THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27-50-450

November 2010

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The Army Lawyer (ISSN 0364-1287, USPS 490-330) is published monthly by The Judge Advocate General's Legal Center and School, Charlottesville, Virginia, for the official use of Army lawyers in the performance of their legal responsibilities. Individual paid subscriptions to *The Army Lawyer* are available for $45.00 each ($63.00 foreign) per year, periodical postage paid at Charlottesville, Virginia, and additional mailing offices (see subscription form on the inside back cover). POSTMASTER: Send any address changes to The Judge Advocate General's Legal Center and School, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia 22903-1781. The opinions expressed by the authors in the articles do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

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The Army Lawyer articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*. *The Army Lawyer* is also available in the Judge Advocate General's Corps electronic reference library and can be accessed on the World Wide Web by registered users at http://www.jagcnet.army.mil/ArmyLawyer.

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Articles may be cited as: ARMY LAW., [date], at [first page of article], [pincite].

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Administrative & Civil Law

The Ghost of Major John Wigmore Returns—Congress Amends the Servicemembers Civil Relief Act (SCRA)*

I. Introduction

The U.S. Senate Subcommittee of the Committee on the Judiciary gathered for a rare Saturday morning hearing on 22 September 1917 to hear legal giants of their time—Secretary of War Newton D. Baker; Major John H. Wigmore, U.S. Army Judge Advocate General's Corps; and Walter George Smith of Philadelphia, President of the American Bar Association. Secretary of War Baker began:

> In a sentence, this bill [The Soldiers' and Sailors' Civil Relief Act] is intended to place our soldiers, who in a very short time, will be overseas in very large numbers, in a state of mind where they and their families will be relieved from the anxieties and solicitudes which follow from legal complications at home to which they cannot give their attention. Secretary Baker knew that what kills or wounds servicemembers more than any enemy is loss of focus and concentration. Making this point he said:
> Men who owe money, men whose families are likely to be embarrassed by inopportune pressure from creditors even for trifling sums, cannot be expected to have the same sort of freedom of mind as if they were relieved from that sort of stress.[1]

Next up was the legendary scion of evidence, John H. Wigmore, who had drafted the bill before the committee. Committee Chair Lee Slater Overman, Democrat from North Carolina, a powerhouse in the Senate, but a student in the presence of Major (Professor) Wigmore, asked:

> You are the author of a great book on evidence, the Dean of Northwestern School of Law, and now you are in the Judge Advocate General's Office, under appointment from civil life, with the rank of major?[2]

Waiting with a pregnant pause, the witness responded:

> Yes, sir. I should like to say something on the need, and the power, and the method of the bill before you. The need is illustrated by this letter which came into our hands.[3]

Reading slowly, but powerfully, John Wigmore gave physical presence to the letter stating the case of a petitioner not present, yet beseeching his Congress:

> I am not kicking on having to serve my country at this time and I expect to give my best in me in her behalf . . . . [T]he way things stand now I am stripped of everything I have and my business is destroyed, and I have no income whatever other than my business, and the moment I am gone that stops. I am not asking to be exempted; all that I ask is that my Government, who in a manner is breaking up my house and taking everything on earth I have, make some provision by which I can save my equities and take care of my family.[4]

As if lecturing his law class, the professor and Army major asked socratically, "What shall we do about this, gentlemen?"[5]

What Congress did about it was encompassed within the first Soldiers' and Sailors' Civil Relief Act of 1918 (SSCRA), drafted by Wigmore and the committee he led. By its own terms, it expired after the signing of the Armistice. As war clouds gathered in 1940, Congress reenacted the SSCRA almost verbatim with no expiration date. It has since been amended a number of times to update its provisions and to keep pace with developments in the law. Nevertheless, by 1990, with the onset of Operation Desert Shield and, later, Desert Storm, there was a major effort to completely rewrite the SSCRA to bring it in line with contemporary legal terminology and new financial services. Then-Representative Sonny Montgomery, Chairman of the U.S. House of Representatives Committee on Veterans' Affairs, the congressional committee with legislative jurisdiction over the SSCRA, asked the

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* This is an edited version of an article originally published in *The Federal Lawyer* as follows: Gregory M. Huckabee, *Our Past is Prologue—50 Years in the Legal Trenches*, FED. LAW., vol. 51, No. 4, May 2004, at 21–23, *available at* http://people.usd.edu/~ghuckabee/scramain.htm (last visited Jan. 11, 2011).

[1] *Soldiers' and Sailors' Civil Relief Bill: Hearings and Memoranda Before the Subcomm. of the Comm. on the Judiciary*, 65th Cong., 1st and 2d Sess. 9, 83–84 (1917).

[2] *Id.*

[3] *Id.*

[4] *Id. See also* H.R. REP. NO. 65-181, app. D, at 41 (1917) (reprinting the entire text of the letter).

[5] *Id.*

Department of Defense (DoD) for legislative drafting assistance.

The DoD provided a four-officer judge advocate SSCRA Task Force composed of one JAG representative from each service. Together with congressional staff and assistance from the American Bar Association (ABA), they crafted what became the Servicemembers Civil Relief Act of 2003 (SCRA).[6] Since 2003, Congress has continued to amend the SCRA to respond to judicial needs for clarification and greater articulation of civil legal protections for servicemembers and their families.

The most important amendment to the SCRA since 2003 is contained in House Report 3219 (as amended by the Senate), a 2010 provision creating a new title VIII to the SCRA. The purpose of the new title VIII is to clarify and enhance protections provided under the Act for servicemembers and their family members. The new title has two important sections, 801 and 802, which address private causes of action (PCOA).

II. The Problem

Although the SCRA of 2003 contains various sections that provide penalties for violations of the afforded protections, it did not specifically state who could bring an application for relief, nor did it specifically exclude private individuals from filing a private cause of action. Despite the intent of the DoD SSCRA Task Force to create a right to a personal cause of action by providing penalties for protection violations, the new title VIII clarifies what was always intended. Some courts considering this PCOA issue have found that such a cause of action exists under the SCRA, but other courts have disagreed.

In *Batie v. Subway Real Estate Corp.*,[7] a servicemember alleged that Subway Corp. violated the SCRA by evicting him from two commercial properties while he was deployed to Afghanistan. After obtaining declaratory judgments in the State of Texas courts, Subway evicted the servicemember from the spaces under the lease. Batie subsequently filed suit in federal district court seeking relief from the declaratory judgments and sought compensatory and punitive damages for alleged SCRA violations. The U.S. District Court declined to overturn the state declaratory judgments stating "Congress envisioned that state courts—not federal district courts—would decide claims involving SCRA's tenant protections during eviction proceedings."[8] The court interpreted the SCRA to mean that jurisdiction is not exclusive in federal court and that the Act does not compel federal adjudication in all cases implicating the statute's provisions. The federal court denied the claim for compensatory and punitive damages referring to the servicemember's failure to cite any provisions of the SCRA authorizing damages. In addition, the court held that even if the servicemember maintains the SCRA as a basis for damages, "there is no provision in the SCRA that authorizes a private cause of action to remedy violations of the statute."[9] The servicemember's claims were subsequently dismissed by the federal court.

Batie, however, filed a motion for reconsideration citing cases in which courts have interpreted certain sections of the SCRA to create a private cause of action. In view of the cases cited in Batie's motion, the federal district court vacated its earlier decision and reinstated the complaint for further adjudication. The case subsequently settled before trial.

In another 2008 case, *Hurley v. Deutsche Bank Trust Company*,[10] National Guard Sergeant James Hurley's house was foreclosed upon and his dependent family members were evicted from the property after Sergeant Hurley became protected by the SCRA. The foreclosed property was subsequently sold to a third party while Sergeant Hurley was deployed to Iraq. On returning home and his release from active duty, Sergeant Hurley sued in federal district court in Michigan seeking damages for violation of his rights under the SCRA. The federal court ruled, however, that there is no "right of private cause of action" to enforce violations of the SCRA.

After significant motion practice, including a motion for reconsideration (which was denied) and a motion for certification of the interim ruling for appeal under 28 U.S.C. § 1292(b),[11] the district court reversed itself; vacated the opinion holding there was no private right of action for damages under the SCRA; entered summary judgment in favor of Sergeant Hurley and his wife against the mortgagee, the mortgage servicing company, and the law firm that handled the foreclosure action; and ruled that both compensatory and punitive damages were available under the SCRA. The *Hurley* case is ongoing. That it took two years just to decide whether or not a private cause of action existed provided compelling evidence to Congress that remedial legislation was needed to clarify what rights a servicemember had under the SCRA. The split in the U.S. district courts created uncertainty in how the SCRA might be enforced in the future. As a consequence, in many jurisdictions across the country, ambiguity involving the PCOA question impacted whether a servicemember could bring a private cause of action to vindicate protections under the SCRA. In response, Congress' new title VIII seeks to provide guidance to the courts by expressly clarifying the purpose and intent of the SCRA, and unambiguously states

[6] Pub. L. No. 108-189, 117 Stat. 2835, 50 U.S.C. App. 501–596 (2006).
[7] 2008 WL 413627(N.D. Tex. Feb. 15, 2008).
[8] *Id.* at *6.
[9] *Id.* at *7.
[10] 2008 U.S. Dist. LEXIS 80526 (W.D. Mich. Sept. 30, 2008).
[11] 28 U.S.C. § 1292(b) 2006).

that a private cause of action does exist to enforce its protections for servicemembers and their families.

III. The Fix

The House of Representatives gets credit for championing and refining draft legislation that the DoD had initially proposed to resolve this PCOA conflict.[12] House Report 3949 and its accompanying House Report 111-324 (which passed the House 398-2), contained the private cause of action provision that was ultimately incorporated into H.R. 3219 by Senate amendment. The new SCRA title VIII contains section 80, which authorizes the Attorney General to commence a civil action against any person who engages in a pattern or practice of violating the SCRA or who engages in a violation of the Act that raises an issue of significant public importance. Furthermore, it establishes the right of those persons individually protected by the Act to intervene in any action brought by the Attorney General and to receive injunctive and monetary relief, along with reasonable attorneys' fees and costs.

In addition, there is a new section 802 that clarifies that those persons individually protected by the Act have their own personal cause of action, independent of any enforcement action the Attorney General might initiate. Those servicemembers individually protected who bring their own private action may generally seek and obtain the same remedies available upon intervention in an action brought by the Attorney General, including equitable or declaratory relief and monetary damages

Both sections explicitly authorize awards of attorneys' fees and costs that support the underlying theme of the amendment to the SCRA and ABA-stated goal: access to justice. The right to collect attorneys' fees will likely reduce litigation and induce settlements by those who might have previously refused to pay damages to servicemembers, hoping that the amount was too small to warrant the cost of litigation. The right to collect attorneys' fees would also bring the SCRA into line with similarly focused statutes such as the Uniformed Services Employment and Reemployment Rights Act, the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, the Federal Truth in Lending Act, 42 U.S.C. 1983, title VII of the Civil Rights Act of 1964, the Employee Retirement Income Security Act, and virtually every state unfair and deceptive trade practices and consumer protection statute. For further information, visit SCRA Online at http://people.usd.edu/~ghuckabe/scramain.htm. The ABA is also coming out in Spring 2011 with a new SCRA *Judges Benchbook*. Stay tuned for more SCRA development.

—Colonel (Ret.) John S. Odom, Jr., Judge Advocate, USAF. He is currently in private practice in Shreveport, Louisiana, and has extensive experience in SCRA litigation.

—Colonel Shawn Shumake, USA, Director of Legal Policy in the Office of the Under Secretary of Defense for Personnel and Readiness.

—Professor Gregory M. Huckabee, Lieutenant Colonel (Ret.). He is a former judge advocate who now teaches at the University of South Dakota and served as the Army representative and Chair of the Department of Defense SSCRA Task Force from 1991–1992.

[12] Private cause of action legislation was included in the Department of Defense's annual National Defense Omnibus Bill for Fiscal Year 2010. S. 1044, 111th Cong. § 513 (2010).

Lore of the Corps

Tried for Treason: The Court-Martial of Private First Class Dale Maple

Fred L. Borch III
Regimental Historian & Archivist

On 24 April 1944, at a general court-martial convened deep inside the U.S. Disciplinary Barracks at Fort Leavenworth, Private First Class (PFC) Dale Maple was found guilty of desertion and lending aid to the enemy. His sentence: to be hanged by the neck until dead. But Maple did not know that he had been sentenced to death, because the court-martial panel, which had conducted its proceedings in secret, had been ordered by the War Department to keep its verdict secret as well—even from the accused. What follows is the true story of the trial of PFC Maple, the first American-born Soldier in the history of the Army "ever to be found guilty of a crime that fits the Constitutional definition of treason."[1]

Born in San Diego, California, in September 1920, Maple was fifteen years old when he graduated from high school, first in his class. A "musical prodigy" with "many recitals to his credit," Maple also was an accomplished equestrian, surfer, and swimmer.[2] He decided to continue his education at Harvard, and continued to excel as a student: Maple graduated Phi Beta Kappa with a B.A., *magna cum laude* at age nineteen. His strength was languages. Dale Maple spoke, "with varying degrees of proficiency," Russian, Polish, Hungarian, Italian, French, Spanish, Portuguese, Danish, Swedish, Icelandic and Dutch. But his first love was German, and, while studying it at Harvard and associating with other students studying German, Maple soon gained the reputation of being a German cultural sympathizer. After he sang the Nazi Party's Horst Wessel Song at the Harvard German Club in the fall of 1940, however, and loudly and publicly declared that National Socialism was "infinitely preferable to democracy," the local media proclaimed that Maple "was the recognized Nazi leader of Boston."[3] While Maple would later insist at his court-martial that these pro-Nazi statements were nothing more than attempts to curry favor with the German government in order to obtain a scholarship to study at the University of Berlin, no one else saw it that way at the time.

Hitler's declaration of war on the United States in December 1941 dashed Maple's hopes for post-graduate work in Germany. He now decided that he should enlist in the Army, and he did, on 27 February 1942. For more than a year, he was an instructor in radio at Fort Meade, Maryland. Then, without any explanation, Maple was re-assigned to the 620th Engineer General Service Company, and he found himself living in barracks at Camp Hale, Colorado. The roughly two hundred Soldiers assigned along with Maple to the 620th were all men whom the Army believed were "unsympathetic, if not downright opposed, to the war aims of the Allies."[4] Some of these allegedly disloyal Soldiers were native born, like Maple. Others were naturalized U.S. citizens; a few were aliens; many were German or of German ancestry.

Maple was assigned to the unit because the Army believed that the pro-Nazi statements he had made at Harvard made him unsuitable for the sensitive radio work he had been doing in Maryland. That also explains why Maple and the other Soldiers assigned to the 620th did work of a menial, and insensitive, nature: cutting wood, digging ditches, and making camouflage netting. Maple was unhappy about this work, which he felt was oppressive, and about his assignment to the 620th, which he viewed as degrading.

Maple soon learned that he and his fellow Americans were not alone at Camp Hale. On the contrary, residing nearby were several hundred German prisoners of war (POWs). These were men from Rommel's vaunted Afrika Korps who, after being captured in North Africa, were now sitting out the war in Colorado.

Maple was soon fraternizing with these German POWs, and his fluency in their language and knowledge of their culture made him a popular figure. Within a short period of time, Maple was talking about helping some of these Afrika Korpsmen to escape. He initially decided to help ten Germans escape. Ultimately, however, Maple chose to help two German sergeants flee to Mexico. Maple purchased an automobile and a pistol, borrowed money from his parents, and, on 15 February 1944, drove from Camp Hale with the two enemy POWs. There was no fence around Camp Hale; Army investigators later concluded that the Germans simply slipped away from their work detail when the guard was not

[1] E. J. Kahn, Jr., *Annals of Crime: The Philologist (Part IV)—Who Wants to Go to Germany in Wartime*, NEW YORKER, Apr. 1, 1960, 62, at 66.

[2] Lieutenant Colonel Bernard A. Brown, Judge Advocate Gen. Dep't., Assistant Judge Advocate, Post Trial Review, *United States v. Dale Maple*, CM 257165, at 18 (21 May 1944); E. J. Kahn, Jr., *Annals of Crime: The Philologists (Part I)—A Trip to Old Palomas*, NEW YORKER, Mar. 11, 1950, 35, 36.

[3] Kahn, *supra* note 1, at 72.

[4] *Id.* at 62.

paying attention and walked away to their rendezvous with Maple.

Maple and the two German POWs, having discarded their uniforms and now dressed in civilian clothing, began driving south. After covering more than six hundred miles, the men were but seventeen miles from the border with Mexico when their car ran out of gas. Maple and the two Germans then walked the rest of the way. On 18 February 1944, they were three miles inside Mexico when they were apprehended by a suspicious Mexican customs officer.

Maple and the two Germans were returned to U.S. authorities within days. The Germans were not punished because, under the law of armed conflict, they had a right to escape. For PFC Maple, however, it was a different story. He was taken into custody by the Federal Bureau of Investigation, indicted on the charge of treason, and arraigned in U.S. District Court in New Mexico. But the criminal proceedings against Maple in federal court went nowhere, since the Army decided that it should prosecute Maple. The result was that Maple was charged with desertion under the 58th Article of War and with two specifications of "aiding the enemy" by "harboring and protecting escaped prisoners of war . . . and affording them shelter and automobile transportation in his private automobile."[5] The Army could not try Maple for treason because, under the Articles of War, treason was not enumerated as a crime. Consequently, Maple was charged under the 81st Article of War, which made it a crime to relieve, correspond with, or aid the enemy. That article was the "military statute that most nearly approximate[d] the civil treason law."[6]

On 17 April 1944, a general court-martial convened at Fort Leavenworth heard Maple's case. The twelve members selected by the convening authority were almost certainly the highest ranking panel in history to hear a case involving a private first class: a major general (MG) (president of the court), a brigadier general, seven colonels, and three lieutenant colonels. The trial judge advocate (JA)—as the prosecutor was then called—was not a member of the Judge Advocate General's Department (JAGD). He had, however, practiced law in Texas before World War II.

Maple had three defense counsel: a major who was not a lawyer, a lieutenant who was a lawyer (but not a member of the JAGD), and civilian counsel, who Maple had hired three days before his trial started. Maple had made a good choice in selecting this civilian lawyer, as the man had previously served as a JAGD captain and consequently was very familiar with court-martial proceedings and the Articles of War.

The proceedings were closed to the public, and the secret nature of the trial meant that Maple's father and mother were not permitted to attend. After Maple entered pleas of not guilty to all charges and specifications, the trial JA presented the Government's case. Testimony from the two German POWs, who testified through interpreters, and the Mexican customs official who had apprehended the accused and the two escapees, left little doubt as to the accused's guilt. Additionally, after an Army psychiatrist testified that Maple had an I.Q. of 152 and, in his expert opinion, understood without question that his actions were treasonous, the likelihood of a guilty verdict must have seemed strong to all in the courtroom.[7]

After the Government rested, Maple took the stand. Under oath, he made a 7000 word statement in which he explained that he had no intent to desert the 620th. Rather, he had left his unit with the two German POWs hoping that he would be caught and tried for treason at a public trial in federal court. Maple insisted that this public forum would give him an opportunity to publicize the abusive and degrading treatment he had suffered in the 620th.

After closing arguments from both sides, the panel adjourned to consider the evidence. On 24 April 1944, the members unanimously concluded that Maple was guilty and that he should be hanged by the neck until dead. But, since the War Department had instructed the court-martial panel that it was not to announce its findings and sentence in court, Maple did not know that he had been sentenced to death. Not until seven months later did Maple learn that he had escaped the hangman's noose when he was informed that President Roosevelt had commuted his sentence to life imprisonment at hard labor, forfeiture of all pay and allowances, and a dishonorable discharge.[8]

It seems that The Judge Advocate General of the Army, MG Myron C. Cramer, was responsible for saving Maple's life. In reviewing the record of trial and providing a post-trial recommendation for the White House, Cramer wrote that

> On the face of the record there appears to be little or nothing to suggest mitigation. But the accused is only 24 years of age, and is inexperienced. While he is undoubtedly legally sane and responsible for his despicable acts, under all the circumstances I am unable to escape the

[5] U.S. Dep't of Def., DD Form 458, Charge Sheet, *United States v. Maple*, CM 257165 (28 Mar. 1944).

[6] Kahn, *supra* note 2, at 48.

[7] Kahn, *supra* note 1, at 77.

[8] War Department, Gen. Court-Martial Order No. 639 (28 Nov. 1944).

> impression that justice does not require this young man's life. I feel that the ends of justice will better be served by sparing his life so that he may live to see the destruction of tyranny, the triumph of the ideals against which he sought to align himself, and the final victory of the freedom he so grossly abused.[9]

In November 1944, Roosevelt took action in Maple's case—likely influenced by Cramer's recommendation that the condemned man be spared. Maple was then transferred from the Army's Disciplinary Barracks to the nearby U.S. Penitentiary in the town of Leavenworth. In April 1946, the Army decided unilaterally to drastically reduce all sentences imposed by courts-martial during World War II, and it cut Maple's sentence to ten years. He was paroled in early 1951.[10] While Maple's case is almost forgotten today, his place in history is assured as the first native-born American Soldier to be court-martialed for the military equivalent of treason.

More historical information can be found at

The Judge Advocate General's Corps
Regimental History Website

Dedicated to the brave men and women who have served our Corps with honor, dedication, and distinction.

https://www.jagcnet.army.mil/8525736A005BE1BE

[9] Kahn, *supra* note 1, at 78.

[10] *Id.*

Target Analysis: How to Properly Strike a Deployed Servicemember's Right to Civilian Defense Counsel

Major John W. Brooker[*]

Of course, there are statutory offenses which demand a general court-martial, and these must be ordered by the division or corps commander; but, the presence of one of our regular civilian judge-advocates in an army in the field would be a first-class nuisance, for technical courts always work mischief.[1]

1. Introduction

Like many other legal codes, the Uniform Code of Military Justice (UCMJ) is living and flexible in that it may be changed via legislation or judicial interpretation. Such adaptability is essential for its survival, as "[n]o legal system can remain static, each must change to reflect the needs and demands of society or risk becoming an anachronistic relic of a dead or dying society."[2] The "needs and demands of society," however, are much more complex for the military justice system than the civilian justice system, as the military justice system cannot focus solely on deterring and punishing crime.

The continual changes to the military justice system are made in a perpetual attempt to balance, but simultaneously promote, two potentially incompatible goals.[3] Major General (MG) William A. Moorman, the former Judge Advocate General of the U.S. Air Force, aptly stated, "While ensuring good order and discipline in the force as a whole is a bedrock purpose for having a military justice system, promoting justice in individual cases is a second, equally important, purpose."[4] The continual struggle between these two goals can be seen in how the UCMJ has been changed in many areas, to include modifications over jurisdiction and appellate review.[5] Some of the most striking modifications, though, have been to a servicemember's rights to counsel and counsel of choice.

A servicemember's rights to counsel and counsel of choice expanded greatly during the mid-twentieth century. "[J]udge advocates before the Military Justice Act of 1968 grew to accept the thought of soldiers being confined for six months as the result of a special court-martial with no lawyers in the courtroom . . . . Now, of course, we look back in disbelief."[6] In 1968, servicemembers received the right to be represented by civilian counsel at all general and special courts-martial.[7] This expansion has not been without controversy.

Following the conflict in Vietnam, numerous commentators proposed that a servicemember's nearly total right to civilian counsel at general and special courts-martial hindered a commander's ability to complete the mission.[8] These commentators proffered solutions to the problems that they saw.[9] The United States is now embroiled in major conflicts in Iraq and Afghanistan, and is again trying courts-martial in combat settings.[10]

Throughout Operation Iraqi Freedom and Operation Enduring Freedom, the impact that a servicemember's right to civilian defense counsel has had on the mission has been palpable. The unavoidable delays and logistical challenges that result from civilian defense counsel practicing in a deployed environment have the potential to negatively impact the military justice system's ability to fulfill its mission.

When a proper application of the UCMJ creates an unintended problem, a detailed analysis of the potential solutions is necessary. When a commander must solve a problem, he or she often implements a process to arrive at the appropriate solution. For example, when using observed,

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[1] WILLIAM T. SHERMAN, 2 MEMOIRS OF GENERAL W.T. SHERMAN 397 (1891).

[2] Major General William A. Moorman, *Fifty Years of Military Justice: Does the Uniform Code of Military Justice Need to be Changed?*, 48 A.F. L. REV. 185, 186 (2000).

[3] *Id.*

[4] *Id.*

[5] *See* UCMJ art. 2(a)(10) (2008) (explicitly extending jurisdiction to certain civilians); H.F. "Sparky" Gierke, *Five Questions About the Military Justice System*, 56 A.F. L. REV. 249, 250 (2005).

[6] Gierke, *supra* note 5, at 250.

[7] UCMJ art. 38(b).

[8] *See infra* Part V.A.

[9] *See infra* Parts VI.A—VI.D.

[10] For a detailed analysis of the court-martial system's application in Iraq and Afghanistan, see Franklin D. Rosenblatt, *Non-Deployable: The Court-Martial System in Combat from 2001-2009*, ARMY LAW., Sept. 2010 at 12–34.

indirect artillery fire against an enemy, an Army commander will use the procedures set forth in Field Manual 6-30.[11]

Because a deployed servicemember's right to civilian defense counsel can undermine a command's ability to effectively use the UCMJ, the UCMJ should be amended to give a general court-martial convening authority (GCMCA) a process by which he or she may abrogate that right when required. While several solutions have been proffered, Precision-Targeted Abrogation is the proposal that most accurately targets the problems without causing excessive collateral damage to the military justice system or to an accused's individual rights.

II. Foundation of a Servicemember's Rights to Counsel and Counsel of Choice

A. The Right to Counsel

Since the right to counsel of choice dovetails with the broader right to counsel, a brief study of the foundation and framework on which both rights stand is necessary. A fundamental understanding of how broad a servicemember's right to counsel extends will provide a platform for analyzing how far the right to counsel of choice can be reduced.

1. Civilian Courts

The Sixth Amendment sets forth the fundamental right that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[12] Although the Sixth Amendment's language may appear simple, the breadth and application of the right to counsel has expanded greatly since it was ratified in 1791.

The Supreme Court did not hold that an indigent defendant had a Constitutional right to counsel in all federal court cases until the landmark case of *Johnson v. Zerbst.*[13] Prior to 1938, the Supreme Court was effectively silent on the issue of an accused's Sixth Amendment right to counsel.[14] Until then, the only right in federal district court to court appointed counsel was statutory, and it extended only to capital cases.[15] These statutes were applied without disturbance for approximately 148 years. Prior to 1938, the constitutional right to counsel was a right to retain counsel, not a right to have counsel appointed.[16]

The last major expansion of the Sixth Amendment right to counsel in civilian courts came in 1963 when the Supreme Court decided *Gideon v. Wainwright*.[17] In Gideon, the Court expanded the Sixth Amendment right to counsel to state courts via the Fourteenth Amendment Due Process Clause.[18]

The rationale for an accused having a right to counsel is relatively simple. In *Powell v. Alabama*, the Supreme Court reasoned:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.[19]

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[11] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 6-30, TACTICS, TECHNIQUES, AND PROCEDURES FOR OBSERVED FIRE (16 July 1991).

[12] U.S. CONST. amend. VI.

[13] Johnson v. Zerbst, 304 U.S. 458, 463 (1938) ("The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."). *See* Powell v. Alabama, 287 U.S. 45, 59–65 (1932) (providing a good description of the history of the right to counsel).

[14] *See* S. SIDNEY ULMER, MILITARY JUSTICE AND THE RIGHT TO COUNSEL 57 (1970); *see also* 3-13 CRIMINAL CONSTITUTIONAL LAW § 13.01[1] (Matthew Bender 2008) [hereinafter CRIMINAL CONSTITUTIONAL LAW].

[15] The Judiciary Act of 1789 states, "That in all the courts of the United States, the parties may plead for their own causes personally or by the assistance of such counsel or attorneys at law . . . ." Ch. 20, § 35, 1 Stat. 73, 92 (1789). Additionally, the Punishment of Crimes Act of 1790 states that for treason and capital offenses, accused persons are entitled "full defense by counsel learned in the law," and that the court or judge is "authorized and required immediately upon his request to assign such person as such counsel . . . ." Ch. 9, § 29, 1 Stat. 112, 118 (1790). For a more detailed outline and analysis of the history of the right to counsel until 1970, see ULMER, *supra* note 14, at 58.

[16] *See* CRIMINAL CONSTITUTIONAL LAW, *supra* note 14, § 13.01[1].

[17] Gideon v. Wainwright, 372 U.S. 335 (1963).

[18] *See id.*

[19] Powell v. Alabama, 287 U.S. 45, 68–69 (1932).

The Court reinforced this logic in *Gideon v. Wainwright*, stating that *Powell v. Alabama* was based on "sound wisdom."[20] Now that it is relatively settled law that the Sixth Amendment guarantees a civilian the right to counsel prior to being deprived of "life or liberty,"[21] a logical question remains: does that right also extend to servicemembers?

2. Military Courts-Martial

Every U.S. servicemember takes an oath to "support and defend the Constitution of the United States against all enemies, foreign and domestic; to bear true faith and allegiance to the same . . . ."[22] Ironically, it is still unclear whether one of the constitutional rights that servicemembers vow to protect, such as the Sixth Amendment right to counsel, applies to Soldiers facing court-martial.

The Supreme Court has yet to decide whether or not the Sixth Amendment right to counsel applies at general and special courts-martial. In *Middendorf v. Henry*, a 1976 case addressing the right to defense counsel at summary court-martial, the Court states, "The question of whether an accused in a court-martial has a constitutional right to counsel has been much debated and never squarely resolved."[23]

The Court struggled with this question as early as 1963. In *United States v. Culp*, the two concurring judges both opined that they believed that the Sixth Amendment right to counsel applies to courts-martial.[24] Since *Middendorf v. Henry*, however, the Court of Appeals for the Armed Forces (formerly known as "Court of Military Appeals") held that the Sixth Amendment right to counsel applies to special and general courts-martial, stating that the right attaches in most cases upon preferral of charges.[25] From a practical standpoint, the current statutory and regulatory rights to counsel make the debate about the constitutional application of a servicemember's right to counsel largely academic.

A servicemember's statutory and regulatory rights to counsel eclipse the protections of the Sixth Amendment. Article 38(b), UCMJ, guarantees a servicemember the right to be represented by counsel at a general or special court martial or article 32 investigation.[26] Article 27, UCMJ, guarantees a servicemember the right to be represented by a qualified lawyer at general courts-martial.[27] Article 27(c), UCMJ, guarantees a servicemember the right to be represented by a qualified lawyer at a special court-martial "unless counsel having such qualifications cannot be obtained on account of physical conditions or military exigencies."[28] Military Rule of Evidence (MRE) 305(e)(2) guarantees a servicemember the right to counsel prior to any post-preferral interrogation.[29] These statutory and regulatory rights, however, have not always been present. Understanding the history of a servicemember's statutory right to counsel will help determine how much, if any, the current right to counsel of choice should be abrogated.

The term "judge advocate" is itself evidence that a servicemember's right to counsel was once radically different.[30] Starting in 1786, judge advocates detailed to courts-martial both prosecuted and assisted the accused.[31] "The judge advocate . . . shall prosecute in the name of the United States of America; [sic] but shall so far consider himself as counsel for the prisoner, after the said prisoner shall have made his plea."[32] This system of dual representation continued until 1916, whereupon an accused was given the right to retain counsel for the first time.[33] The first right to an appointed defense counsel came during a revision of the Articles of War in 1920.[34] Defense counsel,

[20] *See Gideon*, 372 U.S. at 345.

[21] Johnson v. Zerbst, 304 U.S. 458, 463 (1938).

[22] 10 U.S.C. § 502 (2006).

[23] Middendorf v. Henry, 425 U.S. 25, 33 (1976).

[24] *See* United States v. Culp, 14 C.M.R. 199, 217 (C.M.A. 1963) (Quinn, C.J., concurring in the result); *id.* at 219 (Ferguson, J., concurring in the result).

[25] *See, e.g.*, United States v. Wattenburger, 21 M.J. 41, 43 (C.M.A. 1985) (stating that a servicemember's Sixth Amendment right to counsel attaches upon preferral of charges); United States v. Annis, 5 M.J. 351, 353 (C.M.A. 1978) ("From the earliest terms of this Court we have sustained the right of assistance of counsel prior to and during trial on criminal charges.").

[26] UCMJ art. 38(b)(1) (2008) ("The accused has the right to be represented in his defense before a general or special court-martial or at an investigation under section 832 of this title (article 32) as provided in this subsection."); *id.* art. 38(b)(2) ("The accused may be represented by civilian counsel if provided by him.").

[27] *Id.* art. 27(a), (b).

[28] *Id.* art. 27(c).

[29] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 305(e)(2) (2008) [hereinafter MCM].

[30] *See* United States v. Culp, 33 C.M.R. 411, 422 (C.M.A. 1963) ("[A] judge advocate, as his name implies, had a dual capacity. He was a "judge" and he was an "advocate.").

[31] *Id.*

[32] 1786 Articles of War, art. 6, *reprinted in* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 972 (2d ed. 1920 reprint); 1806 Articles of War, art. 69, *reprinted in* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 972, 982 (2d ed. 1920 reprint). Article 90 of the 1874 Articles of War continued the practice of dual representation. *See* 1874 Articles of War, art. 90, *reprinted in* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 986, 993 (2d ed. 1920 reprint).

[33] *See* Articles of War, art. 17, 39 Stat. 650, 653 (1916); *see also Culp*, 14 C.M.R. at 210 ("The Articles of War were again revised by the Act of August 29, 1916, and, to my knowledge, defense counsel as such was mentioned for the first time . . . ."); ULMER, *supra* note 14, at 33 ("Thus between 1806 and 1916, the slight enlargement of the privilege which occurred in the Articles of War was not matched by activity in this area by the Supreme Court.").

[34] *See* Articles of War, art. 17, 41 Stat. 787, 790 (1920); Articles of War, art. 11, 39 Stat. 650, 652 (1916).

however, did not have to be an attorney.[35] That standard held until the passage of the Elston Act in 1948.[36] The Elston Act, which represented "a radical departure from former provisions of both substantive law and procedure,"[37] was the first statute in U.S. history that required that a lawyer be provided, in limited circumstances, to an accused servicemember.[38] The Elston Act required both the trial and defense counsel at general courts-martial to be lawyers.[39] The UCMJ was passed shortly thereafter in 1950, containing the first versions of Articles 27 and 38, UCMJ.[40] The original version of Article 27, affording an accused at special court-martial the right to a lawyer only if the trial counsel was a lawyer, was amended to its current form in 1968.[41]

B. The Right to Counsel of Choice

1. Constitutional Basis

The Court has consistently held that the quality or meaningfulness of an accused's relationship with his lawyer is not the focus of a Sixth Amendment right to counsel claim.[42] The purpose of the Sixth Amendment right to counsel "is simply to ensure that criminal defendants receive a fair trial."[43]

Nonetheless, the Supreme Court has repeatedly acknowledged that an accused that has the means to hire his or her own counsel has some form of Constitutional right in terms of choosing his own counsel.[44] In *Wheat v. United States*, the Supreme Court explains:

> Thus, while the right to select and be represented by one's preferred attorney is comprehended by the *Sixth Amendment*, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers.[45]

More recently, the Court strengthened the view that the right to counsel of choice is constitutionally based. In *United States v. Gonzalez-Lopez*, the Court held that a trial court's improper denial of one's Sixth Amendment right to counsel of choice constitutes automatic grounds to overturn a conviction, and is not subject to any harmless error review on appeal.[46] The Court states that the Sixth Amendment "commands, not that a trial be fair, but that a particular guarantee of fairness be provided—to wit, that the accused be defended by the counsel he believes to be best."[47] The Court further explains that "[t]he right to select counsel of one's choice . . . has never been derived from the *Sixth Amendment's* purpose of ensuring a fair trial. It has been regarded as the root meaning of the constitutional guarantee."[48] Because the Court now holds that a "[d]eprivation of the right [to counsel of choice] is 'complete' when the defendant is erroneously prevented from being represented by the lawyer he wants,"[49] a further inquiry into the statutory basis of the right to counsel of choice, as well as the Court's precedential power over the military, are necessary to see what would be "erroneous" within the military courts.

2. Statutory Basis for the Military

The development of a servicemember's statutory right to counsel of choice at general and special courts-martial is interwoven with the statutory right to representation by counsel. In 1916, as a part of its third revision of the Articles of War, Congress provided a military accused the statutory right to counsel of choice in general and special courts-martial, presuming such counsel was reasonably available.[50] Unfortunately, this right was unclear in practice and utility, as the statute did not clarify the key questions of

[35] *See Culp*, 33 C.M.R. at 425 ("[T]here was no attempt to provide members of the Judge Advocate Corps or persons qualified in the law as members of the court, trial judge advocate, or defense counsel.").

[36] Elston Act, art. 11, 62 Stat. 627, 629 (1948) ("[T]he trial judge advocate and defense counsel of each general court-martial shall, if available, be members of the Judge Advocate General's Department or officers who are a member of a bar of a Federal court or the highest court of a state of the United States."). This right to counsel also extended to pretrial investigations. *See id.* art. 46b, 62 Stat. at 633.

[37] *Culp*, 33 C.M.R. at 425.

[38] *See id.*; ULMER, *supra* note 14, at 57.

[39] Elston Act, art. 11, 62 Stat. at 629.

[40] *See* UCMJ arts. 27 & 38 (1950).

[41] *See* 10 U.S.C.S. § 827 (LexisNexis 2010).

[42] *See, e.g.*, Morris v. Slappy, 461 U.S. 1 (1983) ("[W]e reject the claim that the *Sixth Amendment* guarantees a "meaningful relationship" between an accused and his counsel."); United States v. Cronic, 466 U.S. 648, 657 (1984) ("[T]he appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer as such.").

[43] Strickland v. Washington, 466 U.S. 668, 689 (1984).

[44] *See, e.g.*, Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624–25 (1989).

[45] Wheat v. United States, 486 U.S. 153, 159 (1988). The Court also lists instances in which a defendant may not get his choice of counsel, such as when a defendant cannot afford a particular attorney and when an attorney represents an opposing party. *Id.* at 159–60.

[46] United States v. Gonzalez-Lopez, 548 U.S. 140 (2006).

[47] *Id.* at 146.

[48] *Id.* at 147–48.

[49] *Id.* at 148.

[50] *See supra* note 33 and accompanying text.

whether defense counsel would be civilian or military, as well as who was to pay the requisite costs.[51]

Some of these uncertainties were answered in a 1920 revision of Article 17 of the 1916 Articles of War.[52] This revision to Article 17 gave an accused the right to be represented "by counsel of his own selection, civil counsel if he so provides, or military if such counsel be available, otherwise by the defense counsel duly appointed for the court pursuant to Article 11."[53] Although such a right seemed to be a large step to securing an accused the rights to counsel and counsel of choice, the new rule had little to no practical value. During World War II, approximately 80,000 servicemembers were convicted at general or special court-martial.[54] While many convictions were justified, abuses of the military justice system were overt, widespread, and alarming.[55] The resulting congressional attention resulted in the Elston Act and UCMJ.[56]

Practically, the rights to counsel and counsel of choice firmly codified in the Elston Act and UCMJ did not immediately improve the functioning of the military justice system. The honor and value of defending a servicemember was not yet apparent to all military leaders, as the "lawyers for the accused before courts-martial were shunned by the military."[57] They did, however, provide the foundation for the widely used and firmly rooted statutory right to counsel of choice that accused servicemembers enjoy today.

The Elston Act changed the landscape via two main vehicles. First, it required defense attorneys at general courts-martial.[58] Second, and arguably as important, it expanded the rights to counsel and counsel of choice to the newly-conceived pretrial investigation, which was a prerequisite to a general court-martial.[59] These expansions were successful in that the right to counsel of choice was vigorously exercised as soon as the early 1980s.[60] In 1981, Article 38 was amended to give an accused a right to only one military counsel.[61]

Limiting an accused to only one military counsel demonstrates that Congress has the authority to further curtail a servicemember's right to counsel. In *Gonzalez-Lopez*, the Supreme Court states that a "wrongful" denial of civilian counsel of choice may alone be a Sixth Amendment violation, even if the trial was fair.[62] This holding, however, was for a defendant in an Article III court, making it potentially inapplicable to the military.[63] Even assuming that this rule applies to military courts-martial, Congress has the constitutional authority to determine when a denial would be "wrongful," as courts-martial are organized under Article I of the Constitution.[64] As such, it is important to examine the purposes and values of the military justice system before discussing whether it should be changed.

III. The Value of an Efficient, Accurate, and Fair Military Justice System

A. Policy-Based Reasons

1. Historical Context

Attempts at military legal codes have been made "[a]t least since the time of Gustavus Adolphus."[65] Even prior to the Revolutionary War, American commanders understood the value of discipline. In 1759, George Washington stated, "Nothing is more harmful to the service than the neglect of discipline; for that discipline, more than numbers, gives one army superiority over another."[66]

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[51] ULMER, *supra* note 14, at 34.

[52] Articles of War, art. 17, 41 Stat. 787, 790 (1920).

[53] *Id.* art. 11.

[54] ULMER, *supra* note 14, at 50.

