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MILITARY LAW REVIEW

ARTICLES

BOOK REVIEWS

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ARTICLES

BOOK REVIEWS

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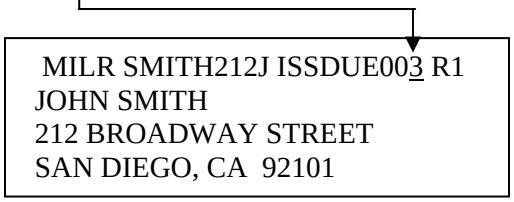

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MILITARY LAW REVIEW

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AUTOMATIC APPEAL UNDER UCMJ ARTICLE 66: TIME FOR A CHANGE

MAJOR JEFFERY D. LIPPERT*

I. Introduction

Uniform Code of Military Justice (UCMJ) Article 66 (Art. 66) requires The Judge Advocate General (TJAG) to refer to a Court of Criminal Appeals, the record of each trial by court-martial in which the approved sentence extends to death, confinement for one year or more, or dismissal, dishonorable or bad conduct discharge (BCD) of a service member.[1] In short, Art. 66 provides an automatic appeal for cases in

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[1] UCMJ art. 66(b) (2002). Article 66(b) states: The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial—

> (1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more; and (2) except in the case of a

which an accused is sentenced to a punitive discharge or confinement for one year or more.[2] Congress adopted the automatic appeal procedures set forth in Art. 66 in 1950 as a safety net to protect the rights of convicted service members in what was then considered a flawed and unfair military justice system.[3] In the more than fifty years since Congress enacted the UCMJ, the circumstances that gave rise to Congress' requirement for an automatic appeal have changed drastically. The safeguards Congress established in Art. 66 are no longer needed in many cases because of improvements at the trial level and changes in society.

As the operational tempo and deployments increase for all branches of the Armed Forces, and demands on the personnel and resources of each service's Judge Advocate General's Corps increase, it is time to reassess the breadth of the safety net that Art. 66 casts. During fiscal years (FY) 1998-2002, the Army, Navy/Marine Corps, and Air Force Courts of Appeals (the service courts) reviewed almost 15,800 cases pursuant to Art. 66.[4] For each of these cases, the federal government provided all of the resources for the appeal—from court reporting and transcription to highly qualified defense appellate counsel and, most importantly, the time and effort of a panel of service court judges to hear and decide each case. No other justice system in the country, state or federal, has such a liberal and generous appellate procedure.[5]

The burden on military units, staff judge advocate offices, government and defense appellate departments, and the service courts in

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> sentence extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61).

Id.

[2] *See id.*

[3] *See generally* H.R. REP. NO. 81-491, at 2-4 (1948) [hereinafter H.R. REP. NO. 81-491] (noting congressional hearings on 1947 amendments to the Articles of War which created the BCD for the U.S. Army); Brigadier General (Retired) John S. Cooke, *Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition*, 165 MIL. L. REV. 1, 17 (2000).

[4] *See, e.g.*, U.S. Court of Appeals for the Armed Forces, *Annual Reports*, *available at* http://www.armfor.uscourts.gov/Annual.htm (last visited Sept. 3, 2004) [hereinafter *Annual Reports*] (listing annual reports covering each fiscal year, including the number of cases reviewed).

[5] *See* The Honorable Jacob Hagopian, *The Uniform Code of Military Justice in Transition*, ARMY LAW., July 2000, at 4; *see generally* PAUL D. CARRINGTON, JUSTICE ON APPEAL 48-96 (1976); ROBERT STERN, APPELLATE PRACTICE IN THE UNITED STATES 131-81 (2d ed. 1989).

preparing, processing, hearing, and deciding these appeals is enormous.[6] Many of these cases did not warrant full judicial appellate review. In most, the likelihood of reversible error was low and little probability existed that the conviction or discharge would have long-term stigmatizing effects on the convicted service member—especially for appeals from special courts-martial. For such cases, the potential benefits to the convicted service member do not warrant expenditure of the tremendous amount of resources required to provide a full appellate review. Other, less resource-intensive, methods of review would adequately protect the convicted service member.

To minimize the number of unnecessary automatic judicial appeals, this article proposes a change to Art. 66—eliminating the automatic judicial appeal for all special courts-martial, including those that adjudge a BCD.[7] This article proposes that the Judge Advocates General, rather than an appellate court, review all special courts-martial under the provisions of UCMJ Article 69[8] (Art. 69). The reasons for this proposed change are threefold. First, recent developments in the UCMJ and military justice provide safeguards that ensure accused service members

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[6] During FY 2002, the Armed Services sent almost 3,500 records of courts-martial to the service courts for review. *See Annual Reports*, *supra* note 4. Rule for Courts-Martial (RCM) 1103(b) requires the government to prepare a verbatim record of every general court-martial case in which:

> (i) Any part of the sentence adjudged exceeds six months confinement, forfeiture of pay greater than two-thirds pay per month, or any forfeiture of pay for more than six months or other punishments that may be adjudged by a special court-martial; or (ii) A bad-conduct discharge has been adjudged.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1103(b) (2002) [hereinafter MCM]. RCM 1103(c) makes the provisions of RCM 1103(b) applicable to special courts-martial. *See id.* R.C.M. 1103(c). Trial counsel are required to prepare an original and four copies of any record of trial that requires review under Art. 66. *See id*. R.C.M. 1103(g); *see also* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE ch. 5 (14 Oct. 2002) [hereinafter AR 27-10] (providing detailed instructions on the preparation, authentication, and handling of records of trial), U.S. DEP'T OF ARMY, REG. 27-13, COURTS OF MILITARY REVIEW—RULES OF PRACTICE ASND PROCEDURE (29 May 1986) [hereinafter AR 27-13] (providing a detailed description of the appellate review process).

[7] *See* UCMJ art. 66. Up until 2002, RCM 201(f)(2)(B) limited the amount of confinement that could be adjudged at a special court-martial to 6 months. *See* MCM, *supra* note 6, R.C.M. 201(f)(2)(B)(i). In 2002, the President of the United States increased the maximum confinement at a special court-martial to one year. *See* MCM, *supra* note 6, R.C.M. 201(f)(2)(B)(i).

[8] UCMJ art. 69.

receive high quality trials[9] that are only infrequently set aside on appeal.[10] Second, service members separated with a BCD from a special court-martial no longer suffer any serious disadvantages or societal stigma based on their receipt of a BCD.[11] Civilian hiring practices and Veteran's Administration practices illustrate that receiving a BCD in today's world has little effect on a convicted service member's future employment, benefits, and lifestyle.[12] Third, reviewing special courts-martial cases under Art. 69 saves significant post-trial resources because such review does not require the preparation of verbatim records of trial.[13] This article includes specific recommendations for changes to the language of Art. 66, related Rules for Courts-Martial (RCM), service regulations, and for changing human resource allocations to accommodate the shift in workloads from the appellate courts to the offices of The Judge Advocates General.

II. History and Background of the BCD and UCMJ Art. 66

A. Separate Systems of Justice Before World War II

First enacted in 1951, the UCMJ consolidated and revised the existing laws governing the separate branches of the service (the Articles of War (AOW)[14] and the Articles for the Government of the Navy[15]) into

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[9] *See* Cooke, *supra* note 3, at 18-19.

[10] *See* data compilations, *infra* note 99.

[11] *See* Captain Charles E. Lance, *A Criminal Punitive Discharge—An Effective Punishment?*, 79 MIL. L. REV. 1, 44 (1978). In this article, the author reviewed various justifications traditionally advanced for imposing punitive discharges and other punishments on offenders. *See id.* Captain Lance surveyed over 1,300 employers, businesses, unions, institutions of higher learning, professional licensing boards, and personnel agencies seeking to ascertain what effect a punitive discharge had upon an applicant's chances of securing employment or securing admission for higher education. *See id.* Using the results of this survey, CPT Lance concluded that, the effectiveness of the punitive discharge as a punishment had decreased as demonstrated by the public's changing attitudes toward former service members who had been separated with punitive discharges. *See id.*

[12] *See id.*

[13] *See* UCMJ art. 69; MCM, *supra* note 6, R.C.M. 1103(b)(2)(B).

[14] *See generally* MANUAL FOR COURTS-MARTIAL, UNITED STATES app. 1, The Articles of War (1928) [hereinafter AoW]. Congress amended the AoW multiple times until the UCMJ supplanted them in 1951.

[15] *See generally* U.S. DEP'T OF NAVY, NAVY REGULATIONS (1920) (reprinted, 1941, with all changes up to and including No. 22) [hereinafter AGN]. This publication was the repository for all regulations issued by the Secretary of the Navy, including those dealing with military justice. The regulations were collectively referred to as the Articles for the

one standard code. These systems of justice were similar in many ways. Both allowed for non-judicial punishment of enlisted service members,[16] and for three levels of courts-martial,[17] roughly equivalent to the three levels set out in the current UCMJ. In the Navy, the three levels included the deck court-martial, the summary court-martial, and the general court-martial.[18] The Army had a summary court-martial, a special court-martial, and a general court-martial.[19]

The most significant difference between the two systems was that the punishment at a Navy summary court-martial could include a BCD.[20] Up until 1948, the AoW had no such discharge; the only discharges Army courts-martial could adjudge were dismissals for officers and Dishonorable Discharges (DD) for enlisted members.[21] The Navy's pre-UCMJ BCD was not, however, considered serious punishment. Although authorized as part of a court-martial sentence, the BCD was akin to the administrative discharges used today.[22] No apparent stigma attached to such a discharge.[23] The Navy separated thousands of sailors

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Government of the Navy. The military justice regulations were superceded by the UMCJ in 1951.

[16] *See* AoW, *supra* note 14, art. 104; AGN, *supra* note 15, art. 24.

[17] *See* AoW, *supra* note 14, art. 3; AGN, *supra* note 15, arts. 24, 26-34, 35-60.

[18] *See* AGN, *supra* note 15, arts. 24, 26-34, 35-60.

[19] *See* AoW, *supra* note 14, art. 3.

[20] *See* AGN, *supra* note 15, arts. 24, 26-34, 35-60.

[21] *See To Amend the Articles of War To Improve the Administration of Military Justice, To Provide for More Effective Appellate Review, To Insure the Equalization of Sentences, and for Other Purposes: Hearing on H.R. 2575 Before the House Subcomm. on Armed Services*, 80th Cong. 1931-33 (1947) [hereinafter Hearing on H.R. 2575] (testimony of MG Thomas H. Green, The Judge Advocate General of the Army); *see also* United States v. Mitchell, 58 M.J. 446, 448 (2003); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 487 (2d ed. 1970).

[22] *See* NAVAL JUSTICE, U.S. NAVY, 53 (October 1945). Guidance for commanders in this publication stated:

> [A] bad-conduct discharge is seldom an appropriate punishment in time of war. If executed, it results in a loss of manpower [to the Navy] while placing both the offender and the service in anomalous position under the Selective Service Law. . . [I]f the offender is not reinducted in some branch of military service, the ultimate result is restoration to civil life with little difficulty in obtaining a safe and comparatively lucrative position. . . . It is noteworthy that the Army special court-martial . . . has no power to adjudge discharge.

Id.

[23] *See id.*; *see also* Hearing on H.R. 2575, *supra* note 21, at 1932 (testimony of Rear Admiral Cacough, The Judge Advocate General of the Navy).

with BCDs during World War II (WWII) with no procedure for judicial appellate review.[24]

B. Pre-UCMJ Military Justice and Early Reform Efforts

Before enactment of the UCMJ, both the Naval and Army justice systems were seriously flawed. The systems were intended to secure obedience and to ensure Soldiers and Sailors served the commander's will.[25] Although both systems provided for courts-martial, the courts looked nothing like today's courts. Courts-martial were merely a tool of the commander to carry out his intentions regarding discipline.[26] There was little, if any, relation to civilian criminal justice. Protecting the rights of the individual was not a primary purpose of the system.[27] As a result, great injustices were done in the name of discipline.[28]

One such injustice in World War I (WWI) sparked interest in reforming the military justice system. In August of 1917 sixty-three soldiers were court-martialed on charges of mutiny and murder stemming from racially charged riots in Houston, Texas.[29] Of the sixty-three soldiers tried, many were acquitted; however, others were sentenced to prison terms and thirteen, all black, were sentenced to death by hanging.[30] The sentences were carried out the day after the trial.[31] No report or message about the trials or the impending sentence was sent to any superior unit or to Washington, D.C.[32] The soldiers were simply hung in compliance with the law in existence at the time.[33] This incident

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[24] *See* Hearing on H.R. 2575, *supra* note 21, at 1932; *see also* Captain John T. Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39, 42-48 (1972) (reviewing the development of the military justice system from colonial times forward, emphasizing the lack of appellate review provided for convicted service members by either military authorities or the civilian courts before the advent of the UCMJ).

[25] *See* Cooke, *supra* note 3, at 3.

[26] *See id*.; *see also* Willis, *supra* note 24, at 43.

[27] *See* Cooke, *supra* note 3, at 3.

[28] *See id.* at 5.

[29] *See* JONATHAN LURIE, MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775-1980 40 (2001).

[30] *See id.*

[31] *See id.*

[32] *See id.*

[33] *See To Improve the Establishment of Military Justice, Hearing on S. 64 Before the Senate Comm. on Military Affairs, 66th Cong., 1st Sess.* 1879-80 (1918). Major General Ansell testified:

and others, however, eventually received significant national attention leading to sweeping reform including review of the courts-martial system.[34]

During WWII, over sixteen million men and women served in the armed forces.[35] Commanders conducted over 2,000,000 courts-martial, resulting in many hundreds of thousands of convictions and stiff sentences. After the war, individuals and institutions lobbied Congress for changes to the system, highlighting its flaws—defense counsel (DC) were not lawyers, law officers who presided over trials were not lawyers, sentences were unable to be revised and trial mistakes could not be corrected.[36] Some of the longstanding complaints were expressed to TJAG of the Army, Major General Crowder, in a letter from the Secretary of War following WWI.[37] In response to these criticisms, Congress, in 1947, attempted its first large-scale effort to reform the military justice system.

The 1947 revisions to the AoW included two important reforms. First, Congress created court-martial review boards within the office of

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> The men were executed immediately upon the termination of the trial and before their records could be forwarded to Washington or examined by anybody, and without, so far as I see, any one of them having had time or opportunity to seek clemency from the source of clemency, if he had been advised.

Id.

[34] *See* LURIE, *supra* note 29, at 40-1 (stating that the initial response to this incident from Washington, D.C., was to issue General Order No. 7, requiring that no sentence of death be carried out until the case had been reviewed in the Office of The Judge Advocate General).

[35] *See* DEP'T OF DEFENSE, PRINCIPAL WARS IN WHICH THE UNITED STATES PARTICIPATED; U.S. MILITARY PERSONNEL SERVING AND CASUALTIES 2 (2003), *available at* http://www.dior.whs.mil/mmid/casualty/wcprincipal.pdf (last visited Dec. 1, 2004) [hereinafter DEP'T OF DEFENSE, PRINCIPAL WARS IN WHICH THE UNITED STATES PARTICIPATED; U.S. MILITARY PERSONNEL SERVING AND CASUALTIES].

[36] *See id.*

[37] *See* Letter from Major General E.H. Crowder, Judge Advocate General, U.S. Army, to Newton D. Baker, Secretary of War, U.S. Army (Mar. 10, 1919), *in* MILITARY JUSTICE DURING THE WAR: A LETTER FROM THE JUDGE ADVOCATE GENERAL OF THE ARMY TO THE SECRETARY OF WAR IN REPLY TO A REQUEST FOR INFORMATION, Government Printing Office, (1919); *see also* SENATE COMMITTEE OF ARMED FORCES, A STUDY OF THE PROPOSED LEGISLATION TO AMEND THE ARTICLES OF WAR (H.R. 2575; AND TO AMEND THE ARTICLES FOR THE GOVERNMENT OF THE NAVY 4-8 (H.R. 3687; S.1338)) (Comm. Print 1948).

TJAG.[38] While not appellate courts, these review boards were responsible for reviewing serious court-martial cases, including cases in which the accused was sentenced to confinement for a year of more or to a punitive discharge.[39]

Second, Congress created a new punitive discharge for the Army—the BCD—that a special or general court-martial could adjudge.[40] Congress specifically modeled the new Army BCD on the BCD the Navy had in place during WWII.[41] While Congress intended this new discharge to be a less severe punishment than the DD, it recognized that some service members receiving this discharge might have difficulty gaining employment in a country where one in every eight people was a military veteran.[42] To lessen the likelihood that a trial error would result in a soldier being sentenced to a BCD, Congress ensured the new review boards would review court-martial cases that adjudged BCDs.[43] It must be remembered, however, that at that time, most other facets of the military justice system had not changed. There were still problems with command influence and a lack of trained DC or judges at most trials was still the norm.[44]

In the next few years, the pace of military justice reform quickened. With the creation of the U.S. Air Force, the debate turned toward the need for a case review authority outside the office of TJAG, and for a more uniform system of military justice.[45] As a result, Congress enacted the Uniform Code of Military Justice (UCMJ) in 1950. With the enactment of the UCMJ, Congress began to change the thrust of military justice from a command-dominated system to one more like the civilian criminal justice system with emphasis on due process and fairness.[46] The UCMJ brought many notable changes to the system. It created the position of law officer – the forerunner of the military judge—so that a

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[38] *See* H.R. REP. NO. 80-1034, at 6 (1947) [hereinafter H.R. REP. NO. 80-1034]. Congress passed the bill, which was the subject of this report, amending the AoW in 1947. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES app. 1, The Articles of War (1949).

[39] H.R. REP. NO. 80-1034, *supra* note 38, at 21.

[40] *See id.* at 6.

[41] *See* Hearing on H.R. 2575, *supra* note 21, at 1930-33.

[42] *See* Cooke, *supra* note 3, at 3.

[43] *See* H.R. REP NO. 80-1034, *supra* note 38, at 2.

[44] *See* Cooke, *supra* note 3, at 9.

[45] *See id.* at 19.

[46] *See id*. at 10.

lawyer, rather than a line officer, presided over courts-martial.[47] The UCMJ afforded the accused, for the first time, the right to be represented by a qualified attorney in general courts-martial.[48] The UCMJ also codified protections against self-incrimination fifteen years before the Supreme Court's decision in *Miranda v. Arizona*.[49]

Of course, the UCMJ also incorporated some aspects of the old AoW system.[50] Among these were the BCD and automatic review provisions Congress added to the AoW in 1947. These provisions were non-controversial by the time of the congressional debates on the UCMJ. Congress incorporated their substance into UCMJ Art. 66 with little comment or discussion.[51] While there have been some minor changes to Art. 66 over time, the substance of Art. 66's automatic review provision has not changed since it was enacted in 1950.[52]

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[47] *See id*. at 9. MANUAL FOR COURTS-MARTIAL, UNITED STATES para. 4e (1951) [hereinafter 1951 MCM]

[48] *See id*. 1951 MCM, *supra* note 47, para. 6a-6b.

[49] 384 U.S. 436 (1966). *See* Cooke, *supra* note 3, at 10*; see also* Honorable Walter T. Cox, III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 14 (1987).

[50] *See* Cox, *supra* note 49, at 9.

[51] *See generally* THE U.S. ARMY COURT OF MILITARY REVIEW, AN AUTHORITATIVE INDEX AND LEGISLATIVE HISTORY OF THE UNIFORM CODE OF MILITARY JUSTICE 1950 1333-3027 (1985) (demonstrating that there was virtually no debate on the substance of Art. 66; most comments in the legislative history note only that Art. 66 was taken essentially verbatim from prior AoW provisions). Article of War 50(e) stated:

> . . . Every record of trial by general or special court-martial involving a sentence to dishonorable discharge or bad conduct discharge . . . and every record of trial by general court-martial involving a sentence to confinement in a penitentiary . . . shall be examined by the Board of Review . . . .

See AoW, *supra* note 134, at 289. The language of AoW 50(e) was reflected in Art. 66(b) of the UCMJ in 1950, which stated:

> The Judge Advocate General shall refer to a board of review the record in every case of trial by court-martial in which the sentence . . . extends to death, dismissal of an officer . . . dishonorable or bad-conduct discharge, or confinement for more than one year.

See JUDGE ADVOCATE GENERAL OF THE NAVY, INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE 1950: 50TH ANNIVERSARY EDITION 582 (2000).

[52] The original AoW did not provide for appellate review. The military first provided appellate boards of review for each service in 1918. *See* Headquarters, Dep't. of Army, Gen. Orders No. 7 (7 Jan. 1918). The jurisdiction and powers of the boards of review

It is not surprising that Congress put an automatic appeal provision in the UCMJ in 1950. While the UCMJ brought extraordinary changes to military justice, it did not fix all of the pre-WWII problems with the system. These included continuing problems with fairness and errors at the trial level.[53] Moreover, in the early 1950s, the situation in our country and military was not much different from WWII. The country was still on a war-footing, fighting the Korean War.[54] The Armed Forces, while smaller than during WWII, were still much larger than today, and had a large number of conscripted troops in their ranks.[55] As large numbers of veterans returned from war, punitively discharged

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were limited to cases involving death sentences, dismissals, and dishonorable discharges. *See id.* The 1947 amendment to the AoW gave the boards of review power to weigh evidence and to review all cases in which the sentence included a punitive discharge. *See* AoW, *supra* note 14, at 288. Congress adopted the jurisdiction and function of the boards of review set up in the AoW into the UCMJ in 1950. *See* JUDGE ADVOCATE GENERAL OF THE NAVY, INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE 1950: 50TH ANNIVERSARY EDITION, *supra* note 51, at 581-82. The 1968 amendments to the UCMJ altered Art. 66 by removing the words "Board of Review" and replacing them with "Court of Military Review." *See* THE U.S. ARMY COURT OF MILITARY REVIEW, INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE 1968 64 (1985). The function of the boards of review and the Courts of Military Review were essentially the same. The 1983 amendments to the UCMJ altered Art. 66 by adding a provision that stated "(B) a notice of appeal under section 861 of this title (article 61) that has not been waived or withdrawn." *See* THE U.S. ARMY COURT OF MILITARY REVIEW, INDEX AND LEGISLATIVE HISTORY OF THE UNIFORM CODE OF MILITARY JUSTICE 1983 197 (1985). In 1994, Congress again changed the name of the service courts of military review to their current name, the service Courts of Criminal Appeals. *See* Pub. L. No. 103-337, 108 Stat. 2831 (1994). There was no change to the service courts' jurisdiction or function. *See id.* The service Courts of Criminal Appeals stated appellate jurisdiction includes: (1) cases in which the sentence, as approved by the convening authority, extends to death, dismissal of a commissioned officer, dishonorable or BCD, or confinement for one year or more; and (2) cases in which the accused has not waived or withdrawn an appeal, except death penalty cases. *See* UCMJ art. 66(b) (2002). The service Courts of Criminal Appeals are unique in that their jurisdiction does not extend solely to trial court errors. Rather, the courts have jurisdiction to determine whether they are convinced of the accused's guilt beyond a reasonable doubt, after "weigh[ing] the evidence, judg[ing] the credibility of witnesses, and determin[ing] controverted questions of fact, recognizing that the trial court saw and heard the witnesses." UCMJ art. 66(c).

[53] *See* Cooke, *supra* note 3, at 13. In *O'Callahan v. Parker*, 395 U.S. 258 (1969), in criticizing the military justice system under the UCMJ up until that time, the Supreme Court stated: ". . .[C]ourts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law." *Id.* at 265.

[54] *See* Cooke, *supra* note 3, at 10.

[55] *See* DEP'T OF DEFENSE, PRINCIPAL WARS IN WHICH THE UNITED STATES PARTICIPATED; U.S. MILITARY PERSONNEL SERVING AND CASUALTIES, *supra* note 35 (during the years of the Korean War, 1950-1953, an average of 5,720,000 service members served on active duty).

service members might expect real difficulties obtaining employment.[56] As it did in the 1947 AoW amendments, Congress enacted an automatic court-martial review provision into the UCMJ to protect service members from the potential stigma of a punitive discharge. Today, however, the military justice system has matured.[57] Improvements in the system undercut the need for close appellate scrutiny of many courts-martial cases Congress deemed necessary over 50 years ago.

III. Changes to UCMJ Reduce the Need for Art. 66 Automatic Appeal

Over the past 50 years, the UCMJ and military justice system has changed significantly.[58] The two changes that have perhaps had the most impact on the quality of justice done at the trial level was the creation in 1968 of a dedicated trial judiciary, and the creation in 1980 of the Trial Defense Service (TDS). The improvements in the system brought about by the creation of a dedicated military trial judiciary and dedicated, independent DC has resulted in a justice system notable for high quality courts-marital, the findings and sentences of which are rarely set aside on appeal.[59]

A. The Effect of Military Judges on the Military Justice System

During the first major overhaul of the UCMJ in 1968, Congress created the position of military judge to preside over courts-martial proceedings, including special courts-martial empowered to adjudge a BCD.[60] Before 1968, the UCMJ provided a "law officer" to preside over courts-moartial. Designated as the "legal arbiter" for a court-martial, the law officer was a judge advocate, a member of the staff judge advocate's staff, designated by the convening authority for each court-martial.[61] The law officer ruled on questions of law and instructed

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[56] *See generally* Hearing on H.R. 2575, *supra* note 21, at 2025 (testimony of MG Thomas H. Green, The Judge Advocate General of the Army, discussing the large numbers of veterans and the potential problems punitively-discharged service members might have obtaining employment).

[57] *See* Cooke, *supra* note 3, at 17.

[58] *See generally id.* (detailing the development of military justice and the UCMJ from 1775 to 2000).

[59] *See* discussion *infra* pt. III.C.

[60] *See* Cox, *supra* note 49, at 19.

[61] *See* JUDGE ADVOCATE GENERAL OF THE NAVY, INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE 1950: 50TH ANNIVERSARY EDITION, *supra* note 51,

the court members prior to their deliberation. The law officer also ruled on motions to dismiss, or even declared mistrials when necessary.[62] However, law officers were not assigned to special courts-martial, even those that could adjudge a BCD.[63]

The addition of the military judge in 1968 was a revolutionary leap forward that gave the courts-martial enough power and authority to offset the influence commanders formerly held over the system.[64] In creating the position of military judge, Congress raised the level of military justice practice to conform more closely to trial procedures in U.S. District Courts.[65] This change also enhanced the prestige and effectiveness of the judge advocates presiding over courts-martial, equating their status to that of civilian trial judges.[66] The rulings of the military judge at trial were binding on the members and sessions of court were totally controlled by the judge.[67]

Further enhancing the power of the military judge, the 1968 amendments to the UCMJ created a wholly independent trial judiciary.[68] As stated above, before 1968, the convening authority designated the law officer for each court-martial. The law officer was subject to the convening authority's control and beholden to the chain of command for efficiency reports and discipline.[69] Since 1968, military judges have been free of those types of concerns because they are assigned by and directly responsible to The Judge Advocates General or his designee, the

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at 1152-4 (Mr. Larkin speaking before the House Committee on Armed Services on March 31, 1949); *see also* THE U.S. ARMY COURT OF MILITARY REVIEW, INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE 1968, *supra* note 52, at 233 (statement of MG Kenneth J. Hodson, The Judge Advocate General of the Army before the House Subcommittee on Armed Forces, September 14, 1967); 1951 MCM, *supra* note 47, para. 4e.

[62] *See* JUDGE ADVOCATE GENERAL OF THE NAVY, INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE 1950: 50TH ANNIVERSARY EDITION, *supra* note 51, at 1154.

[63] *See id.* at 1152-4.

[64] *See* Cooke, *supra* note 3, at 13.

[65] *See* THE U.S. ARMY COURT OF MILITARY REVIEW, INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE 1968, *supra* note 52, at 64.

[66] *See id*.

[67] *See id.; see also* Hagopian, *supra* note 5, at 2-3.

[68] *See* Cooke, *supra* note 3, at 14.

[69] *Cf.* THE U.S. ARMY COURT OF MILITARY REVIEW, INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE 1968, *supra* note 52, at 230-31 (statement of Hon. Charles E. Bennett before House Subcommittee on Armed Forces, September 14, 1967, discussing merits of law officers not appointed by the convening authority).

Chief of the Trial Judiciary.[70] As a result, accused service members need not worry that the person sitting on the bench has ulterior motives when hearing or presiding over cases.

Most importantly for this discussion of Art. 66, however, was Congress' decision in 1968 to provide a military judge for special courts-martial empowered to adjudge a BCD (BCD special). Before 1968, a service member could be punitively discharged with a BCD at a special court-martial where (1) no DC represented him, and (2) no one trained in the law could make legal determinations.[71] One can only imagine the immense potential for error prejudicial to the accused inherent in a pre-1968 BCD special court-martial. With neither a DC nor a judge present, legal errors were common and the rights of the accused were often ignored.[72] Today, the presence of highly qualified military judges at

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[70] UCMJ art. 26(c) states:

> The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a). Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

UCMJ art. 26(c) (2002); *see also* Cooke, *supra* note 3, at 14.

[71] *See* THE U.S. ARMY COURT OF MILITARY REVIEW, INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE 1968, *supra* note 52, at 41(explaining the amendments contained in the report of the Senate Subcommittee on Armed Forces, Senate Report No. 90-1601).

[72] *See id.* at 74-80 (reciting committee discussions regarding problems with special courts-martial in which there was no judge or defense counsel. Congressman Bray highlighted a Marine Corps case where a Marine, later judged to be insane, was punitively discharged with a BCD).

BCD special courts-martial ensure trials are conducted fairly and in accordance with the law, and the rights of the accused protected.[73]

B. The Effect of TDS Counsel on the Military Justice System

Before 1978, Army DC worked in, and for, the office of the staff judge advocate (SJA).[74] The SJA determined who would be a DC and for how long.[75] The SJA was also the rater or senior rater for every DC.[76] As a result, commanders, for whom the SJA worked, could influence DC to the detriment of their clients.[77] This situation posed a serious problem for the system.[78]

To compound this problem, SJAs often assigned the most inexperienced or least competent judge advocates to serve as DC.[79] These were the very officers who were most likely to be affected by improper command pressures, whether deliberately applied or not. Critics credibly alleged that DC assigned and controlled in this way had a

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[73] *See* Weiss v. United States, 510 U.S. 163, 194 (1994). Justice Ruth Bader Ginsburg stated,

> The care the Court has taken to analyze petitioners' claims demonstrates once again that men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service. Today's decision upholds a system of military justice notably more sensitive to due process concerns than the one prevailing through most of our country's history, when military justice was done without any requirement that legally trained officers preside or even participate . . . .

Id. (Ginsburg, J., concurring); *see also* Loving v. United States, 517 U.S. 748 (1996); Cooke, *supra* note 3, at 9.

[74] *See* Lieutenant Colonel John R. Howell, *TDS: The Establishment of the U.S. Army Trial Defense Service*, 100 MIL. L. REV. 4, 5 (1983).

[75] *See id*.

[76] *See id.*

[77] *See id*.

[78] *See generally* Colonel Robert B. Clarke, *Exercise of Independent Professional Judgment by Defense Counsel*, ARMY LAW., Sept. 1979, at 39 (stressing the importance of resisting improper command influences and the necessity to report such exploitation attempts, *reprinting* Memorandum, The Judge Advocate General, U.S. Army, to the Assistance Judge General for Civil Law for the U.S. Army Trial Defense Service/Field Defense Service Office, subject: Exercise of Independent Professional Judgment by Defense Counsel (19 July 1979)).

[79] *See* Howell, *supra* note 74, at 46.

tendency to cooperate with the government at the expense of their clients.[80] At the very least, the system sent mixed messages, and fostered conflicts of interest for both the SJA's office and DC.[81] These conditions undermined the quality of defense services, and caused the public to lose confidence in the essential fairness of the military justice system.[82]

Another problem with SJA control of DC was that they were completely dependent on the SJA office for support.[83] This disadvantaged DC in many ways. First, they had no separate source of funds. If a DC needed to travel to interview a witness or even a client, he or she had to go to the SJA for funding.[84] At best, this allowed many DC activities to be monitored by the government. At worst, the SJA could refuse to provide the necessary funds, impairing the representation. Second, DC had no independent means or mechanisms for training and guidance.[85] They were essentially on their own. This lack of experience coupled with a lack of training adversely impacted on the quality of representation available to military clients. However, with the creation and assignment of all Army DC to TDS in 1980, many of the above problems were finally eliminated.[86]

All branches of the armed forces now assign DC to a separate defense services office.[87] In the Army, TDS is a "stove-pipe" organization completely separate from the local chain of command.[88] This protects DC against actual or potential threats to their professional independence and judgment.[89] It also further reduces the opportunities for improper command influence.[90] Along with a general increase in aggressiveness which is beneficial to their clients, being assigned outside

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[80] *See id.*

[81] *See* Lieutenant Colonel R. Peter Masterton, *The Defense Function: The Role of the U.S. Army Trial Defense Service*, ARMY LAW., Mar. 2001, at 2; *see also* Howell, *supra* note 74, at 5.

[82] *See* Howell, *supra* note 74, at 5.

[83] *See* Masterton, *supra* note 81, at 4.

[84] *See id.*

[85] *See generally* Masterton, *supra* note 81, at 2 (noting that not until 1974 did the Army's Judge Advocate General encourage local SJAs to designate "senior defense counsel" to advise and assist other defense counsel within their commands).

[86] The Army was the last Service to create a special office to which all defense counsel were assigned. The Air Force and Navy established separate trial defense organizations in 1974. *See* Howell, *supra* note 74, at 25.

[87] *See id.*

[88] *See* Masterton, *supra* note 81, at 1.

[89] *See* Howell, *supra* note 74, at 46.

[90] *See id.*

the local SJA office emboldens DC to sniff out, report, and even capitalize on instances of command influence or attempts at it.[91] In addition, the Army generally assigns more experienced lawyers to TDS,[92] and provides them with highly qualified and experienced senior and regional DC to train and guide them.[93] While DC activities are still funded mainly from the resources available to the local SJA, regulations and memorandums of agreement between commands and TDS mandate a level of support for DC at least equal to that received by government counsel.[94] In addition, TDS can independently fund travel for training, attendance at UCMJ Art. 32 proceedings, and courts-martial hearings.[95]

While the 1968 amendments to the UCMJ fixed a serious flaw in the military justice system by requiring qualified DC at both BCD special courts-martial and general courts-martial, the advent of the services' independent DC organizations ensured that service members received the full benefit of this important change to the UCMJ.[96] The services' defense organizations are dynamic, flexible, and efficient organizations

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[91] *See* Masterton, *supra* note 81, at 23*; see also* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE sec. 6-7 (5th ed. 1999). Unlawful command influence in a case can result in the findings and sentence being set aside or "drastic measures" such as a dismissal with prejudice. *See, e.g.*, United States v. Levite, 25 M.J. 334, 340 (C.M.A. 1987) (setting aside the trial court's findings and sentence because of unlawful command influence); United States v. Thomas, 22 M.J. 388, 400 (C.M.A. 1986). In a warning to commanders about unlawful command influence, the Court of Military Appeals stated:

> Recognizing that military commanders and judge advocates usually exert themselves in every way to comply with both the spirit and the letter of the law, we are confident that events like those involved here will not be repeated. However, if we have erred in this expectation, this Court -- and undoubtedly other tribunals -- will find it necessary to consider much more drastic remedies.

Thomas, 22 M.J. at 400.

[92] *See generally* Howell, *supra* note 74, at 34. The Judge Advocate General at the time the Army JAGC developed the TDS, insisted that judge advocates to be assigned to TDS be certified under UCMJ Art. 27(b) as both trial and defense counsel, have at least twelve months remaining on their service obligations, and remain in TDS for at least one year. His requirement for Senior Defense Counsel was that they have career status, and at least two full years of trial experience. *See id.* Most TDS counsel have similar qualifications today.

[93] *See id.* at 46.

[94] *See, e.g.*, AR 27-10, *supra* note 6, at ch. 6 (containing detailed instructions for SJAs as to required support for TDS offices within their commands).

[95] *See* Masterton, *supra* note 81, at 2.

[96] *See* Howell, *supra* note 74, at 15.

that provide aggressive representation to service members in all phases of courts-martial and other adverse proceedings.[97] They ensure the accountability and fairness of the system, and protect their clients' interests to an extent unimaginable at the time the UCMJ was enacted.[98] The military justice system is now mature and, like a child grown into adulthood, requires less supervision.

C. Statistical Analysis of Courts-Martial Cases on Appeal

During fiscal years 1998 through 2002, (FY 98-FY 2002), the three service courts reviewed appeals on a total of almost 17,750 cases under UCMJ Art. 66.[99] Of these, just under 5,700 were from general courts-martial, and just over 12,000 were from BCD special courts-martial.[100] Of the over 12,000 BCD special cases the service courts reviewed, the service courts took action affecting the findings or sentence in under 350 cases, or less than three per cent (3%) of cases.[101]

These numbers alone demonstrate that the trial courts are protecting the rights of the accused, and ensuring that BCD special courts-martial are fair. However, the referenced percentages include not only those cases set aside or reduced because of error at trial, but also those cases

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[97] *See* Major General Hugh R. Overholt, *TDS Tenth Anniversary Message*, ARMY LAW., Dec. 1988, at 3.

[98] *See* Weiss v. United States, 510 U.S. 163, 194 (1994); *see also Loving* v. United States, 517 U.S. 748 (1996)*;* Cooke, *supra* note 3, at 9.

[99] *See Annual Reports*, *supra* note 4; *see also* Data Compilation Courtesy of Mary Dennis, Deputy Clerk of Court, Office of the Clerk of Court, U.S. Army Judiciary (Oct. 29, 2003) (on file with author); Data Compilation Courtesy of Robert Troidl, Clerk of Court, Office of the Clerk of Court, Navy-Marine Corps Court of Criminal Appeals (Mar. 11, 2004) (on file with author); Data Compilation Courtesy of Hattie Simmons, Database Administrator, Air Force Legal Services Agency (Mar. 14, 2004) (on file with author).

[100] *See Annual Reports*, *supra* note 4. Up until 2003, a special court-martial not empowered to adjudge a BCD, commonly referred to as a "straight special," did not meet the requirements for review under Art. 66 because such a court could neither adjudge a BCD, nor adjudge confinement of one year. In 2002, The President of the United States increased the maximum confinement at a special court-martial to one year. *See* MCM, *supra* note 6, R.C.M. 201(f)(2)(B). Accordingly, today it is possible for a straight special court-martial to qualify for Art. 66 review. In practice, however, it is unusual for a service member to be sentenced to the maximum amount of confinement, one year, at either a straight or BCD special court-martial.

[101] *See Annual Reports*, *supra* note 4; *see also* Data Compilation Courtesy of Mary Dennis, *supra* note 99. In two-thirds of the BCD special cases in which the service court took action affecting the findings or sentence, the accused had pled guilty. *See* Data Compilation Courtesy of Mary Dennis, *supra* note 99.

where problems occurred during the post-trial process, including a number of cases in which the appellate courts granted relief on appeal for excessive delay in post-trial processing--commonly known as *Collazo* relief.[102] If the number of cases in which the service courts took action affecting the sentence for *Collazo* problems, is subtracted from the equation, the percentage of BCD special cases affected by the service courts for error by the trial court gets even smaller.[103] Accordingly, it would be fair to say that only on rare occasions does the trial court make an error prejudicial to the accused at a special court-martial.

Over fifty years ago, Congress enacted the automatic appeal provision of Art. 66 to protect service members from errors at trial which were, at that time, common.[104] Such errors are now rare; it stands to reason that the protections afforded by Art. 66 could be changed, in this case, scaled back, to reflect the realities of today. Nonetheless, the fairness and accuracy of courts-martial were not Congress' only concerns in mandating that the cases of service members discharged with a BCD receive an automatic appeal under Art. 66. Congress believed the BCD to be a serious punishment because of the potentially stigmatizing effect it could have on the service member.[105] However, time and developments in our society have invalidated this reason for providing

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[102] *See* United States v. Collazo, 53 M.J. 721, 727 (Army Ct. Crim. App. 2000) (holding that appellate courts have authority to grant relief for excessive post-trial delay without any showing of actual prejudice to the appellant); *see also* United States v. Maxwell, 56 M.J. 928 (Army Ct. Crim. App. 2002); United States v. Bauerbach, 55 M.J. 501 (Army Ct. Crim. App. 2001); *see generally* Major Timothy MacDonnell, United States v. Bauerbach*: Has the Army Court of Criminal Appeals Put "*Collazo *Relief" Beyond Review?*, 169 MIL. L. REV. 154 (Sept. 2001); Major Timothy MacDonnell, *The Journey Is the Gift: Recent Developments in the Post-Trial Process*, ARMY LAW., May 2001, at 81.

[103] An on-line search revealed many published BCD Special cases, between FY 1998 and FY 2003, in which the service courts granted *Collazo* relief. *See, e.g.*, United States v. Chisholm, 58 M.J. 733 (Army Ct. Crim. App. 2003); United States v. Tardif, 58 M.J. 714 (C.G. Ct. Crim. App. 2003); United States v. Harms, 58 M.J. 515 (Army Ct. Crim. App. 2003); United States v. Maxwell, 56 M.J. 928 (Army Ct. Crim. App. 2002); United States v. Hutchison, 56 M.J. 756 (Army Ct. Crim. App. 2002); United States v. Nicholson, 55 M.J. 551 (Army Ct. Crim. App. 2001); United States v. Bauerbach, 55 M.J. 501 (Army Ct. Crim. App. 2001); United States v. Schell, 2001 CCA Lexis 332 (N-M. Ct. Crim. App. 2001).

[104] *See* Hearing on H.R. 2575, *supra* note 21, at 2095 (estimating that during WWII the percentage of general courts-martial where error prejudicial to the accused was fifteen or eighteen percent, and the error rate in special courts-martial was as high as twenty-five or thirty percent).

[105] *See* H.R. REP. NO. 81-491, *supra* note 3, at 2-4.

automatic appeals for service members sentenced to a BCD at a special court-martial.

IV. The Effect of a BCD on Service Members Past and Present

A. Congressional Concerns over Stigma Caused by a BCD

Congress' primary concern in creating the BCD was the negative effect such a discharge might have on service members' ability to gain civilian employment.[106] An example of that concern was clearly expressed by Judge Long, a witness before the House Subcommittee on Armed Forces, during a 1947 hearing on the bill that created the BCD for the Army. Judge Long, a distinguished member of the civilian trial judiciary, appeared before the Subcommittee in support of the bill and stated:

> There [can be] great injustice. For instance, in San Francisco a few days ago, there at the War Memorial Building I was shown a record of a bad-conduct discharge [Navy servicemember]. Here was a boy, 20 years of age given a bad-conduct discharge. Every place he goes he will be confronted with that bad-conduct discharge: "I am sorry, we don't have a job for you; there are too many boys that we can put on with honorable discharges." Now, that boy will go through life, in his search for employment as well as in his other activities, at a distinct disadvantage because he carries that bad-conduct discharge.[107]

In 1947, the concern expressed by Judge Long was well-founded. After WWII, the percentage of veterans in the U.S. population was 12.8%.[108] Of these, over 90% served on active duty during a time of declared war in which the entire nation was mobilized for the war.

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[106] *See generally id.* at 1966-2071 (numerous witnesses, both military and civilian, acknowledging before the committee that a BCD could affect a discharged service member's chances for civilian employment).

[107] *Id.* at 1967 (Judge Long testifying before the House Subcommittee on Armed Services).

[108] U.S. DEP'T OF COMMERCE BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, BICENTENNIAL EDITION 1145 (1975) [hereinafter HSOTUS] (providing data for 1947).

During WWII, people were expected to contribute to the war effort. Congress even passed laws that required people to work in industries essential to the war.[109] It is not surprising that Congress would believe that individuals kicked out of the military for misconduct might have a difficult time obtaining employment when thousands of veterans were returning to the workforce, and all people in the country either knew, were related to, worked in an industry related to the war effort, or were themselves in the armed forces.[110]

B. Changes in Society have Reduced Stigma Caused by a BCD

Today, the situation is vastly different than it was in the years immediately following WWII. The Department of Defense has been an all-volunteer force for almost 30 years. The size of the Armed Forces on active duty is the smallest it has been since the Spanish-American War in the 1800s.[111] Only 1/2 of 1% of the population of our country is on active duty in the military.[112] This decline in military experience and knowledge is reflected in the makeup of the U.S. Congress, where only about 25% of Congress are veterans.[113] Today, what most of our population, including leaders and employers, know of the military and the military justice system comes from movies or television shows.[114]

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[109] *See* JAMES L. ABRAHAMSON, THE AMERICAN HOME FRONT 145 (1983).

