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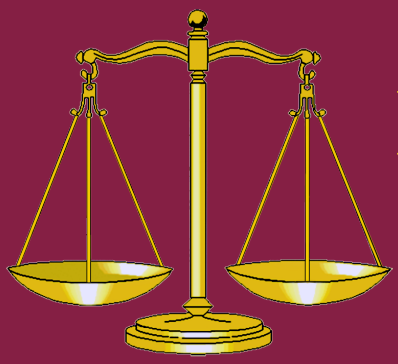

Military Law Review

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Department of the Army Pamphlet 27-100-223-2

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Military Law Review

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MILITARY LAW REVIEW

Volume 223 **Issue 2**

BARRACKS, DORMITORIES, AND CAPITOL HILL: FINDING JUSTICE IN THE DIVERGENT POLITICS OF MILITARY AND COLLEGE SEXUAL ASSAULT

MAJOR ROBERT E. MURDOUGH*

> *And for those who are in uniform who have experienced sexual assault, I want them to hear directly from their Commander-In-Chief that I've got their backs. I will support them. And we're not going to tolerate this stuff and there will be accountability. If people have engaged in this behavior, they should be prosecuted.*
> —President Barack Obama[1]

> *This is on all of us, every one of us, to fight campus sexual assault. You are not alone, and we have your back, and we are going to organize campus by campus,*

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[1] President Barack Obama, Remarks by President Obama and President Park of South Korea in a Joint Press Conference (May 7, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/05/07/remarks-president-obama-and-president-park-south-korea-joint-press-confe.

> *city by city, state by state. This entire country is going to make sure that we understand what this is about, and that we're going to put a stop to it.*
> —President Barack Obama[2]

I. Introduction

She is nineteen years old. She left home six months ago, and this is her first time living on her own. She has made a few new friends and is starting to learn her way around. One Friday night after a particularly stressful week, she and her roommate are invited to a party on the floor below their room. She does not know many of the people there, but she feels comfortable since her roommate will be there as well. When they get there, over twenty people are crammed into a room intended for three. It is hot, loud, and humid. The music is nearly drowned out by the din of conversation.

Someone hands her a red plastic cup filled to the brim with an unfamiliar alcoholic beverage. She has drunk alcohol only once before at her high school graduation party. But not wanting to stand out, she accepts it and begins to drink. She and her roommate lose track of each other in the crowd. The drink helps her to relax, and from somewhere, she gets another one. She sees a guy she recognizes—his job had been to show her around, make sure she knew when and where to be, and introduce her to people so she did not feel isolated. Tonight he is wearing a tight camouflage t-shirt with the word "TAPOUT" across the front in stylized capital letters. He sees her and jerks his chin upward in a wordless nod of recognition. She smiles, glad to see a familiar face. She cannot remember his first name, but thinks he is either twenty-one or twenty-two years old.

He asks if she wants to step into the hallway to "get some air." She agrees, and the hallway is blessedly cooler. He offers her another red cup. Not wanting to be rude, she accepts. By now her head is swimming, the sensation of being drunk is unfamiliar to her. She remembers talking about her hometown. Distantly, as if from underwater, she hears him ask if she has a boyfriend.

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[2] President Barack Obama, Remarks by the President at the "It's On Us" Campaign Rollout (Sept. 19, 2014), *available at* http://www.whitehouse.gov/photos-and-video/video/2014/09/19/president-obama-speaks-launch-it-s-us-campaign.

She wakes up the next morning in physical pain, feeling nauseous. She opens her eyes to see an unfamiliar room decorated with sports and martial-arts posters. She sees her clothes from the night before in a ball on the floor. She is lying underneath a hot blanket on a plastic mattress with no sheets. He enters the room, fully dressed. Questions race through her head. Eventually she asks, in as neutral a tone as she can manage, "Did we have sex last night?" He pauses for a moment and says, "Yeah. You should probably get going."

From that moment, everything that happens—how and by whom that night's events are defined, reported, investigated, and adjudicated—will overwhelmingly depend on one thing. The most important fact will not be his actions, her actions, her blood-alcohol level, or his intentions, but whether she and he are members of the military or students on a college campus.

Military organizations and colleges bear many similarities. Both are organizations of mutual acceptance—an individual must apply to join; the organization may choose to accept. Both communities are relatively insular, have similarly-aged initial entry populations,[3] grapple with the strong nexus between alcohol abuse and sexual assault,[4] and maintain internal disciplinary processes to address misconduct within the

---

[3] Students between eighteen and twenty-four years old accounted for 58.2 percent of all fall enrollment for both undergraduate and post-baccalaureate programs in 2007, 56.9 percent in 2009, and 56.6 percent in 2011. U.S. DEP'T OF EDUC. INST. OF EDUC. SCI, DIGEST OF EDUCATIONAL STATISTICS tbl. 303.45 (2013), *available at* http://nces.ed.gov/programs/digest/d13/tables/dt13_303.45.asp. Meanwhile, the average age for enlistment in the regular Army for the same years was 21.7, 22, and 21.3, respectively. *Support Army Recruiting: Frequently Asked Questions About Recruiting*, U.S. ARMY RECRUITING COMMAND, http://www.usarec.army.mil/support/faqs.htm (last updated Dec. 4, 2013).

[4] *See* REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 16 (June 2014) [hereinafter RSP REPORT] ("Alcohol use and abuse are major factors in military sexual assault affecting both the victim and the offender."); Alyssa S. Keehan, Senior Risk Management Counsel, *Student Sexual Assault: Weathering the Perfect Storm*, UNITED EDUCATORS 1 (2011), *available at* http://contentz.mkt5031.com/lp/37886/394531/Student%20Sexual%20Assault_Weathering%20the%20Perfect%20Storm.pdf ("Most situations involve acquaintances, no witnesses, and an unclear memory of events due to alcohol abuse."); *see also* Richard Perez-Pena & Kate Taylor, *Fight Against Sexual Assaults Holds Colleges to Account*, N.Y. TIMES, May 3, 2014, http://www.nytimes.com/2014/05/04/us/fight-against-sex-crimes-holds-colleges-to-account.html ("In surveys, a majority of the students who say they have been sexually assaulted say that they were under the influence of alcohol at the time, and often the assailants were, too.").

organization.[5] Both are currently under intense public and political scrutiny concerning how they address sexual assault; the media sensationalizes the issue with terms like "epidemic,"[6] while advocates accuse both institutions of perpetuating a "rape culture."[7] Yet political forces have pushed the military and colleges in opposite directions.

Heavy political pressures influence the systems established to respond to sexual assault in the military and in colleges.[8] Those pressures, frequently from the same actors, have produced very disparate, yet commonly problematic, institutional responses to sexual assault. This divergence provides an opportunity to compare and contrast different approaches—one pressured to maximize criminal prosecutions and skeptical of institutional leaders, the other compelled to internalize the roles of fact finder and adjudicator in a quasi-judicial process.

Where politics produce similarity, the comparisons can highlight shortcomings; where politics produce difference, the contrasts can demonstrate the superiority of one approach. First, the manipulation and misinterpretation of the overbroad, ambiguous definitions of the term "sexual assault," which is common to both the military and colleges, shows the need to clearly define the term, while the shortcomings of amateur college investigations highlight the need for professional law enforcement. Second, the drive toward treating victims and accused[9] as

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[5] *See infra* Part III.

[6] *E.g.* Editorial, *Campus Rape Epidemic Finally Getting Attention*, L.A. DAILY NEWS, Feb. 4, 2014, http://www.dailynews.com/opinion/20140204/campus-rape-epidemic-finally-getting-attention-editorial; Nick Schwellenbach, *Fear of Reprisal: The Quiet Accomplice in the Military's Sexual Assault Epidemic*, TIME (May 9, 2013), http://nation.time.com/2013/05/09/fear-of-reprisal-the-quiet-accomplice-in-the-militarys-sexual-assault-epidemic/.

[7] *E.g.*, Caroline Heldman and Bailee Brown, *Why Colleges Won't (Really) Address Rape Culture*, MS. MAGAZINE BLOG (Oct 8. 2014), http://msmagazine.com/blog/2014/10/08/why-colleges-wont-really-address-rape-culture/; David Crary, *Enduring Macho Culture, Unique Legal System Perpetuate Rape Culture in Military*, TALKING POINTS MEMO (June 3, 2013, 11:40 AM), http://talkingpointsmemo.com/news/enduring-macho-culture-unique-legal-system-perpetuate-rape-culture-in-military.

[8] Unless otherwise stated, the terms "college" and "colleges" refer to any post-secondary educational institution, including colleges, community colleges, universities, graduate, and post-graduate schools.

[9] This article is focused on process and policy, not the merits of individual claims. As such, for the sake of simplicity and consistency, it refers to "alleged victims," "complaining witnesses," "potential victims," and the like as simply "victims" regardless of the procedural status or verifiability of a particular case. Similarly, unless stated

equal parties, particularly acute in colleges, produces an unjustly imbalanced system. This should caution the military and colleges alike that the role of the institution is not simply to back the victim but to seek justice. Third, established procedures should not be manipulated solely to influence the results of sexual assault cases, either by curtailing the rights of the accused or by preventing thorough inquiries into allegations. Lastly, disposition decisions can and should be managed by accountable leaders who have the authority and flexibility to choose how best to address each individual case. These principles together form the framework for a coherent and just institutional response to sexual assaults.[10]

This article begins in Part II by tracing the parallel evolutions of the Uniform Code of Military Justice (UCMJ) and the Title IX framework for college disciplinary proceedings. In these two specific communities, political attention to and influence on the particular issue of sexual assault accelerated dramatically within the last few years. Against this historical backdrop, Part III examines in detail how this political involvement has encouraged very divergent approaches to the same problem. Part III compares how sexual assault is reported, investigated, and adjudicated, and highlights the inconsistencies in the political rhetoric and actions that have shaped these systems. Following from this analysis, Part IV lays out the principles described above for a more just and consistent response framework. Finally, the Appendix offers specific suggestions for both the military and colleges.

II. Sparta and Athens: The Evolution of Martial and Educational Due Process

A. Sparta: Military Justice as a Commander's Tool for Good Order and Discipline

> *The military constitutes a specialized community governed by a separate discipline from that of the civilian.*

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otherwise, it uses the word "accused" in both the legal and literal sense to refer to anyone charged with, suspected of, or accused of committing a sexual assault.

[10] Although prevention and education can be important components of an overall institutional program to address sexual assault, sexual harassment, and misconduct in general, this article focuses only on institutional responses to sexual assaults after they occur, from reporting through disposition.

—Justice Robert Jackson[11]

American jurisprudence has long recognized the military as a "specialized community" in which the maintenance of good order and discipline is essential.[12] Military leaders must maintain discipline while respecting the rights of individual servicemembers. The Uniform Code of Military Justice (UCMJ)[13] seeks to accommodate both interests simultaneously.[14] It allows commanders to address servicemembers' misconduct within established procedural safeguards.

1. A System Born to Ensure Due Process for the Accused

During World War II, there were 1.7 million courts-martial in the American military—one third of all criminal trials during that same period in the entire United States.[15] For the first time in history, large numbers of Americans had firsthand experience with military justice, and they did not like what they saw.[16] In response, Congress enacted the UCMJ in 1950.[17] In addition to standardizing military justice across the newly-created Department of Defense (DoD), Congress also intended to correct the perceived abuses during World War II by commanders

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[11] Orloff v. Willoughby, 345 U.S. 83, 94 (1953).

[12] *Id.*; *see also* Parker v. Levy, 417 U.S. 733, 743 (1974).

[13] The UCMJ is implemented and administered through procedural, evidentiary, and interpretive rules and policies promulgated by the President in the *Manual for Courts-Martial*. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012) [hereinafter MCM].

[14] MCM, *supra* note 13, at I-1 ("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.").

[15] THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 191 (1993) [hereinafter HISTORY OF THE JAG CORPS].

[16]
> Substantial numbers of servicemen who had never been in trouble with the law in civilian life served time in military jails, and came home from the war with military records showing court-martial convictions or less than honorable discharges. Senators and Congressmen were flooded with complaints. . . . Most of the stories of unfairness, arbitrariness, misuse of authority and inadequate protection of rights could be boiled down to the criticism that commanders exercised too much control over courts martial procedures from prosecution through review.

Id. at 194.

[17] Act of May 5, 1950, Pub. L. No. 81-506, 64 Stat. 107.

through increased due process protections.[18] Despite this goal, the U.S. Supreme Court initially scorned this new system and, in its first years, heavily curtailed its jurisdiction.[19]

Congress and the executive branch responded. In 1968 Congress enacted a plethora of reforms, notably creating the position of military

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[18] HISTORY OF THE JAG CORPS, *supra* note 15, at 203. The UCMJ assured a statutory "right to remain silent" that was broader, and fifteen years sooner, than the Supreme Court's famous *Miranda* decision. *Compare* UCMJ art. 31 (1950), *with* Miranda v. Arizona, 384 U.S. 436 (1966). It guaranteed the accused at special and general courts-martial representation by a licensed attorney regardless of indigence (a provision which continues to this day). UCMJ art. 27 (1950). It carried over from the 1920 Articles of War the requirement for a "pretrial investigation" prior to referral to a general court-martial to serve as a "bulwark against baseless charges." UCMJ art. 32 (1950); United States v. Samuels, 10 C.M.A. 206, 212 (1959); HISTORY OF THE JAG CORPS, *supra* note 15, at 132, 136. This provision remained substantially unchanged until 2014. *See infra* text accompanying note 63. Court-martial convening authority remained with commanders, but after trial, a convening authority could approve only findings of guilty and sentences that were "correct in law and fact and as he in his discretion determine[d] should be approved." UCMJ arts. 60-64 (1950). This was to be the first of three levels of post-trial review to benefit the accused. HISTORY OF THE JAG CORPS, *supra* note 15, at 206. This provision remained substantially unchanged until 2014. *See infra* note 62 and accompanying text.

[19] *See, e.g.*, United States *ex rel*. Toth v. Quarles, 350 U.S. 11, 17 (1953) ("We find nothing in the history of constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty, or property."); Reid v. Covert, 354 U.S. 1, 37 (1957) ("Notwithstanding the recent [enactment of the UCMJ], military trial does not give an accused the same protection which exists in the civil courts. Looming far above all other deficiencies of the military trial, of course, is the absence of trial by jury before an independent judge after an indictment by a grand jury."). *But see* Burns v. Wilson, 346 U.S. 137, 140-41 (1953) (plurality opinion) (approvingly noting the increased due process protections granted by the newly-enacted UCMJ). The Court's most significant curtailment held that trial by court-martial was unconstitutional unless the charged offenses were "service connected." O'Callahan v. Parker, 395 U.S. 258, 272-73 (1969). In *O'Callahan*, the Court excoriated the system of "so-called military justice." *Id.* at 266 n.7. It decried the fact that "[a] court martial is tried, not by a jury of the defendant's peers which must decide unanimously, but a panel of officers empowered to act by two thirds vote." *Id.* at 263. It alluded to the possibility of command influence on the members of the court, noted that "substantially different rules of evidence and procedure apply in military trials," and condemned the fact that the convening authority appointed the counsel for both sides. *Id.* at 264. The Court concluded "few would deny" that the "system of specialized military courts . . . [is] less favorable to defendants [than civilian courts]." *Id.* at 265. The Court overruled *O'Callahan* in 1987, restoring the statutory subject-matter jurisdiction of the UCMJ. Solorio v. United States, 483 U.S. 435 (1987). Incidentally, both *O'Callahan* and *Solorio* were sexual assault cases. *O'Callahan*, 395 U.S. at 259-60; *Solorio*, 483 U.S. at 436.

judge.[20] By transferring to military judges the authority to rule on questions of law at trial, Congress effectively made the court-martial panel analogous to a civilian jury.[21] In 1980, President Carter promulgated the Military Rules of Evidence, modeled after the Federal Rules of Evidence.[22] In 1983, along with other changes, Congress authorized the service secretaries to remove defense counsel from the supervision of the convening authority[23] and allowed for direct appeal of rulings by the Court of Military Appeals, which was later renamed the Court of Appeals for the Armed Forces (CAAF), to the U.S. Supreme Court.[24] By the 1990s, courts-martial generally resembled civilian criminal trials, and most of the due process protections for the accused equaled or exceeded those of civilian courts.

2. *The Focus Shifts*

The original Article 120 of the UCMJ, "Rape and Carnal Knowledge," defined rape as "an act of sexual intercourse with a female not [the accused's] wife, by force and without her consent" and added that "penetration, however slight, is sufficient to complete [this] offense."[25] The text of the Article remained substantially unchanged for half a century,[26] until a two-decade series of highly publicized sexual assault allegations catalyzed significant changes to Article 120 and to court-martial procedure.

In October 1991, Naval aviators sexually abused multiple women in Las Vegas during the annual convention of the Tailhook aviators'

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[20] Military Justice Act of 1968, Pub L. No. 90-632, § 2-21, 82 Stat. 1335, 1336–40.
[21] HISTORY OF THE JAG CORPS, *supra* note 15, at 246.
[22] Exec. Order 12,198, 45 Fed. Reg. 16,932 (1980); MCM, *supra* note 13, pt. III; *see also* UCMJ art. 36 (2012) (requiring the president to prescribe rules that generally conform to the rules of evidence and procedure for federal district courts "so far as he considers practicable").
[23] Military Justice Act of 1983, Pub L. No. 98-209, § 3, 98 Stat. 1394, 1394–95 (amending UCMJ art. 27).
[24] *Id.* § 10 (amending UCMJ art. 67 and 28 U.S.C. § 1059).
[25] UCMJ art. 120 (1950), 64 Stat. 140.
[26] In 1992, Congress amended the statute to be gender-neutral. National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 1006, 106 Stat. 2315, 2506. In 1996, Congress created the affirmative defense of mistake of fact as to age for "carnal knowledge" (i.e., rape of a child). National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1113, 110 Stat. 186, 462.

association.[27] Amidst the ensuing public scandal, Representative Randy Cunningham sharply criticized the resulting investigation for its aggressiveness, which led to the forced retirement of two admirals and a host of administrative punishments but no court-martial convictions.[28] In 1996, allegations of Army drill instructors sexually abusing trainees made nationwide news.[29] Not all of these instances were "rape by force"; in many cases, instructors used their position of authority to coerce or compel trainees to engage in sexual acts.[30] In the wake of these reports, Senator Barbara Mikulski visited Aberdeen Proving Grounds, Maryland, one of the installations where these abuses occurred.[31] There, she was "not surprised" to learn that all female recruits with whom she privately met "fe[lt] the chain of command works for them [the female recruits]."[32] Nonetheless, she broadly asserted "commanders too often fail to act on complaints" and that victims "are doubly punished, first by the assault, and then by the stunning silence of their commanders. Either the base commanders are out of touch, or they knew and took no action."[33]

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[27] H. G. Reza, *Women Accuse Navy Pilots of Harassment*, L.A. TIMES, Oct. 30, 1991, at B1; Carol J. Castenada, *Naval Officers Accused of Harassment*, USA TODAY, Oct. 31, 1991, at 3A.

[28] Andrea Stone, *Fairness of Intense Tailhook Probe Questioned*, USA TODAY, Aug. 13, 1992, at 3A (noting that Representative Cunningham believed that "[i]nvestigators [were] displaying far more vigor than fairness"); Laurence Jolidon & Andrea Stone, *Tailhook: Two Admirals Ousted*, USA TODAY, Sept. 25, 1992, at 3A; Tim Weiner, *The Navy Decides Not to Appeal Dismissals of Last Tailhook Cases*, N.Y. TIMES, Feb. 12, 1994, at 1-1; *see also* Brian C. Hayes, *Strengthening Article 32 to Prevent Politically Motivated Prosecutions: Moving Military Justice Back to the Cutting Edge*, 19 REGENT U. L. REV. 173, 183-86 (2007) (arguing that media pressure and perceived political considerations led to overly aggressive investigations and referrals of potentially baseless charges to trial, which were ultimately dismissed).

[29] *E.g.*, Michael E. Ruane, *Army Charges 3 with Harassing Women Recruits*, MIAMI HERALD, Nov. 8, 1996, at 3A (Aberdeen Proving Grounds, Maryland); *Three Fort Wood Sergeants Facing Sex Allegations: 7 Others are Hit With Suspension Pending Inquiries*, ST. LOUIS POST-DISPATCH, Nov. 13, 1996, at 1A (Fort Leonard Wood, Missouri); Gilbert A. Lewthwait & Joanna Daemmrich, *Female GIs Describe Drill Sergeant Abuse*, CHI. SUN-TIMES, Nov. 29, 1996, at 24 (Fort Jackson, South Carolina).

[30] *E.g.*, Karen Testa, *Guilty Plea in Army Sex Case; 2 Others Charged at Missouri Base*, CHI. SUN-TIMES, Nov 13, 1996, at 24 (describing the guilty plea of a drill sergeant at Fort Leonard Wood, Missouri, to "failing to obey a general regulation [UCMJ art. 92] by having consensual sex with three female recruits and trying to have sex with another").

[31] Paul W. Valentine & Martin Weil, *General Approves Aberdeen Courts-Martial; Mikulski Urges Joint Chiefs Chairman to End 'Culture of Silence,'* WASH. POST, Nov. 27, 1996, at A12.

[32] *Id.*

[33] *Id.*

In 2003, Senators Wayne Allard and John Warner requested the Secretary of the Air Force investigate allegations by a former Air Force Academy Cadet that she had been raped repeatedly and was subsequently punished for making the report.[34] When the Academy Superintendent referred Cadet Douglas Meester to a court-martial for rape, against the recommendation of the Article 32 Investigating Officer, "Senator Allard immediately hailed the decision."[35] Meester's rape charge was later dismissed in exchange for his guilty plea to conduct unbecoming an officer, dereliction of duty, and the commission of an indecent act.[36]

In 2005, at congressional direction,[37] a subcommittee of the Joint Service Committee on Military Justice produced a massive report proposing six options to "improve the ability of the military justice system to address issues relating to sexual assault."[38] The subcommittee unanimously recommended "no change" to Article 120.[39] But Congress chose an alternative proposal ("Option 5") as the framework for the 2006 comprehensive revision and expansion of Article 120.[40] After CAAF ruled part of the 2006 statute unconstitutional, [41] Congress rewrote

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[34] Mike Soraghan & Erin Emery, *AFA Rape Claim Investigated*, DENVER POST, Feb. 14 2003, at B2. At the time, Article 32 of the UCMJ provided for a "thorough and impartial" investigation into the "truth of the matter set forth in the charges" before trial. UCMJ art. 32 (2000). For more on the history and recent changes to the purpose and scope of Article 32, see *supra* note 18 and accompanying text, *infra* text accompanying note 61, and *infra* note 264 and accompanying text.

[35] Hayes, *supra* note 28, at 192 (citing John Sarche, *Cadet's Court-Martial in Rape Case Hailed as a First Step*, PHILA. INQUIRER, July 4, 2003, at A9).

[36] Erin Emery, *Cadet Cuts Deal; Rape Charges Dropped*, DENVER POST, June 9, 2004, at A1.

[37] Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-75, § 571, 118 Stat. 1811, 1920-21 (2004) (directing the study and report described).

[38] Sex Crimes and the UCMJ: A Report for the Joint Service Committee on Military Justice (2005) [hereinafter JSC Report], *available at* http://www.dod.mil/dodgc/php/docs/subcommittee_reportMarkHarvey1-13-05.doc.

[39] *Id.* at 1. However, the subcommittee acknowledged that the statute posed problems for instances of "date rape" or "acquaintance rape" where the victim and offender know each other and that it lacked definitions of terms like "force" and "consent." *Id.* at 52, 54.

[40] National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 2136, 3257 (2006) (codified at UCMJ art. 120 (2006)); *see also* JSC Report, *supra* note 38, at 1 (recommending "Option 5" to Congress as the best alternative to "no action").

[41] For the offenses of rape, aggravated sexual assault, aggravated sexual contact, and abusive sexual contact, the 2006 law placed on the accused the initial burden to prove consent or mistake of fact as to consent by a preponderance of the evidence and then required the government to disprove consent or mistake of fact beyond a reasonable doubt. UCMJ art. 120(t)(14–16) (2006). The Court of Appeals for the Armed Forces

Article 120 again in 2011.[42] Each amendment significantly broadened the scope of sexually-based criminal conduct proscribed by the UCMJ, which currently addresses both "penetrative" and "nonpenetrative" sexual offenses.[43]

Meanwhile, the 2012 documentary *The Invisible War* brought unprecedented public attention to military sexual assault and, by extension, military justice.[44] The film juxtaposes personal accounts of military sexual assault victims with critical commentary on the military justice system. Although rife with inaccurate and misleading assertions,[45] the film prompted the Secretary of Defense to elevate the

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(CAAF) found this "burden shift" unconstitutional. United States v. Prather, 69 M.J. 338, 343 (C.A.A.F. 2011) ("In an area of law with many nuances, one principle remains constant—an affirmative defense may not shift the burden of disproving any element of the offense [here, the inability of the victim to consent due to "substantial incapacitation"] to the defense.").

[42] National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 541, 125 Stat. 1298, 1404 (2011) (codified at UCMJ arts. 120, 120b, 120c (2012)).

[43] The 2006 Article 120 covered a spectrum of sexually-based offenses, from forcible rape to "indecent exposure." UCMJ art. 120(a-n) (2006). The current Article 120 addresses only physical contact crimes against adults; Article 120b now addresses sexual offenses against children; and Article 120c addresses other sexual misconduct, e.g., "indecent viewing." UCMJ arts. 120, 120b, 120c (2012). Rape and sexual assault are sometimes referred to as the "penetrative offenses" because they include, as an element, a "sexual act," which is defined as penetration, "however slight" of the vulva, anus, or mouth by the penis, or "by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person." UCMJ art. 120(a), (b), (g)(1) (2012); *see also infra* text accompanying note 179 (defining nonpenetrative "sexual contact" offenses).

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

[45] For example, Marine Corps Captain Ben Klay (the husband of one of the victims portrayed) describes the military as "an organization that gives commanders an unbelievable amount of power . . . . You appoint the prosecution, you appoint the defense, you appoint the investigator, you're in charge of the police force, you're in charge of the community, you're in charge of everything. You are judge, you are jury, you are executioner." THE INVISIBLE WAR, *supra* note 44, at 0:51:58. Defense attorneys have not been appointed by commanders since 1983. *See supra* text accompanying note 23. Internal command-appointed investigations into sexual assault allegations are prohibited, s*ee infra* note 106 and accompanying text (the Article 32 hearing, conducted by a command-appointed officer, was formerly known as an "investigation," *see infra* text accompanying note 63, but this occurs only after the initial investigation or inquiry is complete and criminal charges are filed with a view toward a general court-martial, *see* MCM, *supra* note 13, R.C.M. 303, 306, 405). Commanders are the sole adjudicators only for "minor offenses" addressed through nonjudicial punishment. *See* UCMJ art. 15. No convening authority may be a judge or be part of the panel ("jury") that determines guilt or innocence and imposes a sentence. *See* MCM, *supra* note 13, R.C.M. 902(b)(2), 912 (f)(1). Later in the film, attorney Susan Burke discusses statistics published by the

initial disposition authority for rape and sexual assault to commanders in the grade of O-6,[46] many commanders required their subordinate leaders

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Department of Defense (DoD): "when you look at prosecution rates in the 2010 department of defense reports, you begin with 2,410 unrestricted reports, and 748 restricted reports. What that means is *they've already funneled* 748 sexual assault victims into a system that has absolutely no adjudication whatsoever." THE INVISIBLE WAR, *supra* note 44, at 0:54:25 (emphasis added). Burke implies that the military forces victims unwillingly into restricted reporting to avoid adjudication; that is patently untrue. Restricted reports can only be made to a select number of people, all outside the chain of command, and are only restricted at the victim's request so she can obtain medical help and assistance without being compelled to endure the criminal justice process. U.S. DEP'T OF DEF., DIR. 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM encl. 3, para 1.6.2 (6 Oct. 2005) (C1 7 Nov. 2008) [hereinafter DoDD 6495.01] (cancelled and reissued by DoDD 6495.01 (23 Jan. 2012) (C1 30 Apr. 2013)). Burke goes on, "They have identified 3,223 perpetrators. Now what happens once you send a perpetrator over to command? . . . First off, they drop 910, they just don't do anything." THE INVISIBLE WAR, *supra* note 44, at 0:54:25. Burke does not mention, and the film does not add, that the same page of the DoD report that she cites indicates that only 2,554 of the identified "perpetrators" were within military jurisdiction and further explains that the 910 cases in which no action was taken was as a result of "a variety of reasons, including, but not limited to, *insufficient evidence* that an offense occurred, the *victim declined to participate* in the military justice process, or there was probable cause for a nonsexual assault offense only." U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2010, at 10 (Mar. 2011) [hereinafter FY10 REPORT] (emphasis added). The last part of the film shows a lawsuit by several victims, including some portrayed in the film, represented by Burke, against high-level DoD officials. THE INVISIBLE WAR, *supra* note 44. The district court dismissed the suit, and the circuit court affirmed. Cioca v. Rumsfeld, 720 F.3d. 505, 507 (4th Cir. 2013). The crux of the complaint was that senior political leadership of the Department of Defense "alleged[ly] fail[ed] with regard to oversight and policy setting within the military disciplinary structure," and the court dismissed the claim because "[t]his is precisely the forum in which the Supreme Court has counseled against the exercise of judicial authority." *Id.* at 508 (quoting lower court's opinion). Yet on-screen text at the end of the film reads: "In December 2011, the Court dismissed the survivors' lawsuit [*Cioca*] ruling that rape is an occupational hazard of military service." THE INVISIBLE WAR, *supra* note 44, at 1:29:50. This "occupational hazard" language does not appear in either court's opinion, nor was it the basis for the ruling. *See Cioca*, 720 F.3d at 508; Cioca V. Rumsfeld, No. 1:11-cv-151-LO-TCB (E.D. Va. Dec. 9, 2011) (Order Dismissing Complaint); *see also* Dwight Sullivan, *"The Invisible War": uninformed, dishonest, or both?*, CAAFLOG (July 11, 2012), http://www.caaflog.com/2012/07/11/invisible-war-uninformed-dishonest-or-both/ (discussing many of the same inaccuracies as this footnote); *infra* note 46 and accompanying text, text accompanying notes 103–106.

[46] Memorandum from Sec'y of Def. to Sec'ys of Military Dep'ts et al., subject: Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases (20 Apr. 2012); *see also* Steve Pond, *Military Rape Documentary 'Invisible War' Leads to Policy Changes Before Its Opening*, THE WRAP (June 18, 2012 6:35 PM), http://www.thewrap.com/movies/column-post/military-rape-documentary-invisible-war-leads-policy-changes-its-opening-44671/. The epilogue of

to watch the film,[47] and Senator Kirsten Gillibrand would later credit the film with spurring the sweeping legislation that followed.[48] At the end of 2012, Congress created the Response Systems to Adult Sexual Crimes Panel (RSP) to "provide recommendations on how to improve the effectiveness of the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses."[49]

The release of *The Invisible War* roughly coincided with public reports of Air Force drill instructors sexually abusing trainees at Joint Base San Antonio-Lackland.[50] Similar to the Army cases of the 1990s, the allegations included a mix of forcible rapes and coerced or compelled sexual acts, leading to charges against 33 instructors, including one woman.[51] Months later, Air Force Lieutenant General (Lt Gen) Craig Franklin used his authority under Article 60 of the UCMJ to disapprove the findings of guilty in a sexual assault case.[52] In the wake of the

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The Invisible War incorrectly states that "[o]n April 14, 2012, Secretary of Defense Leon Panetta watched this film. Two days later, he took the decision to prosecute away from unit commanders." THE INVISIBLE WAR, *supra* note 44, at 1:33:56.