[55] *See id.* at 50–52 (outlining numerous specific incidents and reactions to miscarriages of the military justice system); *infra* notes 89–92 and accompanying text.

[56] *See* ULMER, *supra* note 14, at 52–53; *supra* notes 36–40 and accompanying text.

[57] United States v. Culp, 14 C.M.R. 199, 214 (C.M.A. 1963) (citing Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1 (1958)).

[58] *See supra* note 39 and accompanying text.

[59] Elston Act, art. 46b, 62 Stat. 627, 633 (1948). This right was retained in the new first version of the UCMJ. UCMJ art. 38(b)(1) (1950) (providing a right to counsel of choice at article 32 hearings).

[60] *See* United States v. Gnibus, 21 M.J. 1, 14 (C.M.A. 1985).

[61] Military Justice Amendments of 1981, Pub. L. No. 97-81, 95 Stat. 1085, 1088. *See Gnibus*, 21 M.J. at 14 (explaining how the exercise of the right of counsel of choice led in part to the amendment).

[62] United States v. Gonzalez-Lopez, 548 U.S. 140 (2006).

[63] *See* United States v. Marcum, 60 M.J. 198, 206 (C.A.A.F. 2004) ("Constitutional rights identified by the Supreme Court generally apply to members of the military unless by text or scope they are plainly inapplicable."). For a good synopsis of the interaction between the Supreme Court and the military justice system, see Anna C. Henning, *Supreme Court Appellate Jurisdiction Over Military Justice Cases*, CONG. RES. SERV., Mar. 5, 2009, at 5, *available at* http://www.fas.org/sgp/crs/misc/RL34697.pdf ("[L]egal interpretations of the Supreme Court do not necessarily create binding precedent for Article I courts, and vice versa. . . . [M]ilitary courts sometimes reject even Supreme Court precedent as inapplicable in the military context.").

[64] Congress's authority to establish the military justice system is based on the U.S. Constitution. U.S. CONST. art. 1, § 8, cl. 14. Chappell v. Wallace, 462 U.S. 296, 300–01 (1983).

[65] General William C. Westmoreland & Major General George S. Prugh, *Judges in Command: The Judicialized Uniform Code of Military Justice in Combat*, 3 HARV. J. L. & PUB. POL'Y 1, 3 (1980) (citing Code of Articles of King Gustavus Adolphus of Sweden 1621, *reprinted in* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 972 (2d ed. 1920 reprint)).

[66] Lieutenant Colonel James B. Roan & Captain Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. REV.

Although military tactics have unquestionably changed over the past 250 years, discipline remains critically important. The Preamble to the *Manual for Courts-Martial* states, "The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[67] In other words, the military justice system is designed to protect national security by providing commanders with an efficient tool to ensure that orders are followed and good order and discipline is maintained. Justice also demands fair procedures and accurate results. An examination of how the American military justice system performed in prior conflicts will demonstrate that efficiency and accuracy do not always coexist peacefully. This conflict can lead to the perception that the system is "unfair."

Creating a military justice system that strikes the proper practical balance between efficiency, accuracy, and other competing factors has proven difficult. General William Westmoreland (Westmoreland), former Commander of U.S. Military Assistance Command, Vietnam, and MG George S. Prugh (Prugh), formerly The Judge Advocate General, U.S. Army, explain, "There is a natural conflict between law and armed force. Both are competitors for authority."[68] Westmoreland and Prugh further state, "The competition between law and armed force is not new. It is probably as old as man, and certainly dates no later than the recognition that law, not executive discretion alone, may limit force."[69]

The command and public must both have faith in the military justice system for it to remain relevant and trusted.[70] Westmoreland and Prugh believed that the military justice systems must "identify and adopt those procedures which ensure fairness and 'due process' while preserving the ability of the forces to achieve their mission."[71] They believed that this was a problem, as commanders and others "risking life and limb" would have little tolerance for sacrificing "mission effectiveness in order to achieve 'due process.'"[72]

During and immediately following the Vietnam War, which coincided with the initial implementation of the changes of the Military Justice Act of 1968,[73] confidence within the military ranks for the military justice system was strong, but problems persisted. A 1971 survey of Army War College students was telling.[74] The survey found that 21.4% of students at least "slightly disapprove[d]" of the military justice system.[75] While the remainder of the students at least "slightly approve[d]" of the military justice system, approximately 80% of the students believed that "processing time delays in special and general courts-martial were excessive."[76] A lack of trust in the military justice system was present at the highest ranks. Westmoreland and Prugh opined that the UCMJ "is not capable of performing its intended role in times of military stress."[77] In their opinion, the military justice system failed to effectively prosecute those responsible for the massacres at My Lai.[78] Despite the fact that "the conduct of a substantial number of soldiers and their leaders was abhorrent to decent civilized people," only six Soldiers faced court-martial, and only one was convicted.[79]

Numerous commentators have opined why the prosecutions proceeded in the manner that they did.[80] According to Westmoreland and Prugh, the procedural and due process protections associated with courts-martial in a deployed environment posed "substantial problems in the administration of military justice. . . . The sheer bulk of the various investigations, numbers of witnesses, repeated interrogations of these witnesses by the batteries of counsel involved at the various stages, supply of counsel, investigators, travel funds, and reporters presented overwhelming difficulties."[81]

More important than the specific problems exposed was the realization that to be respected, the military justice system must not only be both efficient and accurate, but also appear to be so. The process of going through the My Lai

185 (2002) (quoting Letter of Instruction from General George Washington to the captains of the Virginia Regiments (29 July 1759)).

[67] MCM, *supra* note 29, pt. I, ¶ 3.

[68] Westmoreland & Prugh, *supra* note 65, at 1. General William C. Westmoreland served as Commander, U.S. Military Assistance Command, Vietnam (MACV), from 1964–1968. *Id.* Major General George S. Prugh served as The Judge Advocate General, United States Army, from 1971–1975, and as Legal Advisor, MACV, from 1964–1966. *Id.* For a good account of Army Judge Advocates in Vietnam, see FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI 3–57 (2001).

[69] Westmoreland & Prugh, *supra* note 65, at 2.

[70] *See* Moorman, *supra* note 2, at 187–190.

[71] Westmoreland & Prugh, *supra* note 65, at 6.

[72] *Id.*

[73] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (codified as amended in scattered sections of 10 U.S.C.).

[74] Colonel Joseph N. Tehnet & Colonel Robert B. Clarke, *Attitudes of the U.S. Army War College Students Toward the Administration of Military Justice*, 59 MIL. L. REV. 27 (1973).

[75] *Id*. at 41.

[76] *Id*. at 60.

[77] Westmoreland & Prugh, *supra* note 65, at 2.

[78] *See id.* at 61–66. For a detailed account of the purported facts of the My Lai massacre, see SEYMOUR M. HERSH, MY LAI 4: A REPORT ON THE MASSACRE AND ITS AFTERMATH (1970).

[79] Westmoreland & Prugh, *supra* note 65, at 61.

[80] *See, e.g.*, MICHAL R. BELKNAP, THE VIETNAM WAR ON TRIAL: THE MY LAI MASSACRE AND THE COURT-MARTIAL OF LIEUTENANT CALLEY 208–34 (2002); RICHARD HAMMER, THE COURT-MARTIAL OF LT. CALLEY 373–98 (1971).

[81] Westmoreland & Prugh, *supra* note 65, at 64.

investigations and trials, rather than any outrage over the verdicts themselves, exposed the shortcomings of the American military justice system at that time, and demonstrated the need for continued evaluation and improvement of the system.[82] For the first time since the implementation of the UCMJ in 1950, "[m]ilitary justice was tested by the My Lai cases in an atmosphere of unparalleled publicity. . . ."[83] "My Lai and its related legal activities provide an opportunity to evaluate the functioning of the Code in terms of breadth and depth."[84]

Public confidence in the military justice system at that time was not strong. The fact that the military justice system was attacked by both those who supported and opposed accused Soldiers like First Lieutenant William L. Calley demonstrated the lack of confidence in the system.[85] Furthermore, the examination of the system was broad and profound. For example, a House Armed Services subcommittee issued a report to the full committee that included several proposals for changes to the UCMJ.[86] Additionally, several scholarly articles set forth numerous proposals for ways to improve the UCMJ.[87]

Whereas Westmoreland and Prugh were dissatisfied with the "end product" of the legal actions resulting from My Lai, "even though one may conclude that the rights of the individual accused servicemen were scrupulously respected throughout the process,"[88] an almost total and complete lack for individual rights caused the problem with the military justice system in World War II.

When combined with "a greater public awareness of the war through advances in communication," the largely unrestrained World War II military justice system under the Articles of War resulted in "severe criticism of the military justice system. . . ."[89] By 1945, at least 12 million people had served in the American military during World War II. Over 1.7 million courts-martial were tried during the war, resulting in over 100 executions and 45,000 confined servicemembers.[90] In 1945, a panel led by Federal District Court Judge Matthew F. McGuire concluded, "It may be said categorically that the present system of military justice is not only antiquated, but outmoded." McGuire opined that "the present system fails" for its failure to protect individual rights. McGuire also stated, "Certain basic rights vital in our viewpoint as a people, and by virtue of that fact inherent in, and essentially a part of any system, naval or otherwise that purports to do justice, must be accepted and safeguarded."[91]

Abuses of the military justice system during World War II included punishment of court-members for unpopular verdicts, unduly harsh sentences on convicted servicemembers, and unqualified defense counsel.[92] As was the case after My Lai, the President personally reviewed convictions and sentences, and Congress studied perceived flaws in the system.[93] Furthermore, Congress was "deluged with complaints of autocracy in the handling of these courts martial throughout the armed forces."[94] Congress responded dramatically by overhauling the entire system with the Elston Act, and ultimately, the UCMJ.[95]

These historical examples demonstrate that the military justice system must balance both efficiency and accuracy. Whereas the military justice system in World War II appeared to sacrifice accuracy in lieu of efficiency, the subsequent changes to the military justice system through 1968 implemented substantive and procedural safeguards that may have unnecessarily sacrificed efficiency in favor of accuracy.

2. *Current Context*

Lawmakers, American citizens, and military commanders now have an even more important vested interest in ensuring that the military justice system accomplishes its goals efficiently and accurately.[96] Unlike the U.S. military during World War II and the Vietnam War, today's military is composed of an all-volunteer force.[97]

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[82] In fact, the only Soldier convicted, First Lieutenant (1LT) William L. Calley, received overwhelming support from citizens and the President alike. *See* BELKNAP, *supra* note 80, at 191–215.

[83] Captain Norman G. Cooper, *My Lai and Military Justice—To What Effect?*, 59 MIL. L. REV. 93 (1973).

[84] Westmoreland & Prugh, *supra* note 65, at 61.

[85] Many Americans believed that the military justice system was simply assisting the government in "making a scapegoat out of a lieutenant in order to whitewash its own highest echelons." BELKNAP, *supra* note 80, at 191–214.

[86] *See* ARMED SERVICES INVESTIGATING SUBCOMM. OF THE COMM. ON ARMED SERVICES, 91ST CONG., INVESTIGATION OF THE MY LAI INCIDENT 7–8 (Comm. Print 1970).

[87] *See, e.g.*, Cooper, *supra* note 83, at 127; Captain Charles E. Bonney, The UCMJ in Future Hostilities: Towards a More Workable System (April 1974) (unpublished LL.M. thesis, The Judge Advocate General's School) (on file with The Judge Advocate General's Legal Center and School Library).

[88] Westmoreland & Prugh, *supra* note 65, at 65.

[89] JONATHAN LURIE, MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775–1980, at 77 (2001).

[90] *Id*.

[91] *Id*. at 79 (quoting panel reports).

[92] ULMER, *supra* note 14, at 50–53.

[93] President Nixon's most notable military justice action was allowing 1LT Calley to serve his confinement at his Fort Benning, Georgia quarters. President Franklin D. Roosevelt established clemency boards "to review sentences of general court-martial prisoners by the thousands." *Id.*

[94] *See id.* at 51–52 (quoting the Congressional Record).

[95] *See supra* notes 36–41, 59–61 and accompanying text.

[96] See *supra* notes 65–69 and accompanying text for the broad goals of the military justice system.

[97] Conscription into the U.S. military ceased on 1 July 1973, and has not been revived since. *See* 50 U.S.C. app. § 467(c) (2006).

Operation Iraqi Freedom and Operation Enduring Freedom are the first major, prolonged overseas conflicts in which we have used an all-volunteer force. Unless the draft is re-implemented, a public perception of an inaccurate and unfair military justice system could lead to potential volunteers choosing not to join an organization in which they will not receive a fair hearing if accused of misconduct.[98] The resulting recruiting shortage could negatively impact national security in the form of a weaker military.[99] For the first time, the perceived accuracy and fairness of the military justice system now has a direct, albeit difficult to gauge, effect on the military's ability to ensure national security.[100]

Additionally, a military justice system that portrays itself as inefficient or inaccurate could damage the credibility within society that servicemembers have labored to create. The military is now one of the most respected institutions and professions in the United States.[101] An efficient and accurate military justice system only serves to improve this image, and thereby improves a commander's ability to perform his or her mission.

B. Practical Reasons for Commanders

1. Preventing Misconduct

An efficient and accurate military justice system is critical to prevent criminal and disruptive misconduct, particularly conduct that jeopardizes mission success. Although the threat of punishment is never the only thing that deters improper acts, "[h]istory teaches there must be punishment for disobedience or order of cowardice, and that the punishment must be severe enough and certain enough to deter."[102]

Soldiers must be disciplined and follow all legal orders that a commander gives, regardless of how perilous the consequences of such obedience may be. Soldiers must also follow the UCMJ. The very oath of enlistment explicitly sets forth these duties.[103]

Even though many of the punitive articles of the UCMJ mirror those found in the civilian sector, the UCMJ justifiably criminalizes various acts and omissions that are not criminal outside of the military justice system. For example, desertion, absence without leave, and malingering are enumerated offenses in the UCMJ based on conduct that is not criminal in any other context.[104] George Washington succinctly explained the rationale for needing military-specific discipline in a 1776 letter to the President of Congress by stating, "A Coward, when taught to believe, that if he breaks his ranks, and abandons his Colors, will be punished by death by his own party, will take his chance against the enemy."[105] Westmoreland and Prugh state, "The costs of misconduct in combat are truly incalculable. The risks of harm resulting from misconduct in combat are such that almost any step is justifiable to prevent that misconduct."[106]

A commander's need to prevent misconduct goes beyond preventing desertion to maintain unit strength, as certain other misconduct that is not punishable in the United States could greatly jeopardize a unit's safety and mission accomplishment. For example, on 9 May 2008, an American Soldier used a Qu'ran for target practice while serving in Baghdad, Iraq.[107] This act, which was potentially criminal because it was prejudicial to good order and discipline and service discrediting,[108] angered many Iraqis. Residents who attended a ceremony in which MG Jeffery W. Hammond, commander of 4th Infantry Division (Mechanized) and Multi-National Division—Baghdad, apologized for the crime, chanted, "Yes, yes to the Quran," and "America out, out."[109] Such sentiment may have fueled anti-American insurgents, thereby hindering mission accomplishment.

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[98] *See* Moorman, *supra* note 2, at 188-89.

[99] *Id.*

[100] *Id.*

[101] A U.S. Army website states, "Today, because of our Soldiers and our record of accomplishment, the American people regard the Army as one of the Nation's most respected institutions. We will maintain this trust." The Army Vision: Relevant and Ready Landpower in Service to the Nation, http://www.army.mil/aps/07/vision.html (last visited Jan. 5, 2010). In 2006, *Forbes* magazine stated that the military was the sixth most respected profession in America. Tom Van Riper, *America's Most Admired Professions*, FORBES, July 28, 2006, http://www.forbes.com/2006/07/28/ leadership-careers-jobs-cx_tvr_0728admired.html.

[102] Westmoreland & Prugh, *supra* note 65, at 46 (quoting Colonel Archibald King, *Changes in the Uniform Code of Military Justice Necessary to Make It Workable in Time of War*, 22 FED. B.J. 49, 51 (1962)).

[103] Upon enlistment or re-enlistment, every American Soldier must swear or affirm that he or she will "obey the orders of the President of the United States and the orders of the Officers appointed over me, according to regulations and the Uniform Code of Military Justice." Enlistment Oath, 10 U.S.C. § 502(a) (2006).

[104] For the elements and explanations of the offenses of desertion, absence without leave, and malingering, see UCMJ arts. 85, 86, and 115 (2008), respectively.

[105] ROBERT DEBS HEINL, JR., DICTIONARY OF MILITARY AND NAVAL QUOTATIONS 98 (1996) (quoting Letter from George Washington to the President of Congress (Feb. 9, 1776)).

[106] Westmoreland & Prugh, *supra* note 65, at 48.

[107] Kim Gamel, *Soldier Who Shot at Quran Removed from Iraq*, ARMY TIMES, May 20, 2008, http://www.armytimes.com/news/2008/05/ap_quran_051808/.

[108] *See* UCMJ art. 134 (2008).

[109] *Id.*

Determining how a military justice system should address these offenses can be troubling. Westmoreland and Prugh thought a "particularly thorny problem" lied in deciding "an effective yet fair way" of punishing an act which is criminal in a military, but not civilian, context.[110] Westmoreland and Prugh believed that inaccurate punishments in their era caused a problem.[111] They explained, "What underlies this problem is the fact that punishment imposed for the commission of the military offenses is frequently less severe that the consequences of military duty performance. In short, such punishment lacks meaningful deterrent power."[112] This perceived failure caused them to ask, "is the civilian criminal law system an appropriate model for the military code?"[113]

Regardless of whether or not this "civilianized" military justice system is ideal, it is firmly ingrained in American culture.[114] Even back in 1980, Westmoreland and Prugh acknowledged that there is "no concerted, knowledgeable, and persuasive opposition to the steady civilianization of the military justice system."[115] Accordingly, any modifications to the system designed to prevent misconduct must not value efficiency to the degree that it sacrifices procedural accuracy.

2. Maintaining Good Order and Discipline

Crimes are committed in the military every day despite the severe potential punishments set forth in the UCMJ, and those crimes must be addressed. For example, if a commander fails to properly address a situation in which a servicemember steals from another servicemember, the morale and trust within a unit could crumble. How those crimes are handled is as important as whether the final result is accurate and obtained efficiently.

American commanders must use the military justice system if they seek to impose formal punishment. Because commanders in the U.S. military are charged with maintaining good order and discipline,[116] they are given control of the military justice system.[117] Unfortunately, with this power comes the potential for abuse.

The proper use of a military justice system that contains numerous individual rights and procedural protections prevents a tyrant or pushover who holds a leadership position from negatively impacting mission readiness by undermining collective confidence in the unit. When choosing an available disciplinary tool, commanders must understand "the importance of avoiding injustice by getting all the facts straight, and tempering blind justice with judgment."[118]

A military justice system must provide safeguards designed to protect the substantive and procedural rights of the accused, increase the likelihood of an accurate result, and promote the perception of fairness.[119] One such protection under the American military justice system is the provision for civilian counsel of choice under Article 38(b), UCMJ.[120]

C. How Do Civilian Defense Counsel Improve the Military Justice System?

1. Actual Improvement

Civilian defense counsel play a vital role in the military justice system in that they actually improve it. Because objective statistical data does not exist to clearly explain how civilian counsel presence in the military justice system actually improves the efficiency, accuracy, and fairness of the system, the viewpoint of an experienced military justice practitioner provides valuable input.

Colonel (Ret.) Calvin L. Lewis, U.S. Army, a former judge advocate and military judge who has served in a variety of criminal law, academic, and leadership positions during his military and civilian careers, believes that civilian defense counsel bring valuable experience to the military justice system.[121] For example, Colonel (Ret.) Lewis has witnessed experienced civilian defense counsel function as superior trial advocates when compared to their lesser-

[110] *See* Westmoreland & Prugh, *supra* note 65, at 5 ("What is an effective and yet fair way of dealing with . . . the one who through deliberate or grossly negligent action makes himself unfit for duty, or even worse, endangers his comrades, his unit, his nations interests?").

[111] *See id.* at 5.

[112] *Id.* at 5–6.

[113] *Id.* at 5.

[114] *See* Moorman, *supra* note 2, at 188 ("Safeguards to ensure justice in individual cases are firmly established in our military justice system."). *Cf.* REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE 2 (2001) ("[T]he UCMJ has failed to keep pace with the standards of procedural justice adhered to not only in the United States, but in a growing number of countries around the world, in 2001.").

[115] Westmoreland & Prugh, *supra* note 65, at 16.

[116] *See* 10 U.S.C. § 3583 (2006).

[117] The UCMJ vests almost all critical decisions in commanders, not JAs. *See* UCMJ *passim* (2008).

[118] U.S. DEP'T OF DEF., THE ARMED FORCES OFFICER 69 (2006).

[119] *See* Westmoreland & Prugh, *supra* note 65, at 49 ("[T]he disciplinary power is expected to be used justly, fairly. And this fairness is not merely expected to exist but to appear to exist, as well. It is likewise true that, in the last analysis, service discipline must be just and appear to be just.").

[120] *See supra* note 26.

[121] Telephone Interview with Colonel (Ret.) Calvin L. Lewis, Associate Dean for Student Affairs and Diversity, Texas Tech University School of Law (Mar. 2, 2010) [hereinafter Lewis Interview]. For a more detailed biography of COL (Ret.) Lewis, see Professor Calvin Lewis: Professor Biographies, http://www.law.ttu.edu/faculty/bios/Lewis/ (last visited 4 Oct. 2010).

experienced military counterparts.[122] Additionally, many civilian defense counsel have a military-related background, which can be a huge advantage in that they are "in tune with the military system" and can "connect quickly with court members."[123]

Some may argue that despite certain benefits, the presence of civilian defense counsel actually detracts from the military justice system. For the purposes of this paper, however, the quality of a particular civilian defense counsel is not relevant. It is indisputable that numerous talented civilians properly represent their clients and do so to the great satisfaction of all parties involved in the case, most importantly the accused. When analyzing whether or not a command should have the right to abrogate a servicemember's right to civilian defense counsel, the subjective ability of the chosen counsel cannot be a factor, as such cannot be adequately and objectively measured. Both the analysis of whether or not to abrogate the right to civilian defense counsel and a command's choice to do so, if such were possible, must be made on the assumption that the retained civilian defense counsel would provide the accused with the best possible representation.

2. Appearance of Fairness

Sir William Slim, a British military officer who fought in both World Wars, stated:

> The popular conception of a court martial is half a dozen bloodthirsty old Colonel Blimps, who take it for granted that anyone brought before them is guilty . . . and who at intervals chant in unison, "Maximum penalty – death!" In reality courts martial are almost invariably composed of nervous officers, feverishly consulting their manuals; so anxious to avoid a miscarriage of justice that they are, at times, ready to allow the accused any loophole of escape. Even if they do steel themselves to passing a sentence, they are quite prepared to find it quashed because they have forgotten to mark something "A" and attach it to the proceedings.[124]

This quote shows that military justice systems are often misunderstood. It also demonstrates that a transparent and well-understood military justice system could be well-respected and admired. Some commentators indicate that the American military justice system has achieved a respected status.[125] A servicemembers' right to retain civilian defense counsel undoubtedly contributes to a proper understanding of the system.

Regardless of the actual effectiveness of civilian defense counsel, allowing servicemembers to retain civilian attorneys serves the vital role of increasing the perception that the military justice system is transparent and fair. Historically, military members have respected the system more because of their right to hire civilian defense counsel. The aforementioned 1972 Army War College survey demonstrates that respect for the military justice system is based in part on the ability to hire civilian defense counsel.[126] Despite the fact that almost eighty percent of the respondents expressed some degree of approval with both the military justice system and company grade JAs, fifty-eight percent of the respondents indicated that they would rather be represented by civilian counsel.[127] While part of this disparity could be attributed to a misunderstanding of a military defense counsel's duty,[128] the authors believed that these disparities raised "serious issues of the perception of Judge Advocate trustworthiness. . . ."[129] The subsequent advent of independent trial defense services may have alleviated some misperception of defense counsel loyalty. Nonetheless, the fact that more experienced and higher-paid senior officers preferred civilian counsel, despite the general approval for the system, demonstrates how civilian defense counsel can improve the perception of fairness.

Civilian attorneys continue to play a similar role in improving the perception of military justice system in both the military and civilian communities.[130] For example, some servicemembers do not trust military defense counsel.[131] Although military defense attorneys are now typically assigned to independent defense organizations,[132] it is understandable that some accused may wish to hire an attorney not ultimately employed by the same sovereign attempting to convict them. Some servicemembers and civilians believe that trial defense attorneys are still

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[122] Lewis Interview, *supra* note 121.

[123] *Id.*

[124] ROBERT DEBS HEINL, JR., DICTIONARY OF MILITARY AND NAVAL QUOTATIONS, 72 (1966) (quoting FIELD-MARSHAL SIR WILLIAM SLIM, UNOFFICIAL HISTORY (1959)).

[125] *See, e.g.*, Moorman, *supra* note 2, at 187 (2000) ("Thus, the last fifty years has seen orderly, incremental, and evolutionary changes, some quite significant, which have assured the validity of, and continued respect for, our system.").

[126] *See* Tehnet & Clarke, *supra* note 74, at 41–50.

[127] *Id.*

[128] The survey indicated that over one-third of respondents either did not believe or were not sure whether military defense counsel were ethically bound to seek an acquittal for a guilty client. *Id.* at 48.

[129] *Id.* at 50.

[130] Lewis Interview, *supra* note 121.

[131] *Id.*

[132] For example, U.S. Army defense counsel are assigned to the U.S. Army Trial Defense Service, an independent organization headquartered in Arlington, Virginia. *See* U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 2-1(d)(11) (30 Sept. 1996).

somehow subject to the pressures of the command.[133] Because a military defense counsel's duties and independent rating chain are largely unknown to both the military and civilian communities, allowing civilian attorneys to participate in the process supports the concept and perception that the military justice system is fair and open.

Many servicemembers and civilians also believe that civilian attorneys are superior to their military counterparts.[134] To add to the perception of civilian defense counsel superiority, many civilian attorneys represent that servicemembers may benefit from hiring civilian counsel when compared to proceeding with detailed counsel alone.[135] Although the superiority of civilian defense counsel is debatable, the mere fact that an accused can hire who he believes will best represent him helps lends credibility to the military justice system.[136]

Even though the presence of civilian defense counsel in the military justice system is beneficial, the unchecked requirement to produce retained civilian defense counsel to cases in deployed environments has the potential to undermine the military justice system's ability to handle certain cases. Examining the logistics of producing civilian defense counsel to Iraq and Afghanistan serves as a useful starting point to better understand the potential issues.

IV. Producing Civilian Defense Counsel to Iraq and Afghanistan

The mechanics of civilian defense counsel production are typically not memorialized in any operations order, fragmentary order, or other written guidance, and are subject to change based on operational considerations.[137] Commands are generally willing to assist in the production of a civilian defense counsel so long as he or she has a legitimate reason to be present and the security situation allows it.[138] To prevent later confusion and unnecessary effort, most commands, investigating officers, and military judges require a civilian defense counsel to submit some form of written documentation of case acceptance and intent to travel into theater prior to assisting the civilian defense counsel.[139]

The government must put forth significant effort to produce a civilian defense counsel to Iraq or Afghanistan.[140] The government's efforts typically must begin weeks in advance of the civilian defense counsel's flight to the theater entry-point of Kuwait.[141] The government must first coordinate with the corps-level command, the theater-level command, and the U.S. Department of State to obtain the requisite country clearances and travel orders. This initial coordination typically takes one month to complete.[142]

Once the civilian defense counsel arrives at Kuwait International Airport (KWI), the government assumes all logistical responsibility for the civilian defense counsel.[143] The government will arrange transportation from KWI to Ali Al-Salem Air Base, Kuwait.[144] The civilian attorney will then receive the required security briefings and protective equipment prior to the flight into Iraq or Afghanistan.[145] The length of a civilian defense counsel's stay in Kuwait, which is typically between forty-eight hours and one week, largely depends on weather and flight availability.[146]

Once the civilian defense counsel arrives in theater, the servicing Office of the Staff Judge Advocate (OSJA) assumes the logistical responsibility for the civilian defense

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[133] *See* Thorn Lawrence, P.L., Benefits of Civilian Counsel, *available at* http://www.thornlawrence.com/Military-Law/Benefits-of-Civilian-Counsel.shtml (last visited Jan. 13, 2010) ("In reality, one wonders whether all military attorneys who get a paycheck from Uncle Sam and function in an environment where they must be evaluated and promoted by others to survive truly have the ability and freedom to advance all arguments as far and as loudly as necessary to champion your cause and defend you in the most important case of your life.").

[134] Lewis Interview, *supra* note 121. This comment is also based on the author's professional experiences while serving in the United States Army from 18 May 1998 to present [hereinafter Professional Experiences].

[135] *See, e.g.*, Gagne, Scherer & Langemo, LLC, Why You Need a Civilian Military Lawyer, *available at* http://www.gslattorneys.com/civillian-military-lawyer.asp (last visited Jan. 9, 2010) ("But in our experience, people who choose to hire a good civilian military attorney are generally far better off and have a much better shot than those who don't.").

[136] Lewis Interview, *supra* note 121.

[137] This comment is based on the author's professional experiences while serving as the Chief, Military Justice for 4th Infantry Division and Multi-National Baghdad from 27 November 2007 to 10 February 2009 [hereinafter Deployment Experiences].

[138] *Id.*

[139] *Id.*

[140] *Id.* For an account of the situation in Afghanistan, see Eric Hanson, *Know Your Ground: The Military Justice Terrain in Afghanistan*, ARMY LAW., Nov. 2009, at 36, 41–42.

[141] Telephone Interview with Sergeant First Class Corey L. Brann, Operational Law Noncommissioned Officer in Charge (NCOIC), 4th Infantry Div. (Mechanized), Fort Carson, Colo. (Jan. 11, 2010) [Brann Telephone Interview]. Sergeant First Class Brann was the 4th Infantry Division (Mechanized) and Multi-National Division–Baghdad Military Justice Division NCOIC from 15 August 2008 through 10 February 2009. *Id.* A civilian defense counsel coordinates his or her own privately-funded travel arrangements into Kuwait. *Id.*

[142] *Id.* Although it is possible to expedite the process with proper justification and prior coordination, the time saved during Operation Iraqi Freedom 07-09 was usually measured in terms of days, not weeks. *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.* Sandstorms, which ground most aircraft, are common in Kuwait, Iraq, and Afghanistan throughout much of the year. *See, e.g.*, Muhanad Mohammed, *Sandstorm Blankets Iraq, Sends Hundreds to Hospital*, *available at* http://www.reuters.com/article/idUSL5652707 (last visited Jan. 13, 2010).

counsel.[147] In addition to coordinating lodging and meals, the OSJA will coordinate with units to ensure that the civilian defense counsel is able to travel to where he or she needs to go.[148] If a civilian defense counsel needs to go off of a Forward Operating Base (FOB), the government must coordinate such travel with the unit responsible for that area.[149]

It ordinarily takes over one month to satisfy all of the administrative, travel, and security prerequisites for producing civilian defense counsel into Iraq or Afghanistan.[150] This involved and time-consuming process can impact a case in a number of different ways.

V. Conflicts Between Military Operations and the Right to Civilian Defense Counsel

A. Prior Concerns

1. The Vietnam War: Westmoreland and Prugh

Because of the enactment of the UCMJ and the Military Justice Act of 1968, the Vietnam War was the first conflict in which an accused had a statutory right to civilian defense counsel in both general and special courts-martial.[151] Westmoreland and Prugh believed that the military justice system at the time of the Vietnam War was not "combat tested."[152] They concluded that the military justice system used in Vietnam was "particularly inept" during contingency operations, as it is "too slow, too cumbersome, too uncertain, too indecisive, and lacking in the power to reinforce accomplishment of the military missions, to deter misconduct, or even to rehabilitate."[153]

Westmoreland and Prugh believed that a deployed servicemember's unlimited right to civilian defense counsel of choice contributed to delays that made the system "slow" and "cumbersome," and therefore ineffective.[154] When describing the military justice process in Vietnam, they explained, "Many commanders found the procedures less than satisfactory because of the difficulties in performing their operational tasks and at the same time meeting the time restrictions imposed by the military justice system."[155] Westmoreland and Prugh stated that "knowledgeable commanders" pointed to "[t]he extension of the right to counsel from the United States" as one of the reasons that certain worthy cases were not referred to court-martial.[156] Westmoreland and Prugh reasoned, "[a]n accused in a trial must be afforded competent counsel, but that does not require that the counsel be a civilian attorney transported halfway around the world in order to represent an accused in a foreign station during combat when competent military counsel is available at the trial forum."[157]

Because the military justice system has not significantly changed since Westmoreland and Prugh's article, their observations are still valid despite the fact that they were made almost three decades ago. Their observations were not unique.

2. Post-Vietnam War: Wartime Legislative Task Force

In 1982, MG Hugh J. Clausen, The Judge Advocate General of the U.S. Army, feared that the military justice system "might not operate efficiently during major combat operations."[158] In response, he created the Wartime Legislative Task Force (WALT) "to evaluate the military justice system and to make recommendations for improving its effectiveness in wartime."[159] The WALT's primary objective was "to ensure that the military justice system in an armed conflict would be able to function fairly and efficiently, without unduly burdening commanders, or unnecessarily utilizing resources."[160]

The WALT was particularly concerned with the increasing role that lawyers played in the military justice process.[161] "Discipline in the armed forces has come to depend more and more on the actions of lawyers and the provision of legal advice, with a concomitant decline in the scope of commander's disciplinary authority."[162] One of the specific areas that WALT addressed was the impact of a servicemembers right to civilian defense counsel.[163]

As were Westmoreland and Prugh, WALT was primarily concerned with the delays that producing civilian defense counsel could cause. The WALT explained, "[d]elays are sometimes encountered because the accused has not made arrangements for representation, but expresses

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[147] Brann Telephone Interview, *supra* note 141.

[148] *Id*.

[149] *Id*.

[150] *Id*.

[151] *See supra* notes 26–28, 73 and accompanying text.

[152] *See* Westmoreland & Prugh, *supra* note 65, at 53.

[153] *Id.* at 52–53.

[154] *See id*. at 53, 60.

[155] *Id.* at 60.

[156] *Id.*

[157] *Id.* at 83.

[158] Lieutenant Colonel E. A. Gates & Major Gary V. Casida, *Report to the Judge Advocate General by the Wartime Legislation Team*, 104 MIL. L. REV. 139, 141 (1984).

[159] *Id.*

[160] *Id.*

[161] Gates & Casida, *supra* note 158.

[162] *Id.*

[163] *Id.* at 155–57.

a desire to do so, or the accused and his civilian counsel have not come to terms, or the civilian counsel is not available on the trial date."[164] The WALT believed that the effects of these problems, while "common" and "manageable" during peacetime, are "substantially more adverse" during times of conflict.[165]

B. Current Concerns

Interestingly, commentary discussing the potential impact of a servicemember's right to civilian defense counsel largely ceased after the WALT report in 1984. One likely contributing factor is the small number of courts-martial tried in deployed settings between the end of the Vietnam War and the current conflicts in Iraq and Afghanistan.[166] The reintroduction of courts-martial in deployed settings has once again brought the issue to the forefront.

Even though the availability of commercial and military flights may have reduced the logistical challenges involved with producing civilian defense counsel in Iraq and Afghanistan, other unavoidable issues are still problems today. For example, the diversity of jurisdictions in which many civilian defense counsel practice can cause scheduling conflicts that result in delays to military cases. Whereas most military defense counsel are substantially engaged in military cases within a particular command or district, thereby reducing potential scheduling conflicts, civilian defense counsel often carry substantial case loads in other federal and civilian courts.[167]

As a result, the overwhelming majority of cases that require bringing a civilian defense counsel into theater will involve a delay because of scheduling conflicts or administrative requirements.[168] For example, during Operational Iraqi Freedom 07-09, the average delay in the U.S. Army's 4th Infantry Division and Multi-National Division—Baghdad directly attributable to scheduling conflicts and administrative coordination was approximately two months.[169] These unavoidable delays, along with other difficulties resulting from producing civilian defense counsel into a war zone, must be examined when evaluating proposals to reduce a servicemember's right to civilian defense counsel.

1. Operational Dangers

Aside from the resources that paralegals, attorneys, and units devote to bringing a civilian defense counsel into theater, the actual presence of the civilian defense counsel in a war zone can negatively impact a unit's ability to carry out its mission.

First and foremost, the fact that a civilian defense counsel may have little to no military training could add additional strain to a unit charged with the mission of escorting and protecting him or her. Take, for example, the case of a civilian defense counsel with no prior military training or experience who must investigate an alleged crime scene in an unsecured and dangerous area of Baghdad. Whereas a military defense counsel would be armed and trained on his or her assigned weapon, a civilian defense counsel would not be armed at all. In addition, a military defense counsel would have received prior training in military operations, tactics, and terminology. This training would help the military defense counsel better understand how to implement unit drills and standard unit responses in the event of enemy contact. Despite an increased civilian presence on the battlefield,[170] introducing untrained civilian personnel to a battlefield could increase the risks to both the unit charged with his or her protection and also the civilian defense counsel.

Second, commentators overlook the possibility that a situation may arise where a convening authority does not want a civilian attorney present for operational or physical security reasons.[171] Although this scenario may seem

[164] *Id.*

[165] *Id.* at 155–56.

[166] Although some courts-martial were tried in Southwest Asia during Operation Desert Shield and Operation Desert Storm, the number pales in comparison to the number of cases tried during Operation Iraqi Freedom and Operation Enduring Freedom. For example, Army Forces Central Command, the theater-level command for Operation Desert Shield and Operation Desert Storm, "prosecuted only one court-martial during DESERT SHIELD and DESERT STORM." BORCH, *supra* note 68, at 142. The U.S. Army's 1st Armored Division conducted three general courts-martial and one special court-martial. *Id*. As a comparison, during Operation Iraqi Freedom 07-09, which lasted from 19 December 2007 through 10 February 2009, the U.S. Army's 4th Infantry Division and Multi-National Division – Baghdad alone conducted fifteen general and special courts-martial. Deployment Experiences, *supra* note 137. As of 10 February 2009, there were at least three fully-functioning courtrooms in Iraq dedicated solely to trying American courts-martial. *Id.*

[167] For example, deployed U.S. Army defense counsel are stationed in theater with the deployed forces, and are primarily detailed to cases in that particular area. Deployment Experiences, *supra* note 137.

[168] It is important to note that delays based on scheduling conflicts and administrative coordination will not always result in an overall delay to case resolution. For example, a civilian defense counsel may choose to demand speedy trial or advise a client to plead guilty, whereas the military counsel would have attempted to delay the case as much as possible. A civilian attorney may also be able to convince the government to dismiss charges based on evidentiary flaws when the detailed military attorney does not have the skill to do so. Professional Experiences, *supra* note 134.

[169] Deployment Experiences, *supra* note 138.

[170] *See Frontline: Private Warriors* (PBS television broadcast June 21, 2005), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/warriors/view/ [hereinafter *Private Warriors*].

[171] Such operational and physical security reasons are not to be confused with the complications and challenges faced in cases containing classified evidence. These concerns refer to a commander's belief that civilian counsel presence could compromise a mission or simply be too dangerous.

unlikely in Iraq and Afghanistan, where there are as many civilians present accompanying the force as there are servicemembers,[172] a situation may arise where a convening authority wants to restrict an area to all military members.

2. Operational Dangers Example

Assume a servicemember at a remote FOB in Afghanistan is charged with larceny of a fellow servicemember's iPod. The accused, through email, retains civilian defense counsel. The FOB at which the accused is stationed and where the crime occurred is in a very dangerous, intelligence-sensitive area, but neither the unit's location nor any of the evidence is formally classified. The convening authority determines that she does not want any civilians present in this area for fear of their safety, as reliable intelligence indicates that enemy forces are looking to kidnap foreign civilians in order to seek ransoms from their employers. The convening authority is also concerned about the disruption to other missions that the civilian's presence would cause, as the civilian defense counsel would have to be escorted everywhere for physical and operational security reasons. The convening authority's resources are also stretched thin, as there is no way to augment the unit with additional personnel. A military defense counsel is available to represent the accused, and a military judge is available and has determined that the FOB has adequate facilities to try a court-martial.

Under the current military justice system, the convening authority would have to make a difficult choice. If the convening authority moved the court-martial to a larger FOB, the unit would be hamstrung in that the accused and all witnesses would have to leave the remote FOB, thereby sacrificing security and the ability to perform other missions.[173] If the convening authority chose to produce the civilian defense counsel to the unit location, the unit would be hamstrung in that the civilian defense counsel would present a security risk, as well as a strain on unit resources.

In this era of increased civilian presence on the battlefield,[174] some may argue that these operational security concerns are either misplaced or overstated. Civilian attorneys are routinely produced to Iraq and Afghanistan and return home safely.[175] Future conflicts, however, may have a different operational flavor. Regardless of how one weighs the likelihood of potential operational risks, a servicemember's right to civilian defense counsel has created numerous challenges to the administration of justice in Iraq and Afghanistan.