[110] *See, e.*g., ALEX KERSHAW, THE BEDFORD BOYS 223 (2003). Bedford County, Virginia, was home to a number of soldiers of the 29th Infantry Division. *See id.* The men from this county suffered tremendous casualties on D-Day in WWII. *See id.* As in many other communities around the nation, every person in Bedford county knew or was related to someone who served in the war. *See id.*; *see also* ABRAHAMSON, *supra* note 109, at 145.

[111] *See* DEP'T OF DEFENSE, PRINCIPAL WARS IN WHICH THE UNITED STATES PARTICIPATED: U.S. MILITARY PERSONNEL SERVING AND CASUALTIES, *supra* note 35 (U.S. Military Personnel Serving—Civil War Era: 2,213,000 active duty Union Army; Spanish-American War: 306,760; WWI Era: 4,734,991; WWII Era, 16,112,500; Korean War Era: 5,720,000; Vietnam Era: 8,744,000; Persian Gulf War: 2,225,000; 2002: 1,413,577).

[112] *See* U.S. DEP'T OF DEFENSE, ACTIVE DUTY MILITARY PERSONNEL, 1940-2002 (2003), *available at* http://www.infoplease.com/ipa/A0004598.html (last visited Oct. 20, 2004).

[113] *See* William T. Bianco & Jamie Markham, Vanishing Veterans: The Decline in Military Experience in the U.S. Congress 7 (Oct. 1999) (relying on statistics from the congressional make-up in 1999) (unpublished manuscript, on file with the Center for Basic Research in the Social Sciences, Harvard University), *available at* http://www.cbrss.harvard.edu/events/ppe/papers/bian-co.pdf (last visited Oct. 20, 2004).

[114] *See* Thomas E. Ricks, *The Widening Gap Between the Military and Society*, ATLANTIC MONTHLY, July 1997, at 57; *see also* LTC Reed Bonadonna, *News From the Front: Contemporary American Soldiers in the Culture Wars* (2001), *available at*

In 2001, veterans made up 8% of the U.S. population of over 277,000,000 people.[115] Of these, only a relatively small (and decreasing) number served in a time of declared war or full mobilization.[116] By far, the largest number of U.S. veterans living today served in the Vietnam era, a time when military service was disdained, and open protest to the actions of our government, our military, and our service members was commonplace. It was a time when the military justice system was deemed to be fundamentally unfair.[117]

Today, we do not have large numbers of soldiers returning from war to a country filled with veterans looking for work. It would be highly unlikely for the situation Judge Long discussed in Congress in 1947 to be repeated today. There is little competition among veterans for jobs in general. Most employers, while interested in a prospective employee's military service, either do not understand or are not concerned that a prospective employee might have been discharged from the service with a BCD.[118] Other factors such as the type of crime committed are more important in the hiring decision.[119]

In our country today, having been convicted of a crime at some time in the past does not carry with it the social stigma it once did. Our culture now focuses on reintegrating the offender into the community through work and rehabilitation rather than highlighting his or her past problems with the law.[120] Government activities encourage employers to

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http://www.usafa.af.mil/jscope/JSCOPE01/Bonadonna01.html; Pauline M. Kaurin, *The Seige: Facing the Military -- Civilian Culture Chasm* (2001) *available at* http://www.usafa.af.mil/jscope/JSCOPE01/Kaurin01.html (last visited Dec. 3, 2004).

115 *See* HSOTUS, *supra* note 108, at 1145.

116 *See id.*

117 *See* Lance, *supra* note 11, at 40.

118 *See id.*

119 *See id.* at 28.

120 *See, e.g.*, Dina R. Rose & Todd R. Clear, *Who Doesn't Know Someone in Jail? The Impact of Exposure to Prison on Attitudes Toward Formal and Informal Controls*, 84 PRISON L.J. 228, 236-37 (2004) (listing community integration and neighborhood quality among the factors to be considered in evaluating the potential success of an offender's reintegration into society), *available at* http://tpj.sagepub.com/cgi/content/refs/84/2/228 (last visited Dec. 3, 2004); Dina R. Rose, Todd R. Clear, & Judith R. Ryder, Drugs, Incarceration and Neighborhood Life: The Impact of Reintegrating Offenders Into the Community, Final Report 17-25 (2002) (issuing sixteen recommendations to assist criminal offenders seeking successful integration into society) (unpublished report, U.S. Dep't of Justice) (on file with the National Institute of Justice), *available at* http://www.ncjrs.org/pdffiles1/nij/grants/195164.pdf (last visited Dec. 3, 2004).

hire ex-offenders.[121] No longer do ex-offenders face a lifetime of being under-employed and underpaid. Evidence suggests the effects of having trouble with the law (an arrest or criminal conviction) on employment and earning potential are moderate and short-lived.[122] As this Article will next discuss, statistics on the employment status and earnings of punitively discharged veterans bear this out.

C. BCD has Limited Impact on Earnings and Employment Opportunities

In January 2000, the Bureau of Justice Statistics published a study of veterans incarcerated in the United States.[123] The study examined all aspects of the social and economic lives of veterans in prison. Among the questions the veterans in prison answered was whether they had received an honorable discharge or not.[124] The study showed that the employment rates and income levels of these veterans was the same. The fact that some did not receive an honorable discharge made no difference to the rate at which they were able get a job, or to the amount of income they were receiving before being incarcerated as a civilian.[125] The report does not attempt to explain this phenomenon, but some simple reasoning may suggest an answer.

At a minimum, during their initial military training, all veterans receive training and indoctrination in values and skills that serve them well in civilian employment. Among these are training in discipline,

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[121] Among these are programs allowing state and local governments to give tax incentives to employers who hire ex-offenders, subsidized or state-sponsored negligent hiring and liability insurance, and legislative tort reform designed to limit liability for potential misconduct by working ex-offenders. *See* Jennifer Leavitt, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281, 1308-09 (2002).

[122] *See* Jeffrey Grogger, *The Effect of Arrests on the Employment and Earnings of Young Men*, 110 Q.J. ECON. 51, 70 (1995).

[123] *See* CHRISTOPHER MUMOLA, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VETERANS IN PRISON OR JAIL 12 (2000). For this study Mr. Mumola interviewed veterans incarcerated after being discharged from the military. These inmates provided information on their military service, as well as their criminal history and personal background. *See id.* at 1.

[124] *See id.* at 13.

[125] *See id*. It should be noted that veterans in prison who had received less than honorable discharges had more serious histories of criminal misconduct and substance abuse while in civilian life than honorably discharged veterans in prison. *See id*.

following orders, preparing for tasks, and working with others.[126] These traits are valued in employees. Employers know that veterans at least know how to do what they are told. This is true even for those who leave the military with punitive discharges. Veterans are generally good employment risks.[127] While the type of discharge a person received is a factor in the hiring decision, it is not the primary one.[128]

In 1978, the M*ilitary Law Review* published a study of the impact of punitive discharges on the economic opportunities of service members.[129] The study's author sent thousands of questionnaires to businesses and other entities throughout the United States, including Fortune 500 companies, small businesses, colleges and universities, unions, physicians, attorneys, state trade licensing boards, and personnel agencies.[130] The study found that 47% of the employers surveyed believed that a court-martial conviction did not even equate to a federal or state conviction.[131] It found that only 5% of employers would automatically reject an applicant with a punitive discharge.[132] Eighty-four percent stated their opinion concerning an applicant who had been convicted at court-martial would be unaffected by the applicant's receipt of a punitive discharge[133] Only 11% stated that a court-martial conviction could result in an adverse hiring decision, however, the decision would be based on other factors as well.[134] Most indicated the major factor affecting the hiring decision was not whether a punitive discharge had been adjudged, but what type of crime the service member had committed.[135] Similarly, this is the determining factor for eligibility for Veteran's Administration (VA) benefits as well.

By statute, the VA distinguishes between service members discharged with a BCD from a special court-martial versus service members who receive a punitive discharge from a general court-

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126 *See* U.S. DEP'T OF ARMY, FIELD MANUAL 7-21.13, THE SOLDIER'S GUIDE ch. 5 (Feb. 2004).
127 *See* U.S. ARMY RECRUITING COMMAND, PAM. 601-33, INSTRUCTIONAL GUIDE FOR BATTALION LEADERS TEAMS AND GUIDANCE COUNSELORS ch. 4-2 (2002).
128 *See* Lance, *supra* note 11, at 28.
129 *See id*. at 1.
130 *See id*. at 25-26.
131 *See id*. at 28.
132 *See id.*
133 *See id.*
134 *See id.*
135 *See id.*

martial.[136] Service members discharged by action of a general court-martial are automatically barred from all VA benefits.[137] Service members discharged by action of a special court-martial may retain their rights to significant VA benefits.[138] The VA bases this distinction on the types of crimes normally tried at general courts-martial—serious "felony" type crimes, versus those usually tried at special courts-martial—"misdemeanor" type crimes.[139] While the military justice

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[136] *See* 38 U.S.C. § 5303(a) (2000) which states:

> The discharge or dismissal by reason of the sentence of a general court-martial of any person from the Armed Forces. . . shall bar all rights of such person under laws administered by the Secretary based upon the period of service from which discharged or dismissed, notwithstanding any action subsequent to the date of such discharge by a board established pursuant to section 1553 of title 10.

Id.

[137] *See id.*; *see also* 38 C.F.R. § 3.12 (2004).

[138] *See* Lance, *supra* note 11, at 20-23. These benefits include: job counseling, employment placement, Servicemember's Group Life Insurance, home loan guarantees, service-connected death or disability compensation, various disabled veteran benefit (housing, automobile, etc.), funeral and burial expenses, vocational rehabilitation, educational assistance, veteran's preference for farm and rural housing loans, civil service preference, civil service credit for military service, and naturalization benefits. *See id*.; *see also* 38 U.S.C. § 101(2); 77 AM. JUR. 2d *Veterans and Veterans' Laws* § 34 (2003).

[139] *See* 38 C.F.R. § 3.12. Veteran's Administration benefits are barred under the following relevant circumstances:

> (1) A punitive discharge by a general court-martial. This could either be a BCD, DD, or Dismissal.
>
> (2) An officer resigning for the good of the service. By regulations, such resignation can only be accepted by the Secretary of the Army when charges to be tried at a general court-martial have been preferred against the officer.
>
> (3) When a service member deserts the service.
>
> (4) A service member being absent without leave for 180 days.
>
> (5) Acceptance of an undesirable discharge to escape trial by general court-martial. This bar would be effective only if a soldier submitted a request for discharge in lieu of court-martial after a convening authority referred charges to a general court-martial. If the accused submitted the request for discharge before referral, this bar would not apply.

system does not use the labels "felony" and "misdemeanor" as classifications of offenses, it is generally true that more serious crimes are tried at general courts-martial, and crimes of lesser severity are tried at special courts-martial.[140] The VA regulations recognize this distinction by only applying an automatic bar to former service members whose separation documents indicate a punitive discharge adjudged by a general court-martial.[141]

D. Developments in Courts-Martial Sentencing Instructions

The military courts have also noted the distinction between a BCD from a special court-martial and a punitive discharge from a general court-martial. In 1954, Judge Brosnan, concurring in a Court of Military Appeals (COMA) opinion wrote, "[v]iewed realistically and practically, I doubt that scarcely any punishment [even confinement] is more severe than a punitive discharge."[142] This statement reflected Congress' concerns about the effects of a punitive discharge when it created the

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(6) A discharge, whether punitive or not, for mutiny or spying.

(7) A conviction of an offense of moral turpitude. The VA considers any conviction for a felony offense to involve moral turpitude.

(8) Willful and persistent misconduct. The VA often finds lengthy periods of AWOL (30-180 days) resulting in a discharge to be willful misconduct.

(9) Homosexual conduct resulting in a undesirable discharge.

See 38 C.F.R. § 3.12(c)-(d).

[140] *See, e.g.*, Hearing on H.R. 2575, *supra* note 21, at 2025 (discussing the differences between cases tried at general courts-martial and those tried at special courts-martial).

[141] In practice, cases involving what would be "felony" offenses in the civilian criminal courts are sometimes tried at special courts-martial. In such cases, the VA, under 38 CFR § 3.12(d)(3), could deny a service member benefits even though the service member's discharge did not come from a general court-martial. Denial of benefits in such cases, however, is not automatic. The VA will refer to the available punishments for the specific offense listed in the UCMJ. If the punishments available include confinement for a year or more, the VA may bar the convicted service member from benefits. *See generally* Winter v. Principi, 4 Vet. App. 29 (1993) (determining whether Mr. Winter was entitled to benefits after being discharged via Chapter 10 of *AR 635-200* "for the good of the service" in lieu of court-martial, noting that the punishment for Mr. Winter's offense, absence without leave for more than 30 days, included confinement for up to one year, and finding that under the circumstances, Mr. Winter's offense constituted serious misconduct that was willful and persistent for purposes of 38 C.F.R. § 3.12(d)(4)).

[142] United States v. Kelley, 17 C.M.R. 259, 264 (C.M.A. 1954).

BCD in 1947. For years thereafter, military courts echoed Judge Brosnan's statement about the severity of punitive discharges. For example, in 1962 Judge Ferguson stated,

> . . .[T]he ineradicable stigma of a punitive discharge is commonly recognized by our modern society, and the repugnance with which it is regarded is evidenced by the limitations which it places on employment opportunities and other advantages which are enjoyed by one whose discharge characterization indicates he has been a good and faithful servant.[143]

The Army trial judiciary adopted Judge Ferguson's statement on the stigma associated with a punitive discharge almost verbatim in its Military Judges' Guide (now called the Judges' Benchbook)[144] as a standard sentencing instruction. Over time, however, some military judges, relying on data from the 1978 Military Law Review article cited above, and on their own experiences, began to tailor the instruction by adding the words "may affect" or "may place limitations" to the instruction, or by eliminating the word "ineradicable."[145] Eventually, the ineradicable stigma instruction as it related to BCDs was dropped from the Judges' Benchbook in 1982.[146] In 1992, the instruction reappeared in the Benchbook in response to COMA decisions in *U.S. v. Cross*[147] and *U.S. v. Soriano*[148] that reinvigorated the instruction. Nonetheless, military judges continued to recognize the limited stigma attached to a BCD adjudged by a special court-martial by continuing to tailor the instruction. However, the service courts continue to encourage the use

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143 United States v. Johnson, 31 C.M.R. 226, 231 (C.M.A. 1962).

144 *See* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES GUIDE para. 8-4(a)(1) (May 1969).

145 *See, e.g.*, United States v. Rasnick, 58 M.J. 9, 10 (2003) (permitting the trial judge to remove "ineradicable" from instructions provided the panel was informed adequately of the severity of a punitive discharge); United States v. Soriano, 20 M.J. 337, 341 (C.M.A. 1985) (focusing on the trial court's addition of the words "may affect" to the standard instruction); United States v. Greszler, 56 M.J. 745, 746 (A.F. Ct. Crim. App. 2002) (distinguishing the Air Force trial judge's instructions from those of the Army trial judge in *Rush*); United States v. Rush, 51 M.J. 605, 609-10 (Army Ct. Crim. App. 1999) (finding the trial judge's failure to use "ineradicable" in the instruction to be an abuse of discretion).

146 *See Rush*, 51 M.J. at 607-8; *see also* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 2-44 (1 May 1982).

147 21 M.J. 87, 88 (C.M.A. 1985).

148 20 M.J. 337, 341 (C.M.A. 1985).

of the "ineradicable" stigma instruction even if they do not overturn cases in which trial judges give weaker consequence of discharge instructions.[149]

Today, the Judges' Benchbook does not contain an "ineradicable" stigma instruction for use in special courts-martial. The instruction used for special courts-martial reads:

> This court may adjudge a bad conduct discharge. Such a discharge deprives one of substantially all benefits administered by the Department of Veterans Affairs and the Army establishment. (However, vested benefits from a prior period of honorable service are not forfeited by receipt of a bad conduct discharge that would terminate the accused's current term of service.) A bad conduct discharge is a severe punishment and may be adjudged for one who in the discretion of the court warrants severe punishment for bad conduct (even though such bad conduct may not include the commission of serious offenses of a military or civil nature.)[150]

The above instruction does not mention "employment opportunities," "stigma," or a time frame for how long the adverse effects of a BCD may last. By leaving out these elements of earlier instructions on the effects of punitive discharges, the above instruction accurately reflects the limited effect of a BCD from a special court-martial, and lends support to the conclusion that time and developments in our society have eliminated the stigma of the punitive discharge about which Congress was concerned when it enacted Art. 66.

V. Proposal for Altering the Review Scheme for Special Courts-Martial

A. Introduction

The conditions in our military justice system and our society that motivated Congress to create the automatic appeal of special courts-

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[149] *See, e.g.*, *Rush*, 51 M.J. at 610.

[150] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 2-6-10 (15 Sept. 2002).

martial imposing a BCD are no longer present. Our justice system is now a model of fairness and accuracy.[151] Today, a soldier discharged from military service by a special court-martial is no longer likely to be hindered in obtaining employment, or be shunned by society simply because of the characterization of his discharge. Given these changed conditions, there is no longer a need to protect service members who receive a BCD from a special court-marital by providing them with an extensive review of their cases by an appellate court. Given the minimal chance of error in a special court-martial tried in our mature military justice system, and the apparently minimal impact a BCD has on a service member's employability and social status, the scheme of courts-martial review set forth in UCMJ Art. 69 could be used to provide service members a meaningful review of their convictions and sentence while using considerably fewer resources at all levels.

B. Resources Used in Art. 66 v. Art. 69 Review of Special Courts-Martial

Preparing a special court-martial case for Art. 66 review requires SJA offices, DC, and military judges to expend a great deal of time, effort, and resources. Most of this effort surrounds the preparation and duplication of a verbatim transcript of the court proceedings.[152] The court reporter must transcribe the proceedings, proof the transcript, and put it, together with all the allied papers and exhibits, into a formal record for duplication.[153] After that process is completed, the trial counsel (TC), defense counsel (DC), and military judge (MJ) must review and correct any errors in the transcript, ensure all appropriate documents are present, and return it to the court reporter for final correction and duplication.[154]

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[151] *See* Kinsella v. Krueger, 351 U.S. 470, 478 (1956) (stating that the UCMJ provided not only for the fundamentals of due process, but also for protections not required of state criminal courts, and some which would compare favorably with the most advanced criminal codes); *see also* 17 STUDENT LAW. J. 12, 15 (1972) (then Chief Justice Warren commenting favorably on the fairness and accuracy of the military justice system).

[152] *See* UCMJ art. 54 (2002); *see also* MCM, *supra* note 6, R.C.M. 1103.

[153] *See generally* MCM, *supra* note 6, R.C.M. 1103 (establishing the requirements for preparing a record of trial).

[154] *See id.* (setting the procedure for correcting errors in a record of trial); *see also* AR 27-10, *supra* note 6, at para. 5; Interview with Sergeant First Class Andria Robinson, Chief, Court Reporter Training & Senior Court Reporter, U.S. Army, at The Judge Advocate General's Legal Center and School, Charlottesville, VA (Feb. 5, 2004)

While SJA offices, DCs, and MJs do their best to prepare cases for Art. 66 review as quickly as possible, in many jurisdictions the complicated and time consuming process of preparing records of trial results in a backlog of cases waiting to be forwarded to service courts for Art. 66 review. The service courts have become frustrated with the pace of post-trial processing, and have taken direct aim at the problem by granting relief to convicted service members solely because SJA offices take too long to prepare cases for Art. 66 review.[155] The severity of this problem is reflected in the Army TJAG's response to it.

[hereinafter Robinson Interview] (providing information on undocumented practical aspects of preparing records of trial).

The process of preparing a record of trial is resource intensive. An average special court-martial in the Army consists of a judge alone guilty plea. The transcript of an average special court-martial consists of 80-90 pages of transcribed text. *See* Robinson Interview, *supra.* If the case is contested, the number of pages to be transcribed increases by 300 per cent or more. *See id.* All of these pages must either be prepared by or prepared under the close supervision of a certified court reporter. *See id.* To prepare an average special court-martial transcript requires at least two full days of transcription time. Recommended "metric" standards for the court reporters require court reporters to transcribe 40 pages of text per day. *See id*.

Much of the transcript consists of scripted material. In guilty plea cases, this scripted material consists of the description of the elements of the offense, the explanations of the accused rights, and other routine language. *See* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK, *supra* note 150, at ch. 2. In contested cases, more scripted material is added in the form of the judge's instructions, standard voir dire questions, and other routine matters. *See id.* Despite this material being virtually the same in every court-martial, court reporters, however, cannot simply cut and paste from other proceedings. They must listen to and transcribe the proceedings anew for each record.

Similarly, TCs, DCs, and the MJs must also review the transcript and record page by page for each case. *See generally* MCM, *supra* note 6, R.C.M. 1103(i). Jurisdictions vary in the amount of time it takes to complete the transcript review and correction process.

Some SJA offices require TC to review a set number of transcript pages per day. Jurisdictions having such a standard usually require TCs to review 150 pages of transcript per day. *See id.* Transcripts, however, can sit for days or weeks waiting for review while TCs are deployed to training events, or while DCs are working other cases. *See id.* at 34-38. In sum, the record of trial preparation and review process is often time consuming and repetitive.

[155] *See* United States v. Collazo, 53 M.J. 721 (Army Ct. Crim. App. 2000) (holding that appellate courts have authority to grant relief for excessive post-trial delay without any showing of actual prejudice to the appellant); *see also* United States v. Maxwell, 56 M.J. 928 (Army Ct. Crim. App. 2002); United States v. Bauerbach, 55 M.J. 501 (Army Ct. Crim. App. 2001); *see generally* MacDonnell, "Collazo *Relief," supra* note 102, at 154; MacDonnell, *The Journey Is the Gift, supra* note 102, at 81.

In 2002, the Army undertook a service-wide study of post-trial problems.[156] The Army TJAG approved sixteen recommendations, which were enacted in December 2002.[157] After reviewing the study's recommendations, it is apparent the process of preparing records of trial for review under Art. 66 is the main culprit in post-trial delay. Ten of the study's recommendations dealt directly with court reporting, including a recommendation to develop "metric" standards for all phases of the post-trial process, including preparation of records of trial.[158] While the leadership of "the Army's Judge Advocate General's Corps [now] takes post-trial processing seriously and will no longer tolerate unreasonable post-trial delay,"[159] only time will tell whether these initiatives solve post-trial delay.

Once the record of trial for a special court-martial requiring review under Art. 66 is finally prepared, the SJA office forwards it to the office of the clerk of a service court to begin the appellate review process. The process of preparing a case for review by a service court is also time-consuming and resource intensive.[160] Once a case arrives at the clerk of

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[156] *See* Major Jan E. Aldykiewicz, *Recent Developments in Post-Trial Processing:* Collazo *Relief Is Here to Stay!*, ARMY LAW., Apr./May 2003, at 83, 99.

[157] *See id.*

[158] *See id.*

[159] *See id.*

[160] The Army Court of Criminal Appeals (ACCA) internal rules can be found on its website at http://www.jagcnet.army.mil/ACCA. The Navy/Marine Corps Court of Criminal Appeals internal rules can be found on its website at http://www.jag.navy.mil/documents/NMCCARules%20Draft%2002-14-2002.doc. The Air Force Court of Criminal Appeals internal rules can be found on its website at https://afcca.law.af.mil/. The procedures described below are set forth in those rules.

Once the record of trial arrives at the clerk of court's office, the case is logged in and then sent to an Appellate Defense Counsel (ADC). The rules for processing cases on appeal are set forth in *AR 27-13* and each service courts' internal rules of court. The rules published in *AR 27-13* are standard for all the services. The rules require ADCs to file a brief detailing assignments of error no later than thirty days after the clerk of court received the record of trial. *See* AR 27-13, *supra* note 6, at 3 (R. 15). However, ADCs rarely file this brief within thirty days. *See* UNITED STATES ARMY COURT OF CRIMINAL APPEALS, APPEALS PROCESSING TIME FISCAL YEAR: 2003 UNITED STATES ARMY-WIDE 1 (Feb. 4, 2004) [hereinafter ACCA FY 03 Processing Time Chart] (on file with the author).

All the service courts' internal rules allow for multiple continuances. For example, the ACCA's internal rules allow the Chief of the Defense Appellate Division to file two (2) motions for ninety-day extensions of the time to file the initial brief. All the Chief needs to state in these motions is that the extension is "necessary in the interests of justice due to the volume of appellate workload then pending in the division." *See* ACCA Rules of Court, *supra*, at 28-9. The clerk of court usually grants these motions automatically. *See id.* (R. 24.1(c)(4)); *see also* ACCA FY03 Processing Time Chart (an average of 211

court, another period of delay occurs before the case is ready for review by a service court panel. During this period of time, both appellate defense counsel (ADC) and government appellate counsel (GAC) prepare the case for review by the service court. In FY 2003 the average delay between a special court-martial case arriving at the clerk of court and the case being ready for review by the ACCA was 211 days; for general courts-martial the average delay was 311 days.[161] The service courts have no set time in which they must decide a case. There is no screening process. The service courts review every case, even those in which there is no apparent error, and render a decision in each one.[162] Many cases are decided on briefs, but a significant number are scheduled for argument.[163] The ACCA takes an average of 60 days to issue an opinion on special courts-martial cases once the court receives the briefs or hears oral argument.[164]

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days elapsed between the arrival of a special court-martial case at the clerk of court's office, and the case being ready for review by the court.).

Thereafter, the assigned ADC may request additional motions for extension of time to file the initial brief for thirty days at a time. The court will grant these motions for good cause, such as engagement in other litigation, or hardship to counsel. *See* ACCA Rules of Court, *supra*, at R. 24.1(b). The net effect is often months pass before an ADC even begins to review a case for error. *See* ACCA FY03 Processing Time Chart *supra*.

Once the ADC files the initial defense brief or memorandum, the case is sent to a Government Appellate Counsel (GAC) for a response, and the process begins again. *See* ACCA Rules of Court *supra* at 28-9. Eventually, often many months after the case arrived at the clerk of court, both sides will have filed some sort of brief, putting the case "at issue," and a panel of the service court will consider the case. *See also* ACCA FY03 processing time chart, *supra*. During FY2003 for general courts-martial cases, an average of 311 days passed from the time a case arrived at the ACCA clerk of court's office until it was "at issue" and ready for review by the ACCA. *See id.* For special courts-martial cases the average was 211 days. From July through September 2003, the average was 241 days. *See id.* The ACCA takes an average of sixty days to issue an opinion. *See id.*

[161] *See* ACCA FY03 Processing Time Chart, *supra* note 160. The Court of Appeals for the Armed Forces has, on infrequent occasions, entertained petitions for extraordinary relief based on unreasonable delay in the appellate process. *See, e.g.*, Diaz v. The Judge Advocate General of the Navy, 59 M.J. 34, 40 (2003) (making a fact-based decision that eleven periods of enlargement in the accused's appellate processing did not protect the rights of the accused).

[162] *See* AR 27-13, *supra* note 6 at 3. Rule 18 of the service court rules of practice and procedure requires the service courts to give notice of decisions and orders in accordance with RCM 1203. Rule for Court-Martial 1203 requires the service courts to issue decisions in all cases referred to them under Article 66 and RCM 1201. *See* MCM, *supra* note 6, R.C.M. 1203.

[163] *See id.*

[164] *See* ACCA FY03 Processing Time Chart, *supra* note 160.

C. Article 66 Appellate Process Not Cost-effective for Special Courts-Martial

In most instances, providing the full post-trial and appellate process to special court-martial cases is an inefficient use of resources. The vast majority of special courts-martial require Art. 66 review because the service member received a BCD.[165] A large percentage of these cases are guilty pleas.[166] In a significant percentage of special courts-martial, especially in cases from the Marine Corps, service members request a BCD in lieu of confinement.[167] While there is some possibility of error prejudicial to the accused at a guilty plea, the potential for error is relatively low.[168] For contested special courts-martial, statistics show the rate of reversible error is even lower than that for guilty pleas.[169]

It makes little sense to continue to expend the large amount of time, effort, money, and other resources required to provide a full judicial review for special courts-martial cases knowing that (1) in the vast majority of cases the trials were fair, and there is little chance that the trial court committed reversible error; (2) the most severe part of the sentence, a BCD, has no long-term effect on the service member; and (3) in many cases, the accused actually requested the part of the sentence that made the automatic appeal necessary—a BCD.

It is ironic that in many cases all of the work by ADCs, GACs, and the service courts on Art. 66 reviews of special courts-martial cases is done well after the convicted service member has been released from

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[165] *See Annual Reports*, *supra* note 4; *see also* Data Compilation Courtesy of Mary Dennis, *supra* note 99.

[166] *See* Data Compilation Courtesy of Mary Dennis, *supra* note 99.

[167] *See id.* (ACCA reported that in 14.3% of BCD special courts-martial in FYs 1998-2002, the accused requested a BCD as part of the defense sentencing case). Anecdotal evidence from the Marine Corps suggests that 55-60% of Marines at special courts-martial request a BCD as part of the defense sentencing case. Marine Corps judge advocates and military judges even have a name for these individuals. They call them "BCD Strikers." Most of these Marines are being court-martialed for drug use. They are ordinarily sentenced to less than 6 months confinement and a BCD. This practice is prevalent throughout the Marine Corps. Interview with MAJ Tracy Daly, former Associate Judge, Navy-Marine Corps Trial Judiciary, Piedmont Judicial Circuit, Headquartered at Camp Lejeune, NC (Feb. 3, 2004). This phenomena is important because the Navy-Marine Corps Court of Criminal Appeals reviews approximately six times as many special courts-martial under Art. 66 than the Army and Air Force Courts of Criminal Appeals combined. *See Annual Reports*, *supra* note 4.

[168] *See id.*; *see also* Data Compilation Courtesy of Mary Dennis, *supra* note 99.

[169] *See id.*

confinement.[170] As a result, the service member often never participates or assists in the appeal in any meaningful way. Reviewing all special courts-martial under Art. 69 would significantly reduce the amount of time, effort, and resources expended in reviewing these cases, and might even improve the evaluation of the issues in each case.

Many state judicial systems, faced with an explosion of criminal appeals, have taken steps to streamline the appellate process. The procedures many state supreme courts have implemented seek to speed up the process in the same way Art. 69 review would—by eliminating the need for verbatim records of trial and extensive processing and briefing by appellate counsel. These efforts are discussed below.

D. Expedited Appellate Procedures in State Judicial Systems

Article 66 provides an appeal as of right to service members sentenced to a punitive discharge or confinement for one year or more. This appeal is automatic, and the federal government pays all costs. All other courts-martial are reviewed upon application of the convicted service member in the office of the service members' Judge Advocate General under Art. 69.[171] Thus, every service member facing judicial action for criminal misconduct receives a no cost review of his or her case by a tribunal above the trial level no matter what the sentence or the potential issues in the case. Most states and the federal judicial system are not so liberal in granting full judicial appeals in every case, and virtually none pay all the costs of the appeal.[172]

The U.S. and almost every state allow appeals as of right to either the highest court (in states that do not have intermediate appellate courts) or an intermediate court for criminal convictions from the trial court of

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[170] Assuming (1) a service member receives the maximum confinement that could be adjudged at a special court-martial, one year, (2) it takes the SJA office ninety days (an unusually short amount of time) to get the record of trial to the service court clerk of court, (3) ninety days each for both the ADC and GAC to brief the case, and 4) the service court takes sixty days to issue its decision, the service member, receiving five days per month good conduct time credit (the minimum amount), will be released from confinement after 305 days, fifty-five days before the service court issued a decision. *See* U.S. DEP'T OF ARMY, REG. 633-30, MILITARY SENTENCES TO CONFINEMENT para. 13(a) (Feb. 28, 1989) (providing calculations for good time credit).

[171] *See* UCMJ art. 66 (2002); *see also id.* art. 69.

[172] *See* STERN, *supra* note 5, at 13-181.

general jurisdiction.[173] Most states do not allow appeals from courts of limited jurisdiction, although these courts often have power to sentence offenders for misdemeanor offenses—those punishable by incarceration up to one year.[174] In every state appellate court and the federal appeals courts, most of the costs associated with a criminal appeal are borne by the appellant.[175]

These costs can be substantial. They include filing fees, cost bond fees, and costs of transcribing and duplicating the record or specified parts of the record.[176] The other substantial cost is fees for appellate representation. To avoid these costs, the appellant must be indigent.[177] Indigent appellants are prevalent in the civilian criminal system, and are the primary reason for the explosion of criminal appeals.[178] Most states and federal courts have taken direct aim at the proliferation of appeals by enacting measures to encourage individuals to forego appeal, or to track hopeless cases for expedited disposition.[179]

The primary method for expediting cases on appeal is to screen them for merit before full records of trial are prepared. Several states, including New Hampshire, West Virginia, Michigan, Virginia, Nevada, and New Mexico, follow this procedure. In these states and a growing number of others, criminal appellants must file a request to appeal containing a memorandum outlining the merits of the appeal. The appellate court reviews the request, but may summarily reject the request without passing on the merits of the appeal. Court staff, not judges, handle the majority of the screening process.[180]

The only state expedited appellate scheme that has been invalidated is the one formerly used by New Hampshire. The 1st Circuit Court of Appeals struck down New Hampshire's summary disposition scheme in

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[173] *See id.* at 13.
[174] *See id.*
[175] *See id.*
[176] *See id.* at 111-18.
[177] *See id.* at 111.
[178] *See* CARRINGTON, *supra* note 5, at 60.
[179] *See id.* at 91-96.
[180] *See* STERN, *supra* note 5, at 13-15; CARRINGTON, *supra* note 5, at 48-50; *see also* Thomas B. Marvell, *Abbreviate Appellate Procedure: An Evaluation of the New Mexico Summary Calendar*, 75 JUDICATURE 86 (1991); Charles G. Douglas III, *Innovative Appellate Court Processing: New Hampshire's Experience with Summary Affirmance*, 69 JUDICATURE 147 (1985).

Bundy v. Wilson[181] because the state did not allow appellants access to an adequate record of trial before the appellate court ruled on requests for appeal.[182] New Hampshire later changed its scheme to provide appellants with partial records to satisfy this due process requirement.[183]

Most states with summary or expedited appeals processes use a system similar to that of the Nevada Supreme Court.[184] Nevada provides criminal defendants desiring to appeal convictions, with a "computer-generated" transcript, rough draft transcript, or other substitute for a full, certified transcript.[185] The appellant files a written statement of the alleged issues in the case with the "computer-generated" transcript attached.[186] The court reviews the submitted material before deciding to either grant a conference to explore the issues, summarily reject the appeal, or grant an appeal.[187] Nevada reports the expedited review procedures reduced the number of cases requiring full transcripts and briefing by 65%. The court averages between 90 and 120 days to issue a decision on expedited review cases.[188] Review of courts-martial under Art. 69 would provide many of the same advantages as the expedited appellate procedures now used in many states.

E. Discussion of UCMJ Art. 69 Review

1. Introduction

Under UCMJ Art. 69 and R.C.M. 1201(b), the Office of TJAG reviews all courts-martial resulting in a conviction not reviewed under Art. 66.[189] The Judge Advocate General may grant relief on grounds of:

(1) Newly discovered evidence,

(2) Fraud on the court,

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[181] 815 F.2d 125 (1st Cir. 1987).
[182] *See id.* at 130-31.
[183] *See* Marvell, *supra* note 180, at 187.
[184] *See* Paul Taggert, *Criminal Appeals at the Nevada Supreme Court*, 4 NEV. LAW. 24, 26 (1996).
[185] *See id.*
[186] *See id.*
[187] *See id.*
[188] *See id.*
[189] *See* UCMJ art. 69 (2002); *see also* MCM, *supra* note 6, R.C.M. 1201(b)(3); AR 27-10, *supra* note 6, para. 14-1.

> (3) Lack of jurisdiction over the accused or the offense,
>
> (4) Error prejudicial to the substantial rights of the accused, or
>
> (5) Appropriateness of the sentence.[190]

The Judge Advocate General may vacate or modify the findings or sentence in whole or in part or, in certain circumstances, order a rehearing or a new trial.[191] Clemency under Art. 74[192] is not precluded by any action by TJAG under Art. 69.[193] Service regulations govern the submission and review of applications for relief under Art. 69, but such reviews are generally done only on the application of the accused either pro se or with the assistance of defense counsel. They are not automatic, and can be waived.[194]

The Judge Advocate General's powers of review and relief under Art. 69 are strikingly similar to those of the service courts under Art. 66.[195] Both TJAG and the service courts may set aside findings and sentence, order a rehearing, and dismiss charges. While Art. 66 gives the service courts the specific power to weigh the evidence, judge the credibility of the witnesses, and determine controverted questions of fact, Art. 69 does not give TJAG the power to go outside the record of trial to find new facts. Most other appellate tribunals in the United States share this limitation.[196]

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[190] *See* AR 27-10, *supra* note 6, para. 14-1*a*.
[191] *See id.* para. 14-1*c*.
[192] UCMJ art. 74.
[193] *See* AR 27-10, *supra* note 6, para. 14-1*c*.
[194] *See id.* para. 14-2 – 14-4. Reviewing special courts-martial under Art. 69 is similar to the expedited review or summary disposition schemes used by many state appellate courts. Some common features include, the use of partial transcripts, staff attorneys (the equivalent of Art. 69 case reviewers) evaluating merits of cases, and provision for full judicial review if such appeal is warranted. *See generally* pt. __, sec. D, *infra*.**Please direct the reader to the correct part and section.**
[195] *Compare* UCMJ art. 69 and MCM, *supra* note 6, R.C.M. 1201(b), *with* UCMJ art. 66(b).
[196] *See* STERN, *supra* note 5, at 175.

2. Art. 69 Review Process

The Criminal Law Division of the Office of TJAG for the Army, Programs Branch, Victim Witness & Examinations and New Trials (E & NT) section reviews Army cases appealed under Art. 69. Every case E & NT reviews undergoes a thorough examination. An attorney reviews every aspect of pre-trial and post-trial processing in detail, from ensuring the court-martial had jurisdiction to ensuring the form of the action taken by the convening authority is correct.[197] The attorney reviewing the case notes any legal errors or irregularities.[198] Those errors that do not affect the legal sufficiency of the case are remedied through correspondence to the convening authority concerned.[199] Cases which are either legally insufficient or which contain a substantial question of law affecting the legality of the findings or sentence, or which is novel are considered for referral to the ACCA. The attorney reviewing such a case researches both the facts and legal issues pertinent to the case, and prepares a memorandum for review by the TJAG.[200] The TJAG may either take remedial action, or refer the case to the ACCA.[201] If referred to the ACCA, a verbatim record of trial may be prepared.[202]

A convicted service member usually has no further appeal if TJAG finds his or her case to be legally sufficient after Art. 69 review.[203] However, the ACCA has entertained petitions under the All Writs Act in cases TJAG found legally sufficient.[204] In addition, the ACCA has asserted that it has power under Art. 69(d) to hear appeals of cases TJAG reviewed under Art. 69 when those cases present matters that were inconsistent with the guilty plea and those matters implicated a public

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[197] *See* OFFICE OF THE JUDGE ADVOCATE GENERAL UNITED STATES ARMY, CRIMINAL LAW DIVISION, STANDARD OPERATING PROCEDURES FOR EXAMINATION AND NEW TRIALS DIVISION 5-11 (2003) (on file with the author).
[198] *See id.* at 6.
[199] *See id.* at 9.
[200] *See id.* at 9-11.
[201] *See id.* at 9.
[202] *See id.* at 11.
[203] *See* Dew v. United States, 48 M.J. 639 (Army Ct. Crim. App. 1998). Without expressly stating that there was no UCMJ provision that would allow it to entertain an appeal of a case previously reviewed under Art. 69, the court considered the appeal as a collateral attack on the finality of the proceedings under the All Writs Act. *See id.* at 644-45.
[204] *See id.*

policy that precludes enforcement in the military justice system.[205] Such cases are rare.[206]

Logically, the UCMJ does not provide for an automatic or "as of right" appeal to a service court after a case has been reviewed under Art. 69. Article 69 review was designed to be an expedited procedure for cases involving minor sentences in which review by the service courts is unnecessary and would overload the courts.[207] Giving service members a broad right to appeal a TJAG's decision under Art. 69 would defeat the purpose of having an expedited appeal procedure.

There are two significant differences between Art. 66 and Art. 69 reviews of courts- martial. First, an Art. 66 review requires the TC to prepare a verbatim record for the review.[208] Second, in the Art. 66 review process, a dedicated defense counsel represents the convicted service member.[209] Article 69 review requires neither.[210] Despite not requiring either of these resource intensive benefits, review under Art. 69 would still adequately protect the rights of the service members convicted at special courts-martial.

3. Summarized Record is Adequate for Special Courts-Martial Review

While summarized records do not capture every nuance of the action in the courtroom, they meet the requirements of due process in affording

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[205] *See id.* at 663 (Johnston, J., concurring).
[206] *See id.* at 662 (stating that in the six years prior to the *Dew* case, the ACCA reviewed only three cases under Art. 69(d)).
[207] *See id.* at 660.
[208] *See* MCM, *supra* note 6, R.C.M. 1103(b)(2)(B).
[209] *See* UCMJ art. 70(c) (2002) which states:

> Appellate defense counsel shall represent the accused before the Court of Criminal Appeals, the Court of Appeals for the Armed Forces, or the Supreme Court—(1) when requested by the accused; (2) when the United States is represented by counsel; or (3) when the Judge Advocate General has sent the case to the Court of Appeals for the Armed Forces.

Id.
[210] *See* UCMJ art. 69; MCM, *supra* note 6, R.C.M. 1103(b)(2)(B); *see also* AR 27-10, *supra* note 6, para. 14-1.

the convicted service member the opportunity to determine the areas for possible appeal.[211] In guilty plea cases a large part of the case is contained in documents including the charge sheet, pre-trial agreement, quantum, post-trial and appellate rights form, and other similar forms.[212] The majority of the case is essentially scripted. The colloquy between the accused and the judge in a guilty plea case is routine, and if it is not, a summarized recitation of the colloquy should provide a reviewer with enough information to appreciate any legal or factual issues that may arise.[213]

In contested cases, the need for a verbatim transcript may be more apparent, but generally a summarized record would suffice for review.[214] So long as court reporters, counsel, and the military judge are attuned to potential problem areas during the trial, such as voir dire, objections, and instructions (which are usually written), a trained reviewer should be able to find areas where potential error may have occurred.

A certified court reporter is not needed to produce a summarized record.[215] Paralegals, or just about anyone else that can hear and type,

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[211] *See* Draper v. Washington, 372 U.S. 487, 495 (1963) (holding that due process does not require that the government provide the accused with a verbatim record of trial to prepare for an appeal).

[212] *See* AR 27-10, *supra* note 6, para. 5-40; *see also* MCM, *supra* note 6, R.C.M. 1103.

[213] Some courts have found that a verbatim transcript is not necessary in most cases to permit meaningful appellate review. *See* Taggert, *supra* note 184, at 26; *see also* Jeantete v. Jeantete, 806 P.2d 66, 68 (N.M. Ct. App. 1990) (reviewing the trial court's decision with only nine of eleven audio tapes and finding such tapes to be an "adequate record sufficient to review the issues raised on appeal").

[214] *See Draper*, 372 U.S. at 495. The court stated:

> [A] State need not purchase a stenographer's transcript in every case where a defendant cannot buy it. Alternative methods of reporting trial proceedings are permissible if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise. A statement of facts agreed to by both sides, a full narrative statement based perhaps on the trial judge's minutes taken during trial or on the court reporter's untranscribed notes, or a bystander's bill of exceptions might all be adequate substitutes, equally as good as a transcript. Moreover, part or all of the stenographic transcript in certain cases will not be germane to consideration of the appeal, and a State will not be required to expend its funds unnecessarily in such circumstances.

Id. at 495.

[215] *See* AR 27-10, *supra* note 6, para. 5-40(d).

can produce summarized transcripts. Additionally, summarized records do not require word-by-word review and extensive errata. While trial and defense counsel, and the military judge should still review summarized records, the time required to complete that part of the process would be significantly reduced.