[47] *See, e.g.*, Brittany Carlson, *Documentary Educates in a SHARP Way*, BELVOIR EAGLE, Feb. 22, 2013, http://www.army.mil/article/97020/Documentary_educates_in_a_SHARP_way/; Sergeant Jessica Spradlin, *New Sexual Assault Documentary, 'The Invisible War,' Required Viewing for all I Corps NCOs and Officers*, NW. MILITARY (Apr. 11, 2013), http://www.northwestmilitary.com/news/focus/2013/04/New-sexual-assault-documentary-The-Invisible-War-required-viewing/; Ruth Marcus, *'The Invisible War' Helps Open Eyes to Military's Sexual Assault Problem*, WASH. POST, June 6, 2013, http://www.washingtonpost.com/opinions/invisible-war-helps-open-eyes-to-militarys-sexual-assault-problem/2013/06/06/840cfb78-ced9-11e2-8f6b-67f40e176f03_story.html (noting the Coast Guard Commandant ordered senior leaders to watch the film).

[48] Rebecca Huval, *Sen. Gillibrand Credits the Invisible War with Shaping New Bill*, PBS (May 10, 2013), http://www.pbs.org/independentlens/blog/sen-gillibrand-credits-the-invisible-war-in-shaping-new-bill; *see also infra* note 59 and accompanying text (listing some of the legislation to which Senator Gillibrand referred).

[49] National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 576, 126 Stat. 1632, 1758–60 (2012). Congress specifically tasked the Response Systems Panel (RSP) to examine, *inter alia*, "strengths and weaknesses of proposed legislative initiatives to modify the current role of commanders in the administration of military justice and the investigation, prosecution, and adjudication of adult sexual assault crimes." *Id.* § 576(d)(1)(A).

[50] Chris Lawrence, *31 Victims Identified in Widening Air Force Sex Scandal*, CNN (June 29, 2012), http://www.cnn.com/2012/06/28/justice/texas-air-force-scandal/.

[51] Sig Christenson, *Female Trainer Guilty in Lackland Scandal*, SAN ANTONIO EXPRESS-NEWS, May 2, 2013, at A1; James Dao, *Instructor for Air Force is Convicted in Sex Assaults*, N.Y. TIMES, July 21, 2012, at A9.

[52] Letter from Lieutenant General Craig Franklin to Michael B. Donley, U.S. Sec'y of the Air Force (Mar. 12, 2013), *available at*

Lackland incidents and with the publicity generated by *The Invisible War*, congressional reaction to Lt Gen Franklin's act was swift and furious.[53] The next year, as one of his first acts as Secretary of Defense, Charles Hagel proposed eliminating convening authorities' Article 60 discretion.[54] Meanwhile, military sexual assault allegations continued skyrocketing in the national attention.[55] In the spring of 2013, a midshipman at the United States Naval Academy accused three other midshipmen of sexual assault.[56] During the Article 32 investigation,

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http://www.foia.af.mil/shared/media/document/AFD-130403-022.pdf.; *see also supra* note 18 and accompanying text (discussing the history and intent of Article 60).

[53] Senators Barbara Boxer and Jeanne Shaheen sent a letter to the Secretary of Defense describing Lieutenant General (Lt Gen) Franklin's actions as "unacceptable." Letter from Sens. Boxer and Shaheen to Charles T. Hagel, U.S. Sec'y of Def. (Mar. 5. 2013), *available at* http://www.stripes.com/news/full-text-of-sens-boxer-and-shaheen-s-letter-to-hagel-1.210550. Representative Jackie Speier called it a "mockery of the UCMJ." Nancy Montgomery, *Air Force Pilots Sex Assault Dismissal Sparks Cries for Reform*, STARS & STRIPES, Mar. 3, 2013, http://www.stripes.com/news/air-force-pilot-s-sex-assault-dismissal-sparks-cries-for-reform-1.210371. ABC News later quoted Representative Speier describing the UCMJ as "primitive" and a "broken system" because of this authority. Matthew Larotanda, *Overturned Sexual Assault Case Spurs Bill to Limit Commanders' Tribunal Powers*, ABC NEWS (Mar. 12, 2013, 7:14 PM), http://abcnews.go.com/blogs/politics/ 2013/03/overturned-sexual-assault-case-spurs-bill-to-limit-commanders-tribunal-powers/. Senator Claire McCaskill said that Lt Gen Franklin's decision "violates every sense of justice and fairness that we expect in America." Sen. Claire McCaskill, *Their Day in Court*, ST. LOUIS POST-DISPATCH, Mar. 12, 2013, at A13. Senator McCaskill later prevented the promotion of Air Force Lt Gen Susan Helms for taking a similar action. David Alexander, *Female U.S. General Who Overturned Sex-Assault Ruling to Retir*e, REUTERS (Nov. 8, 2013, 7:22 PM), http://www.reuters.com/article/2013/11/09/us-usa-defense-sexualassault-idUSBRE9A800A20131109. Within weeks, the Personnel Subcommittee of the Senate Armed Services Committee held a hearing at which senators and advocates alike strongly criticized Lt Gen Franklin's action. *Hearing to Receive Testimony on Sexual Assaults in the Military Before the S. Subcomm. on Personnel, Comm. on Armed Services*, 113th Cong. 3, 6, 14, 20, 22, 55-56, 64 (2013) [hereinafter Subcommittee Hearing] (statements of, respectively, Sen. Kirsten Gillibrand, Sen. Barbara Boxer, Mr. Brian K. Lewis, Ms. Anu Baghwati, Sen. Richard Blumenthal, Sen. Gillibrand again, and Sen. Claire McCaskill).

[54] Press Release, U.S. Dep't of Def., Statement from Secretary Hagel on Sexual Assault Prevention and Response (Apr. 8, 2014).

[55] *See, e.g.*, Sens. Patty Murray & Kelly Ayotte, *A Strategy to Combat Military Sexual Assaults*, POLITICO (May 22, 2013, 9:33 PM), http://www.politico.com/story/2013/05/a-strategy-to-combat-military-sexual-assaults-91770.html ("Twice in two weeks, the very people in the military who are responsible for protecting victims of sexual assault have been accused of committing these crimes."); Sig Christenson, *GI's life Unraveled in Wake of Assault; Woman Was Attacked in Fort Hood Barracks*, SAN ANTONIO EXPRESS-NEWS, May 25, 2013, at A1.

[56] James Risen, *Maryland: Midshipmen Face Sexual Assault Charges*, N.Y. TIMES, June 20, 2013, at A13.

cross examination of the victim by all three defense attorneys lasted five days,[57] drawing pointed congressional condemnation.[58]

The intense congressional focus on military sexual assault generated an avalanche of legislation.[59] Without waiting for the RSP to finish its report, Congress enacted many diverse proposals as part of the 2014 National Defense Authorization Act (NDAA).[60] The 2015 NDAA made further changes.[61] Unlike the major amendments in 1968 and 1983, almost every change to the UCMJ would serve to work against accused servicemembers, limiting both pre-trial and post-trial opportunities for defense, mitigation, and clemency.[62] Congress completely rewrote

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[57] Lyndsey Layton, *Accuser Testifies for a Fifth Day*, WASH. POST, Sept. 2, 2013, at B-1.

[58] *E.g.*, Ali Weinberg, *Naval Academy Rape Case Could Prompt Changes to Military Hearings*, NBC NEWS (Dec. 12, 12:21 pm), http://www.nbcnews.com/news/other/naval-academy-rape-case-could-prompt-changes-military-hearings-f2D11732125 (criticism by Attorney Susan Burke and Rep. Jackie Speier); Tom Vanden Brook, *Military Sex-Assault Hearings Under Fire; Bill Would Protect Alleged Victims from Intrusive Questions*, USA TODAY, Nov. 6, 2013, at 5A (criticism by Sen. Barbara Boxer and Sen. Lindsey Graham).

[59] *E.g.*, Protect Our Military Trainees Act, H.R. 430, 113th Cong. (2013); Military Sexual Assault Prevention Act of 2013, S. 548, 113th Cong. (2013); H.R. 1864, 113th Cong. (requiring inspector general reviews of retaliatory actions taken against those who made protected communications regarding sexual assault); S. 964, 113th Cong. (2012) (requiring "comprehensive review of the adequacy of the training, qualifications, and experience of the Department of Defense personnel responsible for sexual assault prevention and response"); Better Enforcement for Sexual Assault Free Environments Act of 2013, H.R. 1867, 113th Cong; Better Enforcement for Sexual Assault Free Environments Act of 2013, S. 1032, 113th Cong.; Combating Military Sexual Assault Act of 2013, H.R. 2002, 113th Cong; Combating Military Sexual Assault Act of 2013, S. 871, 113th Cong.; Military Justice Improvement Act of 2013, H.R. 2016, 113th Cong.; Military Justice Improvement Act of 2013, S. 967, 113th Cong.; S. 992, 113th Cong. (2013) (requiring creation of sexual assault prevention and response offices at the chief of staff level for each service); Military Crime Victims Rights Act of 2013, S. 1041, 113th Cong. (2013); Stop Pay for Violent Offenders Act, H.R. 2777, 113th Cong. (2013); Article 32 Reform Act, H.R. 3459, 113th Cong. (2013); Article 32 Reform Act, S. 1644, 113th Cong. (2013); H.R. 3360, 113th Cong. (2013) (amending UCMJ art. 32); Victims Protection Act of 2013, S. 1775, 113th Cong. (2013); S. 538, 113th Cong. (2013) (containing an earlier version of the amendments to UCMJ art. 60 reintroduced in S. 1775).

[60] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, tit. XVII, 127 Stat. 672, 950 (2013) [hereinafter FY14 NDAA].

[61] Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, §§ 531-47, 128 Stat. 3292 (2014) [hereinafter FY15 NDAA].

[62] *E.g.*, National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702(b), 127 Stat. 672 (2013) (codified at UCMJ art. 60(c) (2014)) (eliminating convening authorities' ability to disapprove findings of guilty except for certain minor

Article 32, converting the "thorough and impartial investigation" before trial into to a "preliminary hearing" limited to determining "whether probable cause exists to believe an offense has been committed and the accused committed the offense," restricted the scope of defense cross-examinations at that newly restricted hearing, and gave any victim an absolute prerogative to refuse to testify thereat.[63] From 1950 to 2014, Congress's perception of and focus on military justice had decidedly shifted to the detriment of the accused.

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offenses, greatly curtailing their ability to reduce sentences, and requiring written explanations of such actions to be included in the record of trial); *id.* § 1704 (codified at UCMJ art. 46(b) (2014)) (prohibiting, for "sex-related offenses," defense counsel interview of victims without submitting such a request through the trial counsel; requiring defense counsel to allow victims to be accompanied in such interviews by the trial counsel, victim's counsel, or victim advocate), *amended by* Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 531(b), 128 Stat. 3292 (2014) (amending the statute to require requests for victim interviews to be submitted through the victim's counsel, if applicable, and making other technical changes); National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1705, 127 Stat. 672 (2013) (codified at UCMJ arts. 56(b) and 18(c) (2014)) (mandating a dishonorable discharge for penetrative offenses and limiting jurisdiction over such charges to general courts-martial); *id.* § 1708 (requiring MCM, *supra* note 13, R.C.M. 306 discussion to be amended to prohibit commanders from considering "character and military service of the accused" when deciding how to dispose of offenses); *id.* § 1713 (codified at 10 U.S.C. § 674(b) (2014)) (providing authority for temporary administrative reassignment of servicemembers accused or suspected of committing sex offenses); *id.* § 1744 (requiring any convening authority who chooses not to refer to court-martial a charge for a penetrative offense to submit his decision to either the next higher commander, if his staff judge advocate agrees with the decision, or directly to the service secretary, if the staff judge advocate believes referral is warranted; discussed *infra* text accompanying note 152), *amended by* Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 541, 128 Stat. 3292 (2014) (giving each service's "chief prosecutor" the authority to force secretarial review "in response to a request by the detailed counsel for the Government"); Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 536, 128 Stat. 3292 (2014) (banning the use of "good military character" evidence for select offenses); *id.* § 537(2) (eliminating the "constitutionally required" exception to Mil. R. Evid. 513(d); discussed *infra* notes 263, 276 and accompanying text).

[63] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1702(a), 127 Stat. 672 (2013) (codified at UCMJ art. 32 (2014)). *Compare* UCMJ art. 32 (2012), *with* UCMJ art. 32 (2014). Notably, Congress removed the words "thorough" and "truth" from the statute. *Id.*

B. Athens: Using Title IX as a Weapon

> *School discipline, like parental discipline, is an integral and important part of training our children to be good citizens – to be better citizens.*
> —Justice Hugo Black[64]

After World War II, the notion of colleges standing in *loco parentis* with generally unfettered discretion in student disciplinary matters began to erode.[65] During the social upheavals of the postwar civil rights era, federal courts began intervening in school discipline, finding public schools to be state actors bound by the Due Process clause of the Fourteenth Amendment to the U.S. Constitution.[66] In 1975, the Supreme Court ruled that, because a state-granted education created protected property and liberty interests, public-school students "must be given *some* kind of notice and afforded *some* kind of hearing" before expulsion or lengthy suspension.[67] Since then, "[c]ourts, colleges, and student personnel administrators seem to have wrestled with every aspect of the due process issue."[68]

Meanwhile, Congress accelerated gender integration in 1972 when it passed what came to be known as "Title IX."[69] Title IX's substance is brief but broad:

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[64] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 524 (1969) (Black, J., dissenting).

[65] Nicholas Trott Long, *The Standard of Proof in Student Disciplinary Cases*, 12 J.C. & U.L. 71, 71 (1985).

[66] *Id.* at 71-72. An early example is *Dixon v. Alabama State Board of Education*. 294 F.2d 150 (5th Cir. 1961). Students at Alabama State College had been summarily expelled without notice, a hearing, or an opportunity to appeal for participating in a "sit in" protest at a courthouse. *Id.* at 152-54. The Fifth Circuit held that, once given, the state could not revoke the "privilege" of education without due process; at the very least the college must give some form of prior notice and hearing. *Id.* at 156-57.

[67] Goss v. Lopez, 419 U.S. 565, 574–75, 579–82 (1975). Though the *Goss* ruling applied only to elementary and secondary schools, lower federal courts have applied the Court's holding to public colleges as well. Lavinia M. Wenzel, Note, *The Process That is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1622 n.49 (2012).

[68] Long, *supra* note 65, at 72.

[69] Education Amendments of 1972, Pub. L. No. 92-318, tit. IX, 86 Stat. 235, 373-75 (codified as amended at 20 U.S.C. §§ 1681–88 (2012)).

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.[70]

Congress backed this terse mandate with a very broad grant of regulatory authority to the executive branch.[71] The Department of Education (DOE), which controls the bulk of federal education funds, promulgates and administers Title IX regulations through its Office for Civil Rights (OCR).[72] As part of these rules, OCR requires all schools to establish internal "grievance procedures" through which schools must "prompt[ly] and equitab[ly]" resolve allegations of sex discrimination.[73]

Although courts had intervened in student discipline decades earlier, Congress did not take an active oversight role until 1990. That year, amid reports of increased violent crime in colleges, Congress required all colleges receiving federal funding to publish campus crime statistics and security policies.[74] This became known as the "Clery Act."[75] The fact that Congress mandated no change to the schools' internal disciplinary process and its emphasis on reporting and security policies seem to indicate that, at the time, Congress expected serious crimes would continue to be investigated and prosecuted by off-campus authorities.

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[70] 20 U.S.C. § 1681(a) (2012). There are limited exceptions, primarily regarding admissions standards, for traditional single-sex schools, and military and merchant marine training, etc. *Id.*

[71] *Id.* § 1682 (giving every "Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity" the authority to promulgate and enforce rules and to withdraw federal funding as penalty for violations thereof).

[72] *About OCR*, U.S. DEP'T OF EDUC. (May 29, 2012), http://www2.ed.gov/about/offices/list/ocr/aboutocr.html; *see generally* 34 C.F.R. § 106 (2014) (containing regulations promulgated by the Office for Civil Rights (OCR) to enforce Title IX).

[73] 34 C.F.R. § 106.8 (2014).

[74] Crime Awareness and Campus Security Act of 1990, Pub. L. No. 101-542, § 204, 104 Stat. 2381, 2385–87 (codified as amended at 20 U.S.C.S. § 1092(f) (Lexis 2014)). The Act also amended existing privacy laws to permit disclosure of the outcomes of student disciplinary proceedings to crime victims. *Id.* § 203 (codified as amended at 20 U.S.C. § 1232g(b)(6) (2012)).

[75] Higher Education Amendments of 1998, Pub. L. No. 105-244, § 486(e)(7), 112 Stat. 1581, 1745 (formally titling 20 U.S.C. § 1092(f) the "Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act").

The idea that internal campus tribunals could or should address crimes like rape and sexual assault had not yet taken hold.

But beginning in the 1990s, plaintiffs in federal court relied heavily on Title IX to address sexual harassment of students, both by school employees and other students.[76] When courts limited direct legal actions by students against schools,[77] OCR announced that it would use its Title IX authority to define and ensure an effective response to sexual harassment through Title IX's "administrative enforcement" procedures.[78] Requiring schools to use the Title IX grievance process to internally adjudicate sexual harassment allegations gave students another forum, likely more favorable than the courts, to bring their claims.[79]

Then in the 2000s, a growing number of students filed Title IX grievances with their colleges alleging sexual assault by other students, in many cases after local authorities refused to investigate or prosecute their claims.[80] Many expressed frustration with the procedural

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[76] *See, e.g.*, Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 75 (1992) (holding that sexual harassment is sex-based discrimination under Title IX); Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650 (1999) ("[S]tudent-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute."); Morse v. Regents of Univ. of Colo., 154 F.3d 1124 (10th Cir. 1998).

[77] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 277 (1998) (holding that a school district could be liable under Title IX for its employee's sexual harassment of a student only if district officials had actual notice of and were "deliberately indifferent" to the misconduct); *Davis*, 526 U.S. at 642-44 (similar holding with regard to student-on-student harassment).

[78] OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES iii (2001) (citing *Gebser*, 524 U.S. at 292, for the proposition that OCR can take administrative action against schools even when the action of school officials does not amount to the "deliberate indifference" required by *Davis* to sustain a lawsuit). In its guidance, OCR states that "sufficiently serious" sexual harassment could create a "hostile environment" such that it would "deny or limit a student's ability to participate in or benefit from the school's program based on sex," thus triggering the school's responsibilities under Title IX. *Id.* at 5.

[79] *Id.* at 19 (stating that although "Title IX does not require a school to . . . provide separate grievance procedures [specifically] for sexual harassment," failure to establish some form of grievance procedures that comply with Title IX would itself violate Title IX); *see also supra* text accompanying note 73.

[80] *E.g.*, Kristen Lombardi, *Sexual Assault on Campus Shrouded in Secrecy*, CTR. FOR PUB. INTEGRITY (Dec. 1, 2009, 12:01 AM, updated May 19, 2014, 12:19 PM), http://www.publicintegrity.org/2009/12/01/9047/sexual-assault-campus-shrouded-secrecy; Joseph Shapiro, *Failed Justice Leaves Rape Victim Nowhere to Turn*, NAT'L PUB. RADIO (Feb. 25, 2010, 12:01 PM), http://www.npr.org/templates/story/story.php?storyId=124052847; *College of Holy Cross*

informality and light punishments typical of college disciplinary proceedings.[81] In 2011, OCR suddenly published a "Dear Colleague Letter" (DCL) to all educational institutions that receive federal funding.[82] The DCL extrapolates dicta from several federal cases for the proposition that "a single instance of rape is sufficiently severe to create a hostile environment" *per se*, thus bringing rape and crimes of "sexual violence" within the definition of "sexual harassment"—and within the purview of OCR's authority.[83]

Under the DCL, OCR requires colleges to use their Title IX grievance procedures for all allegations of sexual assault, even if local law enforcement authorities conduct their own investigation and prosecution, and colleges may not wait for the outcome of any pending criminal adjudication.[84] The DCL states that the accused should not be allowed to present character witnesses unless the complainant may do so, may not have an attorney or advisor present unless the complainant may, may not appeal the findings or punishment unless the complainant may, and "strongly discourages" cross-examination of either the accused or the complainant.[85] Congress reinforced OCR in 2013 with the Sexual Violence Elimination (SaVE) Act, amending the Clery Act to statutorily require (for the first time in history) that colleges use administrative disciplinary procedures specifically for adjudicating "domestic violence, dating violence, sexual assault, and stalking."[86]

Responds to Sexual Assault, NAT'L PUB. RADIO (Mar. 10, 2010, 12:00 PM), http://www.npr.org/templates/story/story.php?storyId=124199190.

[81] *E.g.*, Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, CTR. FOR PUB. INTEGRITY (Feb. 24 2010, 12:00 PM, updated July 4, 2014, 4:50 PM), http://www.publicintegrity.org/2010/02/24/4360/lack-consequences-sexual-assault; *Rape Victims Find Little Help on College Campuses*, NAT'L PUB. RADIO (Feb. 27, 2010, 10:53 AM), http://www.npr.org/templates/story/story.php?storyId=124148857.

[82] OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER (Apr. 4, 2011) [hereinafter DCL].

[83] *Id.* at 3 (citing, *inter alia*, Jennings v. Univ. of N.C., 444 F.3d 255, 268, 274 n.12 (4th Cir. 2006); Vance v. Spencer Cnty. Pub. Sch. Dist, 231 F.3d 253, 259 n.4 (6th Cir. 2000)).

[84] *Id.* at 10 ("[A] criminal investigation into allegations of sexual violence does not relieve the school of its duty under Title IX to resolve complaints promptly and equitably . . . a school should not delay conducting its own investigation . . . because it wants to see whether the alleged perpetrator will be found guilty of a crime.").

[85] *Id.* at 11-12.

[86] Congress slightly amended the original Campus Sexual Violence Elimination (SaVE) Act, S. 128, 113th Cong. (2013), and incorporated it into the Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, § 304(a)(5), 127 Stat. 54, 89 (codified at 20 U.S.C.S. § 1092(f)(8) (Lexis 2014)). The amended Clery Act now requires colleges to establish institutional disciplinary procedures for "domestic violence, dating violence,

After issuing the DCL, OCR quickly demonstrated its willingness to enforce its mandates. The University of Montana was the first college to come under federal scrutiny for sexual assault.[87] The Departments of Education and Justice jointly published findings criticizing almost every aspect of the University's procedures, and the University entered into a "resolution agreement" to make federally-directed changes to its systems.[88] In 2013, OCR fined Yale University $165,000 and fined the University of Texas $82,500 for Clery Act violations, two of the heaviest such fines in history.[89] The DOE has since threatened the "nuclear option" of withholding federal funding, on which almost every college relies, for failure to comply with the policies set forth in the DCL.[90]

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sexual assault, [and] stalking" to be conducted by "officials who receive annual training on the issues related to [those offenses, and] how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability," and it directs that "the accuser and the accused are entitled to the same opportunities to have others present" at such a proceeding. 20 U.S.C.S. §1092(f)(8)(A)(iv) (Lexis 2014).

[87] Eliza Gray, *Sexual Assault on Campus*, TIME, May 26, 2014, at 20, 24 ("It was clear that, sooner or later, a college would find itself in the federal crosshairs. That school turned out to be Montana.").

[88] Letter from Anurima Bhargava, Chief, Civil Rights Div., U.S. Dep't of Justice, Educational Opportunities Section, & Gary Jackson, Reg'l Dir., U.S. Dep't of Educ., Office for Civil Rights, Seattle Office, to Royce Engstrom, President, Univ. of Mont., & Lucy France, Univ. Counsel, Univ. of Mont. (May 9, 2013), *available at* http://www2.ed.gov/documents/press-releases/montana-missoula-letter.pdf.

[89] Libby Sander, *Yale U. Is Fined $165,000 Under Crime-Reporting Law*, CHRON. OF HIGHER EDUC., May 16, 2013, http://chronicle.com/article/Yale-U-Is-Fined-165000/139343/.

[90] Tovia Smith, *How Campus Sexual Assaults Came to Command New Attention*, NAT'L PUB. RADIO (Aug. 12, 2014, 5:53 PM), http://www.npr.org/2014/08/12/339822696/how-campus-sexual-assaults-came-to-command-new-attention (quoting Catherine Lhamon, U.S. Ass't Sec'y of Educ. for Human Rights) ("I will go to enforcement, and I am prepared to withhold federal funds."). By using federal funds as leverage, OCR can influence private colleges, which, unlike public colleges, are not "state actors" bound by the Due Process clause of the 14th Amendment. *See generally supra* text accompanying notes 66–67. The Office for Civil Rights maintains that, despite the numerous specific requirements newly imputed to Title IX, the Dear Colleage Letter (DCL) "does not add requirements to existing law" and, therefore, OCR does not need to comply with the procedural requirements for promulgating new federal regulations. DCL, *supra* note 82, at 1 n.1. This position, while controversial, has not been challenged in court. *See* Hans Bader, *Education Department Illegally Ordered Colleges to Reduce Due-Process Safeguards*, EXAMINER (Sept. 21, 2012, 6:49 PM), http://www.examiner.com/article/education-department-illegally-ordered-colleges-to-reduce-due-process-safeguards (arguing that OCR's position violates the Federal Administrative Procedures Act).

In 2014, President Obama created the White House Task Force to Protect Students from Sexual Assault (White House Task Force), endorsing and supporting the policies OCR first announced in the DCL.[91] In addition, many of the senators who were at the forefront of the changes to military law sponsored the Campus Accountability and Safety Act (CASA) to reinforce and expand the requirements imposed by OCR.[92] In mid-2014, OCR publicly listed over four dozen colleges under investigation "for possible violation of federal law over the handling of sexual violence and harassment complaints."[93] By then the legislative and executive branches clearly expected college officials to adjudicate potential sex crimes, to do so swiftly and harshly, and that due process would be of secondary concern.[94] Under threat of a crippling loss of funds, colleges across the country have rushed to comply.[95]

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[91] President Barack Obama, Weekly Address: Taking Action to End Sexual Assault (Jan. 25, 2014), http://www.whitehouse.gov/the-press-office/2014/01/25/weekly-address-taking-action-end-sexual-assault; WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, CHECKLIST FOR CAMPUS SEXUAL MISCONDUCT POLICIES, *available at* https://www.notalone.gov/assets/checklist-for-campus-sexual-misconduct-policies.pdf (endorsing most of OCR's policies, including preponderance of the evidence standard, limitations on cross-examination, and the requirement to extend to the complainant any procedural rights given to the accused).

[92] S. 2692, 113th Cong. § 6 (2013); *see also* Tyler Kingkade, *Senators Turn Attention to College Sexual Assault Reform After Military Reform Battles*, HUFFINGTON POST (Apr. 16, 2014, 5:36 PM, updated Apr. 16, 2014, 10:59 PM), http://www.huffingtonpost.com/2014/04/16/legislation-college-sexual-assault_n_5161355.html.

[93] Press Release, U.S. Dep't of Educ., U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014).

[94] *See, e.g.*, 20 U.S.C.S. § 1092(f)(8)(A)(iv)(I)(bb) (Lexis 2014) (requiring college disciplinary officials to be trained in "how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability"; the statutory text makes no mention of preserving due process for the accused); DCL, *supra* note 82, at 12 ("Public and state-supported schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant."); *see also* Patricia McGuire, *College Presidents Must Lead on Sexual Assault*, HUFFINGTON POST (Sept. 1, 2014, 11:16 AM, updated Nov. 1, 2014, 5:59 AM) http://www.huffingtonpost.com/patricia-mcguire/college-presidents-must-l_b_5744646.html ("Due process does not have to mean undue delays in getting perpetrators off campus and into jail.").

[95] Smith, *supra* note 90.

III. Two Roads Diverge: The Politics of Sexual Assault

Through legislation, regulation, and public pressure, political forces have transformed the military and college sexual assault response processes. Both institutions face the same criticisms—that sexual assaults are underreported, victims face retaliation for reporting, and sexual assaults are ignored or "swept under the rug" by institutional leaders.[96] Yet within less than a decade, political influences, sometimes from the same actors, have produced diametrically opposite approaches to reporting, disposition, and adjudication. At the same time, these divergent approaches share some common attributes, notably a predilection for broad and ambiguous definitions of the term "sexual assault" and a generally dim view of due process protections, which is discussed later in Part IV.

A. How Sexual Assault is Reported and Investigated

> *[I]f there was a rape in your office in the Senate and somebody upstairs yelled and screamed and you went up there as a Senator, what would you do? Would you decide whether the case ought to be prosecuted or would you call the police?*

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[96] *Compare, e.g.*, Mary Beth Marklein, *Colleges Under Pressure to Stem Sexual Assault*, USA TODAY, Aug. 11, 2014, http://www.usatoday.com/story/news/nation/2014/08/11/campuses-prepare-for-new-sexual-assault-regulations/13091139/ (quoting Ms. Annie Clark, co-founder of End Rape on Campus) ("The institutional betrayal that these students face is sometimes worse than the assault itself."); Melinda Hennenberger, *Awareness Must Lead to Action Against Sex Assaults on Campus*, WASH. POST, May 21, 2014, at A2 ("[T]he campus where no or few victims are reporting is a campus where they do not feel safe doing that."), *and* Smith, *supra* note 90 (quoting an anonymous federal official) ("Schools are still blaming victims and failing to punish perpetrators."), *with* Jesse Ellison, *Will the Military Finally Confront its Rape Epidemic?*, THE DAILY BEAST (Nov. 19, 2011), http://www.thedailybeast.com/articles/2011/11/19/will-the-military-finally-confront-its-rape-epidemic.html ("Victims who report their assaults report being further victimized by the military's handling of their complaints."), *and* Ruth Marcus, *Breaking the Chain*, WASH. POST, Mar. 19, 2014, at A15 ("Commanding officers invested with the power to decide whether to pursue prosecutions may be inclined to sweep their buddies' wrongdoing under the rug [or] to view the victims as culpable."), *and* Meredith Clark, *Landmark Year for Military Sex Assault Reform Ends With Spike in Reports*, MSNBC (Dec. 28, 2013, 3:30 PM, updated Jan. 12, 2014, 12:54 PM), http://www.msnbc.com/melissa-harris-perry/big-jump-reports-military-sex-assault (quoting Nancy Parrish, president of Protect Our Defenders) ("One thing we do know is that 62% of those that do report state that they were retaliated against.").