3. Witness Availability

When combined with the current deployment rotations in Iraq and Afghanistan, the delays inherent in producing civilian defense counsel enables an accused to use his or her statutory right to civilian counsel of choice as a sword rather than a shield.[176] Because Army Soldiers often face the longest continuous deployment time,[177] using the Army as an illustration shows that no matter the length of deployment, civilian defense counsel-related delay has the potential to impact all military units.

Civilian defense counsel delay can impact all cases, including those in which only U.S. servicemembers are involved. Most U.S. Army Soldiers deploy to Iraq and Afghanistan for approximately twelve months.[178] Because of the newly-implemented modularity concept,[179] the deployment schedules of Brigade Combat Teams and other subordinate units within a court-martial convening authority are often staggered.[180] This provides a very small window of opportunity in which a GCMCA can try a court-martial without either extending the deployment of an accused, witnesses, and other parties to the court-martial.[181]

Aside from the unpleasantness of extending deployments, the ability of a convening authority to extend certain witnesses is not a given. While all active duty servicemembers and all servicemembers properly facing court-martial charges can be extended in theater with the appropriate command-level approval,[182] involuntarily extending U.S. Army Reserve and U.S. Army National Guard Soldiers beyond the time period set forth in their

[172] *See, e.g.*, August Cole, *Afghanistan Contractors Outnumber Troops*, WALL ST. J., Aug. 22, 2009, at A6, *available at* http://online.wsj.com/article/SB125089638739950599.html.

[173] *See* Rosenblatt, *supra* note 10, at 16, 21–22 (explaining the challenges of trying courts-martial at small, remote forward operating bases).

[174] *See Private Warriors*, *supra* note 170.

[175] Deployment Experiences, *supra* note 138.

[176] UCMJ art. 38(b)(2) sets forth the statutory right to civilian counsel of choice. UCMJ art. 38(b)(2) (2008). *See supra* note 26–28 and accompanying text.

[177] Standard U.S. Army deployments to Operational Iraqi Freedom have lasted between twelve and fifteen months. *See* Jeff Schogol, *Gates "Counting-On" 12-Month Deployments for Army This Year*, STARS & STRIPES, Feb. 3, 2008, *available at* http://www.stripes.com/article.asp?section=104&article=52169.

[178] *Id.*

[179] For a synopsis of the modularity concept, see U.S. DEP'T OF ARMY, 2008 ARMY POSTURE STATEMENT add. G, http://www.army.mil/aps/08/addenda_g.html.

[180] Professional Experiences, *supra* note 134.

[181] For a discussion of witness production issues in Iraq and Afghanistan, see Rosenblatt, *supra* note 10, at 17.

[182] An involuntary deployment extension is commonly known as a "Boots on Ground (BOG) Extension." Deployment Experiences, *supra* note 137. These involuntary extensions are statutorily permissible and set forth in Army regulation; *see* UCMJ art. 2(c) (2008); U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 21-4 (16 Nov. 2005).

orders may not be possible.[183] This wrinkle is especially problematic given the record number of National Guard servicemembers deployed to combat zones in their Title 10 status.[184]

The witness availability problem is further complicated when the critical witnesses are local nationals. Local nationals in combat zones often do not have stable jobs or reliable contact information.[185] Many move frequently, often in search of a better security situation, education, or job.[186] If a military justice system is not efficient, local nationals, who may be the critical witnesses in a case or to a particular charge, may not be present or available when a particular hearing is scheduled. Because RCM 703(b)(1) provides an accused with a right to the in-person production of "any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary,"[187] the military justice system must be efficient in order to ensure that all witnesses are present for a particular case or hearing.[188]

4. Witness Availability Example

Another hypothetical example will illustrate this dilemma. Assume that you are the division-level Chief of Military Justice for your GCMCA.[189] The accused, First Lieutenant (1LT) George I. Joe, a servicemember, was charged yesterday with two crimes that occurred on his FOB in Eastern Afghanistan. The unit arrived in theater just one month ago for a twelve-month deployment. The first charge is rape of another servicemember by digital penetration.[190] The purported rape victim is a member of the Army National Guard. The second charge is for the armed robbery of a local national vendor who lives and works on the FOB.[191] The alleged rape and armed robbery occurred on different days and are factually unrelated. Both witnesses appear credible, and both were able to identify an unmistakable physical characteristic unique to the accused. There is no other physical evidence to support either charge. First Lieutenant Joe's company commander and the unit First Sergeant are witnesses to the rape charge in that they saw 1LT Joe exiting out of the purported victim's trailer immediately after the alleged rape. The Article 32 hearing is scheduled for one week from today. First Lieutenant Joe has already been to TDS, and has been detailed military defense counsel. His military defense counsel has a relatively light caseload and is ready to devote his full time and energy to investigating this case and defending 1LT Joe.

The purported rape victim is scheduled to redeploy three weeks from today, and her 365-day active duty orders carry her on active duty for only two weeks after that. The purported rape victim is generally cooperative, but she is completely unwilling to support any course of action that requires her to stay any additional time in theater, regardless of the impact on the case. The robbery victim is also generally cooperative, but plans to move to a small village in Iran, approximately 100 miles away, in three weeks. He is willing to testify so long as it does not interfere with his pending move. He is not willing to come back to the FOB or to the United States under any circumstances, even if the United States is willing to pay for his travel and reimburse him for his efforts. He is sure that he will get fired from his new job if he were to miss the time required to travel. Furthermore, he lost only $37, so traveling back to Afghanistan simply is not worth it to him.

As you open your email, you receive an email from Mr. John Doe, who recently emailed the Article 32 Investigating Officer and you with the following message:

> I have been retained as 1LT George I. Joe's civilian defense counsel pursuant to Article 38(b)(2), UCMJ. I am authorized to practice before The Supreme Court of the State of North Carolina, and am in good standing with no pending adverse actions. Pursuant to Article 38(b)(4), UCMJ, and RCM 405(d)(2)(C), 1LT Doe has excused his military defense counsel from this case and no longer desires his services. I am in receipt of the notice of the upcoming Article 32 hearing scheduled for one week from today. I hereby request a delay until a date at least four weeks from today's date, as I have court dates in numerous courts every single day for the

[183] There is neither statutory nor regulatory authority to extend reserve servicemember deployments (including National Guard servicemembers) beyond 365 days; *see* 10 U.S.C. § 12,304 (2006).

[184] *See, e.g.*, Molly Blancett, *Oregon Army National Guard Faces Record Deployment and Record Recruitment Numbers*, KVAL.COM, Feb. 27, 2009, http://www.kval.com/news/local/40455487.html.

[185] Deployment Experiences, *supra* note 138.

[186] *Id.*

[187] MCM, *supra* note 29, R.C.M. 703(b)(1).

[188] At first glance, depositions may seem to be a possible solution. According to Rule for Court Martial (RCM) 702, "A deposition may be ordered whenever, after preferral of charges, due to exceptional circumstances of the case it is in the best interest of justice that the testimony of a prospective witness be taken and preserved for use at an investigation or under Article 32 or a court-martial." *Id.* R.C.M. 702(a). Rule for Court-Martial 702(d)(2), however, gives the accused the complete right to counsel, including the right to representation by civilian defense counsel. *Id.* R.C.M. 702(d)(2). Accordingly, if an accused's civilian defense counsel is reasonably unavailable, using a deposition to preserve testimony is a viable option only if the accused does not assert his right to the presence of civilian defense counsel.

[189] A chief of military justice typically oversees all prosecutions in a particular jurisdiction. Professional Experiences, *supra* note 134.

[190] *See* UCMJ art. 120 (2008).

[191] *Id.* art. 122.

> next three weeks, to include a contested murder trial in the third week. I am available on any date after the last trial date three weeks from today, but will need time to travel into Afghanistan. Attached are certified copies of the court dockets where my presence over the next three weeks is required. I do not anticipate any of those dates becoming available. I was also retained just this morning, and will need sufficient time to prepare for the upcoming Article 32 hearing. I will prepare for it at night after my cases conclude each day. I will provide a list of requested witnesses and evidence as required in the notification memorandum. My client does not consent to any depositions, written or oral. If granted, this delay request may be attributable to the defense for speedy trial purposes.[192]

Given the relative seriousness of the charges and the reasons that the extra time is needed, Mr. Doe's delay requests are not unreasonable and likely should be granted.[193] The administrative prerequisites of producing a civilian defense counsel will likely take three weeks or more.[194] Furthermore, Mr. Doe's justification for the delay request is properly justified and documented.

In this hypothetical, the current military justice system gives the command no reasonable options with how to properly handle this case. Because Rule for Courts-Martial (RCM) 702(d)(2) gives the accused a right to counsel under RCM 502(d), and Mr. Doe is qualified under RCM 502(d)(3), a deposition cannot be used to secure the testimony of the witnesses who will soon be unavailable.[195] Because there is no subpoena power overseas, the United States would have to coordinate with Iran for the production of the robbery victim.[196]

As a result, unless the government is able to make the necessary coordination with Iran, 1LT Joe's hiring of a civilian attorney will preclude a court-martial for the robbery charge. Additionally, the justified delay attributable to the hiring of civilian defense counsel will prevent the government from trying the rape case in theater, even though such would likely have been possible if the accused proceeded with only military defense counsel.[197] Although the rape case could be tried in the United States, taking the commander and first sergeant, who are critical witnesses in the case, away from their unit to travel to the United States to testify in person would likely degrade the unit's operational readiness.[198]

VI. Options to Address These Potential Conflicts

A. Status Quo: No Change

As is the case with any problem, it is wise to first analyze the benefits and drawbacks of not fixing the problem at all. Change is not beneficial if its results are worse than the initial problem, as the presence of civilian defense counsel benefits both the servicemember and command in several ways.[199]

The substantial drawbacks of the current system, however, are illustrated in the examples above.[200] An accused can now use the right to civilian defense counsel of choice offensively rather than defensively. In certain cases, the unavoidable delays caused by civilian defense counsel scheduling conflicts and production delays can undermine an entire court-martial case.[201] At a minimum, the mere requirements involved with producing civilian defense counsel could give an accused an increased negotiating stature.

Such drawbacks are unintended consequences of Article 38(b)(2),[202] and serve to undermine the military justice system's ability to assist the command in protecting the United States. Accordingly, it is necessary to analyze

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[192] *See id.* art. 38(b)(4) ("If the accused is represented by civilian counsel, military counsel detailed or selected under paragraph (3) shall act as associate counsel unless excused at the request of the accused."); *see* MCM, *supra* note 29, R.C.M. 405(d)(2)(C) ("The accused may be represented by civilian counsel at no expense to the United States. Upon request, the accused is entitled to reasonable time to obtain civilian counsel and to have such counsel present for the investigation. However, the investigation shall not be unduly delayed for this purpose.").

[193] See MCM, *supra* note 29, R.C.M. 405(d)(2)(C) ("The accused may be represented by civilian counsel at no expense to the United States. Upon request, the accused is entitled to reasonable time to obtain civilian counsel and to have such counsel present for the investigation."); U.S. DEPT OF ARMY, PAM. 27-17, PROCEDURAL GUIDE FOR ARTICLE 32(B) INVESTIGATING OFFICER para. 2-1(d) (16 Sept. 1990) ("Any reasonable request for delay by the accused should be granted.").

[194] *See supra* Part IV.

[195] *See* MCM, *supra* note 29, R.C.M. 502.

[196] *See id.* R.C.M. 703(e)(2)(A) discussion (2008) ("A witness must be subject to United States jurisdiction to be subject to a subpoena. Foreign nationals in a foreign country are not subject to subpoena. Their presence may be obtained through cooperation of the host nation.").

[197] For example, the convening authority could have ordered depositions for witnesses who would likely be unavailable. *See id.* R.C.M. 702.

[198] All parties at a court-martial "shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." UCMJ art. 46 (2008). Rule for Courts-Martial 703(a) implements Article 46. *See* MCM *supra* note 29, R.C.M. 703(a). Rule for Court-Martial 703(b) disallows testimony "via remote means," such as video teleconference, over defense objection. *See id.* R.C.M. 703(b).

[199] *See supra* Part III.C.

[200] *See supra* Parts V.B.1 & V.B.2.

[201] *See supra* Part V.B.2.

[202] *See supra* Part II.B.2.

proposed changes.[203] Because these changes would serve as the ammunition to attack these civilian defense counsel-related problems, we must critically examine all of their intended and unintended effects.

B. Westmoreland and Prugh Plan

Westmoreland and Prugh proposed the enactment of "a special codal provision which would take effect only in time of war or military exigency" as a way of "dealing with the inadequacies of the Code in its wartime or military stress operation."[204] Westmoreland and Prugh proposed UCMJ changes that would be enacted "[i]n a time of war or other military exigency," including declared wars and almost any Presidential commitment of troops."[205]

The proposed statutory changes involving a servicemember's right to civilian counsel begin at Article 32(b), UCMJ.[206] Their proposal reads:

> § 832(b) is amended to provide that the investigating officer, by making an appropriate finding on the record, may rule that due to the war or military exigency appearance by civilian counsel under the circumstances is unreasonable and would interfere with the due administration of justice. The accused may, however, be accorded civilian counsel if one is available from the locality in which the investigation is being held.[207]

They also propose modifying Article 38(b),[208] UCMJ, to read, "§ 838(b) is amended to conform to § 832(b) as to civilian counsel of general and special courts-martial."[209]

Interestingly, this proposed change would give an Article 32 investigating officer, not a commander or convening authority, the power and responsibility to make the determination whether or not the military exigency precludes the government's requirement to produce civilian defense counsel.[210] The proposal is silent as to if or how the Article 32 investigating officer's determination would be reviewed.

The main benefit to this system is the increased efficiency with which the military justice system would operate. The second benefit is that a servicemember could possibly retain the right to civilian defense counsel so long as the government doesn't have the production burden. The second sentence of their proposal gives the Article 32 officer the ability to grant a servicemember the right to civilian counsel "if one is available from the locality in which the investigation is being held."[211] Accordingly, if a civilian defense counsel was able to make it to the deployed location without the assistance of the U.S. government, the Article 32 officer would have a way to allow his or her presence.

Despite a likely increase in efficiency, this paradigm has fundamental legal, practical, and logical flaws that make it inadvisable. First and foremost, the proposal is overbroad and lacks clarity. In spite of Westmoreland and Prugh's caveat that their proposed statute is a "layout," and "is not as specific as the ultimate legislation might be,"[212] the complete lack of implementing guidance makes the proposal hard to evaluate.[213] Take the proposed change to Article 38(b);[214] the plain reading indicates that the Article 32 investigating officer's determination, if appropriate, would be binding on the remainder of the proceeding.[215] Such would be nonsensical, as the operational environment could change between the pretrial investigation and the time of trial, making the presence of civilian defense counsel, where previously unreasonable, reasonable and prudent.[216]

Second, vesting the power in each individual Article 32 investigating officer, rather than a commander or convening authority, could lead to illogical inconsistent rulings. Assume two servicemembers from different companies in the same battalion commit aggravated assaults on the same day by pointing their loaded rifles at their first sergeants. Both accused are charged on the same day, and both have Article 32 hearings scheduled one week from today. Two separate Article 32 investigating officers are appointed. The accused hire the same civilian defense counsel. Under the Westmoreland and Prugh plan, the Article 32 investigating officers could easily come to different conclusions about the reasonableness of producing civilian defense counsel. Even

[203] A chart comparing the details of each proposal is located at Appendix A.

[204] Westmoreland & Prugh, *supra* note 65, at 88.

[205] *Id.*

[206] Article 32 provides a servicemember the right to a "thorough and impartial investigation" prior to any case being referred to a general court-martial. UCMJ art. 32(a) (2008).

[207] Westmoreland & Prugh, *supra* note 65, at 88–89.

[208] UCMJ art. 38(b) sets forth an accused's right to civilian defense counsel. UCMJ art. 38(b). *See* authorities cited *supra* notes 26 & 192.

[209] Westmoreland & Prugh, *supra* note 65, at 88–89.

[210] *See id.*

[211] *Id.* at 89.

[212] *Id.* at 88.

[213] Westmoreland and Prugh assert that nothing in their proposed statute "is intended to alter in any way the substantive rights of an accused." *Id.* Their proposal, however, does exactly that by essentially eliminating the right.

[214] *See supra* note 209 and accompanying text.

[215] *Id.*

[216] For example, the security situation in Baghdad improved markedly during the Summer 2008. *See, e.g.*, Bernhard Zand, *Optimism Grows in Iraq as Daily Life Improves*, SPIEGEL ONLINE INT'L, July 2, 2008, http://www.spiegel.de/international/world/0,1518,563471,00.html.

if the differences were legally permissible, these differing conclusions could discredit the validity of the military justice system in the eyes of both servicemembers and civilians.

Third, Article 32 investigating officers (IO) may not be qualified to make an educated determination based on the operational criteria set forth in the proposed statute. Nothing in the UCMJ or RCM requires an Article 32 IO to have any operational experience, training, or knowledge.[217] An Article 32 IO's role is to assist the commander rather than to make binding decisions.[218] Furthermore, the Article 32 IO's legal advisor will likely be a company grade JA with very little operational training and background. Decisions involving operational considerations are best made by commanders and convening authorities, as they best understand the operational situation. An uninformed decision to disallow civilian defense counsel could undermine the actual fairness of the trial itself, as well as the perception that the system is fair to the accused. Conversely, an uninformed decision to allow civilian defense counsel could harm the commander's ability to accomplish her mission.

Although Westmoreland and Prugh ably identify the theoretical and practical problems that an unchecked right to civilian defense counsel in a deployed environment could cause,[219] their overbroad proposal does not adequately solve the problem. In instances where an established individual right is curtailed in favor of the broader policy goal of a more efficient and effective military justice system, only the convening authority, who is the most qualified to assess the operational situation, should be given the power to abrogate that right.

In kinetic operations, commanders and trained leaders are charged with determining whether there is a military necessity to strike a particular target.[220] It would be unwise to give an untrained officer the power to determine whether or not it is proper to strike a particular target. The same principle should be applied when deciding who should have the power to abrogate a deployed servicemember's right to civilian defense counsel. The convening authority is the properly trained and responsible official. An Article 32 officer is like a staff officer in that he or she should remain an advisor, not a decision maker. An untrained and uninformed Article 32 officer would not have the proper perspective to determine whether the necessity exists to eliminate this critical individual right.

C. Service Secretary Plan

The WALT set forth two separate proposals to limit a servicemember's right to civilian defense counsel. These proposals were designed to balance "the need to recognize the legitimate military considerations with the desire to impinge on accuseds' rights only when clearly necessary."[221] The first proposal was to "preclude civilian representation in specifically defined hostile fire areas."[222] Because WALT conducted a survey that proposed vesting the service secretaries with the power to preclude civilian representation in specific areas,[223] this plan is hereinafter the "Service Secretary Plan."

The WALT survey asked a simple question which received overwhelming support from the active and retired senior military leaders who responded. The question read, "Should the service secretaries or some other authority be allowed to suspend the right to civilian counsel in areas of hostility?"[224] The respondents, consisting of active and retired general officers from all branches, JAs, commanders, and staff officers, supported this proposition more than any of the thirty-six other questions that dealt with all aspects of the military justice system.[225]

Despite the overwhelming support for this proposal, WALT did not recommend it, and The Judge Advocate General did not approve it.[226] The WALT correctly identified the potential overbroad application of such a provision. Despite the operational or efficiency problems that producing civilian counsel may cause, "if absolute geographical limitations concerning retention of counsel are established, the accused might be denied representation by counsel who is readily available."[227]

Changes to the military command structure subsequent to WALT have also created a logical flaw to this concept of vesting any deployment-related power with the respective service secretaries. Under the Goldwater-Nichols Defense Reorganization Act of 1986, the service secretaries were explicitly excluded from the chain of command of deployed servicemembers.[228] Deployed servicemembers are now "subject to the authority, direction, and control of the Secretary of Defense and subject to the authority of

[217] *See* MCM *supra* note 29, R.C.M. 405(d)(1) discussion (2008).

[218] *See* UCMJ art. 32(b); MCM, *supra* note 29, R.C.M. 405(d)(1).

[219] *See supra* Part V.A.

[220] The law of war principle of military necessity "justifies those measures not forbidden by international law which are indispensible for securing the complete submission of the enemy as soon as possible." U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 3a (July 1956) [hereinafter FM 27-10].

[221] Gates & Casida, *supra* note 158, at 156.

[222] *Id.*

[223] *Id.* app. A, at 139.

[224] *Id.*

[225] Out of 259 respondents, 240 supported this proposal, while only nineteen objected. *Id.*

[226] *Id.* at 155–57.

[227] *Id.* at 156.

[228] *See* Goldwater-Nichols Defense Reorganization Act of 1986, 10 U.S.C. § 165 (2006).

commanders of combatant commands."[229] Accordingly, if this proposal were implemented, a more logical choice for who may abrogate the right would be the respective combatant commanders.[230]

Two additional problems make this plan overbroad. First, the security situation in a particular geographical area can change dramatically in a short time period. For example, the security situation in Baghdad, Iraq improved dramatically between April 2008 and September 2008.[231] An accurate, geography-based preclusion rule would require almost daily analysis at the highest command levels, which is neither practical nor feasible.

Second, geography-based restrictions could tempt the government to abuse the system in a misguided effort to secure quicker case resolution. This abuse could occur in a variety of ways. For example, a convening authority might improperly factor the area in which civilian attorneys are precluded in his analysis when exercising his RCM 504(e) venue selection authority.[232] Such a rule would also tempt some commanders facing impending deployment to an area in which civilian counsel are not permitted to not promptly dispose of certain cases. In contrast, commanders would be tempted to extend the deployments of accused servicemembers and witnesses in cases arising contemporaneously with redeployment, even if the case could easily and properly be tried in the United States.

Using an operational law analogy, this plan is indiscriminate and disproportionate.[233] Fire-bombing or carpet-bombing a city violates the law of war because it is indiscriminate.[234] Abrogating a servicemember's right to civilian defense counsel in a particular area is like the carpet-bombing of that right in that particular area. Even if there is a valid military purpose for abrogating the right, doing so in this manner is arguably disproportionate to the resulting gain to the government.[235]

Despite this plan's simplicity and appeal, it would have negative unintended consequences that could be worse than the problem that the current system creates. As a result, the Service Secretary Plan is too overbroad and should not be implemented.

D. The WALT Plan

The WALT Plan proposed and recommended a second plan that is case-specific and more appropriate for today's environment. The WALT correctly recognized that the biggest hurdles to civilian defense counsel representation in a combat zone are the inherent delays involved with producing them into theater.[236] This second WALT proposal, hereinafter the "WALT Plan," is designed to protect the right to civilian defense counsel as much as possible while still providing the command and military justice system a method to prevent delays.[237]

The WALT Plan proposes a loose timeline that would require an accused to request civilian defense counsel "early in the case."[238] This request would be made to the convening authority. The convening authority must then decide "whether, under the attendant conditions, it would be possible for the civilian defense counsel to appear, whether processing the request or the subsequent appearance of counsel would delay trial, and if so, whether other factors would preclude on [sic] otherwise reasonable delay." An accused could appeal a convening authority's decision to deny civilian defense counsel to the military judge, who must apply a "clear abuse of discretion" standard of review. If an accused fails to make a pretrial request, presumably prior to referral, the military judge could either determine that the request is "untimely," or "if appropriate, consider the merits of the request himself." Regardless of a decision to deny civilian defense counsel, a civilian counsel would not be excluded if he was "present at the trial and ready to proceed."[239]

This plan has numerous strengths. First, it is case-specific. The unique factors of each case control the

[229] *Id.*

[230] *See* Bonney, *supra* note 83, at 85–86 ("We should allow either the President, acting as the Commander in Chief, or his designated senior Theatre Commander, to make a firm decision governing the entrance of civilian counsel entering the combat zone to represent an accused."). Similar to the Service Secretary Plan, Bonney supported theater-wide exclusion of civilian defense counsel. *See id.* at abstract. Because Bonney's proposal is nearly identical to the Service Secretary Plan except for the approval authority, it is not separately addressed.

[231] *See supra* note 216 and accompanying text.

[232] *See* MCM, *supra* note 29, R.C.M. 504(e).

[233] The law of war principle of discrimination states, "Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives an accordingly shall direct their operations only against military objectives." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol 1) art. 48, June 8, 1977, 3 U.N.T.S. 1125. The law of war principle of proportionality states that "[a]n attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." *Id.* art. 51(5)(b).

[234] *See id.* art. 51(5)(b) (stating that indiscriminate attacks include "those which employ a method or means of combat which cannot be directed at a specific military objective").

[235] The collateral damage would be the harm to the specific case and to the military justice system as a whole. For concise discussion on proportionality, see *id.*; FM 27-10, *supra* note 220, para. 41.

[236] *See supra* Part IV.

[237] *See* Gates & Casida, *supra* note 158, at 155–57.

[238] *Id.* at 156.

[239] *Id.*

decision as opposed to overbroad, geographically-based limitations. Second, if the initial request is made to the convening authority, the person most in tune with the operational situation and whom the military justice system is designed to support will be making the decision on the appropriateness of civilian defense counsel. Third, this plan has a proposed system of review to protect against an improper or arbitrary denial of civilian defense counsel. Fourth, this plan never completely closes the door on civilian defense counsel representation. An accused could produce civilian defense counsel, which would nullify any previous denial. It also appears that a civilian defense counsel would be allowed to participate if he or she arrived partway through a hearing, which would avoid the unjustifiable situation of denying civilian defense counsel representation when the civilian defense counsel is present and willing to proceed.

This plan also has several drawbacks and unanswered questions. Above all, the system of initial review, which allows a military judge to review a convening authority's decision, has a practical flaw, as the unclear standards of review would create an unintended forum choice for the accused. Whereas the plan states that the military judge would review the convening authority's decision "only for clear abuse of discretion," it also gives the military judge the power to be the first to "consider the merits" of untimely, yet "appropriate," requests for civilian defense counsel.[240]

Consequently, if an accused has good reason to believe that the convening authority will deny the request for civilian defense counsel, several practical reasons indicate that the accused would almost always be better served to submit an untimely request directly to the military judge. First, the military judge would not be bound by the "clear abuse of discretion" review standard.[241] Second, since the military judge's decision would likely be reviewable under Article 66, UCMJ, the military judge may be more likely to err on the side of the accused to prevent appellate scrutiny.[242] Third, the convening authority may still have to testify, at either government or defense request, to explain why the operational situation does or does not allow for the presence of civilian defense counsel.[243] Regardless, since operational considerations are typically classified, inserting judicial proceedings in this process could create a classified case. Accordingly, this plan, which is designed to take away the defense's current Article 38 "sword," could unintentionally give the accused the "machete" of an automatic classified case.

The second potential flaw is more theoretical. Because both the military judge and convening authority are charged with upholding the purposes of military justice,[244] giving an independent military judge, rather than the convening authority, the power to limit an accused's right to civilian defense counsel is understandable. Nonetheless, the military judge will not have the operational training and experience of a convening authority. Commanders base most operational decisions on training, experience, and gut instinct.[245] Because the WALT standard includes the critical variable of "attendant conditions,"[246] which are not defined, but presumably include operational considerations, the military judge is not as qualified as a convening authority to perform such an analysis.

Trained commanders responsible for using the military justice system can make the most informed decision as to whether a military necessity exists to eliminate the right.[247] Using an operational analogy, the WALT Plan is similar to giving a trial counsel, rather than the commander, authority to be the final arbiter on whether a particular artillery strike is necessary. Giving a JA such authority is not impermissible, but most would agree that a JA's training and purpose do not warrant such a role.

E. A New Proposal: Precision-Targeted Abrogation

1. Reasons for a New Proposal

A new proposal is necessary because the aforementioned proposals fail to adequately address the problems they attempt to solve. The proposed solutions would create additional problems because they may unnecessarily or indiscriminately eliminate a valuable individual right. A new proposal, entitled "Precision-Targeted Abrogation," seeks to surgically target a deployed servicemember's right to civilian defense counsel only when

[240] *Id.*

[241] The WALT plan does not discuss appellate review under Article 66, UCMJ. *See* UCMJ art. 66 (2008). Assuming that the standard of review would be the same regardless of who denied civilian counsel, making a request for civilian counsel directly to the military judge could benefit the accused in that the appellate court, rather than the military judge, would be performing the first review of the decision. Furthermore, unless a military judge based his or her decision on specific representations from the convening authority, the appellate court might be less willing to give deference to a military judge's opinions of the operational situation.

[242] For example, a military judge is highly unlikely to not consider the request simply because it was "untimely." Professional Experiences, *supra* note 134. Article 66 sets forth the basic rules for appellate court review. *See* UCMJ art. 66 (2008). Even assuming that the government could seek an interlocutory appeal, such an appeal would usually be unwise, as the time it would take secure the appellate decision would cut against the exact reason why civilian counsel was denied in the first place. *See id.* art. 62 for the rules regarding government interlocutory appeals.

[243] *See* MCM, *supra* note 29, R.C.M. 703(b)(1) ("Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary.").

[244] *See supra* note 67 and accompanying text.

[245] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 6-22, ARMY LEADERSHIP: COMPETENT, CONFIDENT, AND AGILE paras. 6-9 & 6-10 (12 Oct. 2006).

[246] *See supra* note 240 and accompanying text.

[247] *See supra* note 220 and accompanying text.

no viable alternative is present.[248] Precision-Targeted Abrogation attempts to limit incidental damage to the military justice system by effectively balancing a servicemember's right to civilian defense counsel with the military justice system's interests in being efficient, accurate, and fair.

2. Under What Circumstances the Right Should Be Abrogated

Eliminating an accused's rights under Article 38(b)(2), would be allowed only on a case-by-case basis for non-capital cases where the misconduct occurred in a deployed area.[249] Abrogation would require a specific, written finding that there is clear and convincing evidence that either: (1) an Article 32 investigation or court-martial proceeding could properly occur during an operational deployment, but would likely never occur during that operational deployment, solely because of the delay an accused's assertion of his or her Article 38(b)(2) rights would cause; or (2) complying with an accused's Article 38(b)(2) rights creates a reasonably foreseeable risk of death or grievous bodily harm to any person.

3. Who May Abrogate the Right?

Similar to the WALT Plan, Precision-Targeted Abrogation would vest the abrogation authority in a court-martial convening authority.[250] Under Precision-Targeted Abrogation, the authority would be withheld to a GCMCA within the chain of command of an accused deployed in support of a declared war or contingency operation.[251]

There are two main reasons why this power should rest with a GCMCA and not a subordinate commander or official. First, a GCMCA is the only officer truly qualified and positioned to accurately evaluate the operational situation within his entire command, as well as how the introduction of civilian defense counsel could impact his ability to carry out his mission. If the decision to abrogate a servicemember's right to civilian defense counsel is based on operational concerns, a military judge or other officer who does not have operational control of the unit or the responsibility to ensure mission accomplishment should not be given the power to potentially undermine the mission by requiring production.

Second, if the abrogation is based on an inability to prosecute the case because of unavoidable delay caused when an accused exercises his or her Article 38(b)(2) rights, only the GCMCA can properly evaluate how a delay might impact the ability to process a case. The GCMCA is ultimately responsible to ensure fairness throughout the entire process.[252]

One may argue that a military judge or subordinate convening authority could make the decision to abrogate the servicemember's right to counsel. While both options would be legally permissible, neither is advisable. For one, a military judge has no control over a case until it is referred to a special or general court-martial.[253] Because an accused has a right to civilian defense counsel representation at an Article 32 hearing, delays caused by civilian defense counsel production may have consequences that could unfairly prevent the case from ever being referred.[254] Second, such a critical decision impacting individual rights should be withheld from field-grade commanders. General officers are typically more experienced with the military justice system than subordinate commanders. They also have an experienced field-grade JA on their staffs, which is not always the case at lower-level units.[255]

4. GCMCA-Level Procedural and Due Process Requirements

Unlike the WALT Plan, which calls for an accused to "make a timely and detailed request for civilian counsel to

[248] Draft statutory language for Precision-Targeted Abrogation is located at Appendix B. A flow chart diagramming the process is located at Appendix C.

[249] Because of the severe and final nature of the death penalty, capital cases involve numerous additional due process steps and individual protections. *See, e.g.*, MCM *supra* note 29, R.C.M. 501(a) (requiring panels of at least twelve members for capital cases); *id.* R.C.M. 1004 (describing sentencing rules in capital cases); *id.* R.C.M. 1204(c)(2) (describing specific post-trial processing procedures for capital cases). For a good summary of the relevant statutory and case law related to capital cases, see *id.* R.C.M. 1004 analysis, at A21-74 through A21-79.

[250] For a discussion of the WALT Plan, see *supra* Part VI.D. Precision-Targeted Abrogation proposes withholding the power to abrogate an accused's right to civilian counsel to a general court-martial convening authority. *See infra* Part VI.E.2.

[251] The WALT Plan does not propose withholding authority to the general court-martial convening authority (GCMCA). *See* Gates & Casida, *supra* note 158, at 155–57 (1984). Although the first general officer in a servicemember's chain of command is typically the GCMCA that handles a particular case, Article 22 lists numerous other superior commanders who may convene a general court-martial. *See* UCMJ art. 22 (2008). Under Precision-Targeted Abrogation, those superior GCMCAs would have abrogation authority, even though not deployed in support of a declared war or contingency operation. A contingency operation is generally one that is "designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force." 10 U.S.C. § 101(a)(13)(A) (2006).

[252] For example, a GCMCA or the staff judge advocate must review allegations of legal error set forth in post-trial submissions, which occurs after a military judge has lost authority over a case by authenticating the record of trial. *See* MCM, *supra* note 29, R.C.M. 1106(d)(4).

[253] *See* MCM *supra* note 29, R.C.M. 406 & 503.

[254] *See supra* Part V.B.

[255] *See* U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 2-1(d)(11) (30 Sept. 1996).

the convening authority,"[256] an accused has no burden to preserve his Article 38(b)(2) rights under Precision-Targeted Abrogation. The default under Precision-Targeted Abrogation is that a servicemember's Article 38(b)(2) rights remain intact. Furthermore, prior to a servicemember's Article 38(b)(2) rights, a GCMCA must follow specific procedural steps designed to provide a servicemember the due process necessary to ensure that the GCMCA's decision is as fully informed as possible.[257]

When a GCMCA determines that abrogation is necessary, he or she must first notify the accused and military judge (if applicable) in writing of her intent to abrogate the accused's right to civilian defense counsel under Article 38(b)(2), UCMJ.[258] The abrogation notice to the accused must contain: (1) the detailed reasons that justify abrogation; and (2) the time period for which the abrogation applies.[259] The GCMCA must ensure that the accused is detailed a military defense counsel. The accused and defense counsel shall be permitted to immediately review any documentation supporting the abrogation decision.[260] An abrogation notice would serve as an automatic stay of any scheduled hearing or proceedings. The delay would be excluded from speedy trial calculations.[261]

The accused would be provided 48 hours from receipt of the notice of abrogation, or detailing of military defense counsel, whichever is later, to submit privileged written matters to the GCMCA in response to the abrogation notice.[262] The accused would also be provided with the right to a face-to-face meeting with the GCMCA and servicing SJA, in person or via video teleconference, within forty-eight hours of the abrogation notice. The accused's detailed counsel may attend the meeting and present evidence or argument.

After considering any matters that the accused submits, the GCMCA would again weigh the operational situation and case status. If the GCMCA believes that abrogation is necessary, the GCMCA must immediately notify the accused, detailed defense counsel, military judge (if applicable), and first O-10 in the chain of command in the form of an abrogation order. This order must set forth the specific law on which the abrogation is based and the facts and evidence that support the abrogation.[263] It must also specifically address any evidence and matters that the accused submits.

Such procedures would be burdensome, yet appropriate. First, the procedures would give an accused procedural due process to ensure that the GCMCA and reviewing officials have all available evidence, to include the accused's point of view. An accused would have the right to submit privileged matters in writing and in person. This could give the case a "face" rather than just a name, which could benefit the accused.[264] Second, the procedures help to mitigate any argument that servicemembers rights are summarily disregarded in a deployed environment. Third, the procedures assist in preventing fraud, corruption, and bad faith in the process by requiring detailed justifications for all decisions. Lastly, the procedures preserve the record for additional review.

5. System of Initial Review

To prevent abuse and ensure fairness, any abrogation of a well-established right should include an immediate and substantial initial review. Under Precision-Targeted Abrogation, this review would be performed by the first officer in the pay grade of O-10 in the accused's chain of command, who would be known as the reviewing official (RO). If the GCMCA is an O-10, the RO would be the next senior official in the chain of command.[265]

The RO must personally review the abrogation order as expeditiously as possible. The RO may seek advice and assistance from his staff, but the responsibility to review the abrogation order is not delegable. The RO must review the decision on a de novo basis, granting absolutely no deference to the subordinate commander's decision. Although the review may be based solely on the evidence

[256] Gates & Casida, *supra* note 158, at 156.

[257] See Appendix C for a flow-chart diagram of the process.

[258] Such a notice would be entitled "Notice of Intent to Abrogate Rights Under Article 38(b)(2), UCMJ," otherwise known as the "Abrogation Notice."

[259] Abrogating a right for an indefinite time period would be permissible, but subject to periodic review. *See infra* Part VI.E.5.

[260] If the documentation is classified, the command should grant temporary security clearances when possible. If the GCMCA determines that showing the accused or detailed defense counsel the documentation would present a security threat, the accused or detailed defense counsel will not be permitted to inspect the documentation. Any decision to deny inspection is reviewable during the initial review process. *See infra* Part VI.E.5.

[261] Absent excused delay, the government must arraign an accused within 120 days from preferral of charges or imposition of pretrial confinement. *See* MCM *supra* note 29, R.C.M. 707.

[262] These written matters would be privileged under MRE 410, as an accused may wish to present incriminating or embarrassing information in order to prevent the GCMCA from ordering abrogation. *See id.* MIL R. EVID. 410 for a list of privileged pretrial discussions and statements.

[263] If the rationale is based on classified evidence, the GCMCA should seek to either: (1) declassify it; (2) ensure that the defense counsel and accused possess the requisite security clearances; or (3) submit an unredacted version to the reviewing official and a redacted version to the accused and detailed defense counsel.

[264] Many GCMCAs never see an accused's face, either in person or in a photograph. Professional Experiences, *supra* note 134.

[265] There would be no review mechanism in the extremely rare event that the President of the United States convened the court-martial. Article 22(a)(1) gives the President the power to convene courts-martial. UCMJ art. 22(a)(1) (2008).

contained in the file, the RO is encouraged to conduct additional investigation as necessary. The accused has no right to present additional evidence to the RO, but the RO may consider anything an accused submits.

The RO must notify the accused, detailed defense counsel, servicing GCMCA, and military judge (if applicable) of his or her decision within 120 hours of the GCMCA signing the abrogation order. A failure to uphold the abrogation within 5 days will automatically vacate the abrogation order.

Requiring a personal, de novo review by an O-10 or above ensures proper application of the system in two main ways. First, it requires a more experienced commander who possesses the requisite tactical training, operational knowledge, and national policy visibility to agree with the GCMCA's assessment. Second, it forces the GCMCA who orders abrogation to properly justify and believe in the propriety of the decision, as he will not want to look poor by presenting a weak case to a supervising commander.

6. Periodic Review, Appellate Review, and Other Considerations

Both the servicing GCMCA and reviewing official must independently review the propriety of each abrogation order at least once every fourteen days. Each must forward his or her opinion to the accused, detailed defense counsel, and military judge (if applicable). A failure to conduct this periodic review serves to immediately terminate the abrogation order. Article 38(b)(2) rights should be immediately restored whenever either the abrogation standard is not met or servicing GCMCA or RO believes such is warranted.

The decision to abrogate would not be reviewable by the military judge. Furthermore, appellate courts could overturn a case based on improper abrogation only in cases where credible evidence exists of: (1) any form of unlawful command influence, or (2) both the GCMCA and reviewing official violated Article 98, UCMJ, Knowingly and Intentionally Failing to Enforce or Comply With Provisions of the Code.[266] Because abrogating a servicemember's right is appropriate only when a commander makes an educated and informed factual decision about mission or case completion, traditional judicial review is unnecessary and inappropriate. In other words, abrogation is completely based on a factual, rather than legal, determination. Since senior commanders are the officers with the proper training and best access to critical information, injecting military judges into the decision process is unnecessary and unwise.

7. Drawbacks

This Precision-Targeted Abrogation plan contains two drawbacks that are immediately apparent. First, if an abrogation decision is based on classified information, and the accused or defense counsel are not permitted to view the information due to an insufficient security clearance or a security risk, the abrogation decision would be made on evidence to which the accused would be unable to respond. Even if such seems to smack in the face of traditional due process notions, one must remember that the Article 38(b)(2) right to civilian defense counsel of choice is facially statutory, not constitutional.[267] The abrogation decision would have nothing to do with the merits of the actual case. So long as the accused is properly represented by detailed military defense counsel, his or her constitutional right to a fair trial is protected.[268] Even assuming that the right to civilian defense counsel of choice is constitutional, abrogation must simply not be wrongful.[269] The procedures used to abrogate Article 38(b)(2) rights do not have to conform to constitutionally-based discovery rules applicable to the merits of a particular case.[270] The proposed due process rights and review procedures provide sufficient protection to the accused.