4. Defense Counsel Participation in Art. 69 Review

The ADC plays the most critical role in the Art. 66 review process. It is the ADC that reviews the case for error, briefs it, and presents it to the appellate court. Without someone looking at the record on behalf of the convicted service member, no meaningful review of a courts-martial can take place. In cases reviewed under Art. 69, the attorney reviewing a case takes on the function of the ADC. He or she scours the record looking for error prejudicial to service member.[216] While the service regulations implementing Art. 69 do not require the case reviewer to establish an attorney-client relationship with the convicted service member, case reviewers are encouraged to be diligent in ensuring the trial court upheld the rights of the service member.[217] Having the trial defense counsel assist the convicted service member in presenting the case for appeal under Art. 69 makes up for the absence of a dedicated ADC in the Art. 69 review process.

The logical person to assist a service member with an Art. 69 review of a special court-martial conviction is the defense counsel who represented the convicted service member at trial. The trial defense counsel is in the best position to appreciate any potential trial error. He or she would have been present to hear all the evidence, and probably made all the motions and objections in the case. In reviewing the summarized record of trial prepared for the Art. 69 review, the defense counsel would have the opportunity to point out any areas in the summarized transcript in need of more detail. The trial defense counsel could also request preparation of a verbatim transcript for specific portions of a record. Appropriate attention to detail by the defense counsel at this stage of the process would eliminate any potential quality

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[216] *See* OFFICE OF THE JUDGE ADVOCATE GENERAL UNITED STATES ARMY, CRIMINAL LAW DIVISION, STANDARD OPERATING PROCEDURES FOR EXAMINATION AND NEW TRIALS DIVISION, *supra* note 197, at 5-11.

[217] *See id.*; *see also* AR 27-10, *supra* note 6, para. 14-4*b* (encouraging the assistance of counsel in preparation of Art. 69 reviews).

deficit between a summarized record of trial and a verbatim record of trial. Moreover, there is no reason to believe that SJAs would refuse to grant reasonable requests by defense counsel for verbatim records of parts of trials that defense counsel asserted were particularly important for clemency or the Art. 69 review.

Having the trial defense counsel assist with the case for the Art. 69 review will not add a significant amount of work to the defense counsel's workload. At the same time that he or she is preparing clemency matters under R.C.M. 1105, the trial defense counsel will be able to note the allegations of error required for the Art. 69 appeal. This is nothing new. Trial defense counsel do this routinely in preparation for Art. 66 review. Accordingly, preparing such allegations would not be adding to the trial defense counsel's post-trial burden. Appropriate involvement on behalf of their clients by the trial defense counsel at this point in the process would reduce or eliminate any potential deficit in the protections afforded the convicted service member in an Art. 69 review versus those protections currently afforded by an Art. 66 review. In fact, increased involvement of the trial defense counsel at this point in the process, would, in all likelihood, enhance the review process by ensuring that the potential issues in the case were identified soon after the trial, at a time when the convicted service member is available to assist in the process.

5. Benefits of Art. 69 Review

Standing alone, Art. 69 provides significant additional protections for an accused. Under Art. 69(d), TJAG may refer cases to the service courts for further review under Art. 66.[218] This provision gives TJAG a choice to either reduce or set aside cases that have errors at his or her level, or forward such cases to the service court for full appellate review and action. In cases revealing minor error, TJAG may simply adjust the sentence or take other action in favor of the convicted service member. In cases where the trial defense counsel's memo to the Art. 69 case review officer contains credible allegations of serious error, TJAG can forward the case to the service court for a full appellate review.[219] This

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[218] *See* UCMJ art. 69(d) (2002).

[219] Under the proposed scheme of review for special courts-marital, TC would usually not prepare a verbatim transcript. It would be a simple matter to change the *AR 27-10*, para. 5-42(a), and the equivalent regulations for the other Services, to require the court reporter's notes and recordings to be retained until final action or the completion of appellate review. *Compare* AR 27-10, *supra* note 3, para. 5-42(a), *with* AR 27-10, *supra*

provision provides a screening process not unlike those employed by state appeals courts in which appeals appearing to lack merit are tracked for expedited disposition, and those appearing to have real issues are given greater attention by the appellate court.[220]

The tool for protecting the rights of service members given to each TJAG under Art. 69 is just as powerful as that of the service courts under Art. 66. Applied appropriately, the Art. 69 review would be as effective as the Art. 66 review in protecting the rights of service members convicted at special courts-martial. Any deficits in the quality of the review of courts-martial proceedings caused by the absence of a verbatim transcript, and dedicated appellate defense counsel, would be countered by an appropriate level of involvement by the individual who probably knows more about the case than anyone else involved in the process: the trial defense counsel.

The benefits of using Art. 69 review for special courts-martial in place of Art. 66 review are many. SJA offices, defense counsel, and military judges would spend much less time preparing, correcting, and processing verbatim records of trial. This would lead to fewer instances of unreasonable post-trial delay, and fewer cases of *Collazo* relief. Appellate Defense Counsel and GAC would be able to spend more time reviewing other Art. 66 cases,[221] enhancing the quality of appellate practice in cases where full appellate review is necessary. Service members would no longer wait years in limbo for final disposition of their cases on appeal, allowing them to move on in civilian life if their convictions or sentences are upheld, or to receive the benefits due them if their conviction or sentence is set aside or reduced. Finally, the workload of the service courts would be significantly reduced.[222] The implications of reducing the service courts' workload to such an extent

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note 6, para. 5-42(b). This would allow for a partial or complete verbatim transcript to be prepared should either the reviewer at the office of TJAG require it, or in the event TJAG forwarded the case to the Service Court for a full appellate hearing.

[220] *See* STERN, *supra* note 6, at 131-181.

[221] These would include general courts-martial cases and cases forwarded to the service court by TJAGs. *See* UCMJ art. 66.

[222] On average between FY 1998 and FY 2002, special courts-martial reviews accounted for approximately 24% of the ACCA's workload, 28% of the AFCCA's workload, and 80% of the NMCCCA's workload. *See* Data Compilation Courtesy of Mary Dennis, *supra* note 99; *see also Annual Reports*, *supra* note 4. These percentages are likely to increase now that the President increased the maximum confinement that can be adjudged at special courts-martial to one year. *See* MCM, *supra* note 6, R.C.M. 201(f)(2)(B).

are apparent—the size of each court could be decreased, and the remaining judges could give more attention to truly important issues.[223]

Using Art. 69 as the sole review mechanism for special courts-martial would garner all of these benefits, and still protect the rights of convicted service members. Accomplishing such a change would require only minor adjustments to the UCMJ, the RCM, service regulations, and personnel allocations in each of the services. The time has come to seriously consider making this change.

VI. Changes to Effectuate Art. 69 Review of Special Court-Martial

A. Changes to UCMJ

1. Article 66

To remove review of special courts-martial from the purview of the service courts to the offices of the TJAGs, UCMJ Art. 66(b) should be changed to read as follows (bold typeface indicates changed language):

> The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial—(1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge **adjudged by a general court-martial**, or confinement **for more than** one year[.]

The first change limits the number of cases reviewed under Art. 66 by specifying that only cases with a punitive discharge adjudged by a general court-martial are eligible for Art. 66 review. This eliminates Art. 66 review for special court-martial cases that adjudge a BCD with confinement of less than a year. The second change completely eliminates automatic Art. 66 review for special courts-martial by raising the confinement time necessary for an Art. 66 review to more than one

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[223] Such a change would answer some criticisms the service courts have received from civilian legal commentators. *See, e.g.*, Eugene R. Fidell, *Going on Fifty: Evolution and Devolution in Military Justice*, 32 WAKE FOREST L. REV. 1213, 1230 (1997) (criticizing the military judiciary in that they are for the most part anonymous, do not produce enough opinions, and give too much deference to trial judges).

year.[224] Because the maximum punishment that can be adjudged at a special court-martial is only one year, no special court-martial would qualify for an automatic Art. 66 review using this language.

Article 66 (b) currently provides for review of cases where the sentence includes one year or more of confinement.[225] The proposed change in the language of Art. 66 would add one day to the minimum amount of confinement required for an Art. 66 review. For example, if a service member at a general court-martial were sentenced to one-year confinement and no BCD, his or her case would not be eligible for an Art. 66 review. However, a case with a sentence of confinement over one year, i.e. 366 days, would be eligible. As noted above, it is unusual for a service member to be sentenced to the maximum confinement allowed at a special court-martial (one year). Currently, the vast majority of special courts-martial reviewed under Art. 66 involve cases in which the court sentenced the service member to a BCD.[226] Thus, this proposed change would have little practical effect in special courts-martial cases, but would make a bright-line rule that no special courts-martial qualify for an automatic review under Art. 66.

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[224] Some special courts-martial could still be reviewed under Art. 66 after being referred to the service courts by a TJAG under Art. 69. *See* UCMJ art. 69.

[225] *See* UCMJ art. 66(b). Congress based its selection of one-year as the amount of confinement to which a service member must be sentenced to qualify for an Art. 66 review on the distinction most civilian criminal justice systems made between what constituted a felony versus a misdemeanor crime. Most jurisdictions defined as felonies those crimes for which a person could be incarcerated in a state prison or penitentiary, as opposed to a local jail. A convict would only be sent to a prison if his or her sentence was in excess of one year. Convicts serving less than a year of confinement were incarcerated in local jails. *See* Hearing on H.R. 2575, *supra* note 21, at 2025 (testimony of MG Hoover, The Judge Advocate General of the Army). The UCMJ does not distinguish between felony and misdemeanor crimes, thus, the selection of one-year of confinement as the cut-off for eligibility for an Art. 66 review is essentially arbitrary. Because so few special courts-martial actually adjudge confinement of one-year, it would make little difference in practical terms to leave the cut-off at one year. It would be more efficient, and more importantly, more clear, however, to raise the cut-off by one day, and, thereby eliminate all special courts-martial from eligibility for automatic review under Art. 66.

[226] *See* MCM, *supra* note 6, R.C.M. 201(f)(2)(B); *see also* Data Compilation Courtesy of Mary Dennis, *supra* note 99.

2. Article 54

To eliminate the requirement for verbatim transcripts of special courts-martial proceedings, Art. 54 (c)(1)(B) should be eliminated. This section requires that a verbatim transcript be made for special courts-martial in which the sentence includes a BCD, confinement for more than six months, or forfeiture of pay for more than six months.[227] If special courts-martial are ineligible for Art. 66 review, it makes little sense to produce a verbatim transcript of special courts-martial proceedings. While such a transcript would be helpful to an Art. 69 reviewing officer, the whole point of changing Art. 66 to make special courts-martial ineligible for Art. 66 review is to speed up the post-trial process in part by eliminating the need for verbatim transcripts.

Additionally, Art. 54 is somewhat inconsistent with the current Art. 66 in that Art. 66 review is triggered by a sentence to confinement of one-year, not six months. Art. 66 does not even mention forfeitures of pay. When it enacted Art. 66, Congress was concerned that service members sentenced to felony-length terms of confinement, and service members receiving BCDs had an appellate safety net. The addition of the requirement for a verbatim transcript for sentences to confinement over six months was a result of later changes to the UCMJ which allowed for confinement of up to one year at a special courts-martial. When that change went into effect, inconsistencies arose as to when a verbatim transcript was required between general and special courts-martial.[228] Under this proposed change to Art. 54, TC would only have to prepare verbatim transcripts for general courts-martial cases in which the sentence included over one year confinement, or a punitive discharge.

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[227] *See* UCMJ, art. 54(c)(1)(B).

[228] *See* MCM, *supra* note 6, app. 21, R.C.M. 1103(b), analysis at A21-81; *see also* THE U.S. ARMY COURT OF MILITARY REVIEW, INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE—1983 220-1. Article 54 changed with each major amendment to the UCMJ. The goal of each change, however, was to limit the amount of verbatim transcripts that needed to be prepared. *See generally* JUDGE ADVOCATE GENERAL OF THE NAVY, INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE: 50TH ANNIVERSARY EDITION, *supra* note 61, at 1084-87; THE U.S. ARMY COURT OF MILITARY REVIEW, INDEX AND LEGISLATIVE HISTORY--UNIFORM CODE OF MILITARY JUSTICE 1968, *supra* note 52, at 19.

3. Article 19

This article prescribes the jurisdiction of special courts-martial. One of Art. 19's provisions is that a special court-marital may only adjudge a BCD or confinement for more than six months, or forfeitures for more than six months, if a verbatim record of the proceedings is made.[229] This provision of Art. 19 should be eliminated for the same reasons Art. 54(c)(1)(B) should be eliminated. If there is no automatic Art. 66 review of special courts-martial, there is no need for a verbatim transcript of special court-martial proceedings.

B. Changes to the Rule for Courts-Martial 1103

Similar to Arts. 19 and 54 above, the provisions of R.C.M. 1103(b)(2)(B) require verbatim transcripts for special courts-martial adjudging a BCD, and for all courts-martial that adjudge confinement or forfeitures in excess of six months. This rule should be changed to read as follows:

> Except as otherwise provided in subsection (j) of this rule, the record of trial shall include a verbatim written transcript of all sessions except sessions closed for deliberations and voting when the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge adjudged by a general court-martial, or confinement for more than one year.

This language is consistent with the language proposed above for Art. 66, and simplifies the code.

C. Changes to Service Regulations[230]

1. *AR 27-10*, para. 5-27(a)(3) should be eliminated.[231] It is based on the requirement in RCM 1103(b)(2)(B) for a verbatim transcript in

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[229] *See* UCMJ art. 19.

[230] Army regulations on military justice administration are similar to those of the other services. For the sake of brevity, this paper discusses only the relevant Army regulations.

[231] This provision states: "A bad-conduct discharge (BCD), confinement for more than 6 months, or forfeiture of pay for more than 6 months, may not be adjudged at special courts-martial unless— . . . [a] verbatim record of the proceedings and testimony was made." *See* AR 27-10, *supra* note 6, para. 5-27.

special courts-martial that adjudge a BCD. If Art. 66 review of special courts-martial is eliminated there is no need for this regulatory provision.

2. *AR 27-10*, para. 5-42[232] should be changed to ensure that recordings of the proceedings of special courts-martial are retained until the Art. 69 review process is completed. *AR 27-10*, para. 5-42(a) should be changed to read as follows:

> For cases in which a summarized record of trial is authorized, the notes or recordings of the original proceedings will be retained until completion of final action, review under UCMJ Art. 69, or further appellate review, whichever is later. The notes or recordings may be kept by the trial counsel, an assistant, court reporter, or a clerk or stenographer acting under the trial counsel's direction. On order of The Judge Advocate General, the trial counsel shall prepare verbatim transcripts of such proceedings, or specified portions of such proceedings, and shall forward them to the Office of The Judge Advocate General, New Trials and Examinations section, within 30 days of receipt of the order to prepare such verbatim transcripts.

Such a provision in the regulation ensures that the notes and recordings of special courts-martial are available if needed by case reviewing officers, or appellate counsel if TJAG refers the case to a service court.[233]

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[232] AR 27-10, para. 5-42, states:

> *a*. For cases in which a summarized record of trial is authorized, the notes or recordings of the original proceedings will be retained until the record is authenticated.
> *b*. For cases in which a verbatim transcript is required, the verbatim notes or recordings of the original proceedings will be retained until completion of final action or appellate review, whichever is later.
> *c*. The verbatim notes or recordings may be kept by the trial counsel, an assistant, court reporter, or a clerk or stenographer acting under the trial counsel's direction.

AR 27-10, *supra* note 6, para. 5-42.

[233] Recordings of courts-martial proceedings can now be stored in digital format making them both more secure from the elements and easier to retrieve after long periods of time.

It would be advisable to continue the practice of having certified court-reporters use stenographic techniques to record special courts-martial proceedings. While this would require effort on the part of court reporters, it is not the recording process that causes delays in preparing records of trial. Rather, it is the transcription process that is time-consuming and tedious.[234] Having a high quality stenographic recording of special courts-martial cases ensures that if verbatim transcripts are required, a court reporter has a recording that can be used to produce a quality transcript.

D. Changes in Personnel Allocations

If Congress eliminated automatic Art. 66 review of special courts-martial, and replaced it with review under Art. 69, the number of cases reviewed at the services' offices of TJAG would increase significantly. This is particularly true for the Department of the Navy which has the largest number of special courts-martial that impose BCDs.[235] The number of cases currently reviewed under Art. 69 is relatively small, thus, relatively few personnel are assigned to review cases under Art. 69. For example, in recent years, only one attorney was assigned to the Army's Examination and New Trials Division which has responsibility for reviewing cases under Art. 69.[236]

With the influx of new cases requiring Art. 69 review this paper's proposed change would bring about, it would be necessary to increase the number of judge advocate case examiners. There would, of course, be a commensurate drop in the number of cases requiring dedicated appellate counsel. To account for these changes, a simple shift of human resources could take place. For example, because there would be approximately 25% fewer cases for ACCA to review under Art. 66,[237] TJAG could shift a commensurate number of ADCs and GACs out of the

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[234] *See id.*

[235] *See Annual Reports*, *supra* note 4.

[236] *See* U.S. DEP'T OF THE ARMY, OFFICE OF THE JUDGE ADVOCATE GENERAL PUB. 1-1, JAGC PERSONNEL AND ACTIVITY DIRECTORY 11 (2003-4) [hereinafter U.S. DEP'T OF THE ARMY, OFFICE OF THE JUDGE ADVOCATE GENERAL PUB. 1-1, JAGC PERSONNEL AND ACTIVITY DIRECTORY]; U.S. DEP'T OF THE ARMY, OFFICE OF THE JUDGE ADVOCATE GENERAL PUB. 1-1, JAGC PERSONNEL AND ACTIVITY DIRECTORY 10 (2004-5).

[237] Special courts-martial make up about 25% of the Army cases reviewed under Art. 66. *See Annual Reports*, *supra* note 4. Now that the amount of punishment special courts-martial may adjudge has increased to one year, the percentage of special courts-martial is likely to increase.

appellate divisions to New Trials and Examinations. At the time this article was written, there were approximately 40 attorneys working as Army appellate counsel. [238] Moving ten (10) attorneys to Examinations and New Trials would provide the manpower to handle the less labor-intensive courts-martial reviews required under Art. 69. A similar adjustment of the staffing levels at the service courts could also be considered.

VII. Conclusion

Steady increases in the protections afforded accused and convicted service members characterized the first 50 years of military justice under the UCMJ. Since 1987, service members have lived and worked under a mature military justice system that has emphasized due process and fairness. Under the current system, the rights of the accused and convicted are protected at least as well and, in many cases, better than in its civilian counterparts.[239] Changing Art. 66 to eliminate the automatic appeal for all special courts-martial will not reduce the due process rights of convicted service members. By increasing the speed of the post-trial process, and by encouraging more involvement by defense counsel with the case review process, a change to Art. 66 may increase the protections the UCMJ affords service members. At the same time, this change would significantly reduce the workload of SJA offices, military judges, appellate counsel, and most importantly, the service courts. Now is the time to make that change.

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[238] *See* U.S. DEP'T OF THE ARMY, OFFICE OF THE JUDGE ADVOCATE GENERAL PUB. 1-1 (2003-4), *supra* note 236, at 17-8.

[239] *See* Cooke, *supra* note 3, at 18-19; Major George S. Prugh, Jr., *Observations on the Uniform Code of Military Justice: 1954 and 2000*, 165 MIL. L. REV. 21, 41 (2000).

HOME SCHOOLING AWAY FROM HOME: IMPROVING MILITARY POLICY TOWARD HOME EDUCATION

LIEUTENANT COLONEL JEFFREY P. SEXTON*

That some parents "may at times be acting against the interests of their children" . . . creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests . . . The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition.[1]

I. Introduction

With the explosive growth of home schooling in the United States in the past four decades,[2] home school parents have frequently been at odds with state and local authorities over government regulation and control of home education.[3] In every state, parents who home educate have

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[1] Parham v. J.R., 442 U.S. 584, 602-03 (1979).

[2] *See* Patricia M. Lines, *Homeschooling*, ERIC DIG. 151 (Sept. 2001), *available at* http://eric.uoregon.edu/publications/digests/digest151.html (last visited Nov. 10, 2004) (noting that home schooling in the United States grew from 10,000 to 15,000 children in the late 1960s to perhaps one million children by 2001).

[3] *See* Michelle Malkin, *Home-Schooling Under Siege* (May 18, 2001), *available at* http://www.townhall.com/columnists/michellemalkin/printmm20010518.shtml (last visited Nov. 10, 2004) (describing how, in most states, government educators seek to

wrestled with governmental authorities over a myriad of issues, such as mandatory notification requirements, teacher certification requirements, state testing of home schoolers, religious exemptions, equal access policies, and in-home visits by state authorities.[4] Although the trend in recent years has been for states to "limit state controls over private education in favor of expanding parental liberty,"[5] the existence of differing home school legislation and case law throughout the fifty states fosters a climate of unease and uncertainty within the home school community.[6] Of particular concern is the burgeoning issue of educational neglect and the fact that, in some jurisdictions, home school parents are wrongly facing exposure to child neglect investigations and prosecutions.[7]

Military home school parents face similar concerns, as well as additional challenges unique to military service. Frequent moves force military parents to grapple with conflicting, and sometimes confusing, home school laws from state to state, and to navigate the idiosyncrasies

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enforce "meddlesome regulations" that require home school parents to submit curriculum portfolios, file notices of intent to home school, and the like. In one example, a Maryland home school mother was charged with seventy-two counts of criminal truancy for resisting government review of her lesson plan, which happened to be a nationally-respected Catholic curriculum).

[4] *See generally* CHRISTOPHER J. KLICKA, THE RIGHT TO HOME SCHOOL 21, 27, 49 (1998) (discussing the legislative and judicial histories of home schooling, and providing numerous examples of the obstacles often placed in the way of home school families. For example, in a case in Alabama, home school parents were presented with a court order authorizing social workers to enter the home and interrogate the children based solely on an anonymous tip of educational neglect).

[5] *Id.* at 158.

[6] *See generally* CHRISTOPHER J. KLICKA, HOME SCHOOLING IN THE UNITED STATES: A LEGAL ANALYSIS iv-viii (2003) (summarizing in detail the home school laws in the fifty states and demonstrating the lack of uniformity of home school laws throughout the country). For example, forty-one states do not require home school parents to meet specific teacher qualifications; twenty-four states require standardized testing or evaluation of home schoolers; eight states allow home schoolers to obtain some type of religious exemption from compulsory attendance laws; three states require home schools to be subject to the discretionary approval of the local school district, school board or state commissioner; six states require instruction or amount of time to be "equivalent" to public schools; fourteen states allow individual home schools to operate as private or church schools. *See id*. Given the variations in state laws, it is accurate to conclude that no two states are alike in their approach to home schooling.

[7] *See* Malkin, *supra* note 3 (citing the example of the Maryland home school mother charged with criminal truancy); *see also infra* notes 70-73 and accompanying text (providing other examples of child neglect investigations and prosecutions against home school parents).

of state and local education authorities at new duty locations.[8] Of equal concern are issues relating to the military's oversight of home schooling, especially in an overseas environment, and the ramifications for both the military parent and the installation/community commander. At present, although there are no separate Department of Defense (DOD) or service regulations specifically devoted to home schooling within the military, other DOD guidance and service regulations, such as DOD Education Activity policies and the Army's family advocacy regulation, raise difficult questions regarding the military's role in home schooling.[9] Most notable are DOD and Army regulations incorporating definitions of educational neglect within the broader definition of child abuse.[10] Through vague references to home schooling, these regulations open the door for misinterpretation and abuse by commanders, child development personnel, and others within the military's family advocacy bureaucracy.[11] These regulations create more questions than they answer. For example, what is the authority of the DOD, the military services, and the local commander to regulate home schooling? Should the military investigate allegations of educational neglect against military home schoolers? What level of coordination and cooperation with state and local authorities is required of installation commanders? Given the ever-changing landscape of home schooling throughout the country, the need for more definitive DOD policy on these issues is evident.

This article argues that the military's policy regarding home schooling is in need of major revision and is inadequate to protect the right of military parents to home school their children. This article reviews issues relevant to home schooling everywhere, such as the right

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[8] *See generally* KLICKA, *supra* note 6, at iv-viii (summarizing in detail the home school laws in the fifty states and demonstrating the lack of uniformity of home school laws throughout the country).

[9] *See generally* U.S. DEP'T OF ARMY, REG. 608-18, THE ARMY FAMILY ADVOCACY PROGRAM (20 Oct. 2003) [hereinafter AR 608-18]; U.S. DEP'T OF DEFENSE, DIR. 6400.1, FAMILY ADVOCACY PROGRAM (FAP) (23 June 1992) [hereinafter DOD DIR. 6400.1]; U.S. DEP'T OF AIR FORCE, INSTR. 40-301, FAMILY ADVOCACY (1 May 2002) [hereinafter AFI 40-301]; OFFICE OF THE CHIEF OF NAVAL OPERATIONS, INSTR. 1752.2A, FAMILY ADVOCACY PROGRAM (17 July 1996) [hereinafter OPNAV INSTR. 1752.2A]; Memorandum, Department of Defense Education Activity, subject: Home Schooling (6 Nov. 2002) [hereinafter 2002 DODEA Memo].

[10] *See* AR 608-18, *supra* note 9, at 102; U.S. DEP'T OF DEFENSE, INSTR. 6400.2, CHILD AND SPOUSE ABUSE REPORT (10 July 1987) at enclosure 2, attachment 2, para. 13.d.(7) [hereinafter DOD INSTR. 6400.2].

[11] *See infra* notes 126, 128, and 131 and accompanying text (discussing how the DOD and the individual armed services define child neglect and educational neglect).

of parents to direct the education of their children, the role of the state and federal governments in regulating education and home schooling, and the uneasy connection between home schooling and child neglect laws. Next, this article looks at the military's dependent education system and the military's approach to home schooling, highlighting how DOD home schooling policies have created conflict and confusion among commanders, DOD schools, and military parents over the past decade. This article then examines military child abuse/neglect programs and state jurisdictional issues, discussing how military home schoolers are exposed to additional government oversight through educational neglect laws and regulations. Finally, this article proposes changes to DOD policy and regulations that will define specifically the role of DOD, the military services, and commanders in regulating home schooling, clarify family advocacy policy conflicts between home schooling and child neglect issues, and fine tune the cooperative relationships between military installations and state and local child protection agencies. The proposed changes aim to protect the right of parents to direct the education of their children.

II. Parental Rights, State and Federal Roles in Regulating Home Schooling, and the Uneasy Connection with Child Neglect Laws

A. Parents vs. the State: The Battle of Competing Interests

1. The Right of Parents to Direct the Education of their Children

The U.S. Supreme Court consistently has held that parents have the fundamental right to direct the care, custody, and control of their children.[12] This fundamental right is based on the liberty clause of the Fourteenth Amendment.[13] A byproduct of this right is a parent's right to

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[12] *See* Troxel v. Granville, 530 U.S. 57, 65-66 (2000) (citing a long line of cases affirming the right of parents to direct the care, custody, and control of their children, and emphasizing that this right "is perhaps the oldest of the fundamental liberty interests recognized by this Court").

[13] U.S. CONST. amend XIV, § 1. Section 1 states, in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.* This "liberty" right in the Fourteenth Amendment has been interpreted by the Supreme Court to include "parental liberty." *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510, 536 (1925) (finding unconstitutional an Oregon compulsory attendance law that did not recognize the right to

direct his or her child's education and upbringing.[14] In addition to parental rights under the Fourteenth Amendment, the Court has recognized a parental interest in education under the free exercise clause of the First Amendment when a parent's basis for educating a child is "one of deep religious conviction."[15] Thus, the general posture of the Court today is that, although subject to some state regulation, parents have the right to educate their children through means other than the public schools, such as private schools, parochial schools, or home schools.[16]

2. State Interest in Educating Children

The right of parents to direct the education of their children is not exclusive. The Supreme Court also has recognized a state interest in ensuring that children receive an education.[17] The Court's reasoning

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attend private schools); Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (striking down a Nebraska law making it illegal to teach a foreign language to children).

[14] *See* Washington v. Glucksberg, 521 U.S. 702, 720 (1997) ("[I]n addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right . . . to direct the education and upbringing of one's children.").

[15] Wisconsin v. Yoder, 406 U.S. 205, 216 (1972) (requiring the government to show a "compelling interest" to regulate in cases where the parent's interest in educating their children is based on deeply held religious convictions). One commentator argues, however, that in cases since *Yoder*, the trend has been for the courts to reduce the state's "compelling interest" burden to a test of "reasonableness" in religion cases. This would mean, in effect, that the liberty clause of the Fourteenth Amendment is the only solid basis for parents to attempt to limit state regulation of education. *See* Ralph D. Mawdsley, *The Changing Face of Parent's Rights*, 2003 BYU EDUC. & L.J. 165, 174. Another commentator disagrees, arguing that the four-part "compelling interest" test still applies in cases where parental rights are combined with a free exercise of religion claim. The four parts of the "compelling interest" test in a free exercise analysis are: Are the home school family's beliefs sincere and religious?; Are home schoolers' religious beliefs burdened or violated by the state's requirements?; Is the state's regulation "essential" for children to be educated?; and Can the states establish that no alternative form of regulation exists which would be less restrictive to First Amendment rights? *See* KLICKA, *supra* note 4, at 49-71.

[16] *See* J. Bart McMahon, *An Examination of the Non-Custodial Parent's Right to Influence and Direct the Child's Education: What Happens When the Custodial Parent Wants to Home Educate The Child?*, 33 U. OF LOUISVILLE J. OF FAM. L. 723, 732 (1995); *see also* David W. Fuller, *Public School Access: The Constitutional Right of Home-Schoolers to "Opt In" to Public Education on a Part-Time Basis*, 82 MINN. L. REV. 1599, 1615 (1998); Mawdsley, *supra* note 15, at 165; Judith G. McMullen, *Behind Closed Doors: Should States Regulate Homeschooling?*, 54 S.C. L. REV. 75, 77 (2002).

[17] *Yoder*, 406 U.S. at 221; Plyler v. Doe, 457 U.S. 202, 221 (1982).

rests on the argument that education serves both the economic and cultural interests of society.[18] First, education transforms a child into a productive citizen by providing "the basic tools by which individuals might lead economically productive lives."[19] Second, education prepares children to become mature citizens capable of political participation: "Some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."[20] It is on these grounds that the Court recognizes a constitutional basis by which a state gains the authority to regulate education.

A state is not unlimited, however, in its power to regulate the education of children. Because a parent's right to direct the education of children is "fundamental," the state must demonstrate that it has a "compelling interest" whenever it takes action to regulate education.[21] As a result, in the ongoing dispute between home school parents and state authorities, the state's efforts to regulate home schooling must be so "compelling" that they overcome the parent's fundamental right to direct a child's education. Unfortunately, as parents and states alike have learned in court cases throughout the country, the application of this analysis has not been uniform. In some states, the courts have ruled in favor of the parents, such as when parents objected to vague compulsory attendance laws,[22] laws requiring instruction from public school teachers,[23] and laws requiring state certification of home school teachers.[24] In other states, the courts have ruled in favor of the states, such as state laws mandating teacher certification[25] and requiring prior

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[18] *Plyler*, 457 U.S. at 221.
[19] *Id.*
[20] *Yoder*, 406 U.S. at 221.
[21] *See id.* at 233.
[22] *See, e.g.*, Ellis v. O'Hara, 612 F. Supp. 379, 381 (E.D. Mo. 1985) (ruling that the state failed to provide the parents an adequate definition of a "substantially equivalent" education under Missouri's home school statute).
[23] *See, e.g.*, Windsor Park Baptist Church, v. Arkansas Activities Ass'n, 658 F.2d 618, 621 (8th Cir. 1981) (stating that the Fourteenth Amendment forbids the States to prohibit attendance at nonpublic schools, either secular or religious).
[24] *See, e.g.*, Michigan v. De Jonge, 501 N.W.2d 127, 140 (Mich. 1993) (concluding that there are less intrusive means than teacher certification to fulfill the State's interest in ensuring the education of home school children under the compulsory education law).
[25] *See* Johnson v. Charles City, 368 N.W.2d 74, 81 (Iowa 1985) (holding that a teacher licensing requirement for a church school was neither arbitrary nor unreasonable); Nebraska v. Faith Baptist Church, 301 N.W.2d 571, 579 (Neb. 1981) (holding that the state's teacher certification requirement was neither arbitrary nor unreasonable).

approval from the local school district to home school.[26] The various state approaches to home school regulation reflect this lack of consensus in the courts.

B. State Regulation of Home Schooling

The traditional means by which states have exercised their authority to regulate education has been through compulsory education laws. Every state in the union has a compulsory education law or compulsory attendance law mandating that children attend school between certain ages, such as ages six to sixteen.[27] Until the 1980s, most state laws rejected home schooling as an acceptable way to comply with compulsory attendance laws.[28] In fact, as recently as 1980, home schooling was illegal in thirty states,[29] meaning that parents who chose to home educate their children in those states were in violation of compulsory attendance laws. As home schooling became more prevalent in the 1980s, state laws began to change. By 1993, home schooling was

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[26] *See* Ohio v. Schmidt, 505 N.E.2d 627, 629-30 (Ohio 1987) (stating that the requirement to seek approval from the school superintendent for a home education program did not infringe upon the free exercise of religion); Care of Protection of Charles, 504 N.E.2d 592, 600 (Mass. 1987) (holding that a school committee could impose reasonable educational requirements on home schoolers similar to those required of public and private schools); North Dakota v. Patzer, 382 N.W.2d 631, 639 (N.D. 1986) (concluding that teacher certification requirements are the least intrusive personally intrusive means to satisfy the state's interest in seeing that children are taught by capable persons).

[27] *See* National Center for Education Statistics, *Digest of Education Statistics, 2002*, tbl. 150, *at* http://nces.ed.gov/programs/digest/d02/tables/dt150.asp (last visited Nov. 10, 2004). Compulsory attendance laws provide that a child must attend school between certain ages. Although most states currently mandate school attendance only until age sixteen, there is a trend to expand compulsory attendance ages, either by requiring children to start school at earlier ages, such as four or five years old, or by requiring them to stay in school longer, such as seventeen or eighteen. *See* Scott Woodruff, *Compulsory Threats to Education, Freedom*, WASH. TIMES, Apr. 17, 2001, at E5.

[28] *See* KLICKA, *supra* note 4, at 157-58 (noting that in 1980, only three states—Utah, Ohio, and Nevada—recognized the right to home school in their state statutes; however, since 1982, thirty-five states have changed their compulsory attendance laws to specifically allow for home schooling with certain minimum requirements).

[29] *See* Patrick Basham, *Home Schooling: From the Extreme to the Mainstream*, PUB. POL'Y SOURCES 4 (2001), *available at* http://www.fraserinstitute.ca/admin/books/files/homeschool.pdf (last visited Nov. 10, 2004).

legal in every state[30] but usually subject to some degree of state regulation.[31]

The degree of state regulation and oversight of home schooling varies from state to state, resulting in a hodgepodge of home schooling laws throughout the country.

> In practice, there are high regulation, moderate regulation, and low regulation states. High regulation states may require parents to inform the respective educational authority that they wish to begin to home school, maintain compulsory attendance laws, require that the home school curriculum be approved by the state, conduct periodic visits to the home, administer standardized tests, and require that home schooling parents be certified teachers . . . . Moderate regulation states may require parents to send notification and provide test scores and/or professional evaluation of the student's progress. Low regulation states do not require parents to initiate any contact with the state.[32]

Given this variety of approaches from state to state, the impact on military home school families is significant. For example, an Army home school family moving from Fort Hood, Texas, to Fort Lewis, Washington, goes from a state with no notice requirement, no teacher certification requirement, and no standardized testing (Texas), to a state that requires notification to the local school district, teacher certification, and annual standardized testing (Washington).[33] An Air Force home school family moving from Elmendorf Air Force Base, Alaska, to Minot

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[30] *See id.*

[31] *See generally* KLICKA, *supra* note 6, at iv-viii (categorizing state home school regulation by type of regulation, such as standardized testing, amount of instruction required, and teacher qualifications).

[32] Basham, *supra* note 29, at 4-5; *see also* Major Michael D. Carsten, *An Education in Home Schooling*, 177 MIL. L. REV. 162, 165-70 (2003) (providing a comparison of various state home school laws).

[33] *See* TEX. EDUC. CODE ANN. § 25,086(A)(1) (requiring only that the curriculum include a course of study in good citizenship); WASH. REV. CODE ANN. 28A.200.010(1) (Matthew Bender & Co., Inc., LEXISNEXIS through 2004 legislation) (requiring the parent to submit annually a signed declaration of intent to home school to the local school superintendent. The notice must include the name and age of the child, specify whether a certified person will be supervising the instruction, and be written in a format prescribed by the superintendent of public instruction).

Air Force Base, North Dakota, goes from a state with no notice requirement, no teacher certification requirement, and no testing requirement (Alaska), to a state that has an annual notice requirement, significant teacher qualification requirements, and periodic testing requirements (North Dakota).[34] Further, the level of involvement by the local installation or community commander with home schooling issues, to include the commander's level of cooperation and assistance with state and local education authorities, is different from one installation to another and depends on variables such as the type of federal jurisdictional status of the military installation[35] and the type of agreement the installation has with local education and child welfare authorities.[36] All of the above factors combine to create an unsteady state of affairs for military home school parents, especially in light of the continuing conflict between state authorities and home school parents with regard to child neglect and educational neglect laws. This tension highlights the need for a uniform military policy on home schooling across all the armed services.

C. The Federal Government's Role in Home Schooling

In the United States, the states, and not the federal government, have historically exercised the authority to regulate education.

> Public education is primarily a province of the states because article I, section 8 of the U.S. Constitution does not designate education as one of the functions delegated to the national government. Although the federal government has enacted legislation involving various mandates for education, the primary responsibility for

[34] *See* N.D. CENT. CODE § 15.1-23-03 (Matthew Bender & Co., Inc., LEXISNEXIS through 2003 General and Special Sess.). North Dakota's teacher qualification requirements are quite stringent in that a parent must be certified to teach in North Dakota or have a baccalaureate degree; or have a high school diploma or a GED certificate and be monitored by a certified teacher during the first two years of home instruction; or meet or exceed the cut-off score of the national teacher exam given in North Dakota. *See id.*

[35] A state's authority to enforce its laws on a military installation depends primarily on the federal jurisdictional status of the installation. Absent an agreement between the installation and the local community, an installation holding exclusive federal jurisdiction is less susceptible to intervention by state authorities in matters involving child abuse and neglect, to include educational neglect. *See infra* notes 142-61 and accompanying text.

[36] *See* DOD DIR. 6400.1, *supra* note 9, para. E3.1.1.3.1 (encouraging the military services to maintain agreements with local communities on child welfare issues).

> determining the content and implementation of education resides with states. [37]

Despite having no direct constitutional role or responsibility in education, the federal government can significantly impact education issues, to include home schooling within the military, through federal legislation and policies. Of note are federal laws and policies recognizing home schooling as a positive educational alternative, and federal laws providing money to the states to strengthen child services and child welfare agencies.[38]

1. Federal Recognition of the Right to Home School

In recent years, Congress has indirectly recognized the positive results of home schooling by easing the restrictions on home schoolers attempting to enlist in the United States Armed Forces. Prior to 1998, home school graduates were not considered high school graduates for purposes of enlistment and held a lower enlistment priority.[39] In 1998, Congress established a five-year pilot program designating home schoolers as Tier I recruits, [40] which is the same enlistment priority as traditional high school graduates. In 2003, the DOD extended the program for another year.[41]

A more direct acknowledgement by Congress of the legitimacy of home schooling, and, specifically, the right to home school in the military, is a recent amendment to the Overseas Defense Dependents'

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[37] Mawdsley, *supra* note 15, at 191 n.1. Additionally, the U.S. Supreme Court has held that public education is not a right granted to individuals by the federal constitution. *See* Plyler v. Doe, 457 U.S. 202, 221 (1982).

[38] In the view of some state courts, this flow of federal money demonstrates a desire by Congress for states to provide child welfare services on federal enclaves such as military installations. *See infra* notes 59, 152-160 and accompanying text.

[39] *See* U.S. DEP'T OF DEFENSE, DIR. 1304.26, QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, AND INDUCTION para. E1.2.3.1 (21 Dec. 1993) (stating that alternative credential holders and nongraduates may be assigned lower enlistment priority based on their first-term attrition rates).

[40] National Defense Authorization Act, Pub. L. No. 105-261, div. A, tit. V, subtit. G, § 571, 112 Stat. 2033 (1998).

[41] Memorandum, Office of the Under Secretary of Defense, Personnel and Readiness, to: Deputy Chief of Staff, G-1, USA, Chief of Naval Personnel, Deputy Chief of Staff for Personnel, USAF, Deputy Chief of Staff for Manpower and Reserve Affairs, USMC, subject: Extension of Home School and National Youth Challenge Tier I Pilot Program (Aug. 15, 2003) (on file with author).

Education Act (ODDEA).[42] The ODDEA directs the Secretary of Defense to provide a free public education to dependent children in overseas areas.[43] In 2002, Congress amended the ODDEA by directing DOD schools to make auxiliary services available to home schooled military children, such as extracurricular and interscholastic activities.[44] The passage of the amendment is an unambiguous statement by Congress in support of home schooling in general, and home schooling by military parents in particular.

Finally, although still pending in Congress, the proposed Federal Home School Nondiscrimination Act (HONDA),[45] if passed, would be the most definitive statement yet by Congress regarding home schooling. The purpose of the bill is to "amend selected statutes to clarify existing Federal law as to the treatment of students privately educated at home under State law."[46] Among other things, the bill states the following:

> The right of parents to direct the education of their children is an established principle and precedent under the United States Constitution . . . . The Congress, the President, and the Supreme Court, in exercising their legislative, executive, and judicial functions, respectively, have repeatedly affirmed the rights of parents . . . . The rise of private home education has contributed positively to the education of young people in the United States . . . . The United States Constitution does not allow Federal control of home schooling.[47]

Passage of the bill will significantly influence future debate over the extent of control and oversight that federal agencies, to include the DOD, may have over home schooling. If it is the sense of Congress that the Constitution "does not allow Federal control of home schooling,"[48] then the authority of the DOD and/or commanders to regulate home schooling to any significant extent is minimal at best.

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[42] Overseas Defense Dependents Education Act, 20 U.S.C. §§ 921-932 (2000).
[43] *See id.*
[44] *Id.* § 926(d); *see infra* notes 107-10 and accompanying text (discussing the amendment in more detail).
[45] Home School Non-Discrimination Act of 2003, S.1562, 108th Cong. (2003) (pending).
[46] *Id.* at pmbl.
[47] *Id.* sec. 2.
[48] *Id.* sec. 3.

2. Federal Assistance to State Agencies

Although there are numerous other federal laws pertaining to education issues, three laws are of particular relevance to home schooling: The Individuals with Disabilities Education Act (IDEA),[49] the Child Abuse Prevention and Treatment Act (CAPTA),[50] and Title IV-B of the Social Security Act.[51] These laws demonstrate how federal funding has the potential to impact state action and, ultimately, home schooling.

The IDEA is a federal program that provides grants to the states for the provision of services to children with disabilities. Under the IDEA, a public school must provide special needs services to all public school children, and to fund services for privately educated children.[52] Some school districts have insisted that the IDEA *requires* a special needs assessment of home school children, even if the home school parents decline the school's assistance and do not consent to the evaluation.[53] In a recent Missouri case, the school district claimed it had an "obligation" under the IDEA to evaluate an eleven year-old home schooled boy, despite his parent's objections.[54] The school district asserted it would violate the IDEA if it did not pursue evaluation of the child.[55] Is such an interpretation an encroachment on the parents' fundamental right to direct the education of their children? The pending Home School Nondiscrimination Act contains language clarifying that local school officials do not have to evaluate home school children if the parents object.[56]

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[49] Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-87 (2000).
[50] Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-19 (2000).
[51] Social Security Act, 42 U.S.C. §§ 620-26 (2000).
[52] *See* 20 U.S.C. §§ 1400-87.
[53] *See infra* notes 54-56 and accompanying text.
[54] *See* Home School Legal Defense Association, *Hearing Officer Rules Homeschooler Must Submit to Special Needs Evaluation*, *at* http://hslda.org/docs/news/hslda/200303/200303271.asp (last visited Dec. 15, 2004) [hereinafter *Hearing Officer*] (referring to a Missouri hearing officer's decision about the local school district). The Home School Legal Defense Association provides continuing information on rulings that may affect or influence the home school community even prior to those cases reaching litigation at a state or federal court level. *See* Home School Legal Defense Association home page, *at* http://hslda.org/docs/news/hslda/ (last visited Dec. 15, 2004).
[55] *See Hearing Officer*, *supra* note 54.
[56] *See* Home School Non-Discrimination Act of 2003, S.1562, 108th Cong. § 5 (2003) (stating that in any case in which there is an absence of parental consent for an IDEA evaluation, the local educational agency shall not be required to conduct an evaluation and will not be considered to be in violation of the IDEA).