—Senator Barbara Boxer[97]

Perhaps the most frequent accounts of systemic failures in both the military and colleges allege that the organizations mishandle initial reports. *The Invisible War* presents many accounts of victims who either believed they could only report to their commander and were afraid to do so, or who did report and whose commander did nothing against the accused.[98] In 2013, the commanding general of U.S. Army-Japan failed to investigate a sexual harassment allegation and failed to report an alleged sexual assault by the same officer to law enforcement, ultimately leading to his relief from command.[99] Before and after OCR published the DCL, many college victims reported that college officials took no meaningful action and discouraged further reporting.[100] One victim reported that an official specifically told her not to go to law enforcement.[101] In 2014, *Rolling Stone* published a sensational story about an alleged gang rape at the University of Virginia in which the magazine reported that other students and university officials alike worked to suppress the victim's account.[102] Despite these similar

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[97] 160 CONG. REC. S1340 (daily ed. Mar 6, 2014).

[98] THE INVISIBLE WAR, *supra* note 44 (describing the experiences of former Airman Jessica Hinves whose commander stopped the prosecution of her accused assailant, former Coast Guardsman Kori Cioca whose chain of command refused to take any action despite repeated protests, Marine Lieutenant Elle Helmer whose commander closed the investigation into her allegations and then investigated her for public intoxication, and presenting an onscreen graphic stating that four of five Marines interviewed, "who were each assaulted by an officer while serving at Marine Barracks Washington . . . were investigated or punished after they reported.").

[99] Jennifer Hlad, *Probe of Army General Calls Insular Military Culture Into Question*, STARS & STRIPES, Apr. 24, 2014, http://www.stripes.com/news/probe-of-army-general-calls-insular-military-culture-into-question-1.279762.

[100] *E.g.*, Kristen Jones, *Barriers Curb Reporting on Campus Sex Assault*, CTR. FOR PUB. INTEGRITY (Dec. 2, 2009, 11:02 AM, updated May 19, 2014, 12:19 PM) http://www.publicintegrity.org/2009/12/02/9046/barriers-curb-reporting-campus-sexual-assault (describing how one college's failure to investigate an alleged rape in 2006 led to the victim's suicide); Jason Felch, *Pressure on Berkeley Grows; in Federal Complaints, 31 Women Allege the School Botched Sexual Assault Investigations*, L.A. TIMES, Feb. 24, 2014, at AA1 ("The complaints allege that officials for years have discouraged victims from reporting assaults, failed to inform them of their rights and led a biased judicial process that favored assailants' rights over those of their victims.").

[101] Eliza Gray, *Why Victims of Rape in College Don't Report to the Police*, TIME (June 23, 2014), http://time.com/2905637/campus-rape-assault-prosecution/ ("Alexandra Brodsky, a student at Yale law school . . . said: 'When I reported violence to my school, I was told not to go to police. But I never would have told [the school] if I knew I was going to be forced into that option.'") (bracketed alteration in original).

[102] Sabrina Rubin Erdely, *A Rape on Campus: a Brutal Assault and Struggle for Justice at UVA*, ROLLING STONE, Dec. 4, 2014, at 68, 70-77. In April 2015, after extensive

criticisms and potential system failures, the political responses have been almost diametrically opposite.

The Invisible War alleges that all military sexual assault victims must report sexual assaults to their commanding officers and implies that they may not go to law enforcement or anyone else.[103] This is untrue; the military provides a wide range of reporting options, and these have been standardized across the DoD since at least 2005.[104] Military criminal investigative organizations (MCIOs) use specially trained investigators for sexual assault cases.[105] Since at least 2005, commanders have been prohibited from conducting their own investigations into sexual assault allegations and are required to report to their MCIO "[w]hen information about a sexual assault comes to any commander's attention."[106] Yet as part of the 2014 NDAA, Congress took the superfluous step of requiring

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reporting by *The Washington Post* and an external investigation revealed factual inaccuracies and journalistic failures, *Rolling Stone* retracted this article. Will Dana, Managing Editor et al., *Rolling Stone and UVA: The Columbia University Graduate School of Journalism Report,* ROLLING STONE, Apr. 5, 2015, http://www.rollingstone.com/culture/features/a-rape-on-campus-what-went-wrong-20150405.

[103] THE INVISIBLE WAR, *supra* note 44, at 0:52:53 (statement of Attorney Susan Burke) ("If you're a civilian and you're raped, you can call the police and then you have prosecutors . . . . The problem with the military is that instead they have to go to their chain of command.").

[104] *See* DoDD 6495.01 (6 Oct. 2005), *supra* note 45, encl. 3, para 1.6.1.

[105] U.S. DEP'T OF DEF., INSTR. 5505.18, INVESTIGATION OF ADULT SEXUAL ASSAULT IN THE DEPARTMENT OF DEFENSE encl. 2, para 6 (25 Jan. 2013) (C1, 1 May 2013) (listing all training requirements for MCIO sexual assault investigators); *see also* U.S. ARMY CRIM. INVESTIGATION DIV., REG. 195-1, USACID OPERATIONAL POLICY para. 15.7 (1 Oct 2014) (requiring all sexual assault investigators to have at least three years' investigatory experience, attend a specialized two-week training course, and meet other criteria).

[106] DoDD 6495.01 (6 Oct. 2005), *supra* note 45, para 1.11. All unrestricted reports, regardless of to whom made, are forwarded to law enforcement. *Id.* encl. 2, para 2.1; *accord* DoDD 6595.01 (23 Jan. 2012), *supra* note 45, at 18; U.S. COAST GUARD, COMMANDANT INSTR. 1754.10B encl. 1 (2 Apr. 2004); *accord* U.S. COAST GUARD, COMMANDANT INSTR. 1754.10D ch. 5, para. B (19 Apr. 2012); *see also* U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES app. B, tbl. B-1 (15 May 2009) (giving the Army Criminal Investigation Command (CID) exclusive responsibility for investigating all sexual assault and sexual contact crimes and prohibiting unit or command investigations into sexual assault); *accord* U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES app. B tbl., B-1 (9 June 2014); U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 5430.107, MISSION AND FUNCTIONS OF THE NAVAL CRIMINAL INVESTIGATIVE SERVICE para. 6(b)(1)(A) (28 Dec. 2005) (giving the same exclusive authority to the Naval Criminal Investigative Service).

commanders to forward all sexual assault allegations within their units to the appropriate MCIO.[107]

In contrast with the military, oversight of all sexual assault proceedings within a college is consolidated in a Title IX officer, who need not be a law enforcement official or attorney.[108] Law enforcement investigations are not required by any federal policy, though some colleges refer certain investigations to local law enforcement agencies.[109] Even if off-campus law enforcement investigates the allegations, colleges must conduct their own independent investigations.[110] Unlike military sexual assaults, campus sexual assaults may be investigated by anyone designated by the college.[111]

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[107] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1742, 127 Stat. 672 (2013).

[108] 34 C.F.R. § 106.8(a) (2014); DCL, *supra* note 82, at 7. The University of New Hampshire designates the director of its Affirmative Action and Equity Office as the Title IX coordinator. UNIV. OF N.H., DISCRIMINATION AND DISCRIMINATORY HARASSMENT POLICY 6 (2014), *available at* http://www.unh.edu/sites/www.unh.edu/files/departments/affirmative_action_and_equity_office/discrimination_and_discriminatory_ harassment_policy_booklet_july_2014.pdf. The University of Virginia designates its Dean of Students as its Title IX coordinator. UNIV. OF VA., POLICY AND PROCEDURES FOR STUDENT SEXUAL MISCONDUCT COMPLAINTS 1 (2011) [hereinafter UVA POLICY], *available at* http://www.virginia.edu/sexualviolence/documents/ sexual_misconduct_policy070811.pdf.

[109] The University of Montana refers all investigations into "felony crimes against persons and felony drug crimes" to local law enforcement. Memorandum of Understanding between the Univ. of Mont. Office of Pub. Safety, Missoula Police Dep't, and Missoula Cnty. Sheriff's Office 14 (June 30, 2013) (on file with author). Consistent with state law, all employees of the University of New Hampshire (other than confidential counselors and similar service providers) must report sexual violence to the university police. Memorandum from Donna Marie Sorrentino, Dir. and Title IX Coordinator, Affirmative Action and Equity Office, Univ. of N.H., to Faculty and Staff, Univ. of N.H., subject: Reporting Sexual Harassment (Including Sexual Violence) Incidents (Oct. 2014) (on file with author).

[110] *See* DCL, *supra* note 82, at 10.

[111] *See* OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 25 (Apr. 29, 2014) [hereinafter QUESTIONS AND ANSWERS], *available at* http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf ("[N]either Title IX nor the DCL specifies who should conduct the investigation."). The University of Virginia uses a team of investigators, typically including an attorney and mental health professional. UVA Policy, *supra* note 108, at 10. At Duke University, the Office of Student Conduct conducts the investigation, "which may include the use of an independent investigator." DUKE UNIV., STUDENT SEXUAL MISCONDUCT POLICY 7 (2010), *available at* http://studentaffairs.duke.edu/sites/default/files/u122/Student%20Sexual%20Misconduct%20Policy.pdf.

Civil libertarians and victims' advocates alike disparage these amateur investigations.[112] Yet while some senators continued to lambast the military with the erroneous claim that sexual assaults are solely reported to and investigated by commanders,[113] the legislative and executive branches doubled-down on internal college investigations, proposing to improve their quality through increased training in lieu of encouraging or even permitting deferral to law enforcement.[114] The

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[112] *See, e.g.*, Froma Harrop, *Victims of Campus Rape Should Be Dialing 911*, REAL CLEAR POLITICS (May 8, 2014), http://www.realclearpolitics.com/articles/2014/05/08/victims_of_campus_rape_should_be_dialing_ 911_122575.html; Heather MacDonald, *The Obama Administration's Deserving Victims*, NAT'L REVIEW ONLINE (May 8, 2014, 4:00 AM), http://www.nationalreview.com/article/377492/obama-administrations-deserving-victims-heather-mac-donald; Gabrielle Glaser, *Flunking on Sexual Assault*, L.A. TIMES, May 23, 2014, at A19 ("[T]hough the crimes at issue are considered among the most serious in the criminal code, the accusations are typically handled by campus administrators who are unlikely to have the sensitivity, forensic training or expertise required to investigate a possible sex crime."); Peter Berkowitz, *U.S. Colleges' Sexual Assault Crusade*, REAL CLEAR POLITICS (Sept. 5, 2014) http://www.realclearpolitics.com/articles/2014/09/05/us_colleges_sexual_assault_crusade_123851.html ("If an undergraduate were accused of committing murder, no one in charge of a U.S. college or university would think of convening a committee of students, professors, and administrators to gather and analyze evidence, prosecute, adjudicate, and mete out punishment."); Letter from Scott Berkowitz, President of Rape, Abuse, and Incest Nat'l Network, to the White House Task Force to Protect Students from Sexual Assault (Feb. 28, 2014) [hereinafter RAINN letter], *available at* https://rainn.org/images/03-2014/WH-Task-Force-RAINN-Recommendations.pdf ("[U]ntil we find a way to engage and partner with law enforcement, to bring these crimes out of the shadows of dorm rooms and administrators' offices, and to treat them as the felonies that they are, we will not make the progress we hope.").

[113] *See, e.g.*, 160 CONG. REC. S1339 (daily ed. Mar 6, 2014) (statement of Sen. Rand Paul) ("To me, it's as simple as this: Should you have to report sexual assault to your boss?"), S1340 (statement of Sen. Barbara Boxer) ("Would you decide whether the case should be prosecuted or would you call the police?").

[114] A section of the CASA would require all college personnel "with authority to redress sexual harassment or who [have] the duty to report incidents of sexual harassment or other misconduct" to receive training in certain areas, including victim interview techniques and "the effects of trauma, including neurobiological change." S. 2692, 113th Cong. § 6 (2013). The CASA further would provide federal funding to train campus personnel to conduct forensic interviews. *Id.* § 7. The White House Task Force advises that "anyone . . . involved in responding to, investigating, or adjudicating sexual misconduct must receive adequate training" (but does not further define "adequate training"). WHITE HOUSE TASK FORCE, *supra* note 91, at 7. During the rulemaking process to implement the SaVE Act, the DOE's negotiated rulemaking committee proposed an "annual training document" that would require "identifying and becoming skilled in the [Department of Justice's Office of Violence Against Women]'s core competencies" and "training on how to conduct an investigation and hearing process-This [sic] must be training done by the university/institution." *Prevention/Training*

Crime and Terrorism Subcommittee of the Senate Judiciary Committee held the first hearing on the role of law enforcement in campus sexual assaults in December 2014, three years after OCR released the DCL.[115] The strongest legislative endorsements of law enforcement involvement are a SaVE Act provision, which directs colleges to ensure victims know that law enforcement reporting is an option,[116] and a CASA provision that would require colleges to enter a "memorandum of understanding" with local law enforcement.[117] These tepid gestures sharply contrast with the military's statutory and regulatory obligation to refer all allegations of sexual assault to law enforcement.[118]

B. Disposition: The Choice and Who Chooses

> *I think what we need so urgently is transparency, and accountability, and an objective review of facts by someone who knows what they're doing, who is trained to be a prosecutor, who understand[s] prosecutorial discretion. And these cases on a good day for any prosecutor in America to get right is [sic] difficult. So why would we be giving it to someone who doesn't have a law degree, who knows nothing about sexual assault*

Subcommittee Annual Training Document, U.S. DEP'T OF EDUC. (2014), *available at* http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/vawa-rulesannualtrng.pdf. These requirements were not ultimately part of the publicly proposed regulation because "it was the general feeling of the negotiated rulemaking committee that . . . the level of detail went beyond the scope of the Department's rulemaking authority." 79 Fed. Reg. 35,446 (June 20, 2014).

[115] *Campus Sexual Assault: the Roles and Responsibilities of Law Enforcement, Hearing before the Subcomm. on Crime and Terrorism, S. Comm. on the Judiciary*, 113th Cong. (Dec. 9, 2014) [hereinafter SJC Hearing], *available at* http://www.judiciary.senate.gov/meetings/campus-sexual-assault-the-roles-and-responsibilities-of-law-enforcement (embedded video). In opening remarks, two senators suggested that college sexual assault should be investigated by law enforcement, not administrative bodies. *Id.* at 0:21:51 (statement of Sen. Sheldon Whitehouse), 0:26:22 (statement of Sen. Charles Grassley). *But see infra* text accompanying note 173.

[116] 20 U.S.C.S. § 1092(f)(8)(B)(iii)(III) (Lexis 2014).

[117] S. 2692, 113th Cong. §§ 3(a), 4(a) (2013). The White House Task Force also recommends this practice. WHITE HOUSE TASK FORCE, *supra* note 91, at 6.

[118] The one, narrow exception to this requirement is if a victim chooses to make a restricted report in which case the chain of command will never know the particulars of the allegation and law enforcement will not be notified. *See* DoDD 6495.01, *supra* note 45, encl. 3, para 1.6.2.

> *. . . who may know the perpetrator, who may know the victim?*
> —Senator Kirsten Gillibrand[119]

In the military justice system, once a potential crime is reported and investigated, commanders have the "initial disposition authority" to decide what to do with the case.[120] A commander has five options—take no action, take administrative action, pursue nonjudicial punishment under UCMJ Article 15, pursue trial by court-martial, or forward the case to the next higher commander.[121] Commanders at certain levels are "convening authorities," who may convene and refer cases to courts-martial; the most serious punishments, for crimes akin to felonies, are reserved for general courts-martial (which, as the term indicates, are normally convened by a general or admiral).[122] A military court-martial generally resembles a civilian criminal trial from arraignment to verdict,[123] applies rules of evidence similar to those found in federal court,[124] and allows attorneys to represent the accused, government, and,

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[119] SEN. KIRSTEN GILLIBRAND, TESTIMONY BEFORE THE RESPONSE SYSTEMS TO ADULT SEXUAL CRIMES PANEL 312–13 (Sept. 24, 2014), *available at* http://140.185.104.231/public/docs/meetings/20130924/24_Sep_13_Day1_ Final.pdf.

[120] MCM, *supra* note 13, R.C.M. 306.

[121] *Id.* R.C.M. 306(c). Depending on the level of the commander, pursuing trial by court-martial may include preferring (filing) charges, referring charges to a summary, special, or general court-martial, directing a preliminary hearing, or forwarding charges to a commander with greater authority. *See id.* R.C.M. 307, 401–06, 601. Administrative action can include involuntarily discharging the accused from the military. *See infra* text accompanying notes 165–169.

[122] UCMJ arts. 22–24 (2012); MCM, *supra* note 13, R.C.M. 601 (a) ("Referral is the order of a convening authority that charges against an accused will be tried by a specified court-martial."). Note that, except for summary courts-martial, the convening authority may not be the same person who initially prefers charges against the accused. MCM, *supra* note 13, R.C.M. 601(c).

[123] *See generally* MCM, *supra* note 13, R.C.M. 901–24. One significant difference is that, unlike civilian juries, court-martial panels for non-capital cases may consist of as few as five members for a general-court martial or three for a special court-martial. UCMJ art. 25a (2012). Unanimity is not required and hung juries are impossible; if two thirds vote for a finding of guilty, the accused is found guilty, otherwise the finding is of not guilty. MCM, *supra* note 13, R.C.M. 921(c). Also, military sentencing procedures are considerably different from their civilian counterparts. *Compare id.* R.C.M. 1001-03 (providing for an adversarial presentencing phase of trial beginning immediately after an accused is found guilty and for sentencing by the same authority, be it judge or court members), *with, e.g.*, Fed. R. Crim. P. 35 (providing for sentencing in U.S. District Court by a judge, at least seven days after the completion of a presentencing report by a probation officer).

[124] *See* UCMJ art. 36 (2012); MCM, *supra* note 13, pt. III.

in certain cases, victims.[125] Any superior commander may withhold disposition authority for specific cases, categories of offenses, categories of offender, or in general.[126]

In 2013 and 2014, the most contentious issue for the Senate was military commanders' plenary disposition authority, specifically their exclusive discretion to refer cases to courts-martial. Senator Gillibrand introduced the Military Justice Improvement Act (MJIA) four times; this Act would have given independent military attorneys in the grade of O-6 the sole authority to decide whether to refer certain charges, notably including sexual assault, to special or general courts-martial.[127] Senator Claire McCaskill, favoring commanders' retention of their convening authority, vigorously opposed her.[128] Both argued that their approach would better protect sexual assault victims and promote increased sexual assault reporting.[129] The Senate divided sharply over this issue, crossing gender and party lines.[130]

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[125] UCMJ art. 27 (2012) (providing for detailing of trial and defense counsel who are certified attorneys); 10 U.S.C. § 1044e (2014) (providing for special victims counsel); L.R.M. v. Kastenberg, 72 M.J. 364 (C.A.A.F. 2013) (holding that victims have limited standing and right to be represented by counsel in certain evidentiary hearings). Note that most of this description of courts-martial (text accompanying *supra* notes 123-125) does not apply to summary courts-martial. *See generally* MCM, *supra* note 13, R.C.M. 1301-1306. A summary court-martial is not a "criminal proceeding" within the meanings of the Fifth or Sixth Amendments. Middendorf v. Henry, 425 U.S. 25, 34–37 (1976).

[126] MCM, *supra* note 13, R.C.M. 306(a). In April 2012, the Secretary of Defense withheld initial disposition authority for penetrative sex offenses (rape and sexual assault) to commanders in the grade of O-6 of higher. Memorandum from Sec'y of Def., *supra* note 46. The U.S. Coast Guard followed suit in June 2012. U.S. COAST GUARD, COMMANDANT INSTR. 1620, WITHHOLDING INITIAL DISPOSITION AUTHORITY UNDER UCMJ IN CERTAIN SEXUAL ASSAULT CASES (27 June 2012).

[127] S. 967, 113th Cong. (2013); S. 1752, 113th Cong. (2013); S. 2970, 113th Cong. (2014); S. 2992, 113th Cong. (2014). Representative Dan Benishek introduced the House version of the Military Justice Improvement Act (MJIA). H.R. 2016, 113th Cong. (2013).

[128] Sen. Claire McCaskill, *An Evidence Based Approach to Military Justice Reform*, TIME, Mar. 15, 2014, http://time.com/26081/claire-mccaskill-military-sexual-assault-bill/#26081/claire-mccaskill-military-sexual-assault-bill/.

[129] Erika Eichelberger, *The Fight Over How to Stop Military Sexual Assault, Explained*, MOTHER JONES (Nov. 20, 2013, 9:57 AM) http://www.motherjones.com/politics/2013/11/mccaskill-gillibrand-military-sexual-assault.

[130] *See* 160 CONG. REC. S1335–49 (daily ed. Mar. 6, 2014) (floor debate on the Military Justice Improvement Act of 2013, culminating in an unsuccessful 55-45 cloture vote).

Repeatedly, Senator Gillibrand stated that only "independent," "trained," and "experienced" prosecutors should make disposition decisions regarding sexual assault cases in the military.[131] The MJIA would require the proposed independent reviewing authority to have "significant experience in trials by general or special court-martial."[132] However, in early 2013, Senator Gillibrand cosponsored the SaVE Act amendments to the Clery Act, which for the first time statutorily required college officials to investigate and dispose of sexual assault allegations through internal procedures.[133] Arguing in support of the MJIA, Senator Barbara Boxer referred favorably to the 2013 Violence Against Women Reauthorization Act, stating that it:

> sends a clear and unequivocal message that wherever a sexual assault occurs . . . whether on a college campus or on an Indian reservation or in a religious setting or in our military, yes, the offender must be punished. Sexual assault is a heinous and violent crime and it must be treated as such. *It is not an internal matter.*[134]

Yet the Act to which she referred included the SaVE provisions that she cosponsored[135] expressly requiring internal adjudication of college sexual assault.[136] Of the other nine senators who sponsored or cosponsored the SaVE Act, eight also supported the MJIA.[137] Private

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[131] *See, e.g.*, *Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military Before the S. Comm. on Armed Services*, 113th Cong. 50 (2013) [hereinafter SASC Hearing], *available at* http://www.armed-services.senate.gov/imo/media/doc/13-44%20-%206-4-13.pdf. ("JAG military trained prosecutor"); *Comprehensive Resource Center for the Military Justice Improvement Act*, KIRSTEN GILLIBRAND–U.S. SENATOR FROM NEW YORK, http://www.gillibrand.senate.gov/mjia (last visited May 11, 2015) ("independent, trained, professional military prosecutors"); Press Release, Sen. Kirsten Gillibrand, Ahead of Sexual Assault Vote Expected on Senate Floor Next Week, Bipartisan Group of Senators, Survivors, advocates Continue Push for Independent Military Justice System (Feb. 6, 2014) ("experienced trial counsel with prosecutorial experience"); Subcommittee Hearing, *supra* note 53, at 3 ("trained prosecutor").

[132] S. 967, § 2(a)(3)(A)(ii); *accord* S. 1752, § 2(a)(4)(A)(ii); S. 2970, § 2(a)(4)(A)(ii); S. 2992, § 2(a)(4)(A)(ii).

[133] 159 CONG. REC. S470 (daily ed. Feb. 4, 2013); *see also supra* text accompanying note 86.

[134] Subcommittee Hearing, *supra* note 53, at 6 (emphasis added).

[135] 159 CONG. REC. S284 (daily ed. Jan. 14, 2013).

[136] *See supra* notes 92, 137, and accompanying text.

[137] Senator Robert Casey introduced SaVE, and his cosponsors included Senators Mark Begich, Michael Bennet, and Barbara Mikulski. 159 CONG. REC. S284 (daily ed. Jan. 14, 2013). All five cosponsored the MJIA. *Id.* S3569 (daily ed. May 16, 2013), S3956 (daily

organizations have taken similarly inconsistent positions, arguing that military commanders are incapable of making disposition decisions yet insisting that college administrators shoulder similar responsibility.[138]

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ed. June 4, 2013), S5908 (daily ed. July 24, 2013). Senators Patty Murray, Amy Kloubchar, Debbie Stabenow, and Christopher Coons also cosponsored SaVE. *Id.* S284 (daily ed. Jan. 14, 2013), S329–30 (daily ed. Jan 28, 2013). All four voted for the (unsuccessful) cloture motion to allow a vote on the MJIA in 2014. 160 CONG. REC. S1349 (daily ed. Mar. 6, 2014).

[138] The National Organization for Women (NOW) claimed the MJIA would create an "independent, objective, and unbiased military justice system to better respond to the epidemic of sexual assault." *Will Military Sexual Assault Survivors Find Justice?*, NAT'L ORG. FOR WOMEN (Mar. 19, 2014), http://now.org/resource/will-military-sexual-assault-survivors-find-justice-issue-advisory. Yet NOW endorsed and supported the recommendations of the White House Task Force, which in turn endorsed OCR-mandated internal investigations and adjudications, as a way to "hold rapists accountable for their crimes." Terry O'Neill, *NOW Applauds Efforts by White House Task Force to Prevent Campus Sexual Assault*, NAT'L ORG. FOR WOMEN (Apr. 29, 2014), http://now.org/media-center/press-release/now-applauds-efforts-by-white-house-task-force-to-prevent-campus-sexual-assault. The National Women's Law Center expressed "strong support" for the MJIA and for "giving these decisions to trained, experienced prosecutors." Letter from Nancy Duff Campbell, Co-President, Nat'l Women's Law Ctr. to the U.S. Senate (Nov. 13, 2013), *available at* http://www.nwlc.org/resource/letter-senate-support-military-justice-improvement-act. But after asserting that "reports of assaults and schools' failure to address them are widespread," the Center praised OCR's edict to use internal administrative hearings as "crucial to tackling the problem of sexual violence" in colleges. Letter from Fatima Goss Graves, Vice Pres. of Educ. and Employment, Nat'l Women's Law Ctr., et al., to Catherine Lhamon, U.S. Ass't Sec'y of Educ. for Human Rights 2–3 (Nov. 21, 2013), *available at* http://www.nwlc.org/sites/default/files/pdfs/letter_to_ocr_re_sexual_harassment_and_violence.pdf. The editorial board of the *New York Times*, incensed at the Senate's refusal to pass the MJIA, alleged that "the commander-centric structure of the current military justice system . . . deters victims from reporting attacks, helps result in an abysmally low prosecution rate, and . . . inspires little confidence in the integrity of the decision making process." Editorial, *A Broken Military Justice System*, N.Y. TIMES, Mar. 18, 2014, at A22. Three months later the board wrote, "[G]iven that student victims often don't want to go through the ordeal of filing a criminal complaint with the police . . . the reality is that college administrators can't avoid involvement in these cases" and noted, without criticism, that under OCR's mandates, "colleges will still have the ability to determine the nature of disciplinary actions for themselves." Editorial, *New Rules to Address Campus Rape*, N.Y. TIMES, June 30, 2014, at A18. The Washington Post endorsed the MJIA, believing "the authority to investigate and prosecute cases [should] be made by impartial military prosecutors instead of senior officers with no legal training but inherent conflicts of interest." Editorial, *Serving Victims Better*, Wash. Post, Sept. 8, 2013, at A14. Per the same editorial board:

> The he-said, she-said nature of the cases, with alcohol a factor and memories sometimes faulty, make local prosecutors wary . . . That's why the role of college administrators in providing a safe education environment – cooperating with local law enforcement, promulgating

Neither Title IX, the Clery Act (including the SaVE Act amendments), nor any implementing regulations require that the individuals who investigate, dispose of, or adjudicate college sexual assault allegations have legal degrees, licenses, or experience.[139] Furthermore, within the Title IX/SaVE Act framework, significant determinations, such as whether probable cause warrants further proceedings, whether to refer the case to a disciplinary hearing, or even whether the accused is responsible are made by college officials (who may be the same people who investigate the allegations).[140] Yet the (incorrect) notion of commanders conducting their own investigations,[141] the authority of commanders to refer cases to trial,[142] and the ability to set aside findings and apply clemency to sentences,[143] all drew furious condemnation and significant legislative action.

Supporters of the MJIA believe that underreporting, retaliation, and institutional indifference are symptomatic of how the military currently addresses sexual assault.[144] Many MJIA supporters likewise allege that

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> and enforcing student codes of conduct, and offering support and services to students who have been assaulted without trampling on the rights of the accused – is critical.

Editorial, *Raped on Campus*, WASH. POST, May 4, 2014, at A20.

[139] The words "lawyer," "attorney" (other than references to the Attorney General), or "prosecutor" do not appear in 20 U.S.C. §§ 1681–88, 34 C.F.R. § 106, or 20 U.S.C. § 1092(f).

[140] *See, e.g.*, QUESTIONS AND ANSWERS, *supra* note 111, at 39–40 ("[T]he Title IX coordinator . . . is likely to be in a better position than are other employees to evaluate whether an incident of sexual harassment or sexual violence creates a hostile environment and how the school should respond."); UNIV. OF MICH., POLICY ON SEXUAL MISCONDUCT BY STUDENTS 7 (Aug. 19, 2013), *available at* http://studentsexualmisconductpolicy.umich.edu/content/university-michigan-policy-sexual-misconduct ("The Investigator's report and findings must be reviewed and approved by the Title IX coordinator."); UNIV. OF MONT., DISCRIMINATION GRIEVANCE PROCEDURES 5 (Sept. 23, 2013), *available at* http://www.umt.edu/eo/documents/discriminationprocedures.docx ("[The Equal Opportunity & Affirmative Action Office] conducts or oversees the conducting of a fair and impartial investigation . . . [and] determines whether there is a preponderance of the evidence to believe that an individual engaged in a Policy Violation."); UVA Policy, *supra* note 108, at 10 ("The Investigators will determine whether or not there is good cause to grant a hearing.").

[141] *See supra* text accompanying notes 103–107.

[142] *See supra* text accompanying notes 127–130.

[143] *See supra* text accompanying notes 52–53; *supra* note 62 and accompanying text.

[144] *E.g.*, 160 CONG. REC. S1337 (daily ed. Mar. 6, 2014) (statement of Sen. Susan Collins) ("Ensuring that survivors do not think twice about reporting an assault for fear of retaliation or damage to their careers is still not part of the military culture."); *id.* S1338

college sexual assaults are "swept under the rug."[145] Under Title IX's framework, "[t]he lodging of the functions of investigation, prosecution, fact-finding, and appellate review in one office[,] . . . itself a Title IX compliance office rather than an entity that could be considered structurally impartial,"[146] is acceptable, yet MJIA supporters routinely argue that commanders have a "conflict of interest" and cannot be trusted to impartially exercise disposition authority.[147] None have offered any explanation for why these concerns dictate that military leaders must be stripped of disposition discretion while college leaders must be empowered and duty-bound to wield a similar kind of authority.

C. Adjudicative Procedure

> *I've used a single yardstick to measure each idea on the table: will it better protect victims, and lead to more prosecutions?*
> —Senator Claire McCaskill[148]

(statement of Sen. Charles Grassley) ("[T]he current structure of the military justice system is having a deterrent effect on the reporting of these cases.").