Second, the standard that permits a GCMCA to abrogate Article 38(b)(2) rights based on "a reasonably foreseeable risk of death or grievous bodily harm to any person" may be overbroad and lead to unintended consequences. It is inarguable that presence in a combat zone or deployed setting has some degree of inherent risk as death or grievous bodily harm is always somewhat foreseeable. Thus, it is possible that a GCMCA and RO could abuse this standard if their threshold for what is a "reasonably foreseeable risk" was low.

Abuse of the system, however, would be unlikely. GCMCAs and ROs, by the very nature of their duties and qualifications, which involve sending servicemembers into dangerous situations on a daily basis, have a solid understanding of what constitutes a "reasonably foreseeable risk." Additionally, the initial review procedures guard against one commander improperly setting the bar too low for what is a reasonable risk. Regardless, because commanders are responsible for the safety of civilian counsel in theater, their judgment on this issue should be final.

[266] The elements of UCMJ art. 98 (2008) are found at MCM, *supra* note 29, pt. IV, ¶ 22b(2). This offense is "designed to punish intentional failure to enforce or comply with the provisions of the code regulating the proceedings before during, and after trial." *Id.* ¶ 22c(2). Limiting review to these instances will help prevent abuses of the system, as well as correct any that do occur, while also preventing appellate judges from second-guessing the operational-based decisions of the GCMCA and RO.

[267] *See supra* Part II.B.

[268] *See id.*

[269] *See id.*.

[270] For a list of the constitutionally-based court-martial discovery rules, see MCM *supra* note 29, R.C.M. 701 & 703.

These two wrinkles are not the only potential drawbacks to Precision-Targeted Abrogation. Others undoubtedly exist, and should be discussed as they are identified.

8. Application: Specific Examples

The best way to demonstrate the value of Precision-Targeted Abrogation is to re-examine the two prior examples from Part V.B. Both examples demonstrate how Precision-Targeted Abrogation would work.

a. Operational Dangers Example

Using the first example from above,[271] assume a servicemember at a remote FOB in Afghanistan charged with larceny of a fellow servicemember's iPod. The accused, through email, retains civilian defense counsel. The convening authority does not want to produce the civilian defense counsel because of legitimate operational concerns.

Using Precision-Targeted Abrogation, so long all procedures were properly followed, a special or general court-martial could occur. All of the evidence is located at the FOB. The defense counsel and military judge could make it to the FOB. The risk to the unit is not increased by the presence of civilian defense counsel. Under the current system, the commander would have to either sacrifice operational and physical security to try the case, or simply not try the case at all.

b. Witness Unavailability Example

In the second example from above, [272] the accused, 1LT George I. Joe, was charged with rape of another servicemember by digital penetration and armed robbery of a local national vendor. First Lieutenant Joe's company commander and the unit First Sergeant are witnesses to the rape charge. The alleged rape victim and robbery victim will soon be unavailable to testify in any proceeding in theater.

Using Precision-Targeted Abrogation, the GCMCA would have the flexibility to eliminate the right to counsel to the exact degree required.[273] For example, the GCMCA could preserve testimony and still produce a civilian defense counsel for trial. This could be accomplished in one of two ways. First, if the GCMCA believed that a deposition was proper, she could order a deposition and simultaneously abrogate 1LT Joe's right to civilian defense counsel to that deposition,[274] allowing the right to civilian defense counsel to reattach for subsequent proceedings. Second, a GCMCA could abrogate an accused's right to civilian defense counsel through only the Article 32(b) investigation, potentially preserving testimony for potential admission under RCM 804(b)(1).[275] In either situation, the military defense counsel could contact civilian defense counsel to coordinate strategy.

While preserving testimony via a limited deposition abrogation would be an attractive option in many cases where the abrogation is based on anticipated witness unavailability, the GCMCA should not be limited to it. First, the GCMCA is not required to order a deposition.[276] Second, the GCMCA may choose to promote efficiency by preserving testimony at the Article 32 hearing rather than by deposition. First Lieutenant Joe remains protected from losing witness testimony even if the convening authority doesn't order a deposition, as the military judge may order a deposition upon 1LT Joe's request after referral.[277] Such a request would also provide an opportunity to litigate potential evidence admissibility issues.

The GCMCA would have a choice as to how to preserve the testimony of the soon-to-be unavailable witnesses, as well as any witnesses the accused requests. Additionally, the Article 32 investigation could be completed as scheduled, and the case could be referred shortly thereafter. The GCMCA must then re-evaluate the case, and in most cases, revoke the abrogation. Regardless of the path that the GCMCA chooses, following the specific procedures found in Precision-Targeted Abrogation will ensure that the accused's rights are sufficiently protected.

VII. Conclusion

A recent modification to the RCM demonstrates that reducing an accused's right to civilian defense counsel may help strike the proper balance between individual rights and the need for efficiency and effectiveness. Rule for Court-Martial 305(m), which is new to the 2008 edition of Manual for Courts-Martial, gives the Secretary of Defense the authority to "suspend the application" of various individual procedural protections afforded to a pretrial confinee when

[271] For the detailed facts of this example, see *supra* Part V.B.2.

[272] For the detailed facts of this example, see *supra* Part V.B.4.

[273] This example assumes that the government is not pursuing a capital referral for the rape charge. Although death is the maximum punishment listed for rape under UCMJ art. 120 (2008), the Supreme Court has held that imposing the death penalty for raping an adult is cruel and unusual punishment under the Eighth Amendment. *See* MCM, *supra* note 29, pt. IV, ¶ 45f(1); Coker v. Georgia, 433 U.S. 584, 592 (1977).

[274] *See* UCMJ art. 49; MCM *supra* note 29, R.C.M. 702(a) ("A deposition may be ordered whenever, after preferral of charges, due to exceptional circumstances of the case it is in the best interest of justice that the testimony of a prospective witness be taken and preserved for use at an investigation under Article 32 or a court-martial.").

[275] *See id.* R.C.M. 804(b)(1).

[276] *See* authorities cited *supra* note 274.

[277] *See* MCM *supra* note 29, R.C.M. 702(b).

"operational requirements . . . would make application of such provisions impracticable."[278] One of those protections is "[t]he right to retain civilian counsel at no expense to the United States, and the right to request assignment of military counsel."[279]

The RCM 305(m) abrogation of right to counsel is appropriate for that limited setting, but should not be used as a model in the vastly more important realm of pretrial investigations and hearings. As was the case with the Service Secretary Plan,[280] the RCM 305(m) model would be indiscriminate and overbroad if applied in other arenas.

Similar to the security and safety of civilians living an area of conflict, a deployed servicemember's right to civilian defense counsel is valuable and should be preserved when possible. Unfortunately, preserving those valuable things at all costs and in all situations can bring about even greater undesirable consequences. Always preserving civilian security and safety during a conflict could lead to an indefinite extension of the conflict. Always preserving a deployed servicemember's right to civilian defense counsel could do the same, as it could cause the command to lose the ability to use the military justice system to maintain good order and discipline.

A GCMCA's ability to precisely target a problem should not be limited to objectives that the enemy controls. Just as he or she is able to use a laser-guided rocket to destroy a building and minimize collateral damage, he or she should be able to use Precision-Targeted Abrogation as a weapon against a deployed servicemember's use of his or her right to civilian defense counsel.

Major General Moorman accurately stated, "Change for its own sake can never be a sound basis for altering the military justice system; it must be tied to actual needs that genuinely enhance military justice operations under all circumstances and environments in which it is practiced."[281] Precision-Targeted Abrogation addresses one such need in a way that would enhance the military justice system.

[278] *Id.* R.C.M. 305(m).

[279] *Id.* R.C.M. 305(e)(3).

[280] *See supra* notes 233–35 and accompanying text.

[281] Moorman, *supra* note 2, at 186.

Appendix A

Chart: Comparison of Abrogation Proposals

Abrogation System	Who Has Power to Abrogate	Abrogation Time Frame	Initial Review Authority	Who must request review	Standard of Initial Review	Deadline for Initial Review
Westmoreland and Prugh Plan	Art. 32 IO during "Time of War or Military Exigency"	Prior to Article 32 hearing	None (not addressed in proposal)	N/A	N/A	N/A
Service Secretary Plan	Service Secretary in "Areas of Hostility"	Any Time During Hostilities	None (silent regarding cases ongoing upon abrogation)	N/A	N/A	N/A
WALT Plan	Convening Authority or Military Judge (accused must request civilian counsel)	Timely (not further defined)	Military Judge	Accused	Clear Abuse of Discretion	Not specified
Precision - Targeted Abrogation	General Court-Martial Convening Authority of accused in a declared war or contingency operation	Any time prior to production of civilian counsel	First O-10 in Chain of Command (or next higher GCMCA if O-10 convenes C-M)	Automatic Review	De Novo	Within 5 days or prior to any proceeding, whichever is earlier

Appendix B

Draft Statutory Language for Article 38, UCMJ (Precision-Targeted Abrogation)

§ 838. Art. 38. Duties of Trial Counsel and Defense Counsel.

(b)(8) In a case in which the alleged violation of the punitive articles occurred outside of the United States and the accused is assigned to a unit deployed in support of a contingency operation or declared war, any general court-martial convening authority in the accused's chain of command may abrogate a servicemember's rights under paragraph (b)(2) contingent upon compliance with the procedures set forth in this paragraph.

(A) The general court-martial convening authority must first communicate in writing the intent to abrogate the accused's rights under paragraph (b)(2) to the accused, defense counsel for the accused, military judge (if applicable), and the first officer in the pay grade of O-10 or above in the accused's chain of command. If the general court-martial convening authority seeking abrogation of an accused's rights under paragraph (b)(2) is at the pay grade of O-10, the notice will be transmitted to the next senior member of the chain of command. The President of the United States must submit the written finding to only the accused, defense counsel for the accused, any co-accused (if applicable), and defense counsel for a co-accused (if applicable), and the military judge (if applicable).

(B) The notice of intent to abrogate an accused's rights under paragraph (b)(2) must contain the following:

(i) A specific finding by the general court-martial convening authority initiating abrogation that there is clear and convincing evidence that either:

(1) An investigation pursuant to article 32(b) or a court-martial proceeding could properly occur during a deployment in support of a contingency operation or declared war, but would likely never occur during that deployment, solely because of the delay that an accused's assertion of his or her rights under paragraph (b)(2) would cause; or

(2) complying with an accused's rights under paragraph (b)(2) creates a reasonably foreseeable risk of death or grievous bodily harm to any person.

(ii) The time period for which the abrogation of rights under paragraph (b)(2) would apply. The abrogation may be for a specified or indefinite time period, but only for a time period justified under paragraph (b)(8)(B)(i).

(iii) A copy of all documentation that supports the determination under paragraph (b)(8)(B)(i), or the location where the documentation may be reviewed. If the decision is based on classified evidence, all parties must be so notified. The general court-martial convening authority should take all reasonable steps to permit the accused and defense counsel to review classified evidence. Any decision to deny inspection is reviewable under the review process set forth in paragraph (b)(8)(G).

(iv) Notice of the accused's right to submit matters and evidence to the general court-martial convening authority within forty-eight hours of notification or assignment or waiver of military defense counsel, whichever is later. For evidentiary admissibility purposes, all materials submitted would be considered statements made in the course of plea discussions.

(v) Notice of the accused's right to a personal meeting with the general court-martial convening authority and the general court-martial convening authority's principal legal advisor within forty-eight hours of notification or assignment or waiver of military defense counsel, whichever is later. All materials submitted would not be admissible against the accused at a later investigation pursuant to article 32(b) or at a court-martial proceeding. For evidentiary admissibility purposes, all materials submitted would be considered statements made in the course of plea discussions.

(C) The general court-martial convening authority may abrogate a servicemember's rights pursuant to paragraph (b)(2) only after:

(i) Following all procedures set forth in paragraph (b)(8)(B);

(ii) Considering all matters that the accused submits; and

(iii) Determining, after a reassessment of all available evidence, that the finding set forth in paragraph (b)(8)(B)(i) remains valid.

(D) If the general court-martial convening authority orders abrogation, a written abrogation order must be served upon the accused, defense counsel for the accused, military judge (if applicable), and the first officer at the pay grade of O-10 or above in the chain of command who outranks the general court-martial convening authority. The order must:

(i) State the specific finding by the general court-martial convening authority initiating abrogation that there is clear and convincing evidence that either:

(1) An investigation pursuant to article 32(b) or a court-martial proceeding could properly occur during a deployment in support of a contingency operation or declared war, but would likely never occur during that deployment, solely because of the delay that an accused's assertion of his or her rights under paragraph (b)(2) would cause; or

(2) complying with an accused's rights under paragraph (b)(2) creates a reasonably foreseeable risk of death or grievous bodily harm to any person.

(ii) A copy of all documentation that supports the determination under paragraph (b)(8)(D)(i), or the location where the documentation may be reviewed. If the decision is based on classified evidence, all parties must be so notified. The general court-martial convening authority should take all reasonable steps to permit the accused and defense counsel to review classified evidence. Any decision to deny inspection is reviewable under the review process set forth in paragraph (b)(8)(G).

(iii) Specifically address all matters submitted by the accused; and

(iv) State the time period of the abrogation.

(E) If the accused is not represented by counsel upon receiving the notice requirement of paragraph (b)(8)(B), the general court-martial convening authority must ensure that the accused's rights under paragraph (b)(3) are immediately satisfied.

(F) An investigation pursuant to article 32(b) or any court-martial proceeding must be delayed upon the initiation of action under paragraph (b)(8) until the intial review under paragraph (b)(8)(G) is complete. Timely actions under paragraph (b)(8) shall be considered as immediate steps to trial for speedy trial purposes.

(G) Upon the issuance of an abrogation order, the first officer in the pay grade of O-10 in the accused's chain of command who outranks the general court-martial convening authority who ordered abrogation will perform an initial review of the decision to abrogate the accused's rights pursuant to paragraph (b)(2). If the general court-martial convening authority seeking abrogation of an accused's rights under paragraph (b)(2) is at the pay grade of O-10, the next senior member of the chain of command will perform the review. Any decision by President of the United States pursuant to paragraph (b)(8) is not reviewable.

(i) The official performing the initial review (reviewing official) must personally review the case. This authority and responsibility is not delegable.

(ii) The reviewing official must not give any deference to the subordinate commander's abrogation decision or rationale. This initial review shall be a complete reexamination and reevaluation of the available evidence.

(iii) Although this review may be based solely on the matters forwarded by the subordinate commander, the reviewing official may order additional investigation.

(iv) The accused has no right to submit additional evidence to the reviewing official. Any evidence submitted, however, may be considered at the discretion of the reviewing official.

(v) The reviewing official must issue his or her decision within 120 hours from the signing of the abrogation order. Failure to issue a decision within 120 hours will automatically terminate the abrogation order.

(H) The general court-martial convening authority ordering abrogation and the reviewing official must independently review each abrogation order at least once every fourteen days. Each must issue a written opinion to the accused, defense counsel for the accused, and military judge (if applicable) stating whether continued abrogation is still warranted. The general court-martial convening authority ordering abrogation or the reviewing official shall terminate the abrogation immediately if he or she believes that the abrogation is no longer warranted. A failure to issue a written opinion pursuant to this paragraph will automatically terminate the abrogation order.

(I) The decision to abrogate an accused's rights pursuant to paragraph (b)(2) is not reviewable by the military judge.

(J) Article 66 reviews of decisions made pursuant to paragraph (b)(8) are proper only in cases where credible evidence exists of:

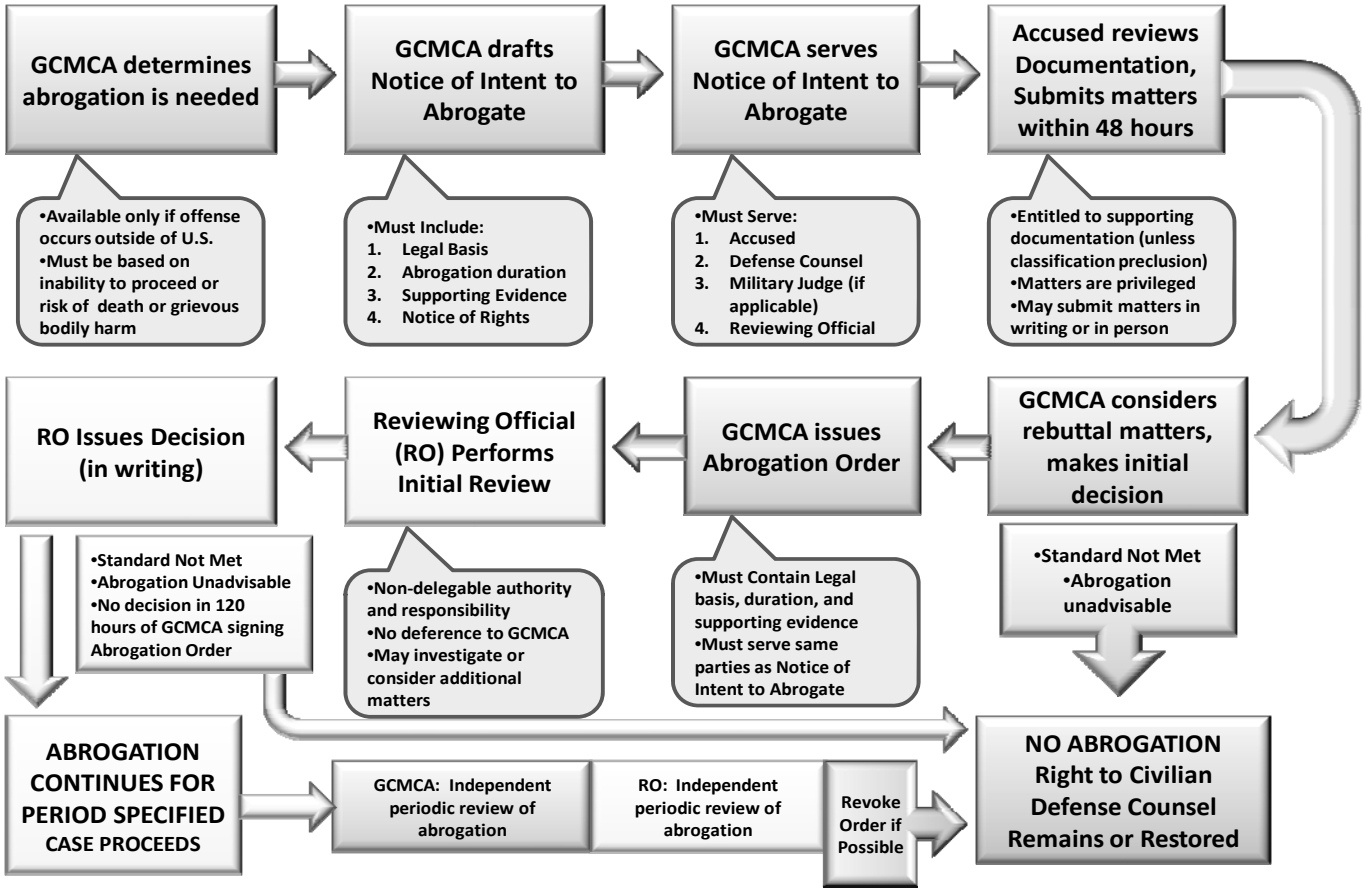
(i) Any form of unlawful command influence; or

(ii) Both the general court-martial convening authority ordering abrogation and the reviewing official violated article 98 by knowingly and intentionally failing to enforce or comply with provisions of this code.

(K) If a servicemember's rights under paragraph (b)(2) are abrogated by operation of this paragraph, the sentence adjudged may not include death.

Appendix C

Flow Chart of the Precision-Targeted Abrogation Process



Where's the Harm? Release Unit Prices in Awarded Contracts Under the Freedom of Information Act

Major David Allen Dulaney[*]

[G]iven that FOIA's primary purpose is to inform citizens about what their government is up to, it seems quite unlikely that Congress intended to prevent the public from learning how much the government pays for goods and services.[1]

I. Introduction

Standing in front of the stacks of breakfast cereal in your local grocery store, you are often presented with several different brands and sizes of cereal boxes. Each type of cereal, such as bran flakes, has a different sized box with a total price taped to the front for easy viewing. It is natural to assume that the flakes packed in the "giant" or "family" size may be the best buy. Or you may think that buying one large box of cereal is a better buy than the individually packed single serve boxes. But the bigger box may not present the best value. How can you determine the best value of bran flakes? You cannot tell by just looking at the item price tag on the box. Assuming the bran flakes are of similar and acceptable quality, the best way to determine the value of each cereal box is by looking at the shelf tag below the box displaying the unit price for the bran flakes. Comparing the unit price per ounce of the bran flakes in different sized containers allows you to determine which box provides the most flakes for your dollar. In this regard, comparison shopping in a grocery store mirrors the process a government contracting officer may use to analyze price in a procurement contract.[2]

Finding value in government contracts is not as easy as it is in a grocery store, however. In fiscal year 2009 alone, the United States Federal Government spent $523,901,729,866 on government contracts.[3] Government contract spending accounted for over 30% of federal funds spent in the same fiscal year.[4] As astounding as these numbers may sound, what is even more astonishing is that watchdog groups and the media report that government contractors routinely overcharge the government for goods and services.[5] This problem has recently received presidential attention when President Obama ordered a review of federal contracting procedures.[6] Specifically, the President wanted to add more accountability and competition to what some experts say is an already overwhelmed procurement system.[7] Perhaps one of the best ways to introduce accountability and competition is by making the procurement system open to the scrutiny of the American public.

With a large percentage of our federal budget going to procurement contracts, and fraud routinely found in those contracts, should not the American taxpayers know how much they pay for goods and services? Under the Freedom of Information Act (FOIA), anyone can request records of government contracts.[8] But as this article will show, over the last decade, government contractor-friendly decisions by the Court of Appeals for the District of Columbia (hereinafter D.C. Court of Appeals) have virtually ensured that taxpayers cannot find out the amount the government is paying for an individual unit of good or service. In other words, judicial precedent is preventing the government from disclosing unit price information without contractor consent.

This article explores how the D.C. Court of Appeal's legal precedent of limiting the release of unit prices is frustrating the FOIA's purpose and is hindering the efficiency of the federal procurement system. To rectify the D.C. Court of Appeal's harmful legal precedent, this paper will recommend that the legal precedent be changed through statutory reform. But to fully understand why this area of law needs to change, it is important to first understand all the background elements of unit price disclosures.

This article examines, in turn: (1) how businesses seek disclosure and non-disclosure of unit prices under the FOIA; (2) how the judiciary has created a legal precedent preventing disclosure of unit prices; and (3) how the

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[1] Canadian Commercial Corp. v. U.S. Dep't of Air Force, 514 F.3d 37 (D.C. Cir. 2008).

[2] Just as a private consumer can accurately compare prices of similar items by using the unit price of that item, so too can government contracting officers when comparing procurement contracts. Federal Acquisition Regulation, 48 C.F.R. § 4.1001 (2010) (requiring that contract bidders answer government solicitations for goods or services with bids that contain unit prices).

[3] Federal Spending FY 2009, http://www.usaspending.gov (last visited Feb. 22, 2010).

[4] *Id*.

[5] *See* Federal Contractor Misconduct Database, http://www.contractormisconduct.org (last visited Feb. 22, 2010). Some of the top offenders of overcharging the government are well known defense contractors, such as Lockheed Martin, Boeing Company, Northrop Grumman, and General Dynamics. *Id*.

[6] Scott Wilson & Robert O'Harrow, *President Orders Review of Federal Contracting System*, Washington Post.com, March 5, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/03/04/AR2009030401690.html.

[7] *Id*.

[8] Freedom of Information Act, 5 U.S.C. § 552(a)(3)(A) (2006).

judiciary's legal precedent is inconsistent with current policy and FOIA's purpose. After examining all these background factors, this article concludes that if Congress will change FOIA to promote disclosure of unit prices, America will reap not only the benefits of lower prices for goods and services, but also experience increased oversight on how the government spends taxpayer money. As a template for change, this article comparatively discusses a similar FOIA law in the United Kingdom. Before arriving at the argument for changing the FOIA, however, the paper first starts by examining what makes a unit price and how contractors use the current language of FOIA to both obtain unit prices and defend them from disclosure.

II. What's in a Unit Price? How Contractors use FOIA

A unit price is the specified amount a consumer pays for goods or services on a per unit basis.[9] Thus, a unit price is often understood to be a predetermined price for a quantity of goods or services.[10] Companies arrive at their unit price by determining a rate and unit of measure and then combining the two.[11] For example, if a contractor sells potatoes to the government at $2 for three pounds, the unit of rate would be dollars/pounds. To arrive at the unit price the company charges the government for potatoes, the government expresses the ratio of dollars to pounds in terms of one.[12] For our example of potatoes, the unit price would be $0.67 per pound of potatoes ($0.67/pound). In government contracting, a unit price is therefore the specified amount the government pays for the goods or services stated per unit. The contracting officer can use unit prices to compare contractor proposals and bids, just as a shopper can in a grocery store.

When comparing contractor proposals and bids, it is helpful to compare the unit prices found in the contract line item number. Unit prices for a stated government contract are located in the CLIN.[13] When a company submits its proposal or bid to the contracting officer, the contracting officer is able to look at the CLIN of each competing contract, and know the unit price of a particular item.[14] Therefore, the contracting officer can easily compare differences in prices for various quantities the competitors charge before choosing which contract presents the best value.[15]

Before the contracting officer awards the contract, only the contracting officer knows the unit price information.[16] This is for good reason. Obtaining the unit price of a particular item contained in a competitor's contract proposal may allow a competing business to determine a competitor's profit margin.[17] Knowing a competitor's profit margin may allow a rival competitor to undercut the competing contractor's bid for a government contract under consideration.[18] Even knowing the unit price in existing contracts is thought to allow a competitor to gain a competitive advantage for future government procurements.[19] The competing contractor can use the unit price knowledge to set its price just under the unit price of his competitor in the future.[20] It is therefore an established business tactic for potential government contractors to use FOIA as a means of obtaining a competitor's unit price and gaining a competitive edge.[21] The following sections will examine the procedure for how a business seeks to obtain unit price information in awarded government contracts.

A. Obtaining Unit Price Information

The FOIA provides procedures that allow any person to make a request for a federal agency document and for federal agencies to make the records promptly available to anyone who makes a proper request.[22] The FOIA is therefore a powerful tool for businesses and potential contractors to find out information concerning government procurements, as most paperwork gathered and produced by the procuring agency is a record, and thereby generally releasable.[23] This section will describe the process of how a person can make a proper records request for contract information with a federal agency, and the appeals process for a denied request.

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[9] Unit Price, http://www.businessdictionary.com/definition/unit-price.html (last visited Feb. 22, 2010).

[10] *Id*.

[11] Distance, Rate and Time, http://www.math.com/school/subject1/lessons/S1U2L3GL.html (last visited Nov. 20, 2009). A rate is a form of ration in which the two terms are in different units. *Id*.

[12] *Id*.

[13] Federal Acquisition Regulation, 48 C.F.R. § 4.1001 (2010).

[14] *Id*.

[15] *See id*.

[16] 48 C.F.R. § 24.202 (2010). The regulation states,

> A proposal in the possession or control of the Government, submitted in response to a competitive solicitation, shall not be made available to any person under the Freedom of Information Act. This prohibition does not apply to a proposal, or any part of a proposal, that is set forth or incorporated by reference in a contract between the Government and the contractor that submitted the proposal.

Id.

[17] McDonnell Douglas Corp. v. U.S. Dep't of the Air Force, 375 F.3d 1182 (D.C. Cir. 2004).

[18] McDonnell Douglas Corp. v. Nat'l Aeronautics & Space Admin., 180 F.3d 303, 306 (D.C. Cir. 1999).

[19] *Id*.

[20] *Id*.

[21] Michael Hordell & Laura Hoffman, *The Freedom of Information Act: A Powerful Tool for Government Contractors*, Mar. 3, 2004, *available at* http://www.pepperlaw.com/pdfs/GC0204.pdf.

[22] Freedom of Information Act, 5 U.S.C. § 552(a)(3)(A) (2006).

[23] *See* discussion *infra* Parts II.A.1, III.

1. The Request

When a person wants to find out information concerning a procurement contract, all the person has to do is file a FOIA request with the agency for the records pertaining to the contract.[24] The FOIA request must satisfy only two requirements to be valid. First, the request must reasonably describe the records sought.[25] A *record* is any information maintained by an agency in any format, including electronic information.[26] The request must be sufficient to enable an agency employee, familiar with the subject of the request, to locate the record with a reasonable amount of effort.[27] Accurately describing the record sought only meets half of FOIA's requirements for a valid request. The requester must still comply with the requested agency's FOIA regulations.[28]

The second requirement for a valid FOIA request is that the requester must make the request in accordance with the agency's published procedural regulations.[29] The requesting person can easily find the federal regulations for a FOIA request as all federal agencies "must promulgate regulations informing the public of 'the time, place, fees (if any), and procedures followed' for making request."[30] Most federal agencies have published rules requiring FOIA requests to be (1) in writing, (2) addressed to the specific official or office, and (3) expressly identified as a FOIA request.[31] Even if the request fails to meet the agency's requirements for a proper FOIA request, the law charges the federal agency to liberally construe the FOIA request so that the request is effectuated.[32] Only upon receiving a proper request is the agency required to process the request for release and give the requester its response.[33]

2. Agency Response

Upon receipt of a proper records request under FOIA, agencies have twenty days to make a determination on the request.[34] The agency does not necessarily have to release the requested records within the twenty days, but it must segregate exempted material and release nonexempt information promptly.[35] If the agency decides not to release the requested record, in part or in full, the agency must inform the requester the amount of the information withheld and the exemption the agency asserts, unless to do so would undermine the exemption.[36] Upon receipt of the agency denial, the requester must first appeal to the agency for reconsideration before seeking judicial intervention.[37]

Once an agency receives the requester's appeal of the denial, the agency must make a determination on the appeal within twenty days after the receipt of such appeal.[38] If the agency upholds its denial in whole or in part, the agency must notify the requester that he may seek judicial review of the denial.[39] Of note, the FOIA requester cannot seek disclosure of the requested records through judicial means until the agency appeal process is exhausted.[40] Only then, can the requester appeal to the judiciary.[41]

3. The Judicial Appeal

Once the agency appeal process is over, the person requesting records of a government contract can apply for judicial relief. FOIA provides every federal district court jurisdiction to force disclosure of agency records if the agency improperly withholds the records.[42] FOIA further provides that the district courts shall review the matter *de novo*[43] and may examine the agency record's contents *in camera* if necessary to protect against disclosure of

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[24] Gregory H. McClure, *The Treatment of Contract Prices Under the Trade Secrets Act and Freedom of Information Act Exemption 4: Are Contract Prices Really Trade Secrets?*, 31 PUB. CONT. L.J. 185, 186 (2002).

[25] 5 U.S.C. § 552(a)(3)(A).

[26] *Id*. § 552(f). This definition includes all records in an agency's possession, whether created by the agency or by another entity covered by FOIA. McGehee v. CIA, 697 F.2d 1095, 1109 , *aff'd in part, vacated in part*, 711 F.2d 1076 (D.C. Cir. 1983).

[27] Dayton Newspapers, Inc. v. VA, 257 F. Supp. 2d 988 (S.D. Ohio 2003).

[28] Freedom of Information Act, 5 U.S.C. § 552(a)(3).

[29] *Id*.

[30] DEP'T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT 56 (2009) (citing 5 U.S.C. § 552(a)(3)(A), (a)(6)(E)), http://www.justice.gov/oip/foia_guide09/procedural-requirements.pdf [hereinafter GUIDE TO THE FOIA]

[31] *See* U.S. DEP'T OF DEF. REG. 5400.7-R, DOD FREEDOM OF INFORMATION ACT PROGRAM para. C1.4.2 (Sept. 1998) (requiring that a records request to any Department of Defense (DOD) agency must: (1) be written; (2) express a willingness to pay fees or explain why fees should be waived; (3) be directed to the proper DOD component; and (4) expressly or impliedly invoke FOIA or an implementing regulation).

[32] *See* LaCedra v. Exec. Office for U.S. Att'ys, 317 F.3d 345 (D.C. Cir. 2003).

[33] 5 U.S.C. § 552(a)(3)(A), (a)(6)(A).

[34] *Id*. § 552(a)(6)(A)(i). If the agency is unable to meet the 20 day requirement, the agency may request an additional ten day extension upon notifying the requester in writing why it needs the extension and when it will make a determination on the request. *Id*.

[35] *See id*. § 552(a)(6)(C)(i) (requiring the records be made available "promptly").

[36] *See id.* § 552(a)(6)(A)(i) (requiring agencies to notify requesters of disclosure determinations, reasons for such determinations, and administrative appeal rights).

[37] *See* Oglesby v. U.S. Dep't of the Army, 920 F.2d 57, 61–65 (D.C. Cir. 1990) (stating that once a party has exhausted its agency appeal, the court has jurisdiction to review the agency's denial).

[38] 5 U.S.C. § 552(a)(6)(A)(i).

[39] *Id*. § 552(a)(6)(A)(ii).

[40] Dettmann v. U.S. Dep't of Justice, 802 F.2d 1472, 1476–77 (D.C. Cir. 1986).

[41] *Id*.

[42] 5 U.S.C. § 552(a)(4)(B).

[43] *Id*.

exempted material.[44] If the court orders disclosure, the FOIA requester not only receives the requested documents, but the court may order the government to pay the requester's reasonable attorney fees and litigation costs.[45] But if the court finds that one of the FOIA exemptions applies, the requester will not receive the agency record.[46] The judiciary's decision ends the person's quest for the agency record.

As a result, in the battle for disclosure of a competitor's unit prices, the judiciary is the final step in the FOIA process. When a court upholds an agency denial, the requesting company may be dismayed by its failure to obtain the government contractor's unit prices. However, the contractor who submitted its unit price information (the submitter) is likely delighted by the prospect of maintaining its competitive advantage in the market place. Moreover, submitters of unit prices will not sit idly by and wait for a judge to make a determination on the exempt status of their commercially sensitive information.[47] Submitters will instead take proactive measures, both administrative and legal, to protect its unit prices contained in government records.[48] The contractor's business decision to protect its unit prices will be examined in the next section.

B. The Business of Protecting Unit Prices

Just as competitors for a government contract want to gain information concerning an established contract's unit prices, the contractor awarded the contract (the submitter) wants the agency to protect its unit price information so it can maintain its competitive advantage.[49] And while the submitter is the one most likely to be affected by disclosure, the submitter has very little time (twenty days) to respond to a FOIA request.[50] Therefore, submitters of unit price information usually stand ready to take legal action in order to prevent disclosure of their information.[51] A submitter's legal recourse to prevent disclosure of its unit prices is further discussed in the next section.

C. Reverse-FOIA

Although FOIA is a disclosure statute, submitters of documents to federal agencies have legal recourse to prevent disclosure of their documents. The name for such an action is a "reverse-FOIA" action.[52] This section will review the administrative and legal process involved when a submitter seeks to prevent disclosure of its unit prices.

1. Administrative Process

The first step in the reverse-FOIA process is the agency's receipt of a competitor's FOIA request. Recognizing that submitters of commercially sensitive information have some due process rights to that information, the President has signed an executive order that requires the agency to notify the submitter before it releases the information.[53] Executive Order 12,600 requires, with limited exceptions,[54] the federal agency to notify the submitters when the agency "determines that it may be required to disclose" the requested data.[55]

After the agency provides notice of possible disclosure to the submitter, the agency must provide the submitter a reasonable amount of time to object to the disclosure of the requested material.[56] However, this consultation is not sufficient to satisfy the agency's FOIA obligations.[57] In order to satisfy FOIA's obligations, an agency is "required to determine for itself whether the information in question should be disclosed."[58]

If an agency decides to disclose the information, the agency must notify the submitter of its decision to disclose the requested records as well as its reasons for disclosure.[59] After the submitter receives notice of the agency's disclosure decision, the agency must provide a reasonable amount of time before disclosure for the submitter to seek judicial relief.[60] It is at this point that the contractor can seek judicial enforcement to prevent disclosure of its submitted

[44] *Id*.

[45] *Id*. § 552(a)(4)(E).

[46] *See* Canadian Commercial Corp. v. U.S. Dep't of Air Force, 514 F.3d 37, 43 (D.C. Cir. 2008) (ruling that a contractor's line item pricing is subject to Exemption 4 of the FOIA, and is exempt from disclosure).

[47] Hordell & Hoffman, *supra* note 21.

[48] *Id*.

[49] *Id*.

[50] 5 U.S.C. § 552 (a)(4)(E).

[51] *See* Hordell & Hoffman, *supra* note 21 (stating that "[i]f you object to an agency's proposed release of your documents under FOIA, you must take prompt action to protect yourself [through]. . . 'reverse FOIA' . . . .").

[52] GUIDE TO FOIA, *supra* note 30, at 863.

[53] Exec. Order. No. 12,600, 3 C.F.R. § 235 (1988). Executive Order 12,600 requires federal agencies to establish procedures to notify submitters of document before disclosure. *Id*.

[54] *Id*. (listing six circumstances in which notice is not necessary, such as when the agency denies disclosure of the requested information or when the information is already public knowledge).

[55] *Id*.

[56] *Id*.

[57] Lee v. FDIC, 923 F. Supp. 451, 455 (S.D.N.Y. 1996).

[58] *Id*. (specifically stating that providing notice to, and receiving an answer from the submitter, the agency still has the responsibility to make the final decision concerning release).

[59] 3 C.F.R. § 235.

[60] *Id*.

information.[61] If the submitter tries to bypass the agency and go directly to the judiciary, a court will find the case is not ripe for judicial review.[62] Once the agency has decided to release the information, the submitter can file a reverse-FOIA suit with the court.

2. Judicial Review

In discussing reverse-FOIA suits, it is helpful to understand where the court gets jurisdiction to hear such a case. Interestingly, a contractor's legal right to prevent disclosure in a reverse-FOIA action does not derive from FOIA.[63] The FOIA does not provide an individual right of action to prevent a federal agency from disclosing a submitter's confidential or commercial financial documents.[64] However, the U.S Supreme Court has recognized that the Administrative Procedures Act provides recourse for submitters to enforce a document's exemption status under FOIA.[65]

In *Chrysler Corp. v. Brown*,[66] the U.S. Supreme Court held that jurisdiction for a reverse-FOIA action cannot be based on the FOIA itself because "Congress did not design the FOIA exemptions to be mandatory bars to disclosure."[67] Consequently, the Court held that the FOIA "does not afford" a submitter "any right to enjoin agency disclosure."[68] Moreover, the Court held that jurisdiction cannot be based on the Trade Secrets Act[69] because it is a criminal statute that does not afford a "private right of action."[70] Instead, the Supreme Court found that federal district courts had jurisdiction to review an agency's decision to disclose requested records under the Administrative Procedure Act (APA).[71] Because of the Court's holding in *Chrysler v. Brown*, reverse-FOIA plaintiffs can argue, under the APA, that an agency's contemplated release would violate the Trade Secrets Act.[72] If the court finds that disclosure would violate the Trade Secrets Act, the agency's action would be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[73] While the Supreme Court did not specifically address the interactions and boundaries between the Trade Secrets Act and FOIA Exemption 4 in *Chrysler*, the D.C. Court of Appeals did nearly a decade later in *CNA Financial Corporation v. Donovan*.[74]

In *CNA Financial Corp.*, the D.C. Court of Appeals ruled that the scope of the Trade Secrets Act covers the same type of information as that found in Exemption 4.[75] Consequently, if information falls within Exemption 4, then it also falls within the Trade Secrets Act, which prohibits disclosure without a company's express authorization to release it.[76] Conversely, if information contained in records is outside the scope of Exemption 4, the court in *CNA Financial Corp.* found it unnecessary to determine if the Trade Secrets Act prohibited its disclosure, as FOIA would grant statutory authorization for disclosure.[77] The combined effect of the courts' interpretation of the FOIA, Trade Secrets Act, and APA is that that agencies can no longer discretionarily disclose information if it falls under Exemption 4. Courts therefore conduct their review of the agency's decision to disclose unit prices by determining if Exemption 4 applies to the unit price.[78]

In making its findings of whether an agency's release of commercially sensitive information is exempt from disclosure under Exemption 4, and thus a violation of the Trade Secrets Act, the court begins its review by scrutinizing the agency's decision to disclose.[79] But the court does not conduct its review under the same *de novo* standard it uses in reviewing an agency's denial of disclosure. Instead, the court is supposed to review the agency's decision to disclose the requested information in deference to FOIA's policy of disclosure and the agency's decision.[80] As will be shown

[61] *Id*.

[62] Dresser Indus., Inc. v. United States, 596 F.2d 1231, 1234, 1238 (5th Cir. 1979).

[63] *See* Chrysler Corp. v. Brown, 441 U.S. 281 (1979).

[64] *See id*. at 282.

[65] *Id*.

[66] *Id*.

[67] *Id*. at 293.

[68] *Id.* at 293–94.

[69] Trade Secrets Act, 18 U.S.C. § 1905 (2006). This statute prevents government employees or officers from unlawfully disclosing confidential information submitted by private persons. *See id*.

[70] *Chrysler Corp.*, 441 U.S. at 316–17.

[71] Administrative Procedures Act, 5 U.S.C. §§ 701–706 (1946).

[72] *Chrysler Corp.*, 441 U.S. at 316–17.

[73] *Id*.

[74] CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1151 (D.C. Cir. 1987).

[75] *Id*.