Similarly, CAPTA and Title IV-B of the Social Security Act each provide funding to states to strengthen child welfare services. To receive CAPTA funding, states must operate state-wide programs that facilitate the reporting, screening, and investigating of child abuse and neglect allegations, to include the establishment of "relatively comprehensive reporting and record keeping systems."[57] In much the same way, Title IV-B funds are provided to the states for establishing, extending, and strengthening child welfare services. In order to qualify for Title IV-B funds, a state must show that child welfare services are available "in all political subdivisions of the State, for all children in need thereof."[58] According to some state courts, federal funding through CAPTA and Title IV-B exemplify a strong federal policy favoring the protection of children, and, therefore, demonstrate Congress's desire for the states to provide child welfare services to children residing on federal enclaves.[59] This interpretation, in turn, places military families under the purview of the state's child neglect laws and opens the door for state child welfare agencies to investigate allegations of child neglect on military installations.

D. The Long Arm of Child Neglect Statutes

Over half the states include educational neglect in their statutory definition of child neglect.[60] Although definitions vary from state to state,[61] educational neglect generally encompasses a failure of parents "to

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[57] Kate Hollenbeck, *Between a Rock and a Hard Place: Child Abuse Registries at the Intersection of Child Protection, Due Process, and Equal Protection*, 11 TEX. J. WOMEN & L. 1, 9 (2001); Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-19 (2000).

[58] 42 U.S.C. § 622(a)(2) (2000).

[59] *See In re* Charles F., 120 N.M. 665, 668 (1995) (stating that "where the federal government has provided money to the states to establish, extend, and strengthen child welfare services and has mandated that those services be made available to all political subdivisions of the state, it has indicated a strong policy in favor of protection of children"); *In re* Terry Y., 101 Cal. App. 3d 178, 183 (Ct. App. 1980) (stating that the juvenile court's exercise of jurisdiction to protect Terry Y. promoted the federal policy toward abused children as reflected in applicable Army regulations and the Social Security Act).

[60] *See* Eric W. Johnson, *Educational Neglect as a Proper Harm to Warrant a Child Neglect Finding: In re* B.B., 76 IOWA L. REV. 167 n.6 (1990).

[61] *See* National Clearinghouse on Child Abuse and Neglect Information, *Statutes-at-a-Glance Definitions of Child Abuse and Neglect*, *available at* http://nccanch.acf.hhs.gov/

ensure that their children are provided an education consistent with standards adopted by the state."[62] The U.S. Department of Health and Human Services lists educational neglect as a category within its overall definition of child neglect.[63] Educational neglect is further divided into three subcategories: permitted chronic truancy, failure to enroll/other truancy, and inattention to special education need.[64] The ramifications of a finding of educational neglect can be severe, to include prosecution of the parent for criminal offenses associated with a finding of child neglect.[65] In addition, the parent may be listed in the state's central registry as a child neglector or abuser,[66] which could threaten important liberty interests, such as employment opportunities, the opportunity to adopt children, and the opportunity to be a foster parent.[67]

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general/legal/statutes/define.pdf (last visited Dec. 13, 2004). A typical state statute is Missouri's, which states that neglect includes a failure to provide a proper education "as required by law." MO. ANN. STAT. § 210.110(9) (LEXISNEXIS through 2003 legislation).

[62] Larry Kaseman & Susan Kaseman, *Taking Charge: Responding to Current Legislative Challenges Promoted by National Organizations*, HOME EDUC. MAG., July/Aug. 1998, *available at* http://www.home-ed-magazine.com/HEM/HEM154.98/154.98_clmn_tkch.html (last visited Nov. 10, 2004).

[63] *See* U.S. Department of Health and Human Services Administration for Children and Families, Administration on Children, Youth and Families, National Center on Child Abuse and Neglect, *Child Neglect: A Guide for Intervention* (Apr. 1993), *available at* http://www.calib.com/nccanch/pubs/usermanuals/neglect/neglect.pdf. Of particular relevance in this publication is the category "failure to enroll/other truancy," which is defined as "[f]ailure to register or enroll a child of mandatory school age, causing the school-aged child to remain at home for nonlegitimate reasons (e.g., to work, to care for siblings, etc.) an average of at least 3 days a month." *Id.* at 7. Failure to enroll and truancy violations are common areas cited by government authorities when charging home school parents with child/educational neglect. *See infra* note 70.

[64] *See id*.

[65] *See infra* note 70 and accompanying text.

[66] *See* Jill D. Moore, *Charting a Course Between Scylla and Charybdis: Child Abuse Registries and Procedural Due Process*, 73 N.C. L. REV. 2063, 2079 n.87 (1995) (noting that most states maintain some kind of central listing, or registry, for the findings of child maltreatment); *see also infra* notes 71-73 and accompanying text.

[67] *See* National Clearinghouse on Child Abuse and Neglect Information, *Due Process and Central Registries: An Overview of Issues and Perspectives*, *available at* http://nccanch.acf.hhs.gov/general/legal/statutes/process.cfm (last visited Nov. 10, 2004).

> [C]entral registries are increasingly used to screen adults for various employment or license eligibility. About half the States, for example, allow or require central registry checks for individuals applying to be child or youth care providers, foster parents, or adoptive parents. Accessible central registry information may thus be available to employers in the child care business, schools, health care providers, or agencies that certify foster parents or arrange adoptions.

Despite the declining academic performance of American public school children in the past forty years[68] and the growing acceptance of home schooling,[69] it is not unusual to hear of an investigation or prosecution against home school parents for failure to comply with the state's compulsory attendance laws, criminal truancy, violation of daytime curfew ordinances, failure to allow social workers to inspect the home, and more.[70] A 2002 Colorado case illustrates how state and local

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Id. at 3.

[68] *See* CHRISTOPHER J. KLICKA, HOME SCHOOLING: THE RIGHT CHOICE 21-44 (2002). The author points out that, even after significant federal and state reforms in the 1980s, and the doubling of funds for public education, student performance continued to decline in the 1990s. *See id.* The author cites the results of the 1999 National Assessment of Educational Progress, which concluded that only one out of five high school seniors was proficient in writing. *See id.*

[69] *See* KLICKA, *supra* note 4, at 19 (asserting that the academic success of home schoolers caused home schooling to become widely accepted and a "trend of the 1990s that will take our nation into the 21st Century").

[70] Examples abound of aggressive government action against home schoolers. In Virginia in 2000, home school parents were arrested and charged with truancy offenses despite properly notifying the school superintendent of their intention to home school. *See* Home School Legal Defense Association, *Home Schoolers Falsely Arrested in Richmond County*, *at* http://www.hslda.org/docs/news/hslda/200003310.asp (last visited Dec. 15, 2004). In Texas in 2001, a husband and wife were summoned to court for "parents contributing to truancy" and their daughter for "failure to attend school," despite the fact that they were using an accredited home school program. *See* Home School Legal Defense Association, *Texas: Homeschoolers in Court*, *at* http://www.hslda.org/courtreport/v18n5/v18n5tx.asp (last visited Dec. 15, 2004). In 2002, another Texas family was charged with truancy after, as a courtesy, notifying the school district that they would be home schooling their twelve-year old daughter (Under Texas law, home school parents do not have to initiate contact with the school district). *See* Home School Legal Defense Association, *Texas: More Case Updates*, *at* http://www.hslda.org/courtreport/v19n4/v19n4tx.asp (last visited Dec. 15, 2004). In Missouri in 2001, a mother was arrested, charged with educational neglect, and incarcerated for three days after withdrawing her second-grade son from school, and despite the fact that she had informed the school of her intention to home school and had filed a Declaration of Enrollment in Home Education with the recorder of deeds. *See* Home School Legal Defense Association, *Wrongly Jailed Mom Cleared by Missouri Court*, *at* http://www.hslda.org/docs/news/hslda/200104050.asp (last visited Dec. 15, 2004). In Kentucky in 2001, local authorities summoned a mother to court for "not cooperating with" a Child Protective Service investigation of educational neglect allegations after refusing to allow social workers into her home to interview her daughter outside of her presence. *See* Home School Legal Defense Association, *In re M Sisters; Parents Charged with Educational Neglect*, *at* http://www.hslda.org/legal/state/ky/20010213msisters/default.asp (last visited Dec. 15, 2004). In California in 2003, officials cited a thirteen-year-old home schooled boy for violating a daytime curfew ordinance after being seen by a policeman riding his bike at 12:30 p.m. *See* Home School Legal Defense Association, *Victory for Homeschool Family in San Diego*, *at* http://www/hslda.org/hs/state/ca/200401140.asp (last visited Dec. 15, 2004).

authorities are quick to categorize allegations against home schoolers as child neglect. In that case, the Colorado Department of Human Services (DHS) investigated a home school couple for child neglect based on an anonymous allegation that their daughter was not in school.[71] Although the parents admittedly were late in filing their notice of intent to home school,[72] numerous witnesses testified that the parents provided an excellent education at home. Regardless, DHS submitted the parents' names to the Colorado state central registry for classification as child neglectors.[73] The parents' names were removed from the central registry only after their attorneys convinced the state Attorney General's office to intervene.

The Colorado case underscores the concerns of home school parents: a mistake in complying with a state's home school law could result in a complaint from an "anonymous" tipster, followed by an investigation by state child service workers, an official listing as a child neglector, possible prosecution for child/educational neglect, and, ultimately, a loss of employment opportunities and other liberty rights. These concerns are not lost on *military* home school parents, who must deal not only with similar rules and regulations issued by the DOD and the military services,[74] but also the multitude of state and local home schooling and child neglect laws.

III. Military Dependent Education: The All-Volunteer Force

A. Department of Defense Public Education: Free But Not Compulsory

The DOD operates public schools on military installations in the United States and throughout the world.[75] These schools are under the authority and control of the Department of Defense Education Activity

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[71] *See* Home School Legal Defense Association, *Home Schooling by State*, *at* http://www.hslda.org/Legal/state/co/20020730MrandMrsY/default.asp (last visited Nov. 10, 2004) [hereinafter Home School Legal Defense Association].

[72] Colorado law requires parents to give notice fourteen days before starting a home school program, and annually thereafter. COLO. REV. STAT. § 22-33-104.5(3)(e) (2004).

[73] *See* Home School Legal Defense Association, *supra* note 71.

[74] *See generally* AR 608-18, *supra* note 9; DOD DIR. 6400.1, *supra* note 9; AFI 40-301, *supra* note 9; OPNAV INSTR. 1752.2A, *supra* note 9.

[75] The DOD operates 224 public schools in twenty-one districts located in fourteen foreign countries, seven states, Guam, and Puerto Rico. *See* Department of Defense Education Activity, DODEA Facts 2002, *at* http://www.odedodea.edu/communications/dodeafacts2002.htm (last visited Nov. 22, 2004).

(DODEA), whose mission in part is to "plan, direct, coordinate, and manage the education programs for eligible dependents of U.S. military personnel" stationed overseas and in specific locations within the United States and specified territories.[76] While DOD schools are free (at least for dependent children of military personnel), no statute or regulation states that they are compulsory.[77] Moreover, no statute or regulation authorizes DOD public schools to exercise authority or oversight over the education of military dependents who do not attend DOD schools. This obviously has implications with regard to command authority to regulate the home school programs of military parents.

1. Military Dependent Education in the United States

The DODEA is divided into two school systems: the Department of Defense Domestic Dependent Elementary and Secondary Schools (DDESS) serving the United States, Puerto Rico and Cuba,[78] and the Department of Defense Dependents Schools (DODDS) serving overseas locations. The mission of DDESS is "to provide a free public education of high quality from pre-kindergarten through grade twelve for eligible dependent children of U.S. military personnel" in the United States and specified possessions.[79] The statutory authority for DDESS schools is 20 U.S.C. § 2164.[80] Neither the statute nor the two DOD directives pertaining to DDESS schools address home schooling or compulsory attendance. The statute merely states that the Secretary of Defense "may enter into arrangements to provide for the elementary or secondary education of the dependents of such members of the armed forces . . . ."[81]

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[76] *See* U.S. DEP'T OF DEFENSE, DIR. 1342.20, DEPARTMENT OF DEFENSE EDUCATION ACTIVITY (DODEA) para. 3.3 (13 Oct. 1992) [hereinafter DOD DIR. 1342.20].

[77] *See id.* paras. 4.2, 4.3 (stating numerous times that the DODEA provides free education, but never stating that attendance of military dependent children is compulsory).

[78] *See id.* para. 4.

[79] U.S. DEP'T OF DEFENSE, DIR. 1342.21, DEPARTMENT OF DEFENSE SECTION 6 SCHOOLS para. 3 (13 Oct. 1992) [hereinafter DOD DIR. 1342.21]; *see also* U.S. DEP'T OF DEFENSE, DIR. 1342.16, PROVISION OF FREE PUBLIC EDUCATION FOR ELIGIBLE DEPENDENT CHILDREN PURSUANT TO SECTION 6, PUBLIC LAW 81-874, AS AMENDED para. 3.2 (16 Oct. 1987) [hereinafter DOD DIR. 1342.16] (incorporating changes through 5 Aug. 1994).

[80] The statute authorizes the Secretary of Defense to provide for the elementary and secondary education of military dependents residing on military installations in the U.S. and territories, commonwealths and possessions of the U.S. *See* 20 U.S.C. § 2164(a)(1) (2000).

[81] *Id.*

The statutory language clearly does not require the Secretary of Defense to establish DOD domestic schools, and does not grant the Secretary, nor the military services, the authority to mandate attendance or to oversee the education of military dependents not attending DOD schools. Similarly, although DOD Directive 1342.16 delegates significant responsibility to installation commanders, such as providing resource and logistics support, ensuring the establishment of elected school boards, and ensuring the safety of students traveling to and from the on-base school,[82] the directive does not grant the commander authority and oversight over the education of military dependents who do not attend DDESS schools. By implication this means that a commander has no authority to regulate the home school programs.

2. Military Dependent Education Overseas

In 1978, Congress overhauled the overseas dependent education program by passing the Overseas Defense Dependents' Education Act (ODDEA).[83] The act directed the Secretary of Defense to "provide a free public education through secondary school for dependents in overseas areas."[84] As with the statutes and directives pertaining to DOD domestic schools, neither the original ODDEA nor implementing directives mention home schooling.[85] Similarly, no provision of the ODDEA or DOD directives requires attendance at overseas DODDS schools, nor do they grant the Secretary of Defense, the military services or the overseas installation/community commander the authority to compel attendance in DODDS schools, or to oversee the education of school-age dependents who do not attend DODDS schools. As with DOD domestic schools, the logical conclusion is that a commander has no authority to regulate the home school programs of military parents overseas.

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[82] *See* DOD DIR. 1342.16, *supra* note 79, para. 5.4.
[83] Overseas Defense Dependents Education Act, 20 U.S.C. §§ 921-932.
[84] *Id.* § 921(a).
[85] *See* U.S. DEP'T OF DEFENSE, DIR. 1342.6, DEPARTMENT OF DEFENSE DEPENDENTS SCHOOLS (DODDS) (13 Oct. 1992) (incorporating changes through 5 Aug. 1994); U.S. DEP'T OF DEFENSE, DIR. 1342.13, ELIGIBILITY REQUIREMENTS FOR EDUCATION OF MINOR DEPENDENTS IN OVERSEAS AREAS (8 July 1982) (incorporating changes through 29 July 1992).

B. The Military's Approach to Home Schooling: A Ship Without a Rudder

As home schooling grew in popularity in the 1980s and 1990s, the military services, and particularly the DODEA, were slow to adapt. The lack of a clear, comprehensive DOD home school policy, especially for overseas schools, influenced some commands to issue local command policies that either restricted home schooling altogether or regulated home schooling to some extent.[86] For example, on 6 November 1989, the U.S. Army community commander at Augsburg, Germany, issued a policy memorandum prohibiting home schooling and requiring parents to enroll their school-age children in either a DODDS school, an accredited local school, or a school accredited by a U.S. civil or religious organization.[87] The command rescinded the policy shortly thereafter, but only after intense lobbying by home school families to the DOD.[88]

The Augsburg policy controversy had minimal affect on DODEA. Through the 1990s, the DODEA did little to develop a uniform home

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[86] *See* Valerie Moon, *Military Homeschooling Overseas*, HOME EDUC. MAG. (Sept./Oct. 2001), *at* http://www.home-ed-magazine.com/HEM/185/somilitary.html. The author notes that:

> Over the years, actions taken by military officials overseas concerning homeschoolers have been uneven, sporadic, decentralized, and yet perennial. In some overseas communities military homeschooling organizations seem to have effectively kept any control at a minimum through visibility in the community, while in other cases community commanders have felt it their business to control homeschooling through restrictive policy letters.

Id.

[87] *See* Memorandum, Brigadier General Louis J. Del Rosso, to See Distribution, subject: USMCA Augsburg High/Elementary School Attendance, Military Community, Policy Memorandum #31,11 (6 Nov. 1989) (on file with author). The policy stated in pertinent part:

> They can elect to enroll children in:
> a. A Department of Defense Dependent School (DoDDS).
> b. A locally accredited public, private, or parochial school.
> c. A school accredited by an acknowledged U.S. civil or religious education association . . . Attendance at schools not meeting the above criteria is . . . strictly prohibited . . . . Similarly, so called "home teaching" (*i.e.*, parent keeps child at home and personally conducts education) is strictly prohibited.

[88] *See* KLICKA, *supra* note 68, at 368.

schooling policy. In 1999, Congress took notice and instructed DODEA to develop a "clear policy" on support for home schooling overseas.[89] The DODEA complied by issuing a home schooling policy memorandum that acknowledged the right to home school.[90] "It is the policy of the Department of Defense Education Activity (DoDEA) to neither encourage nor discourage sponsors from home schooling . . . . DoDEA recognizes that home schooling is a sponsor's right and can be a legitimate alternative form of education . . . ."[91] The memorandum also stated that DODEA would, "consistent with existing regulations," provide home schoolers with auxiliary services, such as library services, and allow participation in extra-curricular and interscholastic activities.[92] It also stated that "[h]ome schoolers who choose to use DODEA services must complete a registration form."[93]

Although the policy memorandum was a step forward for DODEA, in that it acknowledged the right to home school, home school advocates viewed it as inadequate because of the "consistent with existing regulations" language in relation to the use of auxiliary services.[94] At the

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[89] *See* H.R. REP. NO. 106-162 (1999). In the House Armed Services Committee Report accompanying the National Defense Authorization Act for Fiscal Year 2000, Congress urged a more proactive approach on the part of DODEA in establishing a clear home school policy:

> The committee believes that military families who decide to home school their children should be supported by Department of Defense Overseas Schools (DODDS) to the extent possible. . . . The committee is aware that the Department of Defense Education Activity (DODEA) claims that it fully supports home schooling. DODEA's published material and the actual experience of some parents belie that claim, however. The committee believes that DODEA should take a more proactive approach in establishing a clear policy and providing parents information about available DODEA support for home schooling overseas, rather than merely directing parents to the overseas commander. To that end, the committee directs the Secretary of Defense to develop clear policy on support for home schooling overseas.

Id.

[90] Policy Memorandum 99-C-001, Department of Defense Education Activity, subject: Home Schooling (no date) (on file with author) [hereinafter DODEA Memo 99-C-001].

[91] *Id.* para. 1.

[92] *Id.* para. 3.

[93] *Id.*

[94] *See* Moon, *supra* note 86, para. 14 (arguing that one of the problems with the policy was that it failed to address the policy in DOD schools that students must have a certain

time, to be eligible for extracurricular activities at DODDS schools, home school children were required to enroll in at least four classes at a DODDS school.[95] Most military home school families were unwilling to do this as it obviously would defeat the purpose of home schooling altogether.[96]

Another weakness of the DODEA policy was that it did not address the authority of commanders to regulate home schooling. As a result, some commanders continued to issue local home school policies. For example, in a 23 October 2000 memorandum, U.S. Army Europe (USAREUR) issued a policy requiring sponsors to either enroll their children in a DODDS school, enroll them in a public or private host-nation school, or conduct home schooling.[97] The memorandum also required home school sponsors to submit registration forms indicating their intent to home school.[98] By requiring parents to submit a notice of intent, USAREUR apparently believed it had at least *some* authority to regulate home schooling.

Just a few months later, in January 2001, a subordinate unit of USAREUR, the 104th Area Support Group, Hanau, Germany, issued a similar but more detailed policy.[99] It not only required a written declaration of intent to home school, but also "encouraged" sponsors to maintain a "record of curriculum" containing the start date and end date of the program, hours spent in instruction, subject areas to be covered, methods used to determine mastery of materials, a list of textbooks used, progress on standardized tests, samples of student's work, and representative tests and assignments.[100] The policy further stated that "Military Police have the responsibility to challenge all school age

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GPA to participate in extracurricular/auxiliary activities. The author argued that this created a "Hobson's Choice" for DOD schools because they would either anger enrolled students and their parents by allowing non-enrolled home school students to participate without the GPA qualification, or anger home school students and parents by requiring them to participate with strings attached (GPA)). *Id.*

[95] *See id.* para. 24.

[96] *See id.*

[97] *See* Memorandum, Headquarters, United States Army, Europe, and Seventh Army, to See Distribution, subject: Home-Schooling in USAREUR (23 Oct. 2000) (on file with author).

[98] *See id.* para. 3.

[99] *See* Policy Memorandum, HQ, 104th Area Support Group, No: 16-4, subject: Recording Parents'/Guardians' Choice to Educate Their School Age Family Members (22 Jan. 2001) (on file with author).

[100] *See id.* paras. 6a, 6b.

family members for possible truancy during DODDS school class hours (0800-1500)," but made no exception for home schoolers.[101] By laying out criteria by which a home school program could be evaluated (subject areas covered, textbooks used, samples of student's work and assignments), and authorizing the military police to "challenge" children for possible truancy, the policy went far beyond the DODEA and USAREUR policies. Interestingly, neither the 104th Area Support Group policy nor the DODEA and USAREUR policies cited any authority by which the commander could regulate home schooling. As a result, despite the passing of over ten years since the controversial Augsburg prohibition against home schooling, the issue of command authority over home schooling remained unresolved throughout the DOD.

Approximately one month after the 104th Area Support Group's January 2001 policy memorandum, the USAREUR Director of Education announced the formation of a DODEA home school working group (later referred to as a task force) to research and review host nation and "individual state laws and rules governing home schooling."[102] Apparently, Army commanders in Europe had raised the issue with the USAREUR Deputy Commanding General, who took it to DODEA in Arlington, Virginia.[103]

> The group discovered a set of issues that most states address. Those issues are hours of teaching, record keeping, curriculum requirements, teacher qualifications,

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[101] *See id*. para. 7. Police authority to "challenge" children for possible truancy can sometimes conflict with the rights of home schoolers. For example, on 16 December 2003, a thirteen-year old home schooled boy in San Diego was cited by a policeman for violating San Diego's daytime curfew ordinance. *See* Home School Legal Defense Association, *Victory for Homeschool Family in San Diego* (Jan. 14, 2004), *at* http://www.hslda.org/hs/state/ca/200401140.asp (last visited Nov. 10, 2004). The police officer had been conducting a "truancy sweep" and incorrectly believed that home school children were required to abide by the public school's schedule. *See id.*

[102] Laurie Almodovar, *USAREUR Considers Home-Schooling Rules*, CITIZEN VOL. 30, NO. 12 (June 19, 2001) (on file with author), The article summarized the events of a meeting between the USAREUR Director of Education, Mike Perez, and home school parents on 23 May 2001, wherein Perez stated that it was the "area support group commander's responsibility to ensure children within the command are being educated," and "since federal statutes allow only the counting and identification of home-schooled children, some commanders felt it was difficult to fulfill their responsibility." *Id.* The article does not state whether Perez cited any authority for the conclusion that it was the commander's responsibility to ensure that children are being educated. *See id*.

[103] *See id.*

> notification of authorities, testing, eligibility for traditional program supplementation and medical checks . . . . The workgroup decided an assembly should decide how these issues should be addressed . . . . The assembly . . . will be tasked to make recommendations about each issue. These recommendations will go to the assistant secretary of defense for education, who will review them and send them to Congress. This could result in laws allowing regulation of home schooling in military communities outside the United States . . . .[104]

During the same time period, USAREUR began holding "focus group" meetings with home school parents and DODDS school personnel, passing out questionnaires that focused on methods to regulate home schooling conducted by military parents.[105] After pressure from home schoolers and even Congress, DODEA ultimately decided to terminate the task force, as well as its goal of revising the home school policy.[106] Regardless, the entire episode, from USAREUR's lobbying of DODEA, to the focus group meetings, to the formation of the task force, was informative in that it revealed DODEA's discontent with home schooling within the military, and, more importantly, its desire to impose additional DOD control and oversight over home schoolers. The episode also, perhaps, explained why DODEA had not previously issued a clear, unambiguous policy stating that neither DODEA, the military services,

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[104] *Id.*

[105] *See* E-mail from kavmom in Germany, to Military Homeschool message board (May 16, 2001 at 10:41 pm PST), *at* http://www.vegsource.com/homeschool/military/messages/1077.html (last visited Nov. 10, 2004). Typical questions on the questionnaire were: Should there be teacher certification requirements for home school parents? Should there be core subject requirements for home school children? Should parents be required to notify the command they are home schooling? Should home schoolers be required to take standardized tests? Should there be a truancy policy in DODDS schools? *See id.*

[106] *See* Home School Legal Defense Association, *Military's Attempt to Regulate Home Schoolers is Slowed*, *at* http://www.hslda.org/docs/nche/000010/20010724135801.asp (last visited Nov. 10, 2004). The notice quoted DODEA Director Joseph Tafoya:

> At this time there are no plans for the Department of Defense Education Activity . . . to hold a Home School Task Force meeting. On June 7, 2001, the Dependents' Education Council . . . tabled proposed plans to look into the possible revision of our home school policy. It is unfortunate that remarks were made prematurely in Heidelberg about a possible task force.

Id.

nor commanders have any authority to regulate home schooling within the military.

C. Recent Statutory and Policy Changes Regarding Home Schooling Within the Military

1. 2002 Amendment to the Overseas Defense Dependents' Education Act

In 2002, Congress amended the ODDEA by directing that auxiliary services of DOD overseas schools be made available to eligible home schooled dependents:

> (d) Auxiliary services available to home school students. (1) A dependent who is educated in a home school setting, but who is eligible to enroll in a school of the defense dependent's education system, shall be permitted to use or receive auxiliary services of that school without being required to either enroll in that school or register for a minimum number of courses offered by that school. The dependents may be required to satisfy other eligibility requirements and comply with standards of conduct applicable to students actually enrolled in that school who use or receive the same auxiliary services. (2) . . . the term "auxiliary services" includes use of academic resources, access to the library of the school, after hours use of school facilities, and participation in extracurricular and interscholastic activities. [107]

The amendment clearly reflects Congress's dissatisfaction with DODEA's 1999 policy memorandum,[108] and mirrors the directive given by the House Armed Services Committee to the Secretary of Defense and DODEA in its report accompanying the National Defense

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[107] 20 U.S.C. § 926(d) (2000).

[108] *See* 99-C-001 DODEA Memo, *supra* note 90. As previously discussed, the policy memo was considered flawed in that, while it authorized the provision of auxiliary services to home school children, other DOD policies required them to enroll in at least four classes at a DODDS school to be eligible for the services. *See* Moon, *supra* note 86.

Authorization Act for Fiscal Year 2000.[109] The amendment is important to military home schoolers in that it is an unequivocal acknowledgment by Congress of the right of military parents to home school their children. In addition, by authorizing the use of auxiliary services without requiring enrollment or registration, the legislation suggests an intent by Congress that the DODEA's role in regulating home schooling should be minimal.

2. 2002 DODEA Home Schooling Policy: Does it Resolve the Problem?

The ODDEA amendment forced DODEA to revamp its home schooling policy. On 6 November 2002, DODEA issued a new policy memorandum applying to both domestic and overseas DOD school systems.[110] As before, the policy recognizes the sponsor's right to home school, and that home schooling can be a legitimate alternative form of education. Consistent with the ODDEA amendment, the policy authorizes home schoolers to use specified auxiliary services without a requirement to enroll in or to register for a minimum number of courses offered by the school. [111] The policy also directs DODEA schools to offer individual classes and special education services to home schoolers.[112] In addition, the policy includes an attachment of thirty "Frequently Asked Questions and Answers" covering specific questions pertaining to auxiliary services, eligibility, classes and special services, and miscellaneous issues.[113]

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[109] H.R. REP. NO. 106-162 (1999). The ODDEA amendment is consistent with a trend in the states to allow home school students equal access to public school services to some extent. At least thirteen states have enacted statutes guaranteeing home school children some type of public school access to auxiliary services. *See* David W. Fuller, *Public School Access: The Constitutional Right of Home-Schoolers to "Opt In" to Public Education on a Part-Time Basis,* 82 MINN. L. REV. 1599, 1615 (1998).

[110] *See* 2002 DODEA Memo, *supra* note 9.

[111] *Id.* para. 4-7.

[112] *Id.* para. 4. The policy requires home schoolers who take classes or use special education services in DOD schools to "complete a registration form and comply with other registry procedures and requirements." This requirement does not violate the ODDEA amendment, however, because the amendment's prohibition on requiring home schoolers to enroll in or to register for a minimum number of courses applies only in relation to the use of specified auxiliary services, and not to classes or special education services. *See* 20 U.S.C. § 926(d).

[113] *See* 2002 DODEA Memo, *supra* note 9, at 3.

Despite the extensive rewrite, the policy failed again to specifically address whether an installation or community commander has any authority to regulate home schooling. Instead, the policy language is ambiguous, containing such language as:

> Are there legal requirements on home schooling practices for DoD dependents?
> A host nation, state, commonwealth, territory, or possession where a DoD sponsor is stationed may impose legal requirements on home schooling practices. Sponsors are responsible for complying with applicable local requirements and should consult with installation Staff Judge Advocates concerning these requirements.[114]

Although the paragraph does not include commanders in the list of authorities who "may impose legal requirements on home schooling practices," neither does it explicitly restrict commanders from regulating home schooling. The third paragraph of the policy memorandum uses similar language, stating:

> A host nation, state, commonwealth, or territory where a DoD sponsor is stationed may impose legal requirements on home schooling practices. DoDEA encourages DoD sponsors who wish to home school their dependents to communicate their desire to their commanders to determine if there are any *command policies* or other rules ensuring that home schooling practices meet host nation, state, commonwealth, or territory requirements. Sponsors are responsible for complying with applicable local requirements.[115]

The reference in the second sentence to *command policies* arguably opens the door for commanders to regulate home schooling by military personnel under their command. In fact, the language appears to create a *command responsibility* to ensure that home schooling practices meet local government requirements. But how does the commander go about fulfilling that responsibility? By imposing notification requirements on home schoolers? Teacher certification requirements? Curriculum

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[114] *Id.* at question #27.
[115] *Id.* para. 3 (emphasis added).

oversight? Mandatory medical exams? The DODEA policy memorandum provides no explanation.

A better approach would have been to state clearly:

> A commander has no legal authority to regulate the content or structure of home schooling practices. A commander's authority over home schooling practices is limited to those issues relating to the commander's inherent authority to maintain law, order and discipline on the installation and to promote the health and safety of persons on the installation.

With that wording, the issue of command authority to regulate home schooling content and structure would not be in question. Instead, by failing to make a definitive statement regarding the limitations of commanders over home schooling, DODEA has kept the door open for unwitting commanders to continue to issue "command policies" that may go far beyond their authority. This possibility is especially true in commands that have had, and may still have, local guidance on home schooling issued prior to the 2002 DODEA policy memorandum. A prime example is the *USAREUR Student Eligibility Enrollment and Data Handbook* for school year 2003-2004, which states, in part:

> When a family declines to enroll an overseas dependent in DoDDS, the installation commander may call the family to account for this decision. The commander controls access to the military installation, and whether the overseas dependents are "command sponsored" or not, the commander may predicate continued logistical support (e.g. commissary and exchange privileges) for the sponsor's school age dependents on enrollment in some school program that serves the interests of the child. Hence, the installation commander may require attendance in DoDDS, an alternative school approved by DoDDS, or some alternative program acceptable to the commander as a condition of continued command sponsorship.[116]

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[116] USAREUR STUDENT ELIGIBILITY ENROLLMENT DATA HANDBOOK, SCHOOL YEAR 2003-2004 40 (C2, May 2003) [hereinafter HANDBOOK] (on file with author).

The paragraph wrongly states that the commander has authority to mandate attendance, as there is no compulsory attendance law for DOD students attending DODDS schools.[117] Further, although the paragraph is obviously outdated, its presence in the current version of the *USAREUR Student Handbook* is subject to misuse by commanders and DODDS personnel unaware of current law.[118] This underscores the need for an unambiguous DODEA home schooling policy that fully explains the role of DODEA and commanders with regard to home schooling within the military.

IV. Military and State Child Advocacy Programs: A Means to Regulate Home Schooling?

A. Department of Defense Family Advocacy Program

The military addresses problems of child abuse, child neglect, and spouse abuse through the DOD Family Advocacy Program and the family advocacy programs implemented by the individual military services. The starting point is *DOD Directive 6400.1*, which lays out the DOD's overall policy to prevent child and spouse abuse through early identification, intervention, rehabilitation, and coordination with civilian authorities for assistance.[119] The directive instructs each military service to establish family advocacy programs on each installation.[120] In addition, the directive requires the military services to submit child and spouse abuse reports at least semiannually.[121]

The directive emphasizes the importance of the relationship between military installations and local child protective agencies by ordering the services to "[e]ncourage local commands to develop memoranda of understanding (MOUs) providing for cooperation and reciprocal reporting of information with the appropriate civilian officials . . . ."[122]

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[117] *See supra* notes 79-85 and accompanying text.

[118] The *Handbook*'s "Home Schooling" chapter apparently was not updated for the 2003-2004 school year, as evidenced by the fact that the "references" section still lists the 1999 DODEA policy memorandum on home schooling, and not the 2002 DODEA policy. *See* HANDBOOK, *supra* note 116.

[119] *See* DOD DIR. 6400.1, *supra* note 9, para. 4.

[120] *See id.* paras. 5.2.1, 5.2.11.

[121] *See id.* para. 7.

[122] *See id*. para. 5.2.8. Reiterated in para. E3.1.1.3.1 is that family advocacy programs shall include, "[t]he development of local MOUs with civilian authorities for the

Further, in all alleged child abuse cases, the directive orders military family advocacy programs to notify the local child protective services agency in the United States and "where covered by agreement overseas."[123] In short, the DOD directive envisions that local commands will *actively seek* a close, cooperative relationship with local civilian authorities.[124]

Given the above, it is apparent that the DOD gives the military services broad authority to work with local agencies on family abuse issues. But is that authority broad enough to encompass issues of educational neglect? If so, are DOD and individual service definitions broad enough to include allegations of educational neglect against military home schoolers? The DOD directive defines child abuse or neglect as follows:

> Child Abuse and/or Neglect. Includes physical injury, sexual maltreatment, emotional maltreatment, deprivation of necessities, or combinations for a child by an individual responsible for the child's welfare under circumstances indicating that the child's welfare is harmed or threatened. The term encompasses both acts and omissions on the part of a responsible person.[125]

Although the definition does not mention educational neglect, other DOD guidance is more specific. *Department of Defense Instruction 6400.2*,[126] which prescribes DOD reporting requirements for child and spouse abuse incidents, includes a definition of child neglect similar to the DOD Directive, but also includes a definition of educational neglect: "Educational Neglect. Allowing for extended or frequent absence from school, neglecting to enroll the child in school, or preventing the child from attending school for other than justified reasons (e.g., illness, inclement weather)."[127] The definition is nearly identical to the one listed in a 1997 policy memorandum issued by the Office of Assistant

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reporting of cases, provision of services, and the delineation of responsibilities in responding to child and spouse abuse."

[123] *Id.* para. 6.1.4.

[124] The Army family advocacy regulation contains a sample format for a memorandum of agreement with Child Protective Services. *See* AR 608-18, *supra* note 9, fig. E-1.

[125] DOD DIR. 6400.1, *supra* note 9, para. E2.1.3.

[126] DOD INSTR. 6400.2, *supra* note 10.

[127] *Id.* at enclosure 2, attachment 2, para. 13.d.(7).

Secretary of Defense, Force Management Policy,[128] which revised parts of the DOD instruction and is the most recent DOD effort to define child neglect and educational neglect:

> Neglect of a child. A type of child abuse/maltreatment . . . Child neglect includes "Abandonment," "Deprivation of Necessities," "Educational Neglect," "Lack of Supervision," "Medical Neglect," and/or "Non-organic Failure to Thrive" . . .(3) Educational Neglect. A type of child neglect that includes knowingly allowing the child to have extended or frequent absences from school, neglecting to enroll a child in school, or preventing the child from attending school for other than justified reasons.[129]

Thus, DOD takes the position that educational neglect is a type of child neglect, which is a type of child abuse. Therefore, a substantiated case of educational neglect is considered child abuse. At issue for military home schoolers, however, is whether the definition of educational neglect is broad enough to include allegations of *home schooling* educational neglect. On this point the DOD guidance is unclear, leaving numerous questions unanswered. For example, if a military home school parent is accused of "neglecting to enroll a child in school," what must the parent do to prove that the child is in school? Is home schooling an acceptable form of "school?" One would presume so given that both the U.S. Congress and the DODEA acknowledge the legitimacy of home schooling.[130] However, must the parent meet other standards to prove that the home school is legitimate? Is it sufficient to merely say, "We are home schooling," or must the parent comply with some other requirement, such as teacher certification requirements or DOD approved curriculum plans? If the installation is in the United States, does the commander defer to state standards for home schooling? If the state's home school law is lenient, may the commander require more proof than the state? On overseas installations, may commanders draft their own standards, given the lack of state standards? A review of

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[128] Memorandum, Assistant Secretary of Defense, Force Management Policy, to Chief, Customer Service Division, Patient Administration Systems and Biostatistics Activity, CEIS, ATTN: MCHI, 1216 Stanley Road, Fort Sam Houston, TX 78234, subject: Policy Changes for the Submitting of Child and Spouse Abuse Information (22 Aug. 1997) [hereinafter ASD (FMP) Memo] (on file with author).

[129] *Id.* paras. 4-2-2, 4-2-3.

[130] *See* 20 U.S.C. § 926(d); 2002 DODEA Memo, *supra* note 9.

family advocacy regulations from the Army, Navy and Air Force does not resolve these issues, and, in the case of the Army, may even complicate the issues further.

B. Individual Service Family Advocacy Programs

As required by *DOD Directive 6400.1*, the Army, Navy and Air Force each implement family advocacy programs through individual service regulations.[131] The regulations are similar in that they establish family advocacy committees on each installation,[132] and encourage agreements between the installation and the local civilian community on the handling of child and spouse abuse cases.[133] The regulations are less uniform, however, in defining child abuse, child neglect, and educational neglect. For example, the Air Force instruction uses the word "maltreatment" as a term encompassing child abuse/neglect and spouse abuse/neglect,[134] but fails to define abuse or neglect, and does not mention educational neglect at all. The Navy includes educational neglect within its definition of neglect but defers to the DOD Family Advocacy directive for a more specific definition of educational neglect.[135] By default, then, the working definition for educational neglect in the Air Force and the Navy is the one found in *DOD Directive 6400.1*.[136]

With the revision of the Army family advocacy regulation in October 2003, the Army's definition of educational neglect broke new ground by referencing home schooling:

> *Educational Neglect*. A type of child neglect that includes knowingly allowing the child to have extended or frequent absences from school, neglecting to enroll the child *in some type of home schooling* or public or

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[131] *See* DOD DIR. 6400.1, *supra* note 9, para. 5.2.1; *see also* AR 608-18, *supra* note 9; AFI 40-301, *supra* note 9; OPNAV INSTR. 1752.2A, *supra* note 9.

[132] *See* AR 608-18, *supra* note 9, para. 1-8a(1); AFI 40-301, *supra* note 9, para. 1.4.3; OPNAV INSTR. 1752.2A, *supra* note 9, para. 5a.

[133] *See* AR 608-18, *supra* note 9, para. 2-12a; AFI 40-301, *supra* note 9, para. 1.4.8; OPNAV INSTR. 1752.A, *supra* note 9, at encl. 1, para. 12, encl. 4, para. 2.

[134] *See* AFI 40-301, *supra* note 9, at 31.

[135] *See* OPNAV INSTR. 1752.2A, *supra* note 9, at encl. 1, para. 7d.

[136] *See* DOD DIR. 6400.1, *supra* note 9, para. E2.1.3.

> private education, or preventing the child from attending school for other than justified reasons.[137]

The Army's definition changes the phrase "neglecting to enroll a child in school" to "neglecting to enroll the child in some type of home schooling or public or private school."[138] and mirrors the DOD definition almost word for word, it changes the phrase "neglecting to enroll a child in school" to "neglecting to enroll the child in some type of home schooling or public or private school." The reference to home schooling resolves at least one question raised by the DOD's definition in that there is little doubt that the Army considers a home school to be an acceptable type of "school." However, as with the DOD definition, the Army definition leaves other questions unresolved, such as, is *any* type of home schooling acceptable to the Army? Further, must the parent meet some other standard, such as requirements under the state's home school law, or even a standard imposed by the installation commander? Additionally, what standards should apply on overseas installations where state law does not apply? The proponent of the regulation, the Office of the Assistant Chief of Staff for Installation Management,[139] states that the phrase "some type of home schooling" was added with state home schooling laws in mind.[140] The regulation is silent regarding what standards apply for home schoolers residing on overseas installations.[141]

Questions remain regarding home schooling overseas. For purposes of educational neglect investigations of military home schoolers, what is an acceptable "type of home schooling" on an overseas installation? Who develops the standards, and what should the standards be? Until resolution of these questions, military home school families will continue to face inconsistent rules and regulations from one installation to another, and, at times, may find themselves in conflict with commanders, DOD

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[137] AR 608-18, *supra* note 9, at 102 (emphasis added).

[138] The Army's definition references the 1997 memorandum issued by the Assistant Secretary of Defense, Force Management Policy, and, but for the additional reference to home schooling, mirrors the DOD definition almost word for word. *See* ASD (FMP) Memo, *supra* note 128.

[139] *See* AR 608-18, *supra* note 9, at i.

[140] *See* Telephone Interview with Colonel Yvonne Tucker-Harris, Deputy, Family Programs, Family Advocacy Program Manager, U.S. Army Community and Family Support Center, Office of the Assistant Chief of Staff for Installation Management (Jan. 27, 2004).

[141] AR 608-18, *supra* note 9.

school authorities, and even family advocacy personnel over their right to home school.

C. State Involvement In Military Child Advocacy Issues

The ability of a state to exercise legislative jurisdiction on a military installation is significantly affected by the federal jurisdictional status of the installation.[142] Depending on the type of federal jurisdiction, a state's authority to enforce its laws on the installation may range from no authority to full authority.[143] Obviously, this issue has relevance to allegations of home schooling educational neglect and their relation to child protection issues on military installations. If a state has jurisdiction over these issues, then the relationship between the state, installation authorities, and military home schooling parents changes dramatically. In particular, parents would not only have to deal with the military's rules and regulations regarding home schooling and child abuse issues, but also with the *state's* home schooling and child abuse laws.

There are three main categories of jurisdiction on military installations in the United States−proprietary, concurrent, and exclusive.[144] On proprietary and concurrent jurisdiction installations, state criminal and civil laws apply to all persons.[145] On exclusive federal jurisdiction installations the federal government possesses all legislative authority, with no authority reserved to the state, except the right to serve judicial process.[146] Theoretically, this means that state home schooling and child abuse laws apply on proprietary and concurrent jurisdiction installations, but not on exclusive federal jurisdiction installations. As with most issues involving federal-state relations, the analysis regarding exclusive federal legislative jurisdiction is not that simple, especially with regard to areas of the law normally handled exclusively by the

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[142] *See generally* Major Stephen E. Castlen & Lieutenant Colonel Gregory O. Block, *Exclusive Federal Legislative Jurisdiction: Get Rid of It!*, 154 MIL. L. REV. 113, 114 (1997) (citing numerous examples of the unclear intersection of state and federal jurisdiction, such as cases involving juvenile crime, domestic violence, personal injury, wrongful death, and service of process).

[143] *See id.* at 116.

