighbour. A new view of the Soviets permitted non-military issues to become more important in NATO circles and provided an opportunity for greater participation by the smaller nations in the decision-making process.

Id.

[43] *Id.*

support capabilities and emergency responses.[44] Analyzing the development of these initiatives reveals a history of NATO operational precedent that bolsters the need for NATO assistance in Europe's current migration crisis.

B. Post-Cold War Development of NATO Civil Support for Military Operations and Emergency Responses

For a brief moment at the end of the Cold War and the fall of the Berlin Wall, NATO's importance seemed to diminish.[45] However, the collapse of Soviet communism and subsequent ethnic and national strife in Eastern Europe intensified NATO's importance.[46] Prior to this time, NATO's active military involvement was minimal, except for military exercises.[47] The North Atlantic Treaty Organization's increased role involved reaching

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[44] Dr. Petra Ochmannova, *NATO: Evolution and Legal Framework for the Conduct of Operations*, NATO LEGAL GAZETTE 32-33 (July, 2014), http://www.act.nato.int/images/stories/media/doclibrary/legal_gazette_34a.pdf.

[45] *NATO Short History*, *supra* note 1.

[46] *Id.*

> At first, Allies hesitated to intervene in what was perceived as a Yugoslav civil war. Later the conflict came to be seen as a war of aggression and ethnic cleansing, and the Alliance decided to act. Initially, NATO offered its full support to United Nations efforts to end war crimes, including direct military action in the form of a naval embargo. . . . Finally, the Alliance carried out a nine-day air campaign in September 1995 that played a major role in ending the conflict. In December of that year, NATO deployed a UN-mandated, multinational force of 60,000 soldiers to help implement the Dayton Peace Agreement and to create the conditions for a self-sustaining peace.

Id.

[47] Ochmannova, *supra* note 44, at 32-33.

> As reflected clearly in the strategic documents written during the Cold War, the Alliance's aim was deterrence because neither the NATO nations nor the Soviet Union could accept the massive assured destruction that a major military conflict would produce. Thus, from 1949 to 1991, NATO conducted many exercises[,] but zero military operations. Ironically, it was the collapse of the threat posed by the Soviet Union—the North Atlantic Alliance's *raison d'etre*—that propelled NATO into a new era of existence.

Id. (emphasis added).

out to former Soviet bloc nations to work in areas of peacekeeping, economics, and political stability, all of which required the establishment of NATO systems that were non-military in scope.[48]

Protecting and assisting civilian populations remained an area of concern for NATO during and after the Cold War.[49] With regard to assisting the civilian populace, much of NATO's non-military role involved disaster assistance.[50] By 1958, NATO established formalized,

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[48] *Id.*

> New capabilities to prevent conflicts have been introduced and NATO is actively responding to current security threats. In other words, in addition to NATO's ongoing commitment to the collective defence of its member states, the Alliance actually conducts a wide range of operations . . . this new operational remit of the Alliance was further expanded. For the first time NATO committed itself to active engagement outside the territory of its member countries with the aim of responding to new security threats such as terrorism, ethnic conflicts, and human rights abuses. In order to effectively respond to international crises, whether political, military, or humanitarian in nature, the concept of crisis management was further elaborated with the introduction of a new concept for conducting crisis response operations.

Id.

[49] Euro-Atlantic Disaster Response Coordination Centre, *NATO's Role in Disaster Assistance*, NATO (Nov. 2001), http://www.nato.int/eadrcc/mcda-e.pdf.

> Since the creation of the Alliance in 1949, NATO has always placed great emphasis on protection of the population. Faced with potential threat of war which might involve nuclear weapons, the Alliance began to develop various measures in the field of civil protection. Accordingly, in 1951, NATO established the Civil Defence Committee1 to oversee efforts to provide for the protection of our populations. It soon become apparent that the capabilities to protect our populations against the effects of war could also be used to protect them against the effects of disasters.

Id. at 5.

[50] *Id.* at 5-6.

> As early as 1953, following disastrous North Sea floods, NATO had an agreed disaster assistance scheme. By 1958, the North Atlantic Council had established procedures for NATO coordination of assistance between member countries in case of disasters. Subsequently modified, these procedures remained in effect until May 1995, when they were replaced by revised procedures, which also became applicable to Partner countries. Recognizing the importance

coordinated efforts for disaster assistance between member states.[51] These coordination procedures remained in place until 1995, with modifications.[52] In 1997, NATO created the Euro-Atlantic Disaster Response Coordination Centre (EADRCC) to collaborate with the United Nations (UN) for international disaster relief.[53]

Disaster relief to displaced persons became a major focal point for NATO in the Kosovo Refugee Crisis in the 1990s.[54] On June 5, 1998,

> [T]he EADRCC received a request from [United Nations High Commissioner for Refugees] to assist it by moving urgently needed relief items to Albania in response to the initial influx of refugees from Kosovo . . . the EADRCC arranged for 16 flights to airlift 165 tons of relief items . . . using Hercules C-130s offered by both Belgium and Norway.[55]

As the situation in Kosovo continued to deteriorate, NATO expanded its relief efforts to stabilize the situation.[56]

> of enhanced international cooperation in the field of disaster relief, on 17th December 1997, the Euro-Atlantic Partnership Council (EAPC) in Ministerial Session endorsed a proposal to create, as a support and complement to the United Nations, a Euro-Atlantic Disaster Response Capability, and tasked the Senior Civil Emergency Planning Committee (SCEPC) with Cooperation Partners to prepare a more detailed report for the May 1998 EAPC Ministerial. The resultant EAPC Policy on "Enhanced Practical Cooperation in International Disaster Relief" was agreed by EAPC Foreign Ministers on 29 . . . May 1998.

Id.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.* at 25.

[55] *Id.*

[56] *Id.* at 26.

> With the beginning of the NATO Air Campaign on 24 . . . March 1999 and the Serbian programme of forced expulsions of hundreds of thousands of ethnic Albanians, the EADRCC functions intensified and broadened along four major areas of activity: Humanitarian focal point for all EAPC nations; Assistance Requests and offers; Support for UNHCR; and Relationship with NATO bodies, Supreme Headquarters Allied Powers Europe (SHAPE) and other organizations.

Disaster relief was not the only area that increased NATO's involvement with civilian populations. The *NATO Handbook*[57] also stressed the importance of civil, emergency planning in NATO and its capability to provide support to civil authorities of its members by stating, "[c]ivil emergency planning has long been one of the mainstream activities of NATO. Its main roles are to provide civil support for military operations and support for national authorities in civil emergencies, particularly in the protection of civilian populations."[58]

NATO's disaster assistance capabilities that parallel its development of civil support capabilities may be effective tools in responding to the current migrant crisis. As one NATO information guide explains:

> Planning and conducting modern military operations as well as responses to disasters or humanitarian crises is a complex process. Military planners and commanders often call on expertise and capabilities from the civilian sector when mounting an operation. Close cooperation and interoperability between military and civilian actors is vital, and NATO plays an important role in facilitating such cooperation.[59]

The North Atlantic Treaty Organization further emphasizes that it has numerous capabilities that can assist civil and military authorities in times of crisis.

Id.

[57] NATO HANDBOOK, *supra* note 34, at 4.