[76] *See, e.g.*, Canadian Commercial Corp. v. Dep't of Air Force, 514 F.3d 37, 39 (D.C. Cir. 2008) (noting that "unless another statute or a regulation authorizes disclosure of the information, the Trade Secrets Act requires each agency to withhold any information it may withhold under Exemption 4."); *see also e.g.*, Pac. Architects & Eng'rs v. U.S. Dep't of State, 906 F.2d 1345, 1347 (9th Cir. 1990) (holding that when release of requested information is barred by Trade Secrets Act, agency "does not have discretion to release it"). Authorization in form of a statute or a properly promulgated regulation would satisfy the requirements of the Trade Secrets Act, thereby decriminalizing the release of such records. McDonnell Douglas Corp. v. Nat'l Aeronautics & Space Admin., 180 F.3d 303, 306 (D.C. Cir. 1999) (repeatedly noting absence of agency reliance on "any independent legal authority to release" requested information as basis for concluding that it was subject to Trade Secrets Act's disclosure prohibition).

[77] *CNA Fin. Corp.*, 830 F.2d at 1152.

[78] *See Chrysler Corp.,* 441 U.S. at 318 (stating that a judicial review starts with the agency decision under the APA).

[79] *Id*.

[80] *See CNA Fin. Corp.*, 830 F.2d at 1152.

next, the courts' deference to FOIA's policy of disclosure routinely led to the disclosure of unit prices.

3. Differential Treatment

Unlike the heightened judicial scrutiny courts place on agencies when they decide to withhold records pursuant to a FOIA exemption, courts have generally deferred to the agency's decision to disclose requested material. The court shows deference to the agency by holding the party seeking to prevent disclosure to a very high standard of proof.[81] The Supreme Court has held that a court's standard of review for an agency's action of disclosing records over objection is whether the agency acted "arbitrarily and capriciously."[82] Consequently, courts base their review of the agency's decision upon the administrative record compiled by the agency.[83] Courts will not do a *de novo* review in reverse-FOIA cases, as they do for parties seeking to force agency disclosure, unless there are exceptional circumstances.[84] With these review standards, the court will generally defer to an agency's decision to disclose requested information.[85]

When reviewing the administrative record, the court is supposed to defer to the agency's decision unless the agency's decision was clearly erroneous.[86] In due deference to the agency's decision, the reviewing court "[will] not substitute its judgment for the judgment of the agency."[87] Instead, the court "simply determines whether the agency action constitutes a clear error of judgment."[88] Thus, the court does not require the agency to prove there will not be harm from the release of confidential or financial information; instead, it is "enough that the agency's position is as plausible as the contesting party's position."[89] In fact, the D.C. Court of Appeals has even stated that "[t]he harm from disclosure is a matter of speculation, and when a reviewing court finds that an agency has supplied an equally reasonable and thorough prognosis, it is for the agency to choose between the contesting party's prognosis and its own" and not the court's position to choose.[90]

Although the court automatically starts with the presumption that the agency acted properly in disclosing requested FOIA information, the court still has to make its decision on whether a FOIA exemption applies to the requested information. In regards to the litigation surrounding the disclosure and protection of unit prices, FOIA's Exemption 4 is the exemption most government contractors cite as the reason for non-disclosure.[91] Specifically, as the next section will show, contractors claim that the disclosure of their unit prices will cause them competitive harm in the marketplace and are therefore not releasable.[92]

D. FOIA's Exemption 4 and Substantial Competitive Harm

The vast majority of reverse-FOIA litigation aimed at protecting unit prices looks at whether release of such information will cause substantial competitive harm to the contractor.[93] Exemption 4 requires that information be confidential in order for it to be exempt under FOIA. But the statute does not define what information is confidential.[94] Since Congress failed to provide a definition for *confidential*, early courts only found information confidential, and therefore exempt, if there was a confidentiality clause explicitly stated in the government contract.[95] However, in 1974, the D.C. Court of Appeals superseded this test for confidentiality by developing a different test: substantial competitive harm.

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[81] *Id*.

[82] *See Chrysler Corp.,* 441 U.S. at 317–18 (citing 5 U.S.C. § 706(2)(A), which states that the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

[83] AT&T Info. Sys., Inc. v. Gen. Servs. Admin., 810 F.2d 1233 (D.C. Cir. 1987).

[84] Nat'l Org. for Women v. SSA, 736 F.2d 727, 745 (D.C. Cir. 1984) (stating that a *de novo* review is justified in reverse-FOIA cases when: (1) the action is adjudicatory in nature and the agency fact finding procedures are inadequate, or (2) issues that were not before the agency are raised in a proceeding to enforce non-adjudicatory agency action). A complete review is unnecessary for federal agency's that promulgate regulations for reverse-FOIA requests according to Executive Order 12,600. Paul M. Nick, De Novo *Review in Reverse Freedom of Information Act Suits*, 50 OHIO ST. L.J. 1307, 1324 (1989).

[85] *See, e.g.*, McDonnell Douglas Corp. v. Nat'l Aeronautics & Space Admin., 981 F. Supp. 12, 14 (D.D.C. 1997) (stating that the courts conduct a "deferential standard of review" of an agency's decision to disclose information requested under FOIA).

[86] *Id*. (stating that the law "only requires that a court examine whether the agency's decision was 'based on a consideration of the relevant factors and whether there has been a clear error of judgment'").

[87] McDonnell Douglas Corp. v. U.S. Dep't of the Air Force, 215 F. Supp. 2d 200, 204 (D.D.C. 2002).

[88] *Id*.

[89] *Id*. at 205.

[90] *Id*.

[91] *See, e.g.*, Canadian Commercial Corp. v. U.S. Dep't of Air Force, 514 F.3d 37, 46 (D.C. Cir. 2008) (ruling that FOIA, Exemption 4, protected contractor's line item pricing from being disclosed).

[92] *See* Hordell & Hoffman, *supra* note 21 (stating that contractors should claim that the release of their unit prices would allow a competitor to gain a competitive advantage).

[93] GUIDE TO FOIA, *supra* note 30, at 274. The reason the vast majority of unit price cases fall within the "substantial competitive harm" test is that "[p]rice is an essential and required piece of information for the contract, no matter how it was achieved." McDonnell Douglas Corp. v. Nat'l Aeronautics & Space Admin., 180 F.3d 303, 318 D.C. Cir. 2004). Therefore, unit price information is necessarily compelled information requiring a substantial competitive harm determination by the court. *Id*.

[94] *See* 5 U.S.C. § 552 (b)(4) (2006).

[95] GUIDE TO FOIA, *supra* note 30, at 273 (citing GSA v. Benson, 415 F.2d 878 (9th Cir. 1969)).

The D.C. Court of Appeals, the most influential court for Exemption 4 litigation,[96] developed the *substantial competitive harm* test in *National Parks & Conservation Ass'n v. Morton*.[97] In *National Parks*, after noting there was no statutory definition of confidential, the court developed the following definition from legislative intent:[98]

> [C]ommercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) *to cause substantial harm to the competitive position of the person from whom the information was obtained*.[99]

The second prong of this test is now known as the *substantial competitive harm* prong.[100] It is here where the majority of contractors assert that unit prices are confidential and therefore exempt from disclosure.[101]

In applying the *substantial competitive harm* test, most courts historically concluded that unit prices are subject to disclosure under FOIA.[102] Each case decided upon the specific type of information that the government agency sought to release, but the basis for finding no substantial competitive harm centered upon two legal theories: (1) unit prices are too complex to cause a contractor competitive harm if released, and (2) FOIA's policy considerations favored disclosure.[103] A look at the courts' historical treatment of unit prices follows.

1. Complex Unit Prices

The majority of early court decisions favored disclosure of unit prices because they found unit prices contained so many fluctuating variables. The courts reasoned that with so many fluctuating variables, it would be near impossible for competitors to determine relative profit margins or cost multipliers.[104] Thus, the courts reasoned, a competitor's knowledge of the submitter's unit price would not enable it to underbid the submitter in future contracts.[105] Foremost among these lines of cases is *Acumenics Research & Technology v. U.S. Dept. of Justice*.[106]

In *Acumenics*, a 1988 case, the 4th Circuit Court of Appeals decided that release of pricing information would not allow a competitor to derive the bidder's profit multiplier,[107] and therefore would not cause the bidder competitive harm. To quote the court, there were "too many ascertainable variables in the unit price" for its release to do competitive harm.[108] In other words, the court found unit prices so complex that a competitor would not be able to determine the various factors that made up the unit price. Therefore, applying *National Parks*, the court found unit price information was neither a trade secret nor confidential commercial information subject to the Trade Secrets Act and Exemption 4 of FOIA.[109]

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[96] The D.C. circuit is the district of universal venue for all FOIA cases. A FOIA requester has to bring suit in either the district court in which he or she resides, has his or her principle place of business, where the records are located, *or* in the District of Columbia. *See* Freedom of Information Act, 5 U.S.C. § 552(a)(4)(B). Also, it is estimated that nearly 40% of all FOIA cases are brought in the D.C. circuit. E-mail from Richard L Huff, Retired Senior Exec. Serv. member and Co-Dir. of the Office of Info. & Privacy, Dep't of Justice, to Captain David A. Dulaney, Graduate Student, The Judge Advocate Legal Ctr. & Sch., (Jan. 5, 2010, 17:46 EST) (on file with author) (stating his office conducted an informal survey of all FOIA cases filed in a year and estimated that 40% of FOIA cases are filed in D.C.).

[97] Nat'l Parks & Conserv. Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974).

[98] In determining legislative intent for Exemption 4, the court looked at Senate panel reports discussing the balance of interests in exempting commercial and financial information from disclosure. The court found that there were two competing interests Congress intended for exempting commercial and financial information: government efficiency and individual privacy. Government efficiency, the court explained, was gained from encouraging private individuals that information provided to the government would remain confidential. It was feared that disclosure of the individual companies' information would chill their participation in government endeavors, thus limiting the ability of the government to make intelligent, well informed decisions. Conversely, the court found that the Congress recognized the need to protect individuals who submit financial or commercial information to government agencies from the competitive disadvantage from its publication. *Id*. at 767–68.

[99] *Id*. at 770 (emphasis added).

[100] GUIDE TO FOIA, *supra* note 30, at 274.

[101] *Id*.

[102] John Pavlick, Jr. & Rebecca E. Pearson, *Release of Unit Prices after* McDonnell Douglas Corp. v. NASA, PROCUREMENT LAW., Winter 2009, at 9.

[103] *See id*. at 9–10 (discussing the legal theories for releasing unit prices).

[104] Cost multipliers are "the complement of the markup percent charged" for goods or services. DICTIONARY, http://www.marketingpower.com/_layouts/Dictionary.aspx?dLetter=C (last visited Feb. 13, 2010). The cost multiplier "indicates the average relationship of cost to retail value of goods handled in the accounting period." *Id.*

[105] GUIDE TO FOIA, *supra* note 30, at 274.

[106] Acumenics Research & Tech. v. U.S. Dep't. of Justice, 843 F.2d 800, 808 (4th Cir. 1988).

[107] A profit multiplier is the "[p]roduct of pretax or operating profit and a number (called market multiplier) which is either estimated from the selling prices of comparable businesses or is published by the financial press in some countries." Profit Multiple, http://www.businessdictionary.com/definition/unit-price.html (last visited Mar. 4, 2010). "This number commonly ranges from 1 to 5, depending on the current popularity or potential of a particular type of business." *Id*. "Profit multiple is one of the most widely used methods of valuing a business as a going concern." *Id*.

[108] *Id*. (holding that even if a competitor were able to derive the pricing multiplier there would still be no competitive harm because the information would become stale over time).

[109] *Id*.

The Ninth Circuit Court of Appeals has also viewed unit prices as too complex to cause substantial competitive harm if released.[110] In a 1990 case, *Pacific Architects and Engineers, Inc. v. Department of State*,[111] the Ninth Circuit court looked at whether the State Department acted arbitrarily and capriciously when it decided to release the unit price rates for a contract for hourly maintenance and operations services. The contractor argued that the release of unit price rates would cause potential harm because its competitors would be able to calculate its profit margin from the unit price.[112] After its review of the contractor's protest, the State Department disagreed, and found that the unit price contained too many fluctuating variables for competitors to determine profit margin.[113] In making its ruling, the court deferred to the State Department's determination, stating that the State Department had not acted arbitrarily or capriciously.[114] Although the Ninth Circuit agreed with the State Department's assessment that unit prices are too complex to derive a contractor's profit margins, it did not explicitly decide whether unit prices were confidential under Exemption 4.[115] Instead, the court decided the case under the deferential review standard of the Administrative Procedures Act, by holding that the agency did not act arbitrarily or capriciously in disclosing the contractor's unit prices.[116] As a result, the court deferred to the agency's decision that FOIA required disclosure of unit prices.[117]

2. Disclosure by Default

In addition to viewing unit price information as too variable to cause substantial competitive harm, many courts have based their decisions upon FOIA's underlying principle of disclosure. For example, in 1994, the Ninth Circuit, citing *National Parks*, stated that "in making our determination, we must balance the strong public interest in favor of disclosure against the right of private business to protect sensitive information."[118] The court then went on to find that "FOIA's strong presumption in favor of disclosure trumps the contractors' right to privacy" when the data was comprised of "too many fluctuating variables."[119]

In the 1997 case of *Martin Marietta Corp. v. Dalton*, a D.C. district court went as far as to say that FOIA's strong policy of disclosure requires the release of unit prices to the public unless the contractor can prove it will no longer be an effective competitor for government contracts in the future.[120] In that case, the Navy sought to disclose three types of information contained in a government contract. The three types of information were: "(1) cost and fee information, including material, labor and overhead costs, as well as target costs, target profits and fixed fees; (2) component and configuration prices, including unit pricing and contract line item numbers (CLINS); and (3) technical and management information."[121] The contractor argued that the release of such specific information would lead to its competitors underbidding it in the future.[122] The Navy agreed that disclosure would cause the contractor competitive harm, but decided to disclose anyhow.[123] The Navy released the information based upon FOIA's strong policy of disclosure.[124]

The D.C. district court agreed with the Navy's decision to disclose the commercial information.[125] Instead of doing an analysis of the harm created by disclosure, as done in *National Parks*, the court here focused on FOIA's strong policy of disclosure. The court stated in its analysis:

> In perhaps no sphere of governmental activity would that purpose appear to be more important than in the matter of government contracting. The public, including competitors who lost the business to the winning bidder, is entitled to know just how and why a government agency decided to spend public funds as it did; to be assured that the competition was fair; and, indeed, even to learn how to be more effective competitors in the future.[126]

The court then stated that in order to overcome FOIA's strong favor of disclosure the contractor would have to show that it would no longer be capable of winning government contracts if the agency disclosed its unit price information.[127] Thus, substantial competitive harm would occur only if the contractor could no longer do business with the government in the future.

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[110] *See* Pac. Architects and Eng'rs, Inc. v. Dep't of State, 906 F.2d 1345 (9th Cir. 1990).

[111] *Id*.

[112] *Id*. at 1347.

[113] *Id*.

[114] *Id*.

[115] *Id*. at 1348.

[116] *Id*.

[117] *Id*.

[118] GC Micro Corp. v. Def. Logistics Agency, 33 F.3d 1109, 1115 (9th Cir. 1994).

[119] *Id*.

[120] Martin Marietta Corp. v. Dalton, 974 F. Supp. 37 (D.D.C. 1997).

[121] *Id*. at 38.

[122] *Id*.

[123] *Id*.

[124] *Id*. at 39.

[125] *Id*.

[126] *Id*. at 40.

[127] *Id*. at 41.

The combined effect of the courts' general deference to disclosure and its skepticism of harm created by disclosure led to a generally permissive legal precedent for disclosure of unit prices. This permissive precedent lasted from FOIA's inception in 1966 to the end of the 20th century.[128] During this time, most federal courts, including the D.C. Court of Appeals, historically applied *National Parks* and found that agencies must disclose unit prices under the FOIA.[129] Many jurisdictions still practice under this precedent.[130] However, the D.C. Court of Appeals made a sudden departure from this permissive legal precedent in a surprising case just over ten years ago.[131] In the following section, this paper will examine how the D.C. Court of Appeals departed from the precedent of unit price disclosure under the FOIA and has created a near *per se* rule against the disclosure of unit prices.

III. D.C. Court of Appeals' Departure from the Disclosure Precedent

While most courts favored disclosure of unit prices when they applied the *National Parks* substantial competitive harm test, the D.C. Court of Appeals changed that precedent in 2004 with its controversial ruling in *McDonnell Douglas v. National Aeronautics and Space Administration*.[132] In *McDonnell Douglas*, the FOIA Group, Inc. (a law firm dedicated to filing FOIA requests)[133] requested a copy of the government contract, including specific information concerning launch service prices, cost figures for specific launch service components and overhead, labor rates, and profit figures and percentages.[134] McDonnell Douglas objected, stating that the release of the line items prices would allow its customers to "ratchet down" their prices and help competitors to underbid it for future contracts.[135] The NASA, after receiving McDonnell Douglas's protest, determined that release would not cause McDonnell Douglas substantial competitive harm.[136] McDonnell Douglas filed a reverse FOIA suit but the district court agreed with NASA, prompting McDonnell Douglas to appeal.[137]

On appeal, NASA argued that it had properly released the unit prices for two reasons. The NASA's first argument to the court was that disclosure of unit prices was the cost of doing business with the government.[138] The court harshly dismissed this assertion as "either assum[ing] the conclusion, or else assum[ing] a legal duty or authority on the government to publicize these prices."[139] The NASA's second argument was that disclosure of the unit prices would not enable competitors to underbid McDonnell Douglas in future contracts since price was only one of many factors for contract award.[140] The court flippantly dismissed this argument as a "response . . . too silly to do other than to state it, and pass on."[141] The court then ruled that "under the present law, whatever may be the desirable policy course, [McDonnell Douglas] ha[d] every right to insist that its line item prices be withheld as confidential."[142]

The court's ruling created a precedent within the D.C. circuit that substantial competitive harm would follow the disclosure of unit prices to a contractor's competitors, and would thus exempt the information from disclosure.[143] The general preference for disclosing unit prices under FOIA had now changed. The most influential court on FOIA cases appeared to dismiss FOIA's underlying policy of disclosure and view unit prices as *per se* confidential information exempt from disclosure.[144] If unit prices are exempt under Exemption 4, then government agencies are absolutely prohibited from disclosing unit prices.[145] In each successive unit price case brought before the D.C. circuit, the court answered affirmatively and repeatedly that unit prices are confidential and prohibited from disclosure.

In the decade following *McDonnell Douglas*, the D.C. courts have continually ruled that release of unit prices constitutes substantial competitive harm if the contractor

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[128] Paul G. Dembling & Stefan M. Lopatkiewicz, *Access to Contractor Records Under the Freedom of Information Act*, *in* 2-10 FEDERAL CONTRACT MANAGEMENT 10.15, 10.15(4)(b)(i) (Matthew Bender & Co., Inc. ed., 2009).

[129] *Id*.

[130] *Id*.

[131] *Id*.

[132] McDonnell Douglas Corp. v. Nat'l Aeronautics & Space Admin., 180 F.3d 303 (D.C. Cir. 2004).

[133] *See* FOIA Group Inc., http://www.foia.com (stating that "[f] or a low fixed fee our legal staff files and coordinates each FOIA request to ensure that our clients obtain the most cost efficient information release while ensuring them 100% anonymity and confidentiality").

[134] *McDonnell Douglas Corp.*, 180 F.3d at 305.

[135] *Id*. at 306.

[136] *Id*. at 307.

[137] *Id*.

[138] This was a common belief by most federal government agencies at this time. *See* GUIDE TO FOIA, *supra* note 30, at 344 (noting that this was a general principle followed by the courts and agencies). The belief was based upon early court cases within the D.C. as well as U.S. Government Accounting Office bid protest decisions. Pavlick & Pearson, *supra* note 102, at 10.

[139] *McDonnell Douglas Corp.*, 180 F.3d at 306.

[140] *Id*.

[141] *Id*.

[142] *Id.* at 307.

[143] *See* Pavlick & Pearson, *supra* note 102, at 10 (analyzing the court's decision in *McDonnell Douglas*).

[144] *Id*.

[145] *See* discussion *supra* Part II.C.2 (showing how agencies lost their discretion to disclose exempted material under FOIA when the courts interpreted the Trade Secrets Act and the APA to be inextricably linked to the exempt status of requested agency records).

raises the issue.[146] Although the D.C. Court of Appeals specifically stated that it had not created a *per se* rule,[147] subsequent reverse-FOIA cases continually ruled that unit prices were exempt from disclosure.[148] Such repeated rulings frustrated some members of the appellate court, who wrote strong dissents stating that the court's legal precedent of non-disclosure frustrated the purpose of FOIA and created bad policy.[149]

Despite the concern of some of the appellate court judges, the precedent of non-disclosure is now so well established in the D.C. Court's jurisdiction that there is at least a perception by the district court judges that release of unit prices is *per se* prohibited. One district court judge, in following the de facto precedent of non-disclosure of unit prices, found that a contractor's eight-year-old unit price information was not releasable because it would cause the contractor substantial competitive harm.[150] The court made this ruling despite echoing previous dissenters, stating, "[u]nder the present law, whatever may be the desirable policy course, [contractors] have every right to insist that its [unit] prices be withheld . . . [although] it is not the optimal policy course."[151] Although the district court judge did not state why the appellate court's precedent of non-disclosure was "not the optimal policy course," the judge's comment infers that the disclosure of unit prices under FOIA would be sound policy. In the next section, this paper will review the need to change the D.C. Court of Appeals' legal precedent in order to create a more sound procurement policy.

IV. The Need to Change the Non-Disclosure Precedent

As voiced in the minority's dissent within the D.C. Court of Appeals, the court's precedent of preventing disclosure of unit price information is inconsistent with FOIA's fundamental objective of promoting governmental transparency. The D.C. circuit's consistent decisions prohibiting disclosure of unit prices is also contrary to the President's renewed interest in promoting accountability in government procurement. Furthermore, the court's hostile approach to unit price disclosure is frustrating the basic principles of competition, integrity, and transparency in government procurement. The following sections will discuss both the policy shift towards a more scrutinized procurement system and the economic benefits of disclosing unit price information.

A. The Policy Shift to More Disclosure

Shortly after taking office, the President of the United States, Mr. Barack Obama, promised a new age of openness in the federal government.[152] In carrying out his promise, he issued a presidential memorandum to all federal agencies stating:

> In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike . . . . In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public. All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.[153]

Following his increased emphasis for a more open government, the President directed the U.S. Attorney General to "issue new guidance governing the FOIA to the heads of executive departments and agencies, reaffirming the commitment to accountability and transparency."[154]

In accordance with the presidential order, the U.S. Attorney General authored a memorandum revising the Department of Justice's (DoJ) policy regarding requests

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[146] *See, e.g.*, McDonnell Douglas Corp. v. U.S. Dep't. of the Air Force, 375 F.3d 1182 (D.C. Cir. 2004) (ruling that disclosure of option year prices and vendor pricing CLINs is prohibited); MCI Worldcom, Inc. v. Gen. Servs. Admin., 163 F. Supp. 2d 28 (D.D.C. 2001) (ruling that future years' pricing information under contracts was prohibited); Canadian Commercial Corp. v. U.S. Dep't of Air Force, 514 F.3d 37 (D.C. Cir. 2008) (ruling that the Air Force could not release line-item pricing and hourly labor rates information in contract to provide turbojet engine repair, overhaul, and maintenance services); *see also* Essex Electro Eng'rs, Inc. v. U.S. Sec'y of Army, 686 F.Supp. 2d 91 (D.D.C. 2010) (ruling that the release of a contractor's unit prices would cause harm to the contractor's competitive position, and that the contractor only has to show potential competitive injury, not actual harm, for Exemption 4 to apply) .

[147] *See McDonnell Douglas Corp.*, 375 F.3d at 1193.

[148] *See id.*

[149] *Canadian Commercial Corp.*, 514 F.3d at 43–44 (concurring opinion stating that it is now an established rule in the circuit that release of unit prices is prohibited under *National Parks*, 498 F.2d 765 (D.C. Cir. 1974), and that seemed inconsistent with FOIA's fundamental objective).

[150] General Elec. Co. v. U.S. Dep't of Air Force, 648 F. Supp. 2d 95, 104 (D.D.C. 2009).

[151] *Id*. at 105.

[152] *See* Freedom of Information Act, 74 Fed. Reg. 4,683 (Jan. 21, 2009).

[153] *Id*.

[154] *Id*.

under FOIA.[155] The Attorney General stated, in the memorandum, that agencies "should not withhold information simply because it may do so legally."[156] Instead, the Attorney General emphasized that agencies should make "discretionary" disclosures of information. Specifically he wrote "[a]n agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption."[157]

The DoJ's new approach to FOIA exemptions was a departure from the previous administration's guidance. Under the previous administration, the DoJ would defend an agency's decision to deny a FOIA request unless the decision "lack[ed] a sound legal basis or present[ed] an unwarranted risk of adverse impact on the ability of other agencies to protect other important records."[158] The DoJ now defends the denial of a FOIA request only if: (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) the law prohibited disclosure.[159] The new guidance in favor of disclosure has some contractors concerned about the disclosure of their confidential commercial information.[160] Under pressure to follow the new policy, government agencies may now disclose unit prices where before they may have decided to withhold under Exemption 4.[161]

Contractors, however, may have nothing to fear under the D.C. Court of Appeal's interpretation of unit prices and Exemption 4. Since the court has repeatedly ruled that agencies should not disclose unit prices pursuant to Exemption 4, government agencies may decide that the law prohibits unit price disclosure.[162] This understanding means that the DoJ will likely defend the agency in litigation demanding release of unit prices, putting the government on the side of protecting unit prices from disclosure. If the D.C. Court of Appeals' precedent leads to agency reluctance to release unit prices, their unwillingness to disclose would be contrary to President Obama's push for more government transparency. Transparency, as shown in the next section, tends to lead to more integrity and competition in government procurement.

B. Economic Considerations for Unit Price Disclosure

Competition is the driving engine of government procurement.[163] Indeed, the importance of competition in government procurement is codified in U.S. law.[164] The Competition in Contracting Act of 1984 requires that government agencies conduct procurement through "full and open competitive procedures."[165] The D.C. Court of Appeals, however, has routinely ruled that releasing unit price information in awarded contracts decreases competition by enabling competitors to undercut the current procurement contract.[166] Contrary to the court's rulings, releasing unit prices may actually help in the procurement process by promoting basic fundamental economic principles.

In the government procurement system, there are three fundamental economic principles that aim to produce an effective and efficient procurement system.[167] The three principles are competition, integrity, and transparency.[168] These principles encourage participation in the system by treating competing contractors fairly and increasing the public's confidence in the procurement system.[169] This section further examines each principle below.

1. Competition

It is a well-established principle that full and open competition produces the best value.[170] Competition enables the government to increase the quantity, quality and diversity in its contractors.[171] Competition also creates incentives for suppliers to deliver products with emphasis on time, quality, and cost.[172] Additionally, competition motivates contractors to innovate and become more efficient

[155] Memorandum from the U.S. Attorney Gen. to Heads of Executive Departments and Agencies (Mar. 19, 2009), *available at* http://www.justice.gov/ag/foia-memo-march2009.pdf.

[156] *Id*.

[157] *Id*.

[158] *Id*.

[159] *Id*.

[160] *See* James J. McCullough & William S. Speros, *Feature Comment: The Obama Administration's Emerging Policies on Freedom of Information, Transparency, and Open Government—New Benefits and Costs for Government Contractors?*, 51 GOV'T CONTRACTOR 15, Apr. 15, 2009, *available at* http://www.ffhsj.com/siteFiles/Publications (discussing how contractors are rushing to the court to file reverse-FOIA suits to protect commercial information).

[161] *Id*.

[162] *Id*.

[163] Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 3 PUB. PROCUREMENT L. REV. 103, 104 (2002).

[164] Competition in Contracting Act, 41 U.S.C. § 253 (2006).

[165] *Id*. § 253(a).

[166] *See* discussion *supra* Part V.I.D for how the D.C. circuit relied upon the contractors' assertions that release of unit prices would decrease their ability to compete in future contracts.

[167] Schooner, *supra* note 163, at 104.

[168] *Id*.

[169] Am. Bar Ass'n, *Report to Accompany Principles of Competition in Public Procurements*, http://www.abanet.org/contract/admin/pocrpt.html (last visited Jan. 13, 2010) [hereinafter *Principles of Competition*].

[170] Schooner, *supra* note 163, at 104.

[171] *Id*.

[172] *Id*.

and cost effective while still producing the best product to meet the requirements of government.[173] Competition creates desirable economic efficiencies by identifying the most efficient supplier of a certain good or service while determining the most efficient and lowest price.[174] But competition, in and of itself, is not possible without integrity and transparency in the procurement system.[175]

2. Integrity

Integrity in the procurement system is critical to the success of competition.[176] Without confidence in the fairness and equality in the process, contractors may lose faith that agencies will consider their bids upon the merit of their proposals.[177] To support contractor confidence, the rules for competition must be fair and fully disclosed upfront.[178] There are many laws and regulations that promote fairness by preventing improper agency bias, but transparency in the system is also important in preventing bias and promoting integrity.[179] Just as "sunlight is said to be the best of disinfectants,"[180] opening the procurement system to the scrutiny of stakeholders, civil society, and the wider public best enforces integrity.

3. Transparency

Transparency in the procurement system holds both government contractors and officials accountable for the expenditure of public funds.[181] Opening records of procurement information, "demonstrates the integrity of the competitive system, and public confidence in the fairness of the procurement system increases the quantity and quality of the competition."[182] Transparency is therefore crucial for fostering public trust, from both taxpayers and potential government contractors.

In addition to fostering public trust, transparency in government procurement actions benefits competition and lowers procurement costs. Economic theories state that intelligence on a competitor's actions and policies in government procurements may lead to more competition.[183] Intelligence concerning a competing contractor's pricing and cost of bid components lowers the barriers to entry and invites new entrants into the market place.[184] Disclosing a successful government contractor's unit price information would increase competitor intelligence on what price ranges are successful for future government contracts. The increased competitor intelligence would therefore lead to more competition as more prepared contractors enter the procurement market. The procurement system would benefit from the robust competition, as more competition inevitably leads to lower prices.[185]

As beneficial as transparency is to the procurement system, the level of transparency must be balanced against disclosing either the commercially sensitive information in bid proposals or information rising to the level of a trade secret.[186] Disclosure of this type of data would undermine the trust contractors place in the fairness of the procurement system, discouraging competition.[187] It is therefore imperative that restrictions should apply in the disclosure of truly commercially sensitive data.

The government should protect trade secrets and other proprietary information, as release of such information would risk the labor and innovation of private entities. Confidentiality, however, should only be observed when ascertainable harm to the contractor is foreseeable and is not overwhelmed by the public's interest in knowing what its government is doing in the public's name.[188] Therefore, access to information should be balanced by clearly defined rules for ensuring necessary confidentiality.[189] Restricting access to unit price information, however, should not be based upon a contractor's efforts to prevent future

[173] *Id.*

[174] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, PUBLIC PROCUREMENT 19 (2007), http://www.oecd.org/dataoecd/25/48/39891049.pdf.

[175] Schooner, *supra* note 163, at 104.

[176] *Principles of Competition*, *supra* note 169, ¶ 10.

[177] *Id*.

[178] *Id*.

[179] Schooner, *supra* note 163, at 107.

[180] Justice Louis D. Brandeis, *Other People's Money*, HARPER'S WKLY., November 29, 1913, *available at* http://www.law.louisville.edu/library/collections/brandeis/node/196.

[181] Schooner, *supra* note 163, at 111.

[182] *Principles of Competition*, *supra* note 169, ¶ 8.

[183] Steffan Huck et al., *Does Information About Competitor's Actions Increase or Decrease Competition in Experimental Oligopoly Markets?*, 18 INT'L J. OF INDUS. ORG. 1, 39–57 (2000), *available at* http://129.3.20.41/eps/io/papers/9803/9803004.pdf.

[184] Dakshina G. DeSilva et al., *An Empirical Analysis of Entrant and Incumbent Bidding in Road Construction Auctions*, 51 J. OF INDUS. ECON. 3, 295–316 (Sept. 2003), *available at* http://webpages.acs.ttu.edu/kdesilva/ /JOIE%20-%202003.pdf (finding that entrants to the government procurement system are at a significant disadvantage to established contractors because of a lack of information and experience, and that access to the pricing structure of previous contractors may alleviate the disadvantage and increase competition).

[185] Schooner, *supra* note 163, at 104.

[186] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), PROMOTING TRANSPARENCY: POTENTIALS AND LIMITATIONS 10 (2007), http://www.oecd.org/dataoecd/43/36/38588964.pdf.

[187] *Id*.

[188] ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), PRINCIPLES FOR INTEGRITY IN PUBLIC PROCUREMENT 23 (2009), http://browse.oecdbookshop.org/oecd/pdfs/browseit/4209061E.PDF.

[189] *Id*.

competition for government contracts. Instead, government agencies and courts should view the release of unit prices in light of balancing the interests of both the public and the contractor. In the following section, this paper will show how disclosure of unit prices will help restore the balance of confidentiality and the public trust.

C. Confidentiality and the Public Interest

In order to restore FOIA's purpose of transparency in government actions and promote more competition and accountability in the procurement process, the D.C. Court of Appeal's legal precedent against disclosure of unit prices must be reversed. Congress should create a new legal system for evaluating the confidentiality of unit prices under FOIA. The legal system should strive to restore the balance between the public interest of disclosure and the private interest of withholding. The best means of restoring this balance is to look at the balance Congress made in drafting Exemption 4 and the practice of protecting confidential commercial information before FOIA.

When drafting Exemption 4, Congress compared government efficiency with individual privacy.[190] While early case law recognized this balance, the courts do not have a clear balancing test that incorporates the public interest in Exemption 4.[191] Instead, the courts have established a review of an agency's decision that focuses on the expected harm to the contractor, instead of focusing on the public's interests in knowing what its government paid for a good or service.[192] The new system of review should include a balancing test that incorporates the public interest. Incorporating the public interest into Exemption 4 will prevent the distortion of balance found in the D.C. Court of Appeals' *per se* prohibition of unit price disclosure.

While allowing the courts to promote the public's interest, the new system should still protect the legitimate commercial interests of the contractor. The best means of allowing the contractor to protect its interest is to encourage the contractor to be proactive with the government agency.[193] By allowing the contractor to negotiate confidentiality of its commercially sensitive information, as they did before FOIA, the contractor is in the best position to determine the risk level that would accompany disclosure of unit prices. Ultimately, however, it is the agency's decision whether to accept the confidentiality of the information the contractor submits. Nevertheless, an agency's agreement to label a contractor's information as confidential should still be subject to the overall balancing test to prevent inappropriate decisions by agency officials.

Since the FOIA and the common law do not take into account a public interest test for disclosure of unit prices and confidentiality clauses, we must look to our international peers and see how their countries treat commercially sensitive information under their FOIA laws. By analyzing and comparing a legal system that incorporates confidentiality clauses and a public interest test, we are able to evaluate how such a system favors disclosure of unit price information when it promotes competition, decreases procurement costs, and furthers the public policy of monitoring what our government does with taxpayer money. We can also evaluate whether such a system protects truly sensitive information. The United Kingdom (U.K.) has such a legal system.[194] An examination of the U.K.'s law on confidential commercial information follows.

V. The United Kingdom's Approach to Confidential Commercial Information

The United States was not the first or last country to pass legislation providing a general right to access to information held by its public agencies.[195] There are now over sixty countries around the world that have freedom of information laws.[196] Each of these countries designed their freedom of information laws to disclose information as a matter of right, with enumerated exemptions prohibiting the release of particular kinds of information.[197] Most of these laws also provide protection for trade secrets and for other sensitive confidential business information belonging to private enterprises.[198] Some countries specifically exempt

[190] Nat'l Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 767 (D.C. Cir. 1974).

[191] The FOIA does not have a public interest test applicable to its exemptions. *See* Freedom of Information Act, 5 U.S.C. § 552 (2006).

[192] *See Nat'l Parks and Conserv. Ass'n*, 498 F.2d 765.

[193] *See* LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 14.4 (4th ed. 2009) (advising contractor to "tag or otherwise identify any such material as a trade secret when filed with the government agency" in an effort to prevent disclosure of sensitive information).

[194] *See* discussion *infra* Part V.A–C.

[195] Sweden, with established freedom of information law since the eighteenth century, is recognized as the first country to provide a right to government information. THE LAW OF FREEDOM OF INFORMATION 260 (John MacDonald & Clive H. Jones eds., 2003) [hereinafter FREEDOM OF INFORMATION].

[196] These countries include: Albania, Argentina, Armenia, Australia, Austria, Belgium, Belize, Bosnia & Herzegovina, Bulgaria, Canada, Colombia, Croatia, Czech Republic, Denmark, Ecuador, Estonia, Finland, France, Georgia, Germany, Greece, Guatemala, Hong Kong, Hungary, Iceland, India, Ireland, Israel, Italy, Jamaica, Japan, South Korea, Kosovo, Latvia, Liechtenstein, Lithuania, Macedonia, Mexico, Moldova, Montenegro, Netherlands, New Zealand, Norway, Pakistan, Panama, Peru, Philippines, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Tajikistan, Thailand, Turkey, Trinidad & Tobago, Ukraine, United Kingdom, United States, Uzbekistan, Zimbabwe. Freedominfo Home Page, http://www.freedominfo.org.

[197] FREEDOM OF INFORMATION, *supra* note 195, at 260.

[198] Commercial Secrets, http://right2info.org/exceptions-to-access/commercial-secrets (last visited Nov. 26, 2009).

information provided in confidence.[199] However, the laws of several countries contain either an explicit or implicit public interest override concerning confidential commercial information, whether it was provided in confidence or not.[200] The United States' FOIA does not contain either of these provisions.[201] However, modern liberal-democracies such as the U.K. do.[202] The following section is a discussion of how the U.K. treats commercial information submitted to its government agencies.

A. Commercial Interests Exemption

Under the U.K.'s Freedom of Information Act (UKFOIA), commercial interests are exempt from disclosure under two circumstances. The first exemption is a class-based exemption based upon whether the information sought is a trade secret.[203] The second exemption is a prejudice-based exemption for commercial interests similar to the *substantial competitive harm* test used in U.S. courts.[204] This second exemption states that a public authority is exempt from the duty to communicate requested information where information disclosure "would, or would be likely to, prejudice the commercial interests of any person."[205]

The U.K. considers the term *commercial interests* under this exemption to mean "a person's ability to successfully participate in a commercial activity."[206] In determining whether disclosure of information would prejudice the commercial interests of the submitter, the U.K. Information Commissioner[207] (Commissioner) considers the following factors: (1) the commercial interests themselves and how disclosure might prejudice the submitter; (2) whose interests they are; (3) whether release of the information would damage the submitter's business reputation or the confidence that customers, suppliers, or investors may have in it; (4) whether disclosure would have a detrimental impact on its commercial revenue or threaten its ability to obtain supplies or secure finance; or (5) whether disclosure would weaken the submitter's position in a competitive environment by revealing market-sensitive information or information of potential usefulness to its competitors.[208]

A key point to note is that the U.K.'s *commercial interests* exception is only a temporary qualified exemption. While considering all of the previously discussed factors, the Commissioner recognizes that the commercial sensitivity of information may diminish over time.[209] For example, release of unit prices during the bidding process might be more commercially harmful to a government contractor than after the contract is awarded.[210] Thus, in the U.K., if a company wants to protect its commercial information indefinitely, the second commercial interest exemption may not be the best exemption to claim.[211] Under the UKFOIA, a business has a better chance to protect its commercially sensitive information by having a government official classify the information a confidential.[212] The next section further examines the U.K.'s confidentiality exemption.

B. Confidential Information

While the UKFOIA has a specified exemption for information constituting a trade secret or other information that "would, or would be likely to, prejudice the commercial interests of any person,"[213] the UKFOIA also has a separate section in the law that prevents a disclosure of information provided in confidence to a public agency.[214] The exemption found in section 41(1) of the UKFOIA only applies if disclosing the information would constitute an actionable breach of confidence.[215] This is similar to

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[199] The United Kingdom, Ireland, and Australia are such countries. FREEDOM OF INFORMATION, *supra* note 195, at 289–93.

[200] The United Kingdom, Scotland, Australia, and New Zealand provide public interest tests to their exemptions. *Id*.

[201] *See* Freedom of Information Act, 5 U.S.C. § 552 (2006).

[202] FREEDOM OF INFORMATION, *supra* note 195, at 289–93.

[203] *Id.* at 204. The term "trade secret" is not defined in the UKFOIA, but it is generally understood under the common law as commercial information protected by an obligation of competence. *Id*. at 204–05.

[204] *Id*.

[205] Freedom of Information Act § 43(2), 2000, c. 36 (Eng.).

[206] MINISTRY OF JUSTICE, FREEDOM OF INFORMATION GUIDANCE SECTION 43—COMMERCIAL INTERESTS 4 (2008), http://www.justice.gov/uk/about/docs/foi-exemption-s43.pdf [hereinafter MINISTRY OF JUSTICE].