[144] AR 608-18, *supra* note 9, at app. D. A majority of Army installations in the United States are under exclusive Federal legislative jurisdiction. *See id.* at app. D, para. D-1a.

[145] *Id.* at app. D, para. D-1c.

[146] *See* Castlen & Block, *supra* note 142, at 142.

states.[147] Under the traditional view, the federal installation (called a federal "enclave") was considered a "state within a state," and all state authority ceased at the federal enclave's border.[148] The modern trend, however, is for the courts to examine the state law in question to see if it interferes with federal sovereignty.[149] The landmark case in this area is *Howard v. Commissioners*,[150] where the U.S. Supreme Court held that when state law does not interfere with a federal interest, the fiction of a "state within a state" will be ignored.[151] As a result, even on a federal enclave, the state law may apply.

The impact of *Howard* to states dealing with child welfare issues on military installations was significant, and obviously influences an analysis of the applicability of state home schooling laws on military installations under exclusive federal jurisdiction. Two state court cases involving child abuse on military installations are especially instructive. In a 1980 California case, *In re Terry Y.*,[152] state welfare authorities removed an infant child residing on Fort Ord, California, from the custody of his parents' home due to allegations of parental abuse and neglect.[153] The parents argued that the state lacked jurisdiction over the

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[147] *See id.* at 124. Areas of the law normally handled exclusively by the states include: contracts, sales, guardianship, and family relations. *See id.*

[148] *See id.* at 122.

[149] *See* Howard v. Comm's, 344 U.S. 624, 627 (1953) (holding that at times the fiction of a state within a state can have no validity); *In re* Charles F., 120 N.M. 665, 667 (1995 N.M. Ct. App.) (stating that the more recent trend is to examine the state law to be applied to determine whether it interferes with federal sovereignty); *In re* Terry Y., 101 Cal. App. 3d 178, 181 (Ct. App. 1980) (stating there has been a trend in state courts to hold that the exclusive jurisdiction of Congress does not deprive enclave residents of benefits which would otherwise be theirs).

[150] 344 U.S. 624 (1953).

[151] *Id.* at 627. The Court summarized its landmark holding—"where there is no friction, avoid the fiction" as follows:

> The fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries, so long as there is not interference with the jurisdiction asserted by the Federal Government. The sovereign rights in this dual relationship are not antagonistic. Accommodation and cooperation are their aim. It is friction, not fiction, to which we must give heed.

Id.

[152] 101 Cal. App. 3d 178 (Ct. App. 1980).

[153] *Id.* at 179 (describing how the child suffered four fractures over a period of two years).

matter.[154] The California appeals court invoked the *Howard* rationale, stating that child protective laws were a benefit to children living on the installation, and that the laws were consistent with federal policy towards abused children and Army regulations that encouraged state involvement.[155] The court specifically noted that not only did Fort Ord authorities not oppose the jurisdiction of the state courts in the area of child abuse, but they actively sought state jurisdiction.[156]

Similarly, in a 1995 New Mexico case, *In re Charles F.*,[157] a state district court barred the local child protective agency from becoming involved in a child abuse case on Holloman Air Force Base, New Mexico, noting that the base held exclusive federal jurisdiction.[158] The New Mexico Court of Appeals reversed, holding that "in those areas such as public schooling, voting, and welfare benefits, where the federal government has failed to exercise jurisdiction, the states may act even though the area or person over which they assert jurisdiction are located on a federal enclave."[159] Consistent with the analysis in *In re Terry Y.*, the court noted that the Air Force base had an agreement with state officials regarding child abuse cases and that the Air Force actively sought state involvement in those cases.[160] The court stated that under those circumstances, the state's involvement did not interfere with the exercise of federal government sovereignty.[161]

With these cases as a backdrop, it is important to recall that the DOD encourages the military services to work closely with state and local child protective agencies.[162] A prime example is the Army's approach. In *Army Regulation 608-18*, the Army provides a sample "memorandum of agreement for child protective services" between the local installation and local authorities.[163] The sample agreement states that the installation relies upon the local juvenile court to exercise its authority, that the court's jurisdiction over child abuse cases on the installation is supported by congressional deference to state child abuse statutes, and that

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154 *Id*.
155 *See id*. at 183.
156 *See id.* at 182.
157 120 N.M. 665 (1995 N.M. Ct. App.).
158 *See id*. at 667.
159 *Id.*
160 *See id*. at 668.
161 *See id.*
162 DOD DIR. 6400.1, *supra* note 9, para. 5.2.8.
163 *See* AR 608-18, *supra* note 9, fig. E-1.

"developing case law" upholds the exercise of state civil jurisdiction on federal enclaves where the exercise of state authority does not compromise federal sovereignty.[164] This is an aggressive solicitation of state and local civil jurisdiction. If the Army retains this approach, it is likely that in future cases where parents challenge state authority over child protective issues on the installation, the courts will agree with the rationale in *In re* Terry Y. and *In re* Charles F. and conclude that state jurisdiction applies.

Given the above analysis, the question remains whether state and local civil jurisdiction is broad enough to encompass educational neglect cases involving home schoolers residing on military installations under exclusive federal jurisdiction. Do *Howard*, *In re* Terry Y., and *In re* Charles F. settle the issue of state authority over *all* child welfare issues on exclusive federal enclaves, to include educational neglect? Can a distinction be made between a state's authority over allegations of *home schooling* child neglect and *traditional* types of child abuse/neglect on the installation? Additionally, if the conclusion is that the state *does* have authority over military home school cases, should the military be more aggressive in protecting the rights of military home schoolers from state intervention?

The argument in favor of making the distinction between the state's authority over *traditional* child abuse or neglect cases and *home schooling* educational neglect cases is that the military has *not* invited the state to assume jurisdiction over *minor* neglect issues occurring on the installation. As the argument goes, the main purpose of a family advocacy regulation is to protect children from the most severe forms of child abuse, such as physical and sexual abuse.[165] Additionally, although the installation has the ability to resolve relatively minor neglect cases through administrative measures, such as removing the offender from the installation,[166] installations are not equipped to handle the more severe

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[164] *See id.*

[165] *See* OPNAV INSTR. 1752.2A, *supra* note 9, para. 5d (emphasizing, in particular, physical and sexual abuse over other types of abuse).

[166] *See* AR 608-18, *supra* note 9, para. 3-22 (listing various administrative actions the commander may take against offenders in abuse/neglect situations, such as removal from government quarters, bar from the installation, letter of warning, advanced return of civilian family members from overseas locations, termination of post exchange and other privileges, and curtailment of a soldier's military tour of duty in a foreign country).

forms of abuse that require the intervention of state agencies and state civil courts.[167]

This argument is vulnerable because it conflicts with a plain reading of current DOD and service regulations and definitions regarding child neglect and child abuse. As previously discussed, the DOD and service regulations are clear that the military services, and especially the Army, *do* include educational neglect in their definitions of child neglect and child abuse.[168] With the Army's sample memorandum of agreement with local agencies for child protective services specifically stating that child abuse includes child neglect,[169] and absent an affirmative statement in the agreement that educational neglect is excluded from state jurisdiction, there is little room to argue that the state's authority over child abuse and neglect issues does not include educational neglect.

A stronger argument in favor of excluding educational neglect issues from the jurisdiction of state and local agencies is that the federal government, through the operation of DOD schools on military installations, has retained its sovereignty over the education of military dependents. The argument is that the installations that operate DOD schools have, in effect, exercised federal sovereignty in this area.[170] As established in *In re* Terry Y., and *In re* Charles F., in determining whether state law applies on a federal enclave, the courts place great significance on whether the federal government has retained jurisdiction

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[167] *See* Major Lisa M. Schenck, *Child Neglect in the Military Community: Are We Neglecting the Child?*, 148 MIL. L. REV. 1, 4 (1995) (noting that although the goal of the DOD Family Advocacy Program is to protect the child, it is "limited in large part to education, rehabilitation, treatment, and monitoring of parents who commit offenses against the child.") Others measures to protect an abused child, such as removing the child from the home, placing the child in foster care, the issuance of restraining orders, and the authorization of home inspections normally require the involvement of civilian child protection agencies, local law enforcement, and civil courts. *See* AR 608-18, *supra* note 9, para. 3-22e.

[168] *See supra* notes 125-41and accompanying text.

[169] *See* AR 608-18, *supra* note 9, fig. E-1.

[170] A counter argument would be that the federal government does not have, and *never* had, sovereignty over education issues on federal enclaves because, historically, education has been primarily a province of the states. *See supra* note 37 and accompanying text. This argument is weakened by the fact that the U.S. Congress, with regard to military dependent education, has specifically authorized the Secretary of Defense to operate primary and secondary schools on domestic military installations. *See* 20 U.S.C. § 2164 (2000); *see also supra* text accompanying notes 80-81.

over the issue in question.[171] When the federal government invites the state to exercise jurisdiction on the installation, the courts are inclined to conclude that state action does not interfere with federal sovereignty.[172] Thus, it is reasonable to conclude that when an installation operates DOD schools, the federal government retains jurisdiction over dependent education on that installation. As a result, the exercise of state jurisdiction on the installation would create the "friction" that concerned the Court in *Howard*.[173] This argument may be limited, in that arguably it would only apply on those installations operating DOD schools. For installations not operating DOD schools, the door would remain open for the states to exercise authority over allegations of educational neglect involving home schoolers.

V. Military Home Schoolers Residing Off the Installation

Thus far, the focus of the analysis has centered on home schoolers residing on military installations, whether in the United States or overseas. While a majority of the issues pertaining to military home schooling originate *on* installations, any discussion of home schooling within the military is incomplete without consideration of issues facing military home schoolers living *off* the military installation. For example, what is the applicability of state and host nation home schooling laws to military home schoolers residing off the installation? What is the applicability of the *military's* home schooling policy and regulations in these situations?

A. Domestic Home Schooling Off the Installation

The school-age children of military personnel residing in a state, whether on or off the military installation, are subject to the state's compulsory attendance law.[174] With home schooling now legal in every

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[171] *In re* Terry Y., 101 Cal. App. 3d at 182; *In re* Charles F., 120 N.M. at 667; *see also supra* text accompanying notes 154-61 (discussing how the courts developed their findings by examining the state law in question to see if it interferes with federal sovereignty).

[172] *In re* Terry Y., 101 Cal. App. 3d at 182; *In re* Charles F., 120 N.M. at 667.

[173] *See* Howard v. Comm'rs of Louisville, 344 U.S. 624, 627 (1953); *see also supra* text accompanying notes 146-57.

[174] Examples of state compulsory attendance laws include WASH. REV. CODE ANN. 28A.225.010 (requiring children between ages eight and eighteen to attend public school,

state,[175] compliance with a state's compulsory attendance law is simply a matter of complying with the state's home schooling requirements.[176] No federal law or DOD policy or regulation authorizes a commander to regulate the home schooling activities of military parents residing off the installation.[177] Further, no federal law, state law, or DOD policy or regulation exempts military families residing off the installation from the compulsory attendance laws or home school laws of the states.[178] This does not mean, however, that arguments for an exemption are not available. For example, does the *temporary residency* status of the military dependent diminish a state's responsibility over the education of the child?

The temporary residency argument focuses on the contention that the state's long-term interest in educating a military dependent child who is temporarily residing in the state is significantly less than that pertaining to a non-military child.[179] With regard to a non-military child, the state can convincingly assert that it has primary jurisdiction and responsibility over all other states to educate the child.[180] The state's position,

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private school or a home school); N.D. CENT. CODE § 15.1-20-01 (requiring children between ages six and sixteen to attend public school unless an exemption applies, such as private school or home school). Although this article proposed in Part IV.C. that a state's home schooling laws should not apply on installations that have retained federal sovereignty by operating DOD schools, this argument has not been used by the DOD and has not been litigated in court. As a result, the general rule that education historically falls under the province of the states and not the federal government is followed in this analysis. *See supra* text accompanying notes 27, 37.

[175] *See generally* KLICKA, *supra* note 6, at iv-viii (summarizing the home school laws of the fifty states).

[176] *See generally* KLICKA, *supra* note 68, at 367 (stating that "military home schoolers in the United States . . . are required to follow the home school requirements of the state in which they are stationed").

[177] *See generally* discussion *supra* pt. III (frequently making the point that neither the statutes nor DOD Directives pertaining to dependent education, nor the DODEA Home School Policy, give commanders any authority to compel school attendance or to regulate home schooling in any way).

[178] This conclusion is based on research of federal and state law, and DOD policy and regulations, pertaining to home schooling that have been cited throughout this article. *See generally supra* pts. II.B, II.C.1, III.B., III.C.

[179] Arguably, a state has a greater interest in educating someone who is likely to stay in the state. Although not explicitly stated by the courts, a state's interest in transforming a child into an "economically productive" person and one "capable of political participation" is as much for the benefit of the state as the child. *See generally supra* text accompanying notes 19-20.

[180] *See* Mawdsley, *supra* note 15, at 191 n.1 and accompanying text. If public education is primarily a "province of the states," then it stands to reason that the state where the

however, is weakened with regard to a military child, because the child's state of domicile, as well as the other states where the child may live during the parent's military career, will have equal if not more responsibility for the child's education at some point during the child's upbringing. In effect, the state's interest in the education of a temporary resident is not sufficiently "compelling" to overcome the constitutional right of the parents to direct their children's education and upbringing.[181] With this dilution of state responsibility and interest over the education of the military child, the military parent's fundamental rights under the Constitution to direct the child's education free of state regulation and control comes to the forefront.

B. Overseas Home Schooling Off the Installation

Compulsory attendance laws of the fifty states do not apply to military dependents residing overseas, whether on or off the military installation, because they do not reside in any of the fifty states.[182] Additionally, neither the DOD nor the military services have authority under statute or regulation to compel school attendance of military dependents overseas.[183] By implication, neither the DOD nor the military services have the authority to regulate the home schooling activities of overseas military parents residing off the installation.

The authority of the host nation to enforce compulsory attendance and home schooling laws against military dependents living off the installation is not so clear. One scholar maintains that military home schoolers on foreign soil are not subject to host nation compulsory attendance laws when a Status of Forces Agreement (SOFA) or some other similar agreement applies to the foreign country.[184] This conclusion is likely based on the argument that command-sponsored dependents of military personnel covered by a SOFA are generally

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child resides on a permanent basis is the state that has jurisdiction over the child's education. *See* Plyler v. Doe, 457 U.S. 202, 221 (1982).

[181] *See supra* text accompanying note 21 regarding the "compelling interest" standard; *see supra* text accompanying notes 12-16 regarding the parent's right to direct the education of their children.

[182] *See* Letter from CPT Chris E. Ambrose, United States Air Force, Assistant Staff Judge Advocate, to Mrs. Gravelle (July 21, 1989), *quoted in* KLICKA, *supra* note 68, at 369.

[183] *See supra* text accompanying notes 83-85.

[184] *See, e.g.*, KLICKA, *supra* note 68, at 369.

restricted from utilizing social benefits of the host nation, such as voting privileges, universal health care and the like. Public education is clearly a social benefit. Although this argument appears sound, the SOFAs governing American relations with Germany, Japan, and Korea[185] are silent on issues relating to the education of military family members, to include home schooling issues. As a result, other scholars contend that the SOFAs "do not exempt military dependents from the application of host nation law,"[186] and, by implication, "military dependents should be bound by the education requirements of host nations."[187] It would be prudent for the DOD to develop a home schooling policy that allows military home school families to use the DOD as a liaison between the family and the host nation authorities. This policy would provide additional support to the military family in the event the host nation authorities allege that the family is violating host nation law.

VI. Framework for Change: Improving Military Policy Toward Home Education

This article has addressed the conflict between home school parents and government authorities over the regulation and oversight of home schooling, with emphasis on the concerns faced by military home school families. The discussion has highlighted problem areas, such as excessive regulation by local commands, the discord and confusion created by the DODEA's failure to develop clear guidance on home schooling, the intrusion of child neglect laws and regulations into the home schooling arena, and the difficult issues surrounding federal legislative jurisdiction and state laws. These problems underscore the need for the military to rewrite its policies relating to military home schooling, with a view toward protecting the rights of military home school families whenever possible.

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[185] Status of Forces in the Federal Republic of Germany, Aug. 3, 1959, 14 U.S.T. 531, 481 U.N.T.S. 262; Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Jan. 19, 1960, U.S.-Japan, 11 U.S.T. 1652; Mutual Defense Treaty Between the United States of America and the Republic of Korea, July 9, 1966, U.S.-Rep. of Korea, 17 U.S.T. 1677. Given the dates of the SOFAs, it is likely that the drafters of the SOFAs did not envision such a thing as home schooling of military family members.

[186] *See* Carsten, *supra* note 32, at 171 n.65.

[187] *Id.*

The findings and concepts establish the need for changes in the following areas:

1. Issuance of a comprehensive *DOD Home School Policy* addressing all relevant issues related to home schooling within the military. The policy should clearly define the role of the DODEA, commanders, and family advocacy personnel with regard to home schooling issues. The policy should establish a mechanism by which the local installation/community commander can maintain accountability of military home schoolers for purposes of promoting law, order, and discipline on the installation and to serve as a liaison and buffer between state/local/foreign authorities and military home schoolers. The policy should be the DOD's cornerstone guidance on home schooling, and should also include coverage of issues raised in paragraphs 2 and 3 below.

2. Revision of DOD and individual service *family advocacy regulations* to specifically exclude home schooling from definitions of educational neglect. The regulations should also restrict family advocacy jurisdiction over home schooling issues.

3. Revision of DOD and individual service regulations pertaining to *state jurisdiction* over child abuse issues on military installations. The regulations should require that agreements between military installations and state and local authorities will exclude home schooling issues from the jurisdiction of civil authorities.

A. A New DOD Home School Policy: General Provisions[188]

As a starting point, the proposed DOD home school policy should be promulgated by an entity in the DOD other than the DODEA. The DODEA's mission is to provide a free, *public* education for eligible dependents of military personnel in the United States and overseas.[189] The DODEA has no authority over home school education. Removing DODEA from responsibility over home school policy will eliminate the

[188] A proposed new home school policy is at the appendix.
[189] DOD DIR. 1342.20, *supra* note 76, paras. 4.2, 4.3.

inherent conflicts of interest between DOD professional educators and military home school parents.[190]

The philosophical cornerstone of the proposed policy centers on two key concepts addressed throughout this article: That the parents have a constitutional right to direct the education of their children, and the federal government's role in regulating education is extremely limited.[191] The policy would apply equally to military installations in the United States and overseas. The policy recognizes a small, but not insignificant, role for the commander with regard to home school issues. The policy limits the commander's authority to require that military home school parents submit a notice of intent to home school, and conduct a *limited* inquiry into the home school program *if* the commander has probable cause to believe that the program is not legitimate.

Of central importance is the basis for the authority granted to the commander in the policy. The commander's authority is based not on any authority to regulate the education of military dependents, but rather on the commander's *inherent* authority to maintain law, order and discipline within the command and on the installation.[192] Thus, the requirement for the sponsor to submit a notice of intent to home school is intended to address *accountability* and *safety* issues that are of concern to every commander (such as, who is caring for a child during the day?; how many children are on post in case of emergencies?) rather than *education* issues. Likewise, the commander's authority to inquire into a questionable home school program is narrowly tailored to address the fundamental question of whether a child is being educated *at all*, and *not* to regulate the content or structure of the home school program itself.

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[190] *See* KLICKA, *supra* note 4, at 21-27, 113-18. In the view of home school advocates, public school officials are in conflict with home schooling in two critical areas: financial and philosophical. *See id.* at 21-22. Public school officials have a financial interest in whether or not a child attends their schools because for every child on their rolls, they may receive between $3,000 and $4,000 of government funding. *See id*. at 21-22, 113-15. Each home school student is potentially a source of additional government aid for the school. In addition, public school officials are generally philosophically opposed to home schooling because they believe that parents do not possess the qualifications to train and educate children. *See id.* at 22-26.

[191] *See supra* text accompanying note 37; discussion *supra* pt. II.A.1.

[192] *See* AR 608-18, *supra* note 9, fig. E-1 (stating that by virtue of his inherent authority as commander, the commander "is responsible for . . . maintaining law, order, and discipline on the installation").

Accordingly, the proposed policy limits the commander's probable cause inquiry to solicitation of a *statement of assurance* from the parents verifying that they have a written curriculum, are teaching math, reading, spelling, grammar, and are conducting the home school program in a bona fide manner. The commander *may not* require the parents to submit to home visits, teacher certification, student testing, or approval of curriculum. The policy has as its model the home school law as currently applied in Texas,[193] where the parents do not have to initiate any contact with the state or school district.[194] Given the federal government's limited authority to regulate education, applying a lenient state model as a basis for a new DOD Home School Policy only makes sense. In addition, a lenient model would reflect the military's deference to the unique challenges and issues faced by military parents in making educational choices for their children.[195]

In addition, the policy authorizes commanders to promulgate procedures by which off-post military parents, whether in the United States or overseas, may *voluntarily* submit to the installation a notice of intent to home school. The policy authorizes the commander to appoint a liaison from the installation to serve as a single point of contact with local authorities regarding issues pertaining to the home schooling practices of military personnel, whether on or off the installation. The purpose of this process would be to provide a military advocate for military home school families dealing with local education officials, and

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[193] KLICKA, *supra* note 6, at 105-07. The Texas model is based on case law and is quite simple: The parents do not have to initiate contact with the state or the school district in order to home school. *See id*. at 106. If contacted by state authorities, however, the parents may be required to submit written assurance that they are conducting home schooling in a bona fide manner and teach math, reading, spelling, grammar, and good citizenship. *See id.* The parents do not have to submit to home visits, have curriculum approved, or have any special teacher certification. *See id*. The key difference between the Texas model and the proposed DOD Home School policy in this article is that the proposed policy requires the military parents to submit a notice of intent to home school to the commander, whereas Texas law does not require parents to initiate any contact with the state. The notification requirement in the proposed policy centers on the recognition of the unique responsibilities placed on a commander in the U.S. Armed Forces and the inherent authority of the commander to maintain law, order, and discipline on a military installation.

[194] *See id.* at 105-07. Other states and territories that do not require home school parents to initiate any contact with state or local authorities include Alaska, Guam, Idaho, Illinois, Indiana, Michigan, Missouri, New Jersey, Oklahoma, and Puerto Rico. *See generally* KLICKA, *supra* note 6, at 1-123.

[195] *See generally* discussion *supra* pts. I, II.B.

to encourage a positive relationship between the military and the local community.

The proposed policy also clarifies the role of the DODEA with regard to home school issues. In short, the policy limits DODEA's role to making available those auxiliary services and special programs required by the 2002 amendment to the Overseas Defense Dependents' Education Act.[196] Further, the policy removes DODEA from any responsibilities over the parent's submission of the notice of intent to home school.

B. Clarifying the Role of Family Advocacy Programs

The next section of the policy addresses the role of family advocacy programs in relation to educational neglect and home schooling. The policy redefines the DOD definition of educational neglect as follows:

> *Educational Neglect*. A type of child neglect that includes knowingly allowing the child to have extended or frequent absences from school *(excluding home school children),* failing to provide *notice of intent* to enroll the child in home school or a non-DOD public or private school, or preventing the child from attending school *(excluding home school children)* for other than justified reasons. *Home schooling is a justified reason for absence from school and is not considered educational neglect.*

The definition clarifies the Army's confusing "some type of home schooling" language[197] by limiting the definition of home school educational neglect to a failure to submit a notice of intent to the commander. This clarification eliminates any involvement by DOD or the military services in defining an acceptable *type* or *content* of a home school program.[198] The policy reiterates that the authority of the

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[196] 20 U.S.C. § 926(d) (2000); *see also* discussion *supra* pt. III.C.1.

[197] *See* AR 608-18, *supra* note 9, at 102.

[198] In many states, the courts have ruled as unconstitutionally vague certain statutes yielding broad discretion to school officials to define what is a "satisfactory" home school curriculum, or whether a home school curriculum is "substantially equivalent" to the public schools. Laws granting excessive discretion to school officials to define a "satisfactory" home school program infringe upon the constitutional right of parents to

commander and family advocacy personnel to investigate is limited to the notice issue, and to requesting a statement of assurance in those cases when the commander has probable cause to believe that the home school program is not legitimate. Additionally, the policy includes provisions designed to protect the rights of home school parents by prohibiting the initiation of home school investigations based on *anonymous tips*,[199] requiring the release of family advocacy *records* to home school parents upon request,[200] and prohibiting submission of home school neglect *allegations* to the *central registries* of the military services.[201]

C. Fine Tuning Agreements Between Installations and Civil Authorities

The proposed policy modifies current DOD and service regulations by directing commanders to seek agreements with state and local authorities that specifically exclude *home school educational neglect* from the jurisdiction of civil authorities. The policy provides a sample definition of child abuse to be used in local agreements, as follows:

> Child abuse: Child abuse includes child sexual abuse and child neglect and means the physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child under the age of 18 by a person who is responsible for the child's welfare – including any employee of a residential facility or any staff person providing out-of-home care – under circumstances that indicate that the child's health or

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direct the upbringing and education of their children. *See* KLICKA, *supra* note 4, at 83-97 (providing a detailed discussion of these issues).

[199] Home school advocates have proposed a number of reforms designed to prevent harassment of home schoolers, curtail false reporting of abuse or neglect, and protect due process rights. Among the reforms proposed are laws requiring all reporters of child abuse to give their names, addresses and phone numbers, and laws authorizing the subjects of social work investigations the right to inspect their records. *See* Home School Legal Defense Association, *Practical Way to Reform the Child Welfare System*, *at* http://www.hslda.org/docs/nche/000000/00000058.asp (last visited Nov. 22, 2004).

[200] *See id.*

[201] The Army Family Advocacy regulation requires the installation case review committee to submit every report of child abuse, *whether substantiated or unsubstantiated*, to the Army-wide, centralized data bank. Because the Army regulation includes child neglect (including educational neglect) in the definition of child abuse, home schoolers are faced with the very real possibility that a mere allegation of educational neglect will result in an entry in the Army-wide, centralized data bank. *See* AR 608-18, *supra* note 9, paras. 5-2, 5-4.

> welfare is harmed or threatened thereby. *For purposes of this agreement, the terms child abuse, child neglect, mental injury, negligent treatment and maltreatment do not include actions or conduct by home school parents with regard to educating their children.*

The policy also encourages local commands to tailor agreements as much as possible toward the type of federal legislative jurisdiction held by the installation. The policy encourages installations that operate DOD schools to emphasize this fact in their agreements and to state that they are retaining federal sovereignty over education issues on the installation. The policy includes sample language for installations holding concurrent and exclusive legislative jurisdiction. While it is possible that local civil authorities will not agree to limitations on their jurisdictional authority, it is also possible that they *will* agree given their limited resources and heavy workload. By pursuing this policy, the DOD would be taking aggressive steps to protect the rights of military parents to direct the education of their children.

VII. Conclusion

This article examined the problems and conflicts faced within the military home school community, and recommended change to benefit not only military home schoolers, but also to improve the environment confronting commanders, DODEA personnel, family advocacy personnel, and others within the DOD dependent education and child protection community. This article demonstrated that home school issues are at times complex and confusing, ranging from issues faced by the highest court in the land, to the concerns of the U.S. Congress, to the web of fifty states' laws and regulations, and on to local and very personal issues such as whether sponsors should inform commanders of their intent to exercise a fundamental right. Given the dynamic nature of home schooling throughout the country over the past twenty years, it is understandable that the military has been slow to adapt. As with most issues that highlight the natural tension between individual rights and command authority, however, military home schooling is not an insurmountable problem for the DOD, the military services, or commanders. Instead, it provides the military another avenue to aggressively promote individual rights without compromising the needs of the military, and to enhance the quality of life for military families and

military communities as a whole. The proposals and recommendations derived from this article are intended to serve that end.

Appendix

DEPARTMENT OF DEFENSE POLICY MEMORANDUM

HOME SCHOOLING

This Policy Memorandum supercedes all previous policies on home schooling issued by the Department of Defense Education Activity (DODEA). It applies to all Department of Defense (DOD) dependent students eligible to attend a DODEA school on a space-required basis in the Department of Defense Dependents Schools (DODDS) and on a tuition-free basis in the Department of Defense Domestic Dependent Elementary and Secondary Schools (DDESS) systems.

I. Core Concepts Regarding Home Schooling

The DOD recognizes the following:

1. The right of parents to direct the education of their children is an established right protected by the U.S. Constitution.

2. The Congress, the President, and the Supreme Court have repeatedly affirmed the rights of parents.

3. The rise of private home education has contributed positively to the education of young people in the United States.

4. The U.S. Constitution does not allow Federal control of home schooling.

5. Military parents face unique challenges in educating their children, brought on by frequent moves and interruptions in the continuity of life that threatens educational progress. Education by military parents at home has proven to be an effective means of providing a stable educational environment.

6. The DOD supports the right of parents to conduct home education.

II. Authority of Commanders to Regulate Home Schooling

A. The federal government, the DOD, and subordinate commanders have no specific authority to regulate home schooling. However, by virtue of the inherent authority of command, commanders have a responsibility for maintaining law, order and discipline on military installations. Installation/community commanders may exercise the following authority with regard to military home school children residing on military installations:

1. Commanders may promulgate policy requiring sponsors of school-age children residing on the installation to provide notice at the beginning of each school-year of their intent to enroll the child in a non-DOD school or a home school.

2. School-age children are those children who are at least 7 years old and have not turned 17 by 30 October of the new school year. Children who have completed high school, but have not reached the age of 17, are not school-age children.

3. A sponsor's notice of intent should be submitted to the office of the commander or designee. DODEA school officials or personnel shall not play any role in the notice of intent process.

4. If, upon probable cause, a commander has reason to question the legitimacy of the home school, the commander may require the sponsor to provide a written statement of assurance verifying that they have a written curriculum, are teaching math, reading, spelling, grammar and good citizenship, and are conducting the home school program in a bona fide manner. Commanders *may not* require submission to home visits, teacher certification, student testing, or approval of curriculum.

5. Commanders are authorized to take administrative action against sponsors who fail to comply with notice of intent requirements, or who fail upon request to a written statement of assurance verifying the existence of a bona fide home school program. Administrative action may include letters of concern, revocation of installation privileges, such as exchange and commissary privileges, revocation of government housing, and a bar from the installation. In overseas locations, administrative action may also include the return of the civilian family members to the United States. Commanders must warn sponsors at least

60 days prior to *initiating* administrative action. When taking administrative action, commanders must comply with administrative due process procedures required in applicable regulations.

B. Installation or community commanders are authorized to take the following action with regard to military home school children residing *off* the military installation, whether overseas or in the United States, territories and possessions:

1. Commanders may promulgate policy authorizing the sponsors of military school-age children residing off the installation to *voluntarily* provide notice at the beginning of each school-year of their intent to enroll the child in a home school program.

2. Commanders are encouraged to appoint a liaison from the installation to serve as a single point of contact with local authorities regarding issues pertaining to the home schooling practices of military personnel, whether on or off the installation. The purpose of this process would be to provide a military advocate for military home school families dealing with local education officials, and to encourage a positive relationship between the military and the local community.

III. Role of DODEA

Neither the DODEA nor its subordinate DOD school systems or personnel have the authority to regulate home schooling. DODEA schools will comply with the following guidance:

1. DODEA schools will provide and offer home schooled DOD dependents classes and/or special education services, consistent with existing regulations and policy. Dependents of sponsors electing to take a single class or more must complete a registration form and comply with other registry procedures and requirements.

2. By statute, (20 U.S.C. § 926(d), as amended by section 353 of Pub. L. No. 107-107) eligible dependents in overseas areas are entitled to receive specified auxiliary services from DODDS. This Policy Memorandum implements this statutory provision for DOD dependents that are eligible to enroll in DODDS on a space-required basis and administratively extends it to DOD dependents that are eligible to attend

DDESS on a tuition-free basis. A DOD dependent who is educated in a home school setting but eligible to enroll in a DODEA school, shall be permitted to use or receive auxiliary services of that school without being required either to enroll in or to register for a minimum number of courses offered by the school. A DOD dependent who is home schooled may be required to satisfy other eligibility requirements as well as to comply with standards of conduct applicable to students actually enrolled in the DODEA school who use or receive the same auxiliary services. Auxiliary services includes use of academic resources, access to the library of the school, after-hours use of school facilities, and participation in music, sports, and other extracurricular and interscholastic activities. For the purposes of use or receipt of auxiliary services without enrolling or registering in DODDS, a DOD dependent must be eligible for space-required enrollment as specified in *DOD Directive 1342.13*, "Eligibility Requirements for Education of Minor Dependents in Overseas Areas." For the purposes of use or receipt of auxiliary services without enrolling or registering in DDESS, a DOD dependent must be eligible for tuition free enrollment, as specified in *DOD Directive 1342.26*, "Eligibility Requirements for Minor Dependents to attend Department of Defense Domestic Dependent Elementary and Secondary Schools (DDESS)." In both DODDS and DDESS, eligible home schooled DOD dependents using or receiving auxiliary services or electing to take courses will not be charged tuition. Proof of eligibility must be provided and will be maintained at the school where the dependent is receiving services or participating in extracurricular or interscholastic activities. Documentation establishing eligibility will not be maintained as a permanent record and will be returned to the sponsor when services are no longer being received, the dependent is no longer participating in extracurricular or interscholastic activities, or the school year ends, whichever is earliest.

IV. Role of Family Advocacy Programs

The role of the federal government in regulating education and home schooling is extremely limited. With regard to allegations of home school educational neglect, the role of DOD family advocacy programs must also be limited:

1. Definition of educational neglect: The DOD family advocacy directive and the individual service family advocacy regulations shall use the following definition for educational neglect:

> *Educational Neglect*. A type of child neglect that includes knowingly allowing the child to have extended or frequent absences from school *(excluding home school children),* failing to provide *notice of intent* to enroll the child in home school or a non-DOD public or private school, or preventing the child from attending school *(excluding home school children)* for other than justified reasons. *Home schooling is a justified reason for absence from school and is not considered educational neglect.*

2. Investigations: Investigations by the military services into allegations of educational neglect relating to home schooling are limited to the following:

a. Whether the sponsors have complied with the commander's requirements to provide notice of intent to home school. Sponsors deemed to have failed to comply will be given 60 days written notice prior to any final finding of substantiated educational neglect.

b. Whether the sponsor is conducting a bona fide home school program. These inquiries are extremely limited in scope. Sponsors may be asked to provide a written statement of assurance verifying that they have a written curriculum, are teaching math, reading, spelling, grammar and good citizenship. Commanders and government personnel *may not* require submission to home visits, teacher certification, student testing, or approval of curriculum.

3. Anonymous tips: Allegations of educational neglect against home schoolers from anonymous sources shall not be used as a basis to initiate an inquiry or investigation. All reporters of educational neglect against home schoolers shall be required to provide their name, address and phone number. This will discourage false reporting and harassment from those persons opposed to home schooling.

4. Central registries:

a. Prohibition against submission of initial allegations to central registries: The DOD and individual services are prohibited from submitting initial allegations of educational neglect involving home schoolers to the service's central registry.

b. Substantiated cases of educational neglect: Allegations of educational neglect may only be substantiated for the reasons specified in paragraph 2 above.

5. Cooperation with state authorities: DOD personnel are prohibited from participating in investigations against military home schoolers by state authorities. DOD personnel will neither encourage nor discourage involvement by state authorities in allegations against military home schoolers for violating state law.

6. Access to records: Upon request, home school sponsors who have been the subject of an investigation or inquiry into allegations of educational neglect *will* be allowed access to those records.

V. The Relationship Between Local Installations and Civil Authorities

Previous DOD policy encouraged local commands to *actively seek* a close, cooperative relationship with local civilian authorities in matters involving child abuse and child neglect, and to relinquish jurisdiction to the states whenever possible.

This policy modifies previous policy by directing local commanders to seek agreements with state and local authorities that exclude *home school educational neglect* from the definition of child abuse and child neglect, and restrict the local community's authority to investigate such issues. Local commands should seek to tailor agreements as much as possible toward the type of federal legislative jurisdiction held by the installation. For installations that operate DOD schools, commands should emphasize this fact in their agreements and state that they are retaining federal sovereignty over education issues on the installation. Sample model language for local agreements is as follows:

1. Definition of child abuse:

> Child abuse: Child abuse includes child sexual abuse and child neglect and means the physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child under the age of 18 by a person who is responsible for the child's welfare—including any employee of a residential facility

or any staff person providing out-of-home care—under circumstances that indicate that the child's health or welfare is harmed or threatened thereby. *For purposes of this agreement, the terms child abuse, child neglect, mental injury, negligent treatment and maltreatment do not include actions or conduct by home school parents with regard to the education of their children.*

2. For installations holding *concurrent* legislative jurisdiction:

Fort X is within an area of concurrent legislative jurisdiction with the State of Y. While the State and the Federal governments concurrently exercise all of their legislative jurisdiction over the land area of Fort X, state authorities may at times agree to refrain from exercising jurisdiction in certain cases. With regard to issues relating to *home schooling educational neglect* occurring within Fort X boundaries, the Y County Child Protective Services Agency, and the Y County School District hereby agree that Fort X is responsible for the intake, investigation, management and resolution of such cases. The parties agree that Fort X investigations will be based on Department of the Defense regulations and standards and not state home schooling law.

3. For installations holding *exclusive* legislative jurisdiction:

Fort X is within an area of exclusive legislative jurisdiction with the State of Y. While State civil laws generally apply to persons on the installation, those State civil laws requiring enforcement by State officials (for example, child protection laws) only apply to the extent that the Federal laws and military regulations do not conflict with State law, and the installation commander invites the State authorities to exercise jurisdiction on the installation. With regard to issues relating to *home schooling educational neglect* occurring within installation boundaries, the Department of Defense and the United States Army have promulgated regulations addressing the intake, investigation, management and resolution of such cases. As a result, Fort X does *not* invite the Y County Child Protective Services Agency or

> the Y County School District to exercise their authority on the installation with regard to home school educational neglect. As such, Fort X retains responsibility for such cases. The parties agree that Fort X investigations will be based on Department of the Defense regulations and standards and not state home schooling law.

4. Additional language for installations operating DOD schools:

> It is recognized by the parties that Fort X operates DOD schools on the installation. As a result, the federal government maintains its sovereignty over dependent education issues on the installation. Under these circumstances, any unsolicited state involvement with dependent education on the installation would interfere with the exercise of federal government sovereignty.

CIVILIAN PRISONERS OF WAR: A PROPOSED CITIZEN CODE OF CONDUCT

MAJOR CHARLOTTE M. LIEGL-PAUL*

> *The battlefield of modern warfare is all inclusive. Today there are no distant front lines, remote no man's lands, far-off rear areas. The home front is but an extension of the fighting front. In the dreaded event of another all-out war—a thermonuclear war—the doorstep may become the Nation's first line of defense. Under such circumstances, the new code of conduct for the American serviceman might well serve the American citizen.*[1]

I. Introduction

For over fifty years, the U.S. military has used contractors in warfare.[2] Significant issues regarding the legal status of civilians on the

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[1] DEPARTMENT OF DEFENSE ADVISORY COMMITTEE ON PRISONERS OF WAR, POW, THE FIGHT CONTINUES AFTER THE BATTLE, THE REPORT OF THE SECRETARY OF DEFENSE'S ADVISORY COMMITTEE ON PRISONERS OF WAR 31 (Aug. 1955) [hereinafter PRISONER REPORT].

[2] *See* Gordon L. Campbell, Contractors on the Battlefield: The Ethics of Paying Civilians to Enter Harm's Way and Requiring Soldiers to Depend upon Them (Jan. 27-28, 2000), *at* http://www.usafa.af.mil/jscope/JSCOPE00/Campbell00.
html (last visited Oct. 22, 2004). During

> WWII, civilian workers . . . provided support services in all the theaters of war. In the Korean War, contractors provided services ranging from stevedoring, road and rail maintenance to transportation. By Vietnam, contractors were . . . a major part of logistical capabilities within zones of operation providing

battlefield, however, only recently have begun to emerge. More attention is being paid to how the civilian presence impacts the battlefield.[3] The issue of what happens if the enemy captures a civilian contractor, and how that civilian should behave while in captivity has not yet been addressed.

The Department of Defense (DOD) issued guidance on isolated personnel training for DOD civilians and contractors.[4] The instruction outlines "training requirements for DOD civilians and contractor personnel serving overseas or about to deploy overseas."[5] The level of training depends on the risk of capture and focuses on helping contractors survive until they can be rescued.[6] However, this instruction gives no specific guidance on civilian conduct while in captivity. Rather, the instruction directs the Commander, United States Joint Forces Command (USJFCOM) to "develop Code of Conduct training standards" in accordance with the armed forces Code of Conduct.[7]

> construction, base operations, water and ground transportation, petroleum supply and maintenance/technical support for high-technology systems.

Id.

[3] *See, e.g.*, Major Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon?*, 51 A.F. L. REV. 111 (2001); Lieutenant Commander Stephen R. Sarnoski, *The Status Under International Law of Civilian Persons Serving with or Accompanying the Armed Forces in the Field*, ARMY LAW., July 1994, at 29; Major Lisa L. Turner & Major Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F. L. REV. 1 (2001); Major Richard M. Whitaker, *Civilian Protection Law in Military Operations: An Essay*, ARMY LAW., Nov. 1996, at 3.

[4] *See* U.S. DEP'T OF DEFENSE, INSTR. 1300.23, ISOLATED PERSONNEL TRAINING FOR DOD CIVILIAN AND CONTRACTORS (20 Aug. 2003) [hereinafter DOD INSTR. 1300.23].

[5] *Id*. para. 2.2.

[6] *See id*. *Department of Defense Instruction 1300.23* designates three levels of training: Level A (low); Level B (medium); and, Level C (high). *See id*. para. 6.2.1. Personnel in jobs with a low risk of capture receive Level A training, which provides a minimum level of training. *See id*. para. 6.2.1.1. Personnel whose jobs put them at a moderate risk of capture and exploitation receive Level B training. *See id*. para. 6.2.1.2. Personnel whose jobs put them at a significant or high-risk of capture and exploitation and "[t]hose personnel who have position, rank, seniority, or exposure to Top Secret or higher classified information making them vulnerable to greater-than-average exploitation efforts by a captor" receive Level C training. *Id*. para. 6.2.1.3.

[7] *See id*. para. 5.6.

The Code of Conduct is armed forces-specific.[8] Each branch of the armed forces describes what is expected of service members in combat and in captivity.[9] If a civilian, however, were to mirror the conduct expected of a service member, the civilian may jeopardize his noncombatant legal status. This oversight not only blurs the distinction between uniformed military combatants and civilian noncombatants,[10] it places civilian noncombatants in a precarious position.

The distinction between civilian and soldier must be maintained. The DOD must enact civilian-specific guidelines and training. Without civilian-specific guidelines and training, civilian noncombatants could unintentionally violate the law of armed conflict (LOAC) or law of war.[11] If that happens, the civilian may lose his Geneva Convention protections.[12] A civilian could then face continued detention by an

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[8] *See* U.S. DEP'T OF DEFENSE, INSTR. 1300.21, CODE OF CONDUCT (COC) TRAINING AND EDUCATION (8 Jan. 2001) [hereinafter DOD INSTR. 1300.21]. "All members of the Armed Forces are expected to meet the standards the CoC embodies." *Id*. para. E2.1.1.

[9] *See* U.S. DEP'T OF DEFENSE, DIR. 1300.7, TRAINING AND EDUCATION TO SUPPORT THE CODE OF CONDUCT (COC) para. 4.3.1 (8 Dec. 2000) [hereinafter DOD DIR. 1300.7].

[10] *See* Colonel Steven J. Zamparelli, *Contractors on the Battlefield—What Have We Signed Up For?*, 23 A.F. J. OF LOGISTICS 11 (1999). Colonel Zamparelli discusses privatization and competitive sourcing, two terms used interchangeably to describe contracting with the private sector for goods and services, instead of directly hiring employees to do the work. *See id.* He argues that the increased reliance on nonmilitary members on the battlefield "has blurred the distinction between soldier and civilian." *See id.*

[11] *See* CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 5810.01B, IMPLEMENTATION OF THE DOD LAW OF WAR PROGRAM para. 5a (25 Mar. 2002) (supporting the interchangeable use of the terms Law of Armed Conflict (LOAC) and Law of War to describe that part of international law that regulates the conduct of armed hostilities). "The law of war encompasses all international law for the conduct of hostilities, which is binding on the United States or its individual citizens. It includes treaties and international agreements to which the United States is a party, as well as applicable customary international law." *Id.*

[12] *See* Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 134 [hereinafter Geneva Convention III]; and, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

enemy state and subsequent punishment for war crimes or violations of foreign domestic law.[13] Neither prospect is palatable.