> The NATO Handbook is published by the NATO's Public Diplomacy Division under the authority of the Secretary General as a reference book on the Alliance and on Alliance policies. The formulations used reflect as closely as possible the consensus among the member nations[,] which is the basis for all Alliance decisions. However, the Handbook is not a formally agreed NATO document and therefore may not represent the official opinions or positions of individual governments on every issue discussed.

Id.

[58] *Id.* at 297.

[59] NATO Public Diplomacy Division, *Civil Support for Military Operations and Emergency Responses*, NATO BACKGROUNDER 1 (Jan. 2008), http://www.nato.int/nato_static/assets/pdf/pdf_publications/20120116_cep2008-e.pdf [hereinafter *NATO Civil Support Operations*].

> [The] NATO has a range of civilian instruments and capabilities at its disposal to support the military authorities as necessary. These include specialized committees, networks of expertise, an operational centre and international staff elements. The Alliance's civilian and military assets complement one another and can be dovetailed to achieve a desired goal.[60]

The current migrant crisis is affecting multiple NATO members who are primed for NATO to apply their capabilities to render assistance. Like most military and political organizations must, in order for NATO to swing in to action, some form of regulatory authorization is required. It is therefore necessary to look at the NATO's regulatory and legal framework.

III. The Regulatory and Legal Authority at Issue for NATO Assistance in Europe's Migrant Crisis

A more expansive approach to issues affecting NATO, outside the scope of collective self-defense, would fall under a category known as Non-Article 5 Crisis Response Operations (NA5CRO). The Non-Article 5 operational framework is an immense part of NATO's mission. Since 1990, almost all NATO operations have been unrelated to collective self-defense.[61] A list of examples illustrating what these Non-Article 5 operations look like are as follows:

> The conduct of combat and counterinsurgency operations such as in Afghanistan through the [International Security Assistance Force] ISAF mission, disaster relief and humanitarian assistance provided to [the United States] after Hurricane Katrina or to Pakistan after the earthquake and massive flooding, the security mission to secure the delivery of humanitarian relief supplies to Somalia (Operation Allied Provider), or maritime interdiction operations, embargoes, and no-fly zones seen in the case of Libya.[62]

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[60] *Id.*
[61] Ochmannova, *supra* note 44, at 33.
[62] *Id*. at 34.

These are diverse operations with various mission requirements, reflecting the ability for NATO to respond with assistance of a more civil or non-military scope, if necessary.

The NATO published an Allied Joint Publication on NA5CRO (AJP-3.4(A)) for regulatory guidance.[63] The regulatory context for NATO's NA5CRO mission in AJP-3.4(A) is quite clear:

> The need for the North Atlantic Treaty Organization . . . to be capable of responding to a crisis beyond the concept of "collective defence" under Article 5 of the North Atlantic Treaty was first identified in the 1991 Strategic Concept and reiterated thereafter at the 1999 Washington Summit. The Washington Summit recognized that future NATO involvement in non-Article 5 crisis response operations . . . is needed to ensure both the flexibility and ability to execute evolving missions not described under Article 5, including those contributing to effective conflict prevention. The Alliance's military mission of NA5CRO is focused on contributing to effective crises management when there appears to be no direct threat to NATO nations or territories that otherwise would clearly fall under Article 5 "collective defence."[64]

Non-Article 5 Crisis Response Operations are defined in AJP-3.4(A) as:

> [M]ultifunctional operations, falling outside the scope of Article 5, which contribute to conflict prevention and resolution or serve humanitarian purposes, and crisis management in the pursuit of declared Alliance objectives. One principal difference between Article 5 operations and NA5CRO is that there is no formal obligation for NATO nations to take part in a NA5CRO.[65]

The range of operations considered under a Non-Article 5 concept is extensive, ranging from support operations primarily associated with civil

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[63] NATO STANDARDIZATION AGENCY, AJP-3.4(A), ALLIED JOINT DOCTRINE FOR NON-ARTICLE 5 CRISIS RESPONSE OPERATIONS (15 Oct. 2010) [hereinafter AJP-3.4(A)].
[64] *Id.* at 1-1.
[65] *Id.* at 1-3.

agencies, to tasks in support of disaster relief and humanitarian operations, etc.[66]

One critical area that AJP-3.4(A) contemplates that is essential to NATO assistance in the migrant crisis is its guidance and support of civil authorities. The regulation defines such support as:

> All those military activities that provide temporary support, within means and capabilities, to civil communities or authorities, when permitted by law, and which are normally undertaken when unusual circumstances or an emergency overtaxes the capabilities of the civil authorities. Categories of support include military assistance to civil authorities and support to humanitarian assistance operations.[67]

The last two categories of identified support are precisely where the regulatory framework for NATO could be most effective in providing direct assistance to the migrant crisis. First, military assistance to civil authorities considers, "implementation of a civil plan in response to a crisis may depend on the military to provide a stable and secure environment for its implementation. Support might include . . . supporting public administration in coordinating a humanitarian operation, or providing security for individuals, population, or installations."[68] Second, and even more relevant for assisting in the migrant crisis, is the category of humanitarian assistance support for NATO Non-Article 5 operations:

> [Humanitarian Assistance] consists of activities and task to relieve or reduce human suffering. [Humanitarian Assistance] may occur in response to earthquake, flood, famine, or manmade disasters . . . . They may also be necessary as a consequence of war or the flight from political, religious, or ethnic persecution . . . . [Humanitarian Assistance] is limited in scope and duration and is designed to supplement or complement the efforts of the [Host Nation] civil authorities or agencies

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[66] *Id.* at 1-4.
[67] *Id.* at 3-8 to 3-9.
[68] *Id.* at 3-9.

> that may have the primary responsibility for providing that assistance.[69]

Humanitarian Assistance can be broken down into subsections to include assistance for internally displaced persons and refugees.[70] The areas covered in the above-cited subsections of AJP-3.4(A) are applicable for assistance to Europe's current migration crisis.

The legal basis for NATO to undertake Non-Article 5 operations is diverse and open-ended. The following is a list of legal authorizations that would govern in a particular instance:

> 1) [A] United Nation Security Council Resolution (UNSCR) to undertake actions (e.g. the cases of ISAF or Libya); 2) the request of a State for NATO support (e.g. the request from Greece in 2004 for [Airborne Warning and Control System] coverage during the Athens Olympic Games or Pakistan's request to NATO for disaster relief following the 2005 earthquake and the 2010 flooding); or 3) regional mandates from international organisations based on principles of the UN Charter. Irrespective of the underlying authority for NATO action—a UNSCR (United Nations Security Council Resolution), sovereign consent, or the regional mandates—the necessary predicate for legally valid North Atlantic Alliance operations is approval by the NAC (North Atlantic Council) which is achieved through the consensus of its member states.[71]

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[69] *Id.*

[70] *Id.* at 3-12 to 3-13.

[71] *Id*. at 35-36.

> Consequently, there is no difference, in terms of NATO procedure, as to whether the NAC issues a decision under an Article 5 operation or an NA5CRO. In both cases member nations are exercising their sovereign authority to bind themselves to obligations made through their acts and decisions. The only distinction is the level of support required by the Washington Treaty from the NATO nations. For collective defence action taken under Article 5 of the Washington Treaty, NATO nations have a binding obligation to support the NATO state under armed attack, although this support could be political, moral, or financial rather than military in nature. For NA5CRO which is factually founded upon Articles 2, 3 and/or 4 of the Washington

A state request for NATO support would be applicable to the current situation in Europe. Assume there was a Hungarian request for assistance with enhanced border security and migrant processing to minimize criminal traffic or extremist infiltration. The North Atlantic Treaty Organization could select from a variety of operational schemes, such as humanitarian assistance support, or support to civil authorities or a mix of forms of support, in order to assist Hungary and other members in the crisis.