[145] *E.g.*, Sen. Kirsten Gillibrand, *We Will Not Allow These Crimes to be Swept Under the Rug Any Longer*, TIME (May 15, 2014), http://time.com/100144/kirsten-gillibrand-campus-sexual-assault/; Press Release, Sen. Charles Grassley, The Scoop: Denying Sexual Assault is a Serious Crime (Sept. 19, 2014) ("[College] victims have a right to know that they will be treated with respect, and sexual assault will be treated like the crime it is, not swept under the rug."); O'Neill, *supra* note 138 ("For too long, colleges across the country have been brushing this issue under the rug, and not offering enough support for sexual assault victims."); Allie Bidwell, *Senators Seek Crackdown on College Sexual Assaults*, U.S. NEWS (July 30, 2014), http://www.usnews.com/news/articles/2014/07/30/senators-seek-crackdown-on-college-sexual-assaults (quoting Sen. Richard Blumenthal) ("The prevalence of sexual abuse on campuses around the country is staggering, and stunningly underreported.").

[146] Prof. Elizabeth Bartholet et al., *Rethink Harvard's Sexual Harassment Policy*, BOSTON GLOBE, Oct. 15, 2014, at A11 (criticizing Harvard University's new sexual misconduct policy that meets or exceeds all OCR requirements).

[147] *E.g.*, Gillibrand, *supra* note 119, at 303 ("[T]hese improvements [the MJIA] will remove the inherent conflict of interest."); SASC Hearing, *supra* note 131, at 130 (statement of Ms. Nancy Parrish, President, Protect Our Defenders) ("You must remove the bias and conflict of interest. . . . It is not going to change until you fundamentally reform the system, until you have professional prosecutors looking at these cases."); Campbell, *supra* note 138, at 1 ("Nowhere else in our system of justice does one individual – particularly one with an inherent conflict of interest – have this authority.").

[148] Sen. Claire McCaskill, *Sexual Assaults in the Military—The Policy Matters*, HUFFINGTON POST (Nov. 18, 2013, 2:05 PM, updated Jan. 23, 2014, 6:58 PM), http://www.huffingtonpost.com/claire-mccaskill/sexual-assaults-in-the-mi_b_4297449.html.

The 2014 NDAA contains two provisions regarding disposition of sexual assault. The first expresses a congressional preference for trials by court-martial of charges of rape, sexual assault, forcible sodomy, or attempts to commit the same and that nonjudicial punishment and administrative action are inappropriate dispositions for those crimes.[149] The second expresses a congressional belief that "the Armed Forces should be exceedingly sparing" in granting a request for discharge or resignation in lieu of court-martial (an administrative process sometimes known as a "RILO") for servicemembers charged with those same offenses.[150] This language first originated in Senator Claire McCaskill's Victim Protection Act of 2013.[151] The 2014 and 2015 NDAAs also require any convening authority who chooses not to refer a charge for a penetrative offense to submit his decision for review to either the next higher commander, if his staff judge advocate agrees with the decision, or directly to the service secretary, if the staff judge advocate or the service's "chief prosecutor" believes referral is warranted.[152]

These provisions followed months of criticism comparing the numbers of reported and estimated sexual assaults to the number of courts-martial and disparaging alternative dispositions, including RILOs, as examples of how military sexual assaults are "swept under the rug."[153]

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[149] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1752(a), 127 Stat. 672 (2013).

[150] *Id.* § 1753.

[151] S. 1775, 113th Cong. §§ 208–09 (2013).

[152] § 1744, *amended by* Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 541, 128 Stat. 3292 (2014). Senator McCaskill would have gone further; the Victim's Protection Act would have required the case to be directly forwarded to the service secretary any time the "senior trial counsel detailed to the case" believes referral is warranted. S. 1775, 113th Cong. § 202(c). The FY15 NDAA allows the detailed trial counsel to request the "chief prosecutor," a term previously absent from the UCMJ, to force such secretarial review. Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 541, 128 Stat. 3292 (2014).

[153] *E.g.*, Karisa King, *Twice Betrayed; Systematic Injustice: Sex Assault Convictions are Rare in the Military*, SAN ANTONIO EXPRESS-NEWS, May 20, 2013, at A1 ("Meanwhile, 286 offenders received nonjudicial or administrative punishment or discharges, allowing them to dodge a criminal mark on their record. In 70 cases, suspects slated for possible courts-martial were allowed to quit their jobs to avoid charges."); Briefing Paper, Servicewomen's Action Network, Department of Defense (DoD) Annual Report on Sexual Assault in the Military, Fiscal Year 2011, at 5 (Apr. 17, 2012), *available at* http://servicewomen.org/wp-content/uploads/2012/04/SAPRO-briefing-report-4_17_12.pdf ("[T]he DoD cannot abdicate its judicial responsibilities and continue to allow 10% of perpetrators to RILO [resign in lieu of court-martial] and avoid prosecution

Meanwhile, MJIA opponents argued that taking referral authority from commanders and giving it to lawyers would undesirably *reduce* the number of sexual assault prosecutions.[154] Overall, Congress's expressed and implied belief is that for military sexual assault, justice can only be achieved by a criminal trial.

On the other hand, the dearth of criminal prosecutions of college sexual assault has fueled a demand for a different adjudicative system, rather than cries for increased criminal trials.[155] Meeting this demand, the SaVE Act and OCR require colleges to use internal administrative procedures for sexual assault.[156] All colleges must create a uniform procedure

> to determine (1) whether or not the conduct occurred; and (2) if the conduct occurred, what actions the school will take to end the sexual violence, eliminate the hostile environment, and prevent its recurrence, which may include imposing sanctions on the perpetrator and providing remedies for the complainant and broader student population.[157]

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simply by quitting their job."); THE INVISIBLE WAR, *supra* note 44, at 0:54:25 (statement of Attorney Susan Burke) ("[W]hen you look at prosecution rates in the 2010 department of defense reports, you begin with 2,410 unrestricted reports . . . then of the 1,025 that they actually take some action, do they court martial them? No. Only half of them, 529 actually got court-martialed. The rest, 256 to [nonjudicial] Article 15 punishments, 109 to administrative discharges and 131 to quote other adverse administrative actions, whatever the heck that means."); Subcommittee Hearing, *supra* note 53, at 3 (statement of Sen. Kirsten Gillibrand) ("Of 2,439 unrestricted reports filed in 2011 for sexual violence, only 240 proceeded to trial . . . . The Defense Department itself puts the real number closer to 19,000. A system where in reality closer to 1 out of 100 alleged perpetrators are faced with *any accountability at all.*") (emphasis added).

[154] *See, e.g.*, 160 CONG. REC. S1342 (statement of Sen. Claire McCaskill) ("[I]t is clear that right now we have more cases going to court-martial over the objections of prosecutors than the objections of commanders."), S1344 (statement of Sen. Kelly Ayotte) ("What about those 93 victims where the commander said: Bring the case forward, even though the JAG lawyer said no. They would not have gotten justice . . . . The evidence shows that actually commanders are bringing cases more frequently than their JAG's lawyers [sic] and over their objections.").

[155] *See supra* text accompanying note 80, WASH. POST, *Raped on Campus*, *supra* note 138; *infra* text accompanying notes 171–176.

[156] 20 U.S.C.S. § 1092(f)(8)(B)(iv) (Lexis 2014); DCL, *supra* note 82, at 10. *Cf.* 34 C.F.R. § 106.8(b) (2014).

[157] QUESTIONS AND ANSWERS, *supra* note 111, at 24.

According to OCR, because "a Title IX investigation will never result in incarceration of an individual . . . the same procedural protections and legal standards [as for a criminal trial] are not required."[158] Under Title IX and the SaVE Act, college disciplinary procedures need not apply formal rules of evidence,[159] they need not allow for an appeal,[160] they need not allow the accused to be represented by an attorney,[161] and they may be conducted by anyone appointed by the college.[162] The DCL directs colleges to use a "preponderance of the evidence" standard for these administrative adjudications.[163] The sanction is not a criminal conviction or sentence; the harshest punishment is expulsion.[164]

These procedures are remarkably similar to the military's administrative separation process (ADSEP). Under these procedures, a servicemember who has committed misconduct may be involuntarily separated from the military, with much fewer due process rights than at a criminal trial.[165] An enlisted servicemember facing an ADSEP who has served at least six years or who could receive an Other than Honorable

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[158] *Id.* at 27.

[159] The Title IX regulations adopt the procedural provisions applicable to Title VI of the Civil Rights Act of 1964. *See* 34 C.F.R. § 106.71. The Title VI regulations apply the Administrative Procedure Act to administrative hearings required prior to termination of federal financial assistance and require that termination decisions [need only] be "supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d).

DCL, *supra* note 82, at 11 (internal parenthetical omitted).

[160] *Id.* at 12; *see also* 20 U.S.C.S. § 1092(f)(8)(B)(iv)(II)(bb) (Lexis 2014).

[161] DCL, *supra* note 82, at 12; *see also* 20 U.S.C.S. § 1092(f)(8)(B)(iv)(II) (Lexis 2014).

[162] *See supra* note 111 and accompanying text.

[163] DCL, *supra* note 82, at 10–11. The original version of the SaVE Act would have statutorily required colleges to use the preponderance of the evidence standard. S. 128, 113th Cong. § 2(a)(5) (2013).

[164] Though it is the most severe option available, many victims and advocates consider expulsion to be the only appropriate punishment. *See, e.g.*, Tyler Kingkade, *Yale Fails to Expel Students of Sexual Assault*, HUFFINGTON POST (Aug. 1, 2013, 9:11 AM, updated Jan. 23, 2014, 6:58 PM), http://www.huffingtonpost.com/ 2013/08/01/yale-sexual-assault-punishment_n_3690100.html; Lombardi, *supra* note 81 (quoting Colby Bruno, Managing Att'y, Victims Rights Law Ctr.) ("I don't understand in what crazy universe rape or sexual assault doesn't warrant expulsion.").

[165] *See* U.S. DEP'T OF DEF., INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS (27 Jan. 2014) [hereinafter DoDI 1332.14]; U.S. DEP'T OF DEF., INSTR. 1332.30, SEPARATION OF REGULAR AND RESERVE COMMISSIONED OFFICERS (25 Nov. 2013) [hereinafter DoDI 1332.30].

Conditions discharge is entitled to a hearing before a board.[166] The board consists of at least three commissioned, warrant, or noncommissioned officers, none of whom are required to be lawyers.[167] The board is not bound by any rules of evidence other than "reasonable restrictions . . . concerning relevancy and competency of evidence."[168] The board uses a preponderance of the evidence standard.[169]

Eschewing both law enforcement investigation and criminal prosecution, an administrative procedure with no possibility of criminal conviction is the preferred disposition for college sexual assault. At the same time, a nearly identical procedure in the military is "sweeping it under the rug" and "avoiding accountability."[170] These positions cannot be logically reconciled. It appears easy to explain the disparate treatment with the obvious fact that the military has its own criminal justice system, while colleges do not. Yet many advocates praise college administrative hearings as preferable to law enforcement investigations and criminal trials.[171] After the executive director of a victims' advocacy

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[166] DoDI 1332.14, *supra* note 165, encl. 3, para. 10.d, encl. 5, para. 2.a(7); *see also* DoDI 1332.30, encls. 3–5 (board procedures for officer separations). An enlisted servicemember who has served less than six years, or a commissioned officer with less than six years commissioned service, may be separated with an Honorable or General (Under Honorable Conditions) Discharge without the right to any formal board or hearing, and only minimal notice requirements. DoDI 1332.14, *supra* note 165, encl. 5, para. 2.a; DoDI 1332.30, *supra* note 165, encl. 6, para. 1. An Other than Honorable Conditions Discharge is the most severe form of administrative separation available in an ADSEP. DoDI 1332.14, *supra* note 165, encl. 4, para. 3.b(2)(c).

[167] DoDI 1332.14, *supra* note 165, encl. 5, para. 3.e(1)(a). The board may also have a nonvoting legal advisor. *Id.*

[168] *Id.* encl. 5, para. 3.e(5).

[169] *Id.* encl. 5, para 3.e(7). The board's findings and recommendations on separation and characterization are forwarded to the separation authority, a high-ranking commander, who may approve or disapprove them, but he may not approve findings and recommendations less favorable to the respondent. *Id.* encl. 5, para 3.f(4).

[170] *See supra* note 153 and accompanying text.

[171] *E.g.*, Jessica Valenti, *Why We Need to Keep Talking About 'Rape Culture'*, WASH. POST, Mar. 30, 2014, at B3 (responding to RAINN Letter, *supra* note 112) ("[Activist Wagatwe] Wanjuki further questions RAINN's criminal justice focus, given that the system can be sexist, racist, and a 'grossly inadequate venue to most survivors.'"); Emma Bolger, *Frustrated by Inaction, Student Reports Sexual Assault to the Police*, COLUMBIA SPECTATOR, May 16, 2014, http://columbiaspectator.com/news/2014/05/16/frustrated-columbias-inaction-student-reports-sexual-assault-police (describing how Ms. Emma Sulkowicz believes, based on her treatment by police when she reported a sexual assault, "Columbia needs to be improving its own adjudication process for sexual assault"); Gray, *supra* note 101 (reporting on comments made at a roundtable discussion hosted by Senator McCaskill) ("For the advocates, doing right by the victim often means respecting her or his wishes not to report the crime to the police and even telling the victim about the

group bluntly told members of the Senate Judiciary Committee that "campus-based adjudication processes don't work,"[172] Senator Richard Blumenthal, an MJIA supporter and CASA co-sponsor, fired back:

> I hope I misread [sic] your testimony because I read it as essentially disapproving those on-campus adjudication processes as to use your words "they don't work." . . . It seems to me the issue you just raised [that expelling offenders without criminal sanctions leaves them free to assault elsewhere] is separate and apart from the existence and integrity and fact finding effectiveness of the on-campus adjudication process and I hope that you will support what's in the bill [CASA], which is to preserve and in fact enhance what we have now in many campuses.[173]

Senator Gillibrand, among others, acknowledged that civilian prosecutors typically refuse alcohol-driven college sexual assault cases, leaving campus hearings as the only option.[174] One college police chief candidly admitted that some campus sexual assault cases could not satisfy the "beyond a reasonable doubt" evidentiary standard of a criminal trial.[175] Some, including Senator McCaskill, indicated that victims may prefer less formal proceedings to the very public, protracted,

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possible downsides of the criminal justice system–which can lead to a months-long process that might threaten a victim's confidentiality.").

[172] SJC Hearing, *supra* note 115, at 01:35:15 (statement of Ms. Peg Lanhammer, Exec. Dir., Day One).

[173] *Id.* at 01:57:42.

[174] *E.g.*, Lombardi, *supra* note 80 ("Most cases involving campus rape allegations come down to he-said-she-said accounts of sexual acts that clearly occurred . . . . At times, alcohol and drugs play such a central role, students can't remember details . . . . A prosecutor says 'I'm not going to take this to a jury.'") (internal quotations and attributions omitted); SJC Hearing, *supra* note 115, at 0:40:52 (statement of Sen. Kirsten Gillibrand) ("Even in cases where survivors have felt supported by their interactions with police, they have been devastated by slipshod investigations, drawn out court proceedings, and the refusal of prosecutors to take their cases."); WASH. POST, *Raped on Campus*, *supra* note 138.

[175] SJC Hearing, *supra* note 115, at 01:26:12 (statement of Ms. Kathy Zoner, Chief, Cornell Univ. Police) ("Survivors and those supporting them become angry and confused when a DA is unable to prosecute cases criminally where a respondent has been found responsible on campus during their proceedings. The lower administrative standard of proof falls short often of the higher beyond a reasonable doubt standard.").

and intense experience of testifying at a criminal trial.[176] Each of these concerns could apply equally to military cases, for which Congress expects nothing short of prosecution.

D. Common ground: The Ambiguous, Overly Inclusive Definitions of Sexual Assault

> *Not every single commander can distinguish between a slap on the ass and a rape because they merge all of these crimes together.*
> —Senator Kirsten Gillibrand[177]

While political forces exacerbate significant differences in the ways in which the military and colleges respond to sexual assault, both approaches start from a common preference for broad and ambiguous definitions of the term "sexual assault." Whether the institutions' use of such broad definitions spawned the political fervor, or the intense political attention compelled the institutions to adopt them, is, for the most part, immaterial. The current definitions and statistics propagated

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[176] *E.g.*, Eliana Dockterman, *The Vanderbilt Rape Case Will Change the Way Victims Feel About the Courts*, TIME (Jan. 29, 2015), http://time.com/3686617/the-vanderbilt-rape-case-will-change-the-way-victims-feel-about-the-courts/ ("Perhaps the most compelling reason students are deterred from reporting a rape to the police is that they think they will spend years going through the criminal judicial process reliving the agony of their attack only to be denied justice."); Gray, *supra* note 101 ("Victims are afraid of going through a public rape trial because of how awful it can be for the victim. [V]ictim's [sic] naturally decide it isn't worth the risk."); Harrop, *supra* note 112 ("[M]any of the aggrieved women prefer going to university authorities for a more cushioned experience. It is believed that a college-based panel investigating charges of 'gender-based sexual misconduct' will be more sympathetic to the woman's narrative."); SJC Hearing, *supra* note 115, at 0:31:25 (statement of Sen. Claire McCaskill) ("Right now because the criminal justice system has been very bad, in fact much worse than the military and much worse than college campuses in terms of addressing victims and supporting victims and pursuing prosecutions, there is almost a default position that victims have taken through advocacy groups that they might be better off just doing the Title IX process."). Senator McCaskill elsewhere stated that she "wants as many cases as possible to be handled in criminal courts." Nick Anderson, *Men Punished in Sexual Misconduct Cases on Colleges* [sic] *Campuses are Fighting Back*, WASH. POST, Aug. 20, 2014, http://www.washingtonpost.com/local/education/men-punished-in-sexual-misconduct-cases-on-colleges-campuses-are-fighting-back/2014/08/20/96bb3c6a-1d72-11e4-ae54-0cfe1f974f8a_story.html. However, the CASA has no provisions to such effect, unlike the analogous "sense of Congress" provisions from her Victims Protection Act. *Compare* S. 2692, 113th Cong. (2013), *with* S. 1775, 113th Cong. § 208 (2013).

[177] SASC Hearing, *supra* note 131, at 49.

by and about both institutions significantly impede accurate debate and informed policies.

1. The Definitional Problem

"Sexual assault," as defined by the UCMJ, refers to one of the two penetrative offenses (rape is the other) that require "penetration, however slight of the vulva or anus or mouth."[178] By definition, it excludes any crime that does not include such penetration. In contrast, the common element of aggravated sexual contact and abusive sexual contact, the "nonpenetrative offenses," is "sexual contact":

> (A) touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person; or (B) any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person. Touching may be accomplished by any part of the body.[179]

However, the DoD's Sexual Assault Response and Prevention Policy defines "sexual assault" more broadly as "[i]intentional sexual contact characterized by use of force, threats, intimidation, or abuse of authority or when the victim does not or cannot consent [including the UCMJ offenses of] rape, sexual assault, aggravated sexual contact, abusive sexual contact, [and] forcible sodomy."[180] The Article 120 definition of "sexual contact" effectively criminalizes the entire spectrum of human bodily contact if matched with the requisite mental state (e.g. "intent to arouse"). Because the policy definition incorporates this term by reference, under DoD policy, "sexual assault" means more than the crime of sexual assault.

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[178] UCMJ art. 120(g)(1) (2012). The UCMJ also criminalizes nonconsensual sodomy, which includes oral and anal penetration by a "sex organ." UCMJ art. 125 (2014).
[179] UCMJ art. 120(g)(2) (2012).
[180] DoDI 6495.01, *supra* note 45, at 17 (23 Jan. 2012).

The law requires colleges to adopt similarly broad definitions of sexual assault. The Clery Act defines "sexual assault" by reference to the Federal Bureau of Investigation's uniform crime reporting system.[181] These offenses range from "forcible rape" to "forcible fondling," defined as "the touching of the private body parts of another person for the purpose of sexual gratification, forcibly and/or against that person's will, or . . . where the victim is incapable of giving consent."[182] The DCL similarly defines "sexual violence" as "physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol," broadly including "rape, sexual harassment, sexual battery, and sexual coercion."[183]

These policies generate several problems by including everything from forcible intercourse to a nonconsensual touch on the arm through clothing within the spectrum of "sexual assault." Justice can take a different form for offenses of different severity—nonconsensual intercourse should, and likely would, be dealt with more harshly than a "slap on the ass." To the lay public, "sexual assault" is largely synonymous with the crime of rape.[184] Victims and society expect a certain disposition level for a crime labeled "sexual assault"; this expectation is reinforced when statistics count a report as sexual assault, or a victim is *told* she was sexually assaulted even when the events alleged, though true, do not meet the defined elements of that crime.[185]

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[181] 20 U.S.C. §1092(f)(6)(v) (2012).
[182] 34 C.F.R. § 668, subpt. D, app. A. (2014).
[183] DCL, *supra* note 82, at 1-2.
[184] Consider that journalists and commentators often use the two terms interchangeably. *See, e.g.*, Pond, *supra* note 46; Weinberg, *supra* note 58; Lombardi, *supra* note 80; Ellison, *supra* note 96; Gray, *supra* note 101.
[185] Tricia D'Ambrosio-Woodward, *Military Sexual Assault: a Comparative Legal Analysis of the 2012 Department of Defense Report on Sexual Assault in the Military: What It Tells Us, What It Doesn't Tell Us, and How Inconsistent Statistic Gathering Inhibits Winning the "Invisible War,"* 29 WISC. J. OF L. GENDER, & SOC. 173, 206 (Summer 2014) ("If an attempted rape is classified for reporting purposes as a 'sexual assault' but then not prosecuted as a 'sexual assault' because there was no penetration, this leads to an outcry over the lack of punishment or an abuse of command discretion, when quite simply, as a matter of law, it does not meet the requirements for prosecution."); Jed Rubenfeld, *Overbroad Definitions of Sexual Assault are Deeply Counter-Productive*, TIME (May 15, 2014), http://time.com/99890/campus-sexual-assault-jed-rubenfeld/ ("[Overbroad definitions] conflate violent rape – one of the most serious of all crimes – with objectionable conduct of much lesser gravity."); *see also* supra note 175 and accompanying text.

Broad definitions also generate cynicism about the veracity of reports.[186] Lastly, they unreliably skew data, fueling misinterpretation with significant implications for policymaking.

2. *The Statistical Problem*

In its 2010 annual report on sexual assault, the DoD extrapolated data from its biannual Workplace and Gender Relations Survey of Active Duty Members (WGRA) and criminal justice statistics to estimate that there were 19,000 "incidents of unwanted sexual contact" in the military during Fiscal Year 2010.[187] The report defines "unwanted sexual contact" as "the survey term for all of the contact sexual crimes against adults proscribed by the [UCMJ]."[188] In its 2012 report, using similar definitions and methodology, the DoD estimated 26,000 victims.[189] Neither report subdivides these extrapolations by offense type. Senator McCaskill and others rightly criticized this conflation.[190] Nonetheless, the media largely reported the 19,000/26,000 figures as the number of

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[186] Marisa Taylor & Chris Adams, *Military Stance Muddies War on Rape: Critics Questioning Push to Prosecute Weak Cases Unlikely to Earn Convictions*, CHI. TRIBUNE, Dec. 26, 2011, at C24 (quoting an anonymous Navy prosecutor) (internal quotation marks omitted) ("There is a pressure to prosecute, prosecute, prosecute . . . . When you get one that's actually real, there's a lot of skepticism. You hear it routinely: Is this a rape case or is this a navy rape case?"); Rubenfeld, *supra* note 185 ("They can generate antipathy for complainants, because the conduct alleged to be rape is often perceived by many not to be rape.").

[187] FY10 REPORT, *supra* note 45, at 97.

[188] *Id.* at 2 n.3. The study used subjective survey questions that asked "[s]ervice members whether someone . . . without their consent or against their will, sexually touched them, had (attempted or completed) sexual intercourse with them, oral sex with them, anal sex with them, or penetrated them with a finger or object," regardless of the criminality of such incident. DEF. MANPOWER DATA CTR., 2010 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS: OVERVIEW REPORT ON SEXUAL ASSAULT, at iii.

[189] U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2012, at 12 (May 2013) [hereinafter FY12 REPORT].

[190] SASC Hearing, supra note 131, at 29 ("We have unwanted sexual contact, 36,000 [sic]. Well, that doesn't tell us whether it is an unhealthy work environment or whether or not you have got criminals."), 45 (statement of Sen. Lindsey Graham) ("I don't want everybody in the country to think that every allegation is of rape."), 113 (statement of Major General (Retired) John Altenberg, Chairman, Amer. Bar Ass'n Standing Comm. on Armed Forces L.) ("[S]urvey responses are extrapolated by mathematicians to reflect 26,000 unwanted sexual contacts but then translated by critics and journalists to be 26,000 actual rapes or sexual assaults."); *see also* Captain Lindsay Rodman, *The Pentagon's Bad Math on Sexual Assault*, WALL ST. J., May 20, 2013, at A17.

"sexual assaults" or "rapes," without nuance or qualification,[191] and Senator Boxer repeatedly employed this misleading figure to advocate for the MJIA and other legislation.[192]

In 2014, following criticism that the WGRA questions did not match the statutory elements of the UCMJ, the DoD hired the RAND Corporation to conduct its biannual survey.[193] Although RAND used questions designed to match the anatomical and somatic elements of the UCMJ, its report inexplicably labeled every completed or attempted sexual contact as "sexual assault,"[194] estimating 19,000 victims for Fiscal Year 2014.[195] Unsurprisingly, many influential media outlets reported this as 19,000 sexual assaults without further explanation or clarification.[196]

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[191] *E.g.*, Melinda Hennenberger, *Military Assault Victims Find their Voice*, WASH. POST, May 9, 2012, at A02 ("The Pentagon estimates that there were 19,000 sexual assaults in our military last year."); Helene Cooper, *Two Cases, One Conclusion on Military Justice*, N.Y. TIMES, Mar. 22, 2014, at A3 ("In 2012 there were an estimated 26,000 sexual assaults on military men and women."); Schwellenbach, *supra* note 6 ("An estimated 26,000 people in the U.S. military were victims of sexual assaults in 2012, a substantial increase from an estimated 19,000 in 2010.").

[192] Subcommittee Hearing, *supra* note 53, at 7 (statement of Sen. Barbara Boxer) ("The Department of Defense estimates that 19,000 sexual assaults occur in the military."); Michael Doyle, *Sen. Boxer Wants to Change How Military Investigates Sexual Assault*, MCCLATCHY DC (Nov. 5, 2013), http://www.mcclatchydc.com/2013/11/05/207582_sen-boxer-wants-to-change-how.html ("'The fact is, there are 26,000 sexual assaults a year,' Boxer said."); 160 CONG. REC. S.1340 (daily ed. Mar. 6 2014) (statement of Sen. Barbara Boxer) ("Here is the deal . . . . There were 26,000 estimated sexual assaults in 2012).

[193] RAND CORP., SEXUAL ASSAULT AND SEXUAL HARASSMENT IN THE U.S. MILITARY: TOP-LINE ESTIMATES FOR ACTIVE-DUTY SERVICE MEMBERS FROM THE 2014 RAND MILITARY WORKPLACE STUDY 4–5 (2014) [hereinafter RAND STUDY].

[194] *Id.* at ix (defining "sexual assault" as "three mutually exclusive categories: penetrative, non-penetrative, and attempted penetrative crimes [in which no physical contact occurred]").

[195] *Id.* at 17–19. This estimate used the WGRA methods from prior years. *Id.* Using its own methods, RAND estimated about 20,000 victims. *Id.* at 9. Additionally, RAND opined that the WGRA survey actually underestimated the number of penetrative offenses while it overestimated the number of nonpenetrative offenses that, though potentially qualifying as sexual harassment, did not meet the elements of a crime. *Id.* at 24–25. Still, RAND's methods estimated that penetrative offenses accounted for only 43% of crimes against women and 35% against men. *Id.* at 27.

[196] *E.g.*, Helene Cooper, *Reports of Sexual Assaults in the Military on Rise*, N.Y. TIMES, Dec. 4, 2014, at A19 ("The Pentagon estimated that 19,000 men and women were sexually assaulted in 2014."); Terry Atlas, *Military Sex-Assault Victims See Retaliation as Reports Rise*, BLOOMBERG (Dec. 4, 2014 3:37 PM), http://www.bloomberg.com/news/2014-12-04/military-sex-assault-victims-see-retaliation-as-reporting-rises.html ("The Pentagon estimates that 19,000 military women

For colleges, the most-repeated claim is that "one in five" college women will be the victim of sexual assault.[197] This figure comes from the 2007 Campus Sexual Assault Study (CSA), which reported that "19% of undergraduate women reported experiencing attempted or completed sexual assault since entering college" at "two large public universities."[198] Similar to the WGRA and RAND studies, the CSA broadly defined "sexual assault" as "forced touching of a sexual nature, oral sex, sexual intercourse, anal sex, and/or sexual penetration with a finger or object."[199] Critics have attacked almost every aspect of this study, including its response rate and possible self-selection bias,[200] limited sample size,[201] broad and subjective definitions,[202] and the

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and men were sexually assaulted in fiscal 2014."); Alan Yuhas, *Pentagon: Rape Reports Increase Among 19,000 Estimated Military Victims*, THE GUARDIAN, Dec. 4, 2014, http://www.theguardian.com/us-news/2014/dec/04/pentagon-rape-assault-reports-increase-military. *But see, e.g.*, Tom Vanden Brook, *Some Military Sex Cases Decline; Reports of Unwanted Contact are Down by 27% Since 2012, Records Show*, USA TODAY, Dec. 4, 2014, at 3A.

[197] *See, e.g.*, Tim Mak, *Congress Finally Moves on Campus Sexual Assault*, THE DAILY BEAST (July 30, 2014) http://www.thedailybeast.com/articles/2014/07/30/senators-introduce-new-bill-to-combat-campus-sexual-violence.html; Jake New, *One in Five?* INSIDE HIGHER EDUC. (Dec. 14, 2014), https://www.insidehighered.com/news/2014/12/15/critics-advocates-doubt-oft-cited-campus-sexual-assault-statistic ("If there's a conversation about the prevalence of campus sexual assault in the United States, the phrase 'one in five' is usually within earshot."); Hennenberger, *supra* note 96; WASH. POST, *Raped on Campus*, *supra* note 138.

[198] NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, THE CAMPUS SEXUAL ASSAULT STUDY FINAL REPORT x, 5-3 (Oct. 2007). The report summary uses the much-quoted phrase "one out of five undergraduate women." *Id.* at xviii. *See also* C.P. Krebs et al., *College Women's Experiences with Physically Forced, Alcohol- or Other Drug-Enabled, and Drug-Facilitated Sexual Assault Before and Since Entering College*, 57 J. AM. C. HEALTH 639 (2009) (the study authors' publication of their results).

[199] *Id.* at xi.

[200] Tessa Berenson, *1 in 5: Debating the Most Controversial Sexual Assault Statistic*, TIME (June 27, 2014), http://time.com/2934500/1-in-5%e2%80%82campus-sexual-assault-statistic/.