Conflicts in Afghanistan and Iraq currently involve the U.S. The DOD employs civilians in a variety of roles in these conflicts.[14] Department of Defense civilians and contractors, at times, work side by side with uniformed personnel. This close cooperation places civilians in danger of capture, captivity, and isolation. Civilians accompanying the force who are captured by the enemy will likely be classified as prisoners of war.[15] Regulations, instructions and official memorandums, however, do not provide guidelines for surviving enemy capture. While the lack of material addressing civilian prisoner of war behavior has yet to pose a problem, America cannot afford to consider objectionable civilian prisoner of war conduct at the last minute, nor address it after the fact.[16]

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[13] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 498 (15 July 1976) ("Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefore[e] and liable to punishment."). In addition to potential prosecution by an enemy state, a U.S. national may be tried for war crimes under U.S. federal criminal law. *See* 18 U.S.C. § 2441(c) (2000). War crimes include "any conduct defined as a grave breach in any of the [Geneva Conventions] or any protocol to such convention to which the United States is a party;" conduct "prohibited by Article 23, 25, 27 or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land;" and conduct constituting a violation of common Article 3 of the Geneva Conventions. *Id*.

[14] Approximately 14,391 civilian specialists were deployed to the 1991 Persian Gulf War: 5,213 DOD civilian employees and 9,178 contractor personnel. *See* GOVERNMENT ACCOUNTING OFFICE, PUB. GAO/NSIAD 95-5, DOD FORCE MIX ISSUES, GREATER RELIANCE ON CIVILIANS IN SUPPORT ROLES COULD PROVIDE SIGNIFICANT BENEFITS app. IV (Oct. 19, 1994) [hereinafter DOD FORCE MIX]. Civilian functions include, but are not limited to, logistics, plumbing, food service, maintenance and supply, postal services, engineering, and transportation. *See id*. "[N]either DOD nor the services know the totality of contractor support being provided to deployed forces. However, military officials believe that the use of contractors for support to these forces has increased significantly since the 1991 Gulf War." GOVERNMENT ACCOUNTING OFFICE, PUB. GAO-03-695, MILITARY OPERATIONS, CONTRACTORS PROVIDE VITAL SERVICES TO DEPLOYED FORCES BUT ARE NOT ADEQUATELY ADDRESSED IN DOD PLANS 1 (June 24, 2003) [hereinafter MILITARY OPERATIONS]. The GAO completed their work as the 2003 war with Iraq began; therefore, they "were unable to fully ascertain the extent of contractor support to U.S. forces inside Iraq." *Id*. at 7.

[15] *See* Geneva Convention III, *supra* note 12, art. 4A(4).

[16] *See* PRISONER REPORT, *supra* note 1, at 32. Adverse media attention on a minority of prisoner misconduct cases prompted the Korean War prisoner of war study. *See id*. at 1-2. This attention was disproportionate to the number of Americans surviving Communist imprisonment. *See id*. at vi. Approximately 1.6 million Americans served in the Korean War. *See id*. Of the 4,428 Americans surviving imprisonment, only 192 (one out of every twenty-three) were suspected of committing serious offenses against their fellow prisoners of war. *See id*. at vi.

To avoid violations of the laws of war allegations against the U.S., or even the appearance of a violation, the DOD must develop civilian-specific guidelines and training without delay.

This article begins by identifying the typical civilians on the battlefield and defining their legal status upon capture. Following that discussion is a brief history of the Armed Forces Code of Conduct, which includes the establishment, development and enforcement of the Code. The Armed Forces Code serves as a model for similar, yet noncombatant specific, guidelines for U.S. citizen civilians as prisoners of war. As with the Armed Forces Code, the civilian guidelines will function as a moral obligation with enforcement through criminal prosecution for misconduct defined under current U.S. statutes. The U.S. may not want to acknowledge the potential for civilian prisoners of war, but the prospect seems inevitable. Under these circumstances, the opportunity for change is best addressed before American civilian contractors are captured.[17]

II. Background

"Since the end of the Cold War, the DOD has cut more than 700,000 active duty troops,"[18] as well as more than 300,000 DOD civilian positions, without a similar reduction in operational requirements.[19] Consequently, significant numbers of DOD contractors and DOD civilian employees will deploy for combat and other contingency operations with the United States military forces.[20] Given the current resistance to increasing the size of the active-duty force and the limits on the number of military personnel allowed in an area, deploying civilians will continue to be the standard practice.[21]

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[17] *See* Major Holman J. Barnes, Jr., A New Look at the Code of Conduct 1 (1974) (unpublished thesis, The Judge Advocate General's School, U.S. Army) (on file with The Judge Advocate General's Legal Center and School Library, Charlottesville, Virginia). Since World War I there have been 142,255 American prisoners of war: WWI, 4,120; WWII, 130,201; Korea, 7,140; Vietnam, 771; and Persian Gulf, 23. *See* STUART I. ROCHESTER & FREDERICK KILEY, HONOR BOUND: AMERICAN PRISONERS OF WAR IN SOUTHEAST ASIA, 1961-1973 597 (1998).

[18] *See* Kathryn McIntire Peters, *Civilians at War*, GOV'T EXECUTIVE, July 1996, at 23.

[19] *See* Zamparelli, *supra* note 10, at 13.

[20] *See* DOD FORCE MIX, *supra* note 14; Zamparelli, *supra* note 10, at 8.

[21] *See* MILITARY OPERATIONS, *supra* note 14, at 8. "Limits on the number of military personnel allowed in an area, called 'force caps,' lead DOD to use contractors to provide

Due to the significant force drawdowns and budgetary constraints, current DOD policy is to "civilianize" positions whenever possible as a way to save costs while minimizing the impact on force effectiveness.[22] Properly applied, civilian support is a force multiplier that enhances a commander's operational capability.[23] Civilians can provide greater continuity in certain positions and free the uniformed personnel for combat-specific functions.[24] Civilian support, however, creates a quagmire of legal issues for the battlefield commander.

One of those issues is how civilian conduct in captivity will reflect upon the United States' military. Before delving into the conduct required of civilians in a prisoner of war environment, it is necessary to define the types of civilians supporting military operations and their status under international law.[25] Following that will be a discussion of the development and utility of the Armed Forces Code of Conduct. The Armed Forces Code of Conduct will then be used as a model for a similar civilian code of conduct in prisoner of war situations.

A. Civilians Supporting Military Operations

"Civilians fall within three main categories: DOD civilian employees; contractor personnel which includes personnel under contract with or employed by an organization under contract with the DOD; and non-affiliated persons—a broad group of civilians who share overlapping interests with the military."[26] Civilians serve in a variety of support

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support to its deployed forces." *Id.* "Since contractors are not included in most force caps, as force levels have been reduced in the Balkans, the Army has substituted contractors for soldiers to meet requirements that were originally met by soldiers. By using contractors the military maximizes its combat forces in an area." *Id*.

[22] *See* U.S. DEP'T OF DEFENSE, QUADRENNIAL DEFENSE REVIEW REPORT 53-54 (Sept. 30, 2001).

[23] *See* DOD FORCE MIX, *supra* note 14, at 4.

[24] *See id*.

[25] *See* RESTATEMENT OF THE LAW (THIRD); THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 101 (1987) (providing the following definition: "International law . . . consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical.").

[26] Turner & Norton, *supra* note 3, at 4. "The category of non-affiliated persons includes media, IGOs, NGOs, PVOs, refugees, stateless persons, and IDPs." *Id*. at 4 n.9. IGOs are intergovernamental organizations; NGOs are non-governmental organizations; PVOs are private voluntary organizations; and, IDPs are internally displaced persons. *See id*. at 2.

positions, including transportation, maintenance and repair, and weapon system support.[27]

Civilians accompanying U.S. forces[28] typically include DOD civilian employees and DOD contractors.[29] Department of Defense civilian employees are "U.S. citizens or foreign nationals employed by the [DOD] and paid from appropriated or non-appropriated funds under permanent or temporary arrangement."[30] A DOD contractor is "[a]ny individual, firm, corporation, partnership, association, or other legal non-federal entity that enters into a contract directly with the [DOD] to furnish services, supplies, or both, including construction."[31] While these definitions include persons other than U.S. citizens, this paper concentrates exclusively on U.S. citizen contractors and civilian employees, collectively referenced as civilians, unless otherwise noted.

Fortunately, the vast majority of U.S. civilians in a hostile fire or combat zone have volunteered for this hazardous service to their country.[32] Civilians volunteer either by way of an emergency-essential agreement[33] or via a contract with a government agency. Nevertheless,

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[27] *See* DOD FORCE MIX, *supra* note 14, at 30.

[28] As used throughout this article, civilians accompanying the force are non-uniformed persons called upon to follow the armed forces during conflict. *See* COMMENTARY III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 64 (Jean S. Pictet ed., 1960) [hereinafter COMMENTARY III].

[29] During Operation Iraqi Freedom (OIF), the DOD embedded media throughout military units. *See generally* BILL KATOVSKY & TIMOTHY CARLSON, EMBEDDED: THE MEDIA AT WAR IN IRAQ (2003). Technically, these reporters accompanied the U.S. forces; however, this has not been the typical method of media on the battlefield and is not critical to this paper's proposal. *See id.* at xi.

[30] DOD INSTR. 1300.23, *supra* note 4, para. E1.1.1.

[31] *Id.* para. E1.1.2.

[32] *See* U.S. DEP'T OF DEFENSE, DIR. 1404.10, EMERGENCY-ESSENTIAL (E-E) DOD U.S. CITIZEN CIVILIAN EMPLOYEES para. 4.8 (10 Apr. 1992) [hereinafter DOD DIR. 1404.10]; U.S. DEP'T OF DEFENSE, INSTR. 3020.37, CONTINUATION OF ESSENTIAL DOD CONTRACTOR SERVICES DURING CRISES para. 6.7 (6 Nov. 1990) [hereinafter DOD INSTR. 3020.37].

[33] Emergency-essential (E-E) positions are "those positions specifically required to ensure the success of combat operations or the availability of combat-essential systems." DOD DIR. 1404.10, *supra* note 32, para. 4.1. Further,

> [t]he agreements document that incumbents of E-E positions accept certain conditions of employment arising out of crisis situations wherein they shall be sent on temporary duty, shall relocate to duty stations in overseas areas, or continue to work in overseas areas after the evacuation of other U.S. citizen employees who are not in E-E positions.

under current DOD policies and procedures, civilian employees can be directed or assigned to perform emergency-essential missions involuntarily or on an unexpected basis.[34] On the other hand, the terms and conditions of the contract govern a contractor's presence.

B. Status and Applicable Law

Whether on the battlefield voluntarily or involuntarily, each person must have a classification in order to determine his or her rights and responsibilities. Personnel on the battlefield are classified as either combatants or noncombatants.[35] This classification is critical in determining an individual's legal status under international law.[36]

Combatants encompass uniformed members of the armed forces, with the exception of medical personnel and chaplains.[37] The Geneva Conventions do not define noncombatants; however, by implication, noncombatants include all personnel who are not members of an armed force.[38] Combatants have the right to participate directly in hostilities;[39] all others must refrain from participating in the hostilities.[40] Civilians acting inconsistent with their noncombatant status risk losing the protections of this status[41] and facing war crimes allegations if captured. Refraining from participating in hostilities protects the noncombatant

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Id. para. 4.6. These positions cannot be converted to military positions because of the need for uninterrupted performance. *See id.* para. E2.1.5. A sample written agreement can be found at Enclosure 3 to *DOD Directive 1404.10*.

[34] *See id.* para. 4.8.

[35] *See* LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 85 (1993).

[36] *See* A.P.V. ROGERS, LAW ON THE BATTLEFIELD 7 (1996).

[37] Protocol Additional to the Geneva Conventions of Aug. 12, 1949, art. 43, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3 (entered into force Dec. 7, 1978) [hereinafter Additional Protocol I]. The United States signed the protocols on December 12, 1977, subject to declarations but never formally ratified them; nor has the United States ratified Additional Protocol II. The United States, however, has stated it considers many provisions of Protocol I and almost all of Protocol II (all except for the limited scope of application in Art. 1), to be customary international law. *See* Michael J. Matheson, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. POL'Y 419, 429-431 (1987); George H. Aldrich, *The Laws of War on Land*, 94 AM. J. INT'L L. 42, 46 (2000).

[38] *See* Additional Protocol I, *supra* note 37, art. 50.

[39] *See id.* art. 43, para. 2.

[40] *See id.*; *see also* ROGERS, *supra* note 36, at 8; Turner & Norton, *supra* note 3, at 26.

[41] *See* Additional Protocol I, *supra* note 37, art. 51, para. 3 (stating "[c]ivilians shall enjoy the protection. . .unless and for such time as they take a direct part in hostilities").

from targeted attack.[42] Noncombatant civilians near the hostilities, however, risk incidental harm during an attack of legitimate military objectives, for example the armed forces. In other words, mere civilian presence does not immunize an area from military operations.[43]

A noncombatant's legal status, rights, and obligations depend upon the issue addressed and the nature of the conflict. The full scope of the Geneva Conventions only applies during international armed conflicts or during occupation by one state of the territory of another.[44] During contingencies not amounting to international armed conflict, host nation law or applicable status of forces agreements determine a civilian accompanying the armed forces' status.[45] The Geneva Conventions also provide protections during non-international conflicts;[46] however, these protections are minimal.[47] The remainder of this article focuses on international armed conflicts.

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[42] *See id*. art. 51, para. 2.

[43] *See id*. para. 7.

[44] Geneva Convention I, *supra* note 12, art. 2; Geneva Convention II, *supra* note 12, art. 2; Geneva Convention III, *supra* note 12, art. 2; Geneva Convention IV, *supra* note 12, art. 2. Article 2 is the same in each of the four Geneva Conventions and is frequently referred to as Common Article 2. "Any differences arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a State of War." COMMENTARY III, *supra* note 28, at 23.

[45] *See* Memorandum, Secretary of the Air Force, to ALMAJCOM-FOA-DRU/CC, subject: Interim Policy Memorandum—Contractors in the Theater (8 Feb. 2001) (on file with author).

[46] Geneva Convention I, *supra* note 12, art. 3; Geneva Convention II, *supra* note 12, art. 3; Geneva Convention III, *supra* note 12, art. 3; Geneva Convention IV, *supra* note 12, art. 3. As with Article 2, Article 3 is the same in each of the four Geneva Conventions and is often referred to as Common Article 3.

[47] *See* COMMENTARY III, *supra* note 28, at 34. Article 3 applies to non-international conflict and,

> will be the only Article applicable to them until such time as a special agreement between the Parties has brought into force between them all or part of the other provisions of the convention. . .It at least ensures the application of the rules of humanity which are recognized as essential by civilized nations and provides a legal basis for interventions by the International Committee of the Red Cross or any other impartial humanitarian organization.

Id. at 34-35.

During international armed conflicts, international law determines the noncombatant's status upon enemy capture. The noncombatant is either a prisoner of war covered by Geneva Convention III or a civilian covered by Geneva Convention IV. "Every person in enemy hands must have some status under international law. . .*There is no* intermediate status; nobody in enemy hands can be outside the law."[48]

Civilian employees and contractors are generally entitled to prisoner of war status if they have "fallen into the power of the enemy" [49] during an international armed conflict and are "persons who accompany the armed forces without actually being members thereof."[50] The civilian accompanying the force must also possess authorization from the armed forces, generally by way of an armed forces-issued identification card.[51] However, possession of an identification card is not an absolute condition of the entitlement to be treated as a prisoner of war.[52] The identification card, also known as a Geneva Convention Card, merely provides the civilian with a means to prove his status.

A civilian employee or contractor protected under Geneva Convention III as a prisoner of war will not also be protected under Geneva Convention IV.[53] When Geneva Convention IV protections apply, the enemy cannot confine civilians unless State security makes it

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[48] COMMENTARY IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 51 (Jean S. Pictet ed., 1958) [hereinafter COMMENTARY IV]. The Global War on Terrorism, however, brings into question the Commentary's statement, "Every person in enemy hands must have some status under international law." In a February 2002 press release, the White House formally acknowledged the difficulty of applying current international law to terrorists and those enemies not categorized as an "enemy state." Statement by the Press Secretary, The White House, Regarding the Status of the Detainees in Guantanamo Bay, Feb. 7, 2002, *available at* 2002 WL 191074. "The war on terrorism is a war not envisaged when the Geneva Convention was signed in 1949. . .[T]he Convention simply does not cover every situation in which people may be captured or detained by military forces, as we see in Afghanistan today." *Id.*

[49] Turner & Norton, *supra* note 3, at 66 n.445 (noting this phrase as "a broader concept than capture, including for example, members of the armed forces who are under enemy control after surrender before repatriation"); *see also* COMMENTARY IV, *supra* note 48, at 50.

[50] Geneva Convention III, *supra* note 12, art. 4A(4)

[51] *See* Geneva Convention III, *supra* note 12, art. 4A(4); *see also* U.S. DEP'T OF DEFENSE, INSTR. 1000.1, IDENTITY CARDS REQUIRED BY THE GENEVA CONVENTIONS para. 5.2 (5 June 1991) [hereinafter DOD INSTR. 1000.1].

[52] *See* COMMENTARY III, *supra* note 28, at 65.

[53] *See* Geneva Convention IV, *supra* note 12, art. 4, para. 4.

absolutely necessary.[54] Additionally, the Detaining Power must follow specific procedures outlined in Geneva Convention IV, Article 43.

Civilians authorized to accompany the armed forces include civilian government employees, civilian members of military aircraft, war correspondents, members of labor units, and members of services responsible for the welfare of the armed forces.[55] These civilians receive authorization from the armed forces they accompany, and "their proximity to the fighting places them at greater risk of injury, death, and capture."[56] Geneva Convention III provides that the enemy may hold prisoners of war until the end of active hostilities.[57] When active hostilities have ceased, prisoners of war must be released and repatriated, unless criminal proceedings are pending against the prisoner.[58]

During captivity, prisoners of war should be treated in accordance with Geneva Convention III. This Convention details the prisoners' rights and protections but does not explicitly prescribe prisoner conduct. Geneva Convention III does, however, require that the prisoner provide identifying information and comply with the laws in effect for the captor's armed forces.[59] This lack of guidance for prisoner conduct partially influenced the creation of the Armed Forces Code of Conduct.[60]

C. History of the Military Code of Conduct

1. Establishment and Development

President Dwight D. Eisenhower established the "Code of Conduct for Members of the Armed Forces of the United States" (Armed Forces

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[54] *See id.* art. 42, para. 1. The internment should last only as long as the circumstances warranting such action continue to exist. *See* COMMENTARY IV, *supra* note 48, at 256.

[55] *See* Howard S. Levie, *Prisoners of War in International Armed Conflict*, 59 INT'L L. STUD. 60-61 (1977).

[56] Guillory, *supra* note 3, at 115; *see also* Geneva Convention III, *supra* note 12, art. 4A(4).

[57] *See* Geneva Convention III, *supra* note 12, art. 118, para. 1.

[58] *See id*. arts. 118, 119. The detaining power is not obligated to hold prisoners pending criminal proceedings but may chose to do so. *See* COMMENTARY III, *supra* note 28, at 557.

[59] *See* Geneva Convention III, *supra* note 12, arts. 17, 82.

[60] *See* PRISONER REPORT, *supra* note 1, at 14-15.

Code) on 17 August 1955, by signing Executive Order 10,631.[61] The Armed Forces Code grew out of the public response to the experiences of prisoners of war incarcerated during the Korean Conflict.[62] Prior to establishing the Armed Forces Code, an Advisory Committee studied and recommended how the DOD could provide service members an adequate ideological foundation for the prisoner of war environment.[63]

During the Korean War, public interest in U.S. prisoners of war flourished.[64] Maltreatment,[65] communist indoctrination,[66] brainwashing and forced confessions,[67] collaboration,[68] and U.S. defectors[69] were just some of the concerns. Adverse publicity, along with misperceptions, ran rampant.[70] This eventually led to the American perception that U.S. service members were inadequately prepared for the enemy captors' conduct.[71] As a result, Secretary of Defense Charles E. Wilson identified

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[61] Exec. Order No. 10,631, 20 Fed. Reg. 6057 (Aug. 17, 1955). The current Armed Forces Code of Conduct is reproduced at Appendix A.

[62] *See* DEFENSE REVIEW COMMITTEE, REPORT OF THE 1976 DEFENSE REVIEW COMMITTEE FOR THE CODE OF CONDUCT 1 (1976) [hereinafter VIETNAM REPORT].

[63] *See* PRISONER REPORT, *supra* note 1, at 37.

[64] *See id*. at vi (identifying much of the adverse publicity as caused by a "lack of information and consequent misconceptions").

[65] *See id*. at 8-9. "Prisoner rations were scanty—a basic diet of rice occasionally leavened with some foul kind of soup." *Id*. at 8. While indigenous persons could stomach such a diet, the average American could not, which often lead to long bouts of sickness. *See id*. at 9.

[66] *See id*. at 12-13. The enemy forced American POWs to read Communist literature, participate in debates, and tell what they knew about American politics and history. *See id*. at 12. Unfortunately, the captor frequently knew more about America than the American POW. *See id*. "Lectures—study groups—discussion groups—a blizzard of propaganda and hurricanes of violent oratory were all part of the enemy technique." *Id*.

[67] *See id*. at 13-14. In some cases, "American prisoners of war were subjected to mental and physical torture, psychiatric pressures or 'Pavlov Dogs' treatment." *Id*. at 13.

[68] *See id*. at 27. Some prisoners, at the request of their captors, informed on fellow prisoners, wrote Communist literature, taught Communism, delivered anti-U.S. speeches, and ordered fellow prisoners to sign peace petitions. *See id*. at 26-27.

[69] *See id*. at 12. A few prisoners sincerely converted to Communism while other converts were influenced by "[e]xpediency, opportunism, and fear of reprisal." *Id*. at 27. Enemy political officers held Communism "up as the salvation of the world and Marx as mankind's benefactor," which led some American POWs to accept Communism as an easy out. *Id*. at 12.

[70] *See id*. at vi.

[71] *See id*. Such a perception was, in reality, not the only factor that contributed to U.S. service members unpreparedness for capture:

> In truth, the American prisoners in Korea were victimized as much by youth and inexperience as by inadequate PW resistance and survival training. Most PWs in Korea were enlisted men—in most instances

a need for "providing Americans who serve their country in battle with every means we can devise to defeat the enemy's techniques."[72]

After nearly three months of studying the Korean prisoner of war experience, the Defense Advisory Committee presented the Armed Forces Code to Secretary Wilson who, in turn, presented it to President Eisenhower. After President Eisenhower issued Executive Order 10,631, "for the first time in American military history, a definitive statement of the principal rules governing the war conduct of American servicemen and their deportment in the unfortunate event of capture,"[73] had been issued.

The Armed Forces Code was an aspirational, moral guide for service member conduct in captivity as well as in combat.[74] In addition to promulgating the Code, President Eisenhower directed that "members of the armed forces liable to capture [] be provided with specific training and instruction designed to better equip them to counter and withstand all enemy efforts against them."[75] The Code served as a foundation for all service members dealing with captivity. It was intended to provide a clear and concise guide to behavior while in captivity.[76] Controversy, however, arose during the first real test of the Code's efficacy—Vietnam.

While intended to be clear and concise, the Armed Forces Code posed problems during the Vietnam War. When promulgated, President Eisenhower essentially left it to the individual services to educate and train their personnel on the Code. Each service approached Code training based on their mission and needs. As a result, disagreement over the Code's proper interpretation surfaced.[77] The disagreement also

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> lower-ranking and less educated than PWs in Vietnam, the majority of whom were officers and thus could be expected to be more highly motivated and better trained.

ROCHESTER & KILEY, *supra* note 17, at 20 n.*.

[72] PRISONER REPORT, *supra* note 1, at 37.

[73] Major George S. Prugh, Jr., *The Code of Conduct for the Armed Forces*, 56 COLUM. L. REV. 678 (1956).

[74] *See* Exec. Order No. 10,631, 20 Fed. Reg. 6057 (Aug. 17, 1955).

[75] *Id.*

[76] *See* VIETNAM REPORT, *supra* note 62, at 1.

[77] *See* DEFENSE REVIEW COMMITTEE, REPORT OF THE 1976 DEFENSE REVIEW COMMITTEE FOR THE CODE OF CONDUCT, REPORT SUPPLEMENT II-3 (1976) [hereinafter VIETNAM SUPPLEMENTAL REPORT]. The services could not agree on the implementation of

extended into the prisoner of war environment.[78] The disagreement over interpretation and attendant controversy over the validity of the Code, culminated in 1976 with the Code's first review.

In 1976, the Deputy Secretary of Defense appointed a Defense Review Committee to examine the provisions of the Armed Forces Code and prisoner of war conduct while in captivity.[79] The 1976 Committee's composition corresponded to that of the 1955 Committee that initiated the Code.[80] The 1976 Committee validated the Code and its necessity as an "instrument[,] which establishes high standards of behavior for all members of the Armed Services."[81] To correct misunderstandings in the

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> the wording of Article V [which] repeatedly caused the greatest disagreement . . . Disagreement over the intent of this Article centered primarily on the issue of conditioning: the Army, Navy, and Marine Corps recommended teaching servicemen to adhere exclusively to the "big four" (name, rank, service number, date of birth), while the Air Force gradually began to advocate instruction in ruses and stratagems for "second line" defenses.

Id.

[78] *See* JOHN G. HUBBELL, A DEFINITIVE HISTORY OF THE AMERICAN PRISONER-OF-WAR EXPERIENCE IN VIETNAM, 1964-1973 153 (1976). As POWs, member of the different armed services

> debate[d] over how to handle the Vietnamese interrogators . . . Many clung to a strict interpretation of the Code of Conduct. They argued that to give the enemy anything "free"—without torture—is to peel away a layer of defense; that no matter how unimportant, even silly, the item might seem, it puts the enemy one step closer to the important things he might seek. Far better to make him work for everything. Hang tough as long as you can.
>
> Others advocated a policy of deceit. Be smart. Play it by ear. Give a little where it doesn't matter. When it comes to information of military or propaganda value, lie. If you can't get away with it, then time to clam up.

Id.

[79] *See* VIETNAM REPORT, *supra* note 62, at iv-vii. The committee's charter included formally reviewing the Code of Conduct and its supporting training programs. *See id*. at vi. The charter also directed that the committee specifically consider "the experiences of detainees and POWs with the Code." *Id*. at vii. The Deputy Secretary of Defense directed the committee "to reaffirm the validity of the Code of Conduct for its intended purposes or to recommend such changes as necessary." *Id*.

[80] *See id*. at v.

[81] *Id*. at 8.

various articles, the Committee recommended word changes to Article V, and training improvements for Articles I, II, III, IV, and VI.[82]

On 3 November 1977, President Jimmy Carter issued Executive Order 12,017, changing Article V to reflect the recommendations.[83] Since the change in 1977, only one additional modification has been made to the Code itself, when President Ronald Reagan eliminated the gender specific terms.[84]

In six brief but powerful articles, the Armed Forces Code addresses those situations and decision areas that all military personnel may face in captivity. The Code provides "basic information useful to U.S. [prisoners of war] in their efforts to survive honorably while resisting their captor's" exploitative efforts.[85] "It is designed to aid the fighting men of the future . . . in the fight for their minds, their loyalty, and their allegiance to their country,"[86] and is the initial protection against the psychological stress experienced in combat and captivity.[87]

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[82] *Id*. The Committee recommended the following changes to the first sentence of Article V: "required" to replace "bound" and eliminate the word "only." *See id*. at 9. Changes to training included a revision of the existing DoD training directive, which should encompass "training levels for all servicemembers, continuation training in the code of conduct and related topics, and training to inform all servicemembers of the Armed Forces' responsibilities to their families." *Id.* at 13. The committee further recommended centralized instructor training under the Secretary of Defense with a single service acting as the executive agent. *See id*.

[83] Exec. Order No. 12,017, 42 Fed. Reg. 57941 (Nov. 3, 1977). Article V now reads, "When questioned, should I become a prisoner of war, I am required to give name, rank, service number and date of birth. I will evade answering further questions to the utmost of my ability. I will make no oral or written statements disloyal to my country and its allies or harmful their cause." *Id*.

[84] Exec. Order No. 12,633, 53 Fed. Reg. 10,355 (Mar. 28, 1988). "American fighting man" in Articles I and VI became simply "American" and "never surrender my men" in Article II became "never surrender the members of my command." On 28 February 2003, President George W. Bush issued Executive Order 13,286, which did not change the Code but merely added language to reflect the role of the Secretary of Homeland Security in implementing and disseminating the Code with respect to the Coast Guard, except when it is serving as part of the Navy. See Exec. Order No. 13,286, 68 Fed. Reg. 10,631 (Feb. 28, 2003).

[85] DOD INSTR. 1300.21, *supra* note 8, para. E2.1.2.

[86] Carter L. Burgess, *Foreword*, *Prisoners of War*, 56 COLUM. L. REV. 676 (1956).

[87] *See* Walter A. Lunden, *Captivity Psychoses Among Prisoners of War*, 39 J. CRIM. L. & CRIMINOLOGY 721 (1949) (providing a discussion of the psychological impact captivity has on a prisoner of war).

While some consideration had been given to making the Armed Forces Code a statutory law, or akin to a military order, the Defense Advisory Committee rejected this idea in 1955,[88] as well as 1977.[89] Therefore, the Code's articles remain as moral guides to behavior and are not binding as law. The Code's failure, however, to rise to the level of law does not necessarily mean a military member avoids disciplinary action after disobeying the Code.

2. Enforcement

Despite the decision to keep the Armed Forces Code as a moral guide rather than making it a statutory law, the military could discipline its members for violating the Code through administrative action, non-judicial punishment,[90] or trial by courts-martial. Violations of the Armed Forces Code of Conduct will fall under specific provisions of the UCMJ, such as mutiny or sedition,[91] aiding the enemy,[92] and misconduct as a prisoner.[93] Military prisoners of war have been found guilty of communicating or corresponding with, or holding intercourse with the

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[88] *See* PRISONER REPORT, *supra* note 1, at 19; Exec. Order No. 10,631, 20 Fed. Reg. 6057 (Aug. 17, 1955). The committee found that

> after listening to former prisoners of war, ranging from general to private, and after consulting with nationally known experts in the field of law, psychology, education, and religion, [] some might not measure up to the standards of the Code. However, the Code provides no penalties. It is not definitive in its terms of offenses; rather, it leaves to existing laws and the judicial processes the determination of personal guilt or innocence in each individual case.

Burgess, *supra* note 86, at 676.

[89] *See* VIETNAM REPORT, *supra* note 62, at 18. The Committee concluded, "[b]ehavior cannot be effectively legislated, but it can be affected by training and leadership. United States law, particularly the UCMJ, is appropriate for punishing all illegal PW activity." *Id*.

[90] UCMJ art. 15 (2002). Administrative action, such as censures or reprimands, and non-judicial punishment, commonly called an Article 15, usually occur for minor offenses. While offenses enumerated on Article 15s must reflect a provision of the Uniform Code of Military Justice (UCMJ), administrative actions could document offenses under the UCMJ, service regulations, or command policy.

[91] UCMJ art. 94 (2002).

[92] *See id.* art. 104.

[93] *See id.* art. 105.

enemy;[94] aiding the enemy by participating in enemy psychological warfare;[95] and, receiving favorable treatment at the expense of other prisoners.[96] These activities, all resulting in convictions by general court-martial, violate the Code's requirements to "resist by all means available,"[97] not to "accept . . . special favors from the enemy,"[98] and not to give information or take part in actions "harmful to my comrades."[99] These examples demonstrate that the Armed Forces Code of Conduct reflects the type of conduct prohibited by the UCMJ.[100]

The Armed Forces Code provides service members a concise guide for avoiding criminal offenses under a voluminous and complex series of U.S. statutes, DoD directives and instructions, as well as service instructions and regulations. The Code also provides service members

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[94] *See* United States v. Dickenson, 20 C.M.R. 154 (C.M.A. 1955). During the Korean War, Corporal (CPL) Dickenson, while a prisoner of war, helped make radio broadcasts criticizing the U.S. and informed on other prisoners in return for special favors. *See id*. at 171. The *Dickenson* court determined that Article 105, misconduct as a prisoner, was not the exclusive provision governing prisoner misconduct. *See id*. at 165. Therefore, a service member could be charged for violating any provision of the UCMJ while a prisoner of war. *See id*. at 164. For his misconduct, CPL Dickenson received a dishonorable discharge, total forfeiture of all pay and allowances, and confinement for ten years. *See* United States v. Dickenson, 17 C.M.R. 438 (A.B.R. 1954).

[95] *See* United States v. Olson, 22 C.M.R. 250 (C.M.A. 1957). Master Sergeant (MSG) Olson, while a prisoner of war, made speeches, gave talks and wrote articles all of which were contrary to the interests of the U.S. *See id*. at 253. The court convicted him of giving aid to the enemy through his participation in the enemy's psychological warfare against the U.S. and other American prisoners of war. *See id*. at 258. The appellate court considered whether the government properly charged MSG Olson under Article 104, UCMJ, or whether he should have been charged under its predecessor, Article of War 81. *See id*. at 254-55. The court determined that there was enough evidence to allege an offense under both Article 104 and Article of War 81. *See id*.

[96] *See* United States v. Batchelor, 22 C.M.R. 144 (C.M.A. 1956). Corporal (CPL) Batchelor, while a prisoner of war, led voluntary "study groups" wherein he repeatedly expressed views contrary to the United Nations and U.S. interest. *See id*. at 150. He also made daily broadcasts over the camp public address system expressing similar statements and informed guards of misconduct by a fellow prisoner. *See id*. at 150-51. Corporal Batchelor's actions resulted in a favored prisoner status such that he was permitted to come and go almost as he pleased in the camp, had better food to eat and received Chinese currency to spend rather than being issued rations. *See id*. at 150. At trial, the court sentenced CPL Batchelor to a dishonorable discharge, total forfeiture of all pay and allowances, and confinement for twenty years. *See id*. at 149.

[97] Exec. Order No. 10,631, 20 Fed. Reg. 6057 (Aug. 17, 1955) (art. III).

[98] *Id.*

[99] *Id*. art. IV.

[100] *See* Major Elizabeth R. Smith, Jr., *The Code of Conduct in Relation to International Law*, 31 MIL. L. REV. 85, 124 (1966) (noting, however, that there is no indication the Code drafters intended code violations to be criminal).

with a mechanism for increasing their chance of survival in captivity. The Armed Forces Code accomplished this without the passage of a new law or service regulation. Civilians, working side by side with military members on the battlefield, and similarly at risk of enemy capture, deserve analogous comprehensive guidance. Without such guidance, the United States does a disservice to its citizen employees because "DoD civilians and contractors are presently operating around the world unprepared for a potential isolating incident."[101]

III. Analysis

> *America no longer can afford to think in terms of a limited number. . . becoming prisoners of war. . . Modern warfare has brought the challenge to the doorstep of every citizen*.[102]

Any civilian accompanying the armed forces could become a prisoner of war, either alone, or along with military personnel.[103] The armed forces may minimize the odds of a civilian becoming a prisoner of war by keeping civilians away from actual combat. However, as with service members,[104] a civilian, however, could end up being in the wrong place at the wrong time.[105] Therefore, civilians require behavioral

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[101] Defense Prisoner of War/Missing Personnel Office, *2001 Department of Defense Personnel Recovery Conference After Action Report, Executive Summary* pt. II, 3.h.1.a (Jan. 22-24, 2001), *available at* http://www.dtic.mil/dpmo/pr/2001conf_aar.htm.

[102] PRISONER REPORT, *supra* note 1, at v.

[103] *See* ERNEST C. BRACE, A CODE TO KEEP 23-32 (1988). During the Vietnam War, Ernest Brace, a civilian pilot, was the longest held civilian prisoner of war. *See* JOHN MCCAIN, FAITH OF MY FATHERS 212 (1999). When the Pathet Lao first captured Mr. Brace, he was with a Thai national, Harnavee. *See* BRACE, *supra*, at 23-32. Mr. Brace was held in Laos for over three years before his transfer to the Hoa Lo Prison (Hanoi Hilton), where other American prisoners of war were held. *See* MCCAIN, *supra*, at 213-14 (noting that Brace, as a civilian, "was under no obligation to adhere to the Code of Conduct. The United States expected him not to betray any highly sensitive information, the disclosure of which would endanger the lives of other Americans. But other than that, he was not required to show any fidelity to his country and her cause beyond the demands of his own conscience.").

[104] *See Lynch Criticizes Military Portrayal* (Nov. 7, 2003), *available at* http://www.usatoday.com/news/nation/2003-11-07-lynch-laments_x.htm (last visited Dec. 16, 2004).

[105] *See* BORGNA BRUNNER, IRAQ TIMELINE: 2002-PRESENT, *available at* http://www.infoplease.com/spot/iraqtimeline2.html (referencing the hostage-taking of an American Contract worker in April 2004). *Department of Defense Instruction 1300.21*

guidelines to increase their chance of survival in captivity, and to avoid potential criminal sanctions upon repatriation.

Maintaining the distinction between the uniformed member, a combatant, and the civilian necessitates a separate code for the civilian. Civilians are not combatants,[106] regardless of prior military experience or reserve status. Civilians are not expected to act like combatants, nor do they enjoy the universally recognized combatant immunity.[107] However, each person subject to the laws of the United States, military and civilian, remains accountable for his acts even while isolated from friendly forces. A United States citizen civilian employee or contractor also remains accountable to the United States of America.

A. Captive's Allegiance

Every U.S. citizen, whether by birth or naturalization, as a matter of law, owes an absolute and permanent allegiance to the U.S.[108]

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identifies three different forms of captivity: prisoner of war, detainee, and hostage. *See* DOD INSTR. 1300.21, *supra* note 8, at encls. 2, 3. The hostage situation usually involves capture by terrorists and "is generally the least predictable and structured form of captivity." *Id*. para. E3.11. "[H]ostages play a greater role in determining their own fate since the terrorists in many instances expect or receive no rewards for providing good treatment or releasing victims unharmed." *Id*. Unlike State Actors who have signed and ratified the Geneva Conventions and other treaties governing the treatment of prisoners of war, terrorists do not follow any particular rules for the treatment of their captives. "[P]ersonnel captured by terrorists . . . are often held for individual exploitation, or to influence the U.S. Government, or both." *Id*. para. E3.4.

[106] Geneva Convention III, *supra* note 12, art. 4; and, Additional Protocol I, *supra* note 37, art. 43, details the qualifications of a combatant.

[107] *See* THE JUDGE ADVOCATE GENERAL'S DEPARTMENT, UNITED STATES AIR FORCE, AIR FORCE OPERATIONS & THE LAW: A GUIDE FOR AIR & SPACE FORCES 29 (2002). Combatant immunity is immunity from prosecution for warlike acts:

> In general, any person who engages in violent acts on behalf of a party to an armed conflict is a *combatant*. Assuming combatants act with the authority of a sovereign state, they are immune from prosecution for their violent acts as long as they have acted in accordance with the laws of war.

Id.

[108] *See, e.g.*, United States v. Fricke, 259 F. 673, 675 (S.D.N.Y. 1919); United States v. Tomoya Kawakita, 96 F. Supp. 824, 826 (S.D. Cal. 1950). Frequently, the terms citizen and national have the same meaning. However, while all citizens of the U.S. are nationals thereof, all nationals of the U.S. are not citizens thereof. *See* Law Don Shew v. Dulles, 217 F.2d 146, 147 (9th Cir. 1954); *see also* 8 U.S.C. § 1101(a)(22) (2000).

Allegiance is defined as the loyalty of a citizen to his or her government.[109] That is, "allegiance to the political entity the United States, not to the person of the President nor to the party in power for the time being."[110] To be relieved of one's duty of allegiance imposed by citizenship, one must voluntarily act to renounce or abandon their American nationality and allegiance.[111] For example, a U.S. citizen can lose his nationality by taking an oath or other formal declaration of allegiance to a foreign state,[112] by voluntarily serving in the armed forces of foreign state when that armed force is engaged in hostilities against the United States,[113] or upon conviction by a court of competent jurisdiction of committing any act of treason against the United States.[114]

Simply falling into an enemy's hands does not change a captive's allegiance.[115] Captivity merely removes the combatant or noncombatant from the active battlefield, and in no way affects the duty of allegiance to

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[109] RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 55 (2d ed. 1998).

[110] Chandler v. United States, 171 F.2d 921, 938 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949).

[111] *See* Gillars v. United States, 182 F.2d 962, 983 (D.C. Cir. 1950) (finding sufficient evidence to support voluntary renunciation of American allegiance with one overt act).

[112] *See* 8 U.S.C. § 1481(a)(2) (2000).

[113] *See id*. § 1481(a)(3)(A). For a comprehensive discussion of U.S. citizenship and the question of denationalization, *see* J.M. Spectar, *To Ban or Not to Ban an American Taliban? Revocation of Citizenship & Statelessness in a Statecentric System*, 39 CAL. W. L. REV. 263 (2003). The author argues, "given the [United States Supreme] Court's view of the 14th Amendment and citizenship, it is highly unlikely that a denationalization proceeding against Walker would succeed absent compelling evidence of treason." *Id*. at 264. John Walker Lindh's indictment did not include a count of treason. *See* John Walker Lindh Indictment, United States v. Lindh, Criminal No. 02-37-A (E.D. Va. Feb. 5, 2002). "It was widely reported that the government decided against charging Lindh with treason . . . because it couldn't prove the elements of the crime." Audio broadcast: Michael Ryan, *President Bush Spares John Walker Lindh* (July 19, 2002), *available at* http://www.tompaine.com/feature2.cfm/ID/6034 (last visited Dec. 6, 2004). Further, the plea agreement reached with prosecutors and personally approved by President Bush, had Walker Lindh pleading "guilty to serving in the Taliban army and carrying weapons in doing so." Bob Franken & John King, *'I Plead Guilty,' Taliban American Says, Plea Bargain Precludes Possible Life Sentence* (July 17, 2002), *available at* http://cnn.com/2002/LAW/07/15/walker.lindh.hearing (last visited Dec. 6, 2004). In exchange for the plea, prosecutors dropped charges which "included conspiring to kill Americans overseas, providing support to al Qaeda and other terrorist groups, and using firearms and other destructive devices during crimes of violence." *Id*.

[114] *See* 8 U.S.C. § 1481(a)(7).

[115] *See* PRISONER REPORT, *supra* note 1, at 22. Prisoner of war status does not change the fact that "[a]n American is responsible and accountable for his actions. . .nor does it change the obligation to remain faithful to the United States and the principles for which it stands." *Id*

one's own nation.[116] Captivity does, however, subject the prisoner of war to a duty of obedience to certain laws, rules, and regulations of his captor.[117] Nevertheless, obedience to a foreign power's laws does not provide an American citizen a license to commit treason.[118] Moreover, when war breaks out, a citizen's obligation of allegiance further limits the freedom to act contrary to American interests.[119]

When war breaks out between the U.S. and a foreign state, the foreign state becomes the enemy and remains the enemy for the duration of the war. Obviously, all members of the foreign state's armed force are considered enemies. Additionally, all persons working for the foreign state, either by assisting the foreign state in the prosecution of its war or by hampering the U.S. in the prosecution of its war against the foreign state, are also considered enemies of the U.S.[120]

Whenever appropriate, provisions of U.S. law continue to apply to American citizens, including while they are prisoners of war.[121] The entire body of United States law will not apply. American prisoners of war, however, should still be concerned about certain statutes with significant penalties. These statutes prohibit such conduct as privately corresponding with foreign governments,[122] communicating defense information to aid a foreign government,[123] and intentionally interfering

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116 *See id*.

117 *See* Geneva Convention III, *supra* note 12, art. 82; Prugh, *supra* note 73, at 682.

118 *See* United States v. Olson, 22 C.M.R. 250, 255 (C.M.A. 1957) (exceeding an area of permissible obedience to a foreign power may constitute treason).

119 *See* Chandler v. United States, 171 F.2d 921, 944 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949) (finding that a citizen may provide aid and comfort the enemy but if not done with adherence to the enemy or an intent to betray, treason cannot be found).

120 *See* United States v. Fricke, 259 F. 673, 675 (S.D.N.Y. 1919) (during war, all military members and those engaged by or working for the enemy state as agents or spies are enemies of the U.S.).