Further assume Hungary's request is considered and consensus within the North Atlantic Council (NAC) occurs;[72] a mandate to outline specific objectives to assist in the crisis results:

> As every operation has a different strategic goal, it requires different assets and can prescribe different levels of involvement from each NATO nation. Therefore, within NATO, it is the approved NAC mandate that provides the purpose and scope of each operation. This mandate is subsequently implemented by: 1) NATO and partner nations who decide to participate and contribute to the specific NATO operation; and 2) the Supreme Allied Commander Europe (SACEUR), through the NATO command and force structure. With respect to the NATO nations, all are required to implement the NATO

> Treaty, there is neither a legal nor a formal obligation for nations to provide support.

Id.

[72] NATO HANDBOOK, *supra* note 34, at 34.

> The North Atlantic Council (NAC) has effective political authority and powers of decision, and consists of permanent representatives of all member countries meeting together at least once a week. The Council also meets at higher levels involving foreign ministers, defence ministers or heads of state and government, but it has the same authority and powers of decision-making, and its decisions have the same status and validity, at whatever level it meets. The Council has an important public profile and issues declarations and communiqués explaining the Alliance's policies and decisions to the general public and to governments of countries which are not members of NATO.

Id.

> mandate via their respective national procedures in order to ensure the lawful use of their national military assets.[73]

Implementation involves NATO members contributing at every aspect of the development of an operational plan.[74] This is where NATO assistance in the migration crisis could focus on the wide-ranging avenues of approach to managing heavy migration flows and ease security fears for its members in Europe.

IV. Current NATO Capabilities for Use in Support to Europe's Migrant Crisis

A. Crisis Management Capabilities in Support to Civil Authorities

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[73] Ochmannova, *supra* note 44, at 36.

[74] *Id*. at 37.

> For SACEUR [Supreme Allied Commander Europe], the NAC approval is a green light. Based on such approval, SACEUR may direct his staff to develop a mission operational plan (OPLAN) that contains detailed information on the mission objectives and how they should be reached. NATO nations have many opportunities, during the OPLAN development and approval process, to comment on the OPLAN draft. When SACEUR determines that the OPLAN contains his best military recommendations for mission accomplishment, it is finalised and forwarded through the Military Committee for approval by the NAC. Only after the NAC approves the OPLAN may the specific NATO/NATO-led operation actually commence. This process for initiation of NATO operations through the OPLAN development displays the high degree of interconnectivity between NATO (as an international organisation) and its member states. Decisions related to the conduct of operations are not taken by any NATO body or military headquarter independently. The twenty-eight NATO nations sitting collectively in the NAC, partner nations participating in NATO operations, and the NATO military command structure directed by SACEUR constantly interact. Thus, NATO obtains proactive participation of its member states during all phases of the conduct of its operations. Each step in the decision-making process involves the nations' considerations and approval. As a result, they are wholly involved in this process and can either reaffirm their initial intent to execute an operation or halt the planning process at any step, thereby changing NATO's course of action.
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> *Id.*

The North Atlantic Treaty Organization can provide clear and precise goals that reflect the EU's concerns for improving the handling of the migration crisis based on its organized command structure and direct link to the senior military and political leadership of its members.[75] NATO's support to crises is extensive, to say the least.[76] For instance, one of NATO's main organizational elements for crisis management capability is in its support to civil authorities via the Crisis Response System (NCRS):

> The overarching NATO Crisis Response System (NCRS) is a process within which a number of elements are geared to addressing different aspects of NATO's response to crises in a complementary manner. These include: the NATO Crisis Management Process (NCMP), the NATO Intelligence and Warning System (NIWS), NATO's Operational Planning Process and NATO Civil Emergency Planning Crisis Management Arrangements,

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[75] *Id*. at 38.

> Given the explained establishment and functioning of NATO, NATO nations are clearly involved at every stage of the decision-making process as they exercise their full sovereignty and control over their level of involvement within the Alliance. Although it is usually emphasised that "the legal hierarchy between international organisations and their member states is interestingly unclear," such a premise does not apply to the close degree of interaction between the Alliance and its member states in their conduct of operations.

Id.

[76] *Crisis Management*, TOPICS (Jan. 29, 2015), http://www.nato.int/cps/en/natolive/topics_49192.htm.

> [The] NATO has different mechanisms in place to deal with crises. The principal political decision-making body is the . . . (NAC), which exchanges intelligence, information and other data, compares different perceptions and approaches, harmonises its views and takes decisions by consensus, as do all NATO committees. In the field of crisis management, the Council is supported by the Operations Policy Committee, the Political Committee, the Military Committee and the Civil Emergency Planning Committee. Additionally, NATO communication systems, including a "Situation Centre" (SITCEN), receive, exchange and disseminate political, economic and military intelligence and information around the clock, every single day of the year.

Id.

> which together underpin NATO's crisis management role and its ability to respond to crises.[77]

These systems can be coordinated with NATO member or non-NATO governments most affected by the large influx of migrants, should a way forward be achieved at the North Atlantic Council level. The list of capabilities is very extensive and worth consideration in addressing the migrant crisis.[78]

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[77] *Id.*

[78] *Id.*

> NATO is one of few international organisations that have the experience as well as the tools to conduct crisis management operations. The NCRS is effectively a guide to aid decision-making within the field of crisis management. Its role is to coordinate efforts between the national representatives at NATO Headquarters, capitals and the strategic commands. It does this by providing the Alliance with a comprehensive set of options and measures to prepare for, manage and respond to crises. It complements other processes such as operations planning, civil emergency planning and others, which exist within the Organization to address crises. It was first approved in 2005 and is revised annually. One of the core components of the NCRS is the NCMP. The NCMP breaks down a crisis situation into six different phases, providing a structure against which military and non-military crisis response planning processes should be designed. It is flexible and adaptable to different crisis situations. NATO periodically exercises procedures through scheduled crisis management exercises (CMX) in which the Headquarters (civilian and military) and capitals, including partners and other bodies who may be involved in a real-life crisis participate. Standardization: countries need to share a common set of standards, especially among military forces, to carry out multinational operations. By helping to achieve interoperability–the ability of diverse systems and organisations to work together–among NATO's forces, as well as with those of its partners, standardization allows for more efficient use of resources. It therefore greatly increases the effectiveness of the Alliance's defence capabilities. Through its standardization bodies, NATO develops and implements concepts, doctrines and procedures to achieve and maintain the required levels of compatibility, interchangeability or commonality needed to achieve interoperability. For instance, in the field, standard procedures allow for the transfer of supplies between ships at sea and interoperable material such as fuel connections at airfields. It enables the many NATO and partner countries to work together, preventing duplication and promoting better use of economic resources. Logistics: this is the bridge between the deployed forces and the industrial base that produces the material and weapons that forces need to accomplish their mission. It comprises the identification of requirements as well as both the building up of stocks and capabilities,

The North Atlantic Treaty Organization also possesses an organizational structure that contemplates providing civilian expertise,[79] support for stabilization and reconstruction,[80] among other things. North

> and the sustainment of weapons and forces. As such, the scope of logistics is huge. Among the core functions conducted by NATO are: supply, maintenance, movement and transportation, petroleum support, infrastructure and medical support. The Alliance's overarching function is to coordinate national efforts and encourage the highest degree possible of multinational responses to operational needs, therefore reducing the number of individual supply chains. While NATO has this responsibility, each state is responsible for ensuring that - individually or through cooperative arrangements–their own forces receive the required logistic resources.