[201] Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 7, 2014), http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html ("I asked the lead author of the study, Christopher Krebs, whether the CSA [was representative of all American college women]. His answer was unequivocal: 'We don't think one in five is nationally representative statistic.' It couldn't be, he said, because his team sampled only two schools."); *see also* Krebs, *supra* note 198, at 645 ("[B]ecause this study only examined the sexual assault experiences of women from 2 large public, 4-year universities, it may be that the experiences of these women are not representative of those of all college women, which limits the generalizability of study findings.").

practical implausibility of the 20% statistic.[203] Yet advocates,[204] senators,[205] and Vice President Biden[206] have publicly repeated this figure as nationally representative of college "sexual assaults" without qualification or clarification, usually in support of further regulatory or legislative programs.

Whether the military's 19,000/26,000 extrapolation, the college "one-in-five" formulation, polemics like *The Invisible War*,[207] or unverified accounts like *Rolling Stone*'s story about the University of Virginia,[208] inaccurate and misleading claims pose a significant threat to

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[202] Kevin Williamson, *The Rape Epidemic is a Fiction*, NAT'L REVIEW ONLINE (Sept. 24, 2014, 4:00 AM), http://www.nationalreview.com/article/388502/rape-epidemic-fiction-kevin-d-williamson (quoting NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, SEXUAL ASSAULT ON CAMPUS: MEASURING FREQUENCY (2008)) ("The DoJ hints at this in its criticism of survey questions, some of which define 'sexual assault' so loosely as to include actions that 'are not criminal'. . . . 'More than 35 percent said they did not report the incident because they were unclear as to whether a crime was committed or that harm was intended.'").

[203] Diana Furchtgott-Roth, *Bill to Address Fake Campus-Rape Epidemic Goes Too Far*, ECONOMICS 21 (Aug. 1, 2014), http://www.economics21.org/commentary/bill-address-fake-campus-rape-epidemic-goes-too-far ("If parents really thought that their daughters had a 20% chance of being raped when they went off to college, they would never send them into such danger."); MacDonald, *supra* note 112 ("[D]espite an alleged campus sexual-assault rate that is 400 times greater than Detroit's, female applicants are beating down the doors of selective colleges in record numbers.").

[204] *E.g.*, O'Neill, *supra* note 138 ("With one in five women being sexually assaulted while in college, these efforts are long overdue."); Graves, *supra* note 138 (citing the figure as "19% of undergraduate women."); New, *supra* note 197 (quoting Ms. Lara Dunn) ("I believe in the one in five statistic wholeheartedly because I am a survivor and I remember how many of my friends disclosed that it had happened to them too.").

[205] *E.g.*, Emma Goldberg, *Sitting Down with U.S. Senator Richard Blumenthal*, YALE HERALD (Oct. 3, 2014), http://yaleherald.com/voices/sitting-down-with-u-s-senator-richard-blumenthal/ (quoting Sen. Richard Blumenthal) ("The sad, tragic fact is that one in five women are victims of sexual assault during the four years they're on college campus."); Gillibrand, *supra* note 145 ("[T]he price of a college education should never include a one in five chance of being sexually assaulted."). Senator Gillibrand's office removed references to this statistic from her website on or about December 18, 2014. Caitlin Emma, *Morning Education*, POLITICO (Dec. 19, 2014 10:00 AM) http://www.politico.com/morningeducation/1214/morningeducation16529.html.

[206] Vice President Joseph Biden, Remarks at the Launch of the It's On Us Campaign 05:28 (Apr. 29, 2014), *available at* http://www.whitehouse.gov/photos-and-video/video/2014/04/29/vice-president-biden-speaks-preventing-campus-sexual-assault (downloadable audio) ("One in five of every one of those young women who's dropped off that first day of school before they finish school will be assaulted, will be assaulted in her college years.").

[207] *See supra* note 45 and accompanying text.

[208] Erdely, *supra* note 102.

informed debate and sound policy. Senators have used such claims to assert an urgent need for immediate and drastic policy changes.[209] Popular media have repeated them without question,[210] fueling public misperceptions and possibly public acceptance of otherwise objectionable, even draconian, policies. They facilitate the obscuration of important details that contradict the prevailing narrative—for example, despite accusations to the contrary,[211] courts-martial are overwhelmingly commanders' preferred disposition for sexual contact crimes, especially *actual* (UCMJ-defined) rapes and sexual assaults.[212] Hyperbole impedes objective analysis and informed decision-making.[213]

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[209] *E.g.*, 160 CONG. REC. S1336 (daily ed. Mar. 6, 2014) (statement of Sen. Harry Reid) ("Congress cannot stand idly by while the blight of [military] sexual assault continues."), S1339 (statement of Sen. Rand Paul) ("[F]or the 26,000 people having this happen to them, we need to come up with a solution. [The MJIA] is an idea whose time has come."); SJC Hearing, *supra* note 115, at 35:51 (statement of Sen. Kirsten Gillibrand) ("The fact that according to one study nearly one in five women in college will be victims of sexual assault or attempted assault during their undergraduate careers should shake the conscience of all of us and it demands action."); *supra* text accompanying note 192; *see also* SASC Hearing, *supra* note 131, at 110 (statement of Ms. Anu Baghwati) ("With approximately 26,000 members of the military having experienced some form of sexual assault over the past year alone, this issue calls for immediate attention.").

[210] *See supra* notes 191, 196, 197 and accompanying text.

[211] *See supra* text accompanying notes 149–154.

[212] In fiscal years 2011, 2012, 2013, and 2014, court-martial charges accounted for 62%, 68%, 71%, and 64% respectively, of "sexual assault offenses" (including both penetrative and nonpenetrative crimes) on which commanders took action. U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2011, at 41 (Apr. 2012) [hereinafter FY11 REPORT]; FY12 REPORT, *supra* note 189, at 69; U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2013, at 79 (Apr. 2014) [hereinafter FY13 REPORT]; U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY FISCAL YEAR 2014, app. A, 25 (May 2015) [hereinafter FY14 REPORT]. Among thousands of reports in those same four fiscal years across the DoD, commanders disposed of only a handful of penetrative offenses nonjudicially or administratively. FY11 REPORT, *supra* note 212, at 35 (two cases, nonparticipating victim); FY12 REPORT, *supra* note 212, at 74 (one case, nonconsensual sodomy); FY13 REPORT, *supra* note 212, at 46 (no cases); FY14 REPORT, *supra* note 212, app. B, 27 (dispositions reported by percentages, of a total of 1,262 "command actions" for penetrative offenses, rounded to the nearest percent, three percent were administrative separations and one percent was nonjudicial punishment). Of the "sexual assault offense" court-martial charges resolved in those fiscal years, RILOs accounted for 15%, 16%, 13%, and 11% respectively. FY11 REPORT, *supra* note 212, at 43; FY12 REPORT, *supra* note 212, at 71; FY13 REPORT, *supra* note 212, at 82; FY14 REPORT, *supra* note 212, app. B, 28 .

[213] *Cf.* D'Ambrosio-Woodward, *supra* note 185, at 190 (subsection heading: "Different Numbers Gathered by Different Organizations Utilizing Different Definitions of Terms Creates Chaos, Not Understanding"), 191–92 ("[A] confusing and widely diverse set of

Perhaps most damaging, inflated statistics and false assertions, whether about reports or processes, can counter-productively discourage victims from reporting sexual assaults by leading them to believe that "nothing will be done."[214]

IV. Four Principles for a Just Legal Framework

With two different systems designed to address similar problems, comparisons are inevitable. With military and college sexual assault, the abundant political and public rationales, arguments, and commentary provide further bases for comparison. In some cases, the structural differences between the systems reveals the benefits or shortcomings of one or both—the drive to treat a victim as "party" equal to the accused dominates college adjudications but also demonstrates the fallacy of that philosophy. Also, the military's preference for law enforcement investigations illustrates a way to incorporate professional investigations into institutional adjudication. In others, the common experiences of both institutions provide reinforcing lessons—both have met adverse and unintended consequences from manipulating established procedures solely to influence the results of sexual assault cases. In still others, inconsistent political rhetoric provides strong argument against divergent approaches—the arguments of those who demand college leaders shoulder responsibility for addressing sexual assault undercut the arguments against military commanders wielding the same responsibility. Comparing and contrasting these systems ultimately yields four common principles for both institutions to develop more just responses to sexual assault.

A. Clearly Define the Crime of Sexual Assault, and Investigate it as a Crime

> Sexcrime *covered all sexual misdeeds whatever . . . . There was no need to enumerate them separately, since they were all equally culpable.*
> —George Orwell[215]

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possible incidents that would require a different approach in the eradication, yet all are lumped together and then promulgated as fuel to the media and political frenzy.").

[214] *Cf.* Gray, *supra* note 101; Dockterman, *supra* note 176.

[215] GEORGE ORWELL, NINETEEN EIGHTY-FOUR 251 (Signet Classic ed. 1996) (describing "Sexcrime" as one example of "newspeak," politically manipulated language used in the fictional dystopia depicted in the book).

With the 2006 and 2011 amendments to Article 120 of the UCMJ, Congress created a criminal statute that makes a wide range of activity a sex crime.[216] The DoD sought to capture all of that criminal behavior under the rubric of "sexual assault" in its surveys and statistics,[217] and then senators and advocates were apoplectic when the statistics showed both a high number of "sexual assaults" and a low prosecution rate.[218] Colleges experienced a similar phenomenon with the CSA study, though less dramatic.[219] At the core of many misunderstandings about sexual assault is the failure to consistently define the term and to differentiate it from other criminal (and non-criminal) behavior. Effective procedures to address sexual assault must begin with precise and consistent definitions.

The military is worse than colleges in that its policies and surveys use the term "sexual assault" simultaneously to mean both the actual crime of sexual assault and also other misconduct. As an initial step, one of the two definitions of "sexual assault" needs to give way to the other. This could be accomplished by eliminating the crime of sexual assault, possibly amending the UCMJ to define all penetrative offenses as different degrees of rape. This would leave "sexual assault" as the umbrella term used in policies and surveys to define any sexual contact, criminal or otherwise. But since "sexual assault" is usually synonymous with rape in public discourse, a better solution is to use "sexual assault" to refer exclusively to violations of UCMJ article 120(b), consistently use a different umbrella term like "sexual contact" or even OCR's preferred "sexual violence" in policies and surveys, and *clearly* separate statistics for penetrative and nonpenetrative offenses.[220]

The Clery Act and DCL definitions, though still problematic, at least limit the body parts involved to those that more realistically reflect "sexual" offenses and are less preoccupied with avoiding a focus on "consent."[221] The UCMJ makes almost any bodily contact a potential

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[216] *See supra* note 43 and accompanying text, *supra* Part III.D.1.
[217] *See supra* Part III.D.2.
[218] *See supra* note 153 and accompanying text.
[219] *See supra* Part III.D.2.
[220] The DoD unfortunately tends to put a single overall "bottom line up front" number, like the 19,000/26,000 estimate, prominently near the beginning of its reports, where it is most likely to be seen and repeated by media and politicians, while burying more accurate information distinguishing the types of offenses in the middle. *See, e.g.*, FY10 REPORT, *supra* note 45; FY12 REPORT, *supra* note 189; RAND STUDY, *supra* note 193.
[221] The Clery Act and DCL use simple phrases like "against that person's will" and "incapable of giving consent." *See supra* text accompanying notes 182–183. A

sex crime, while also making almost every sex crime (other than penile penetration) a specific intent offense.[222] Any nonconsensual genital or anal penetration is a sex crime, as is nonconsensual penile penetration of the mouth. Intent to "arouse" or to "abuse, humiliate, or degrade" is superfluous. At the other end of the spectrum, offensively or harmfully touching another person is already proscribed as battery regardless of the specific intent.[223] At most, "sexual contact" is best limited to nonconsensual touching of "private parts" (e.g., genitals, breasts, buttocks).[224] Narrowing the physical act element of sex crimes would eliminate the need for prosecutors to prove specific intent, better reflect the gravity of sexual offenses, better distinguish sexual assault from other criminal conduct like hazing or battery, better allocate investigative resources,[225] and lessen the perceived disparity between allegations and dispositions or punishments.[226]

On the other hand, the military is superior to colleges in its investigation protocols. Senator McCaskill and critics of college

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significant expectation of the 2006 revisions to UCMJ Article 120 was that the new statute would eliminate "lack of consent" as an element of rape or sexual assault, out of a belief that the focus of the trial should be on the accused's actions rather than the victim's behavior. *See* JSC Report, *supra* note 38, at 6, 44. The 2006 version of Article 120 explicitly states that lack of consent is not an element of any offense except for "wrongful sexual contact." UCMJ art. 120(r) (2006). The 2011 version, rather than succinctly saying "without consent" or even "against that person's will," lists a variety of ways in which sexual acts or sexual contact can be accomplished, e.g., "by using force," "threatening or placing that other person in fear," "causing bodily harm," or by administering a drug or intoxicant, or when the accused "knows or reasonably should know" that the victim is asleep, unconscious, or impaired such that the victim cannot consent. UCMJ art. 120(a-d) (2011). All of these are examples of acts perpetrated "without consent." These are all essentially semantic distinctions without substantive difference and, in practice, will not keep the relevant acts, words, and behavior of the victim from being presented at trial. *See* JSC Report, *supra* note 38, at 59–60 ("Elimination of lack of consent as an element will not change what evidence is admissible at trial . . . . Ultimately, it is impossible to completely eliminate the focus on the victim's consent.").

[222] *See supra* note 43 and accompanying text; *supra* Part III.D.1

[223] *See* UCMJ art. 128 (2012).

[224] Some jurisdictions refer to this as "sexual battery." *E.g.*, VA. CODE ANN. § 18.2-67.4 (2014); CAL. PENAL CODE § 243.4 (Deering 2014); *see also* DCL, *supra* note 82, at 2. The 2006 version of Article 120 limited the definition of "sexual contact" to the genitalia, anus, groin, breast, inner thigh, or buttocks, though it still included an element of specific intent to "abuse, humiliate, or degrade . . . or to arouse or gratify the sexual desire." UCMJ art. 120 (2006).

[225] Sexual assault cases require specially trained investigators. *See supra* note 105 and accompanying text.

[226] *See supra* notes 153, 164 and accompanying text.

investigations are correct—crimes should be investigated by law enforcement.[227] Colleges should be permitted, even expected, to rely on law enforcement investigations (whether by off-campus agencies or law enforcement organic to the college) in their adjudications without having to reinvestigate the same offenses. The misgivings of victims and officials over relying on law enforcement may stem from the popular association of police with prosecutors, fueling the assumption that making a report to police can only lead to either a criminal trial or nothing at all.[228] The military, by separating investigation from disposition and adjudication, demonstrates a way to allow professional investigations yet still provide multiple avenues once the investigation is complete, be it judicial, administrative, or neither. Similarly, local partnerships between college and off-campus officials can allow law enforcement to conduct investigations into serious crimes (ideally all sex crimes), reserving campus investigations for misconduct of lesser gravity, and then discuss the results with both college officials and prosecutors to decide the appropriate disposition. This would also divide investigative and adjudicative responsibilities between different offices, providing a secondary benefit of further impartiality and procedural integrity.

B. Adjudication Must Remain Institution v. Accused, not Victim v. Accused

> *[T]he highest form of injustice is to appear just without being so.*
> —Plato[229]

Among the multiple criticisms of the DCL, OCR's decree that colleges use the preponderance of the evidence standard to adjudicate sexual assault generated the most controversy.[230] As this standard was

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[227] *See supra* note 112 and accompanying text; Anderson, *supra* note 176.

[228] *See, e.g.*, Gray, *supra* note 101; Bolger, *supra* note 171.

[229] THE REPUBLIC bk. II, at 361:a (Richard W. Sterling & Adam C. Scott trans., 1985, Norton Paperback ed. 1996).

[230] *See, e.g.*, Will Creely, *Why the Office for Civil Rights' April 'Dear Colleague Letter' was 2011's Biggest FIRE Fight*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Jan. 3, 2012), http://www.thefire.org/why-the-office-for-civil-rights-april-dear-colleague-letter-was-2011s-biggest-fire-fight/; Bader, *supra* note 90. The original version of the SaVE Act would have legislatively required all colleges to use this standard; Congress stripped

already common in student disciplinary proceedings,[231] for many colleges this decree would not have a significant practical impact. But more telling is OCR's proffered rationale for its mandate. Asserting that preponderance is the only acceptable standard for "equitable grievance procedures,"[232] OCR explains that this allows "a balanced and fair process that provides the same opportunities to *both parties*."[233] This reflects a philosophy that the accused and victim are equal "parties" before the tribunal.

The Department of Education established Title IX grievance procedures, which were intended to allow students to file complaints against the institution (victimized student v. institution),[234] grafted them onto colleges' already-existing disciplinary procedures (institution v. accused student) through the DCL (buttressed by the SaVE Act), and thereby created a bastardized, quasi-adversarial system in which the victim and accused are treated as if they are on equal footing (victim v. accused). Thus OCR decreed that "both parties" must have equal opportunities to present evidence, equal rights to have a lawyer present, and, most significantly, an equal ability to appeal the findings or punishment.[235] But they are not truly on equal footing; the system still expects the institution to fulfill independent prosecutorial functions as a "party" to the action. The resulting system is unjustly imbalanced.

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this requirement from the final law. *Compare* S. 128, 113th Cong. § 2(a)(5) (2013), *with* 20 U.S.C.S. § 1092(f)(8)(iv)(I) (Lexis 2014).

[231] HEATHER KARJANE ET AL., NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, CAMPUS SEXUAL ASSAULT: HOW AMERICA'S INSTITUTIONS OF HIGHER EDUCATION RESPOND 122 (2002) (noting that 81.4% of those colleges whose published materials specified an evidentiary standard used the preponderance standard but also noting that the majority of colleges surveyed did not specify a standard); MAJORITY STAFF OF S. SUBCOMM. ON FINANCIAL & CONTRACTING OVERSIGHT, 113TH CONG., SEXUAL VIOLENCE ON CAMPUS: HOW TOO MANY INSTITUTIONS OF HIGHER EDUCATION ARE FAILING TO PROTECT STUDENTS 12 (2014), *available at* http://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf (noting that 85% of colleges in the subcommittee's nationwide survey use the preponderance of evidence standard).

[232] DCL, *supra* note 82, at 10.

[233] QUESTIONS AND ANSWERS, *supra* note 111, at 26 (emphasis added).

[234] *See supra* text accompanying note 73.

[235] QUESTIONS AND ANSWERS, *supra* note 111, at 26; *see also* 20 U.S.C. § 1092(f)(8)(B)(iv)(II–III) (requiring "the accuser and accused" to have the same opportunities to have others present at a disciplinary proceeding for sexual assault, simultaneous notice of the results, and simultaneous notice of "the institution's procedures for the accused and the victim to appeal the results of the institutional disciplinary proceeding").

Defenders of the preponderance standard justify its use on the assumption that the danger of an innocent student being punished is equal to the danger of a guilty student being exonerated.[236] This is true in a private legal action (including a civil rights lawsuit) in which the remedy obtained is a *private* remedy, primarily to compensate for the harm suffered.[237] But college adjudications impose *institutional* sanctions (expulsion, suspension, etc.) that, while perhaps providing some vindication for the victim, are principally imposed in recognition of the offense against the college community as a whole.[238]

While an adverse result could be personally traumatic for a victim, a victim is not exposed to any comparable risk of the institution directly depriving her of fundamental liberty or property interests.[239] For private actions, it is appropriate to use a standard of proof that equally allocates the risk of an erroneous decision.[240] If college adjudications were truly adversarial private actions, the victim would have to marshal evidence and bear the burden to show she was assaulted—but this is not the case in a college sexual assault hearing.[241] The college has an independent

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[236] *E.g.*, Nancy Hogshead-Makar & Brett Sokolow, *Setting a Realistic Standard of Proof in Sexual-Misconduct Cases*, CHRON. OF HIGHER EDUC. (Oct. 15, 2012), http://chronicle.com/article/Setting-a-Realistic-Standard/135084/ ("Preponderance presumes a level playing field, one that is not advantageous to either party. But a higher standard, such as clear and convincing evidence, would make it less likely that those who commit sexual misconduct would be held accountable."); Wenzel, *supra* note 67, at 1649–50 ("[A] higher evidentiary standard is more likely to result in too few guilty students being held accountable."), 1652 ("The preponderance of the evidence standard thus best accommodates a school's concern for erroneous findings in either direction because the standard allocates the risk of error equally between the [college and the accused]."); Graves, *supra* note 138, at 9–10 ("Campus sexual violence proceedings can be traumatic [for victims] . . . . Requiring a higher burden of proof would only impose additional burdens on complainants and result in more discrimination going unchecked.").

[237] *See generally* 22 AM. JUR. 2D *Damages* § 28 (2014).

[238] The Office for Civil Rights explicitly acknowledges that college actions to address sexual assault "may include imposing sanctions on the perpetrator and providing remedies for the complainant *and broader student population*." QUESTIONS AND ANSWERS, *supra* note 111, at 24 (emphasis added).

[239] *Cf.* Major Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129, 179 (2014) ("Although a victim might not be vindicated by the process . . . she will never lose basic rights, such as life, liberty, or property. The accused, on the other hand, has everything to lose.").

[240] *See* Long, *supra* note 65, at 73–74; Graves, *supra* note 138, at 8.

[241] *See* Hogshead-Makar & Sokolow, *supra* note 236 (supporting the preponderance standard through a false dilemma: "[p]onder whether it should be harder for a woman to prove that a man raped her than for a man to prove he did not."). *Cf.* Gillibrand, *supra*

obligation to determine the truth of the allegations because deterring, correcting, and removing misconduct is in the interest of the entire college community.[242] Considering the victim and accused as equal parties reflects a false equivalency, and it is unjust to equalize the rights of the accused with those granted to the victim when the responsibility to present a case and the risk of an erroneous decision are so unbalanced.[243]

This false equivalency creates a dangerous paradigm—when sexual assault is framed as victim v. accused, every case can only be black and white, him or her, one is lying and one is telling the truth. It discourages law enforcement, prosecutors, and other officials from questioning victims' accounts because they are supposed to be on "the victim's side."[244] When an accused is acquitted of a crime, it does not

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note 119, at 325 ("I don't want to weigh the scales of justice in favor of the victim. I don't want to weigh the scales of justice in favor of the defendant. I want it to be even.").

[242] *Cf.* QUESTIONS AND ANSWERS, *supra* note 111, at 30 ("Because a school has a Title IX obligation to investigate possible sexual violence, if a hearing is part of the school's Title IX investigation process, the school must not require the complainant to be present at the hearing as a prerequisite to proceed with the hearing.") As argued above, colleges should be permitted to rely on law enforcement investigations and, when appropriate, the criminal justice system, rather than be required to conduct their own parallel proceedings. Either way it is not the victim's responsibility to investigate and prove her own allegations before the tribunal, nor should it be.

[243] This is not to say that the preponderance standard is *per se* unjust. As the DCL correctly states, it is the standard for many civil and administrative proceedings, and it is the standard used by the military for ADSEPs (which is effectively an employment termination/labor law hearing). *See* DCL, *supra* note 82, at 10; *supra* text accompanying note 169. The standard of proof is just one factor in assessing the requirements of due process, and a lower burden of proof could be offset by other procedural safeguards; the point is that institutions must have flexibility to ensure their procedures meet the needs of their particular communities. *See generally* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976) (citations omitted) (holding that "[d]ue process . . . is not a technical conception with a fixed content unrelated to time, place, and circumstances" but rather "is flexible and calls for such procedural protections as the particular situation demands," by analyzing the nature of the private interest at stake, the risk of error, and the Government's interest, including the administrative burden possible additional procedures would require).

[244] *See, e.g.*, Zerlina Maxwell, *No Matter What Jackie Said, We Should Generally Believe Rape Claims*, WASH. POST, Dec. 6, 2014, http://www.washingtonpost.com/posteverything/wp/2014/12/06/no-matter-what-jackie-said-we-should-automatically-believe-rape-claims/ ("Many people . . . will be tempted to see [the discovery of inaccurate claims in *Rolling Stone*'s story about the University of Virginia, Erdely, *supra* note 102] as a reminder that officials, reporters, and the general public should hear both sides of the story and collect all the evidence. This is what we mean in America when we say someone is 'innocent until proven guilty.' After all, look what happened to the Duke lacrosse players. *In important ways, this is wrong.* We should believe, as a matter of default, what an accuser says." (emphasis added));

automatically mean the victim lied about what events occurred or how she felt about it, while a person who does not expressly say "yes" to intercourse has not necessarily been raped. But the false equivalency does not countenance different perceptions of the same event, let alone different dispositions.

In criminal trials, which are the military's preferred disposition for sexual assault,[245] the victim does not have the same procedural rights as the accused. Still, the same false equivalency undergirding the Title IX/SaVE framework has infiltrated military justice, primarily post-conviction, with proposals for victim unsworn statements during presentencing[246] and victim input during post-trial clemency.[247] This

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Wagatwe Wanjuki, *Believing Victims is the First Step to Stopping Rape*, N.Y. TIMES, Dec. 12, 2014, http://www.nytimes.com/roomfordebate/2014/12/12/justice-and-fairness-in-campus-rape-cases/believing-victims-is-the-first-step-to-stopping-rape. *Cf.* Lizze Crocker, *What the U-VA Rape Case Tells us About a Victim Culture Gone Mad*, THE DAILY BEAST (Dec. 5, 2014), http://www.thedailybeast.com/articles/2014/12/05/what-the-uva-rape-case-tells-us-about-a-victim-culture-gone-mad.html ("We live in a culture that valorizes victims—where to question *one* woman's claim of sexual abuse is to be a 'rape apologist' . . . . Question them, and you are colluding in exacerbating the awful effects of their trauma. Question their actions or motives and you are 'victim shaming' and 'victim blaming.'")

[245] *See* supra note 212 and accompanying text.

[246] *See* 80 Fed. Reg. 6058 (Feb. 4, 2015) (proposing a new Rule for Courts-Martial 1001A allowing victims to make unsworn statements during presentencing, free of cross-examination). In the military, during presentencing procedures, an accused may make an unsworn statement to the court, not subject to cross-examination. MCM, *supra* note 13, R.C.M. 1001(c)(2). Currently a victim may testify about the "financial, social, psychological, or medical impact" of the accused's crime but must do so subject to the normal rules of evidence. *Id.* R.C.M. 1001(b)(4). Some advocate shielding victims from cross-examination during presentencing. *E.g.* RSP REPORT, *supra* note 4, at 30. At this point in a trial, the allegations have already been proven beyond a reasonable doubt; the accused is a convicted criminal and is about to be sentenced. The victim and accused do not have an equal stake in the outcome of the proceeding, and there is no compelling reason to so limit the right of the accused to examine and question the evidence of such impact presented against him before he is sentenced. The RSP argues that unsworn victim statements would align the UCMJ with the federal Crime Victims Rights Act. *Id.* But military trials are bifurcated, with adversarial sentencing procedures rather than guideline-driven judicial determinations assisted by a presentencing report. *See supra* note 123 and accompanying text. And, as the RSP acknowledges, for a variety of reasons guideline-driven sentencing procedures akin to those used in federal district court are not appropriate for courts-martial. RSP REPORT, *supra* note 4, at 52; *accord* MCM, *supra* note 13, app. 21, at A21-72 ("The military does not have—and it is not feasible to create—an independent, judicially supervised probation service to prepare presentence reports.").

[247] *See* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1706, 127 Stat. 672 (2013) (codified at UCMJ art. 60(d) (2014)) (allowing for victims to

false equivalency also tinges policy debates over military sexual assault. The frenzied comparison of the number of reports to the number of trials and convictions is one prominent example.[248] When "doing justice for victims" means that anything short of prosecution is unacceptable, the inference is that every allegation is always capable of evidentiary proof and only indifference or malfeasance on the part of those administering the justice system can account for the disparity in numbers.

This dovetails with the assertion that convening authorities, who are the commanders of accused servicemembers, cannot do justice because of their perceived conflicting loyalties to the command, to the victim, and to the accused.[249] These arguments ignore the fact that prosecutors have identical obligations; in both civilian and military justice

> the [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.[250]

Perhaps the most insidious danger of the "victim as a party" mentality is that it subtly encourages key actors to forget this.[251]

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submit matters to the convening authority during the post-trial clemency process). Ironically, Congress has so severely curtailed the convening authority's post-trial clemency power, especially in sexual assault cases, as to render this provision essentially moot. *See supra* note 62.

[248] *See supra* note 153 and accompanying text.

[249] *See, e.g.*, 160 CONG. REC. S 1346 (daily ed. Mar. 6 2014) (statement of Sen. Mazie Hirono) ("[The MJIA] would . . . eliminate potential bias and conflicts of interest because unlike the commanding officer, the military lawyer would be unconnected to either the survivor or the accused."); Campbell, *supra* note 138, at 1 ("Commanders . . . may have both the victim and the perpetrator in their command. Nowhere else in our system of justice does one individual – particularly one with an inherent conflict of interest – have this authority."); Murphy, *supra* note 239, at 143–44 ("[C]ommanders cannot properly evaluate cases without their loyalties and duties to the accused and victim conflicting."); *supra* text accompanying note 119.

[250] Berger v. United States, 295 U.S. 78, 88 (1935).

[251] *Cf.* United States v. McDowell, No. 14-5005 (C.A.A.F. Aug. 8, 2014) (denying prosecutors' petition for an extraordinary writ to prevent defense counsel from deposing a victim; discussed *infra* note 277); Petition for Extraordinary Writ in the Nature of a Writ of Prohibition, Morse v. Biehl & Agar, Army Misc. 20140294 (A. Ct. Crim. App. 2014), *available at* http://www.caaflog.com/wp-content/uploads/LTC-Morse-v.-LTC-Biehl-and-COL-Agar-writ-of-prohibition.pdf (seeking to bar enforcement of an order issued to an officer under investigation to "cease and desist" his appointed defense attorneys'

Principally with the advent of the Special Victims Counsel program,[252] the military has increased the "voice" of victims within the judicial process. Although Special Victims Counsel are provided at government expense to victims who qualify for their service, to date the substantive rights given to victims in the military justice system are not significantly different than similar rights afforded in federal civilian court.[253] But it is a disturbingly short step from allowing victims to be accompanied by counsel to permitting that counsel (or even the victim) to sit before the bar of the courtroom with the prosecutor, confer privately on trial strategy, or independently question witnesses and present evidence, in effect "teaming up" on the accused. This phenomenon could easily lead the accused, victims, panel members, the public, and even prosecutors themselves to believe that the role of "the government" is to win the case "for the victim" rather than to do justice. It is terribly unjust if purportedly impartial college adjudicators use this approach, but infinitely worse for the attorney representing the "sovereignty" in a criminal trial to abandon the obligation to "ensure justice is done."[254] This would shatter public confidence in the impartiality of any justice system, civilian or military, and consequently its legitimacy.[255]

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questioning of witnesses because, per the command's staff judge advocate, the defense attorney's investigation had "upset" the victim); United States v. Bowser, 73 M.J. 889 (Af. Ct. Crim. App. 2014) (upholding trial judge's dismissal with prejudice of rape, sodomy, and assault charges, after trial counsel failed to disclose potentially exculpatory information and then refused judge's order to provide witness interview notes for *in camera* review), *aff'd*, No. 15-0289 (C.A.A.F. Mar. 25, 2015).

[252] *See* 10 U.S.C.S. § 1044e (Lexis 2014).

[253] *Compare* UCMJ art. 6b (2015), *with* 18 U.S.C. § 3771 (2012).