[207] The Information Commissioner is charged with enforcing the UKFOIA. The Commissioner's general responsibilities are to: (1) promote good practice, the observance of the requirements of the Act and the provisions of the codes; (2) disseminate information to the public about the operation of the Act, good practice and other matters within the scope of his functions and to give advice as to any of those matters; (3) assess, with the consent of any public authority, whether it is following good practice; and (4) consult the Keeper of Public Records about the promotion and observance of the section 46 code in relation to public records. Freedom of Information Act § 47, 2000, c. 36 (Eng.).

[208] MINISTRY OF JUSTICE, *supra* note 206, at 4–5.

[209] *Id.* at 5.

[210] *Id*.

[211] *See id*. at 544–45 (discussing the need for businesses to be mindful of the statutory exemptions, and that section 41 (confidential information) is an absolute exemption while section 43 (commercial interests) is a qualified exemption).

[212] *Id.*

[213] Freedom of Information Act § 43(1)–(2), 2000, c. 36 (Eng.).

[214] *Id.* § 41(1). Section 41(1) exempts information if: "(a) it was obtained by the public authority from any other person (including another public authority, and (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person." *Id*.

[215] INFORMATION COMM'R OFFICE (ICO), FREEDOM OF INFORMATION ACT AWARENESS GUIDANCE NO. 2, at 1 (2006), http://www.ico.gov.uk/upload/documenhttp://www.ico.gov.uk/upload/documents/library/freedom_of_information/ detailed_specialist_ guides/awareness_guidance_2_-_information

confidentiality clauses in the United States. Under British common law, a contractor can bring an action for breach of confidence to prevent the disclosure of commercial information of a confidential nature.[216]

Information is confidential if the person submitting the information to the public authority does so in circumstances importing an obligation of confidence.[217] Confidentiality can arise in a wide variety of circumstances, but the most straightforward example in which a confidential obligation will arise is when public officials enter into procurement contracts with private contractors.[218] However, in order for information to be protected from disclosure by an obligation of confidence, it must not be trivial information or already publicly available.[219]

Even when confidentiality arises in procurement contracts, the confidentiality of that contract is still subject to a balancing test that includes the public's interest in knowing the terms of the contract.[220] The public interest, as the next section shows, may allow agencies to disclose a contractor's unit prices even when an exemption applies.

C. Public Interest Overrides

Although U.K. government officials are not required to disclose a government contractor's submitted information if it falls under either the commercial interests or confidentiality exemptions, both exemptions are subject to the public interest. Under the UKFOIA, the commercial interests exemption is a qualified exemption that is statutorily based in section 2 of the UKFOIA.[221] Section 2 of the UKFOIA is subject to a statutorily prescribed public interest test.[222] The confidentiality exemption, however, is an absolute exemption to disclosure that is not subject to the statutory public interest test found in the UKFOIA.[223] Despite it being an absolute exemption, the confidentiality exemption is still subject to the public interest. Instead of an explicit public interest test, the confidential exemption has an inherent public interest defense found in the common law that is similar to the balancing test provided in the *commercial interests* exemption.[224] This section reviews how the Commissioner and U.K. courts apply the public interest test to both exemptions for commercial interests and information submitted in confidence.

1. Statutory Public Interest Test for Commercial Interests Exemption

Even when the release of commercial information prejudices a government contractor, a U.K. government official may still release the information if the official finds that releasing the information serves the wider public interest.[225] The Commissioner has recognized that there is a public interest in disclosing commercial information in order to ensure that: (1) "there is transparency in the accountability of public funds"; (2) "there is proper scrutiny of government actions in carrying out licensing functions in accordance with published policy"; (3) "public money is being used effectively, and that departments are getting value for money when purchasing goods and services"; (4) "departments' commercial activities, including the procurement process, are conducted in an open and honest way"; and (5) "business can respond better to government opportunities."[226] In determining whether information is exempt from disclosure for being commercially sensitive, the Commissioner weighs these public interest factors against the privacy interest of the submitter. As the next section will show, this balancing test that the Commissioner applies to the qualified exemption of commercial information is similar to the test the U.K. courts use in determining the applicability of the confidentiality exemption.[227]

2. Inherent Public Interest Test for Confidential Exemption

Although the confidential exemption is an absolute exemption, it is a rather dubious absolutism because the courts still subject it to its own public interest test. Since the UKFOIA does not provide for a cause of action to prevent

_provided_in_confidance.pdf [hereinafter UKFOIA AWARENESS GUIDANCE].

[216] *Id*. at 2.

[217] *Id*.

[218] When entering into contracts with private contractors, United Kingdom public officials are warned that the contractors may request confidentiality clauses pertaining to the terms of the contract. *Id*. at 5. Upon this circumstance, the public official is instructed to carefully consider these terms in view of their obligations to disclose information under the UKFOIA. *Id.* at 1.

[219] *Id*. at 3.

[220] FREEDOM OF INFORMATION, *supra* note 195, at 601.

[221] *Id.* at 151.

[222] *Id*. at 35–36.

[223] *Id*. at 166.

[224] *Id*. at 601.

[225] *See* Freedom of Information Act § 2, 2000, c. 36 (Eng.). The act states,

> In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—(a) the information is exempt information by virtue of a provision conferring absolute exemption, or (b) in all the circumstances of the case, the *public interest* in maintaining the exemption outweighs the public interest in disclosing the information.

Id. (emphasis added).

[226] FREEDOM OF INFORMATION, *supra* note 195, at 11.

[227] *Id*. at 601.

disclosure, the party seeking to prevent disclosure must seek an injunction for a breach of confidence in the common law.[228] This is similar to the reverse-FOIA suit in the United States. Unlike the United States, however, U.K. courts will not enforce an obligation of confidence where to do so would be contrary to the public interest.[229] In cases concerning the public interest defense, U.K. courts have emphasized that their task is to balance the public interest in honoring an obligation of confidence in a particular case with the public interest in disclosing the information in question.[230] Consequently, the legal exercise that the courts conduct in a breach of confidence case is very similar to that which the Commissioner performs in the public interest test under the UKFOIA.[231] Contrary to the experience of unit price cases in the United States, when comparing the exemptions to disclosure against the public interest, it is very likely that unit prices in U.K. government contracts will be disclosed. The U.K.'s precedent of disclosing unit prices pursuant to the public interest is examined further below.

D. United Kingdom's Precedent of Disclosing Unit Prices

In the few cases the Commissioner has decided concerning the disclosure of a contractor's unit price information,[232] the Commissioner has routinely held that agencies should disclose unit prices under the UKFOIA.[233] In these unit price cases, the Commissioner has ruled that agencies should disclose unit prices for two general reasons. First, the Commissioner has ruled that government contractors are unlikely to suffer substantial harm from the release of their unit prices charged to the government.[234] Secondly, the Commissioner has found that any harm that the contractor suffers from the release of unit prices is outweighed by public's interests in knowing the amount its government pays to private sector companies for goods and services.[235] Specifically, the Commissioner has found that disclosure of unit prices serves the public interest in that it increases competition[236] and lowers procurement costs,[237] while increasing transparency and accountability of government procurement decisions.[238] The Commissioner's combined skepticism of contractor harm and respect for the benefits of unit price disclosure has led to disclosure of unit prices, as is discussed further below.

1. Skeptical View of Contractor Harm

Unlike the D.C. Court of Appeals, and like many of the other courts in the United States, the U.K. Commissioner seems skeptical of a contractor's claim that release of its unit prices will cause it substantial harm in the marketplace. In his decisions, the Commissioner has considered contractor and agency claims that release of the contractor's unit prices would "allow rival suppliers to reduce their own prices,"[239] and "allow competitors of the contractor to undermine its tenders in contracts of a similar nature."[240] The Commissioner has ruled that these claims of harm to legitimate commercial interests are meritless.[241]

In considering the assertion that disclosure of unit prices would allow a competitor to reduce its own prices and underbid the contractor in future cases, the Commissioner has ruled that these assertions of competitive disadvantage are very unlikely. First, the Commissioner has stated that release of unit price information would only reveal "how much a particular contractor has charged for a particular job."[242] The Commissioner reasoned that it would not follow that revealing the costs would allow a competitor to reduce its own prices, as prices consist of various fluctuating

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[228] *Id*. at 596. To bring suit under the common law for breach of confidence, the party seeking an injunction must meet three elements. *Id.* First, the information itself must be confidential. *Id.* Second, the information must have been submitted to another in circumstances importing an obligation of confidence. *Id.* Third, the receiver of information must have disclosed the information without authorization, to the detriment of the submitter. *Id.* Both trade secrets and commercially sensitive information are often viewed as confidential information subject to a breach of confidence suit. *Id*. at 544–45.

[229] *Id*. at 601.

[230] *Id*. at 170.

[231] *Id*.

[232] The author only found three decisions published by the Information Commissioner's Office pertaining to unit prices and the UKFOIA's exemptions for confidentiality and prejudice to commercial interests and trade secrets. The ICO publishes its decisions on its website, located at http://www.ico.gov.uk.

[233] *See* East Riding of Yorkshire Council, Decision Notice No. FS50090685 (U.K.), Info. Comm'r Office, Jan. 28, 2008, http://www.ico.gov/uk/upload/ documents/decisionnotices/2008/fs_50090685.pdf (finding that the release of how much a public park pays its gas supplier for a 47kg cylinder of gas had to be released under the UKFOIA); East Riding of Yorkshire Council, Decision Notice No. FER0079969 (U.K.), Info. Comm'r Office, Feb. 5, 2008, http://www.ico.gov.uk/upload/documents/decisionnotices/2008/fer_0 079969.pdf (ruling that the UKFOIA required the amount the public authority paid a waste management company per ton of waste removed from a park to be disclosed); Bristol City Council, Decision Notice No. FS50164262 (U.K.), Info. Comm'r Office, May 27, 2009, http://www.ico. gov.uk/upload/documents/decisionnotices/2009/fs_50164262.pdf (requiring a school district to disclose the details of contractor costs for information technology services).

[234] *See* discussion *infra* Part V.D.1.

[235] *See* discussion *infra* Part V.D.2.

[236] *See East Riding of Yorkshire Council*, Decision Notice No. FER0079969.

[237] *See Bristol City Council*, Decision Notice No. FS50164262.

[238] *Id*.

[239] East Riding of Yorkshire Council, Decision Notice No. FS50090685 (U.K.), Info. Comm'r Office, Jan. 28, 2008, at 9.

[240] *East Riding of Yorkshire Council*, Decision Notice No. FER0079969, at 13.

[241] *Id*.

[242] *East Riding of Yorkshire Council*, Decision Notice No. FS50090685, at 9.

factors.[243] Second, in order for competitors to be able to ascertain the prices that the contractor might submit in future contracts, the competitor would have to be able to identify the pricing model the contractor used.[244] The Commissioner has found that disclosure of unit prices themselves does not reveal the means of accurately identifying the pricing model used by a contractor.[245] Thus, competitors would be unable to predict the prices that a contractor may decide to submit in any potential bids for future contracts.[246] Finally, the Commissioner has stated that the complaining contractor "would benefit from the same transparency when competing for other contracts."[247] In other words, releasing unit prices in similar government contracts would level out the playing field for all potential government contractors, not just the contractor's rivals.[248] For these reasons, the Commissioner found that it is unlikely that contractors would be prejudiced so much in the marketplace as to warrant exempting the disclosure of unit prices under the UKFOIA.[249] But even in those rare instances when the Commissioner found release of a contractor's unit prices would harm the contractor's legitimate commercial interests, the Commissioner has surmised that the public interest would require disclosure anyhow.[250] As will be examined in the next section, the Commissioner often finds that the public interest outweighs contractor harm from the release of unit price information.

2. The Public Interest Outweighs Contractor Harm

Even in those rare circumstances when the release of unit price information would harm the contractor, the Commissioner has found that the public interest outweighs whatever harm the contractor may suffer. Similar to the legal precedent before the D.C. Court of Appeals' precedent of non-disclosure, the Commissioner has ruled that the UKFOIA's strong policy of disclosure outweighs the contractor's privacy interest in protecting unit prices.[251] Specifically, the Commissioner seems to base his decisions to disclose unit price on the basic principles that transparency in the procurement system increases competition, lowers procurement costs, and promotes honesty and accountability in the government procurement system.

In each of the unit price cases reviewed for this article, the Commissioner has stated that the public interest benefits from more competition in the procurement system.[252] Similar to the findings of the economic studies discussed in section IV,[253] the Commissioner has stated that disclosure would attract more competitors for government contracts because "[c]ompetitors to the current supplier may see that they could also provide the same service to the [government] and make a profit."[254] Additionally, disclosure of unit prices would attract new entrants to the procurement system because it will "allow inexperienced contractors to have an understanding of the range of prices regularly tendered by experienced providers."[255] The result of the increased competition would almost inevitably drive down the costs to the government for procuring goods and services.[256] Thus, the Commissioner concluded that there is a "positive public interest in giving contractors the opportunity to consider tendering with greater knowledge of the current prices being accepted."[257]

In addition to increasing competition and lowering procurement costs, the Commissioner has also favored disclosure of unit prices because of the strong public interest in understanding the circumstances in which the government provides public money to private sector.[258] The Commissioner has stated that disclosure of unit prices would "allow proper accountability of spending of public funds."[259] Accountability of public spending, the Commissioner reasoned, would come from the "greater scrutiny of the contracts the government makes on behalf of its citizens."[260] The level of transparency gained from disclosure of unit prices would thereby "encourage integrity and quality in the handling of such agreements which are matters of legitimate public interest."[261] Disclosure of unit prices, the Commissioner has reasoned, would therefore benefit the

[243] *Id*.

[244] Bristol City Council, Decision Notice No. FS50164262, Info. Comm'r Office, (U.K.), May 27, 2009, at 16.

[245] *Id*.

[246] *Id*.

[247] *Id*. at 17.

[248] *Id*.

[249] *Id*. at 9; East Riding of Yorkshire Council, Decision Notice No. FER0079969 (U.K.), Info. Comm'r Office, Feb. 5, 2008, at 15.

[250] *Bristol City Council*, Decision Notice No. FS50164262, at 19.

[251] *Id*.

[252] *See* East Riding of Yorkshire Council, Decision No. FS50090685, Info. Comm'r Office (U.K.), Jan. 28, 2008; *East Riding of Yorkshire Council*, Decision Notice No. FER0079969; *Bristol City Council*, Decision Notice No. FS50164262.

[253] *See* articles cited *supra* notes 183, 184 (stating that competitor's intelligence about a contractor's pricing policies leads to more competition).

[254] *East Riding of Yorkshire Council*, Decision Notice No. FS50090685, at 9.

[255] *East Riding of Yorkshire Council*, Decision Notice No. FER0079969, at 15.

[256] *East Riding of Yorkshire Council*, Decision Notice No. FS50090685, at 9.

[257] *East Riding of Yorkshire Council*, Decision Notice No. FER0079969, at 14.

[258] Bristol City Council, Decision Notice No. FS50164262, Info. Comm'r Office, (U.K.), May 27, 2009, at 19.

[259] *Id*.

[260] *East Riding of Yorkshire Council*, Decision Notice No. FER0079969, at 13.

[261] *Bristol City Council*, Decision Notice No. FS50164262, at 9.

procurement system by increasing competition and promoting more accountability for government spending. This is a lesson that the United States can take from the U.K.'s treatment of unit prices.

E. Lessons Learned from the U.K.'s Treatment of Unit Prices

As was shown in the previous sections, the UKFOIA is designed to protect legitimate commercial interests of contractors, but only in so far as legitimate privacy interests do not overwhelm the public's interest. The UKFOIA's legal system of subjecting its exemptions to a public test allows the Commissioner and courts to balance these two interests for the overall good of the procurement system. When the UKFOIA is applied to unit prices, however, the public interest often wins over the privacy interest. Why is this so? As the Commissioner stated repeatedly in his decisions, there is a strong public interest in a more competitive, accountable, and transparent procurement system. In the Commissioner's decisions, disclosure of unit prices in awarded government contracts promotes these interests. Disclosing unit prices in the United States would presumably have the same benefits for our procurement system.

VI. Conclusion

Our procurement system can have the benefit of lower prices and greater accountability if the law provided for disclosure of unit prices, like what is found in our grocery stores. Just as a grocery shopper can view the various unit prices of bran flakes on a grocery shelf, so too can the cereal producer's competitors. The disclosure of the cereal producer's unit price causes its competitors to lower their prices, invites new entrants to the bran flake market, and increases better options for the consumer. Disclosure of unit prices also allows the consumer to go to another grocery store, compare prices, and determine if the store is overcharging. The benefit of disclosing the bran flakes unit prices is a more efficient and accountable bran flakes market.

Just as disclosure of unit prices is commonplace in our grocery stores, disclosure of contractors' unit prices in government contracts was also the norm under FOIA. Competing contractors were able to obtain unit prices by requesting agency records pertaining to awarded contracts. Contractors were able to seek judicial protection for what was truly commercially sensitive information. Courts routinely ruled in favor of disclosing unit prices for two reasons: (1) unit prices were too complex to identify information truly harmful to the contractor, and (2) FOIA's strong policy required disclosure regardless of the harm suffered by the contractor. For these two reasons, courts generally held that agencies could disclose unit prices.

Then, in 1999, the D.C. circuit began a pattern of successively ruling against agency decisions to disclose unit prices. This pattern continues even today.[262] The D.C. circuit's universal jurisdiction means that contractors file about half of all the reverse FOIA lawsuits in this one circuit. As a result, the D.C. courts have been allowed to change FOIA's generally permissive disclosure of unit prices into a prohibition. By prohibiting the disclosure of unit prices, the D.C. courts have thwarted FOIA's balance of contractor privacy and the public's interest in a transparent and efficient procurement system. The UK's treatment of sensitive commercial information, however, proves that freedom of information laws can protect both the private and public interests while generally disclosing unit price information.

Congress must act to restore FOIA's balance and correct the harm the D.C. courts have caused to the procurement system. Adopting the statutory language for Exemption 4 that this paper proposes[263] will permit disclosure of unit prices when the disclosure serves the public interest more than it harms the private contractor. This balanced approach is especially important considering the controversy over public expenditures. With the federal government spending the public's money at ever-increasing levels, and contractor fraud ever present, there is a strong public interest in holding the government accountable for how it spends taxpayer dollars on contracts.[264] A legal system that discloses unit prices will best serve the public's interest by promoting an accountable and efficient procurement system, just as disclosure of unit prices does in our grocery stores.

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[262] In *Essex Electro Eng'rs, Inc. v. U.S. Sec'y of Army*, 686 F.Supp. 2d 91 (D.D.C. 2010), the D.C. circuit once again held that a contractor's unit prices cannot be disclosed under FOIA.

[263] This article's proposed Exemption 4 language is available in Appendix A, along with the current Exemption 4 language, the UKFOIA's exemptions for commercial interests and information submitted in confidence, and the UKFOIA's codified public interest test.

[264] *See* Representative Henry A. Waxman, Prepared Remarks to The Center for American Progress Forum on return to Competitive Contracting (May 14, 2007), *available at* http://oversight.house.gov/images/stories/documents/20070515121402.pdf (noting that records levels of discretionary federal spending is spent on federal contracts, and that while spending has soared, oversight and accountability have been undermined).

Appendix

1. The current 5 U.S.C. § 552(b)(4) (Exemption 4) language is as follows:

> [FOIA] does not apply to matters that are—
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential.[264]

2. The UKFOIA's exemptions for information submitted in confidence and commercial interests are as follows:

> Information provided in confidence.
> (1) Information is exempt information if—
> (a) it was obtained by the public authority from any other person (including another public authority), and
> (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.[265]
>
> Commercial interests.
> (1) Information is exempt information if it constitutes a trade secret.
> (2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).[266]

3. The UKFOIA's exemptions are subject to the following statutory public interest test:

> In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—
> (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
> (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.[267]

4. This paper's proposed change to 5 U.S.C. § 552(b)(4) (Exemption 4), which incorporates a balance of legitimate commercial interests with the public interest as seen in the UKFOIA, is as follows:

> [FOIA] does not apply to matters that are—
> (4) trade secrets and commercial or financial information submitted to a government agency in confidence, or the release of which would be expected to have an unreasonably adverse effect on a person's commercial or financial interests, *subject to the public interest.*

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[264] Freedom of Information Act, 5 U.S.C. § 552(b)(4) (2006).

[265] Freedom of Information Act § 41, 2000, c. 36 (Eng.)

[266] *Id.* § 43.

[267] *Id.* § 2.

A Look at the *Feres* Doctrine as It Applies to Medical Malpractice Lawsuits: Challenging the Notion that Suing the Government Will Result in a Breakdown of Military Discipline

Major Edward G. Bahdi[*]

Don't let this be it. Don't let this be it. Fight![1]

I. Introduction

In January 2009, CBS Evening News aired a story about the death of Marine Sergeant (Sgt.) Carmelo Rodriguez.[2] Sergeant Rodriguez was first diagnosed with melanoma when he enlisted in the Marine Corps in 1997.[3] The medical doctor who performed the examination noted on Sgt. Rodriguez's medical chart that his skin looked "abnormal" and that Sgt. Rodriguez had melanoma on his right buttocks.[4] Unfortunately, the doctor never informed Sgt. Rodriguez of the diagnosis.[5] Furthermore, the doctor made no recommendation for further treatment.[6]

In 2005, Sgt. Rodriguez, who was serving in Operation Iraqi Freedom, as a platoon leader, went to seek medical treatment for puss seeping out of a wound.[7] Medical personnel misdiagnosed the skin cancer as a wart and advised Sgt. Rodriguez to have it looked at on his redeployment.[8] Five months later, Sgt. Rodriguez saw a different physician in the United States.[9] The doctor diagnosed and informed Sgt. Rodriguez that he had stage III melanoma.[10] Sergeant Rodriguez died of stage IV malignant melanoma on 16 November 2007.[11]

The story of Sgt. Rodriguez has revitalized the national debate over the fundamental fairness of the *Feres*[12] doctrine and the sweeping effect the Supreme Court's 1950 ruling has had on military personnel. In *Feres*, the Court ruled that the Federal Tort Claims Act (FTCA) prohibited servicemembers from filing suit against the United States for any type of injuries suffered incident to their service. The Court provided a three-part rationale for its holding: (1) generally speaking, the Federal Government and private individuals do not share equal degrees of tort liability; (2) allegations of Government negligence are controlled by state tort law—Congress could not have meant for the FTCA to apply to servicemembers because they have no control over their place of duty; and (3) a statutory scheme in the Veteran's Benefits Act (VBA) already provided a means for servicemembers to receive compensation for injuries suffered incident to their service.

Current legislation pending before the 111th United States Congress seeks to overturn *Feres* as it applies to military servicemembers suing for substandard military medical care. This article suggests that the best way to overturn the *Feres* doctrine as it relates to military medical malpractice claims is to focus the national debate on the detrimental impact, if any, such suits will have on military discipline and decision making. Also discussed are the second- and third-order effects that the Army must anticipate if *Feres* is repealed.

II. Emergence of the Federal Tort Claims Act

As a general principle, the United States enjoys the protection of sovereign immunity from lawsuits filed against it by private citizens.[13] One cannot sue the United States for injury caused by agents of the United States unless the Federal Government has waived its sovereign immunity. During the 1940s, two significant tragedies took place that triggered the U.S. Congress to pass legislation partially relinquishing the Government's sovereign immunity.

On 28 July 1945, Lieutenant Colonel (LTC) William Franklin Smith, a graduate of the U.S. Military Academy and a decorated veteran with 100 combat missions, took off in a B-25 Mitchell bomber from his home in Bedford, Massachusetts, to rendezvous with his commanding officer in Newark, New Jersey. The two men were then to fly to

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[1] *CBS Evening News with Katie Couric: A Question of Care: Military Malpractice?* (CBS television broadcast Jan. 31, 2007), *available at* http://www.cbsnews.com/stories/2008/01/31/eveningnews/main3776580.shtml (last visited Mar. 1, 2010) [hereinafter *CBS Evening News*). These are the final words of Sgt. Carmelo Rodriguez moments before he died.

[2] *CBS Evening News with Katie Couric: Marine's Cancer Misdiagnosed?* (CBS television broadcast Aug. 6, 2008), *available at* http://www.cbsnews.com/video/watch/?id=3776975n&tag=related;photovideo (last visited Mar. 1, 2010). *See also Eye to Eye with Katie Couric: Misdiagnosed?* (CBS television broadcast Aug. 6, 2008), *available at* http://www.cbsnews.com/video/watch/?id=3777186n&tag=related;photovideo (last visited Mar. 1, 2010) [hereinafter *Eye to Eye*].

[3] *CBS Evening News*, *supra* note 2; *Eye to Eye*, *supra* note 2.

[4] *Eye to Eye*, *supra* note 2.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Feres v. United States, 340 U.S. 135 (1950).

[13] Cohens v. Virginia, 19 U.S. 264, 411–12 (1821).

their home base in South Dakota. While flying over New York City, LTC Smith encountered heavy fog over the Manhattan skyline. Because of the dense fog, LTC Smith became disorientated and crashed into the 79th floor of the Empire State Building, killing fourteen people.[14]

Less than two years later, the Texas City Disaster of 1947, occurred in the port town of Texas City, fourteen miles north of Galveston, Texas.[15] On 16 April 1947, the SS *Grandcamp*, a French-registered cargo vessel, was docked at Texas City. During the early morning hours, the crew noticed a small fire had broken out near the hull of the ship. The ship's cargo included 2300 tons of ammonium nitrate. Internal temperatures eventually reached approximately 850 degrees Fahrenheit, causing the ammonium nitrate to explode. Fireballs from the explosion could be seen from miles away, and the blast created a fifteen-foot tall tidal wave that flooded the surrounding area. The sheer force of the explosion lifted a nearby cargo ship out of the water and tossed it 100 feet. The shock itself was felt as far away as Louisiana, and Denver, Colorado, was able to pick up the blast on its seismograph. Between 500 and 600 people lost their lives in the blast.[16]

In light of these two events, the U.S. Congress passed the FTCA, which waived sovereign immunity for torts committed by agents of the United States acting within the scope of their duties, permitting those who were injured to seek compensation from the Federal Government.[17] However, Congress carved out thirteen exceptions, thus retaining sovereign immunity as it relates to certain torts.[18] Of the thirteen exceptions, only a few relate to the negligent acts of the military: (1) claims arising from the military's exercise or performance of, or the failure to exercise or to perform, a discretionary function; (2) any claim arising out of combat activities during time of war; and (3) any claim arising in a foreign country.[19] Congress's intent in waiving sovereign immunity and creating the thirteen exceptions has been the subject of great debate over the past six decades.[20] Opponents of the *Feres* doctrine have spilled an enormous amount of ink arguing that Congress sought to limit servicemembers' ability to file suit against the Federal Government only with regards to the three exceptions listed above.

III. The U.S. Supreme Court's Interpretation of the Federal Tort Claims Act

As stated earlier, the Supreme Court's decision in *Feres v. United States*, effectively placed a moratorium on the ability of a servicemember to sue the Federal Government for tortious conduct committed by its agents if the injury suffered was incident to the servicemember's service in the military.[21] The Supreme Court first introduced the language "incident to service" in *Brooks v. United States*.[22] The case involved two brothers who were on active duty status but on leave at the time of the accident. The brothers were injured when the privately owned car they were riding in was struck by a military truck driven by a civilian employee of the Army.[23] The issue in the case was whether members of the Armed Forces could recover under the FTCA for injuries sustained not "incident to their service" in the military.[24] The Court addressed the issue by stating

> We are not persuaded that "any claim" means "any claim but that of servicemen." The statute does contain twelve exceptions. None exclude petitioner's claims. One is for claims arising in a foreign country. A second excludes claims arising out of combatant activities of the military or naval forces, or the Coast Guard, during time of war. These and other exceptions are too lengthy, specific, and close to the present problem to take away petitioners' judgments. Without resorting to an automatic maxim of construction, such exceptions make it clear to us that Congress knew what it was about when it used the term "any claim." It would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed. The overseas and combatant activities exceptions make this plain.[25]

[14] *See* Empire State Building Tourism, http://www.esbnvc.com/tourism_facts_esbnews_mar1996.cfm?CFID=37168863&CFTOKEN=92435881 (last visited Mar. 1, 2010).

[15] *See* Moore Memorial Public Library's Texas City Disaster 1947 Online Exhibition, http://www.texascity-library.org (last visited Mar. 1, 2010) [hereinafter Moore Memorial Public Library's Texas City Disaster 1947 Online Exhibition]. *See also* HUGH W. STEPHENS, THE TEXAS CITY DISASTER, 1947 (1997).

[16] Moore Memorial Public Library's Texas City Disaster 1947 Online Exhibition, *supra* note 15.

[17] Federal Tort Claims Act, 60 Stat. 843 (1946), *as amended by* 28 U.S.C. § 921, 60 Stat. 842, now 28 U.S.C. §§ 1346(b), 2671–2680 (2006).

[18] 28 U.S.C. § 2680 (2006).

[19] *Id.* The Government will also not be responsible for any intentional torts committed by a service member to include assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. *Id.* § 2680.

[20] *See, e.g.*, Kosak v. United States, 465 U.S. 848 (1984).

[21] 340 U.S. 135, 146 (1950).

[22] 337 U.S. 49 (1949).

[23] *Id.* at 50.

[24] *Id.*

[25] *Id.* at 51.

It is important to note that the Court took great pain to emphasize that it did not view the FTCA as having blanket exclusion against servicemembers. The Court believed that Congress did in fact have servicemembers in mind when it crafted the FTCA. It would have been difficult for Congress to neglect these men and women, who only a year prior were fighting in World War II.[26] The Court went on to state

> But we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired. Were the accident incident to the Brooks' service, a wholly different case would be presented. We express no opinion as to it . . .[27]

Although the Court carved out this "incident to service" test, it nonetheless made clear that it believed servicemembers could file a tort claim under the FTCA so long as the injury was not caused by their service in the Army.[28]

Two years later, the Supreme Court issued its opinion in *Feres v. United States*.[29] *Feres* was actually a combination of three separate tort suits filed against the Government. The first case was *Feres v. United States*, which was on appeal from the Second Circuit.[30] First Lieutenant (1LT) Rudolph J. Feres was on active duty when he died in a barracks fire at Pine Camp, New York. The executrix of Feres's estate argued that the military was negligent in housing 1LT Feres in unsafe barracks that was serviced by a defective heating plant. Furthermore, the executrix argued that the Government was negligent because it failed to have an adequate fire watch. The second case was *Jefferson v. United States*, which was on appeal from the Fourth Circuit.[31] In *Jefferson*, the plaintiff underwent abdominal surgery while on active duty. Eight months later, the plaintiff, who was no longer in the Army, underwent a second abdominal surgery. Medical personnel performing the second surgery found a towel marked "Medical Department U.S. Army" inside the plaintiff's abdomen. The plaintiff filed suit alleging negligence on the part of the Army surgeon. The third case was *United States v. Griggs* which was on appeal from the Tenth Circuit.[32] In *Griggs*, the executrix of decedent's estate alleged that while Griggs was on active duty, he was negligently treated by Army surgeons, who caused his death.

The Court distinguished the plaintiffs in *Feres* from the plaintiffs in *Brooks* based on their duty status. Although both plaintiffs were active duty Soldiers, the plaintiffs in *Brooks* were on leave at the time of their injury, whereas the plaintiffs in *Feres* were not.[33] The Court stated that such facts were the "wholly different case" not addressed in the *Brooks* decision.[34] Thus, the Court held that the injuries suffered by the latter group were incident to their service in the Army.[35] In its holding, the Court concludes

> that the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress, in drafting the Act, created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law in the absence of express congressional command.[36]

The Court provided three reasons to justify its holding. First, the Court said it made sense to prohibit recovery for injuries received incident to service. The Court stated that when one looks at the statutory scheme of the FTCA, Congress must have meant to exclude servicemembers from being able to sue the Government.[37] Under § 2674 of the FTCA, the United States is liable only "to the same extent as a private individual under like circumstances."[38] The Court felt that the limitation in § 2674 meant it had to exclude service-related injuries because

> plaintiffs can point to no liability of a "private individual" even remotely analogous to that which they are asserting against the United States. We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving. Nor is there

[26] World War II officially ended in 1945. *See* The National World War II Museum, http://www.nationalww2museum.org (last visited Mar. 1, 2010).

[27] *Brooks*, 337 U.S. at 52.

[28] *Id.*

[29] 340 U.S. 135 (1950).

[30] *Id.* at 136–37.

[31] *Id.* at 137.

[32] *Id.*

[33] *Id.* at 138.

[34] *Id.*

[35] *Id.* at 146.

[36] *Id.*

[37] *Id.* at 141–42.

[38] *Id.* at 141.

> any liability "under like circumstances," for no private individual has power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of command.[39]

Second, the Court reasoned that under the FTCA, "the law of the place where the act or omission occurred"[40] will determine liability but in the situation of a soldier who must live where he is ordered, the belief "[t]hat the geography of an injury should select the law to be applied to his tort claims makes no sense."[41] "It would hardly be a rational plan of providing for those disabled in service by others in service to leave them dependent upon geographic considerations over which they have no control and to laws which fluctuate in existence and value."[42]

Lastly, the Court stated that Congress already provided "systems of simple, certain, and uniform compensation for injuries or death of those in armed services."[43] The Court noted that Congress remained silent on how the FTCA would affect the comprehensive system of benefits already in place through the VBA for these servicemembers. The fact that Congress was silent indicated that it had no intention of servicemembers falling within the authority of the FTCA.[44]

And so the Supreme Court in *Feres* clarified the "incident to service" language it first introduced in *Brooks* to unequivocally state that servicemembers were exempt from filing suit under the FTCA for injuries suffered on account of their relation to the military.

Four years later, in the case of *United States v. Brown*,[45] the Supreme Court fashioned a new rationale for prohibiting tort suits by servicemembers: such suits would have a negative impact on military discipline. Brown was a discharged veteran who sued the Veterans Affairs hospital for negligent treatment of his injured knee. In its decision, the Court stated

> The peculiar and special relationship of the solider to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court to read that Act as excluding claims of that character.[46]

It would be another twenty-three years before the Court would elect to revisit its reasoning in *Feres* and *Brown*. In 1977, the Court heard oral arguments in the case of *Stencel Aero Eng'g Corp. v. United States*.[47] On 9 June 1973, Captain (Capt.) John Donham, an Air National Guard officer, was permanently injured when the egress life-support system found in his F-100 fighter aircraft failed to properly engage. Captain Donham brought suit against the manufacturer of the egress life-support system—Stencel Aero Engineering Corporation who in turn brought an indemnification suit against the United States. The Court reaffirmed its reasoning in *Feres* and *Brown*:

> In reaching this conclusion, the Court considered two factors: First, the relationship between the Government and members of the Armed Forces is "'distinctively federal in character,'" (citation omitted); it would make little sense to have the Government's liability to members of the Armed Services dependent on the fortuity of where the soldier happened to be stationed at the time of the injury. Second, the Veterans' Benefits Act establishes, as a substitute for tort liability, a statutory "no fault" compensation scheme which provides generous pensions to injured servicemen, without regard to any negligence attributable to the Government. A third factor was articulated in *United States v. Brown*, (citation omitted), namely, "(t)he peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders or negligent acts committed in the course of military duty . . . ."[48]

Eight years later, the Court again issued an opinion tying the *Feres* doctrine to the negative impact such suits have on military discipline. Shearer was an Army Private (PVT), who, while off duty at Fort Bliss, Texas, was kidnapped and murdered by another Soldier. The perpetrator already had a criminal past—a conviction for murder by a New Mexico court and a conviction for manslaughter by a German court.

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[39] *Id.* at 141–42.

[40] *Id.* at 142.

[41] *Id.* at 143.

[42] *Id.*

[43] *Id.* at 144.

[44] *Id.*

[45] 348 U.S. 110 (1954).

[46] *Id.* at 112.

[47] 431 U.S. 666 (1977).

[48] *Id.* at 671–72.

Suit was filed by PVT Shearer's mother alleging that the Army's negligence in failing to control the perpetrator, failing to warn the community of his violent past, and failing to remove him from the military caused her son's death. In *United States v. Shearer*,[49] the Court reaffirmed its belief that suits brought by servicemembers for injuries they received incident to their service are barred by *Feres* because they are the "type[s] of claims that, if generally permitted, would involve the judiciary in sensitive military affairs, at the expense of military discipline and effectiveness."[50]

The concern over military discipline is again addressed by the Court in the case of *United States v. Johnson*.[51] On 7 January 1982, Lieutenant Commander (LCDR) Horton W. Johnson, a U.S., Coast Guard helicopter pilot, was sent on a rescue mission. During the course of the flight, LCDR Johnson requested radar assistance from the Federal Aviation Administration (FAA). Soon after FAA flight controllers assumed radar control, LCDR Johnson's helicopter crashed into a mountain. The crash killed LCDR Johnson and his crew.[52] Lieutenant Commander Johnson's widow filed suit alleging negligence by the FAA. The Court held that the *Feres* doctrine bars an FTCA suit on behalf of a servicemember killed during the course of an activity incident to the member's military service. In the case at hand, LCDR Johnson's death came about "because of his military relationship with the Government."[53] Lieutenant Commander Johnson was executing a mission considered a "primary duty of the Coast Guard."[54] The Court went on to provide further clarification on how such suits have an effect on military discipline by saying:

> In every respect the military is, as this Court has recognized, "a specialized society." (citation omitted). "To accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." (citation omitted). Even if military negligence is not specifically alleged in a tort action, a suit based upon service-related activity necessarily implicates the military judgments and decisions that are inextricably intertwined with the conduct of the military mission. Moreover, military discipline involves not only obedience to orders, but more generally duty and loyalty to one's service and to one's country. Suits brought by servicemembers against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word.[55]

In short, the Court feared that allowing Johnson to sue the FAA would call into question the decision of the Coast Guard to send LCDR Johnson on the rescue mission and its decision to cede flight control to the FAA. The Court felt that such intrusion into the military's decision making could affect military discipline in future cases.[56] These fears of the Government were earlier mentioned in *Brooks*: "[t]he Government envisages dire consequences . . . [a] battle commander's poor judgment, an army surgeon's slip of hand, a defective jeep which causes injury, all would ground tort actions against the United States."[57]

IV. Analysis

A. Judicial Activism and Judicial Dissent

In several of its opinions, the Supreme Court passed comment regarding the language of the FTCA and whether Congress meant to exclude servicemembers from filing suit against the Government. There is little harmony among the Justices with regards to the FTCA and the *Feres* doctrine.[58]

In *Feres*, the Court observed that "[t]here are few guiding materials for our task of statutory construction. No committee reports or floor debates disclose what effect the statute was designed to have on the problem before us, or that it even was in mind."[59] However, the fact that there is very little in terms of legislative history has not prevented the Court from being proactive in its interpretation of the FTCA.

In fact, the Court has engaged in an exercise of lawmaking with regards to the FTCA.[60] The Court in *Brooks* created the "incident to service" test whereby the Court believed servicemembers could file a tort claim under the FTCA so long as the injury was not caused by their service in the Army.[61] This "incident to service" language is absent from the FTCA. The Court in *Feres* conceded that

[49] 471 U.S. 52 (1985).

[50] *Id.* at 59.

[51] 481 U.S. 681 (1987).

[52] *Id.* at 683.

[53] *Id.* at 689.

[54] *Id.* at 691.

[55] *Id.*

[56] *Id.* at 692.

[57] Brooks v. United States, 337 U.S. 49, 52 (1949).

[58] *See* Appendix.

[59] Feres v. United States, 340 U.S. 135, 138 (1950).

[60] Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine*, 192 MIL.L.REV. 1, 34 (2007).

[61] *Id.* at 52.

the FTCA does not explicitly contain any language excluding servicemembers from filing suit for injuries sustained incident to service.[62] Nevertheless, the Court "judicially promulgated"[63] the *Feres* doctrine and barred servicemembers from filing any type of tort claim against the Government. Finally, the Court in *Brown* came up with another rationale for its decision in *Feres*—that allowing servicemembers to file tort suits against the Government would affect military discipline.[64]

Nowhere in the FTCA are servicemembers explicitly excluded from filing suit against the Government. In fact, the only language within the FTCA that directly impacts servicemembers is the enumerated exceptions. Congress listed thirteen exceptions to the general waiver of sovereign immunity.[65] Of those thirteen exceptions, only a few relate to a servicemember's ability to file suit: (1) claims arising out of the government's exercise of discretionary function;[66] (2) claims arising out of combatant activities;[67] and (3) claims arising in a foreign country.[68] Allowing servicemembers to file suit based on any of these three exceptions would certainly have an impact on military discipline—a cause of concern for the Court in *Brown*. For instance, suits based on the Government's exercise of a discretionary function would call into question the tactical, operational, or strategic decisions made by military leaders. Permitting claims arising out of combatant activities would call into question the decision of the President to send servicemembers into combat. Finally, suits arising in a foreign country would call into question our Government's foreign and defense policies. It is for these reasons that Congress fashioned these three exceptions that directly impact servicemembers. However, none of the exceptions place a complete moratorium on a servicemember's ability to sue the Government for any form of tort actions, much less for military medical malpractice.