Id.

[79] *NATO Civil Support Operations*, *supra* note 59, at 2.

> Civil capabilities can be used by military authorities at all times for advice on technical matters during peacetime (preparedness), the planning stages of an operation and the execution phase. For example, transport experts analyze civilian or commercial air and sea lift capabilities and provide results to military planners, thereby helping the military to identify more cost-effective and readily available strategic transport solutions for military operations. Civil emergency planners support military authorities by assisting them in implementing civilian advice and effectively using civilian resources for operations. Civil experts can accompany military teams on-site to provide on-the-spot evaluations and analysis. In addition, during major international events, such as the NATO Summit in Riga in November 2006 or the Olympic Games in Greece in 2004, civil experts have supported the military in providing protection against possible attacks using chemical, biological, radiological or nuclear agents.

Id.

[80] *Id.*

> Civilian expertise may increasingly be required in the future to advise the military in the context of support for stabilization and reconstruction efforts, in coordination with the host nation. This could include advice on issues such as rebuilding local industry, relaunching agricultural production, reconstructing health and civil communications infrastructure. Close civil-military coordination between actors in the field is an important element of current NATO operations. The Provincial Reconstruction Teams established across Afghanistan are a good example. These small teams of civilian and military personnel work in the provinces to extend the authority of the central Afghan government as well as to help local authorities provide security and assist with reconstruction work.

Id.

Atlantic Treaty Organization civil support capabilities have an even deeper framework that addresses civil emergency, humanitarian, and disaster relief.[81] This framework involves Planning Boards and Committees,[82] Network of Civil Experts,[83] and a Civil Capabilities Catalogue.[84]

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[81] *Id.* at 3.

> [The] NATO's civil emergency planning activities are conducted under the overall guidance of the Senior Civil Emergency Planning Committee (SCEPC). Activities cover specific areas in which civil support may be required by NATO's Military Authorities for both collective defence operations (covered under Article 5 of NATO's founding treaty) and "non-Article 5" or crisis-response operations, which encompass military operations as well as disaster and humanitarian relief. This support is provided as necessary through a range of civilian capabilities and instruments.

Id.

[82] *Id.* at 4.

> Under the authority of the Senior Civil Emergency Planning Committee, the Planning Boards and Committees are the means by which civil support to military operations is actually carried out. They cover specific areas of expertise such as transport, communications, civil protection, industrial planning and supply, medical matters, food and agriculture. At the request of military planners, the Planning Boards and Committees can carry out studies on specific areas to support military operations. For example, the Planning Board for Inland Surface Transport conducted a study on rail networks in Afghanistan.

Id.

[83] *Id.*

> A group of 350 civil experts located across the Euro-Atlantic area are selected based on specific areas of support frequently required by the military. They cover civil aspects relevant to NATO planning and operations including crisis management, consequence management and critical infrastructure. Provided by nations, experts are drawn from government and industry. They serve for three years, participate in training and respond to requests for assistance in accordance with specific procedures known as the Civil Emergency Planning Crisis Management Arrangements. The Planning Boards and Committees are responsible for maintaining and updating this network of experts.

Id.

[84] *Id.*

> The Civil Capabilities Catalogue is a list of [thirteen] areas comprising civilian assets and expertise which provide a "reachback" capability

B. Potential NATO Humanitarian Assistance Support and Coordination Capability in the Migrant Crisis

Additional NATO regulations continue to expand its ability to assist in non-combat situations with military support similar to the current problems involving Europe's migrant crisis. Take, for example, the Allied Joint Publication on Humanitarian Assistance (AJP-3.4.3).[85] Whether or not humanitarian assistance is NATO's best approach for involvement, reviewing AJP-3.4.3 illustrates how NATO can play a vital role in the crisis. The publication describes:

> The overarching guidelines and fundamentals to assist Allied joint force commanders (JFCs) and their staffs to plan and provide support to humanitarian assistance (HA). While AJP-3.4.3 is intended for use by operational-level Allied joint force and subordinate component commands, the doctrine is instructive to, and provides a useful framework for, operations conducted by a coalition of NATO, NATO partners, non-NATO nations, and to enhance interaction with other organizations.[86]

The AJP-3.4.3 references growing cooperation with the EU for humanitarian missions.[87] The measures involved in humanitarian assistance run the gamut of civil support operations to disaster relief that we have explored earlier in this discussion, specifically, support to

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> for the NATO Military Authorities. This capability can be used during crisis-response operations, from the force commander located in the area of operations up through the entire military chain of command to the highest strategic levels. By using the "reachback" capability, any military level with a request for information or advice on a civilian matter can address this need for civilian expertise through a fast and simple process. The expert might be at NATO Headquarters, in a national ministry or a commercial business. This capability is used in real-world situations, such as in Afghanistan, and is frequently tested during exercises. It can be accessed through a variety of communications networks such as telephone and video link.

Id.

[85] NATO STANDARDIZATION AGENCY, AJP-3.4.3, ALLIED JOINT DOCTRINE FOR THE MILITARY CONTRIBUTION TO HUMANITARIAN ASSISTANCE (8 Oct. 2016) [hereinafter AJP-3.4.3].

[86] *Id.* at IX.

[87] *Id.*

dislocated civilians.[88] North Atlantic Treaty Organization's doctrinal position on humanitarian assistance contemplates an ever-changing operational environment[89] that relies on partnership with NATO members

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[88] *Id.* at 2-1.

> Humanitarian Assistance is conducted in response to natural and man-made disasters causing widespread human suffering. Humanitarian Assistance activities conducted by NATO-led forces are limited in scope and duration and are conducted in a supporting role to larger multinational efforts. Humanitarian Assistance is conducted at the request of the [Host Nation] or the agency leading the humanitarian efforts; it may be either in the context of an ongoing operation, or as an independent task. Normally, military forces work to create the conditions in which these other agencies can operate more freely and effectively, bearing in mind the desire to maintain distinction between military and humanitarian actors. North Atlantic Treaty Organization military activities may support short-term tasks such as relief supply management and delivery or providing emergency medical care. However, support could be expanded to other activities (e.g. debris cleaning) aimed to support the relief of the stricken [Host Nation]. The North Atlantic Treaty Organization has military assets (aircraft, helicopters, ships, ground vehicles) necessary to transport food and shelter provided by humanitarian organisations to those in need in isolated locations. Military engineers also are able to build bridges to places that would otherwise be impossible to reach. Furthermore, military activities could also take the form of advice and selected training, assessments, and providing manpower and equipment. Other missions might include command and control, logistics, medical, engineering, communications, and the planning required to initiate and sustain [Humanitarian Assistance]. Specific types of military support to Humanitarian Assistance include DR (Disaster Relief), support to dislocated civilians, technical assistance and support, chemical, biological, radiological, and nuclear (CBRN) consequence management (CM), and security.

Id.

[89] *Id.* at 1-6.