[254] One cautionary example is the infamous "Duke Lacrosse Case" in which, amidst intense public furor, three Duke University students faced criminal charges for rape. *Duke Lacrosse Incident: Looking Back at the Duke Lacrosse Case*, DUKE UNIV. (last updated May 2007), http://today.duke.edu/showcase/lacrosseincident/. The local district attorney deliberately withheld exculpatory evidence while stoking the public outcry. *Id.* He resigned pending disbarment, the state Attorney General exonerated the three accused, and the University paid each accused a financial settlement for its employees' role in fomenting public antipathy. *Id.*

[255] *See generally* United States v. Rosser, 6 M.J. 267, 271 (C.M.A. 1979) ("[W]e believe it incumbent upon the military judge to . . . establish[ ] the confidence of the general public in the fairness of the court-martial proceedings."). Additionally, the varied criticisms of college adjudications often share a common theme, namely, that whether due to ideology or political pressure, colleges are bent on ensuring accused are punished rather than fairly and impartially deciding cases on their merits, which serves as a strong caution for the military justice system. *See, e.g.*, Peter Berkowitz, *supra* note 112;

C. Do Not Manipulate Procedures Solely to Influence the Results of Sexual Assault Cases

> *The road to Hell is paved with good intentions.*
> —Unknown[256]

Despite the divergent political rhetoric and mandates imposed on the military and colleges, they originate from common philosophies, which are underscored by an apparent belief that previously-established systems are inadequate to address sexual assault. Most of the recent sexual assault policy changes fit within one of three philosophical themes. The first, already discussed, is the proclivity for broad definitions of "sexual assault" that maximize the potential for prosecution. The second is a well-intentioned desire to minimize the scrutiny of victims. One example in the college setting is the discouragement of cross-examination;[257] the CASA's proposed "amnesty" for related misconduct (such as underage drinking) for any student who reports sexual violence "in good faith" would be another.[258] Military examples include the ability of a victim to refuse to testify at an Article 32 hearing and restrictions on pretrial access of defense counsel to victims.[259]

The third theme is a less-benevolent drive to limit the accused's ability to participate in or to end-run the process, a notion likely based on a belief that dismissals, acquittals, or light punishments result from the machinations of those accused and their lawyers as much as from insufficient evidence. This third trend in particular reflects the "victim as a party" philosophy, which rationalizes curtailment of the accused's rights as merely leveling the playing field.[260] College examples include the unwavering requirement to use a lower standard of proof and conditioning several rights of the accused on providing the same rights to

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MacDonald *supra* note 112; Bartholet, *supra* note 146; Williamson, *supra* note 202; Furchtgott-Roth, *supra* note 203.

[256] HENRY G. BOHN, A HAND-BOOK OF PROVERBS 514 (1899).

[257] DCL, *supra* note 82, at 12.

[258] S. 2692, 113th Cong. § 125 (2014).

[259] *See supra* note 62 and accompanying text; text accompanying note 63; *infra* note 277 and accompanying text. Another indirect example is the mostly semantic focus on removing "lack of consent" as an element of the crime. *See supra* note 221 and accompanying text.

[260] *See supra* note 236 and accompanying text.

victims.[261] Military examples include the sharp reduction in post-trial clemency, requirements for higher-level reviews of decisions not to refer cases to trial, restrictions on considering military character in disposition decisions and as evidence at trial,[262] elimination of the "constitutionally required" exception to Military Rule of Evidence 513,[263] and the reduction in the scope of Article 32 (while still leaving it as a purely advisory hearing).[264]

The SaVE Act expects that college sexual assault hearings will accomplish the dual goals of "protect[ing] . . . victims and promot[ing] accountability,"[265] while Senator McCaskill seeks proposals for the

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[261] *See supra* text accompanying notes 230 and 235. The DCL/SaVE Act treatment of accused students' appellate rights is particularly troubling—either an accused has no way to correct an unjust result (short of a lawsuit) or an accused is always at the risk of a victim demanding a "do-over." Again, this would not be problematic if the process was truly private and adversarial, but the institution, which controls the structure, funding, and staffing of the process should not be allowed to keep trying until a panel expels the accused.

[262] *See supra* note 62 and accompanying text.

[263] Military Rule of Evidence 513 prohibits disclosure of or admission into evidence any confidential communications between a patient and psychotherapist. MCM, *supra* note 13, Mil. R. Evid. 513. It currently provides eight exceptions to that prohibition, the last of which permits disclosure or admission when "constitutionally required." *Id.* Mil. R. Evid. 513(d)(8). The FY15 NDAA directs this exception be removed by June 17, 2015. Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 537(2), 128 Stat. 3292 (2014); *see also* 80 Fed. Reg. 6058 (Feb. 4, 2015) (proposing an executive order amending Mil. R. Evid. 513 to comply with the NDAA).

[264] *See supra* text accompanying note 63. Senator Carl Levin proclaimed that the revised Article 32 would "[m]ake the Article 32 process more like a grand jury proceeding." 159 CONG. REC. S8548 (daily ed. Dec. 9, 2013). A grand jury indictment is a prerequisite to trial for any felony offense in federal civilian court but not in a military court. U.S. CONST. amend. V (exempting the armed forces from the Constitution's grand jury requirement); Fed. R. Crim. P. 7(a). Despite dozens of changes to the UCMJ in the last two years, an Article 32 hearing officer's findings are still entirely advisory. *Compare* UCMJ art. 32 (1950), *with* UCMJ art. 32 (2014). Even if the Article 32 hearing officer determines no probable cause exists, the case can still proceed to trial. Under the new statutory regime, the judge advocate who conducts a preliminary hearing could find no probable cause to warrant prosecution of a sexual assault case, the convening authority and staff judge advocate could agree that prosecution is not warranted, and yet the case must *still* be forwarded to the next higher convening authority, who could nonetheless refer the case to a court-martial. *See* UCMJ art. 32 (2014); National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1744, 127 Stat. 672 (2013); *see also* Hayes, *supra* note 28, at 174 ("Congress should revise Article 32 to require the independent establishment of probable cause before a convening authority may refer charges to court-martial").

[265] 20 U.S.C.S. §1092(f)(8)(A)(iv) (Lexis 2014).

military that "better protect victims and lead to more prosecutions."[266] But these goals conflict. Protecting victims in the aftermath of trauma is an obviously important and commendable purpose. However, the only way to ensure total protection of a victim is to forego recourse to any disciplinary system. Without pursuing any action against the accused, the victim is never disbelieved or challenged, and is able to obtain assistance and rehabilitation without further hardship. Conversely, efforts to "promote accountability" by punishing those responsible will necessarily require victims to recount, often in explicit detail, the events they allege and subject them to scrutiny. In the starkest terms, a victim cannot demand that an institution punish and label someone as a sex offender without any scrutiny of the allegation.

Being questioned by investigators or at tribunals is intimidating, even terrifying, but vital to guard against unjust results. Because of the intimate subject matter, sexual assault victims demonstrate uniquely special courage when they testify about their experiences. Nonetheless, that same reason makes due process essential; the ability of adjudicators to distinguish between a felony and "an act that goes on hundreds of times every day, almost always consensually" depends on an assessment of facts and credibility.[267] And due process dictates that the level of permissible scrutiny of the allegation is directly proportionate to the harshness of the possible punishment.[268]

Even with the best intentions, it is inappropriate to create new procedures or unique exceptions to established procedures solely for sexual assault. From a practical standpoint, they can quickly backfire in the courts. Referring to college procedures, Senator McCaskill said, "I don't think we are anywhere near a tipping point where the people being accused of this are somehow being treated unfairly."[269] However, lawsuits by students found "responsible" for sexual assault by OCR-

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[266] McCaskill, *supra* note 148.

[267] Megan McCardle, *You Can't Just Accuse People of Rape*, BLOOMBERG (Dec. 9, 2014, 9:00 AM), http://www.bloombergview.com/articles/2014-12-09/you-cant-just-accuse-people-of-rape.

[268] *See generally* In re Winship, 397 U.S. 358 (1970) (holding that an accused may not be convicted of a crime, or subject to the consequences of a criminal conviction, unless the state proves every element of the crime beyond a reasonable doubt); Mathews v. Eldridge, 424 U.S. 319, 334-45 (1976) (discussed *supra* note 243 and accompanying text); Crawford v. Washington, 541 U.S. 36, 61 (2004) (holding that the reliability of witness testimony in a criminal trial must be tested "in the crucible of cross examination.")

[269] Anderson, *supra* note 176.

compliant campus tribunals have met with enough success that colleges spend significant resources to defend against them or settle the claims.[270] Even before the DCL, the insurance group United Educators lost $36 million in 262 sexual assault-related claims filed against member colleges from 2006-2010, with nearly 3 out of 4 claims paid to accused students rather than "accusers."[271] Colleges are bearing the harsh consequences of the policies forced upon them and are caught between liability to aggrieved students and OCR's financial Sword of Damocles.

So too is the military suffering from the policies imposed upon it, largely from the law of unintended consequences. After CAAF invalidated part of the 2006 version of Article 120, Congress rewrote the entire statute.[272] In 2007, President Bush modified the military's "rape shield" rule of evidence (Rule 412) to permit a military judge to admit

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[270] *See, e.g.*, Order Granting Preliminary Injunction, King v. Depauw Univ., No. 2:14-cv-70-WTL-DKL, 2014 U.S. Dist. LEXIS 117075 (S.D. Ind. Aug. 22, 2014) (enjoining college from suspending a student found responsible for sexual misconduct and sexual harassment, finding that he was likely to succeed in showing the college's action was "illegal, arbitrary, or capricious"); I.F. v. Adm'rs of the Tulane Educ. Fund, 131 So. 3d 491, 498-500 (La. 2013) (reversing and remanding to trial court due to an incomplete evidentiary record, finding that Tulane University failed to meet "minimal due process" and that the student's "due process rights were ill-defined, ambiguously applied, and as such, presumptively violated."); Berge v. Univ. of Minn., 2010 WL 3632518 (Minn. Ct. App. 2010) (ordering a new college disciplinary hearing for suspended student because the first arbitrarily and capriciously excluded evidence); Ashe Scow, *Due Process Win: Swarthmore College Settles Lawsuit with Accused Student*, WASH. EXAMINER (Nov. 21, 2014 3:47 PM), http://www.washingtonexaminer.com/due-process-win-swarthmore-college-settles-lawsuit-with-accused-student/article/2556518; Susan Kruth, *Saint Joseph's Settles Title IX Lawsuit Brought by Expelled Student*, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Jan. 6, 2015), http://www.thefire.org/saint-josephs-settles-title-ix-lawsuit-brought-expelled-student/ (describing how the college settled with student after the trial court denied the college's motion to dismiss). *But see, e.g.*, Bleiler v. College of the Holy Cross, No. 11011541-DJC, 2013 WL4174340 (D. Mass. Aug. 26, 2013) (granting college's motion for summary judgment, finding that the college had complied with Title IX and the plaintiff student had not been expelled arbitrarily or capriciously); Opinion and Order Granting Defendant's Motion for Summary Judgment, Yu v. Vassar College, No. 1:13-cv-4373 (S.D.N.Y. Mar. 31, 2015) (finding that expelled student's claim alleging he was dismissed arbitrarily and capriciously, and in violation of Title IX, to be without merit).

[271] Keehan, *supra* note 4, at 1.

[272] *See supra* note 41 and accompanying text. Senator Deb Fischer used this as a cautionary example to her Senate Colleagues when arguing against hasty enactment of the MJIA. 160 CONG. REC. S1345 (daily ed. Mar. 6 2014) ("That was the case in 2007 [sic], when Congress, armed with the best of intentions, modified the rape statute. Those hasty changes disrupted the judicial process and compelled Congress to rewrite the language. Do you know what happened? It delayed justice.").

"constitutionally required" evidence of a victim's prior sexual behavior or predisposition only if its probative value outweighed the "danger of unfair prejudice to the alleged victim's privacy," a condition not found in its federal counterpart.[273] In 2011, CAAF noted that this could violate an accused's constitutional rights[274] and, later that year, reversed a rape conviction in just such a case, with a sweeping opinion broadly defining the scope of "constitutionally required" evidence.[275]

The most recent battery of legislative changes have not yet reached the appellate courts, but two likely targets for judicial scorn are the removal of the "constitutionally required" exception to Military Rule of Evidence 513[276] and attempts to curtail pre-trial questioning of victims,

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[273] Exec. Order 13,447, 72 Fed. Reg. 56,179, 56,184–86 (2007). *Compare* MCM, *supra* note 13, Mil. R. Evid. 412, *with* Fed. R. Evid. 412 (requiring a balance of the probative value against "danger of harm to any victim and of unfair prejudice to any party" only in civil cases).

[274] United States v. Gaddis, 70 M.J. 248, 253 (2011).

[275] United States v. Ellerbrock, 70 M.J. 314 (2011). *Ellerbrock* broadly held that evidence of a victim's sexual behavior or sexual predisposition is "constitutionally required" whenever "the evidence is relevant, material, and the probative value of the evidence outweighs the dangers of unfair prejudice." *Id.* at 318.

[276] *See supra* note 263 and accompanying text. As CAAF noted in *Gaddis*, Congress and the President "cannot limit the introduction of evidence that is required to be admitted by the Constitution." *Gaddis*, 70 M.J. at 253 (citing Dickerson v. United States, 520 U.S. 428, 437, 444 (2000)). The legislative history of this change to Rule 513 is scant, but it appears to be in reaction to the 2013 Naval Academy case. *See supra* text accompanying notes 56–58. The military judge in that case ordered production of the victim's mental health records; and she sought an extraordinary writ from the Naval-Marine Corps Court of Criminal Appeals and CAAF to prevent this disclosure. Proposed Brief of Protect Our Defenders as Amicus Curiae, L.C. v. Daugherty, No. 14-8010 (C.A.A.F. Feb. 13, 2014), *available at* http://protectourdefenders.com/downloads/CAAF_Amicus_Brief-LC_v_Daugherty-Protect_Our_Defenders_2-13-2014.pdf. Protect Our Defenders, an advocacy group, argued that military judges regularly and erroneously use the "constitutionally required" exception to "routinely disclose victims' records . . . . with complete confidence that their orders will never be reversed" because a ruling favorable to the defense (i.e., ordering disclosure of a victim's mental health records) could never be appealed by the prosecution or victims. *Id.* at 5. The House of Representatives version of the FY15 NDAA included a provision that would have mirrored the federal Crime Victims Rights Act, allowing victims to petition the service Court of Criminal Appeals for review of such judicial orders within seventy-two hours and writs of mandamus to block an improperly ordered disclosure, limiting any trial delay to at most five days. *Compare* H.R. 4435, 113th Cong. § 535 (2014), *with* 18 U.S.C. § 3771(d)(3) (2012). The Senate version directed that Rule 513 "shall be modified . . . to clarify or eliminate the current exception to the privilege when the admission or disclosure of a communication is constitutionally required." S. 2410, 113th Cong. § 542 (2014). When the final legislation emerged, it included the writ of mandamus provision (but eliminated, without explanation, the seventy-two hour and five day time limits) and an order that the

whether at a preliminary hearing, deposition, or interview.[277] Furthermore, the Supreme Court could return to its mid-century outlook[278] if it finds that the military has reverted to such a "rough form of justice"[279] that it violates due process. Any of these could produce a string of reversed convictions years after trial, in cases where the allegations are not only true but proven, leaving victims feeling betrayed by the very system that had been altered supposedly for their benefit. Lastly, increased prosecutions will certainly not guarantee increased convictions.[280] A reduced conviction rate would only fuel further outcry

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"constitutionally required" exception be eliminated within 180 days of passage. Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 537(2), 128 Stat. 3292 (2014). The version of the NDAA for Fiscal Year 2016 introduced in the Senate on May 19, 2015, using the term "interlocutory appeal" rather than "writ of mandamus," would institute the seventy-two hour and five day limits, and would expand the rights of victims to seek reversal of rulings by an Article 32 hearing officer as well those of a military judge. National Defense Authorization Act for Fiscal Year 2016, S. 1376, 114th. Cong. § 549 (2015).

[277] In 2014, CAAF summarily denied a government petition for an extraordinary writ to stop a judge-ordered deposition of a victim in a sexual assault case. United States v. McDowell, No. 14-5005 (C.A.A.F. Aug. 8, 2014). Chief Judge Baker, taking the unusual step of writing a concurrence to summary disposition, hinted that the "continuing trend toward affording alleged crime victims protections throughout the criminal justice process, particularly in sexual assault cases" will lead to further litigation over "how Article 6(b) and the new Article 32 interplay with an accused's rights." *Id.* (Baker, C.J., concurring). Possibly in response to this case, the Department of Defense gave notice of a proposed executive order amending the Rules for Courts Martial to provide that "[a] victim's declination to testify at a preliminary hearing or a victim's declination to submit to pretrial interviews shall not, by themselves, be considered [justifications to order a deposition of a victim]" and further that depositions of victims may only be ordered if "the victim will not be available to testify at court-martial." 80 Fed. Reg. 6058 (Feb. 4, 2015). The Senate version of the NDAA for Fiscal Year 2016 would allow victims (but no other categories of witnesses) to seek orders from the service Courts of Criminal Appeals to quash deposition orders. National Defense Authorization Act for Fiscal Year 2016, S. 1376, 114th. Cong. § 549 (2015). Denying all pretrial access to victims probably violates an accused's Constitutional rights. *See* United States v. Aycock, 35 C.M.R. 130, 161–62 (C.M.A. 1964) (citations omitted) ("[T]o deny [the accused] any access to the witness until the trial . . . makes such entitlement [to compulsory process to obtain witnesses] 'in most part an empty and high-sounding phrase.'").

[278] *See supra* note 19 and accompanying text.

[279] Reid v. Covert, 354 U.S. 1, 35 (1957) (plurality op.), *cited in* Denedo v. United States, 556 U.S. 904, 918 (2009) (Roberts, C.J., dissenting). The absence of any analogue to a grand jury requirement was one of the Court's earliest criticisms. *Reid*, 354 U.S. at 37. That deficiency, perceived or actual, persists today, and it has only been exacerbated by recent changes to Article 32. *See supra* note 264 and accompanying text.

[280] The RSP advised against the provisions of the 2014 and 2015 NDAAs requiring higher level review of decisions not to refer certain cases to trial, *see supra* text accompanying note 152, believing that these provisions create undue pressure to prosecute cases even "in situations where referral does not serve the interests of the

and entrench the belief among victims that prosecution "isn't worth the risk."[281]

In addition to judicial censure, there is a more subtle concern. A justice system serves many goals—exoneration, punishment, deterrence, protection, rehabilitation, etc.[282] But though a victim may feel vindicated by a conviction, catharsis is not a purpose of any justice system. Paradoxically, this is why many college victims and advocates, frustrated by the criminal justice system, have stoked the demand for colleges to create an entirely separate, quasi-judicial process to better "protect victims."[283] The heavy criticisms of the legitimacy of this resulting system[284] and the many successful attacks against it[285] serve as a strong caution against similarly manipulating military justice. The UCMJ is designed to achieve justice and maintain discipline while protecting the rights of the accused.[286] When it fails to do the latter, it will fail at the former.

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victim or of justice." RSP REPORT, *supra* note 4, at 23. *Cf.* Taylor & Adams, *supra* note 186 ("Last year, military commanders sent about 70 percent more cases to courts-martial that started as rape or aggravated sexual assault allegations than they did in 2009. However, only 27 percent of the defendants were convicted of those offenses or other serious crimes . . . . When factoring in convictions for lesser offenses such as adultery, which is illegal in the military, or perjury, about half the cases ended in convictions. The military's conviction rate for all crimes exceeds 90 percent, according to a 2010 report to Congress by the Pentagon.").

[281] Gray, *supra* note 101; *see also* Dockterman, *supra* note 176.

[282] *See generally* 18 U.S.C. § 3553(a)(2) (2012); *accord* MCM, *supra note* 13, R.C.M. 1001(g).

[283] *See* Alexandra Brodsky & Elizabeth Deutsch, *No, We Can't Just Leave College Sexual Assault to the Police*, POLITICO (Dec. 3, 2014), http://www.politico.com/magazine/story/2014/12/uva-sexual-assault-campus-113294.htm; Gray, *supra* note 101; Valenti, *supra* note 171; Bolger, *supra* note 171.

[284] *See supra* note 255 and accompanying text.

[285] *See supra* text accompanying notes 270–271.

[286] *See supra* note 14 and accompanying text.

D. Institutional Leaders Should be in Charge, Empowered, and Accountable

> *The [infantry] take care of their own—no matter what. Dillinger belonged to us, he was still on our rolls. Even though we didn't want him, even though we never should have had him, even though we would have been happy to disclaim him, he was a member of our regiment. We couldn't brush him off and let a sheriff a thousand miles away handle it . . . . The regimental records said that Dillinger was ours, so taking care of him was our duty.*
> —Robert Heinlein[287]

At the press conference announcing the introduction of the CASA, Senator Richard Blumenthal stated "campus sexual assault must command attention at the top administrative rung of all universities."[288] At the same press conference, Senator Gillibrand stated, "we are going to lift the burden of solving this problem off the shoulders of our survivors and placing [sic] it firmly on those of our colleges and universities."[289] The language about college sexual assault used by these two prominent MJIA supporters is remarkably similar to the arguments of other senators against the MJIA.[290] Senator Charles Grassley asserted, "Sexual assault is a law enforcement matter, not a military one."[291] He similarly declared, "Sexual assault [in colleges] is not some mere code of conduct violation. It is a major criminal offense"—in support of the bill that

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[287] STARSHIP TROOPERS 140 (Ace Premium Ed. 2010).

[288] Press Release, Sen. Richard Blumenthal, Bipartisan Bill Takes Aim at Sexual Assault on Campuses, Protecting Students, Boosting Accountability and Transparency at Colleges (July 30, 2014).

[289] Tovia Smith, *New Bill Aims to Hold Colleges Accountable for Campus Sex Crimes*, NAT'L PUB. RADIO (July 31, 2014), http://www.wbur.org/npr/336766002/new-bill-aims-to-hold-colleges-accountable-for-campus-sex-crimes.

[290] *See, e.g.*, 160 CONG. REC. S1342 (statement of Sen. Lindsey Graham) ("[W]e have a rape in the barracks. The worst thing that could happen in a unit is for the commander to say, this is no longer my problem. It is the commander's problem."), S1341 (statement of Sen. Carl Levin) ("[T]he strongest, most effective approach we can take to reduce sexual assault is to hold commanders accountable for establishing and maintaining a command climate that does not tolerate sexual assault."), S1344 (statement of Sen. Kelly Ayotte) ("I want to hold commanders more accountable for not only how they handle these crimes but also for that zero tolerance policy within their units.").

[291] *Id.* S1338 (daily ed. Mar. 6, 2014).

would require "campus disciplinary proceedings related to any claims of sexual violence."[292]

The inconsistent positions of those who endorse both the Title IX/SaVE/CASA paradigm and the MJIA[293] make a surprisingly cogent argument against the MJIA. Supporters of CASA and MJIA opponents alike (for that matter, all those who expect the military and colleges to address sexual assault) acknowledge, in deed if not word, the fundamental principle that leaders are responsible for their organizations and the safety of their people. Nowhere is this truer than in the military—military commanders are singularly responsible for every facet of their commands to a degree unparalleled in civilian life.[294]

Lost amidst the focus on statistics, confounded by the obsessive drive toward uniformity, and exacerbated by the problem of overbroad definitions is the idea that each case is different and must be handled differently. Some cases warrant a criminal trial, some warrant administrative disposition, and some warrant no adverse action but simply support for the victim. The ability, and requirement, to assess each case and determine the best disposition is ultimately a function of *leadership*. College leaders, when they are not hamstrung by draconian mandates designed to maximize "accountability," can oversee an effective, fair, and impartial disciplinary process. Colleges should have the structural flexibility to defer to law enforcement for investigations, to discuss with local prosecutors whether criminal prosecution is an appropriate disposition, and to choose whether to pursue administrative discipline, perhaps concurrent with or dependent upon the outcome of the judicial process—with input from legal advisors, victims, advocates, and the like as appropriate.[295]

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[292] Campus Accountability and Safety Act, S. 2692, 113th Cong. § 6 (2013); Press Release, Sen. Richard Blumenthal, *supra* note 288.

[293] *See supra* text accompanying notes 131 –147.

[294] *See* U.S. DEP'T OF ARMY. REG. 600-20, ARMY COMMAND POLICY para. 2-1(b) (6 Nov 2014) ("Commanders are responsible for everything their command does or fails to do.").

[295] This relates back to the need for consistent and precise definitions of "sexual assault." Senator McCaskill and critics of college hearings are correct in that the penetrative crimes of rape and sexual assault are normally best dealt with criminally. *See* Peter Berkowitz, *supra* note 112; MacDonald *supra* note 112; *supra* text accompanying notes 149-151; Anderson, *supra* note 176. But there can be individual exceptions for any number of legitimate legal and practical reasons that do not amount to "sweeping it under the rug" (not the least of which could be a victim's adamant refusal to participate in a criminal trial). Lesser sexual offenses could be disposed of through either criminal or

Such a disposition decision requires more than just an algorithmic evaluation of evidence, which MJIA supporters fail to acknowledge.[296] The very term "prosecutorial discretion" acknowledges that prosecutors are *expected* to consider not just the evidentiary strength of a case but also time, cost, priority, and the interests of the community.[297] These concerns are as much political as they are legal. As the Title IX/SaVE framework plausibly demonstrates, a law license is not a requirement to make these decisions. Yet MJIA supporters aver that commanders, trained in warfighting rather than law, cannot make these assessments.[298] With more charitable phrasing, some argue relieving commanders of responsibility to convene courts-martial would "free them" to focus on their combat mission.[299] But this is a false dilemma. First, the maintenance of good order and discipline is crucial to the services'

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administrative proceedings. This is analogous to ordinary assault and battery, which can be both a crime and a civil tort. The appropriate venue(s) for disposition will vary with each case depending on factors so profuse and varied that they cannot be universally, algorithmically analyzed. Statutorily compelling a uniform disposition for every case is neither effective nor appropriate.

[296] *See, e.g.*, Rep. Jamie Herrera Beutler, *Bill Would Change Military for Better*, THE DAILY NEWS ONLINE, Jan. 5, 2014, http://tdn.com/news/opinion/guest-column-bill-would-change-military-for-better/article_847652fe-74d2-11e3-b0dc-001a4bcf887a.html ("The bill would mean that evidence of a sexual assault case would be evaluated by independent, trained prosecutors who would decide if proceedings should move forward based on the facts of the case."); Sen. Kirsten Gillibrand, *Sexual Assaults and American Betrayal*, N.Y. DAILY NEWS, Mar. 14, 2014, http://www.nydailynews.com/opinion/sexual-assaults-american-betrayal-article-1.1721007 ("We need every case to move forward based solely on the evidence and judged solely on the merits, not political pressure or other non-legal considerations.").

[297] *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL para. 9-27 (2014) ("Principles of Federal Prosecution"); Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 6, 8 (2012).

[298] *E.g.*, Murphy, *supra* note 239, at 167 ("Military justice attorneys are the best equipped to make all decisions regarding a criminal case because they are the subject matter experts."), 169 ("The MJIA allows for the subject matter experts to perform their legal duties directly."). *Cf.* MAJOR ROBERT K. FRICKE, I'LL DECIDE WHAT CASES TO PROSECUTE AND YOU DECIDE WHAT INFANTRY TACTICS TO EMPLOY—A PROPOSAL TO ELIMINATE THE COMMANDER'S POWER TO REFER CHARGES TO TRIAL BY COURT-MARTIAL—ANOTHER STEP TOWARD DISASSOCIATING THE WORD "MILITARY" FROM "JUSTICE" 109-13 (1999).

[299] *E.g.*, MAJOR GENERAL (RETIRED) MARTHA RAINVILLE, TESTIMONY BEFORE THE RESPONSE SYSTEMS TO ADULT SEXUAL CRIMES PANEL 12-13 (Jan. 30, 2014) ("[The MJIA] would allow those commanders to focus their efforts on command business . . . on the warfighting abilities of their units . . . to let commanders lead."); FRICKE, *supra* note 298, at 114 (arguing that transferring convening authority would "free[ ] up the commander to fight").

combat mission. Second, commanders regularly make, and are held accountable for, decisions in areas only tenuously connected to warfighting.[300]

Commanders' accountability, ironically, leads some to believe that "independent prosecutors" are necessary to protect accused from politically-motivated prosecutions by commanders who "are fearful to make the unpopular decision to not refer a sexual assault case."[301] Occasionally, MJIA supporters make statements to this effect as well[302] (even though they are arguably a primary cause of such trepidation). Major Elizabeth Murphy, an Army judge advocate who proposes entirely removing convening authority from commanders, argues that that "the potential effect [of the political pressures to prosecute] is that commanders may be sending cases forward when they should not."[303] She cites two anonymous Army brigade commanders:

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[300] For example, commanders, even without advanced training in finance or accounting, are expected to ensure the appropriate allocation of funds from different fiscal appropriations and can be held accountable for drawing from improper appropriations. *See* U.S. DEP'T OF DEF., 7000.14-R, DOD FINANCIAL MANAGEMENT REGULATION, vol. 14, ch. 5, para. 050302 (Nov. 2010). Commanders without legal training must still synthesize international law with operational needs when developing rules of engagement. *See* CHAIRMAN OF THE JOINT CHIEFS OF STAFF, INSTR. 3121.01B, STANDING RULSE OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES app. A, para. 6.a (13 June 2005). Relevant to sexual assault, commanders are statutorily required to investigate and respond to all sexual *harassment* complaints, 10 U.S.C. § 1561 (2012), demonstrating congressional acknowledgment of the responsibility and capability of commanders to address a very similar concern even though it is relatively independent of their combat mission.

[301] Murphy, *supra* note 239, at 149. This is not a new concept; in the late 1940s, the American Bar Association and numerous state bar organizations repeatedly asked Congress to completely remove military justice from command control in order to protect the accused. HISTORY OF THE JAG CORPS, *supra* note 15, at 199.

[302] *E.g.*, Subcommittee hearing, *supra* note 53, at 28 (statement of Ms. Anu Baghwati) ("[P]utting legal experts in charge of the process serves everyone better. It creates a fairer and more impartial trial for the accused as well."); N.Y. TIMES, *A Broken Military Justice System*, *supra* note 138 (quoting Sen. Kirsten Gillibrand) ("I'm not interested in an innocent soldier going to jail any more than I'm interested in a guilty perpetrator going free. . . . We need an objective trained prosecutor making these decisions about whether a case should go forward, not politics."). Despite this rhetoric about the need for lawyers to review cases to protect the accused, none have proposed amending Article 32 to prohibit referral if the impartial, trained, and experienced lawyer who conducts the preliminary hearing finds no probable cause to warrant prosecution. *See supra* note 264 and accompanying text.

[303] Murphy, *supra* note 239, at 148.