121 *See* United States v. Bowman, 260 U.S. 94, 97-98 (1922) (noting that statute applicability may "depend[] upon the purpose of Congress as evinced by the description and nature of the crime and upon the territorial limitations upon the power and jurisdiction of a government to punish crime under the law of nations").

122 *See* 18 U.S.C. § 953 (2000) (forbidding U.S. citizens from carrying on unauthorized "correspondence or intercourse with any foreign government . . . with intent to influence the measures or conduct of the foreign government . . . in relation to any disputes or controversies with the United States, or to defeat the measures of the United States").

123 *See id.* § 794 (prohibiting the obtaining or delivering of information connected with or relating to the national defense "with intent or reason to believe that [the information would] be used to the injury of the United States, or to the advantage of any foreign nation").

with the loyalty, morale, or discipline of the military forces.[124] With these statutes, the Geneva Conventions, and the Armed Forces Code of Conduct in mind, a Citizen Code of Conduct would briefly but comprehensively define the conduct expected of American civilian prisoners of war. All American prisoners of war may then "stand firm and united against the enemy" and aid one another in surviving.[125]

B. A Citizen's Code of Conduct

> *The responsibility for the maintenance and preservation of the United States and all it stands for is one which must be shared by every citizen.*[126]

The proposed Citizen Code of Conduct provides a framework of behavioral standards to guide U.S. citizen civilian conduct while a prisoner of war. While the Geneva Conventions set forth the rights and protections that should be afforded prisoners, the Conventions, do not prescribe conduct that a nation may require of its personnel who could become prisoners.

As with the Armed Forces Code, the proposed Citizen Code is a "moral" code, imparting behavioral limits. The Citizen Code is designed to assist civilians being held as prisoners of war with surviving captivity and avoiding criminal prosecution upon repatriation. The proposed Citizen's Code consists of five overarching principles.[127] The principles emphasize mutual trust, honor and obligation between the prisoner of war, those similarly situated, and the United States. The principles serve as a benchmark of simple ideals an American citizen can easily comprehend and follow. The next five subsections follow the format of the proposed principle, with an analysis of the provision.

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[124] *See id.* § 2387(a) (penalizing the "advis[ing], counsel[ing], urg[ing], or in any manner caus[ing] or attempt[ing] to cause insubordination, disloyalty, mutiny, or refusal of duty by any member of the military" and the "distribut[ion] or attempt[ed] distribut[ion of] any written or printed matter which advises, counsels, or urges insubordination, disloyalty, mutiny, or refusal of duty").

[125] *See* PRISONER REPORT, *supra* note 1, at 23.

[126] *Id.* at 31.

[127] Although analogous to the Armed Forces Code, the proposed Citizen's Code of Conduct specifically considers the limitations imposed on noncombatants. A code that acknowledges the noncombatants' constraints reduces the likelihood that the distinction between soldier and civilian will erode the prisoner of war environment.

1. American Allegiance

> I am an American, accompanying the forces which guard my country and our way of life. I am prepared to fulfill my obligation of allegiance to the United States of America.

Being an American has meaning and one should take pride in being an American. An American enjoys numerous freedoms, not the least of which are the advantages of democratic institutions and concepts. "The great thing about being an American is that no matter what our nation of origin might be, once we pledge our loyalty to this country, we become Americans, regardless of sex, age, creed or nationality."[128] All too often, however, Americans take these concepts for granted and need to be reminded of their freedom and way of life as an American. This reminder is especially needed for the prisoner of war.

Two key factors greatly affected survival in a prisoner of war environment—dedication and motivation.[129] These two factors were incorporated into *DOD Instruction 1300.21, Code of Conduct (COC) Training and Education.*[130] Dedication and motivation do not depend on the military status of the individual. Dedication and motivation are universal concepts applicable to all individuals finding themselves in a prisoner of war environment.

Therefore, this first principle necessarily focuses the American citizen on the United States and what it means to be a U.S. citizen. This focus is necessary because "[a] prisoner's world is subject to a variety of influences, both internal and external, influences that can cause. . .perceptions to expand and contract as the situation changes."[131] What does not change is what it means to be an American. This principle is a common reference point for all American prisoners of war and "when

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[128] Michael T. Moseley, *Code of Conduct Empowers Military* (Apr. 11, 2003), *available at* http://public.travis.amc.af.mil/news/tailwindonline/stories/2003/apr/20030411_11.htm (last visited Dec. 7, 2004).

[129] *See generally* ROCHESTER & KILEY, *supra* note 17, at 597.

[130] DOD INSTR. 1300.21, *supra* note 8.

[131] Commander Robert J. Naughton, *Motivational Factors of American Prisoners of War Held by the Democratic Republic of Vietnam*, 27 NAVAL WAR C. REV. 2, 3 (1975) (reflecting the author's six years of experiences and observations as a prisoner of war during Vietnam).

properly understood and followed makes the captive's belief structure increasingly resistant to any external efforts to alter it."[132]

This principle also focuses the American on individual responsibility as well as the United States' responsibility. It serves as a reminder that every American is part of a team working together—the prisoner of war working to survive with honor and the U.S. working toward the prisoner's release.[133] "The combination of pride and obligation seems to motivate men, time and time again, to resist to the limit of their endurance."[134] This principle is intended to evoke a sense of pride, duty, and patriotism.[135]

2. Special Favors, Parole and Escape

> If I am captured, I will not negotiate my own release nor accept special favors from the enemy. If offered and approved, I may accept a simple parole. When directed, I will make every effort to escape and aid others to escape.

This principle, as with the corresponding principle from the Armed Forces Code, is aimed at enemy efforts to influence, manipulate and compromise prisoners of war. This principle is necessary since it is unlikely that a captor would offer special favors without expecting some benefit. Special treatment by the enemy "is a technique used to break the will of those who are captured. It helps to propagate the Stockholm Syndrome, in which the captured begins to identify with the captors and assist them unwittingly."[136] Further, under the appropriate set of

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[132] Lieutenant Colonel Richard E. Porter, *The Code of Conduct: A Guide to Moral Responsibility*, 32 AIR UNIV. REV. 107, 111 (1983).

[133] *See generally* U.S. DEP'T OF DEFENSE, DIR. 2310.2, PERSONNEL RECOVERY (22 Dec. 2000). The DOD has primary responsibility for recovering U.S. military, DOD civilian employees and contract personnel deployed outside the United States and its territories. *Id.* at para. 4.2; *see also* U.S. DEP'T OF DEFENSE, INSTR. 2310.4, REPATRIATION OF PRISONERS OF WAR (POW), HOSTAGES, PEACETIME GOVERNMENT DETAINEES AND OTHER MISSING OR ISOLATED PERSONNEL para. 4.2 (21 Nov. 2000) [hereinafter DOD INSTR. 2310.4]. A prisoner's release "can occur through military or diplomatic means; through efforts of International Organizations [], Non-Governmental Organizations[] or persons; or through a combination of these means." DOD INSTR. 2310.4, *supra*, para. 4.2.

[134] *Id.*

[135] *See* Naughton, *supra* note 131, at 4.

[136] Moseley, *supra* note 128.

circumstances, the acceptance of special favors might subject a repatriated prisoner of war to trial for unauthorized intercourse or communication with the enemy.[137]

Under international law, parole traditionally consisted of the release of a prisoner in return for a promise not to bear arms.[138] Geneva Convention III, Article 21, however, places no restrictions on the types of promises required of a prisoner in exchange for parole,[139] with the exception that parole must be authorized by the prisoner of war's country.[140] DOD defines parole as "promises a POW gives the captor to fulfill stated conditions. . .in consideration of special privileges."[141] Current U.S. policy prohibits military prisoners of war from accepting parole, but is silent regarding parole for civilians.[142]

A civilian that accepts a parole agreement from an enemy captor potentially violates U.S. law if the civilian initiated and negotiated the parole agreement without authorization or if the parole agreement contains conditions that violate other U.S. statutes.[143] The United States has conferred upon the DOD the primary responsibility for recovery and repatriation of U.S. military personnel, DOD civilian employees and DOD contractor prisoners of war.[144] Any interference with this authority by a civilian prisoner of war acting on his or her own initiative, may find

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[137] *See* 18 U.S.C. § 953 (2000); *supra* note 122 (providing the text of the "Logan Act"); s*ee also* Martin v. Young, 134 F. Supp. 204 (N.D. Cal. 1955) (holding that "voluntarily attending social functions conducted by his captors; by living, eating, drinking with, and otherwise fraternizing with his captors; and by otherwise unnecessarily cooperating with his captors" could be tried in the U.S. courts); United States v. Peace Info. Ctr., 97 F. Supp. 255, 261 (D.C.D.C. 1951) (confirming such treacherous acts as crimes under federal law).

[138] *See* COMMENTARY III, *supra* note 28, at 178.

[139] *See id.* "The Convention makes provision for liberty on parole or promise, but with a reservation: the laws and regulations of the Power on which prisoners depend must be respected. This reservation is imperative for the Detaining Power itself." *Id*. at 179. "Such laws and regulations may either forbid prisoners of war to accept release on parole in any circumstances, or may allow them to do so subject to certain conditions." *Id*.

[140] *See* Geneva Convention III, *supra* note 12, art. 21.

[141] DOD INSTR. 1300.21, *supra* note 8, para. E2.2.3.1.5.

[142] *See id*.

[143] *See supra* note 122 (providing the text of 18 U.S.C. § 794). Any parole agreement conditioned upon giving information to the enemy likely violates this statue. However, "[t]he Detaining Power may not. . .offer release on parole to prisoners of war if the laws and regulations of the Power on which they depend forbid them to accept." COMMENTARY III, *supra* note 28, at 179.

[144] *See* Missing Persons Act, 10 U.S.C. §§ 1501-1513 (2000); DOD INSTR. 2310.4, *supra* note 135, para. 4.2.

him or herself facing an indictment under the Logan Act for unauthorized interjection into the conduct of United States' foreign affairs.[145]

As far as escape is concerned, Geneva Convention III recognizes that the prisoner's country may impose upon him a duty to attempt to escape and that prisoners make such attempts.[146] Geneva Convention III has also placed certain restrictions upon the Detaining Power's ability to punish escape attempts. A prisoner may only receive disciplinary punishments for unsuccessful escape attempts.[147] A prisoner of war is subject to judicial trial and punishment for any offense that entails violence against life or limb or otherwise is committed without the sole intention of facilitating the escape.[148] Escapes and attempted escapes cannot be used as an aggravating circumstance during a trial for an offense committed during an escape or attempt to escape.[149]

The United States has imposed an escape obligation on its military members;[150] there is no similar obligation on U.S. civilians. Escape can have a detrimental effect on an enemy's war effort. It can also, however, have an equally detrimental effect on the welfare of the prisoners of war who remain behind.[151]

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[145] *See* 18 U.S.C. § 953 (2000); *supra* note 122 (providing the text of this section).

[146] *See* VIETNAM REPORT, *supra* note 62, at 23-24; Geneva Convention III, *supra* note 12, arts. 91-94.

[147] *See* Geneva Convention III, *supra* note 12, art. 92. Disciplinary sanctions include fines, eliminating certain privileges, additional duties, or more rigorous confinement. *See id*. art. 89. Additionally,

> [i]t is easy to determine at what point an attempt to escape ends and becomes a successful escape, but much more difficult to determine when it actually begins. To escape is to elude the custody and authority of the Detaining Power, and an attempt to escape logically begins when any preparatory action is undertaken for that purpose. An attempt to escape may be considered as beginning when prisoners of war acquire tools, maps, or plans, or when they start to dig a tunnel or stock food supplies, etc.

COMMENTARY III, *supra* note 28, at 449.

[148] *See* Geneva Convention III, *supra* note 12, art. 93, para. 2.

[149] *See id*. art. 93, para. 1.

[150] *See* Exec. Order No. 10,631, 20 Fed. Reg. 6057 (Aug. 17, 1955); DOD INSTR. 1300.21, *supra* note 8, paras. E2.2.3, E2.2.3.1.4.

[151] *See* BRACE, *supra* note 103, at 58. During his time in captivity, Ernest Brace attempted escape three times. *See* MCCAIN, supra note 103, at 213. While each attempt led to progressively more severe suffering upon capture, he knew that the likelihood of a

Escape is the ultimate form of resistance and prisoners of war, including civilians "must be prepared to take advantage of escape opportunities whenever they arise."[152] The Geneva Conventions do not prohibit civilian prisoners of war from escaping,[153] nor would an escape jeopardize the civilian noncombatant's prisoner of war status. An escaping noncombatant civilian, would, of course, jeopardize his or her protected status if, subsequent to escape, he or she engaged in hostilities.[154]

To increase the chance of success, however, escape attempts must be a coordinated effort. Impulsive or ill-planned escape attempts may endanger or cancel well-planned escape attempts, which have been properly coordinated. Irrational escape attempts may also serve as an excuse for a captor to impose harsh or abusive treatment on all prisoners in an attempt to preclude any further escape attempts.

3. Loyalty

> If I become a prisoner of war, I will keep faith with my fellow prisoners. I will obey the directives of those in command and I will give no information or take part in any action, which might be harmful to my comrades or my country.

One of the highest priorities of the DOD is "[p]reserving the lives and well-being of U.S. military, DOD civilian employees, and DOD

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successful escape depended upon a coordinated plan. *See id.* Hardly a day passed that he "did not devote some time to the prospect of escaping." BRACE, *supra* note 103, at 85. Mr. Brace suffered his confinement alone, despite being captured with a Thai national, until his transfer to the Hoa Lo Prison. *See id.* Upon initially arriving at the Hoa Lo Prison, Mr. Brace was placed in the same room as Harnavee, the Thai national, for the night, giving Mr. Brace his first opportunity to talk with Harnavee in nearly three years. *See id*. at 137. It was here Mr. Brace learned that his escape attempts resulted in harsher treatment not just for himself, but also for Harnavee. *See id*.

[152] DOD INSTR. 1300.21, *supra* note 8, para. E2.2.3.1.4.

[153] While the Geneva Conventions do not prohibit escape, the Detaining Power may prohibit such conduct through laws, regulations, or orders applicable to prisoners of war. "If any law, regulation or order of the Detaining Power shall declare acts committed by a prisoner of war to be punishable, whereas the same acts would not be punishable if committed by a member of the forces of the Detaining Power, such acts shall entail disciplinary punishments only." Geneva Convention III, *supra* note 12, art. 82, para. 2; *see also id.* arts. 92-93.

[154] *See id*. art. 3(1); Additional Protocol I, *supra* note 37, art. 51, para. 3.

contractors placed in danger of being isolated, beleaguered, detained, [or] captured. . .while participating in U.S.-sponsored activities."[155] "The [DOD] has a moral obligation to protect its personnel, prevent exploitation of its personnel by adversaries, and reduce the potential for captured personnel being used as leverage against the United States."[156] The DOD's policy, however, does not distinguish between the battlefield and the prisoner of war environment, nor does it distinguish between neutral, allied or enemy soil. These DOD obligations correspond to the obligations required of the prisoner of war—the mutual trust, honor and obligation that are the foundation of the Code.

"Keep faith," pronounces the fundamental necessity that prisoners of war remain faithful to one another. Further,

> [t]he adage "divide and conquer" is true both with regard to the tactics of the captor and as the antithesis to a formula for survival in a prisoner of war environment. A prisoner that has suffered extreme hardship through torture, illness, disease, or personal tragedy . . . can be pulled through his crisis only with aid of fellow prisoners. The prisoner who fails to assist fellow prisoners in the long run is acting contrary to his own best interests as well as those of the group.[157]

The prisoner of war environment can be compared to that of surviving a storm on a ship at sea.[158] "The survival of each individual is not a function of his individual survival skills but is dependent on the combined actions of each man to save the ship and get to calm waters. The key to saving the ship is a coordinated effort."[159]

A coordinated effort demands that one individual be in charge. In the prisoner of war environment, that individual is the senior military officer present. Military individuals receive CoC training prior to

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[155] DOD INSTR. 1300.23, *supra* note 4, para. 4.1.
[156] *Id.*
[157] Colonel J. Howard Dunn & Major W. Hays Parks, *"If I Become a Prisoner of War. . ."*, U.S. NAVAL INST. PROC., Aug. 1976 at 25.
[158] Commander Michael L. Kalapos, *A Discussion of the Relationship of Military and Civilian Contractor Personnel In the Event Members of Both Groups Become Prisoners of War* 8 (1987) (unpublished Executive Research Project, Industrial College of the Armed Forces) (on file with author).
[159] *Id.*

deploying "commensurate with their risk-of-capture level."[160] Furthermore, military members receive training in the Armed Forces Code from the moment they enter military service.[161] As duties and assignments change, so does the level of knowledge and training expected of a military member.[162] Therefore, the most qualified, trained individual to command the prisoner of war organization is the senior military officer present. This command organization, with civilians under the senior military officer, would be limited to the prisoner of war environment.[163]

The need for and benefit of a unified command structure was recognized during Vietnam. While "[i]n nearly every previous conflict . . . [civilians] had been repatriated or interned . . . the North Vietnamese and their associates disregarded this rule and held them as captives."[164] Civilians returning from captivity during Vietnam expressed the view that "civilians in a combat zone and liable to capture be clearly placed under the [Armed Forces] Code of Conduct."[165] This would include all civilians whether a contractor, a general schedule employee, or a member of the senior executive service.[166]

Command and discipline are essential, particularly in prisoner of war environment where they "permit unity of effort and a degree of strength and consistency in communicating with a captor."[167] In the psychologically vulnerable prisoner of war environment, loyalty to fellow captives, survival, and allegiance to the U.S. should be paramount

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[160] *See* DOD INSTR. 1300.21, *supra* note 8, para. 4.4.3.
[161] *See id.* para. 5.2.1.1.
[162] *See id*. paras. 5.2.1.2, 5.2.1.3.
[163] *See* Kalapos, *supra* note 158, at 2 (recognizing that although civilians had no legal obligation to follow a chain of command, they did so during the Vietnam War).
[164] Harold L. Hitchens, *Factors Involved in a Review of the Code of Conduct for the Armed Forces*, 30 NAVAL WAR C. REV. 47, 58 (1978). If persons qualify as a prisoner of war in accordance with Geneva Convention III, Article 4, there is no requirement for repatriation or internment based upon the person's status as a civilian. Repatriation and internment, however, appeared to be common practice during prior conflicts. On the other hand, "internment" is a term used in Geneva Convention IV. An Occupying Power generally uses internment when necessary for reasons of security. *See* Geneva Convention IV, *supra* note 12, art. 78.
[165] *Id*.
[166] During Vietnam, "some prisoners were not sure what was acceptable behavior. Those who did not have the guidance coming down through a chain of command often were the ones who wound up cooperating with the enemy." BRACE, *supra* note 103, at 149.
[167] Dunn & Parks, *supra* note 157, at 26.

rather than bickering over who is going to be responsible for what and to whom. When survival is dependant upon a combined effort of all individuals similarly situated, it is not the time to be asserting an "I don't have to" attitude.

A unified command structure facilitates communication, cohesion, and the orderly return of the greatest number of prisoners of war.[168] One command structure under the senior military member would also prevent civilians from interfering with activities required of the armed forces, which may subject a civilian to prosecution upon repatriation.[169] The senior civilian should not hesitate to advise the senior military officer on civilian-specific matters; however, there should only be one commander of the prisoner of war organization.

Although primary responsibility for the well being of all United States civilian citizens abroad rests with the Department of State,[170] the Department of State has little, if any, control over civilians while held in captivity. The Department of State would certainly be working toward the release of all captured U.S. personnel. During their captivity, DOD-uniformed personnel, however, are in the better position to provide for their safety and security.

4. Providing Information

> When questioned, should I become a prisoner of war, I am required to give my full name, date of birth, and rank

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[168] *See* Kalapos, *supra* note 158, at 2.

[169] *See* 18 U.S.C. § 2387 (2000); *supra* note 123 (providing the text of this section). This statute does not by its terms specifically embrace acts committed outside the U.S.; however, it is the type of criminal statute that would be inferred to have extra-territorial application in the absence of a provision to the contrary. *See* Martin v. Young, 134 F. Supp. 204, 208 (N.D. Cal. 1955) (stating that acts by a prisoner of war, such as participating in the preparation of propaganda writings and articles designed to promote disloyalty and disaffection among U.S. troops and attacking the war aims of the United States by asserting the United States had used germ warfare, could be prosecuted under 18 U.S.C. § 2387); United States v. Bowman, 260 U.S. 94, 97-98 (1922) (criminal statutes dealing with acts that are directly injurious to the government, and capable of perpetration without regard to particular locality, are to be construed as applicable to U.S. citizens upon the high seas or in a foreign country, despite no express declaration to that effect).

[170] *See* 22 U.S.C. § 2656 (2000); Exec. Order No. 12,656, 53 Fed. Reg. 47491 (Nov. 18, 1988) (amended by Exec. Order No. 13,074, 63 Fed. Reg. 7277 (Feb. 12, 1998)).

> equivalent. I will evade answering further questions to the utmost of my ability. I will make no oral statements disloyal to my country and its allies or harmful to their cause.

Upon capture, one of the first duties of the detaining power is to establish the identity of the captured individuals.[171] To assist in the identification process, Article 17, Geneva Convention III, requires every prisoner of war, when questioned on the subject, to "give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information."[172] This information not only establishes the prisoner's identity, it also designates the treatment to be accorded the prisoner of war.[173] The prisoner must give sufficient information to establish beyond any doubt the status as a member of an enemy armed force.[174] If a prisoner fails to provide this information, the detaining power may restrict the privileges accorded the prisoner based on rank or status.[175] A prisoner may not be coerced in any manner to provide this information nor be punished for refusing to answer.[176]

Privileges under Geneva Convention III depend upon the "rank" of the prisoner of war. Geneva Convention III does not delineate the status of persons accompanying the force beyond conferring the prisoner of war status upon such individuals. The knowledge of an individual's rank is necessary "to insure equality of treatment between prisoners of equal rank."[177] *Department of Defense Instruction 1000.1* contains equivalent

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[171] *See* COMMENTARY III, *supra* note 28, at 156.

[172] Geneva Convention III, *supra* note 12, art. 17; *see also* Rick S. Lear & Jefferson D. Reynolds, *Your Social Security Number or Your Life: Disclosure of Personal Identification Information by Military Personnel and the Compromise of Privacy and National Security*, 21 B. U. INT'L L.J. 1, 7 (2003) (providing a thorough discussion of the history of the social security number as an identifying number for military members and the security issues technology has created).

[173] Article 16, Geneva Convention III requires the Detaining Power to take into consideration rank and sex, as well as state of health and age, in determining the prisoner of war treatment. Articles 44 and 45 of the same Convention also direct that prisoners of war "be treated with the regard due to their rank and age." Geneva Convention III, *supra* note 12, art. 16.

[174] *See* COMMENTARY III, *supra* note 28, at 156.

[175] *See* Geneva Convention III, *supra* note 12, art. 17, para. 2.

[176] *See id*. art. 17, para. 4.

[177] *See id*. art. 43.

rank guidance for civilians.[178] Civilian employees are assigned to an appropriate Geneva Convention Category, based upon the civilian's pay grade.[179] Contractors are assigned "to an appropriate category . . . based upon the individual's standing in his profession or line of work and the difficulty and responsibility of the duties to be performed."[180] The rank equivalency should appear on the individual's identification card.[181]

Geneva Convention III does not require the prisoner of war to give a captor any information beyond name, rank, identification number, and date of birth.[182] Prisoners may give additional information. The commentary to Geneva Convention III, however, cautions against giving military information to the captor,[183] and U.S. domestic law prohibits communicating defense information to a foreign government.[184] Article 17 of Geneva Convention III prohibits the use of physical and mental torture or coercion in any form on prisoners "to secure from them information of any kind."[185] This does not mean, however, that a detaining power cannot ask a prisoner for information.

During any conflict, a detaining power will try to obtain military information from a prisoner to use to the detaining power's advantage.[186] "Contractor personnel are relied on for technical assistance; advice; instruction; and training of military personnel in the installation, operation, and maintenance of weapon systems and equipment."[187] Their

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[178] *See* DOD INSTR. 1000.1, *supra* note 51, at Attachment 1 to Enclosure 3 (providing a Table of Military and Civilian Equivalent Grades for Prisoner of War Identification).
[179] *Id*.
[180] *Id*. para. E3.1.4.
[181] *Id*. para. 5.2.4.
[182] *See* U.S. DEP'T OF ARMY, REG. 350-30, CODE OF CONDUCT, SURVIVAL, EVASION, RESISTANCE, AND ESCAPE (SERE) TRAINING para. 2-7a (10 Dec. 1985). Communication is allowed with those outside the prisoner of war environment. Prisoners have the right to write to family and the Central Prisoners of War Agency. *See* Geneva Convention III, *supra* note 12, art. 70. Prisoners are allowed to send and receive letters and cards. *See id*. art. 71. Communications with those outside the prisoner of war environment, however, are subject to censorship. *See id*. art. 76. Prisoners also have the right to make known their requests regarding the conditions of captivity and to remain in communication with the prisoners' representatives. *See id*. arts. 78 and 57.
[183] COMMENTARY III, *supra* note 28, at 156.
[184] 18 U.S.C. § 794 (2000).
[185] Geneva Convention III, *supra* note 12, art. 17 para. 4; COMMENTARY III, *supra* note 28, at 163.
[186] *See id*.
[187] U.S. DEP'T OF DEFENSE, OFFICE OF THE INSPECTOR GENERAL, AUDIT REP. NO. 91-105, CIVILIAN CONTRACTOR OVERSEAS SUPPORT DURING HOSTILITIES 1 (June 26, 1991).

knowledge and security clearance level makes them at great risk of exploitation by an enemy force. Any information beyond the minimum required under Geneva Convention III might aid the enemy in its war efforts. Any information on military operations or other information relating to national security, in the hands of the enemy, potentially poses a significant risk to the military and security of the United States.

Following the experiences of American prisoners of war during the Korean conflict, American service members were directed to give only the information specified in Article 17.[188] This is evident from the text of the Armed Forces Code as well as the instructional material that accompanied the original text.[189] However, this proved unworkable, which lead to the two word changes to Article V, previously discussed.[190]

Minimizing the disclosure of important information, surviving captivity, and returning home without selling out or betraying his country or comrades should be the objective of any American prisoner of war. There must be some degree of resistance to providing additional information if a prisoner of war regards himself as a citizen. There is no clear distinction as to what may be information harmful to the military aspects of war and what information is intended for political and propaganda aims. The face of warfare is changing dramatically and drastically as technology forges forward. Therefore, resistance to propaganda, indoctrination and other enemy techniques to gain

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[188] *See* Exec. Order No. 10,631, 20 Fed. Reg. 6057 (Aug. 17, 1955).

[189] *Id*. The training material accompanying Article V of the Code of Conduct for Members of the Armed Forces of the United States directs,

> When questioned, a prisoner of war is required by the Geneva Convention and permitted by this Code to disclose his name, rank, service number and date of birth. A prisoner of war may also communicate with the enemy regarding his individual health or welfare as a prisoner of war and, when appropriate, on routine matters of camp administration. Oral or written confessions true or false, questionnaires, personal history statements, propaganda recordings and broadcasts, appeals to other prisoners of war, signatures to peace or surrender appeals, self criticisms or any other oral or written communication on behalf of the enemy or critical or harmful to the United States, its allies, the Armed Forces or other prisoners are forbidden.

Id.

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

information begins with providing the minimum information required to be disclosed.

"I will evade answering . . . to the utmost of my ability," however, allows for the realities of interrogation and individual susceptibility to sustained coercion. It acknowledges that everyone has a breaking point. "Make no oral statement . . ." is more of an absolute because disloyal statements are contrary to established law. Mere words or disloyal thoughts would not be criminal;[191] however, propaganda statements that further the enemy efforts or hamper the United States' interests would.[192] The Citizen's Code "seeks to minimize the ability of hostile nations to use American prisoners as propaganda tools and sources of information."[193]

Divulging false information may be an invaluable tool for avoiding intense interrogation but it has drawbacks.[194] Convincing information generally requires credible answers and constant vigilance because an interrogator will test the story's veracity. In this era of technology and

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[191] *See* Chandler v. United States, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949). During WWII, Douglas Chandler, a U.S. citizen, worked as an employee of the German Radio Broadcasting Company, an agency of the German government. *See id.* at 924. He volunteered to prepare "commentaries" and record them for broadcast to the United States. *See id.* at 925. The broadcasts were used extensively as a means of psychological warfare to support the German war effort. *See id.* at 925-26. On appeal, Chandler challenged his conviction based on the fact that mere words, the expression of opinions and ideas for the purpose of influencing people, could not constitute the overt act of treason and is protected by the First Amendment. *See id*. at 938. The Court disagreed:

> It is well settled that one cannot, by mere words, be guilty of treason. That is true in the sense that the mere utterance of disloyal sentiments is not treason; aid and comfort must be given to the enemy. But the communication of an idea, whether by speech or writing, is as much a[n] act as is throwing a brick, though different muscles are used to achieve different effects . . . Trafficking with the enemy, in whatever form, is wholly outside the shelter of the First Amendment.

Id. at 938-39 (internal citations omitted).

[192] *See* Gillars v. United States, 182 F.2d 962, 968 (D.C. Cir. 1950). Preparing and making speeches in Germany for broadcast to the U.S. for the purpose of showing discontent with the U.S. government, impairing the morale of the armed forces and creating dissension between the American people and the people of allied countries constituted treason. *See* Burgman v. United States, 188 F.2d 637, 639-40 (D.C. Cir.), *cert. denied*, 342 U.S. 838 (1951).

[193] Lear & Reynolds, *supra* note 172, at 11.

[194] Dunn & Parks, *supra* note 157, at 27.

the rapid access to information, information is more readily verifiable. What may have taken days or weeks during Vietnam to verify, is easily verifiable today in matter of hours, if not minutes.

A prisoner of war should also be aware of other legal concerns in making or signing statements, whether the statements are true or false. A prisoner could possibly be confessing to acts which are clear violations of international law or the law of the country in which they are held prisoner. Such confessions, although likely forced, might place the prisoner in greater jeopardy. This is especially true if the statement involves acts committed prior to capture because some states have expressed reservations in regard to Article 85, Geneva Convention III.[195] These reservations essentially remove Geneva Convention III protections from prisoners of war convicted for acts committed prior to capture.[196]

5. Reminder

> I will never forget that I am an American, responsible for my actions and dedicated to the principles, which made my country free. I will trust in my God and in the United States of America.

The final principle in the Citizen Code of Conduct ties into the first, reinforcing an American's allegiance to the United States. It serves to instill discipline and acknowledge responsibility and accountability for individual actions. Finally, it reminds individuals that the United States is dedicated to the return of all prisoners of war and to not give up in the face of adversity.

C. Enforcement

Although not subject to the discipline of the U.S. while interred by the enemy,[197] a prisoner is, upon repatriation, subject to prosecution for

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[195] COMMENTARY III, *supra* note 28, at 423.

[196] *Id*. at 424.

[197] Geneva Convention III, *supra* note 12, arts. 82-88. The prisoner is subject to discipline under the laws and regulations of the detaining power. *Id*. During captivity, "disciplinary punishment may be ordered only by an officer having disciplinary powers in his capacity as camp commander, or by a responsible officer who replaces him or to whom he has delegated his disciplinary powers." *Id*. art. 96, para. 2. "In no case may

criminal acts committed during captivity.[198] The DOD may investigate the circumstances of capture and the period of detention.[199] Since the two World Wars, American prisoners of war have been tried for their misconduct while in the hands of the enemy.[200] "Prisoner misconduct during the two World Wars consisted primarily of giving military information, doing acts detrimental to other prisoners, making propaganda broadcasts, and generally collaborating with and giving aid and comfort to the enemy."[201]

There are at least a half dozen criminal statutes at the United States' disposal that can be used to punish misconduct by its citizens while in captivity. Some of these statutes have been previously mentioned and linked to specific provisions of the proposed Citizen's Code. Current U.S. statutes capture the majority of documented misconduct[202] and misconduct contemplated by the Citizen's Code. The existing U.S. laws, judicial processes, and the recently enacted Military Extraterritorial

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such powers be delegated to a prisoner of war or be exercised by a prisoner of war." *Id*. para. 3. The camp commander is "a responsible commissioned officer belonging to the regular armed forces of the Detaining Power." *Id*. art. 39, para. 1.

[198] *See* United States *ex. rel.* Hirshberg v. Malanaphy, 73 F. Supp. 990, 992 (E.D.N.Y. 1947) (holding that a repatriated prisoner of war may be held liable for offenses committed during captivity against his country and his fellow prisoners of war and cannot defend on the grounds that his country's legislation does not apply because it is suspended by Geneva Convention III, art. 82); *see also* COMMENTARY III, *supra* note 28, at 409.

[199] *See* DOD INSTR. 2310.4, *supra* note 135, para. E1.1.2.3. The repatriation process consists of three phases. *See id*. para. E1.1. "Phase I begins when the returnee first comes under U.S. military control." *See id*. para. E1.1.1. Phase II "upon arrival at the theater treatment and processing facility." *See id*. para E1.1.2. And, Phase III "when the returnee is transported to a CONUS facility." *See id*. para. E1.1.3. During Phase II, intelligence personnel conduct a tactical debriefing of the repatriated prisoners of war. While this debriefing is focused on obtaining "time-sensitive information on U.S. personnel last seen alive in a POW camp system, but who are still unaccounted for," the instruction acknowledges the potential for prisoners to divulge incriminating information. *See id*. para. E1.1.2.3. The instruction provides direction for the interviewer should this occur. *See id.*

[200] Prisoners of war were tried under the civilian law of treason since military law had no provision specifically covering prisoners of war until 1951 (UCMJ art. 105). Note, *Misconduct in the Prison Camp: A Survey of the Law and An Analysis of the Korean Cases*, 56 COLUM. L. REV. 709, 719 (1956). Prior to the Korean War, Chief Signalman Harold Hirshberg was the only American tried by court-martial for his misconduct offenses. *See id*. at 719 n.68. The effective date of the Uniform Code of Military Justice was 31 May 1951.

[201] *Id*. at 720.

[202] *See generally* PRISONER REPORT, *supra* note 1; *Misconduct in the Prison Camp*, *supra* note 200, at 742-64.

Jurisdiction Act[203] not only provide criminal sanctions but also an enforcement mechanism. Determining whether the existing scheme satisfactorily addresses criminal behavior, however, will not be possible until after the first prosecution of civilian prisoner of war misconduct.

One area of the law that should be amended today is the statute of limitations for prosecuting criminal conduct committed by prisoners of war. In general, no person may be prosecuted, tried, or punished for any non-capital offense more than five years after the commission of the offense.[204] Based upon recent conflicts, five years might not be a problem for prosecuting criminal acts committed while a prisoner of war. During Vietnam, however,` the enemy held some prisoners over eight years.[205] Theoretically, criminal acts committed upon initial capture would be beyond a prosecutors reach. The limitations period, however, may be suspended under certain circumstances.[206]

The War Suspension Act statute stops the statute of limitations from running when the United States is at war.[207] Unfortunately, this statute is limited to crimes involving fraud against the United States and has been restricted to declared wars.[208] Consideration should be given to amending the War Suspension Act to encompass a broader scope of criminal offenses, as well as international armed conflicts.

The United States last declared war on another country in World War II. However, the United States.continues to be involved in military conflicts around the world. The War Suspension Act is essentially moot because of the now settled practice of becoming involved in conflicts without formally declaring a war and the limits on war as a method of settling international disputes.[209] Failing an amendment to the War Suspension Act to include "international armed conflict," consideration should be given to expanding the statute that suspends the limitations

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[203] 18 U.S.C. §§ 3261-3267 (2000). Enacted on 22 November 2000, these laws extend federal criminal jurisdiction over civilians accompanying the armed forces who commit serious offenses overseas when a host country does not exercise criminal jurisdiction. 18 U.S.C. § 3261(b).

[204] *See id.* § 3282(a).

[205] *See* ROCHESTER & KILEY, *supra* note 17, at 598.

[206] *See* 18 U.S.C. § 3287.

[207] *See id.*

[208] *See* United States v. Shelton, 816 F. Supp. 1132, 1135 (W.D. Texas 1993) (defining a conflict as a "war" provided by in the Suspension Act).

[209] *See* U.N. CHARTER art. 2, paras. 3, 4.

period to permit the U.S. to obtain foreign evidence.[210] Without the ability to stop the limitations period from running during international armed conflicts, some prisoner of war misconduct may go unpunished.[211]

The United States has an affirmative obligation to prevent misconduct from recurring. Declining to punish or the inability to punish those who violate domestic law could adversely affect future prisoners in captivity. Prosecution may be difficult, however, it is the only way to enforce compliance of the code for the greater good, and ensure justice. Administrative or contractual remedies are insufficient to ensure compliance with the Citizen's Code and ensure the safety of all personnel, uniformed as well as civilian, in captivity. Only an individual's own moral character and the deterrent of punishment upon repatriation can prevent misconduct. "Morally undesirable conduct may or may not warrant legal action depending on the requirements of the law for prosecution, but it is fair to say that legal prosecution always consists of morally undesirable conduct. The requirements for legal prosecution exceed those for morally acceptable conduct."[212]

D. Training

Cohesiveness, discipline, and leadership are essential to survival in a prisoner of war environment. Without proper training, however, these three elements of survival will not exist. *Department of Defense Directive 1300.7*, discusses the policy behind training in the Armed Forces Code of Conduct.[213] "CoC training fosters the high degree of motivation and dedication necessary . . . to survive captivity."[214] This is no less true for the Citizen's Code.

Citizen Code of Conduct training will promote compliance with the law of war,[215] and U.S. law. Citizen Code training will also serve as a reminder to all Americans of the democratic ideals and institutions that make the U.S. such a great country. To accomplish these objectives,

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[210] *See* 18 U.S.C. § 3292.

[211] This is especially true if the United States finds itself involved in another Vietnam type conflict where some prisoners of war were held over eight years. *See* ROCHESTER & KILEY, *supra* note 17, at 598.

[212] Porter, *supra* note 134, at 111.

[213] DOD DIR. 1300.7, *supra* note 9, para. 3.

[214] *See id.* at para. 3.1.

[215] *See id*. (promoting service members' compliance with the Law of War).

training "must be presented with understanding, skill and devotion sufficient to implant a conviction in the heart, conscience, and mind . . . that full and loyal support of the code is to the best interests of his country, his comrades, and himself."[216]

Training also would not be complete without exposure to the culture of the country to which the civilian is deploying. All potential prisoners of war should have a basic understanding of the enemy's culture and the anticipated methods that an enemy captor may employ against prisoners of war.[217] Those at risk of becoming a prisoner of war need the best tools available to resist and cope with current, known practices, since an enemy is liable to work harder on Americans than other prisoners because of our seemingly superior attitude. The next enemy is likely to employ a combination of physical and ideological techniques, to weaken allegiance to the United States and western ideals.

As the Defense Review Committee concluded in 1976, "the six articles of the Code will never stand alone without supportive training, no matter how well they are worded."[218] This is also true with civilian training in the Citizen's Code. The DOD has taken the first step toward training civilian employees and DOD contractor personnel by issuing *Department of Defense Instruction 1300.23*, *Isolated Personnel Training for DOD Civilian and Contractors*. The instruction, however, has yet to be fully implemented and is deficient in several respects.

First, the DOD instruction mandates training to support the Code of Conduct.[219] The only Code of Conduct that currently exists is the Armed Forces Code. Training civilians on this standard gets dangerously close to erasing, not just blurring, the distinction between uniformed combatants and noncombatant civilians authorized to accompany the force. A civilian should understand what is required and expected of a military member; however, a civilian should not be trained to comply with those expectations. The Armed Forces Code conflicts with the obligations of a noncombatant civilian under the law of war and the Geneva Conventions. A Citizen's Code, specifically tailored to the rights and obligations of a civilian prisoner of war, would cure this deficiency.

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[216] PRISONER REPORT, *supra* note 1, at 15.
[217] VIETNAM REPORT, *supra* note 62, at 11.
[218] *Id.* at 8.
[219] *See* DOD INSTR. 1300.23, *supra* note 4, para. 5.6.

Second, the instruction anticipates implementing instructions from each of the Military services.[220] Separate implementing instructions and training ignores the results from the 1976 Defense Review Committee's review of the Armed Forces Code.[221] The 1976 Committee devoted a significant amount of attention to the issue of the Armed Forces Code and related training.[222] The wide disparity in training caused many prisoners to view their obligations under the Code differently, which often caused friction within a group of prisoners.[223] Centralized, combined service and realistic training that includes uniformed and civilian trainees would help remedy this deficiency. While the time available to train is often limited, consistency of interpretation may be the key to survival in the prisoner of war environment.

Finally, in addition to training on a Citizen's Code of Conduct, civilians must be informed that their behavior in captivity or detention is fully accountable under U.S. law and be reminded of their duty of allegiance. The consensus of repatriated prisoners of war interviewed by the 1976 Committee "was that those who violated the UCMJ were not required to account for their actions; they were put to no test of justice; and, their apparent immunity would serve to undermine the command authority in any future PW organizations."[224] Similarly, this can be expected from civilian prisoners of war. The Citizen's Code serves to protect the prisoner of war and the U.S. by placing equal obligations on the prisoner and the U.S.[225] United States civilians need to fully understand their obligations as an American and the United States' obligations to its citizens.

IV. Conclusion

America must not fall into the trap of thinking that U.S. civilians are not at risk of capture because of the United States' military superiority. America has yet to see any major incidents involving civilian employees or contractor personnel but that day could be just over the horizon. All civilians accompanying the armed forces, therefore, must be trained on how to behave in the event of capture. Not only must the DOD train

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[220] *See id.* paras. 5.7.1, 6.1.
[221] *See* PRISONER REPORT, *supra* note 1, at 12-13.
[222] *See* VIETNAM REPORT, *supra* note 62, at 9.
[223] *See id*.
[224] *Id*. at 16.
[225] *See* VIETNAM SUPPLEMENTAL REPORT, *supra* note 77, at IV-2.

these civilians for survival in captivity, the DOD must also inform and train civilians on their rights and obligations if captured.

With the ever-increasing number of civilians near active hostilities, an isolating incident, such as enemy capture, is virtually inevitable. Therefore, "[i]t is critical to establish standards of behavior for DOD civilians and contractors for conduct as isolated individuals"[226] today. These standards of behavior are embraced in the proposed Citizen Code of Conduct.

Untrained and uninformed civilians would be easy victims of an unscrupulous enemy. Many of our "enemies" today fear United States dominance and imposition of western ideals. Our enemy is also well aware of the fact that the law significantly constrains U.S. conduct, military as well as civilian. The next American prisoners of war are likely to encounter an enemy that employs a combination of ideological tactics, to weaken allegiance to the United States and western ideals, as well as torture. Improper and objectionable behavior not only puts the civilian at risk but also all other prisoners of war, including service members. All service members' conduct is fully accountable under the UCMJ; civilians should learn that their behavior in captivity is also fully accountable under U.S. law.

The Citizen's Code provides a framework of ideals and ethical standards that will help an individual in resisting the physical, mental, and moral onslaughts of an enemy captor. The Citizen's Code will provide Americans with the "unified and purposeful standard of conduct"[227] that the 1955 Committee stated Americans required. If the individual lives up to the ideals and ethical standards, the individual need not worry about an investigation concerning their behavior. The individual will also not have to live the rest of their life knowing that something they said harmed fellow prisoners or their country and its allies.

The Citizen's Code does not ask Americans to put themselves in harms way, nor does it ask them to do something they are not already

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[226] Defense Prisoner of War/Missing Personnel Office, *2001 DoD Personnel Recovery Conference After Action Report, Executive Summary* pt. II, 3.h.1.b (Jan. 22-24, 2001), *available at* http://www.dtic.mil/dpmo/pr/2001conf/2001conf_aar.htm (last visited Nov. 23, 2004).

[227] PRISONER REPORT, *supra* note 1, at vii.

required to do as U.S. citizens. Domestic law, as well as Geneva Convention III, requires these things. As with the Armed Forces Code, the Citizen's Code does not conflict with U.S. law, international law or the law of war.[228] All of which continue to apply to all Americans, civilian or military, during captivity or other hostile detention. Every individual is responsible and accountable for his or her conduct at all times.

Failure to adhere to a Citizen's Code may subject an individual to prosecution.