> The operational environment (OE) impacts the conduct of [Humanitarian Assistance]; important elements to consider include the nature of the crisis, the prevailing security environment, and the system of international relief at work. Humanitarian emergencies may occur suddenly or develop over a period of time. Speed of onset has important consequences for action that can be taken. Preparedness and early warning measures are much less developed for sudden onset disasters. Slow onset emergencies include those resulting from crop failure due to drought, the spread of an agricultural pest or disease, or a gradually deteriorating political situation leading to conflict. Rapid onset emergencies are usually the result of sudden, natural events such

and non-NATO partners.[90] The North Atlantic Treaty Organization potentially provides the EU with a highly focused and streamlined approach to executing operations in support of managing the migration crisis.

The key takeaway from the historical development of NATO civil support and humanitarian operations, beyond Article 5, is that NATO has the organizational skills to assist in securing the unstable regions where most of the migrants are coming from, and also secure where they are going in Europe. How best to categorize where the migrant crisis should fall under NATO legal and regulatory authority should not detract from the overall benefits of NATO assisting in the crisis. The NATO assistance

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> as wind storms, hurricanes, typhoons, floods, tsunamis, wild fires, landslides, avalanches, earthquakes and volcanic eruptions. They also may be caused by accidental or human-caused catastrophes such as civil conflict, acts of terrorism, sabotage, or industrial accidents.

Id.

[90] *Id.* at 1-8.

> The lack of common structures, policies, and procedures necessary for effective interaction, and a lack of mutual understanding in how the NATO-led force and other organizations plan and conduct operations, may complicate efforts at achieving unity of purpose. Traditional command and control relationships will not apply between the joint force and the civilian and governmental organizations operating within the joint operations area (JOA). The challenge is to determine how NATO-led forces can best be utilized through coordination networks. Difficulties may arise when many civil and military authorities, foreign governments, the [United Nations] and other [International Organizations], as well as [Non-Governmental Organizations] conduct assistance activities within the same operational area prior to, during, and after departure of NATO-led forces. Thus, the [Joint Force Commander] should consider how consultation and liaison can foster common understanding and unity of purpose. This may require additional attention be paid to the interaction between agencies and organizations at all levels both within and external to the JOA. Consequently, the JFC must consider the communication and liaison linkages necessary to facilitate this coordination. The goals and operating procedures of all concerned may not be compatible; however, thorough collaboration and planning with concerned entities can contribute to successful operations in this complex and challenging environment. Achieving unity of effort will require constant coordination, flexibility, and assessment both in the planning and execution of operations.

Id.

could relieve pressure from an EU effort that has resulted in internal disagreement.[91] Bear in mind, the road toward NATO involvement in Europe's migrant crisis is not an easy one, particularly in light of the need for consensus among its member states. Of course, this further complicates NATO's relationship to internal EU policies. The NATO-EU relationship is a complicated and nuanced one.[92] Understanding this unique relationship and importance in dealing with the migrant crisis warrants a closer look.

V. The EU-NATO Strategic Working Relationship for a Coordinated Response to the Migrant Crisis

Institutional literature on NATO describes:

> Both NATO and the European Union (EU) have, since their inception, contributed to maintaining and strengthening security and stability in western Europe. NATO has pursued this aim in its capacity as a strong and defensive political and military alliance and, since the end of the Cold War, has extended security in the wider Euro-Atlantic area both by enlarging its membership and by developing other partnerships. The European Union has created enhanced stability by promoting progressive economic and political integration, initially among western European countries and subsequently also by welcoming new member countries. As a result of the respective organisations' enlargement processes, an increasing number of European countries have become part of the mainstream of European political and economic development, and many are members of both organisations.[93]

The NATO and EU cooperation is a relatively recent phenomenon. Prior to the 1990s, each developed separate security regimes with NATO, having more prominence with collective self-defense initiatives to contain the rise of Soviet dominance in Eastern Europe.[94]

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[91] Morris, *supra* note 18.
[92] NATO HANDBOOK, *supra* note 34, at 243.
[93] *Id*.
[94] *Id*. at 244.

The *NATO Handbook* explained:

> In the early 1990s, it became apparent that European countries needed to assume greater responsibility for their common security and defence. A rebalancing of the relationship between Europe and North America was essential for two reasons: first, to redistribute the economic burden of providing for Europe's continuing security, and second, to reflect the gradual emergence within European institutions of a stronger, more integrated European political identity, and the conviction of many EU members that Europe must develop the capacity to act militarily in appropriate circumstances where NATO is not engaged militarily.[95]

Seeing the need for better cooperation and consultation on security matters with a more robust EU security force inspired a more formal NATO-EU bilateral declaration in the European Security and Defence Policy (ESDP) in 1999.[96] The strategic relationship between NATO and the EU was further cemented and clarified in the Berlin Plus Arrangements of 2003.[97] Some of the main elements of Berlin Plus included:

> Despite shared objectives and common interests in many spheres, the parallel development of NATO and the European Union throughout the Cold War period was characterised by a clear separation of roles and responsibilities, and the absence of formal or informal institutional contacts between them. While a structural basis for a specifically European security and defence role existed in the form of the Western European Union, created in 1948, for practical purposes western European security was preserved exclusively by NATO. For its part, the Western European Union undertook a number of specific tasks, primarily in relation to post-war arms control arrangements in [W]estern Europe. However, its role was limited and its membership was not identical to that of the European Union.

Id.

[95] *Id*.

[96] *Id*. at 247.

[97] *Id*. at 248.

> The Berlin Plus arrangements are based on the recognition that member countries of both organisations only have one set of forces and limited defence resources on which they can draw. Under these circumstances, and to avoid an unnecessary duplication of resources, it was agreed that operations led by the European Union would be able

> [T]he further adaptation of NATO's defense planning system to incorporate more comprehensively the availability of forces for EU-led operations; procedures for the release, monitoring, return and recall of NATO assets and capabilities; and NATO-EU consultation arrangements in the context of an EU-led crisis management operation making use of NATO assets and capabilities.[98]

These elements listed in Berlin Plus are crucial in NATO and the EU providing a coordinated response to the migration crisis. The above reference to EU-led crisis management operations making use of NATO assets and capabilities is noteworthy. Such coordinated action could be useful in ongoing security missions undertaken by the EU dealing with migrants.

A. Potential NATO-EU Coordinated Response to the Migrant Crisis at Sea?

Take the recent EU naval operations to minimize human trafficking and rescue refugees from the Mediterranean as an example.[99] More and more migrants have drowned in poorly-equipped vessels operated by human traffickers, gaining negative international attention for the EU as casualties continued to mount.[100] On May 18, 2015, the EU's executive authority approved a naval mission (EUNAVFOR) in the Mediterranean with an objective to disrupt the "business model" of human smuggling and

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> to benefit from NATO assets and capabilities. In effect, these arrangements enable NATO to support EU-led operations in which the Alliance as a whole is not engaged. They have facilitated the transfer of responsibility from NATO to the European Union of military operations in the former Yugoslav Republic of Macedonia and in Bosnia and Herzegovina. Agreed in March 2003, these arrangements are referred to as Berlin Plus because they build on decisions taken in Berlin in 1996 in the context of NATOWEU cooperation.

Id.

98 *Id*. at 249.

99 European Union External Action Service, *Mission Description*, EUROP'N UN. EXT. ACT'N, http://eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/mission-description/index_en.htm (last visited Mar. 20, 2017).