> [O]ne stated that if a sexual assault or sexual harassment case comes across his desk, even if he thinks it is not a good case, he feels he should send it forward, err on the side of the victim, and hope that justice is served in the end. He stated that there is "indirect [unlawful command influence] from the top right now." The second brigade commander contended that the hard part is when he is told by someone that there is no case, but everyone looks to him to make the decision, and he will be scrutinized for not seeming to take the matter seriously enough if he does not opt for a court-martial. He stated that there is a lot of indirect pressure, and his concern is that a statistic will show that he did not send enough cases forward, that his name will be out there as "someone who doesn't get it."[304]

Put bluntly, if a commander is willing to court-martial one of his Soldiers over his own misgivings in order to protect his own career and promotion potential, he is unfit for command and should be relieved—likewise for one who suppresses allegations in order to protect a favored subordinate or to avoid scrutiny of his command. Commanders can order troops into battle fully knowing that some of them may die. Soldiers trust their commanders to make the right decisions, fully knowing that the "right decisions" will sometimes put their lives at risk. That a commander would violate that trust and sacrifice a subordinate to political pressure in order to safeguard his own career represents an existential threat to military discipline and national security. The solution is to demand commanders with moral courage, not to absolve them of the obligation to use it.

Considerable debate focused on the MJIA's potential impact on military discipline; opponents argued it would degrade discipline while

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[304] *Id.* at 149 (citing Interview with Anonymous Person, Charlottesville, Va. (Nov. 7, 2013)). "Unlawful command influence" typically refers to the statutory, regulatory, and judicially-imposed prohibitions against superior commanders influencing their subordinates' participation in, administration of, and independent discretion regarding, the military justice system. *See generally* UCMJ art. 37 (2012); MCM, *supra* note 13, R.C.M. 104; United States v. Allen, 33 M.J. 209, 212 (C.M.A. 1991) ("There is no doubt that the appearance of unlawful command influence is as devastating to the military justice system as the actual manipulation of any given trial."); United States v. Gore, 60 M.J. 178, 178 (C.A.A.F. 2004) (quoting United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986)) ("Unlawful command influence is recognized as the 'mortal enemy of military justice.'").

its supporters maintained that it would not have adverse effects.[305] But its effect, or lack thereof, on discipline is less important than its dilution of command responsibility. Its supporters take pains to point out that commanders would still have convening authority for crimes that are "uniquely military in nature."[306] They at least tacitly acknowledge that commanders, wholly responsible for the performance of their organizations, sometimes must impose significant penalties either as punishment for or deterrence of misconduct.

This is why "willfully disobey[ing] the lawful command of [a] superior commissioned officer," a meaningless notion in civilian life, is a potential capital crime in the military.[307] This is why categories of misconduct broadly defined as "unbecoming of an officer and gentlemen," "to the prejudice of good order and discipline in the armed forces," or "of a nature to bring discredit upon the armed forces" are punishable as crimes.[308] This is why a disinterested prosecutor may view a $100 barracks larceny as insignificant[309] while the commander sees it as an egregious breach of trust. Commanders are unequivocally accountable for the performance of their commands and must have all the educational, corrective, and disciplinary authorities necessary to fulfill that responsibility. In turn, the UCMJ exists to guard against their

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[305] *See* 160 CONG. REC. S1335–49 (daily ed. Mar. 6, 2014) (Senate debate on the Military Justice Improvement Act of 2013).

[306] *Comprehensive Resource Center for the Military Justice Improvement Act*, KIRSTEN GILLIBRAND – U.S. SENATOR FROM N.Y, http://www.gillibrand.senate.gov/mjia (last visited May 11, 2015). Senator Gillibrand publicly reassured the Joint Chiefs of Staff that convening authority for "crimes of mission" would remain with commanders. SASC Hearing, *supra* note 131, at 49 ("[Senator Gillibrand speaking:] We have chosen to keep all crimes of mission—going [absent without leave], not showing up on time, not charging up the hill when you command your servicemember to do so."), 50 ("[General James Amos, Commandant, U.S. Marine Corps, speaking:] So that would be things like failure to obey orders and regulations . . . . [Senator Gillibrand's reply:] No, that is excluded under our bill. Any crime of mission is excluded."). At the time Senator Gillibrand made these assertions, the version of the MJIA then before the Senate would have removed UCMJ Article 92, "Failure to Obey Order or Regulation," from commanders' convening authority. S. 967, 113th Cong. § 2(a)(2) (2013). The next version changed this. S. 1752, 113th Cong. §2(a)(3) (2013).

[307] UCMJ art. 90 (2012).

[308] UCMJ art. 133, 134 (2012); *see also* Parker v. Levy, 417 U.S. 733, 743–44 (1974) (upholding the constitutionality of Articles 133 and 134 due to the specialized nature of military society).

[309] *See* UCMJ art. 121 (2012); MCM, *supra* note 13, pt. IV, ¶ 47.e(1)(b) (limiting a sentence of confinement for larceny of nonmilitary property of a value less than $500 to at most six months).

abusive or arbitrary use.[310] Focusing on discipline rather than accountability puts the proverbial cart before the horse.

The MJIA further fails to maintain accountability in a more ominous, latent fashion. In order for republican government to function properly, the military must be subordinate to, and accountable to, civilian leadership, and by extension the broader public.[311] That accountability is achieved through the chain of command, beginning with the democratically elected president.[312] Likewise, those who wield the prosecutorial authority of the state must be close to the public in accountability. Thus every United States Attorney is directly appointed by the President,[313] while principal state prosecutors are elected or directly appointed.[314]

The MJIA would create an independent prosecutorial authority, deliberately unmoored from the chain of command and by extension any real public accountability. Not only does "prosecutorial discretion" require more than just legal acumen,[315] it is also almost completely

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[310] Thus the argument that "a servicemember should not face the possibility of a federal conviction for minor offenses, especially those that are military in nature," Murphy, *supra* note 239, at 173, misses the point. What may be minor in civilian life is potentially major in military life. Major Murphy argues that only serious crimes with analogous statutes in federal civilian law are worthy of courts-martial. *Id.* at 170-72, 179-80. But to take one example, the only companion statute she proposes to Article 90, "Assaulting or Willfully Disobeying Superior Commissioned Officer," is 18 U.S.C. § 111, Assault. *Id.* at 183. She identifies no equivalent to Article 92, "Failure to Obey Order or Regulation." *Id.* Some violations of military authority are so significant (literally matters of life and death) that they require significant penalties. Potentially significant, felony-level penalties require corresponding due process safeguards. "Civilianizing" the military criminal code the way she proposes would undercut the entire justification for martial law.

[311] *See generally* SAMUEL HUNTINGTON, THE SOLDIER AND THE STATE 14-15, 81 (1957).

[312] *See* U.S. CONST. art. II, § 2.

[313] 28 U.S.C. § 541 (2012). The Senate must advise and consent to these nominations. *Id.*

[314] *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS, 2007 - STATISTICAL TABLES 1 (2011) ("The chief prosecutor, also referred to as the district attorney, county attorney, commonwealth attorney, or state's attorney, represents the state in criminal cases and is answerable to the public as an elected or appointed public official."); *accord* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS, 2001, at 2 (2002) (noting that "chief prosecutors," as defined above, were elected in 47 of 50 states).

[315] *See supra* text accompanying note 297.

unfettered.[316] The principal check is public accountability. The MJIA would bury prosecutors inside the military hierarchy, unresponsive to the needs of command and largely unaccountable to the public, with opaque, exclusive, and unfettered power to seek punishment for the most serious crimes—or not.[317] This is anathema to the principles of unity of command and military discipline, to the need for military subordination to public authority, and to any democratic system of justice.

V. Conclusion

> *Make us to choose the harder right instead of the easier wrong, and never to be content with a half truth when the whole can be won. Endow us with courage that is born of loyalty to all that is noble and worthy, that scorns to compromise with vice and injustice and knows no fear when truth and right are in jeopardy.*
> —Cadet Prayer[318]

Sixty years after Congress created the UCMJ to protect accused servicemembers from abusive and arbitrary punishment, a significant faction in Congress now believes it must be almost completely dismantled and restructured because is is not being used aggressively enough. Multiple federal organizations and a fair number of outside parties consider the notion of due process in student disciplinary hearings, the result of courage in the civil rights era, as an obstacle to be overcome or circumvented in the name of "accountability." The federal government has used its formidable authority to shape institutional responses to sexual assault, but the aggressive rush to "fix" the problem subordinates notions of due process, truth-seeking, and even the presumption of innocence. Fueled by an underlying assumption that too few perpetrators are sufficiently punished, the poignant and emotionally-

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[316] *See* Krauss, *supra* note 297 (citing, *inter alia*, Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978), Wayte v. United States, 470 U.S. 598, 607 (1985), Wade v. United States, 504 U.S. 181, 186 (1992); United States v. Armstrong, 517 U.S. 456, 464 (1996)).

[317] *Cf.* Hon. Elizabeth Holtzman, Statement to the Response Systems to Adult Sexual Crimes Panel 268 (Jan. 30, 2014) ("Here we have a command structure where we know who's held accountable . . . . When it's turned over to a faceless, nameless organization[,] who's making that charging decision? Who do I complain to? Who do I hold accountable? These are very serious questions.")

[318] U.S. MILITARY ACADEMY, OFFICE OF CHAPLAINS, http://www.usma.edu/chaplain/SitePages/ Cadet%20Prayer.aspx (last visited May 11, 2015).

charged environment of sexual assault threatens otherwise broadly accepted principles of justice. And in that setting, it is difficult for anyone in a position of both power and publicity to argue for policies that will be seen as making it harder to punish rapists. Nonetheless, the "obligation to govern impartially is as compelling as [the] obligation to govern at all."[319]

The prolific inconsistencies produced by the divergent politics of military and college sexual assault are difficult to explain. However, they illuminate the need for institutional and political leaders with moral courage to enact and support better, more just responses to sexual assault. Unintentionally, the proponents of aggressive military and college responses provide a collection of cautionary examples, useful comparisons, and forceful arguments against many of the severe policies they endorse. Comparing the two systems demonstrates the need for precise definitions, professional investigations, fair adjudications, and empowered institutional leaders. Far from a conflict of interest, balancing obligations to society, to accused, and to victims is a fundamental function of governance. Political, military, and educational leaders alike bear this responsibility. Every servicemember and every student accused of sexual assault is their constituent for whom these leaders are obligated "to ensure justice is done."[320]

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[319] Berger v. United States, 295 U.S. 78, 88 (1935).
[320] *Id.*

Appendix

Military Justice Proposals

In the spirit of "do not bring up problems without proposing solutions," this Appendix summarizes, restates, and expands upon specific legislative and policy proposals discussed in varying depths throughout this article to better align military justice with the four principles outlined:

A. Clearly define the crime of sexual assault and investigate it as a crime.

B. Adjudication must remain institution v. accused, not victim v. accused.

C. Do not manipulate procedures just to influence the results of sexual assault cases.

D. Institutional leaders should be in charge, empowered, and accountable.

1. Extend the requirement imposed by § 1774 of the FY14 NDAA that any convening authority who chooses not to refer a charge for a penetrative offense to court-martial to submit his decision to the next higher convening authority to charges for ANY offense, and repeal the provisions for secretary-level review. In the alternative, repeal it entirely. (Principles C, D). Any higher commander can withhold authority to act on a case.[321] This implies that the higher commander must have knowledge of the case to make that decision. Extending this requirement to all courts-martial charges would allow higher convening authorities to exercise this withholding ability and would also make higher review a matter of routine rather than implicitly pressuring on commanders to refer sexual assault cases. If Congress solely intended to pressure commanders to increase sexual assault prosecutions, that is unjust and warrants repeal.[322] The provisions for secretary-level review, especially the one allowing any detailed trial counsel to request that the "chief prosecutor" force secretarial review, should be repealed regardless. These provisions openly encourage

[321] *See supra* text accompanying note 126.
[322] *See also* RSP REPORT, *supra* note 4, at 23 (recommending Congress repeal § 1744).

circumvention of the chain of command.[323] If both the convening authority and staff judge advocate believe referral is unwarranted, and the assigned trial counsel cannot persuade them otherwise, the trial counsel should not be allowed to circumvent both his senior supervising attorney and commanding officer by going straight to the service secretary via the "chief prosecutor."

2. Prohibit referral if the Article 32 officer finds there is no probable cause. (Principles C, D). It is plausible that the original wide-ranging Article 32 is no longer necessary in military justice, with modern law enforcement, a military trial judiciary, and more sophisticated rules of discovery. But considering the rhetoric over the need for "trained, experienced" lawyers to review cases,[324] this would be a simple way to preserve the "bulwark against baseless charges"[325] and potentially forestall attacks on the overall constitutionality of the revised military justice system.[326]

3. Repeal the amendment to Article 32 allowing any victim to choose not to testify. Also, or in the alternative, eliminate the system of barriers which would effectively deny defense counsel any pretrial access to victims. (Principles A, B, C). By reducing the scope of Article 32 to a preliminary hearing, Congress adequately addressed the abuses it intended to prevent. But it is inconceivable that the preliminary hearing, which is designed to assess whether probable cause exists, should not be allowed to evaluate the credibility of the most significant witness. More importantly, denying defense counsel all pre-trial access to victims is likely unconstitutional (it will almost certainly generate significant appellate litigation).[327]

4. Allow witness subpoenas for Article 32. (Principles A, C, D). This relates to number 3, above. Currently, civilian witnesses cannot be compelled to testify at an Article 32 (though they can be subpoenaed for a deposition).[328] Providing process to compel witness attendance (even by remote means) at an Article 32 would eliminate any inequality

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[323] *Cf. supra* text accompanying notes 311–317.
[324] *See supra* note 302 and accompanying text.
[325] United States v. Samuels, 10 C.M.A. 206, 212 (1959) (discussed *supra* note 18 and accompanying text).
[326] *See supra* note 279 and accompanying text.
[327] *See supra* note 277 and accompanying text.
[328] UCMJ art. 47 (2012).

between civilian victims and military victims, who unlike civilians could be ordered to testify at an Article 32 prior to the new statute.[329]

5. Amend Article 60 to either eliminate ALL ability to disapprove findings and modify sentences, or return the previous discretionary standard. Concurrently, amend Article 66 to allow any convicted servicemember to petition for discretionary review by the Court of Criminal Appeals, regardless of sentence, without prior Article 69 review by the Judge Advocate General. (Principles B, C, D). Either review by the convening authority is a necessary level of post-trial review,[330] or it is not. The specific charges are immaterial to this analysis. If it is not, or no longer, necessary, its removal can be offset by allowing for discretionary appellate review of all cases, not just the automatic review of cases where the sentence includes more than one year of confinement or a punitive discharge.[331]

6. Amend Article 120 to (1) define a "sexual act" as genital penetration, anal penetration, or oral-penile penetration without a

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[329] Congress considered, and rejected, a proposal to do this in 2011. Major Chris W. Person, *The* Subpoena Duces Tecum *and the Article 32 Investigation: A Military Practitioner's Guide to Navigating the Uncharted Waters of Pre-Referral Compulsory Process*, ARMY LAW., Feb 2014, at 9–10. Congress, concerned about the uncertain avenues for challenging a subpoena pre-referral, compromised and allowed for subpoenas of documentary evidence but not personal testimony. *Id.* at 10; *see also* UCMJ art. 47 (2012). Adding compulsory process to compel witness attendance would require clarification of these issues; witnesses could raise challenges to subpoenas with some combination of the convening authority, a military magistrate, military judge, or U.S. District Court.

[330] *See supra* note 18 and accompanying text (discussing the history and purpose of Article 60).

[331] Currently the Courts of Criminal Appeals may only review cases in which the sentence includes death, a punitive discharge or dismissal, or confinement of at least a year. UCMJ art. 66(b)(1) (2012). The service Judge Advocates General may also ask the Courts of Criminal Appeals to review cases that do not meet that threshold. UCMJ art. 69(d). The current post-trial structure creates a gap in post-trial review. A convening authority may not reduce any sentence if the *maximum* sentence exceeds two years' confinement, UCMJ art. 60(c)(3) (2014), but there is no avenue for direct judicial review if the *actual* sentence does not include death, punitive discharge or dismissal, or confinement of at least a year. UCMJ art. 66(b)(1) (2012). For example, a servicemember convicted of violating Article 107, False Official Statement (which is punishable by up to 5 years' confinement, MCM, *supra* note 13, pt. IV, ¶ 31.e), but sentenced to only 5 months' confinement without a punitive discharge cannot correct errors of law in his trial quickly through the convening authority nor can he have his case judicially reviewed by a Court of Criminal Appeals without referral by the Judge Advocate General.

specific intent requirement, (2) restrict the definition of "sexual contact" to nonconsensual contact with genitals, breasts, and buttocks, and (3) eliminate "intent to arouse" and at least, "intent to abuse, humiliate, or degrade" from sexual contact crimes. (Principles A, C). Proscribing any form of human contact as a specific intent sex crime is unwieldy and overbroad.[332]

7. Amend DoD and service policies to be consistent with the statutory terms used in Article 120 (Principles A, C). Use "sexual contact," "sexual violence," or another umbrella term as a policy term, rather than "sexual assault." Do not aggregate penetrative and nonpenetrative offenses in statistics.[333]

8. Amend the provisions of the FY15 NDAA affecting Article 6(b) and Military Rule of Evidence 513 to (1) reinstate the "constitutionally required" exception to the exclusionary rule, and (2) add the 72-hour and 5-day time limits of the federal Crime Victims Rights Act to the writ of mandamus provisions. (Principles B, C). The possibility of appellate review addresses the concern over military judges routinely ordering production of mental health records because they have had no disincentive.[334] Also, this will create, likely in short order, the body of case-law to guide judges that has to date been missing. Eliminating the "constitutionally required" provision is overkill that will lead to more litigation and likely a string of reversed convictions, requiring retrials that are difficult for victims and commands alike. But at the same time it is likely that victims will request writs of mandamus in nearly every case in which a military judge orders production or admission of mental health records. Victims should not be able to indefinitely delay every proceeding; adding the 72-hour and 5-day time limits already found in federal law[335] will allow for vindication of their rights without undue delay.

9. Do not enact: (1) the Military Justice Improvement Act, (2) the proposed Rule for Courts-Martial 1001A (allowing victims to make unsworn statements during presentencing), (3) the proposed modifications to Rule for Courts-Martial 702 (restricting depositions

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[332] *See supra* text accompanying notes 221–226.
[333] *See supra* text accompanying note 220.
[334] *See supra* note 276 and accompanying text.
[335] *See supra* note 276 and accompanying text. *Cf.* UCMJ art. 36 (2012) (requiring court-martial rules of procedure and evidence to generally conform to their federal counterparts, "so far as [the president] considers practicable").

of victims). (Principles B, C, D). The MJIA would undercut the purpose and intent of military law, reduce commanders' accountability for the performance of their commands, undermine commanders' authority, and create an unaccountable prosecutorial authority.[336] The proposal for victim unsworn statements assumes an equality that does not exist between victims and accused, and is not appropriate in an adversarial sentencing proceeding.[337] And, as discussed above, the government's denial of all pre-trial access to victims is likely unconstitutional (it will almost certainly generate significant appellate litigation).[338]

Specific Proposals for Colleges

Because due process is less stringent for administrative law than criminal law, and because colleges vary widely in size, composition, and culture, colleges need flexibility to design their own procedures. Therefore most of the recommendations here focus on eliminating, rather than modifying or creating, nationwide policies.

1. Permit, even encourage, any sexual offense defined as a felony by state law, if not every sex crime, to be investigated by law enforcement in lieu of internal administrative investigations. (Principles A, C). This could be law enforcement organic to the college or local off-campus law enforcement, or colleges could pool resources to share investigative services. But the *investigation* (as distinct from adjudication) of these crimes should be done by trained professionals.[339]

2. Broadly, separate the functions of investigation and adjudication. (Principles A, B, C). This relates to number 1, above. The DCL uses "investigation" to refer to the entire process;[340] a single individual can theoretically be responsible for the entire process.[341] Dividing these responsibilities provides greater structural protection against arbitrary and capricious actions, and guards against actual or perceived conflicts of interest.

3. If local prosecutors pursue criminal charges, allow colleges to defer any adverse action until the completion of the criminal

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[336] *See supra* parts III.B and IV.D.
[337] *See supra* note 246 and accompanying text.
[338] *See supra* note 277 and accompanying text.
[339] *See supra* text accompanying notes 227–228.
[340] DCL, *supra* note 82, at 9–13.
[341] *See supra* text accompanying notes 108, 111, 140, and 146.

proceeding. (Principles A, B, D). This does not preclude temporary measures designed to ensure safety, like reassignment of living areas, stay-away orders of protection, rescheduling classes, etc. Colleges could choose whether to pursue immediate disposition or else wait for the criminal process to complete itself.[342]

4. If a criminal proceeding ends in a dismissal or acquittal, allow colleges to choose not to pursue any further adverse action. (Principles A, B, C, D). Right now, colleges must conduct their own procedures regardless of whether criminal proceedings are pending or even concluded.[343] College leaders should be allowed, based on the facts of the case, to choose to allow the criminal justice system to run its course. If the case ends without conviction, colleges should be permitted to rely on the determination of civil authorities or the judicial system that the accused is not responsible.

5. Do not condition the rights of the accused on the rights of the victim. (Principles B, C). The two are not equally situated in the process.[344] Most significantly, an accused should be able to appeal an adverse result, but it is not fair to expose him to repeated risks by allowing victim appeals if the institution, which designs, staffs, and funds the adjudicative process, fails to meet the burden of proof it has set for itself.

6. Eliminate the requirement to use the preponderance of evidence standard. (Principles B, C). This relates to number 5, above. College adjudications are not victim v. accused private actions.[345] The standard of proof is one element of due process, and a higher standard may be warranted depending on the overall structure of the process.[346]

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[342] *See supra* text accompanying notes 227–228, parts IV.A, IV.D. *Cf. supra* text accompanying note 242.
[343] *See supra* text accompanying notes 84, 110.
[344] *See supra* part IV.B.
[345] *See supra* text accompanying notes 231–243.
[346] *See supra* text accompanying note 243.

RUDDERLESS: 15 YEARS AND STILL LITTLE DIRECTION ON THE BOUNDARIES OF MILITARY RULE OF EVIDENCE 513

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I. Introduction

Though Military Rule of Evidence (MRE) 513 was enacted in 1999, there has been very little case-law authored in the ensuing fifteen years defining the scope of the rule.[1] While litigation over MRE 513 has increased at the trial level, particularly in sexual assault cases, the appellate courts have been conspicuously silent on defining the parameters of the rule.[2] One possible explanation of this silence could be

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[1] STEPHEN A SALTZBURG ET AL., 2 MILITARY RULES OF EVIDENCE MANUAL § 513.04 (7th ed., Matthew Bender & Co. 2011).

[2] *Id.* (citing United States v. Rodriguez, 54 M.J. 156 (C.A.A.F. 2000) (declining to recognize a psychotherapist-patient privilege under MRE 501(a)(4), recognizing instead a privilege more limited under MRE 513 than that recognized by the Supreme Court in Jaffee v. Redmond, 518 U.S. 1 (1996)); United States v. Jenkins, 63 M.J. 426 (C.A.A.F. 2006) (recognizing a more limited privilege under MRE 513 than that adopted in *Jaffee* and finding that the military judge's admission of the accused's statements to a federal civilian psychologist during a command-directed mental health evaluation was proper under the exceptions listed in MRE 513(d)(4) and (d)(6)); *see also* United States v. Bazar, 2012 CCA LEXIS 267, at *8 (A.F. Ct. Crim. App. July 20, 2012) (finding no abuse of discretion when the military judge conducted an MRE 403 balancing test and determined that defense proposed cross-examination "was not constitutionally required under either [MRE 412 or 513]."); United States v. Palmer, 2013 CCA LEXIS 1116, at *13-*16 (A.F. Ct. Crim. App. Nov. 25, 2013) (upholding a military judge's review and release of a victim's mental health records but limiting cross examination regarding those records to rebutting specific impacts that the victim testified to during the sentencing phase); United States v. Hudgins, 2014 CCA LEXIS 227, *15 (A.F. Ct. Crim. App. Apr. 3, 2014)

that trial courts have tended to err on the side of reviewing mental health records *in camera* and releasing some privileged material, thus leaving little opportunity for the issue to be addressed on appeal.[3] Whatever the reason, the lack of clear boundaries has continued to frustrate practitioners—who are searching for a consistent and reliable analytical framework to address MRE 513 issues.

In a common scenario faced at the trial level, the defense seeks an alleged victim's mental health records either to: (1) search for impeachment evidence, or (2) present evidence that the victim has a mental disease or defect, which may either raise an issue of witness competency under MRE 601[4] or serve also as impeachment evidence under MRE 608(c).[5] The oft-cited basis for requesting these records is that they are constitutionally required under the Fifth and Sixth Amendments. This clash between the accused's constitutional rights and the application of the psychotherapist-patient privilege sets the stage for vehement litigation.

On December 12, 2014, the United States Congress passed the Fiscal Year 2015 National Defense Authorization Act (NDAA), which the President subsequently signed into law.[6] Section 537 of the NDAA requires significant changes to MRE 513.[7] Among those changes are the elimination of the explicit "constitutionally required" exception in MRE 513(d)(8), and significant refinements to the procedural requirements of

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(finding no abuse of discretion where the military judge conducted an *in camera* review of the victim's mental health records, released at least one record to the defense, the defense did not cross-examine the victim on the one record released, the remaining records were not aligned with the defense theory of the case, and the victim's relationship with her boyfriend began several weeks after the acts charged).

[3] *See* Annys Shin, *Alleged Military Sex Assault Victims Seek To Block Use Of Counseling Records*, WASH. POST, Feb. 14, 2014, http://www.washingtonpost.com/blogs/local/wp/2014/02/14/alleged-military-sex-assault-victims-seek-to-block-use-of-counseling-records/; *see also* JUDICIAL PROCEEDINGS PANEL, INITIAL REPORT 115-16 (Feb. 2015) [hereinafter JPP INITIAL REPORT].

[4] As a practical matter, competency is a very low threshold and is unlikely to be the foundation for excluding a witness's testimony. *See* United States v. Lyons, 33 M.J. 543 (A.C.M.R. 1991).

[5] *See* JPP INITIAL REPORT, *supra* note 3, at 110.

[6] *See* Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, 128 Stat. 3292 (2014) [hereinafter NDAA].

[7] *See id.*

the rule.[8] Though this act of Congress seems to eliminate a contentious issue,[9] litigation in this area is not likely to end.[10]

This is true because, although the "constitutionally required" exception will no longer be printed in the text of MRE 513, the privilege is still subordinate to the dictates of the Constitution. Consequently, litigation will likely continue as counsel seek to pierce the privilege under the auspices of the Constitution even without an enumerated exception. This article focuses on establishing a framework for addressing this issue.

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[8] *See id*.

[9] Annys Shin, *supra* note 3.

[10] The negligible impact of eliminating the "constitutionally required" exception under MRE 513(d)(8) is rooted in both the Constitution and case-law. When viewing the intersection of the Constitution and a rule created by legislative or judicial act, it is imperative to remember that constitutional rights prevail over conflicting statutes and rules. *See* Rock v. Arkansas, 483 U.S. 44, 56 (1987) (where the Court noted that evidentiary rules must be evaluated as applied for a determination whether the interests served justify the potential limitation imposed on a defendant's constitutional rights); Newton v. Kemma, 354 F.3d 776, 781-82 (8th Cir. 2004) (noting "that the Supreme Court has recognized in other circumstances that constitutional rights can trump evidentiary privileges" and that "[w]hether a constitutional right might prevail over a privilege seems to be a function of the relative strength of the privilege and the nature of the constitutional right at stake"). One federal district court has already succinctly handled this issue, stating "[a]s important as the psychotherapist-patient privilege may be, it simply does not trump the Constitution." United States v. White, 2013 U.S. Dist. LEXIS 49426, *41 (S.D. W. Va. Apr. 5, 2013), *rev'd on other grounds*, Kinder v. White, 2015 U.S. App. LEXIS 6681 (4th Cir. Apr. 22, 2015). *But see* United States v. Shrader, 716 F. Supp. 2d 464 (S.D. W. Va. 2010) (stating "[t]he Court finds that the psychotherapist-patient privilege is not subordinate to the Sixth Amendment rights of Defendant"); State v. Fromme, 949 N.E.2d 789 (Ind. 2011). The Court of Appeals for the Armed Forces has been equally clear regarding the supremacy of constitutionally required evidence. United States v. Gaddis, 70 M.J. 248, 250-51 (C.A.A.F. 2011). Furthermore, commentators have recognized that the "constitutionally required" language has always been superfluous. *See* STEPHEN A. SALTZBURG ET AL., 1 MILITARY RULES OF EVIDENCE MANUAL §412.02 (7th ed., Matthew Bender & Co. 2011); *see also* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE §4:81, at 306 (3d ed. 2007) (stating that the identical constitutionally required language found in Federal Rule of Evidence 412 is "arguably unnecessary because Fed.R.Evid. 412 is subordinate to the Constitution anyway"). As the *Military Rules of Evidence Manual* points out regarding the same constitutionally required language found in MRE 412, "this final exception is unclear. It also is unnecessary. Any limitation on a constitutional right would be disregarded whether or not such a Rule existed. Perhaps its real function is to explicitly recognize that serious constitutional questions are likely to be raised with frequency and to put judges and lawyers on the alert." SALTZBURG ET AL, *supra* 10, § 412.02; *see also* JPP INITIAL REPORT, *supra* note 3, at 120.

With little guidance from the appellate courts, practitioners have been forced to determine for themselves how to navigate the intersection of the Constitution and this privilege.[11] As a result, the temptation has been to simply borrow from the most heavily litigated military rule of evidence that expressly contains a constitutionally required exception, namely, MRE 412. Though the phrase "constitutionally required" does appear in that rule,[12] it is important to recognize up front that MRE 412 is a rule of relevance[13]—while MRE 513 is a rule of privilege. The difference is critical because rules of privilege operate to exclude otherwise relevant evidence based on countervailing public policy concerns.[14] Therefore, while MRE 412 might be a good place to begin the analysis—even if MRE 513 no longer contains an explicit "constitutionally required" exception—completely exporting the standard from MRE 412 leads to an incomplete result, as the MRE 412 case law focuses on relevance and does not consider the important public policy interests underlying a rule of privilege.

This article argues that the proper evaluation of the constitutional aspects of piercing the psychotherapist–patient privilege requires three steps: First, practitioners must understand the rationale behind the psychotherapist-patient privilege in order to identify and account for all of the interests at stake. Second, counsel should analyze constitutional requirements by supplementing MRE 412 jurisprudence with federal and

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[11] The need for a coherent interpretation is made more pressing in light of LRM v. Kastenberg, 72 M.J. 364, 370–71 (C.A.A.F. 2013) (recognizing a victim's right to be heard through counsel on matters related to the privacy interests contained in MRE 412 and MRE 513); *see also* NG v. Superior Court, 291 P.3d 328 (Alaska Ct. App. 2012) (involving an alleged victim of sexual assault who appealed a trial court ruling requiring that she sign a release so that decades of mental health records could be produced for an *in camera* review).

[12] *See* SUPPLEMENT TO MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 412 (2012) [hereinafter MCM SUPPLEMENT].