B. Congressional Response to the *Feres* Doctrine

The Court repeatedly invites Congress to correct any mistake the Court has made with regards to the *Feres* doctrine.[69] As Justice Scalia penned in his dissenting opinion in *Johnson*, "*Feres* was wrongly decided and heartily deserves the "widespread, almost universal criticism" it has received."[70] Therefore, it may serve Congress well to pass legislation that would bring resolution to the issue of whether Congress originally intended to allow servicemembers to file suit against the Government for tort claims.[71]

There is legislation pending before both houses of Congress that, if passed and signed by the President, would allow for servicemembers to file a tort claim/suit against the Federal Government but only for medical malpractice. On 12 March 2009, U.S, Representative Maurice D. Hinchey (D–N.Y.), introduced the Carmelo Rodriguez Military Medical Accountability Act of 2009 before the U.S. House of Representatives.[72] On 24 June 2009, U.S. Senator Charles E. Schumer (D–N.Y.), introduced similar legislation before the U.S. Senate.[73]

On 7 October 2009, the House Judiciary Committee voted in favor of presenting the bill in its amended form to the entire body of the House of Representatives.[74] The amended version of the bill would add § 2681 to chapter 171 of title 28. The following are select provisions found in the text of the bill:

> (a) IN GENERAL – Chapter 171 of title 28, United States Code, is amended by adding at the end of the following: "**§ 2681. Certain claims by members of the Armed Forces of the United States**
>
> > "(a) A claim may be brought against the United States under this chapter for damages relating to the personal injury or death of a member of the Armed forces of

[62] *Feres*, 340 U.S. at 139.

[63] Brou, *supra* note 60, at 1.

[64] United States v. Brown, 348 U.S. 110, 112 (1954).

[65] 28 U.S.C. § 2680 (2006).

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *See* Feres v. United States, 340 U.S. 135, 138 (1950) ("Under these circumstances, no conclusion can be above challenge, but if we misinterpret the Act, at least Congress possesses a ready remedy."); *see also id.* at 139 ("These considerations, it is said, should persuade us to cast upon Congress, as author of the confusion, the task of qualifying and clarifying its language if the liability here asserted should prove so depleting of the public treasury as the Government fears."); Rayonier, Inc. v. United States, 352 U.S. 315, 320 (1957) ("If the Act is to be altered that is the function for the same body that adopted it."); United States v. Johnson, 481 U.S. 681, 687 (1987) ("Nor has Congress changed this standard (of *Feres*) in the close to 40 years since it was articulated, even though, as the court noted in *Feres*, Congress 'possesses a ready remedy' to alter a misinterpretation of its intent.").

[70] United States v. Johnson, 481 U.S. 681, 700 (1987).

[71] Recent attempts have been made by Congress to amend the FTCA to allow service members to sue the government for military medical malpractice. *See* H.R. 1161, 99th Cong. (1st Sess. 1985); H.R. 1942, 98th Cong. (1st Sess. 1983).

[72] Carmelo Rodriguez Military Medical Accountability Act of 2009, H.R. 1478, 111th Cong. (1st Sess. 2009). The bill is named in honor of Marine Sgt. Carmelo Rodriguez.

[73] Carmelo Rodriguez Military Medical Accountability Act of 2009, S. 1347, 111th Cong. (1st Sess. 2009). The bill is named in honor of Marine Sgt. Carmelo Rodriguez.

[74] The next step is to convince House Majority Leader Steny Hoyer to bring the bill to the floor of the House of Representatives for consideration and vote before the entire House members. The bill in the Senate remains with the Senate Judiciary Committee.

the United States arising out of a negligent or wrongful act or omission in the performance of medical, dental, or related health care functions (including clinical studies and investigations) that is provided by a person acting within the scope of the office or employment of that person by or at the direction of the Government of the United States, whether inside or outside the United States.

"(b) A claim under this section shall not be reduced by the amount of any benefit received under subchapter III (relating to the Servicemembers' Group Life Insurance) of chapter 19 of title 38.

"(d) (2) In the case of an act or omission occurring outside the United States, the 'law of the place where the act or omission occurred' shall be deemed to be the law of the place of domicile of the plaintiff.

(c) EFFECTIVE DATE – The amendments made by this section shall apply with respect to a claim arising on or after January 1, 1997, and any period of limitation that applies to such a claim arising before the date of enactment of this Act shall begin to run on the date of that enactment."

C. Criticism of the Carmelo Rodriguez Military Medical Accountability Act of 2009

On 24 March 2009, the U.S. House of Representatives Subcommittee on Commercial and Administrative Law invited five witnesses[75] to testify before the committee regarding their positions on House Bill 1478. One of the witnesses was Mr. Stephen A. Saltzburg, a member of the American Bar Association's (ABA) House of Delegates, who provided the ABA's position on the pending legislation.

Mr. Saltzburg testified that the *Feres* doctrine should at the very least be repealed as applied to military medical malpractice claims[76] and that the legislation should be enacted into law.[77] However, Mr. Saltzburg argued in favor of repealing the entire doctrine on the principle that (1) the only limits on servicemembers found in the FTCA are those laid out in the exceptions; (2) the "incident to service" argument created by the Supreme Court should be rejected; and (3) "the exception for conduct that occurs during military action extends to all armed conflict and not only wars."[78]

In addressing the Court's concern over the impact on military discipline, Mr. Saltzburg found it "especially difficult to see how repealing *Feres* in medical malpractice cases could have any negative impact on the chain of command."[79] Nonetheless, in an effort to assuage any such concerns, he added that "the current exceptions in the FTCA provide ample protection to any actions which challenge discretionary command decisions or any tortious acts resulting therefore, or acts that arise out of combatant activities."[80]

The ABA encouraged Congress to "act expeditiously to end the current separate and unequal status and treatment of members of our Armed Forces regarding medical malpractice injuries."[81]

Testimony also came from Major General (MG) (Ret.) John D. Altenburg, Jr.,[82] former Deputy Judge Advocate General, U.S. Army. Major General Altenburg testified in favor of the *Feres* bar and provided several reasons for his opinion.

First, MG Altenburg acknowledged that although there may be a need for Congress to reassess and possibly increase the amount of benefits currently in place for injured servicemembers and their families, the benefits system as a

[75] The five witnesses were U.S. Representative Maurice Hinchey (D-NY); Major General (Ret.) John D. Altenburg, Jr., Former Deputy Judge Advocate General, United States Army; Mr. Stephen A. Saltzburg, member of the American Bar Association's House of Delegates and Co-Chair of the Military Justice Committee of the Criminal Justice Section; Mr. Eugene R. Fidell, Visiting Lecturer, Yale Law School and President, National Institute of Military Justice; and Ms. Ivette Rodriguez, sister of Marine Sgt. Carmelo Rodriguez.

[76] *Carmelo Rodriguez Military Medical Accountability Act of 2009: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. 114 (2009) (statement of Stephen A. Saltzburg, member of the American Bar Association's House of Delegates and Co-Chair of the Military Justice Committee of the Criminal Justice Section).

[77] *Id*. at 99.

[78] *Id*. at 104, 112, 115.

[79] *Id*. at 114.

[80] *Id*.

[81] Letter from Thomas M. Susman, Dir. of Governmental Affairs Office, Am. Bar Ass'n, to The Honorable John Conyers, Jr., Chairman, Comm. on the Judiciary, U.S. House of Representatives (July 28, 2009), *available at* http://www.abanet.org/poladv/letters/tortlaw (on file with author).

[82] Major General Altenburg has previously testified before Congress on the *Feres* doctrine. *See The Feres Doctrine: An Examination of this Military Exception to the Federal Tort Claims Act: Hearing Before the S. Committee on the Judiciary*, 107th Cong. 2d Sess. 24 (2002) (statement of Major General John D. Altenburg, Jr.).

whole provided the necessary financial and rehabilitative support needed by the injured parties.[83] These benefits include a "broad system of workers' compensation-like benefits administered by the military Services and the Veterans Administration."[84] He estimated that these benefits to include "continued medical care, medical disability, vocational training and job placement services, survivor benefits, and potential pay and entitlements (among others like life and injury insurance)" were valued in the hundreds of thousands of dollars.[85]

Second, MG Altenburg took issue with the underlying purpose of the bill—holding the medical community accountable for their negligence.[86] He believed that systems were already in place "to prevent medical wrongs and to make sure the same medical error is not repeated, or at the very least, the possibility of making the same mistake is minimized."[87]

Lastly, MG Altenburg argued that allowing servicemembers to file lawsuits with the likelihood of some receiving varying awards for similar injuries would result in a breakdown in good order and discipline:

> The current military disability and compensation system is designed to ensure servicemembers receive similar compensation for similar injuries under all circumstances experienced in the line of duty, and the Feres Doctrine "incident to service" test directly supports this design. Yet, H.R. 1478 proposes a discriminatory favoritism among servicemembers and will harm morale by undermining the equities of the benefit system and the justice system.[88]

This claim of military good order and discipline, first introduced by the Court in *Brown* (1954), and further advocated in *Stencel* (1977), *Shearer* (1985), and *Johnson* (1987), has in many ways evolved into a nebulous argument. Proponents of the *Feres* doctrine has been too quick to claim that all suits brought by servicemembers will result in a breakdown of good order and discipline; the Supreme Court, and to a greater extent, lower courts have failed to challenge the Government to specifically prove the nexus between the two. This has caused great angst among opponents to the *Feres* doctrine—especially in light of servicemembers being harmed by negligent medical treatment, such as the case with Sgt. Rodriguez.

D. The Argument Over Military Discipline

The future of the *Feres* doctrine as it applies to military medical malpractice lawsuits is contingent upon whether proponents can demonstrate the military discipline nexus or whether opponents can debunk this rationale. The time has come, however, to bring final resolution to the issue.

Justice Scalia's scathing dissent in *Johnson* is clear indication that the Court's "latter-conceived-of 'military discipline' rationale"[89] is in flux.[90] Scalia, a strict constructionist, stated that the *Feres* bar was nowhere to be found in the FTCA. "We realized seven years too late that 'there is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it.'"[91] In terms of military discipline, he stated:

> I cannot deny the possibility that some suits brought by servicemen will adversely affect military discipline, and if we were interpreting an ambiguous statute perhaps we could take that into account. But I do not think the effect upon military discipline is so certain, or so certainly substantial, that we are justified in holding (if we can ever be justified in holding) that

[83] *Carmelo Rodriguez Military Medical Accountability Act of 2009: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 111th Cong. 129–30 (2009) [hereinafter Altenburg Statement] (statement of Major General (Ret.) John D. Altenburg, Jr.).

[84] *Id.* at 132.

[85] *Id.* at 137.

[86] *Id.* at 134–36. It should be noted that under the current law, the Federal Employees Liability Reform and Tort Compensation Act ("Westfall Act") does protect medical personnel from being sued in their individual capacity if it is determined that they were acting in the scope of their employment at the time of the alleged negligence. When medical personnel are sued in their individual capacity by non-service members for alleged torts that occur in the scope of their employment, the United States will often substitute itself in place of the service member. This would defeat any goal a service member plaintiff would have of holding medical personnel financially liable. *See* U.S. DEP'T OF ARMY, REG. 27-40, LITIGATION para. 4-4 (19 Sept. 1994).

[87] Altenburg Statement, *supra* note 83, at 134.

[88] *Id.* at 139.

[89] United States v. Johnson, 481 U.S. 681, 698.

[90] It is interesting to note that Justice Scalia assumed office as an Associate Justice of the United States Supreme Court on 26 September 1986 and therefore was only on the bench for eight months before filing his dissent in *Johnson*. However, three senior members of the Court, of differing political philosophies, chose to join Scalia in his dissent. They included Justice Brennan who was already on the Court for thirty-one years; Justice Thurgood Marshall who was already on the Court for twenty years; and Justice John Paul Stevens who was already on the Court for twelve years. *See* Members of the Supreme Court of the United States, http://www.supremecourtus.gov/about/members.pdf (last visited Mar. 1, 2010).

[91] *Johnson*, 481 U.S. at 702 (Scalia, J., dissenting) (quoting Rayonier, Inc. v. United States, 352 U.S. 315, 320 (1957) (footnote omitted)).

> Congress did not mean what it plainly said in the statute before us.[92]

Scalia provided several logical reasons why military discipline was not addressed in the *Feres* decision or by Congress itself when it passed the FTCA: (1) perhaps it was unclear to Congress the affect such suits would have on military discipline; (2) perhaps Congress thought that the exclusions listed in the FTCA (*e.g.*, claims based upon combat command decisions; claims based upon performance of discretionary functions; claims arising in foreign countries; intentional torts; and claims based upon the execution of a statute or regulation) would automatically bar those types of suits that threatened military discipline; (3) perhaps Congress assumed that because the Government, and not the individual, will normally be liable in such suits, it was not worried about the affect such suits will have on military discipline; or (4) perhaps Congress believed that prohibiting such suits would have a negative affect military discipline.[93]

Scalia summed up his argument by stating that "neither the three original *Feres* reasons nor the *post hoc* rationalization of "military discipline" justifies our failure to apply the FTCA as written."[94]

Subsequent to the *Johnson* opinion, several appellate court decisions were issued that addressed servicemember tort litigation, and in particular, how such suits would cause federal courts to question military decisions, and moreover, affect military discipline. Lacking in any of these opinions, however, is a clear articulation of the nexus between medical malpractice suits and good order and discipline.

Atkinson v. United States[95] (*Atkinson I*) is by all accounts the first appellate court case to challenge the notion that all military medical malpractice suits are inherently *Feres* barred on the basis that they upset military discipline. In this case, Atkinson was an active duty Soldier alleging negligent prenatal care against the Government. In reversing the district court's decision to grant the Government's motion for summary judgment, the Court of Appeals for the Ninth Circuit put into context the lacking nexus it found between such a suit and any adverse impact it would have on military discipline:

> we fail to see how Atkinson's suit for negligent care administered in a non-field military hospital incident to her pregnancy can possibly undermine "the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel . . . ." (citation omitted). At the time Atkinson sought treatment, she was "not subject in any real way to the compulsion of military orders or performing any sort of military mission." (citation omitted). No command relationship exists between Atkinson and her attending physician. No military considerations govern the treatment in a non-field hospital of a woman who seeks to have a healthy baby. No military discipline applies to the care a conscientious physician will provide in this situation. Thus, in seeking treatment for complications of her pregnancy, Atkinson "was subject to military discipline only the very remotest sense." (citations omitted). . . . We are not dealing with a case "where the government's negligence occurred because of a decision requiring military expertise or judgment." (citation omitted).[96]

In light of the Supreme Court's *Johnson* opinion issued six months after *Atkinson I*, the Ninth Circuit withdrew its opinion in *Atkinson I* and issued a new opinion in *Atkinson v. United States* (*Atkinson II*), holding now that Atkinson was *Feres* barred.[97] However, the basis for the court's decision in *Atkinson II* was the fact that "*Johnson* appears to breathe new life into the first two *Feres* rationales, which until that time had been largely discredited and abandoned."[98] The two rationales referenced were the federal relationship between Government and servicemembers and the benefits already provided to servicemembers through the VBA. It is significant to note though that the court did not base its reversal on the military discipline rationale.[99] The court distinguished the facts in *Atkinson* from the facts in *Johnson* by pointing out that Johnson's helicopter crash was incident to his service in the Coast Guard whereas the harm suffered by Atkinson was a result of negligent prenatal medical treatment.[100] In essence, the court again felt that the military discipline rationale was too far-reaching to apply in Atkinson's case. The *Atkinson* court, however, is the only appellate court to have such reservations about automatically connecting the military discipline rationale to military medical malpractice cases.

Less than a month after the *Atkinson II* opinion, the Court of Appeals for the Eleventh Circuit heard the case of *Del Rio*

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[92] *Id.* at 699.

[93] *Id.* at 699–700.

[94] *Id.* at 700.

[95] 804 F.2d 561 (9th Cir. 1986), *withdrawn*, 825 F.2d 202 (9th Cir. 1987).

[96] *Id.* at 564–65.

[97] 825 F.2d 202 (9th Cir. 1987).

[98] *Id.* at 206.

[99] *Id.*

[100] *Id.*

v. United States.[101] Del Rio was an active duty Navy sailor who alleged that negligent prenatal care administered by the military caused premature delivery of her twin sons. The premature delivery caused one son to die and the other to suffer bodily injury. The court concluded that military discipline was part of the reason for barring a suit under the *Feres* doctrine. However, the court provided no substantial analysis as to how military discipline would be detrimentally influenced other than to say:

> [t]he district court correctly concluded that the medical malpractice case would require the court to second-guess the medical decisions of the military physicians. The malpractice suit would require the officers to "testify in court as to each other's decisions and actions." (citations omitted). Obviously the suit "*might* impair essential military discipline" because her position as a navy hospital corpsman places the discipline, supervision and control of her working group at issue.[102] (citations omitted).

Twenty five days later, the Court of Appeals for the Tenth Circuit issued its own post-*Johnson* opinion in *Madsen v. United States*.[103] Madsen was an Air Force captain who suffered injuries from a motorcycle accident and received treatment at an Army hospital. Appellant brought suit against the Government alleging medical malpractice. Holding that appellant was barred from filing suit under all three prongs of the *Feres* doctrine, the court addressed the military discipline prong by simply stating that appellant "was not free from the military command structure during his hospitalization, but was assigned to a medical holding company and was subject to orders from the hospital commander."[104]

Nearly a year after the *Johnson* opinion, the Court of Appeals for the Sixth Circuit issued a decision with regards to military medical malpractice cases and the *Feres* doctrine. In *Irvin v. United States*,[105] the court followed suit and barred a former active duty appellant from filing a cause of action against the Government for negligent prenatal care. The court quoted the Supreme Court's decision in *Stencel* with regards to military discipline:

> Turning to the third factor, it seems quite clear that where the case concerns an injury sustained by a soldier while on duty, the effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party. The litigation would take virtually the identical form in either case, and at issue would be the degree of fault, if any, on the part of the Government's agents and the effect upon the serviceman's safety. The trial would, in either case, involve second-guessing military orders, and would often require members of the Armed Services to testify in court as to each other's decisions and actions. This factor, too, weighs against permitting any recovery by petitioner against the United States.[106]

These appellate court holdings overly simplify the military discipline argument. They conclude that military medical malpractice suits negatively impact good order and discipline but fail to articulate what government evidence, if any, was offered to prove the impact. This point is best made by a federal district court when it properly challenged the Government to articulate the nexus.

In *C.R.S. v. United States*,[107] plaintiff D.B.S. was attending basic training at Fort Benning, Georgia when he had to undergo surgery at the local Army community hospital for abdominal bleeding. During the course of the surgery, D.B.S. received blood that was contaminated with HIV D.B.S. contracted the virus and subsequently passed it along to his wife N.A.S. The two conceived a child, C.R.S., who was born with the virus. The district court denied the Government's motion for summary judgment. As part of its rationale, the court stated that plaintiffs' claims had little connection to military discipline. More importantly, the court found that the Government failed to prove the impact such a case would have on military discipline:

> The government fails to demonstrate how permitting this claim to go forward would imperil decisions about national security and the military mission. Allowing a suit by a former member of the military for acts unrelated to the military mission does not, on these facts, threaten the integrity of military decision making. Furthermore, *some* inquiry into military activities and decision making is not a sufficient rationale for barring all suits. The same, or even greater, level of inquiry may result when a civilian sues the government for conduct related to military activities.

[101] 833 F.2d 282 (11th Cir. 1987).

[102] *Id.* at 286.

[103] 841 F.2d 1011 (10th Cir. 1987).

[104] *Id.* at 1014.

[105] 845 F.2d 126 (6th Cir. 1988).

[106] *Id.* at 129 (quoting Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 672–73 (citations omitted)).

[107] 761 F.Supp. 665 (D. Minn. 1991).

> (citations omitted). Finally, these claims do not present the treat of a [S]oldier haling his superior into court. (citations omitted).[108]

In reality, federal courts do in fact scrutinize the military's role in committing torts. This is illustrated in FTCA causes of action brought by civilian plaintiffs against the military, whether the alleged injury was caused by medical malpractice, negligent personal injury, property damage, or ultra-hazardous activities. Furthermore, servicemembers often provide sworn testimony as to how such torts were committed during depositions or at trial.

In settings outside of servicemember tort litigation, it is not uncommon for courts to pass judgment on military decisions. For instance, the Supreme Court issued opinions on military decisions that impacted the First Amendment of the U.S. Constitution.[109] Likewise, in military court-martials, commanders provide testimony regarding command decisions while servicemembers testify against each other and against their commanders.

Military negligent malpractice lawsuits rarely, if ever, question policy decisions made by Army Medical Corps officers in their capacity as a commander or staff officer.[110] Instead, they question the diagnosis and medical care rendered by physicians, physician assistants, and nurses to the servicemember, and whether such decisions/treatment met the standard of care – nothing more. Such claims do not fall into any of the exceptions articulated by Congress in the FTCA to include questioning military decisions that are made during a time of war or decisions made during the military's exercise or performance or the failure to exercise or perform a discretionary function.[111]

Simply put, the Supreme Court's military discipline rationale, first articulated in *Brown*, has added another layer of confusion to the already confusing *Feres* doctrine. This confusion has only been propounded by courts failing to require a showing of proof of the negative impact such suits would have on military discipline. Congress has also contributed to the uncertainty by failing to legislatively settle the issue of whether the FTCA was intended to encompass suits filed by servicemembers. An up or down vote on the Carmelo Rodriguez Military Medical Accountability Act would help bring resolution to this contentious issue that has been alive for over five decades.

E. Allowing Soldiers to File Medical Malpractice Claims: What Should the Army Expect

As discussed above, there is a serious push within Congress and the general public to have the *Feres* doctrine repealed, at least as it applies to medical malpractice lawsuits. Nonetheless, *Feres* minimized the amount of claims and litigation that the Army handles on a daily basis. If this bill becomes law, it will undoubtedly cause the Army to face a tidal wave of administrative claims and malpractice suits from the vast potential pool of active and reserve component personnel who are injured on a yearly basis due to military treatment.

Under the current framework, those seeking to file suit against the Army must first file an administrative claim with the claims office at a local military installation. Once filed, the local installation and U.S. Army Claims Service (USARCS) both have a combined total of six months within which to investigate and settle the claim. In accordance with Army Regulation 27-20,[112] the area claims office has authority to settle claims for up to $50,000 while the Commander of USARCS retains authority to settle claims for up to $200,000.

If six months elapse and the claim has neither been settled nor denied, the claimant may then file a civil suit in federal district court.[113] Although a great deal of claims are resolved at the administrative level, many claims, especially those with a settlement value of greater than $200,000, end up in litigation.[114]

Granting Soldiers the ability to file a civil suit against the United States will bring about a tremendous challenge for Government attorneys, paralegals, investigators, and support staff to handle this potential increase in workload.[115] The Army's current legal personnel structure will become greatly strained with the potential volume of new cases. In Fiscal Year (FY) 2008 and FY 2009, the Army received 251 claims[116] and 196 claims,[117] respectively. Furthermore, in calendar year 2009, twenty-nine new medical malpractice lawsuits were filed against the Army in federal district

[108] *Id.* at 668.

[109] *See* Greer v. Spock, 424 U.S. 828, 896 (1976) (holding that military installations are not public forums for civilian political activity. Commanders have the "historically unquestioned power" to prevent civilians from accessing a military post. "There is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command.").

[110] Brou, *supra* note 60, at 56.

[111] 28 U.S.C. § 2680 (2006).

[112] U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS para. 4-6 (8 Feb. 2008).

[113] 28 U.S.C. § 2675.

[114] Attorneys are entitled to collect twenty-five percent in attorney fees for cases that resolve in federal district court as opposed to the twenty percent allowed in the administrative phase. *See id.* § 2678.

[115] Altenburg Statement, *supra* note 83, at 140–42.

[116] E-mail from Jeffrey Raeber, Attorney, Tort Claims Div., U.S. Army Claims Serv., to author (Jan. 13, 2010, 12:42 EST) (on file with author).

[117] E-mail from Jeffrey Raeber, Attorney, Tort Claims Div., U.S. Army Claims Serv., to author (Jan. 13, 2010, 12:43 EST) (on file with author).

court.[118] It stands to reason that if Soldiers are no longer barred from filing claims for medical malpractice, the likelihood of these numbers increasing is substantial.

The Congressional Budget Office (CBO) estimates that enactment of H.R. 1478 would increase medical malpractice claims by 750 claims per year and of these, 250 claims would settle out of court or receive an award from the court.[119] The CBO further estimates that awards for 4100 medical malpractice claims would be paid over the 2010-2019 period[120] and that this would increase direct spending from the Judgment Fund by $2.7 billion.[121]

In terms of administrative claims, there will likely be a need for an increase in the number of tort attorneys and investigators assigned to the local installation Office of the Staff Judge Advocate (OSJA) as well as USARCS. The Army may also need to study the benefits of maintaining this two tier settlement authority structure within the administrative phase, and consider the possibility of investing the area claims office with full $200,000 settlement authority.

In terms of litigation, the U.S. Department of Justice defends the Army in all suits brought against it in federal court. Attorneys assigned to U.S. Army Litigation Division, Torts Branch, and to a lesser extent the local installation's OSJA, are tasked with assisting the Assistant U.S. Attorneys during all stages of litigation. This includes drafting motions to dismiss and motions for summary judgment; answers; responses to interrogatories; litigation reports; and obtaining all forms of discovery. If *Feres* is repealed, the Army will undoubtedly need to increase the number of attorneys, paralegals, and support staff currently assigned to the Torts Branch.

The other unresolved question is whether the bill should be made retroactive to as early as 1997 when Rodriguez had his military entrance physical and was diagnosed with melanoma. If this bill were made retroactive, it would mean that all servicemembers who had a potential suit from as far back as thirteen years ago would now be eligible to file a claim. This poses a host of legal issues predominantly in the area of discovery to include retrieving old patient medical charts, hospital records, test results, and locating witnesses who are no longer in the military and whose memories have faded with time. Other issues that would need to be resolved are courts having personal jurisdiction over those no longer in the military; how to handle claims filed by relatives of deceased soldiers; and whether settlement awards should be valued at present dollar value or the worth of the dollar at the time of the injury. There will also be a need to figure out the issue of statute of limitations as it relates to when the servicemember was made aware of the injury (e.g., assuming 1997 is the cut-off date, will the statute of limitations apply to when the injury took place or when the servicemember discovered the injury). All these issues should caution policymakers to think long and hard about the Government's ability to handle such retroactive claims.

V. Conclusion

The *Feres* doctrine has survived repeated assaults over the course of sixty years. The real battle over *Feres* needs to center around the issue of military discipline. If proponents are unable to demonstrate the nexus, then *Feres* should be overturned in the limited sense of medical malpractice claims.

Permitting servicemembers to file suit against the military will not be a complete panacea for their misfortune. Even with a partial repeal of *Feres*, stories similar to that of Marine Sgt. Carmelo Rodriguez will continue to unfold within the military. Many will continue to suffer from the ill effects of military medical malpractice. But partially repealing *Feres* will provide some level of compensation to the servicemembers and their family for the military's negligence. It will hold the Government accountable for its failure to meet the proper standard of care.

The *Feres* Court and other courts have invited Congress to repeal the *Feres* doctrine if Congress felt the decision was wrong.[122] Even if Congress were not inclined to accept the invitation, it should at the very least pass new FTCA legislation to clear up the years of confusion otherwise created by an overly active Supreme Court.

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[118] E-mail from Kelly Williams, Paralegal, U.S. Army Litigation Div., to author (Feb. 23, 2010, 10:41 EST) (on file with author).

[119] Congressional Budget Office, *Cost Estimate for H.R. 1478 Carmelo Rodriguez Military Medical Accountability Act of 2009*, *available at* http://cbo.gov/ftpdocs/106xx/doc10670/hr1478.pdf (last visited Mar. 1, 2010).

[120] *Id.*

[121] *Id.*

[122] *See* Feres v. United States, 340 U.S. 135, 138 (1950) ("Under these circumstances, no conclusion can be above challenge, but if we misinterpret the Act, at least Congress possesses a ready remedy."); *see also id.* at 139 ("These considerations, it is said, should persuade us to cast upon Congress, as author of the confusion, the task of qualifying and clarifying its language if the liability here asserted should prove so depleting of the public treasury as the Government fears."); Rayonier, Inc. v. United States, 352 U.S. 315, 320 (1957) ("If the Act is to be altered that is the function for the same body that adopted it."); United States v. Johnson, 481 U.S. 681, 687 (1987) ("Nor has Congress changed this standard (of *Feres*) in the close to forty years since it was articulated, even though, as the court noted in *Feres*, Congress 'possesses a ready remedy' to alter a misinterpretation of its intent.")

Appendix

The *Feres* Doctrine Timeline

Case	Factual Summary	Legal Holding	Voting by USSC
***Brooks* (1949)**	Two brothers, who were active duty Soldiers on leave at the time of the accident, were riding in a privately owned vehicle when a military truck driven by a civilian employee of the Army struck them.	"Incident to service" language introduced.	Opinion written by Justice Murphy. Justices Frankfurter and Douglas, dissenting.
***Feres* (1950)**			
a. Feres	Plaintiff was an active duty Soldier who died in a barracks fire.	Plaintiffs cannot sue because their injuries were incident to their service.	Opinion written by Justice Jackson with whom Chief Justice Vinson, and Justices Black, Reed, Frankfurter, Burton, Clark and Minton joining. Justice Douglas, concurring
b. Jefferson	Plaintiff was an active duty Soldier who underwent abdominal surgery performed by the military. Subsequent abdominal surgery revealed a towel was left behind during the first abdominal surgery.	Rationale: 1. Liability: Federal ≠ State 2. State tort law controls; FTCA could not apply to the military because they lack choice as to which state to live in. 3. Benefits already provided through VBA.	
c. Griggs	Plaintiff was an active duty Soldier who died because of the negligent, careless and unskillful acts of members of the Army Medical Corps.		
***Brown* (1954)**	A discharged veteran sued the VA hospital for negligent treatment of his injured knee.	Court raises a new concern: impact of such suits on military discipline.	Opinion written by Justice Douglas. Justice Black, with whom Justices Reed and Minton join, dissenting.

***Stencel Aero Eng'g Corp.* (1977)**	Air National Guard Captain permanently injured when the egress life-support system failed on his fighter aircraft.	Court reaffirms principles laid out in *Feres* and *Brown*. Rationale: 1. Relationship between government and servicemembers distinctively federal in character. 2. Benefits already provided through VBA. 3. Military discipline.	Opinion written by Chief Justice Burger. Justice Marshall, with whom Justice Brennan joins, dissenting.
***Shearer* (1985)**	Army Private, while off duty, was kidnapped and murdered by another Soldier. Army aware that perpetrator was previously convicted by a German court for manslaughter.	Court states that the first two *Stencel* factors are "no longer controlling": (1) relationship between the government and servicemembers; and (2) VBA benefits. Court states such suits would involve the judiciary in sensitive military affairs, at the expense of military discipline and effectiveness. Reaffirms the three factors cited in *Stencel*. Emphasis on military discipline.	Opinion written by Chief Justice Burger. Justice Brennan, with whom Justices Blackmun and Stevens join, concurring in part and concurring in judgment. Justice Marshall concurring in judgment. Justice Powell took no part in the decision. Opinion written by Justice Powell, with whom Justices Rhnquist, White, Blackmun, and O'Connor, joining. Justice Scalia, with whom Justices Brennan, Marshall, and Stevens join, dissenting.

American Civil-Military Relations: The Soldier and the State in a New Era[1]

Reviewed by *Major Andrew D. Gillman*[*]

Obviously, the real world is one of blends, irrationalities, and incongruities: actual personalities, institutions, and beliefs do not fit into neat logical categories. Yet neat logical categories are necessary if man is to think profitably about the real world in which he lives and to derive from it lessons for broader application and use.[2]

How does one write for the Soldier-scholar? Pure theory tends to impractical application; pure practice to a morass of disjointed theory. In *American Civil-Military Relations: The Soldier and the State in a New Era*, editors Suzanne C. Nielsen and Don M. Snider pursue more theory than practice as they seek to "amplify . . . the remarkable contribution that Samuel P. Huntington's *The Soldier and the State* . . . has made, and continues to make, to the study of civil-military relations."[3] The book succeeds as an academic text, blending a dozen articles from multiple disciplines into a pedagogically thorough perspective on Huntington's classic. Somewhere between the classroom door and the chambers of Congress, however, the neatly packaged conclusions fall short of clear guidance for practitioners grappling with a new century's realities. Despite these flaws and tedious prose, with effort the careful professional can extract lessons for improving both academically as a scholar and in the practice of civil-military relations.

To understand *American Civil-Military Relations*, one must first comprehend the work it celebrates. In 1957, Samuel Huntington advanced a bold theory of civilian-military interaction.[4] Writing during the Cold War's infancy, he sought to answer how a liberal democratic state could sustain the large force required to win that conflict, while remaining both militarily effective and democratically appropriate.[5] Huntington proposed a model comprised of interdependent elements, bound together by conflicting imperatives and methods of control.[6] The model described civilian and military leaders as operating within different cultures, interacting with each other as well as society.[7] He predicted continuing tension[8] in those relationships, as liberal[9] aspirations of American civil leaders and society clashed with the conservative realist mindset of a professional officer corps.[10] Paradoxically, Huntington concluded that to preserve democracy, society should grant the military substantial autonomy in managing violence (its peculiar professional skill), in exchange for submission to civilian direction.[11] For his theories, critics excoriated

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[1] AMERICAN CIVIL-MILITARY RELATIONS: THE SOLDIER AND THE STATE IN A NEW ERA (Suzanne C. Nielsen & Don M. Snider eds., 2009) [hereinafter AM. CIV.-MIL. REL.].

[2] SAMUEL P. HUNTINGTON, THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS, at vii (1957).

[3] Suzanne C. Nielsen & Don M. Snider, *Acknowledgements* to AM. CIV.-MIL. REL., *supra* note 1, at xvii.

[4] *See* Suzanne C. Nielsen & Don M. Snider, *Introduction* to AM. CIV.-MIL. REL., *supra* note 1, at 1; *see generally* HUNTINGTON, *supra* note 2.

[5] *See* HUNTINGTON, *supra* note 2, at 80–97, 456–66; Nielsen & Snider, *supra* note 4, at 1.

[6] *See* HUNTINGTON, *supra* note 2, at 80–97; Nielsen & Snider, *supra* note 4, at 2–4.

[7] *See* HUNTINGTON, *supra* note 2, at 143–62; Nielsen & Snider, *supra* note 4, at 4–6.

[8] *See* HUNTINGTON, *supra* note 2, at 143–62; *see also* Michael C. Desch, *Hartz, Huntington, and the Liberal Tradition in America*, *in* AM. CIV.-MIL. REL., *supra* note 1, at 91, 92, 108.

[9] *See* Desch, *supra* note 8, at 93 (arguing that "Liberal," as used by Huntington, referred not to the left of the American political spectrum, but rather to a "political system or set of values based on a combination of individual freedom, equality of opportunity, free markets, and political representativeness").

[10] *See* HUNTINGTON, *supra* note 2, at 59–79, 143–62, 456–66; Desch, *supra* note 8, at 101 (arguing similarly that "conservative Realism," as used by Huntington, referred not to the modern American political spectrum's right, but rather a distinct ideology). The ideology is characterized by

> . . . a number of distinct tenets: the conviction that violence is a permanent feature of international relations; the assumption of the primacy of the state in international relations; a discounting of intangible factors such as intentions and ideology in favor of a focus on tangible things such as material capabilities; and reluctance to commit military force and to wage war in all save the most pressing circumstances, but then a willingness to do so without limitation of the means employed.

Desch, *supra* note 8, at 101. Desch contrasted Huntington's view of absolutist Liberalism, which took opposite views on nearly all these tenets. *See id*. at 101–02.

[11] Huntington argued that a society which pursued a military democratically and ideologically representative of its citizenry did so at the risk of politicizing and thereby undermining officer professionalism and effectiveness. *See* HUNTINGTON, *supra* note 2, at 456–66. Three years later, the sociologist Morris Janowitz countered in an equally seminal work that the ideal citizen-soldier should aspire to civic republican values, which produce effective combat leaders firmly committed to democracy; society should therefore actively manage the military to inculcate these values. *See* MORRIS JANOWITZ, THE PROFESSIONAL SOLDIER: A SOCIAL AND

Huntington as overly militant, students staged protests during his lectures, and Harvard fired him.[12] His work endured though, and is now considered a foundational classic in the genre of civil-military relations[13] and a milestone in developing the American officer corps' self-conception as a profession.[14]

Fifty years later, a group of scholars gathered at the United States Military Academy at West Point, New York[15] to create a text illuminating *The Soldier and the State*'s contributions for a new generation of students.[16] *American Civil-Military Relations* is the result.[17] The contents include twelve articles by civilian and military writers in the fields of political science, sociology, and history.[18] Editors Suzanne Nielsen (current) and Don Snider (emeritus), faculty members at West Point, added an introductory chapter,[19] a comprehensive index,[20] and a wealth of endnotes[21] for future reference and research. Nielsen and Snider also distill the book in a final chapter, [22] cataloging nine conclusions—among them that Huntington's model remains relevant despite the inseparable nature of political and military affairs,[23] and that the military should expand its conceptualization of profession both in membership and required expertise.[24]

American Civil-Military Relations will appeal most to its core audience: the instructor or student in political science or sociology at the graduate or advanced undergraduate level. Broad surveys by established civilian scholars such Michael Desch (path of Liberalism),[25] Richard Betts (evolutions in government),[26] Peter Feaver (development of methodology, with student co-author Erika Seeler),[27] and Richard Kohn (military and civilian behaviors),[28] place Huntington's work in context and should foster vigorous class debates. Likewise, focus pieces by active duty U.S. Army officers Matthew Moten (dysfunctional relation portrait),[29] Christopher Gibson (civil-military partnership),[30] Richard Lacquement (military professional expertise, with co-author Nadia Schadlow, Ph.D.),[31] and Darrell Driver (military mindset)[32] each challenge aspects of Huntington's model.

The work's broadest academic appeal, though, lies in its rich variety of approaches to scholarly writing. Feaver and Seeler's dissection of methodology,[33] Desch's stalking of a political theory's arc,[34] and Driver's quantitative modeling of conservative realism[35] each showcase techniques of

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POLITICAL PORTRAIT (1960). For a good summary of the influence of these two works, see Peter D. Feaver & Erika Seeler, *Before and After Huntington: The Methodological Maturing of Civil-Military Studies*, *in* AM. CIV.-MIL. REL., *supra* note 1, at 72, 85–89.

[12] Robert D. Kaplan, *Looking the World in the Eye*, ATLANTIC MONTHLY, Dec. 2001, at 68, 70–72 (interview with Huntington). Huntington published *The Soldier and the State* while an assistant professor of government at Harvard. The book was initially dismissed as propagandist by skeptical academics, and so infuriated his colleagues that they voted to deny him tenure two years later. Forced to leave, he joined the faculty at the University of Chicago. In 1962, Harvard realized its mistake and lured him back as a tenured full professor. Students on campus staged protests during his classes, so his graduate students organized details to patrol the halls so lectures could proceed. Huntington continued teaching at Harvard for the next four decades, twice chairing the same department that once rejected him. *See id*. at 71–76.

[13] *See, e.g.*, Feaver & Seeler, *supra* note 11, at 89–90 (concluding that *The Soldier and the State* merits status as a political science classic due its methodological advances as well as its theories).

[14] *See* Nielsen & Snider, *supra* note 4, at 6–7.

[15] The setting was *apropos*: *The Soldier and the State* famously concluded by referring to the Academy as "a gray island in a many colored sea, a bit of Sparta in the midst of Babylon[,]" in contrasting its military values to prevailing national sentiments of Liberalism. HUNTINGTON, *supra* note 2, at 464–66.

[16] *See* Nielsen & Snider, *supra* note 3, at xvii–xviii.

[17] *Id*.

[18] *See Contributors* to AM. CIV.-MIL. REL., *supra* note 1, at 391.

[19] *See* Nielsen & Snider, *supra* note 4, at 1.

[20] *See Index* to AM. CIV.-MIL. REL., *supra* note 1, at 399.

[21] *See Notes* to AM. CIV.-MIL. REL., *supra* note 1, at 309.

[22] *See* Suzanne C. Nielsen & Don M. Snider, *Conclusion* to AM. CIV.-MIL. REL., *supra* note 1, at 290, 291.

[23] *See id.* at 290–93.

[24] *See id.* at 295–301.

[25] Desch, *supra* note 8, at 91.

[26] Richard K. Betts, *Are Civil-Military Relations Still a Problem*, *in* AM. CIV.-MIL. REL., *supra* note 1, at 11.

[27] Feaver & Seeler, *supra* note 11, at 72.

[28] Richard H. Kohn, *Building Trust: Civil-Military Behaviors for Effective National Security*, *in* AM. CIV.-MIL. REL., *supra* note 1, at 264.

[29] Matthew Moten, *A Broken Dialogue: Rumsfeld, Shinseki, and Civil-Military Tension*, *in* AM. CIV.-MIL. REL., *supra* note 1, at 42.

[30] Christopher P. Gibson, *Enhancing National Security and Civilian Control of the Military: A Madisonian Approach*, *in* AM. CIV.-MIL. REL., *supra* note 1, at 239.