100 James Mackenzie & Robin Emmott, *Migrants' Bodies Brought Ashore as EU Proposes Doubling Rescue Effort*, REUTERS (Apr. 20, 2015), http://www.reuters.com/article/us-europe-migrants-idUSKBN0NA07020150420.

trafficking networks and contribute to the prevention of loss of life at sea.[101] The EU naval operation was authorized for a duration of twelve months and consisted of three phases:

> The first phase focuses on surveillance and assessment of human smuggling and trafficking networks in the Southern Central Mediterranean. The second stage of the operation provides for the search and, if necessary, diversion of suspicious vessels. The third phase would allow the disposal of vessels and related assets, preferably before use, and to apprehend traffickers and smugglers.[102]

NATO could step up its security assistance in the crisis, like in the above mentioned second and third phases of the EU operation which would be a great opportunity for coordination with the EU on migrants in the Mediterranean in conjunction with NATO's current sea operations.[103] Criticism of the EU naval operations short-term vision may also aid in NATO lending more robust assistance to the EU operation.[104]

In July 2015, researchers from the Netherlands Institute of International Relations published a report assessing the challenges facing the current security systems for both the EU and NATO, and reported better ways for them to respond to them.[105] The report also notes the criticism of the EUNAVFOR's short-term limitations.

> Due to mounting crises, wars, demographic pressure, dismal economic prospects and oppression in the . . . (Middle East and North Africa) region, the EU will continue to function as a magnet for refugees. Commissioner Frans Timmermans expressed this eloquently: "As long as there are wars and hardships in our neighbourhood, people will continue to risk their lives in search of European shores. There is no simple solution

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101 European Union External Action Service, *supra* note 99.

102 *Id.*

103 *Operations and Missions: Past and Present*, TOPICS (Dec. 21, 2016), http://www.nato.int/cps/en/natohq/topics_52060.htm.

104 *See generally* Giovanni Faleg & Steven Blockmans, *EU Naval Force EUNAVFOR MED Sets Sail in Troubled Waters*, CEPS COMMENTARY (June 26, 2015), https://www.ceps.eu/system/files/CEPS%20Commentary%20EUNAVFOR%20G%20Faleg%20S%20Blockmans_0.pdf.

105 MARGRIET DRENT ET AL., NEW THREATS, NEW EU AND NATO RESPONSES (2015).

> to this complex problem, but it is clear that there is no national solution. There is only a European solution."[106]

The Netherlands Institute Report goes further to explain the problem, stating:

> However, only initiating push back operations and disrupting the "business models" of the traffickers, as Operation EUNAVFOR Med is designed to do, will not solve the migration flows from the South to the EU. A true comprehensive approach of tackling root causes, improving regional refugee facilities, enhancing border management in transit countries and a common EU asylum policy is the only sustainable answer to this problem.[107]

A comprehensive approach by the EU is the answer to the problem, and it will certainly require greater initiative by EU member states. The Netherlands Institute report provides some excellent advice for the EU on how best to proceed.[108] However, a comprehensive approach that aims to succeed requires a more robust response on the part of EU member states in *conjunction* with NATO. With its reach across the Atlantic to the United States, NATO could lend increased logistical support to a crisis that is affecting most, if not all, member states. Later phases of the EUNAVFOR mission in the Mediterranean will require UN Security Council approval to dispose of vessels and apprehend traffickers and smugglers in territorial waters outside of EU control.[109] NATO's state

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[106] *Id*. at 47.
[107] *Id*.
[108] *Id*.

> [A] common EU asylum policy is needed: the competence for immigration law and the asylum system still lies strictly with the individual member states and while the Commission tries to take the initiative in the matter, national political interests to keep the toxic immigration issue at bay are still dominant. Solidarity among the member states by allowing a fair 'intra-EU relocation system' of refugees among the [twenty-eight] member states is still a distant prospect and only a voluntary distribution plan could be agreed by the Heads of States and Government in their June meeting.

Id.
[109] Faleg & Blockmans, *supra* note 104, at 3.

executive level membership could be a great help at the UN for supporting an EU mission phase that may have extraterritorial political and diplomatic implications. Robust coordination between NATO and the EU on land, in the migrant crisis, is another critical area for opportunity to improve.

B. Potential NATO-EU Coordinated Response to the Migration Crisis on Land?

The EU's border management control authority commonly known as FRONTEX, from the French language—*Frontières Extérieures*—for external borders, plays a major role in recent efforts to address the migrant crisis on land and sea.[110] The FRONTEX agency has a wide variety of platforms in use to help with European borders affected in the crisis.

> Frontex relies on member states to provide most of its capacities, it is to be expected that border management related capacities are going to be in high demand. Surveillance equipment, such as remotely piloted air systems (RPAS) and satellite observation are particularly vital as they enable enhanced surveillance coverage of long stretches of land and sea borders. Frontex is already working on the 'Eurosur' surveillance system to improve both its own and member states' situational awareness and reaction capability in order to prevent irregular migration and cross-border crime at the external land and maritime borders.[111]

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[110] Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders, EUR-LEX, http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Al33216.

[111] DRENT ET AL., *supra* note 105, at 48.

> The Frontex operations and the [Common Security and Defence Policy] naval operation in the Mediterranean demand specific capacities, such as offshore patrol vessels, patrol boats, search and rescue equipment, helicopters, airplanes, and debriefing and screening teams. Triton has a regional base in Sicily from which Frontex will coordinate the operation and work closely with liaison officers from Europol, Eurojust and EASO (European Asylum Support Office) in support of the Italian authorities. Close coordination between EUNAVFOR Med and Frontex is required for the operational activities. But one could also envisage that sharing naval and air assets would be the most efficient way to make optimal use of the available resources.

The capabilities provided for FRONTEX could be augmented with NATO military capabilities for surveillance, coupled with crisis management efforts. These efforts could assist in managing the care and containment of large numbers of migrants pouring into smaller NATO and EU countries, like Hungary.

The Netherlands Institute Report [112] captures the metaphysical dynamic at play in the migrant crisis affecting EU border management explaining, "Border management is almost literally at the interface between internal and external security and the politically salient issue of mass migration is currently pushing the increased coordination of policies and instruments from various EU institutions forward."[113] Examples of policies and instruments of EU institutions were detailed in the report.[114] This intersection of internal and external security is yelling at the top of its lungs for NATO involvement to fill in the space created by the unique circumstances forced upon the EU by the migrant crisis.

C. General Assessment of NATO-EU Coordination

By no means would NATO assistance to the EU be smooth and flawless. There are variety of challenges NATO involvement would face with an enhanced relationship with the EU. North Atlantic Treaty Organization internal political divisions—like Turkey versus Greece over Cyprus—and NATO's concern for Russian expansion in Eastern Europe,

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Id. at 48.

[112] DRENT ET AL., *supra* note 105.

[113] *Id.*

[114] *Id.*

> Work is ongoing to allow the greater involvement of EU Agencies in the [Freedom, Security, and Justice] sector, in particular Europol and Frontex, in [Common Security and Defence Policy] missions. A proposal was made by the Commission for a new regulation on Europol to consolidate the enhanced contribution to [Common Security and Defence Policy]. Similar arrangements are being prepared for Frontex. Legal texts have entered into force between the EU Satellite Centre (SATCEN) and Frontex, enabling the establishment of operational cooperation. Intra-institutional, intra-agency and inter-organisational cooperation and coordination will remain the keywords in tackling the complex security issues on the EU's southern periphery.
>
> *Id.*

are prime examples.[115] However, the crux of the argument is that the space between created by the crisis, no matter how small or tough for NATO to fit in is meaningful enough to explore. North Atlantic Treaty Organization involvement brings all the major players in the migrant crisis together, free from EU political rivalries, to focus on specific security and assistance measures, on an equal footing, that may improve negotiations or at least clarify a better way forward.