> Recognizing the importance and necessity for considering evidentiary, extenuating, mitigating, and psychological factors as well as the political ramifications of postwar prosecution of former prisoners of war, the role of the prisoner of war . . . in future conflicts will be more difficult if we do not insure now that the words "responsible for my actions"'. . enjoy a firm basis of support.[229]

Former prisoners of war have been court-martialed for misconduct after every major conflict in our nation's history. If the present U.S. statutory scheme does not adequately address civilian prisoner of war misconduct, we owe it to our potential future prisoners to identify and rectify the deficiencies.

Today's battlefield will almost certainly continue to bring new issues to the forefront of our legal community, especially with the increasing number of civilians as part of the battle space. The situation is becoming increasingly complex. Despite the complexity and the emphasis on delineating a policy with respect to civilians on the battlefield, one area has been ignored—the civilian prisoner of war. Just because civilians are not uniformed members of the armed forces, does not mean they are out of harms way. Civilians are considered a part of the total force package, yet their risk of enemy capture falls by the wayside. As the Army recommended to the 1976 Committee, "effort should be made at the appropriate level of government to clarify the responsibilities and

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[228] *See generally* Smith, *supra* note 101 (providing an excellent discussion of the compatibility of the Armed Forces Code with Geneva Convention III).

[229] Dunn & Parks, *supra* note 157, at 23.

expected standards of conduct of U.S. civilian persons . . . confined by the enemy."[230]

Today's battlefield presents major challenges, including challenges that will extend to the treatment and conduct of prisoners of war. These challenges demand moral guidance and realistic, joint training. Service members have the Armed Forces Code of Conduct, the UCMJ and continuous training obligations. Without a comparative set of guidelines and training, specifically tailored for the civilian, individually and collectively, civilians will pay a higher price than their military colleagues.[231]

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[230] VIETNAM SUPPLEMENTAL REPORT, *supra* note 77, at II-7.

[231] *See* Porter, *supra* note 134 , at 110. Lieutenant Colonel Porter uses the civilian hostages in Iran to demonstrate how their lack of guidance created difficulty and uncertainty as to what constituted proper conduct in the situation. *See id*. at 110. "Each [civilian] had to probe the 'minefield of survival and personal dignity' using intuition. Each had to agonize over which of the captor's demands justified compliance and which did not . . . Military hostages appear to have had a discernible advantage because they understood their overall moral responsibility." *Id*.

Appendix A

Armed Forces Code of Conduct

I

I AM AN AMERICAN, FIGHTING IN THE FORCES WHICH GUARD MY COUNTRY AND OUR WAY OF LIFE. I AM PREPARED TO GIVE MY LIFE IN THEIR DEFENSE.

II

I WILL NEVER SURRENDER OF MY OWN FREE WILL. IF IN COMMAND I WILL NEVER SURRENDER THE MEMBERS OF MY COMMAND WHILE THEY STILL HAVE THE MEANS TO RESIST.

III

IF I AM CAPTURED I WILL CONTINUE TO RESIST BY ALL MEANS AVAILABLE. I WILL MAKE EVERY EFFORT TO ESCAPE AND AID OTHERS TO ESCAPE. I WILL ACCEPT NEITHER PAROLE NOR SPECIAL FAVORS FROM THE ENEMY.

IV

IF I BECOME A PRISONER OF WAR, I WILL KEEP FAITH WITH MY FELLOW PRISONERS. I WILL GIVE NO INFORMATION OR TAKE PART IN ANY ACTION WHICH MIGHT BE HARMFUL TO MY COMRADES. IF I AM SENIOR, I WILL TAKE COMMAND. IF NOT, I WILL OBEY THE LAWFUL ORDERS OF THOSE APPOINTED OVER ME AND WILL BACK THEM UP IN EVERY WAY.

V

WHEN QUESTIONED, SHOULD I BECOME A PRISONER OF WAR, I AM REQUIRED TO GIVE NAME, RANK, SERVICE NUMBER, AND DATE OF BIRTH. I WILL EVADE ANSWERING FURTHER QUESTIONS TO THE UTMOST OF MY ABILITY. I WILL MAKE NO ORAL OR WRITTEN STATEMENTS DISLOYAL TO MY COUNTRY AND ITS ALLIES OR HARMFUL TO THEIR CAUSE.

VI

I WILL NEVER FORGET THAT I AM AN AMERICAN, FIGHTING FOR FREEDOM, RESPONSIBLE FOR MY ACTIONS, AND DEDICATED TO THE PRINCIPLES WHICH MADE MY COUNTRY FREE. I WILL TRUST IN MY GOD AND IN THE UNITED STATES OF AMERICA.

Appendix B

Proposed Citizen Code of Conduct

I

I AM AN AMERICAN, ACCOMPANYING THE FORCES WHICH GUARD MY COUNTRY AND OUR WAY OF LIFE. I AM PREPARED TO FULFILL MY OBLIGATION OF ALLEGIANCE TO THE UNITED STATES OF AMERICA.

II

IF I AM CAPTURED, I WILL NOT NEGOTIATE MY OWN RELEASE NOR ACCEPT SPECIAL FAVORS FROM THE ENEMY. IF OFFERED AND APPROVED, I MAY ACCEPT A SIMPLE PAROLE. WHEN DIRECTED, I WILL MAKE EVERY EFFORT TO ESCAPE AND AID OTHERS TO ESCAPE.

III

IF I BECOME A PRISONER OF WAR, I WILL KEEP FAITH WITH MY FELLOW PRISONERS. I WILL OBEY THE DIRECTIVES OF THOSE IN COMMAND AND I WILL GIVE NO INFORMATION OR TAKE PART IN ANY ACTION, WHICH MIGHT BE HARMFUL TO MY COMRADES OR MY COUNTRY.

IV

WHEN QUESTIONED, SHOULD I BECOME A PRISONER OF WAR, I AM REQUIRED TO GIVE MY FULL NAME, DATE OF BIRTH, AND RANK EQUIVALENT. I WILL EVADE ANSWERING FURTHER QUESTIONS TO THE UTMOST OF MY ABILITY. I WILL MAKE NO ORAL STATEMENTS DISLOYAL TO MY COUNTRY AND ITS ALLIES OR HARMFUL TO THEIR CAUSE.

V

I WILL NEVER FORGET THAT I AM AN AMERICAN, RESPONSIBLE FOR MY ACTIONS AND DEDICATED TO THE PRINCIPLES WHICH MADE MY COUNTRY FREE. I WILL TRUST IN MY GOD AND IN THE UNITED STATES OF AMERICA.

SOLVING THE WAR PUZZLE: BEYOND THE DEMOCRATIC PEACE[1]

REVIEWED BY MAJOR RICHARD P. DIMEGLIO[2]

> *Wars are not simply accidents. Nor, contrary to our ordinary language, are they made by nations. Wars are made by people; more specifically they are decided on by the leaders of nation states . . . . Incentive theory makes the claim that we can predict the occurrence of war more accurately, and intervene to control it more effectively, when we focus our attention squarely on the incentives of the decision makers controlling the decision to use force . . . .*[3]

Solving the War Puzzle: Beyond the Democratic Peace is Professor John Norton Moore's latest effort to provide an "incremental" contribution to the "war/peace puzzle" in the hope of developing a theory as to the cause of conflict and a means to control warfare.[4] Although Moore's book fails to achieve the overly ambitious title and does not truly provide a solution, it is worth a considered study by international law practitioners and military strategists. Moore offers readers a new overarching theory incorporating both the widely accepted democratic peace model and the principle of deterrence. By providing this model, he offers a more predictive and comprehensive foreign policy paradigm by which one can analyze the jigsaw world of international relations.

Moore is certainly not a stranger to international law or intellectual debate as to the origins of warfare. As the Walter L. Brown Professor of Law and the Director of the Center for National Security Law at the University of Virginia School of Law, and as the former Chairman of the Board of the United States Institute of Peace, he has taught, lectured and

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[1] JOHN NORTON MOORE, SOLVING THE WAR PUZZLE: BEYOND THE DEMOCRATIC PEACE (2004).

[2] U.S. Army. Written while assigned as a student, 53d Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[3] MOORE, *supra* note 1, at xx-xxi.

[4] *See id*. at xiii.

written extensively on the subjects of international law, war, and peace, for over four decades.[5] He is eminently qualified to tackle these topics and his personal expertise and past involvement are on display throughout the text and insightful endnotes. Moore diligently supports his arguments with primary and secondary sources throughout the book. He annexes several graphs and charts; unfortunately, they are not well-referenced by the main text and are somewhat confusing.

Moore has long-championed the theory of the democratic peace, which, at its most general level, "posits that major war will occur only rarely, if at all, between well-established democratic nations."[6] In *Solving the War Puzzle*, Moore, however, is forced to concede that by itself the democratic peace "does not provide a satisfactory general theory of the origins of war since democracies have been robustly involved in war with nondemocracies, and nondemocracies have been robustly involved in war with everyone on an equal opportunity basis."[7] Moore recognizes that the democratic peace, standing alone, is incomplete as a conflict management theory since "it focuses only on the correlation between democracy and war, and this in turn fails to capture the real strength of the case for democracy, the rule of law, and human freedom across virtually all of the most commonly shared goals of mankind."[8] In his introduction, Moore informs the reader that the goal of his book is to incorporate the fundamental concept of the democratic

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[5] *See id*. at 173. Moore has also held numerous other posts to include: Counselor on International Law to the United States Department of State; United States Ambassador to the United Nations Conference on the Law of the Sea; Member of the United States Delegation to the United Nations General Assembly and the Athens round of the Conference on Security and Cooperation in Europe. He is also an Honorary Editor of the *American Journal of International Law* and a member of the Board of Directors of Freedom House. *See id*.

[6] *See id*. at 1. "Major interstate war" is defined by Moore as "those [conflicts] with more than 1,000 battle-related fatalities fought between two or more sovereign nations." *Id*. at 106 n.3. The definition of major interstate war "does not include civil wars or colonial wars or those between a nation and a less than sovereign political entity." *Id*. Moore cites to a study by Professors Rudy Rummel and Bruce Russett showing that between 1816 and 1991 there were 353 pairings of nations fighting in international wars, yet none of these wars were between democracies. *See id*. at 2. The theory of the democratic peace can be traced back to the works of Immanuel Kant who described a republic where free people would naturally desire avoidance of war and as voting members could control the actions of the State. *See* Steven Geoffrey Gieseler, *Debate on the 'Democratic Peace,' at* http://www.unc.edu/depts/diplomat/archives_roll/2004_01-03/gieseler_debate/gieseler_debate.html (Mar. 3, 2004).

[7] MOORE, *supra* note 1, at xviii.

[8] *Id*. at 7.

peace and the recognized principle of deterrence while uncovering "a broader and more predictive and workable theory about the causes of war."[9] Moore succeeds with this goal, although at times he focuses more upon the strengths of the former democratic peace model and the principle of deterrence rather than providing deep insight and analysis into his new theory.

Moore introduces the reader to his new paradigm, which he terms "incentive theory," after surveying idealistic and realistic perspectives and analyzing the incentives for and against war at the individual, state and international levels.[10] Moore does not assume much knowledge on behalf of the reader and proceeds through each step in his reasoning in a deliberate manner. He develops his theory by incorporating and blending the past ideas and works of other scholars and crossing into other disciplines such as economic theory.[11] Pointing to several historical examples, Moore ultimately posits that most major wars arise as a result of the synergy between an absence of democracy and an absence of effective deterrence at the national and international levels against aggressive nondemocratic nations, *along with a failure to provide a proper set of incentives to the individual decision makers leading those nondemocratic nations*.[12] This second half of the equation summarizes Moore's thesis and represents his refinement to the existing democratic peace and deterrence models.[13]

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[9] *Id*. at xix.

[10] *See id*. at xvii-xix. Moore contrasts the positions of idealists and realists. He states that "[i]dealists, the relative optimists of theory, focus on the role of third party dispute settlement, creation of international organizations, enhancing trade and other peaceful interactions among nations, and the role of democratic governance." *Id*. at xvii-xviii. By contrast, "[r]ealists, the relative pessimists, in turn focus on the security dilemma of an anarchic international system, power relations between states – particularly the struggle for power between and among great powers, and the effect of different forms of international systems on the competition." *Id*. at xviii. Moore cites to Kenneth N. Waltz's 1954 study, *The State and War*, where Waltz analyzed the origins of war on three levels, "the individual level, that is, violence, beliefs, and other subjectivities rooted in the individual; the state or national level, that is, variables accounting for war rooted in the form of government and other national variables; and the international level, that is, variables rooted in the broader international system." *Id*. at xix.

[11] *See generally id*. at 1-12.

[12] *See id*. at xx.

[13] Interview with John Norton Moore, Professor, University of Virginia School of Law, in Charlottesville, Va. (Sept. 7, 2004) [hereinafter Interview with John Norton Moore]. Moore's incentive theory model should be viewed as an overarching theory that incorporates under it the concept of the democratic peace model along with the principle of deterrence. Moore argues that to prevent conflict we must first analyze the incentives of government elites and then attempt to influence their decisions utilizing the

Moore tests his incentive theory in a brief discussion of the current global war on terrorism. He argues that in contrast to other paradigms in international relations, his incentive theory, while admittedly developed to account for the cause of major interstate war, is adaptable to the war on terror.[14] Moore argues "the key to reducing terrorism is to reduce the incentives of terror leaders, and those who support them, below the point where they will continue their actions."[15] Yet, while discussing the current war in Iraq, Moore is forced to confess that his theory is best applied to the incentives *for* going to war faced by President George W. Bush and British Prime Minister Tony Blair, rather than the incentives *against* war faced by Iraq's Saddam Hussein.[16] Moore admits that an application of his incentive theory would have predicted that Hussein "would do whatever was necessary to avoid the war and stay in power" since he knew any war could ultimately only end in utter defeat and his personal removal.[17] However, Moore, often reluctant to concede on any point, feels that Hussein's actions were an anomaly and no other contemporary approach to foreign relations would have done better.[18]

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frameworks and principles of the democratic peace and deterrence. *See id*. Moore ties in his theory to the democratic peace by highlighting a logical, yet significant, distinction between democracies and nondemocracies. He observes that a democratic leader will more easily conclude that a failed or imprudent war or aggressive act is, in simplest terms, not worth it because he or she is faced with being voted out of office by the democratic electorate. *See id*. "Democracy internalizes these costs in a variety of ways including displeasure of the electorate at having war imposed upon it by its own government. And deterrence either prevents achievement of the objective altogether or imposes punishing costs making the gamble not worth the risk." MOORE, *supra* note 1, at 43. In contrast, the leader of a nondemocratic regime does not share that self-preservation concern. "Decision elites in nondemocratic nations, then, may be far more disposed to high risk aggressive actions risking major war and other disasters for their people." *Id*. at 11. Moore often uses a classroom analogy of a "heads-I-win, tails-I-lose" situation for a democratically elected leader who engages in international conflict. If the war effort succeeds, the democratic leader's popularity soars (as did U.S. President George H.W. Bush's immediately after the Gulf War). If the war effort suffers, the democratic leader will suffer detrimental effects (as did Lyndon Johnson with regards to Vietnam). By contrast, the leader of a nondemocratic nation faces a "heads-I-win, tails-*you*-lose" scenario and only the citizens in his country who may potentially die or lose their well-being experience the loss. *See* Gieseler, *supra* note 6; *see also* MOORE, *supra* note 1, at 78-82.

[14] *See* MOORE, *supra* note 1, at 69.

[15] *Id*. at 71.

[16] *See id*. at 78-82.

[17] *Id*. at 82.

[18] *See id*.

Upon conclusion of the book, the reader may question just how novel is Moore's "new" theory. Moore's argument that his incentive theory allows us to "predict the occurrence of war more accurately, and intervene to control it more effectively, [by focusing] our attention squarely on the incentives of the decision makers controlling the decision to use force" is very intuitive and would seemingly find little resistance in most intellectual and practical debates.[19] Simply stating, as Moore does, that one should analyze the incentives of terror leaders in an effort to curb terrorism, or that a leader will often take actions to protect his personal status, does not place his theory at the cutting edge of international law paradigms. Moore attempts to deflect this critique by arguing that his theory represents an important advance since it is the first to focus this precisely upon the importance of incentives in the foreign policy realm.[20] Despite this claim and despite his insistence that his new paradigm "is empathically not democracy-building by aggressive use of force or a democratic 'just war' or 'crusade for democracy,'" the lack of novelty in his incentive theory explains why Moore allots a majority of his pages to listing the benefits of and extolling the virtues of a liberal democracy rather than developing his overarching incentive theory.[21]

Moore's focus and discussion on the democratic peace model, however, has the benefit of providing even the most seasoned international law practitioner with additional insights into the causes of war. Any reader, whether or not already familiar with the democratic peace model, will be impressed by Moore's discussion of the synergy between democracy and peace.[22] Moore, however, unfortunately feels a need to contend with every small potential historical exception to the democratic peace and deterrence models.[23] In desiring to show a 100% correlation, Moore occasionally loses sight of the overall message and overwhelming connection between democracy and peace.

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[19] *Id*. at xx-xxi.

[20] *See* Interview with John Norton Moore, *supra* note 13; *see also* MOORE, *supra* note 1, at 130-31 n.8.

[21] MOORE, *supra* note 1, at 83. There is an important distinction between a mere electoral democracy and a full liberal democracy. Moore notes that "[w]hile an electoral democracy is certainly superior to totalitarianism, the full benefits of democracy, including quite probably the very stability of democratic institutions, comes from achieving liberal democracy." *Id*. at 85. Liberal democracies are superior in achieving "a full commitment to human freedom." *Id*.

[22] *See generally id*. at 1-8, 13-25.

[23] *See generally id*. at 13-25.

For example, as previously noted, the democratic peace model states that democracies, rarely, if at all, go to war against one another. Instead of relying on the word *rarely*, Moore seemingly feels obligated to contest every possible instance to the contrary. If there is an historical example of a war between two democracies, Moore will attempt to find an alternative explanation. He will argue that either one of the countries was not a true liberal democracy, the war happened before the 1928 Kellogg-Briand Pact outlawing aggressive war as a modality of conducting foreign policy, the incident was not a "major" war because there were not 1,000 casualties, or there was some permissible rationale such as humanitarian intervention that provided a just cause for engaging in hostilities.[24] Moore argues that the Spanish-American war was not commenced by an aggressive act by the U.S. because the U.S. believed that Cuba had sunk the battleship Maine;[25] the 1897 Greco-Turkish war was really the result of Greece's "humanitarian intervention against Turkish mistreatment of Greeks in Crete;"[26] and the government of Italy "was not really democratic in its foreign policy in 1911" before initiating the Italo-Turkish War.[27] In the lone situation where Moore reluctantly concedes a democratic nation was the aggressor, the 1956 Suez War pitting Britain, France and Israel against Egypt, he still finds a means to slide the war under the democratic peace model.[28] Moore argues that the actions by the Israelis were defensive in nature, and when one takes out the number of casualties caused by the Israelis, the number of casualties caused only by the British and French then falls under the 1,000 casualty cutoff needed to define it as a major war.[29] The synergy between

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[24] *See generally id*.
[25] *See id*. at 21.
[26] *Id*.
[27] *Id*. at 22. Additionally, Moore sometimes simplifies the equation too much in terms of democracy and deterrence. For example, in analyzing the origins of the American Civil War, Moore notes that "the not yet democratic Confederacy initiated the use of force at Fort Sumpter [sic] and levels of Union deterrence were low." *Id*. at 126 n.17. Analyzing the root causes of the American Civil War simply in democratic and deterrence terms leaves a lot off the table.
[28] *See id*. at 21-22.
[29] *See id*. Moore finds another distinction by stating that although the British and French attack is "best characterized as aggression under the [United Nations] Charter" the goals of both countries "were principally to impose international control to protect access to the canal for all nations following Nasser's nationalization, while recognizing Egypt's sovereign right to a fair return from operation of the canal." *Id*. at 21. The 1,000 battle death cutoff "is used to eliminate those instances of violence attributable to accidents, unauthorized incursions, limited military actions designed for deterrence, and military actions by a strong military against a weaker adversary not anticipated to resist."

democracy, deterrence, and peace in the scope of major interstate war is both intuitively and scientifically overwhelming. Moore's unnecessary desire to contest every small, potentially contradictory result causes his reader to lose sight of the bigger picture.[30]

In addition to his emphasis on democracy, Moore also expends a great deal of effort in his book extolling the virtues of a strong deterrence. Moore views deterrence to be one of the key prongs, along with the democratic peace, under his overarching incentive theory.[31] He references the reader to many historical examples for the proposition that the absence of an effective deterrence will often lead to aggression and warfare, while the presence of an effective deterrence can prevent war.[32] As with the basic premise behind incentive theory, this argument seems intuitively obvious and Moore's depth of analysis in this area is unnecessary.

Instead of allotting the majority of the book to historical analysis and a restatement of the democratic peace and deterrence models, Moore

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Elizabeth A. Palmer, *Democratic Intervention: U.S. Involvement in Small Wars*, 22 PA. ST. INT'L L. REV. 313, 316 (2003).

[30] Worth noting is that the correlation is perhaps not as strong when applied to smaller wars—wars with less than 1,000 casualties. Another study conducted by a former student of Professor Moore has shown that from the time of "gaining its independence, the U.S. has sent military troops abroad to participate in small wars in some form or fashion a total of 138 times. . . . U.S. actions were illegal according to post-Charter international standards in over 15% of the small wars identified." Palmer, *supra* note 29, at 339-40. Palmer's study suggests that the democracy variable is not as essential of an element in conflict management for "small" wars. Perhaps it is this type of realization that pushes Moore to admit that the democratic peace model by itself, while powerful in its correlative value, is "not an adequate theory for war avoidance" and pushes him towards the analysis of incentive theory. *See* John Norton Moore, *Editorial Comments: Solving the War Puzzle*, 97 AM. J. INT'L L. 282, 282 (2003). *But see* MOORE, *supra* note 1, at 132 n.15 (arguing that the majority of the alleged aggressive acts by the U.S. that are cited by Palmer occurred before the existence of the United Nations Charter).

[31] *See* Interview with John Norton Moore, *supra* note 13.

[32] *See generally* MOORE, *supra* note 1, at 27-38. Specifically Moore points to World War I, World War II, the Korean War, Vietnam, The Iran-Iraq War, the United Nations operation in Somalia and the Gulf War as prime examples of a lack of effective deterrence. *See generally id.* at 28-30, 45-52. Conversely, Moore states that the existence of the North Atlantic Treaty Organization (NATO) provided a strong deterrent to the Soviet block and was the reason that World War III did not erupt in Europe during the second half of the 20th century. *See id.* at 30, 50. Moore also praises NATO's "known precommitment with forces in the field" to deter aggression and contrasts NATO with the usual unwillingness of the United Nations to commit forces until aggression has already occurred. *Id*. at 55 (emphasis omitted).

should have focused a greater part of his considerable expertise on applying his incentive theory to the contemporary international environment. Only at the end of the book does Moore finally start to provide the reader with specific suggestions to guide future policy.[33] He incorporates his incentive theory amongst a wide range of suggestions focusing again primarily on deterrence and democratic enlargement. Unfortunately, this analysis is only seven pages in length, and it conceals some of its substance and specific remarks in the endnotes rather than stating them in the text.[34] Finishing the book, the reader is left with a desire that Moore had focused his energies more towards providing a blue print for the future conduct of foreign policy, especially in the realm of the current global war on terrorism.[35]

Although Moore does not "solve the war puzzle," his incentive theory, while not necessarily academically innovative, provides a useful and improved foreign policy paradigm under which the democratic peace and deterrence models can be analyzed. *Solving the War Puzzle* offers insights for commanders and judge advocates wishing to understand the causes of war at the strategic level. Any reader not already familiar with the concept of the democratic peace will be impressed with the strength of the demonstrated correlation between democracy and peace. Moore sums up his goal in offering this book and the new paradigm by stating:

> even if "incentive theory" proves a more useful focus in seeking to predict and control war, it does not offer a slot-machine for simple answers. . . . Until we set aside pervasive myths about war and focus our attention on the critical variables, we will have little chance to control this age-old scourge of mankind. It is hoped that this book may make an at least modest contribution to this goal.[36]

Indeed, Moore accomplishes this goal and provides the reader with some of the pieces for future analysis on how to put the puzzle together.

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[33] *See id*. at 83-89.
[34] *See id* at 138-43.
[35] Moore plans to write a follow on book that will focus his incentive theory more squarely on contemporary policies and the terrorism issue. *See* Interview with John Norton Moore, *supra* note 13.
[36] MOORE, *supra* note 1, at xxvi.

THE MISSION
WAGING WAR AND KEEPING PEACE WITH AMERICA'S MILITARY[1]

REVIEWED BY MAJOR JULIE LONG[2]

> *There are many differences between the U.S. wars in Vietnam and Iraq, but one stunning similarity is the administrations' reliance on U.S. armed forces to bring radical social change to a country as alien to most soldiers as the planet Mars.*[3]

Dana Priest, author of *The Mission, Waging War and Keeping Peace with America's Military*, seems to have spent the better part of 1998 through 2003 traveling the globe with everyone from four-star generals to grunts.[4] Her readers are much the better for it. In *The Mission*, Ms. Priest provides highly engrossing, descriptive accounts of post-Cold War U.S. military engagements, coupled with timely and important observations about how the United States puts its foreign policy into practice. While the book's criticisms are primarily aimed at policy makers and political leaders above the level of most military leaders—and, despite some limitations, such as digressions into stories that lend little to Ms. Priest's overall theme[5] and her failure to sufficiently develop her alternative to military peacekeeping—in many ways, *The Mission* reads like a very engaging "lessons learned" for service members involved in peacekeeping and peace enforcement operations.

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[1] DANA PRIEST, THE MISSION, WAGING WAR AND KEEPING PEACE WITH AMERICA'S MILITARY (2004).

[2] U.S. Army. Written while assigned as a student, 53d Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[3] PRIEST, *supra* note 1, at 401-02.

[4] *See id*. at 19-20, 407.

[5] *See id.* at 292-302. As Michael O'Hanlon notes in his review of *The Mission*, several articles that Ms. Priest wrote for the *Washington Post*, supplemented by research she conducted while on a sabbatical with the U.S. Institute of Peace, form the basis for the book. *See* Michael O'Hanlon, *Taking the Lead*, The Brookings Institute, *available at* http://www.brook.edu/views/articles/ohanlon/20030901.pdf, at 227 (last visited Dec. 7, 2004). This may help to account for such digressions.

Ms. Priest, a *Washington Post* reporter for more than fifteen years,[6] is a consummate storyteller. She colorfully brings to life the exploits of military members in hot spots around the world in an effort to illustrate what she sees as wrong with U.S. foreign policy execution today.[7] Indeed, Ms. Priest believes that much of what she sees is flawed. She vividly describes what she terms the U.S. political leadership's lazy over-reliance on a powerful, yet misunderstood military.[8] As a consequence of this misplaced proclivity to choose what she terms the easy "quick fix"[9] of military engagement, Ms. Priest contends that the United States has failed to grasp a historic opportunity to leverage its unprecedented preeminence and "lead a messy world toward a more stable peace."[10] Ultimately, *The Mission* is Ms. Priest's attempt to demonstrate that nation-building is best accomplished by civilians. She pointedly notes that although the United States has struggled through more than "[t]welve years of reluctant nation-building . . . [it] still [has not] spawned an effective civilian corps of aid workers, agronomists, teachers, engineers – a real peace corps – to take charge of postwar reconstruction . . . ."[11] According to Ms. Priest, the consequences of this failure are grave and run the gamut from failed policies[12] to human rights abuses[13] and even to heinous crimes.[14]

Ms. Priest broadly argues that following the fall of the Soviet Union, U.S. political leaders failed to develop a strategic plan to deal with the

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[6] *See* Washington Post, *Q&A with Dana Priest*, *at* http://www.washingtonpost.com/wp-srv/national/talk/priest.htm (last visited Dec. 7, 2004).

[7] *See* PRIEST, *supra* note 1, at 395-405 (describing activities of U.S. Soldiers in Iraq and critiquing the policies of the Bush adminstration).

[8] *See id.* at 18. Ms. Priest is bi-partisan in her assessment that the U.S. political leadership failed to understand or respect the military, reporting that "[f]or such a smart politician, Clinton had been so dumb in the beginning regarding his relations with people in uniform." *Id.* at 42. Ms. Priest reports that the military was constantly second-guessed under Secretary Rumsfeld's leadership. *See id.* at 24. She further notes that according to General Hugh Shelton, then-Chairman of the Joint Chiefs of Staff, Secretary Rumsfeld and his staff "weren't willing to take anything for granted. If you said the sun was up, they raised the blind and said, 'Let us see.'" *Id.*

[9] *Id.* at 13.

[10] *Id.*

[11] *Id.* at 390.

[12] *See, e.g.*, *id.* at 195-215 (describing failures in U.S. anti-drug and military policies in Colombia).

[13] *See, e.g.*, *id.* at 216-43 (describing U.S. military involvement with elements of the Indonesian military that she asserts subverted congressional requirements related to human rights).

[14] *See, e.g.*, *id.* at 343-65 (describing the rape of a young Kosovar girl by a U.S. service member).

difficult issues confronting the United States in the post-Cold War world.[15] Even prior to Communism's fall, and with little public debate, politicians systematically had degraded the capacity of the U.S. civilian foreign policy apparatus, leaving it unable to pursue diplomatic solutions to the challenges arising out of the demise of the bi-polar world.[16] Ms. Priest contends that into this vacuum grew a powerful military establishment, headed by the "CinCs," the commanders of the Pentagon's five regional commands,[17] who unlike their civilian foreign policy counterparts possessed both the will and the resources to "shape" the world.[18]

Ms. Priest brings her thesis to life through a series of vignettes that take the reader on an odyssey of travel, including forays with Special Forces troops in Nigeria and Afghanistan, and with CinCs in Indonesia, the Middle East, and Colombia.[19] Combining legislative and political

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[15] *Id*. at 13-14 (placing equal blame on both the executive and legislative branches).

[16] *See id.* at 45-47. For example, Ms. Priest reports that during the 1970s and 1980s, Congress slashed the State Department's operations budget by twenty percent. *See id.* at 45.

[17] The acronym "CinC," commander in chief, previously was applied to the commanders of the five regional commands. *See id.* at 29. Ms. Priest reports that Secretary Rumsfeld disliked this title, stating, "There is only one CinC under the Constitution and law, and that is POTUS [the President of the United States]." *Id.* Rumsfeld subsequently issued a memo changing the CinCs' title to "commander." *See id.* Ms. Priest chose to use the term CinC in her book; for the sake of consistency, this review does so as well.

[18] *See id.* at 16-17. Ms. Priest asserts that the military's seeming foreign policy take-over accelerated under the Bush administration. *See id*. at 396-405. She argues, for instance, that if President Bush were serious about working to instill democracy in the Middle East

> he would have transferred Deputy Defense Secretary Paul Wolfowitz to the State Department, where the friendly, former academic could turn his unbounded zeal for a democratic revolution in the Middle East into political and diplomatic—not military—initiatives. Instead, Wolfowitz spent his days trying to figure out how to use military operations to achieve political reform.

Id. at 404. Interestingly, Mr. Wolfowitz published an op-ed piece in the September 16, 2004 edition of the *New York Times*, in which he calls on the Indonesian government to release a political journalist charged with criminal defamation and to strengthen its rule of law and progress toward full democracy. Paul Wolfowitz, *The First Draft of Freedom*, N.Y. TIMES, Sept. 16, 2004, at A33. This remarkable article supports Ms. Priest's observation that the Defense Department seems to have moved beyond winning the nation's wars to carrying out the nation's foreign political policies as well. *See* PRIEST, *supra* note 1, at 16-17, 396-405.

[19] *See, e.g.*, *id.*, 175-215 (describing U.S. military activities in Nigeria, Afghanistan, Indonesia, the Middle East, and Colombia).

research with anecdotes gleaned from numerous interviews, Ms. Priest first explores the historical development of the regional commands and the CinCs' forty-year climb to their current positions of power.[20] Ms. Priest points out the uncomfortable fact that the CinCs, dubbed by Ms. Priest as "proconsuls to the empire,"[21] command resources and retinues that far outweigh those of their State Department colleagues.[22] In addition to dedicated aircraft,[23] the CinCs have "colonels and majors by the dozen . . . [who] plan exercises, share technical assistance, promote the sale or donation of American military equipment, or resolve policy disputes . . . ."[24] Perhaps most importantly, and in most stark contrast to the civilian foreign policy agencies, the CinCs have at their disposal Special Forces and conventional troops who can be mobilized to carry out the nation's policy objectives.[25] Ms. Priest writes, "Special forces were often the tool of default when U.S. policymakers abandoned more difficult alternatives, such as long-term economic development or political reform won th[r]ough creative diplomatic sticks and carrots." [26] As a result, the CinCs and their troops, rather than the civilian agents who are actually charged with carrying out U.S. foreign policy, are often the face of the United States in foreign countries,[27] a fact that Ms. Priest asserts gravely distorts policy outcomes.[28]

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[20] *See id*. at 66-77.

[21] *See id.* at 61. Ms. Priest apparently takes this term from an interview with former CinC General Anthony Zinni who Ms. Priest reports as stating he had become "a modern-day proconsul, descendant of the warrior-statesmen who ruled the Roman Empire's outlying territory, bringing order and ideals from a legalistic Rome." *Id.* at 70. The term "proconsul" refers to officials of ancient Rome. Tiscali Reference, *Consul (Roman History),* Tiscali, *at* http://www.itscali.co.uk/reference/encyclopaedia/hutchinson/m0013586.html (last visited Dec. 13, 2004). An assembly of the Roman people each year elected two consuls to serve as chief magistrates of the Roman Republic. *See id.* The two shared full civil authority in Rome and were the chief military commanders. *See id.* After serving a one-year term, a consul ordinarily then served as proconsul of a province, the Roman government's representative and local military commander. *See id.*

[22] *See* PRIEST, *supra* note 1, at 71.

[23] *See id.* Ms. Priest states that "a CinC's ability to move around in the world is his greatest intelligence weapon." *Id.* at 76. In contrast, at the State Department only the Secretary of State has a dedicated aircraft, and all other diplomats fly scheduled airlines or hitch rides on military aircraft. *See id.* at 71.

[24] *Id.*

[25] *See id.* at 17, 74-75.

[26] *Id.* at 17.

[27] *See id.* at 85-91, 112-14. One commentator notes in her review of *The Mission* that Ms. Priest warns of "a dangerous trend toward having the military handle quasi-diplomatic missions, filling a vacuum left by underfunded civilian agencies," and quotes Ms. Priest as asserting that "The face of America is becoming a face with a helmet on." Louise Gilmore Donohue, *Tracking the Military is Her Mission*, UNIVERSITY OF

In Colombia, for example, Ms. Priest writes that forty years of civil war, "[c]orrupt government officials, impoverished peasants, and lush jungles . . . conspired to make Colombia a hospitable place for coca farmers and drug traffickers,"[29] and the resultant cocaine fueled "an American tragedy with an unending rippling effect."[30] She points out that the drug crisis rested on civil and economic under-pinnings, and crucially, that the local regional leadership was historically wary of U.S. military intervention.[31] In spite of this, Ms. Priest asserts that the only solution U.S. political leaders truly backed was a military one.[32] She reports that even General George Joulwan, then-commander of the U.S. Southern Command, "envisioned the solution as more than just a military attack."[33] He had sufficient commandos, fast planes, and law enforcement agents to break up the drug cartels, but lamented, "Where was the crop-substitution program? Where were the new roads to bring the crops to market? Where was the political dialogue to allow guerrillas to disarm and the wars to end . . . ?" [34] Ms. Priest contends that such elements were absent from the U.S. toolbox, because the U.S. political leadership lacked the coherence, foresight, and will to pull it all together.[35] In the end, after almost two decades of U.S. involvement, Colombia is little better than a failed state, engulfed in a tripartite civil war, while the U.S. goal of eradicating the drug trade remains unachieved.[36]

CALIFORNIA, SANTA CRUZ REVIEW, Fall 2003, *available at* http://review.ucsc.edu/fall-03/alumni_profile.html (last visited Dec. 13, 2004).

[28] *See* PRIEST, *supra* note 1, at 403-05.

[29] *Id.* at 196.

[30] *Id.*

[31] *See id.* at 197-201.

[32] *See id.* at 196-97.

[33] *Id.* at 205.

[34] *Id.*

[35] *Id.* at 209. Ms. Priest reports, for example, that under "Plan Colombia," hammered out in 2000 by General Charles E. Wilhelm, then-commander of the U.S. Southern Command, and Colombian President Andres Pastrana as a comprehensive effort to strengthen government, promote regional development, and curtail drug production, of an available $1.3 billion, $519 million went to train three Colombian battalions and to purchase Blackhawk helicopters, while only $3 million was earmarked to support the peace process aimed at ending the fighting between government troops, paramilitary forces, and insurgents. *See id*. at 208-09. Moreover, in spite of the huge expenditure of U.S. money for "Plan Colombia," the Bush administration's top civilian policy-making positions for Latin America and counter-narcotics efforts remained unfilled for more than a year. *See id.* at 209.

[36] *See id.*

At the heart of the book lies Ms. Priest's extensive treatment of U.S. actions in Kosovo, where her enormously detailed depictions frequently follow even the hour-by-hour actions of individual Soldiers.[37] In one instance, Ms. Priest describes an episode that took place in November 2003 in which a group of local Serb women approached her while she accompanied a squad of infantry Soldiers on a patrol in Vitina, Kosovo.[38] The women handed Ms. Priest a four-page declaration requesting three sewing machines and asked that it be presented to the U.S. lieutenant colonel commanding the forces in Vitina.[39] This document, Ms. Priest contends, "was a spontaneous, entrepreneurial request that any development expert or aid worker would have seized upon. Not the military: 'Sewing machines! We don't do sewing machines!' scoffed the battalion's bullet-headed lieutenant colonel when I inquired about the declaration his lieutenant had passed along to him."[40] To Ms. Priest, the encounter epitomizes the ultimate futility of using Soldiers as nation-builders, and "the consequences of substituting generals and Green Berets for diplomats, and nineteen-year-old paratroopers for police and aid workers on nation-building missions."[41]

It is in this portion of the narrative, however, where the book's flaws are most evident. At times, Ms. Priest's interesting and compelling thesis becomes lost in the storytelling, as she seems to include material because it makes for a good story, rather than for its contribution to her theme. For example, Ms. Priest devotes an entire chapter to the experiences of Drita Perezic, an Albanian-American hired by the United States to work as a translator in Kosovo.[42] Ms. Priest poignantly describes that Ms. Perezic, although born and raised in the United States, was frequently mistaken for a local Albanian and at times was verbally abused and humilitated as a result.[43] At other points, she writes that Ms. Perezic was often dismayed and frustrated that the Soldiers frequently

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[37] *See, e.g., id.* at 148-65 (describing the actions of Special Forces A Teams in the early days of the war in Afghanistan).
[38] *See id.* at 14.
[39] *See id.* at 15-16.
[40] *Id.* at 16.
[41] *Id.* at 14.
[42] *See id.* at 292.
[43] *See, e.g.*, *id.* at 295 (describing an incident in which a Soldier, mistaking Ms. Perezic for a local Albanian, shouted at her "Who gave you the right to speak English?").

failed to understand the context and historical setting of their mission in Kosovo.[44]

Perhaps Ms. Priest intended this chapter to illustrate her point that however well-meaning they may be, U.S. Soldiers simply lack the skills and inclination to successfully rebuild a war-torn country. Unfortunately, she lingers too long on instances in which Soldiers were rude or coarse toward Ms. Perezic[45] and focuses too intensely on Ms. Perezic's emotional reaction to the devastation she encounters in Kosovo.[46] As a result, the reader is distracted from Ms. Priest's overall message, and the chapter becomes more an interesting anecdote than a contribution to the book as a whole.

Likewise, Ms. Priest devotes the better part of two chapters to events that culminated in the rape and murder of an eleven-year old Kosovar girl by a U.S. Soldier.[47] This story is part of a larger one about the exploits of a U.S. infantry battalion in Kosovo[48] that is virtually a case study on how the leadership of an otherwise well-trained, motivated unit can fail in the amorphous world of peacekeeping Ms. Priest's riveting and graphic account of the girl's ordeal is first-class reporting.

She describes with intense detail, for example, one company's efforts to unscramble the web of organized crime in a Kosovar town.[49] The leaders of the criminal gang were interwined with the town's civic leadership. These figures used their positions to foment ethnic discord in an attempt to hide illegal activities, thereby undermining the units' peacekeeping efforts.[50] In response, the Soldiers began an intensive intelligence gathering effort, sometimes resorting to physical violence and intimidation to gain information about suspects. As Ms. Priest recounts, Staff Sergeant (SSG) Frank Ronghi, later convicted of the rape

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[44] *See id.* at 299. Ms. Priest notes, for example, that most of the Soldiers Ms. Perezic worked with knew nothing about Kosovo, and as a result, were forced to rely on her as a kind of "cultural '911.'" *See id.* at 297.

[45] *See, e.g., id.* at 297 (describing a scene in which an Army lieutenant colonel yells at Ms. Perezic because she asked him, at the urging of other Soldiers, when he would become a "full bird").

[46] *See, e.g., id.* at 296-300 (describing how Ms. Perezic reacted when confronted with death and violence while on patrols with U.S. Soldiers)

[47] *See id.* at 320-65.

[48] *See id.* at 303-84.

[49] *Id.* at 320-42.

[50] *Id.*

and murder of the young local girl, participated in many of the more questionable incidents.[51]

Unfortunately, the details of SSG Ronghi's crime receive such prominent treatment[52] that the reader is left to draw the conclusion that this crime, like the other policy failures Ms. Priest recounts, is a consequence of leadership failure or poor foreign policy choices, rather than the vicious acts of an individual criminal. If Ms. Priest intends this conclusion, it is glaringly irresponsible and terribly lazy analysis in an otherwise thoughtful book. If, on the other hand, she does not intend the reader to draw this conclusion, then Ms. Priest unfortunately allowed her journalist's eye for a good story to get the better of her.

More significantly, Ms. Priest uses the flaws in the United States' execution of the Kosovo mission, especially those of the infantry unit she closely follow, to advocate that the United States should establish "a Peace Corps for the 21st Century,"[53] a body of civilian development and law enforcement professionals who would replace Soldiers in international nation-building efforts.[54] Yet in this argument, Ms. Priest seems to overlook her own point. While she successfully documents the weaknesses of the international efforts in Kosovo, she provides nothing to back up her assertion that civilians would have been more successful than Soldiers. Ms. Priest, in fact, points out in her narrative that the civilian agencies at work in Kosovo were perhaps even less successful than the Soldiers in bringing relief to the needy.[55] She tellingly documents, for example, the ineptitude and complacence of the civilian U.N. Mission in Kosovo Police (UNMIK-P), a "mishmash" of officers from over fifty countries with little police training, no common language, and little interest in risking their lives in Kosovo.[56]

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[51] *See id.* at 334-39.

[52] *See id.* at 343-65. Indeed, Ms. Priest fills more pages recounting the details of this crime than she did describing the role of the CinCs, a crucial aspect of her overall theme. *See id.* at 61-77.

[53] *See The Connection: A Peace Corps for the 21st Century* (WBUR radio broadcast, March 12, 2004), *available at* http://www.theconnection.org/shows/2004/03/20040312_b_main.asp (last visited Dec. 13, 2004).

[54] *See* PRIEST, *supra* note 1, at 390.

[55] *See, e.g.*, *id.* at 325-26, 378-84 (describing the inability of the Italian police assigned in Kosovo to deal effectively with organized crime, and the utter failure of various intergovernmental organizations to cope with the problems of internal refugees and disputes over housing).

[56] *See id.* at 369-71.

Indeed, despite Ms. Priest's claims, what *The Mission* teaches is not that civilians are necessarily better suited to nation-building than Soldiers, although this may be the case. Instead, the book stands for the essential proposition that success in such missions requires political will and focused leadership at many levels to follow through with the difficult tasks of rebuilding civil society once the fighting has stopped. In the aftermath of major combat operations in Iraq, this central message of *The Mission* is perhaps even more compelling than it was when the book was first published in 2003. Ms. Priest offers a remarkable picture of U.S. service members' actions across the globe, and her concept of a civilian corps designed to rebuild in the aftermath of war or the wake of a failed state deserves more attention. In the meantime, U.S. Soldiers will no doubt continue to engage in peacekeeping and nation-building around the globe. *The Mission* offers a close-up view of that world, and it should be on every military leader's reading list.

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Jennifer L. Crawford, Editor, MLR — 4 OCT 04

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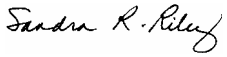

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