[31] Nadia Schadlow & Richard A. Lacquement Jr., *Winning Wars, Not Just Battles: Expanding the Military Profession to Incorporate Stability Operations*, *in* AM. CIV.-MIL. REL. *supra* note 1, at 112.

[32] Darrell W. Driver, *The Military Mind: A Reassessment of the Ideological Roots of American Military Professionalism*, *in* AM. CIV.-MIL. REL., *supra* note 1, at 172.

[33] *See* Feaver & Seeler, *supra* note 11, at 72. Co-authored by a graduate student, this exquisite piece merits close examination by aspiring professional writers, both for adroitly navigating a large body of theoretical literature, and cleverly discerning that Huntington's methods (rigor, ecumenism, and pragmatism) presaged a larger shift in social science research that may outlive his theory.

[34] *See* Desch, *supra* note 8, at 91. For those addressing charged debates or seeking broader meaning in disparate fact patterns, this article deftly separates policy from theory, tracking Liberal absolutist traditions across several presidential administrations from opposing political parties and arguing convincingly while controversially that Liberalism remains a dominant and surprisingly bipartisan movement.

[35] *See* Driver, *supra* note 32, at 172. This short survey report strikes an empirical blow to Huntington's stereotype of military conservatism through a simple sorting exercise. *But see* Desch, *supra* note 8, at n.64 and

academic persuasion. Conversely (perhaps unintentionally), some chapters fall short of ideal, and may profitably be studied as examples of how *not* to plead a case. Risa Brooks's abrupt conclusion,[36] Williamson Murray's generic call to action,[37] and even the editors' introductory illogical leap[38] all show that the best writers sometimes falter.

Thus, *American Civil-Military Relations* provides the greatest benefits to those in an academic context, critiquing Huntington's model and teaching scholarly writing techniques. At some point, though, the student must leave the classroom for the wider world. It is here that the book fails to reach a larger practice-oriented audience. In fairness, some chapters suggest useful expansions to the military profession's boundaries, or propose thoughtful distinctions between types of political behaviors; these merit a close look. However, reliance on inaccurate historical evidence and failure to explore future trends both counsel that readers proceed with caution.

Military members at all levels may profit from two chapters challenging traditional professional boundaries. Schadlow and Lacquement argue that, given the wide variety of unconventional and nonkinetic operations, the military professional's peculiar expertise must expand beyond managing violence to succeed long-term.[39] Further, David Segal and Karen De Angelis propose expanding the concept of a military profession to include reservists, senior noncommissioned officers, and perhaps even civilian and contractor employees, who now share far more responsibility, corporateness, and expertise than in Huntington's day.[40] These areas constantly evolve: provincial reconstruction teams,[41] new fiscal authorities,[42] and composite units[43] all exemplify recent shifts towards increased professional membership and scope.

In addition, military and civilian leaders, as well as their respective staffs, should ponder any of four chapters on appropriate and effective political behaviors. Moten's piece—the gem of the bunch—intimately explores the disintegration of civil-military relations (or sadly, even civil speech) between then-Secretary of Defense Donald Rumsfeld and General (GEN) Eric Shinseki. The real treasure lies in his "what-if" analysis, which emphasizes that personalities play an underappreciated role in Huntington's theoretical model. Also, though not an attorney, James Burk ponders the justification for finding culpability when following illegal orders, relevant both to the Law of War and moral principles of delegation and accountability.[44] Lastly, the Brooks[45] and Kohn[46] articles each propose categories of political behavior and evaluate their impacts. While their conclusions are debatable,[47] the defining and weighing of such categories and impacts is perhaps this book's greatest theoretical *and* practical contribution.[48]

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accompanying text (citing opposing study). While his understanding of conservatism differs from Desch's (quoted at note 8 *supra*), Driver's article provides an elegant template for statistical analysis of human elements, and of brevity in persuasion.

[36] *See* Risa A. Brooks, *Militaries and Political Activity in Democracies*, *in* AM. CIV.-MIL. REL., *supra* note 1, at 213, 237. In six rapid-fire lines and with little explanation, the article takes an unexpectedly strident position, abandoning twenty-five preceding pages that developed a more nuanced understanding of political behavior.

[37] *Compare* Williamson Murray, *Professionalism and Professional Military Education in the Twenty-First Century*, *in* AM. CIV.-MIL. REL., *supra* note 1, at 133 (nonspecific exhortation to seek professional education), *with* Lieutenant Colonel Jeff Bovarnick, *Read Any Good (Professional) Books Lately?: A Suggested Professional Reading Program for Judge Advocates*, 204 MIL. L. REV. 260 (2010) (detailed advice on encouraging and pursuing professional reading, with recommended techniques and beginning book lists).

[38] *See* Nielsen & Snider, *supra* note 4, at 2–7. Discussion of Huntington's model jumped without warning from elements to impacts, leaving the reader to interpolate the crucial middle steps of his logic. Those not steeped in the jargon may struggle to connect the dots, or to see the articles introduced in the context of a broader debate.

[39] *See* Schadlow & Lacquement, *supra* note 31, at 112.

[40] *See* David R. Segal & Karin De Angelis, *Changing Conceptions of the Military as a Profession*, *in* AMERICAN CIVILIAN MILITARY RELATIONS, *supra* note 1, at 194.

[41] *See, e.g.*, *Provincial Reconstruction Teams Fact Sheet*, U.S. EMBASSY, BAGHDAD, IRAQ (Sept. 15, 2009), http://iraq.usembassy.gov/iraq_prt/provincial-reconstruction-teams-fact-sheet.html (describing PRTs in Iraq, a combined military and civilian initiative to promote stability and development).

[42] *See, e.g.*, U.S. DEP'T. OF DEFENSE, REG. 7000-14.R, DOD FIN. MGMT. REG. vol. 12, ch. 27, para. 270104 (Jan. 2009) (listing uses for which newly appropriated Commander's Emergency Response Program (CERP) funds "may be used to assist the Iraqi or Afghan people" including water and sanitation, food production, agriculture/irrigation, and electricity generation and transportation).

[43] *See, e.g.*, *Units*, 116TH AIR CONTROL WING, http://www.116acw.acc.af.mil/units/index.asp (last visited Sept. 14, 2010) (describing the 116th ACW, a Total Force Wing comprised of nine distinct categories of personnel).

[44] *See* James Burk, *Responsible Obedience by Military Professionals: The Discretion to Do What Is Wrong*, *in* AM. CIV.-MIL. REL., *supra* note 1, at 149 (arguing that autonomy implies accountability, not blind obedience).

[45] *See* Brooks, *supra* note 36, at 218–24 (with chart at 219). The five categories are public appeals, grandstanding, politicking, alliance building, and shoulder tapping. *Id.*

[46] *See* Kohn, *supra* note 28, at 274–89 (discussing numerous behaviors by both military and civilian leaders that inspire trust, as well as pressures to resist).

[47] For instance, Brooks and Kohn take strong positions that almost any political behavior by military officials threatens democracy. *See* Brooks, *supra* note 36, and accompanying text; Kohn, *supra* note 28, at 274–84. However, Nielsen & Snider conclude Huntington was wrong: it is impossible to separate political activity from military action, particularly at the highest levels. *See* Nielsen & Snider, *supra* note 22, at 290–93; *see also* MARK PERRY, FOUR STARS (1989) (listing myriad political activities intertwined with military action by the Joint Chiefs of Staff from 1945–86); Betts, *supra* note 26, at 11 (arguing that military political activity may look messy but is part of American democracy and poses little threat). *American Civil-Military Relations* leaves this theory-practice disconnect open for debate.

[48] Hence the introductory quote to this review. *See supra* note 2 and accompanying text. Ethics officials, legislative liaisons, and civil-military relations specialists might fruitfully compare these categories with current guidance on political activities by military personnel, *e.g.*, U.S. DEP'T OF

Sadly, this review does end not on that happy note. Aside from dense prose, two major flaws should serve as warnings to practitioners relying on *American Civil Military Relations*. First, the historian-reader might keep the pitchfork handy, as some articles rely on ignored, incomplete, or inaccurate understandings of past events. For example, to prevent domination by another Rumsfeld, Gibson proposes elevating the Chairman of the Joint Chiefs of Staff to a "Commanding General" (CG) position, giving this CG plenary authority over combatant commands, and assuring the CG access to the President as equal as that of the Secretary of Defense.[49] Such a position sounds suspiciously like that occupied by GEN Maxwell Taylor under President Kennedy in the 1960s, which his fellow JCS members claimed Taylor often used to constrict information flowing to the President.[50] To borrow Eliot Cohen's phrase, the proposal resolves one "unequal dialogue"[51] by creating another.[52]

In addition, Brooks classifies the 2003 congressional testimony by Army Chief of Staff GEN Eric Shinseki as political behavior.[53] While she later demurs in her analysis,[54] she ultimately concludes in general that such political behavior is destructive to democracy.[55] In reality, Moten's detailed review of hearing transcripts and U.S. Central Command (CENTCOM) records suggest that GEN Shinseki showed constraint, agreed with known CENTCOM estimates, and testified under oath before Congress—as the law requires.[56]

Even Kohn's work does not escape criticism. Addressing how military leaders must avoid civilian manipulation, he cites the departing words of GEN Matthew Ridgway, whom he praised as providing a model exemplar of "professional behavior" in trying circumstances, after he was "not renewed" as Army Chief of Staff by President Eisenhower.[57] Kohn next contrasts military resignation or retirement, solely for political effect, as wholly unprofessional as "there is no tradition of resignation of any kind in the American military."[58] However, at least three accounts suggest Ridgway deliberately resigned or retired early for political effect, refusing to carry out policies he deemed dangerous.[59] Those well-versed in history may spot other miscues, but these three doubtful arguments caution against relying too heavily on this book.

Finally, this work neglects a substantial opportunity to look toward the future. Though the subtitle reads, "in the New Era[,]" most articles remain retrospective, glancing only briefly to modern challenges.[60] They miss the chance to address a generation of all-volunteer officers, during a steady decrease in congressional military representation;[61] the proliferation of non-state threats and rising prominence of counterinsurgency doctrine;[62] increased domestic military operations such as disaster relief; the post-Cold War era; information transparency and availability; and increased judicial scrutiny of government action.

In summary, if you are interested in political science or military sociology, I recommend this book. If you are

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DEFENSE DIR. 1344.10, POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES (Feb. 19, 2008).

[49] *See* Gibson, *supra* note 30, at 239.

[50] *See* PERRY, *supra* note 47, at 125–30. For instance, Perry quotes General Curtis LeMay, then U.S. Air Force Chief of Staff, as saying, "[w]e in the military felt we were not in the decision-making process at all . . . [the JCS] did not agree with Taylor most of the time, so we felt that the president [sic] was not getting . . . unfiltered military advice." *Id.* at 127 (internal citations omitted).

[51] *See* ELIOT COHEN, SUPREME COMMAND: SOLDIERS, STATESMEN, AND LEADERSHIP IN WARTIME, at 209 (2002).

[52] Moreover, elevating the Commanding General to cabinet-level rank, as Gibson proposes, begs the question of where this General would fall in the line of succession to the Presidency—a tangible and weighty potential diminishing of civilian control.

[53] *Compare* Brooks, *supra* note 36, at 214, with Moten, *supra* note 29, at 54–56 (recounting in detail, that after much grilling, GEN Shinseki grudgingly offered a higher troop estimate for Iraq than the prevailing Bush administration number).

[54] *See* Brooks, *supra* note 36, at 230–31 (finding Shinseki's behavior did not fit neatly into her categorization scheme, but his obligation to speak out was uncertain—the fact that history later proved him right overshadowed the question of propriety).

[55] *See id.* at 236–39.

[56] *See* Moten, *supra* note 29, at 54–71.

[57] *See* Kohn, *supra* note 28, at 280–81 (applauding Ridgway's 1955 valedictory address).

[58] *Id.*

[59] *See* PERRY, *supra* note 47, at 58–64 (citing Eisenhower's Staff Secretary and Defense Liaison Officer, (later GEN) Andrew J. Goodpaster, as recollecting that the President threatened the JCS that if they did not agree with his policies, they could leave—Perry ultimately concluded that Ridgway deliberately retired early as a way of resigning in protest); *accord* RUSSELL F. WEIGLEY, HISTORY OF THE UNITED STATES ARMY 521–22 (enlarged ed. 1984) (suggesting Ridgway and other senior generals resigned to protest Eisenhower's policies) and ARTHUR M. SCHLESINGER, A THOUSAND DAYS: JOHN F. KENNEDY IN THE WHITE HOUSE, at 310 (2002 ed.) (winner of the Pulitzer Prize, this memoir by a noted historian observed that GEN Ridgway and two other senior Army generals purposefully resigned to "carry their fight to the public"). A year after resigning/retiring, Ridgway published a book questioning Eisenhower's policies. *See* HAROLD H. MARTIN, SOLDIER: THE MEMOIRS OF MATTHEW B. RIDGWAY (1956).

[60] Notable exceptions include the articles by Schadlow & Lacquement, *supra* note 31, and Segal & De Angelis, *supra* note 40. *See* notes 40–43 and accompanying text *supra*.

[61] *See* JENNIFER E. MANNING, CONG. RESEARCH SERV., R40086, MEMBERSHIP OF THE 111TH CONGRESS: A PROFILE, at 9–10 (2010) (noting continued decline in percentage of congressional members with prior military service).

[62] For instance, the new Counterinsurgency Field Manual departs substantially from the tenets Desch identifies as central to Huntington's concept of conservative military Realism. *Compare* Desch, *supra* note 8, at 101 (block quotation above), *with* U.S. ARMY FIELD MANUAL 3-24, COUNTERINSURGENCY paras. 1.2 to 1.4, 5.11 to 5.13, and appx. D (Dec. 2006) (noting the prevalence of non-state threats, counseling that both intangible and tangible approaches must be pursued, and embracing several legal and practical restrictions on means in warfare).

studying political science at West Point or another military academy, it is a must read. However, if you are a practitioner, I recommend cautious sampling: the second coming of a bold new Sam Huntington must wait for another day.

CLE News

1. Resident Course Quotas

a. Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's Legal Center and School, U.S. Army (TJAGLCS), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, attendance is prohibited.

b. Active duty service members and civilian employees must obtain reservations through their directorates training office. Reservists or ARNG must obtain reservations through their unit training offices or, if they are non-unit reservists, through the U.S. Army Personnel Center (ARPERCOM), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200.

c. Questions regarding courses should be directed first through the local ATRRS Quota Manager or the ATRRS School Manager, Academic Department at (800) 552-3978, extension 3307.

d. The ATTRS Individual Student Record is available on-line. To verify a confirmed reservation, log into your individual AKO account and follow these instructions:

Go to Self Service, My Education. Scroll to Globe Icon (not the AARTS Transcript Services).

Go to ATTRS On-line, Student Menu, Individual Training Record. The training record with reservations and completions will be visible.

If you do not see a particular entry for a course that you are registered for or have completed, see your local ATTRS Quota Manager or Training Coordinator for an update or correction.

e. The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGLCS CLE Course Schedule (August 2009–September 2010) (http://www.jagcnet.army.mil/JAGCNETINTERNET/HOMEPAGES/AC/TJAGSAWEB.NSF/Main?OpenFrameset (click on Courses, Course Schedule))

ATTRS. No.	Course Title	Dates
	GENERAL	
5-27-C20	184th JAOBC/BOLC III (Ph 2)	18 Feb. – 4 May 11
5-27-C20	185th JAOBC/BOLC III (Ph 2)	15 Jul – 28 Sep 11
5-27-C22	59th Judge Advocate Officer Graduate Course	16 Aug 10 – 26 May 11
5-27-C22	60th Judge Advocate Officer Graduate Course	15 Aug – 25 May 12
5F-F1	216th Senior Officer Legal Orientation Course	21 – 25 Mar 11
5F-F1	217th Senior Officer Legal Orientation Course	20 – 24 Jun 11
5F-F1	218th Senior Officer Legal Orientation Course	29 Aug – 2 Sep 11
5F-F3	17th RC General Officer Legal Orientation Course	1 – 3 Jun 11
5F-F5	Congressional Staff Legal Orientation (COLO)	17 – 18 Feb 11
5F-F52	41st Staff Judge Advocate Course	6 – 10 Jun 11
5F-F52-S	14th SJA Team Leadership Course	6 – 8 Jun 11

JARC 181	Judge Advocate Recruiting Conference	20 – 22 Jul 11

NCO ACADEMY COURSES		
512-27D30	2d Advanced Leaders Course (Ph 2)	10 Jan – 15 Feb 11
512-27D30	3d Advanced Leaders Course (Ph 2)	10 Jan – 15 Feb 11
512-27D30	4th Advanced Leaders Course (Ph 2)	14 Mar – 19 Apr 11
512-27D30	5th Advanced Leaders Course (Ph 2)	23 May – 28 Jun 11
512-27D30	6th Advanced Leaders Course (Ph 2)	1 Aug – 6 Sep 11
512-27D40	2d Senior Leaders Course (Ph 2)	14 Mar – 19 Apr 11
512-27D40	3d Senior Leaders Course (Ph 2)	23 May – 28 Jun 11
512-27D40	4th Senior Leaders Course (Ph 2)	1 Aug – 6 Sep 11

WARRANT OFFICER COURSES		
7A-270A0	JA Warrant Officer Basic Course	23 May – 17 Jun 11
7A-270A1	22d Legal Administrators Course	13 – 17 Jun 11
7A-270A2	12th JA Warrant Officer Advanced Course	28 Mar – 22 Apr 11

ENLISTED COURSES		
512-27D-BCT	13th BCT NCOIC Course	9 – 13 May 11
512-27D/20/30	22d Law for Paralegal NCO Course	21 – 25 Mar 11
512-27D/DCSP	20th Senior Paralegal Course	20 – 24 Jun 11
512-27DC5	34th Court Reporter Course	24 Jan – 25 Mar 11
512-27DC5	35th Court Reporter Course	18 Apr – 17 Jun 11
512-27DC5	36th Court Reporter Course	25 Jul – 23 Sep 11
512-27DC6	11th Senior Court Reporter Course	11 – 15 Jul 11
512-27DC7	15th Redictation Course	28 Mar – 1 Apr 11

ADMINISTRATIVE AND CIVIL LAW		
5F-F24	35th Administrative Law for Military Installations and Operations	14 – 18 Mar 11
5F-F22	64th Law of Federal Employment Course	22 – 26 Aug 11
5F-F24E	2011USAREUR Administrative Law CLE	12 – 16 Sep 11
5F-F202	9th Ethics Counselors Course	11 – 15 Apr 11

CONTRACT AND FISCAL LAW		
5F-F10	164th Contract Attorneys Course	18 – 29 Jul 11
5F-F12	82d Fiscal Law Course	7 – 11 Mar 11
5F-F14	29th Comptrollers Accreditation Fiscal Law Course	28 Feb – 4 Mar 11
5F-F103	11th Advanced Contract Course	31 Aug – 2 Sep 11

CRIMINAL LAW		
5F-F31	17th Military Justice Managers Course	22 – 26 Aug 11
5F-F33	54th Military Judge Course	18 Apr – 6 May 11
5F-F34	36th Criminal Law Advocacy Course	31 Jan – 4 Feb 11
5F-F34	37th Criminal Law Advocacy Course	7 – 11 Feb 11
5F-F34	38th Criminal Law Advocacy Course	12 – 16 Sep 11
5F-F34	39th Criminal Law Advocacy Course	19 – 23 Sep 11

INTERNATIONAL AND OPERATIONAL LAW		
5F-F40	2011 Brigade Judge Advocate Symposium	9 – 13 May 11
5F-F41	7th Intelligence Law Course	15 – 19 Aug 11
5F-F47	55th Operational Law of War Course	22 Feb – 4 Mar 11
5F-F47	56th Operational Law of War Course	1 – 12 Aug 11
5F-F48	4th Rule of Law Course	11 -15 Jul 11

3. Naval Justice School and FY 2010–2011 Course Schedule

For information on the following courses, please contact Jerry Gallant, Registrar, Naval Justice School, 360 Elliot Street, Newport, RI 02841 at (401) 841-3807, extension 131.

Naval Justice School Newport, RI		
CDP	**Course Title**	**Dates**
0257	Lawyer Course (020) Lawyer Course (030)	24 Jan – 1 Apr 11 1 Aug – 7 Oct 11
0258 (Newport)	Senior Officer (040) Senior Officer (050) Senior Officer (060) Senior Officer (070) Senior Officer (080)	14 – 18 Mar 11 (Newport) 25 – 29 Apr 11 (Newport) 23 – 27 May 11 (Newport) 13 – 17 Jun 11 (Newport) 6 – 9 Sep 11 (Newport)

2622 (Fleet)	Senior Officer (Fleet) (060) Senior Officer (Fleet) (070) Senior Officer (Fleet) (080) Senior Officer (Fleet) (090) Senior Officer (Fleet) (100) Senior Officer (Fleet) (110) Senior Officer (Fleet) (120) Senior Officer (Fleet) (130)	14 – 18 Feb 11 (Pensacola) 4 – 8 Apr 11 (Pensacola) 9 – 13 May 11 (Pensacola) 16 – 20 May 11 (Naples, Italy) 27 Jun – 1 Jun 11 (Pensacola) 1 – 5 Aug 11 (Pensacola) 1 – 5 Aug 11 (Camp Lejeune) 8 – 12 Aug 11 (Quantico)
03RF	Continuing Legal Education (020) Continuing Legal Education (030)	7 Mar – 20 May 11 13 Jun – 28 Aug 11
03TP	Basic Trial Advocacy (010)	7 – 11 Feb 11
07HN	Legalman Paralegal Core (010) Legalman Paralegal Core (020) Legalman Paralegal Core (030)	26 Jan – 18 May 11 24 May – 9 Aug 11 31 Aug – 20 Dec 11
NA	Intermediate Trial Advocacy (010)	16 – 20 May 11
525N	Prosecuting Complex Cases (010)	11 – 15 Jul 11
627S	Senior Enlisted Leadership Course (Fleet) (060) Senior Enlisted Leadership Course (Fleet) (070) Senior Enlisted Leadership Course (Fleet) (080) Senior Enlisted Leadership Course (Fleet) (090) Senior Enlisted Leadership Course (Fleet) (100) Senior Enlisted Leadership Course (Fleet) (110) Senior Enlisted Leadership Course (Fleet) (120) Senior Enlisted Leadership Course (Fleet) (130) Senior Enlisted Leadership Course (Fleet) (150) Senior Enlisted Leadership Course (Fleet) (160) Senior Enlisted Leadership Course (Fleet) (170)	31 Jan – 12 Feb 11 (Okinawa) 16 – 18 Feb (Norfolk) 22 – 24 Mar 11 (San Diego) 25 – 27 Apr 11 (Bremerton) 16 – 20 May 11(Naples) 1 – 3 Jun 11 (San Diego) 1 – 3 Jun 11 (Norfolk) 6 – 8 Jul 11 (San Diego) 8 – 10 Aug 11 (Millington) 20 – 22 Sep ((Pendleton) 21 – 23 Sep 11 (Norfolk)
748A	Law of Naval Operations (010) Law of Naval Operations (020)	28 Feb – 4 Mar 11 (San Diego) 19 – 23 Sep 11 (Norfolk)
748B	Naval Legal Service Command Senior Officer Leadership (010)	25 Jul – 5 Aug 11
748K	Trial Advocacy CLE (040)	14 – 15 Apr 11 (San Diego)
786R	Advanced SJA/Ethics (010)	25 – 29 Jul 11
7485	Classified Information Litigation Course (010)	2 – 6 May 11 (Andrews AFB)
7487	Family Law/Consumer Law (010)	Cancelled
7878	Legal Assistance Paralegal Course (010)	18 – 22 Apr 11
846L	Senior Legalman Leadership Course (010)	25 – 29 Jul 11
850T	Staff Judge Advocate Course (010) Staff Judge Advocate Course (020)	25 Apr – 6 May 11 (Norfolk) 11 – 22 Jul 11 (San Diego)

850V	Law of Military Operations (010)	6 – 17 Jun 11
900B	Reserve Lawyer Course (010) Reserve Lawyer Course (020)	20 – 24 Jun 11 26 – 30 Sep 11
932V	Coast Guard Legal Technician Course (010)	8 – 19 Aug 11
961A (PACOM)	Continuing Legal Education (030)	16 – 20 May 11 (Naples)
961D	Military Law Update Workshop (010) Military Law Update Workshop (020)	TBD TBD
961G	Military Law Update Workshop (Enlisted) (010) Military Law Update Workshop (Enlisted) (020)	TBD TBD
961J	Defending Complex Cases (010)	18 – 22 Jul 11
3938	Computer Crimes (010)	6 – 10 Jun 11 (Newport)
3759	Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	28 Mar – 1 Apr 11 (San Diego) 4 – 8 Apr 11 (San Diego) 25 – 29 Apr 11 (Bremerton) 2 – 6 May 11 (San Diego) 6 – 10 Jun 11 (San Diego) 19 – 23 Sep 11 (Pendleton)
4040	Paralegal Research & Writing (020) Paralegal Research & Writing (030)	7 – 20 Apr 11 18 – 29 Jul 11
4044	Joint Operational Law Training (010)	TBD
4048	Legal Assistance Course (010)	18 – 22 Apr 11
NA	Iraq Pre-Deployment Training (020) Iraq Pre-Deployment Training (020)	16 – 18 Feb 11 12 – 14 Jul 11
NA	Legal Specialist Course (020) Legal Specialist Course (030)	28 Jan – 1 Apr 11 29 Apr – 1 Jul 11
NA	Paralegal Ethics Course (020) Paralegal Ethics Course (030)	7 – 11 Mar 11 13 – 17 Jun 11
NA	Legal Service Court Reporter (020) Legal Service Court Reporter (030)	14 Jan – 1 Apr 11 22 July – 7 Oct 11
NA	Information Operations Law Training (010)	4 – 18 Mar 11 (Norfolk)
NA	Senior Trial Counsel/Senior Defense Counsel Leadership (010)	4 – 8 Apr 11

Naval Justice School Detachment Norfolk, VA		
0376	Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080) Legal Officer Course (090)	24 Jan – 11 Feb 11 28 Feb – 18 Mar 11 4 – 22 Apr 11 9 – 27 May 11 13 Jun – 1 Jul 11 11 – 29 Jul 11 15 Aug – 2 Sep 11
0379	Legal Clerk Course (030) Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080)	31 Jan – 11 Feb 1 7 – 18 Mar 11 11 – 22 Apr 11 16 – 27 May 11 18 – 29 Jul 1 22 Aug – 2 Sep 11
3760	Senior Officer Course (040) Senior Officer Course (050) Senior Officer Course (060) Senior Officer Course (070)	28 Mar – 1 Apr 11 6 – 10 Jun 11 8 – 12 Aug 11 (Millington) 12 – 16 Sep 11

Naval Justice School Detachment San Diego, CA		
947H	Legal Officer Course (030) Legal Officer Course (040) Legal Officer Course (050) Legal Officer Course (060) Legal Officer Course (070) Legal Officer Course (080)	24 Jan – 11 Feb 11 28 Feb – 18 Mar 11 9 – 27 May 11 13 Jun – 1 Jul 11 25 Jul – 12 Aug 11 22 Aug – 9 Sep 11

947J	Legal Clerk Course (040) Legal Clerk Course (050) Legal Clerk Course (060) Legal Clerk Course (070) Legal Clerk Course (080) Legal Clerk Course (090)	31 Jan – 11 Feb 11 28 Mar – 8 Apr 11 9 – 20 May 11 13 – 24 Jun 11 1 – 12 Aug 11 22 Aug – 2 Sep 11

4. Air Force Judge Advocate General School Fiscal Year 2010–2011 Course Schedule

For information about attending the following cou Legal Clerk Course (070)rses, please contact Jim Whitaker, Air Force Judge Advocate General School, 150 Chennault Circle, Maxwell AFB, AL 36112-5712, commercial telephone (334) 953-2802, DSN 493-2802, fax (334) 953-4445.

Air Force Judge Advocate General School, Maxwell AFB,AL	
Course Title	**Dates**
Paralegal Apprentice Course, Class 11-02	3 Jan – 16 Feb 11
Legal & Administrative Investigations Course, Class 11-A	7 – 11 Feb 11
European Trial Advocacy Course, Class 11-A (Off-Site, Kapaun AS, Germany)	14 – 18 Feb 11
Judge Advocate Staff Officer Course, Class 11-B	14 Feb – 15 Apr 11
Paralegal Craftsman Course, Class 11-02	14 Feb – 30 Mar 11
Paralegal Apprentice Course, Class 11-03	28 Feb – 12 Apr 11
Environmental Law Update Course (SAT-DL), Class 11-A	22 – 24 Mar 1
Defense Orientation Course, Class 11-B	4 – 8 Apr 11
Advanced Labor & Employment Law Course, Class 11-A (Off-Site, Rosslyn, VA location)	12 – 14 Apr 11
Military Justice Administration Course, Class 11-A	18 – 22 Apr 11
Paralegal Apprentice Course, Class 11-04	25 Apr – 8 Jun 11
Cyber Law Course, Class 11-A	26 – 28 Apr 11
Total Air Force Operations Law Course, Class 11-A	29 Apr – 1 May 11
Advanced Trial Advocacy Course, Class 11-A	9 – 13 May 11
Operations Law Course, Class 11-A	16 – 27 May 11
Negotiation and Appropriate Dispute Resolution Course, 11-A	23 – 27 May 11
Reserve Forces Paralegal Course, Class 11-A	6 – 10 Jun 11
Staff Judge Advocate Course, Class 11-A	13 – 24 Jun 11
Law Office Management Course, Class 11-A	13 – 24 Jun 11
Paralegal Apprentice Course, Class 11-05	20 Jun – 3 Aug 11
Judge Advocate Staff Officer Course, Class 11-C	11 Jul – 9 Sep 11
Paralegal Craftsman Course, Class 11-03	11 Jul – 23 Aug 11
Paralegal Apprentice Course, Class 11-06	15 Aug – 21 Sep 11

Environmental Law Course, Class 11-A	22 – 26 Aug 11
Trial & Defense Advocacy Course, Class 11-B	12 – 23 Sep 11
Accident Investigation Course, Class 11-A	12 – 16 Sep 11

5. Civilian-Sponsored CLE Courses

For additional information on civilian courses in your area, please contact one of the institutions listed below:

AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL: Association of Government Attorneys in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

ALIABA: American Law Institute-American Bar Association
Committee on Continuing Professional Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB: Continuing Education of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA:	Computer Law Association, Inc. 3028 Javier Road, Suite 500E Fairfax, VA 22031 (703) 560-7747
CLESN:	CLE Satellite Network 920 Spring Street Springfield, IL 62704 (217) 525-0744 (800) 521-8662
ESI:	Educational Services Institute 5201 Leesburg Pike, Suite 600 Falls Church, VA 22041-3202 (703) 379-2900
FBA:	Federal Bar Association 1220 North Fillmore Street, Suite 444 Arlington, VA 22201 (571) 481-9100
FB:	Florida Bar 650 Apalachee Parkway Tallahassee, FL 32399-2300 (850) 561-5600
GICLE:	The Institute of Continuing Legal Education P.O. Box 1885 Athens, GA 30603 (706) 369-5664
GII:	Government Institutes, Inc. 966 Hungerford Drive, Suite 24 Rockville, MD 20850 (301) 251-9250
GWU:	Government Contracts Program The George Washington University Law School 2020 K Street, NW, Room 2107 Washington, DC 20052 (202) 994-5272
IICLE:	Illinois Institute for CLE 2395 W. Jefferson Street Springfield, IL 62702 (217) 787-2080
LRP:	LRP Publications 1555 King Street, Suite 200 Alexandria, VA 22314 (703) 684-0510 (800) 727-1227
LSU:	Louisiana State University Center on Continuing Professional Development Paul M. Herbert Law Center Baton Rouge, LA 70803-1000 (504) 388-5837

MLI:	Medi-Legal Institute 15301 Ventura Boulevard, Suite 300 Sherman Oaks, CA 91403 (800) 443-0100
MC Law:	Mississippi College School of Law 151 East Griffith Street Jackson, MS 39201 (601) 925-7107, fax (601) 925-7115
NAC	National Advocacy Center 1620 Pendleton Street Columbia, SC 29201 (803) 705-5000
NDAA:	National District Attorneys Association 44 Canal Center Plaza, Suite 110 Alexandria, VA 22314 (703) 549-9222
NDAED:	National District Attorneys Education Division 1600 Hampton Street Columbia, SC 29208 (803) 705-5095
NITA:	National Institute for Trial Advocacy 1507 Energy Park Drive St. Paul, MN 55108 (612) 644-0323 (in MN and AK) (800) 225-6482
NJC:	National Judicial College Judicial College Building University of Nevada Reno, NV 89557
NMTLA:	New Mexico Trial Lawyers' Association P.O. Box 301 Albuquerque, NM 87103 (505) 243-6003
PBI:	Pennsylvania Bar Institute 104 South Street P.O. Box 1027 Harrisburg, PA 17108-1027 (717) 233-5774 (800) 932-4637
PLI:	Practicing Law Institute 810 Seventh Avenue New York, NY 10019 (212) 765-5700
TBA:	Tennessee Bar Association 3622 West End Avenue Nashville, TN 37205 (615) 383-7421

TLS:	Tulane Law School Tulane University CLE 8200 Hampson Avenue, Suite 300 New Orleans, LA 70118 (504) 865-5900
UMLC:	University of Miami Law Center P.O. Box 248087 Coral Gables, FL 33124 (305) 284-4762
UT:	The University of Texas School of Law Office of Continuing Legal Education 727 East 26th Street Austin, TX 78705-9968
VCLE:	University of Virginia School of Law Trial Advocacy Institute P.O. Box 4468 Charlottesville, VA 22905

6. Information Regarding the Judge Advocate Officer Advanced Course (JAOAC)

a. The JAOAC is mandatory for an RC company grade JA's career progression and promotion eligibility. It is a blended course divided into two phases. Phase I is an online nonresident course administered by the Distributed Learning Division (DLD) of the Training Developments Directorate (TDD), at TJAGLCS. Phase II is a two-week resident course at TJAGLCS each January.

b. Phase I (nonresident online): Phase I is limited to USAR and Army NG JAs who have successfully completed the Judge Advocate Officer's Basic Course (JAOBC) and the Judge Advocate Tactical Staff Officer Course (JATSOC) prior to enrollment in Phase I. Prior to enrollment in Phase I, a student must have obtained at least the rank of CPT and must have completed two years of service since completion of JAOBC, unless, at the time of their accession into the JAGC they were transferred into the JAGC from prior commissioned service. Other cases are reviewed on a case-by-case basis. Phase I is a prerequisite for Phase II. For further information regarding enrolling in Phase I, please contact the Judge Advocate General's University Helpdesk accessible at https://jag.learn.army.mil.

c. Phase II (resident): Phase II is offered each January at TJAGLCS. Students must have submitted all Phase I subcourses for grading, to include all writing exercises, by 1 November in order to be eligible to attend the two-week resident Phase II in January of the following year.

d. Regarding the January 2012 Phase II resident JAOAC, students who fail to submit all Phase I non-resident subcourses by 2400 1 November 2011 will not be allowed to attend the resident course.

e. If you have additional questions regarding JAOAC, contact Ms. Donna Pugh, commercial telephone (434) 971-3350, or e-mail donna.pugh@us.army.mil.

7. Mandatory Continuing Legal Education

Judge Advocates must remain in good standing with the state attorney licensing authority (i.e., bar or court) in at least one state in order to remain certified to perform the duties of an Army Judge Advocate. This individual responsibility may include requirements the licensing state has regarding continuing legal education (CLE).

To assist attorneys in understanding and meeting individual state requirements regarding CLE, the Continuing Legal Education Regulators Association (formerly the Organization of Regulatory Administrators) provides an exceptional website at www.clereg.org (formerly www.cleusa.org) that links to all state rules, regulations and requirements for Mandatory Continuing Legal Education.

The Judge Advocate General's Legal Center and School (TJAGLCS) seeks approval of all courses taught in Charlottesville, VA, from states that require prior approval as a condition of granting CLE. For states that require attendance to be reported directly by providers/sponsors, TJAGLCS will report student attendance at those courses. For states that require attorneys to self-report, TJAGLCS provides the appropriate documentation of course attendance directly to students. Attendance at courses taught by TJAGLCS faculty at locations other than Charlottesville, VA, must be self-reported by attendees to the extent and manner provided by their individual state CLE program offices.

Regardless of how course attendance is documented, it is the personal responsibility of each Judge Advocate to ensure that their attendance at TJAGLCS courses is accounted for and credited to them and that state CLE attendance and reporting requirements are being met. While TJAGLCS endeavors to assist Judge Advocates in meeting their CLE requirements, the ultimate responsibility remains with individual attorneys. This policy is consistent with state licensing authorities and CLE administrators who hold individual attorneys licensed in their jurisdiction responsible for meeting licensing requirements, including attendance at and reporting of any CLE obligation.

Please contact the TJAGLCS CLE Administrator at (434) 971-3309 if you have questions or require additional information.

Current Materials of Interest

1. Training Year (TY) 2011 RC On-Sites, Functional Exercises and Senior Leader Courses

Date	Region	Location	Units	ATRRS Number	POCs
25 – 27 Feb 2011	National Capital Region On-Site FOCUS: Expeditionary Contracting & Rule of Law	Alexandria, VA	151st LSO 139th LSO 10th LSO 153d LSO USARLC	002	CPT David Rittgers dave_rittgers@yahoo.com david.rittgers@us.army.mil SSG Marlon Zuniga Marlon.Zuniga@usar.army.mil 703-960-7393, ext. 7443
25 – 27 Mar 2011	Western On-Site FOCUS: Military Justice & Advocacy / Legal Administrators	Salt Lake City, UT	87th LSO 6th LSO 75th LSO 78th LSO	003	MAJ Timothy Taylor Timothy.l.taylor@us.army.mil SFC Brenda Hallows Brenda.hallows@usar.army.mil 801.656.3600
30 Apr – 6 May 2011	Trial Defense Service Functional Excercise	San Antonio, TX	22d LSO 154th LSO	NA	CPT DuShane Eubanks d.eubanks@us.army.mil 972.343.3143 Mr. Anthony McCullough Anthony.mccullough@us.army.mil 972.343.4263
14 – 21 May 2011	Nationwide	Fort McCoy, WI	8 Soldiers from each LSO	NA	SSG Keisha Parks keisha.williams@usar.army.mil 301.944.3708
2 – 5 Jun 2011	Yearly Training Brief and Senior Leadership Course	Gaithersburg, MD	Each LSO Cdr, Sr Paralegal NCO, plus one designated by LSO Cdr	NA	LTC Dave Barrett David.barrett1@us.army.mil SSG Keisha Parks keisha.williams@usar.army.mil 301.944.3708
15 – 17 Jul 2011	Northeast On-Site FOCUS: Rule of Law	New York City, NY	4th LSO 3d LSO 7th LSO 153d LSO	004	CPT Scott Horton Scott.g.horton@us.army.mil CW2 Deborah Rivera Deborah.rivera1@us.army.mil 718.325.7077
12 – 14 Aug 2011	Midwest On-Site FOCUS: Rule of Law	Chicago, IL	91st LSO 9th LSO 8th LSO 214th LSO	005	MAJ Brad Olson Bradley.olson@us.army.mil SFC Treva Mazique treva.mazique@usar.army.mil 708.209.2600, ext. 229

2. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DoD) access in some cases. Whether you have Army access or DoD-wide access, all users will be able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

(a) Active U.S. Army JAG Corps personnel;

(b) Reserve and National Guard U.S. Army JAG Corps personnel;

(c) Civilian employees (U.S. Army) JAG Corps personnel;

(d) FLEP students;

(e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DoD personnel assigned to a branch of the JAG Corps; and, other personnel within the DoD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to: LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

(1) Using a Web browser (Internet Explorer 6 or higher recommended) go to the following site: http://jagcnet.army.mil.

(2) Follow the link that reads "Enter JAGCNet."

(3) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "Password" in the appropriate fields.

(4) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.

(5) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.

(6) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

(7) Once granted access to JAGCNet, follow step (c), above.

3. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

The TJAGSA, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGSA, all of which are compatible with Microsoft Windows XP Professional and Microsoft Office 2003 Professional.

The TJAGSA faculty and staff are available through the Internet. Addresses for TJAGSA personnel are available by e-mail at jagsch@hqda.army.mil or by accessing the JAGC directory via JAGCNET. If you have any problems, please contact Legal Technology Management Office at (434) 971-3257. Phone numbers and e-mail addresses for TJAGSA personnel are available on TJAGSA Web page at http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGSA classes, please ensure that your office e-mail is available via the web. Please bring the address with you when attending classes at TJAGSA. If your office does not have web accessible e-mail, forward your office e-mail to your AKO account. It is mandatory that you have an AKO account. You can sign up for an account at the Army Portal, http://www.jagcnet.army.mil/tjagsa. Click on "directory" for the listings.

Personnel desiring to call TJAGSA can dial via DSN 521-7115 or, provided the telephone call is for official business only, use the toll free number, (800) 552-3978; the receptionist will connect you with the appropriate department or directorate. For additional information, please contact the LTMO at (434) 971-3264 or DSN 521-3264.

4. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Daniel C. Lavering, The Judge Advocate General's Legal Center and School, U.S. Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.C.Lavering@us.army.mil.