A comprehensive approach envisioned by the authors of the Netherlands Institute Report does not specifically call on NATO involvement in the crisis.[116] However, the report is instructive as to how NATO could become involved in the EU's migration problem when the report examines the need for improvement in the overall NATO-EU relationship.

> In its external policies the EU can cover a wide set of instruments in areas like trade, development aid, the energy sector, financial assistance and the strengthening

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[115] *Id*. at 50-51.

> Berlin Plus procedures are complicated and the decision-making process, involving two organisations, is very slow. Operating within the NATO command chain makes it more difficult to develop and implement the comprehensive approach with EU civil actors. But the most important blockade is of a purely political nature. The second and last 2004 'take-over' operation in [Bosnia and Herzegovina] could be agreed by both organisations because Cyprus (EU member since 1 May 2004), under pressure from Greece, swallowed the bitter pill of being excluded from the formal EU-NATO coordination arrangements. This was demanded by Turkey for its consent to the Berlin Plus package, based on the non-recognition policy of Ankara with regard to the status of (Greek-Cypriot led) Cyprus. The exclusion of Cyprus from formal EU-NATO meetings led to politically embarrassing situations, even at the ministerial level. At the Informal Meeting of EU Defence Ministers in Noordwijk during the Dutch EU Presidency in September 2004, the Cypriot Defence Minister was asked to leave the room for the agenda point on the upcoming take-over of the NATO [Stabilisation Force] operation by the EU. Naturally, this created a political incident with the Cypriot defence minister loudly protesting. Besides, the practical effect was zero, as one of the members of the Cypriot delegation followed the discussion in a listening-room, which had no entrance checks on nationality. As a result of Berlin Plus, all formal meetings of the NAC and the PSC in Brussels take place without the participation of Cyprus.
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> *Id.*

[116] DRENT ET AL., *supra* note 105.

> of good governance and the rule of law. In a situation of confrontation many of these areas can be used differently, for example by imposing financial and economic sanctions, by cutting aid or by changing energy import dependency. NATO can only use the military instrument, either in article 5 or in non-article 5 situations. Although step-by-step border security is bringing the use of military capacities to the EU's frontiers, the Common Security and Defence Policy limits the use of EU military operations to 'crisis management', in areas external to the EU. Clearly, there is *potential overlap between the EU and NATO's non-article 5 tasks*.[117]

The Netherlands Report reference to the overlap of NATO's non-article 5 tasks is the space that NATO can fill in Europe's handling of the migrant crisis.[118] The tasks that NATO is prepared to fulfill, discussed earlier in Section III, can potentially fill security gaps for better border control and processing of migrants for EU and NATO members struggling with large migrant populations.

Again, NATO assistance will not be easy. It will require consensus and a detailed agreed-upon plan of action. Migrant assistance will also have to overcome NATO's apparent reluctance to assist displaced persons or refugees, as explained by AJP 3.4(A)'s discussion of Non Article 5 operations. "Although these operations may receive some support from NATO forces, the Alliance will seldom, if ever, conduct these operations."[119] The allied publication goes on to explain that such activities are primarily for the host nation, international and nongovernmental organizations to deal with.[120] Perhaps major security concerns regarding who exactly is seeking entry into Europe, due to the recent Paris attacks, will overcome this apparent reluctance. An assessment of NATO's role in recent developments may also present an opportunity for more enhanced assistance.

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[117] *Id*. at 49 (emphasis added).
[118] DRENT ET AL., *supra* note 105.
[119] AJP-3.4(A), *supra* note 63, at 3-12 to -13.
[120] *Id.*

VI. New Developments Regarding NATO Assistance in the Migrant Crisis

"With time all things are revealed," is a saying attributed to the famed French renaissance writer, Francois Rabelais.[121] Monsieur Rabelais sums up exactly why a new-developments section is required for this article. Much of the research for this article was gathered in late fall and early winter of 2015. At that time, the migration crisis taxing Europe continued to result in a variety of mixed and controversial responses from some EU and NATO member states.[122] The pressing need for NATO to assist in some capacity remained the obvious inspiration for this research paper. The migration crisis continues to intensify in Europe, and on February 10, 2016, an announcement from the NATO Secretary General was made—NATO assistance in the crisis was pending discussion by defense ministers on the North Atlantic Council (NAC).[123]

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[121] *Francois Rabelais Quotes*, ART QUOTES, http://www.art-quotes.com/auth_search.php?authid=3290#.Vs6StP5f1Ms (last visited Mar. 20, 2017).

[122] *See generally* Ass'd Press, *The Latest: Slovenia Puts Restrictions on Migrants*, YAHOO (Jan. 21, 2016), http://news.yahoo.com/latest-macedonia-opens-border-migrants-102122288.html; Nicolas Garriga & Karl Ritter, *Sweden, Denmark Introduce Border Checks to Stem Migrant Flow*, YAHOO (Jan. 4, 2016), http://news.yahoo.com/sweden-introduces-border-checks-stem-migrant-flow-101629361.html; Ass'd Press, *Austria Turns Away 3,000 Migrants in 20 Days*, YAHOO (Jan. 13, 2016), http://news.yahoo.com/latest-rights-monitor-hungary-asylum-seekers-risk-103353888.html.

[123] NATO HANDBOOK, *supra* note 34, at 34.

> All member countries of NATO have an equal right to express their views round the Council table. Decisions are the expression of the collective will of member governments arrived at by common consent. All member governments are party to the policies formulated in the Council or under its authority and share in the consensus on which decisions are based . . . . Twice a year, and sometimes more frequently, it meets at ministerial level, either in formal or informal session, when each country is represented by its minister of foreign affairs. Meetings of the Council also take place in defence ministers' sessions. Summit meetings attended by heads of state or government are held whenever particularly important issues have to be addressed or at seminal moments in the evolution of Allied security policy.

Id.

A. The Facts Regarding NATO's Proposed Response to the Migration Crisis

During the press briefing on February 10, 2016, the day before the ministers of defense were to meet at the NAC, the NATO Secretary General announced:

> This evening, we will meet with the European Union, as well as our partners Australia, Finland, Georgia, Jordan, and Sweden. We will discuss how we can address together the challenges in our neighbourhood, to the south and to the east. During the course of this ministerial, we will also discuss how NATO can support Allies in responding to the refugee and migrant crisis we see in Europe and close to Europe in the Middle East, Syria and Turkey. We will do so based on an initiative by Turkey.[124]

During the question and answer portion of the briefing, the Secretary General went further, explaining:

> We all understand the concern and we all see the human tragedy and all the challenges which are connected to the migrant and the refugee crisis, which we have seen for many years in the Middle East but which has now become a great challenge for Europe. So, of course, when Allied Turkey and also other Allies raise the question of what NATO can do to help them to manage this refugee and migrant crisis, of course we will look very seriously into the request and discuss how we can follow-up and what NATO can do.[125]

The following day, after the North Atlantic Council ministerial meeting took place, a detailed plan of action from the Secretary General was announced.

> We have just addressed how our Alliance is responding to a changed security environment. Europe is facing the greatest refugee and migrant crisis since the end of the

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[124] *Doorstep by NATO Secretary General Jens Stoltenberg*, NATO (Feb. 10, 2016), http://www.nato.int/cps/en/natohq/opinions_127825.htm.
[125] *Id.*

> Second World War. Driven by conflict and instability on our southern borders, as well as the criminal networks that traffic in human suffering. We have just agreed that NATO will provide support to assist with the refugee and migrant crisis. This is based on a joint request by Germany, Greece and Turkey. The goal is to participate in the international efforts to stem illegal trafficking and illegal migration in the Aegean. NATO's Standing Maritime Group 2, is currently deployed in the region under German command. It will be tasked to conduct reconnaissance, monitoring and surveillance of the illegal crossings in the Aegean Sea in cooperation with relevant authorities. And to establish a direct link with the European Union's border management agency Frontex.[126]

B. Is NATO's Current Response Plan for the Crisis Sufficient?

The plan of action announced from NATO requires coordinated efforts with the EU, as previously discussed in Section V. These efforts could forge deeper cooperation between NATO and the EU in the crisis. NATO's Secretary General goes on to explain:

> As part of the agreement, Greek and Turkish armed forces will not operate in each other's territorial waters or air space. Our top military commander SACEUR [Supreme Allied Commander Europe] is now directing the Standing NATO Maritime Group to move into the Aegean without delay. And to start maritime surveillance activities. Our military authorities will work out all the other details as soon as possible. And Allies will be looking to reinforce this mission. This is not about stopping or pushing back refugee boats. NATO will contribute critical information and surveillance to help counter human trafficking and criminal networks. We will do so in cooperation with national coastguards, and working closely with the European Union. We have also decided to intensify

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[126] *Press Conference by NATO Secretary General Jens Stoltenberg Following the Meeting of the North Atlantic Council at the Level of Defence Ministers*, NATO (Feb. 11, 2016), http://www.nato.int/cps/en/natohq/opinions_127972.htm.

> intelligence, surveillance and reconnaissance at the Turkish-Syrian border.[127]

The announcement reveals the contemplation of the complex issues already discussed in Section X of this article related to the need to overcome political differences among NATO and EU members. Notice the Greek and Turkish designated areas of operation, used to avoid confrontation and preserve consensus in NATO to assist in the crisis. North Atlantic Treaty Organization's security focus in the Aegean Sea and sharing information with the EU's FRONTEX may start to address the security concerns expressed by the Hungarian Prime Minister after the Paris Attacks, discussed earlier. NATO's announcements are positive steps in the right direction, aimed to assist in the migrant crisis. However, as of 2017, with the migrant crisis still plaguing Europe, is this all that is required from NATO?[128] Is it enough?

One NATO observer back in October 2015, made a compelling case for NATO involvement in the crisis.

> Today, Germany, Austria, and, especially, Greece and the Western Balkan countries are trying to cope with huge flows of refugees as tens of thousands of people, young and old, flee the war in Syria and try to make their way to Europe. Greece as well as Macedonia, Serbia, Croatia, and Slovenia are stretched beyond their limits in trying to provide basic security and shelter for the refugees. On October 20, Slovenia announced it would deploy the military to help patrol the country's borders. Ljubljana recognized it had to deal with a civil emergency. And that is what this part of Europe is facing: a civil emergency that requires an emergency response. That is what NATO should be providing. But ever since the beginning of the refugee crisis many months ago, NATO has remained on the sidelines, almost indifferent to a problem that has the potential to undermine the stability of some of the countries in southern Europe.[129]

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[127] *Id.*

[128] Eliza Mackintosh, *No More Excuses On Resettling Refugees, European Commission Warns*, CNN (Mar. 2, 2017), http://www.cnn.com/2017/03/02/europe/european-countries-not-meeting-refugee-resettling-obligations/.

[129] Dempsey, *supra* note 24, at 1.

The situation on the borders of Europe, and within many NATO and EU member states, is critical regarding the care, control, and management of large migrant populations. The same contributor also pointed out NATO's lack of initiative.

> Some could argue that these kinds of civilian crises have nothing to do with NATO. That is not the case. The alliance has a Civil Emergency Planning Committee whose goal is unambiguous: "Civil Emergency Planning provides NATO with essential civilian expertise and capabilities in the fields of terrorism preparedness . . . humanitarian and disaster response and protecting critical infrastructure." NATO also has a Euro-Atlantic Disaster Response Coordination Center based at the alliance's headquarters in Brussels. The center is supposed to work closely with the UN Office for the Coordination of Humanitarian Affairs and other international organizations. So far, this center has not been catapulted into action. And the alliance has a Civil Emergency Planning Rapid Reaction Team that is meant to evaluate civil needs and capabilities to support a NATO operation or an emergency situation, which is what the Western Balkans are now facing. No evidence of that being activated either.[130]

Despite the security action proposed by NATO for land and sea operations with the EU, a civil, emergency support-role for NATO should swing to action in order to shore-up complete and effective assistance to the crisis in Europe. The civil emergency planning capabilities, humanitarian assistance, and even disaster relief discussed in earlier sections of this article, should complement recent security measures announced by NATO. This is, arguably, the only way the migrant crisis improves effectively, with cooperation from NATO and the EU. A final point to consider regarding how NATO can delve deeper in assistance goes back to its record of accomplishment for civil and military support.

> It [is] not as if NATO didn't have some experience in supporting civil emergencies. In August 2005[,] after Hurricane Katrina, NATO transported 189 tons of relief and emergency supplies to the United States. In the same

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[130] *Id.*

> year, after a request from Pakistan to assist after the huge earthquake in the Kashmir region, NATO airlifted 3500 tons of supplies and sent engineers, medical units, and specialized equipment. The alliance helped Pakistan again in 2010[,] to cope with the floods of that year.[131]

Once again, the specter of much-needed civil support capabilities and humanitarian assistance coordination from NATO looms over the treaty organization. This should not deter a robust response from it. NATO has the power to alleviate the strain on EU countries struggling with large migrant numbers.

VII. Conclusion

The EU currently remains divided over how best to respond to the migration crisis.[132] A coordinated multinational response is required, not only from the EU, but also from NATO. The North Atlantic Treaty Organization has an historic record of coordinated responses to all manner of civil emergencies and non-military crises.[133] The recent announcement that NATO will provide some security assistance to its members affected by the crisis is not enough. NATO must dig deeper in its set of operational tools and apply more of its capabilities. It has a civil support construct with a vast array of civil emergency planning and support to military authorities in its arsenal.[134] The humanitarian-assistance support framework is another major effort available for use in support of the crisis.[135]

The NATO has the capability to formulate a more robust plan of action because of its inherent structure, which requires consensus from heads of state, diplomatic chiefs, and defense leaders from all of its members on the North Atlantic Council.[136] Europe can unite with North American partners in NATO and respond to the challenges posed by the migration crisis. The

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131 *Id.*
132 *EU's Migration System Close to Complete Breakdown*, EURONEWS (Feb. 25, 2016), http://www.euronews.com/2016/02/25/eu-s-migration-system-close-to-complete-breakdown/.
133 *NATO Short History*, *supra* note 1.
134 Ochmannova, *supra* note 44, at 32-33.
135 *Id.*
136 *Id.* at 36.

time is now for the NATO elephant in Europe's living room to take a stand—with the full weight of its operational strength.

By Order of the Secretary of the Army:

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