[13] *See* United States v. Saipaia, 24 M.J. 172, 175 (C.M.A. 1987). *But see* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 412 analysis, at A22-41 [hereinafter MCM] (stating that the rule should "not be interpreted as one of absolute privilege"). This language appears to be more of an unfortunate use of the term rather than a recognition that a rule in the four-hundred section of the *Manual* dealing with relevance actually belongs in the five-hundred section dealing with privilege.

[14] *See* United States v. Trammel, 445 U.S. 40, 50 (1980) (stating "privileges contravene the fundamental principle that the public . . . has a right to every man's evidence. As such, they must be strictly construed and accepted only to the very limited extent that . . . excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth") (internal citations omitted).

state psychotherapist-patient privilege case law. The MRE 412 decisions provide a starting point but do not properly account for all of the interests involved. Thus case-law from other jurisdictions concerning the privilege can be used to construct the rest of the framework needed to ensure a complete analysis. Third, practitioners must understand and be able to apply the new procedural requirements under the NDAA. There are substantial changes to the process, particularly regarding the standard for an *in camera* review. These changes reflect Congress's intent to strengthen the privilege so a functional knowledge of their impact on the analysis is crucial.

Ultimately, this issue is important for trial counsel, defense counsel, victim's legal counsel (or special victim's counsel), and military judges to understand in order to ensure that the proper balance is struck between a victim's[15] right to privacy, including avoiding interfering with a victim's psychological recovery; society's interest in encouraging people to seek mental health services; the government's right to bring an accused to trial; and the accused's rights guaranteed by the Constitution.[16]

II. The Rationale Behind The Enactment of MRE 513

The underlying policy objective of MRE 513 is to facilitate mental health diagnosis and treatment. As with most rules of privilege, like the lawyer-client privilege or the husband-wife privilege, there are exceptions. Those exceptions outline the policy interests against which the privilege competes. While there are several exceptions in MRE 513, this article focuses on whether the Constitution demands production and admission of the records at issue in a given case. Before one can ascertain if the Constitution overrides the psychotherapist-patient privilege, it is necessary to understand the reason why the privilege was enacted. To do so, it is imperative to consider the seminal case of *Jaffee v. Redmond*, the four distinct interests implicated by piercing of the psychotherapist-patient privilege, and the stated purpose of MRE 513.

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[15] The individual with the privacy interest throughout this article is presumed to be the victim. However, it is worth noting that the standard and procedure for reviewing an MRE 513 issue is the same no matter who the patient is.

[16] *See* Clifford S. Fishman, *Defense Access to a Prosecution Witness' Psychotherapy or Counseling Records*, 86 OR. L. REV. 1, 62 (2007); Jaffee v. Redmond, 518 U.S. 1 (1996).

A. *Jaffee v. Redmond*

The Supreme Court first recognized the existence of a psychotherapist-privilege in federal law in *Jaffee v. Redmond.*[17] The majority began its discussion by noting that testimonial privileges are disfavored and should only be accepted if they serve a significant public policy goal.[18] The Court concluded that the psychotherapist-patient privilege is based on the same foundational principle as the attorney-client and spousal privileges: the "imperative need for confidence and trust."[19] In drawing this comparison, the Supreme Court found that:

> [e]ffective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.[20]

The Court specifically identified the public policy interest at stake, finding that "[t]he psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance."[21]

The Court was so concerned with reinforcing trust and confidence in the strength of the new privilege that it rejected the circuit court's

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[17] 518 U.S. 1 (1996). The enactment of MRE 513 implemented *Jaffee* in military courts. *See* MCM, *supra* note 13, MIL. R. EVID. 513 analysis, at A22-51.
[18] *See Jaffee*, 518 U.S. at 9; s*ee also* Upjohn Co. v. United States, 449 U.S. 383, 389, (1981).
[19] *Jaffee*, 518 U.S. at 10.
[20] *Id.*
[21] *Id.* at 11.

balancing test, which considered the evidentiary need for mental health records.[22] Significantly, the Court stated:

> Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege. As we explained in *Upjohn*, if the purpose of the privilege is to be served, the participants in the confidential conversation "must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."[23]

This language from *Jaffee* led to the enactment of MRE 513, which was a significant change to military jurisprudence. Prior to the codification of MRE 513, military courts had used an evidentiary-value analysis. For instance, in *United States v. Morris*,[24] the trial court was confronted with a defense discovery request for the medical, psychological, and counseling records of the victim.[25] The judge reviewed the records *in camera* and—using the discovery standard under Rule for Courts-Martial (RCM) 701—disclosed those portions of the records in which the victim mentioned the charged offense.[26]

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[22] The balancing test that the circuit court advanced "requires an assessment of whether, in the interests of justice, the evidentiary need for the disclosure of the contents of a patient's counseling sessions outweighs that patient's privacy interests." Jaffee v. Redmond, 51 F.3d 1346, 1357 (7th Cir. 1995). Some argue the Supreme Court's rejection of this overt balancing appears to render the privilege absolute. *See* Fishman, *supra* note 16, at 5. However, the presence of numerous listed exceptions in MRE 513(d) makes the privilege as enacted qualified. *See* United States v. Isham, 48 M.J. 603, 606 (N-M Ct. Crim. App. 1998). Ultimately, the distinction between an absolute and qualified privilege is not dispositive to the analysis of the constitutionally required exception in MRE 513(d) in light of United States v. Gaddis, 70 M.J. 248, 250-51 (C.A.A.F. 2011).

[23] *Jaffee*, 518 U.S. at 17-19 (*citing* Upjohn Co. v. United States, 449 U.S. 383, 393 (1981)). In a footnote, the Court does state that "future developments in the federal psychotherapist privilege might uncover situations in which the privilege must give way." *Id*.

[24] 47 M.J. 695, 704 (N-M Ct. Crim. App. 1997).

[25] *See id*. at 699.

[26] *See id*. at 700.

Cases like *Morris* analyzed the disclosure of psychiatric records of a victim based on a mixture of the RCM 701 and MRE 412 standards.[27] While there was some consideration by the court of the confidentiality interests of the alleged victim, there was certainly no consideration of the societal interest identified in *Jaffee* since the privilege did not exist at the time. Further although the Supreme Court's rejection of the lower court's balancing test in *Jaffee* may seem to preclude consideration of any competing interests, such a broad interpretation was never intended.[28] The "constitutionally required" standard, which was formerly found explicitly in MRE 513(d)(8) but is now implicitly included, is mandated by the supreme law of the land, and it is distinct from the lesser balancing test of mere evidentiary need that the Supreme Court rejected in *Jaffee*.[29]

In both civilian and military jurisprudence, when the Constitution conflicts with a rule created by legislative or judicial act, constitutional rights frequently supersede.[30] The Court of Appeals for the Armed

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[27] *Id.*

[28] *See* Jaffee v. Redmond, 518 U.S. 1, 18 n.19 (1996).

[29] *See* Commonwealth v. Barroso, 122 S.W.3d 554, 558 (Ky. 2003) (stating "the issue . . . is not whether [an accused's] 'need' for the evidence should be balanced against [a witness's] interest in maintaining the confidentiality of her psychotherapy, but whether the constitutional rights afforded to a criminal defendant by the Fifth, Sixth, and Fourteenth Amendments to [the] United States Constitution prevail over a state policy interest expressed in a statute or rule creating an evidentiary privilege").

[30] *See* Rock v. Arkansas, 483 U.S. 44, 56 (1987) (noting that evidentiary rules must be evaluated when applied for a determination whether the interests served justify the potential limitation imposed on a defendant's constitutional rights); Newton v. Kemma, 354 F.3d 776, 781-82 (8th Cir. 2004) (noting "that the Supreme Court has recognized in other circumstances that constitutional rights can trump evidentiary privileges" and that "[w]hether a constitutional right might prevail over a privilege seems to be a function of the relative strength of the privilege and the nature of the constitutional right at stake"); United States v. White, 2013 U.S. Dist. LEXIS 49426, at *41 (S.D. W. Va. Apr. 5, 2013) ("[a]s important as the psychotherapist-patient privilege may be, it simply does not trump the Constitution.") , *rev'd on other grounds*, Kinder v. White, 2015 U.S. App. LEXIS 6681 (4th Cir. Apr. 22, 2015). *But see* United States v. Shrader, 716 F. Supp. 2d 464 (S.D. W. Va., 2010) ("[t]he Court finds that the psychotherapist-patient privilege is not subordinate to the Sixth Amendment rights of Defendant. The *Jaffee* court explicitly foreclosed the possibility that the privilege contain[s] a balancing test. Defendant, by arguing that the privilege is secondary to his rights under the Sixth Amendment, is explicitly and impermissibly asking the Court to balance his rights with that of the privilege. While the Court notes that *Jaffee* can be distinguished from the instant case due to the fact that the former was a civil action, it finds that the emphatic language used by the *Jaffee* court regarding the fallacy of a balancing test demonstrates that the court intended for the privilege to apply in all circumstances, civil and criminal. Exceptions to the privilege, even in the Sixth Amendment context, would, indeed, eviscerate the

Forces has been clear regarding the supremacy of constitutionally required evidence in relation to other interests.[31] Therefore, despite language in *Jaffee* that suggests the privilege is not subject to weighing it against other needs, the accused's interest in a trial that comports with the Constitution is not extinguished by the enactment of the privilege. This is no less true after congressional elimination of the "constitutionally required" language from the rule itself. While the language of the rule has changed, the Constitution has not.

B. Defining the Interests

Prior to continuing with the analysis, practitioners must identify the interests at stake in psychotherapist-patient privileged evidence when an accused's constitutional rights are also implicated. Because privileges exclude otherwise relevant evidence based on an overriding public policy interest,[32] there is an obvious tension between the party seeking to pierce the privilege and the holder. However, the psychotherapist-patient privilege is far more complex than merely the intersection of two competing parties. In fact, there are four distinct interests involved when MRE 513 collides with the Constitution: (1) society's interest in encouraging people to seek mental health treatment; (2) the patient's interest in confidentiality; (3) the state's interest in prosecuting crime; and (4) the accused's interest in challenging the witnesses against him.

Turning first to society's stake, as the Court in *Jaffee* noted, rules of privilege are enacted because they serve a significant public interest.[33] The Court specifically recognized society's interest in encouraging people with mental and emotional problems to seek treatment for those issues.[34] The Court further stated that confidentiality is critical to ensuring that people with mental health issues seek that treatment.[35] Thus, society's interests are served by a rule that gives patients reassurance that the information they reveal will remain confidential.

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effectiveness of the privilege.") (quotation and internal citation omitted); State v. Fromme, 949 N.E.2d 789 (Ind. 2011).

[31] *See* United States v. Gaddis, 70 M.J. 248, 250-51 (C.A.A.F. 2011).

[32] *See* United States v. Trammel, 445 U.S. 40, 50 (1980).

[33] *See Jaffee*, 518 U.S. at 11.

[34] *See id.*

[35] *See id.* at 10.

Secondly, the patient has an interest in confidentiality because of the significant embarrassment and shame often felt about the issues discussed in a mental health setting.[36] These feelings about deeply personal events in one's life can be so pronounced that patients are willing to forego treatment or the prosecution of an accused in order to protect their privacy.[37] As the Supreme Court noted, a process and a standard for evaluating the intrusion into the mental health communications of a patient that does not address the need for predictable confidentiality is no better than no rule at all.[38]

Third, the government has an interest in prosecuting crime.[39] Part of that interest involves encouraging victims to come forward and participate in the justice process.[40] That interest is ill-served by a privilege that does not afford some measure of confidentiality because victims are less likely to pursue a case when they believe their mental health history will be open for others to see—especially the accused.[41]

To that end, it could be suggested that maximizing the confidentiality of the privilege by treating it as absolute—such that it can only be overcome with the consent of the patient[42]—would best serve the interests of society, the victim, and the government. However, an absolute privilege does not fully address the government's concern. States that treat the privilege as absolute have accounted for the accused's interests in challenging the witnesses against him by striking the witness's testimony or barring the witness from testifying at all if the witness will not consent to disclosure.[43] This exclusion persists until the witness waives the privilege.[44] Such a formula favors the confidentiality

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[36] *See* State v. Thompson, 836 N.W.2d 470, 489 (Iowa 2013); Commonwealth v. Barroso, 122 S.W.3d 554, 558 (Ky. 2003); People v. Foggy, 521 N.E.2d 86, 91-92 (Ill. 1988); State v. Peseti, 65 P.3d 119, 129 (Haw. 2003); State v. L.J.P., 637 A.2d 532, 537 (N.J. 1994).

[37] *See* Shin, *supra* note 3; Jennifer L. Herbert, Note, *Mental Health Records in Sexual Assault Cases: Striking a Balance to Ensure a Fair Trial for Victims and Defendants*, 83 TEX. L. REV. 1453, 1454-55 (2005).

[38] *See Jaffee*, 518 U.S. at 17-18.

[39] *See* Fishman, *supra* note 16.

[40] *See* Shin, *supra* note 3; *see also* Herbert, *supra* note 37.

[41] *See* Shin, *supra* note 3; *see also* Herbert, *supra* note 37.

[42] *See* Fishman, *supra* note 16 at 18 (discussing Connecticut, Michigan, Nebraska, New Mexico, Wisconsin and South Dakota as states that follow the method of requiring a witness to consent to release of the records or striking that witness's testimony).

[43] *See id.*

[44] *See id.*

that society and the patient seek while also addressing the accused's needs. Unfortunately, it leaves the state's interest in punishing potentially serious criminal misconduct unaddressed as the case is unlikely to go to trial without the testimony of a key witness. In the military context, where courts-martial are functions of command, such a rubric also fails to address one of the dual purposes of military justice, the good-order and discipline interests of the commander.[45]

Finally, the accused has an interest in challenging the witnesses against him through cross examination.[46] While this interest could outweigh all others if the evidence is constitutionally required,[47] not every limitation on cross-examination is of a constitutional magnitude.[48] Therefore, any standard used to address the intersection of the Constitution and MRE 513 must account for this interest while recognizing that evidence rising to the level of a constitutional deprivation must be disclosed regardless of countervailing interests.

With those four concerns in mind, one can then view a conflict between the Constitution and the psychotherapist-patient privilege in the proper context. Ensuring that the standard balances the needs of all while also recognizing the fundamental nature of the guarantees of the Fifth and Sixth Amendments to the Constitution is imperative to a full analysis of the issue.

C. MRE 513 Is a Rule of Privilege

In 1999, President Clinton signed Executive Order 13,140, which codified *Jaffee* in MRE 513.[49] The new privilege protected confidential communications between a patient and psychotherapist.[50] The analysis to MRE 513 makes clear this is not a doctor-patient privilege. Instead it is a separate rule, which is based on the social benefit of confidential counseling, which was recognized by *Jaffee* and which is similar to the

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[45] *See* MCM, *supra* note 13, pt I, ¶ 3.
[46] *See* Fishman, *supra* note 16, at 9.
[47] United States v. Gaddis, 70 M.J. 248, 250-51 (C.A.A.F. 2011).
[48] *See* Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (stating "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish").
[49] *See* Exec. Order No. 13,140, 64 Fed. Reg. 55, 115 (Oct. 12, 1999).
[50] *See id.*

clergy-penitent privilege.[51] However, the clergy-penitent privilege in MRE 503 is an absolute privilege.[52] Thus, if the three elements of that privilege are established, there are no exceptions to the rule and the evidence is protected.[53]

By contrast, after the implementation of the NDAA, MRE 513 will contain seven specific exceptions that can operate to overcome the protections of the privilege.[54] Even though there are listed exceptions to MRE 513, it is still a rule of privilege just like the attorney-client protection found in MRE 502–which also has listed exceptions. Consequently there is no rationale to give it less weight than any other similarly-situated privilege.[55]

In practice, the psychotherapist-patient privilege has not received the same deference as other rules of privilege. One court highlighted the disparate treatment of the psychotherapist-patient privilege compared to the attorney-client privilege by noting that "any court would make short work of an argument that the attorney-client privilege can be overcome by a criminal defendant's cross-examination needs."[56] When considering the reason for the treatment of the different privileges in relation to the Constitution, one court succinctly noted that "the Supreme Court has recognized in other circumstances that constitutional rights can trump evidentiary privileges. Whether a constitutional right might

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[51] *See* MCM, *supra* note 13, MIL. R. EVID. 513 analysis, at A22-51.

[52] *See* MCM, *supra* note 13, MIL. R. EVID 503.

[53] *See* United States v. Isham, 48 M.J. 603, 606 (N-M Ct. Crim. App. 1998). Despite the fact that the clergy-penitent privilege has been historically strong, there is no justification for this privilege to be immune from the other dictates of the Constitution – at least any more than the attorney-client privilege. *See* Newton v. Kemma, 354 F.3d 776, 781-82 (8th Cir. 2004).

[54] MCM, *supra* note 13, MIL. R. EVID. 513(d); Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 537 (2014).

[55] *See* State v. Thompson, 836 N.W. 2d 470, 489 (Iowa 2013) (noting that "[i]f we were to find that a criminal defendant has a general due process right to obtain otherwise privileged evidence, where would it end? Consider a case where a victim of a serious violent crime gives somewhat inconsistent accounts as to what happened—a not uncommon occurrence. Could the crime victim's spouse be subpoenaed to testify under oath about what the victim told him or her? Could the victim's priest be subpoenaed? Could the victim's attorney be required to produce communications with the victim?") (internal citations omitted).

[56] *See* United States v. Shrader, 716 F. Supp. 2d 464 (S.D. W. Va. 2010).

prevail over a privilege seems to be a function of the relative strength of the privilege and the nature of the constitutional right at stake."[57]

Within that sliding-scale perspective, MRE 513 seems to be a comparatively weak privilege, particularly in light of the anecdotal evidence suggesting that the protections are often pierced for at least an *in camera* review.[58] However, Congress has recently fortified the privilege significantly, and that policy decision cannot go unnoticed.[59] Therefore, decisions to pierce MRE 513 can be made only by weighing the strength of the privilege against the potential harm to the constitutional right at stake. While MRE 513 does have exceptions, it still establishes a statutory privilege and any decision to override it should be made as cautiously as the decision to invade a privilege like the attorney-client privilege.

Practitioners need to understand the rationale behind the Court's decision in *Jaffee*, the four interests involved in breaching the psychotherapist-patient privilege, and the fact that MRE 513 is a rule of privilege, just like the attorney-client privilege, in order to begin a full review of an MRE 513 issue. Failure to consider these matters will lead to an inadequate result, one that unwittingly extinguishes some important interest.[60]

III. When Can the Constitution Overcome MRE 513?

As noted above, assessing the application of MRE 513 by evaluating its enumerated exceptions does not end the analysis. While Congress eliminated the explicit exception for "constitutionally required" evidence in the FY15 NDAA, the implicit exception inherent in our system of justice remains. In fact, the explicit "constitutionally required" exception can still be found in other rules of evidence whose policy objectives are

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[57] *See* Newton v. Kemma, 354 F.3d 776, 781-82 (8th Cir. 2004).

[58] *See* Shin, *supra* note 3.

[59] *See* § 537.

[60] *See* United States v. Tigueros, 69 M.J. 604 (Army Ct. Crim. App. 2010). Though not a case analyzed under MRE 513, the court in *Tigueros* stated, "In this case and others like it where there is no dispute over the relevance of the requested material, due diligence requires trial counsel to ask each victim whether she has attended any mental health counseling sessions, investigate the existence of any medical records, and obtain them, employing a subpoena or other compulsory process where necessary." *Id*. Though there may have not been an assertion of the privilege in this case, language such as this reflects a lack of consideration for all of the interests involved in MRE 513.

aimed at the protection of similar rights.[61] However, the appearance of that language in different portions of the MRE should not imply that the Constitution's impact on every evidence rule is, or ought to be, uniform.

For example, the military "rape shield" law contains a "constitutionally required" exception in MRE 412.[62] As a result, military appellate courts have developed a significant body of case law on the intersection between the Constitution and MRE 412.[63] Given that MRE 513 had previously included an explicit "constitutionally required" exception, it is tempting to apply MRE 412 case law when interpreting MRE 513. However, MRE 412 is a rule of relevance, whereas MRE 513 is a rule of privilege.[64] Since privileges act to exclude otherwise relevant evidence,[65] merely borrowing the MRE 412 rubric—without more—would result in a flawed and inadequate analysis. The following will show how two foundational Supreme Court cases, the MRE 412 jurisprudence, and the addition of the element of necessity combine to form a complete analytical framework.

A. The Collision of Privileges and Constitutional Rights

When reviewing a request to pierce the MRE 513 privilege one of the most commonly cited considerations is the accused's interest in challenging the credibility of the witnesses against him. That interest can ultimately become paramount to all others if it rises to a constitutional magnitude.[66] Practitioners facing this issue should first look to the cornerstone decisions of *Pennsylvania v. Ritchie*[67] and *Davis v. Alaska*[68] concerning the interaction between rules of privilege and an accused's rights under the Constitution.

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[61] *See* MCM, *supra* note 13, MIL. R. EVID. 412, 514.
[62] *See id.* MIL. R. EVID. 412.
[63] *See* United States v. Banker, 60 M.J. 216, 222 (C.A.A.F. 2004); United States v. Ellerbrock, 70 M.J. 314, 318 (C.A.A.F. 2011).
[64] *See supra* Part I. Though the phrase "constitutionally required" was formerly an exception under MRE 513(d)(8) before the enactment of the Fiscal Year 2015 National Defense Authorization Act, the boundaries of that exception had never been the subject of an Appellate opinion.
[65] *See supra* Part I.
[66] *See* United States v. Gaddis, 70 M.J. 248, 250-51 (C.A.A.F. 2011).
[67] 480 U.S. 39 (1987).
[68] 415 U.S. 308 (1974).

In *Pennsylvania v. Ritchie*, the United States Supreme Court weighed the Sixth Amendment confrontation rights of an accused in the context of a state law that privileged certain government agency documents from the state department of Children and Youth Services.[69] The accused claimed that his confrontation rights were violated by the law because the documents limited his ability to impeach the only eyewitness, his daughter, and that the file may contain names of some witnesses favorable to him.[70] The plurality specifically rejected the Pennsylvania State Supreme Court's holding that "a statutory privilege cannot be maintained when a defendant asserts a need, prior to trial, for the protected information that might be used at trial to impeach or otherwise undermine a witness' testimony."[71] Instead the Court found that the "ability to question adverse witnesses . . . does not include the power to require disclosure of any and all information that might be useful in contradicting unfavorable testimony."[72] The Court also stated that "the Confrontation Clause only guarantees 'an opportunity for effective cross examination, not cross examination that is effective in whatever way and to whatever extent the defense might wish.'"[73] Thus, the Court recognized that the right to confront witnesses is not a mechanism that triggers a wholesale search through any document that might bear the fruit of impeachment. Put simply, when confronted with a privileged document, a greater showing than the mere possibility of impeachment material is needed.

The other important Supreme Court case to consider when examining the clash of a privilege and the Constitution is *Davis v. Alaska.* In that case, the Supreme Court examined Alaska's law that privileged certain

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[69] *See* 480 U.S. at 43-44.

[70] *See id.* at 51-54. The opinion contains language suggesting that the Confrontation Clause is not applicable to pre-trial discovery materials. *Id.* at 52-53. It is also worth noting that this is a plurality opinion and only four justices (Powell, Rehnquist, White, and O'Connor) agreed with this proposition regarding the Confrontation Clause. The fifth justice needed for a majority (Blackmun) was of the opinion that there may be situations in which the Confrontation Clause is violated by the lack of pre-trial discovery. *Id*. at 61. Finally, two justices (Brennan and Marshall) dissented regarding this view of the Confrontation Clause, while two justices (Stevens and Scalia) declined to reach the merits as they found that a writ of certiorari should not have been granted because the lower court's judgment was not final. *Id.* at 66, 73. Thus this opinion cannot stand for the proposition that the Confrontation Clause does not apply to pre-trial discovery. *See* Marks v. United States, 430 U.S. 188, 193 (1977).

[71] *Ritchie*, 480 U.S. at 52.

[72] *Id. at 53.*

[73] *Id.* (internal citation omitted).

juvenile court records. The defense presented the court with a concrete, specific theory of a possible motive to fabricate, which was based on specific facts that it discovered through witness interviews, namely, that the witness was still on probation from a juvenile offense, and therefore, he would want to implicate someone else in order to keep from violating his probation.[74] The Supreme Court found that the state law of privilege violated the confrontation clause when the defense was not permitted to delve into that matter at trial.[75]

The difference between *Davis* and *Ritchie* illustrates the confluence of the Constitution and rules of privilege very clearly. In *Davis*, the defense already knew certain information existed, clearly articulated the importance of that information to the defense theory of the case, and made an adequate record at trial of how that theory of the case was related to the Constitution. By contrast, the defense in *Ritchie* could not overcome a statutory protection to view a privileged document by merely speculating that the covered communication might contain more ammunition for cross examination.

These cases demonstrate that simply invoking one's right to confront is not enough to overcome the protections afforded the privileged material.[76] However, there is a point at which those protections must yield to the ultimate guarantees of the Fifth and Sixth Amendments. Thus, it is important to look at how those constitutional guarantees have been evaluated in other settings.

B. Constitutionally Required Under MRE 412

Even though "constitutionally required" has been deleted in MRE 513, that exception cannot be legislated away.[77] The explicit "constitutionally required" language has always been viewed as

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[74] *See* Davis v. Alaska, 415 U.S 308, 308-9 (1974).
[75] *Id.*
[76] *See* MCM, *supra* note 13, MIL. R. EVID. 514 analysis, at A22-52 ("The exceptions to Rule 514 are similar to the exceptions found in Rule 513 and are intended to be applied in the same manner. In drafting the 'constitutionally required' exception, the Committee intended that communication covered by the privilege would be released only in the narrow circumstances where the accused could show harm of a constitutional magnitude if such communication was not disclosed. In practice, this relatively high standard of release is not intended to invite a fishing expedition for possible statements made by the victim, nor is it intended to be an exception that renders the privilege meaningless.").
[77] *See supra* Part I.

superfluous.[78] However, it does appear in MRE 412(b)(1)(C) and has been the subject of significant litigation in that context. Under MRE 412, evidence is constitutionally required if the proponent (typically, the defense) can articulate how the evidence sought is relevant and material, and that the probative value outweighs the danger of unfair prejudice.[79]

In applying this analysis, relevance is defined in MRE 401 as "any tendency to make a fact more or less probable than it would be without the evidence [when that] fact is of consequence" to the case.[80] Regarding materiality, courts have held, when "determining whether evidence is material, the military judge looks at the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which this issue is in dispute; and the nature of the other evidence in the case pertaining to this issue."[81] Finally, "the probative value must be balanced against and outweigh the ordinary countervailing interests reviewed in making a determination as to whether the evidence is constitutionally required."[82] In MRE 412 jurisprudence, those countervailing interests are the dangers of unfair prejudice, such as harassment, confusion of the issues, the witness's safety, or an interrogation that is repetitive or only marginally relevant.[83]

However, simply borrowing this standard, without more, does not adequately address all of the interests at stake when litigating a psychotherapist-patient privilege issue. Though MRE 412 case law does contain some minimal consideration of the alleged victim's interests—contained in the balancing test—and recognizes the supremacy of the accused's interests in evidence that rises to a constitutional magnitude, there are many substantial interests not accounted for. Specifically, MRE 412 jurisprudence does not: weigh the victim's interest in confidentiality;[84] consider society's interest in encouraging people to seek mental health treatment, which was recognized in *Jaffee*; or account for the government's interest in prosecuting crime, as detailed above. Based on *Ritchie* and *Davis*, something else must be shown when

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[78] *See* SALTZBURG, *supra* note 10.
[79] *See* United States v. Ellerbrock, 70 M.J. 314, 318 (C.A.A.F. 2011).
[80] MCM, supra note 13, MIL. R. EVID. 401.
[81] United States v. Banker, 60 M.J. 216, 222 (C.A.A.F. 2004).
[82] *Ellerbrock*, 70 M.J. at 318 (citing United States v. Gaddis, 70 M.J. 248 (C.A.A.F. 2011).
[83] *See* MCM, *supra* note 13, MIL. R. EVID. 412; *see also Gaddis*, 70 M.J. at 252.
[84] *See Banker*, 60 M.J. at 222.

determining whether piercing a rule of privilege is constitutionally required. That something else is necessity.

C. Adding a Fourth Prong of Necessity to the MRE 412 Rubric Completes the Analysis

The above three-pronged standard from MRE 412—relevance, materiality, and the balancing of probative value with unfair prejudice—ensures that the accused's interest in due process and witness confrontation are accounted for by the court. However, the interests of society, the government, and the patient must also be factored in when determining whether the court should breach an MRE 513 privilege. Since there are no military or Supreme Court cases that address piercing the psychotherapist-patient privilege on constitutional grounds, it is instructive to look at state cases that have done so. State courts dealing with provisions similar to MRE 513—without an explicit "constitutionally required" exception—have required that the accused demonstrate that the evidence is necessary in order to justify the intrusion.[85] "Necessary" has been defined as "unavailable from less intrusive sources."[86] This additional element is added to ensure that due regard is paid to the protected nature of the psychotherapist-patient communications.

The addition of necessity to the analysis is important because there is the potential to overlook the fact that MRE 513 is a rule of privilege under a standard that is simply borrowed completely from MRE 412. As a result, courts could easily default to looking through very personal records and releasing any portion deemed relevant.[87] Such a low standard is similar to the RCM 701 rubric, which was used in *United*

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[85] *See* State v. Thompson, 836 N.W.2d 470, 489 (Iowa 2013); Commonwealth v. Barroso, 122 S.W.3d 554, 558 (Ky. 2003); People v. Foggy, 521 N.E.2d 86, 91-92 (Ill. 1988); State v. Peseti, 65 P.3d 119, 129 (Haw. 2003); State v. Green, 646 N.W.2d 298 (Wis. 2002); State v. L.J.P., 637 A.2d 532, 537 (N.J. 1994).

[86] *Barroso*, 122 S.W.3d at 564; *see also* Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 537, 128 Stat. 3292, 3369 (2014) (adopting the language from United States v. Klemick, 65 M.J. 576, 580 (N-M Ct. Crim. App. 2006), that the proponent must show whether the information sought was not merely cumulative of other information available and that the moving party make reasonable efforts to obtain the same or substantially similar information through non-privileged sources).

[87] *See* Shin, *supra* note 3.

States v. Morris.[88] To do so ignores the fact that privileges purposefully exclude otherwise relevant evidence based on a larger public policy goal,[89] and such an analysis would not address all of the interests at stake.

Requiring the court to consider the necessity of reviewing the privileged material, as well as the necessity in disclosing it, ensures that the court takes into account society's interests in fostering the atmosphere of confidence and trust that *Jaffee* found so imperative to the mental health of the citizenry.[90] Necessity also ensures that the alleged victim's interests in keeping some of the most personal, private, and potentially embarrassing information[91] confidential remains a consideration in the analysis. In addition, necessity serves the interest of the government in encouraging alleged victims' participation in the legal process, as it fosters trust that their most private records will not be handed over to the alleged perpetrator without the proponent demonstrating that the information is vital and cannot be obtained any other way.[92]

When all of the above facets are taken together, a standard emerges defining when the Constitution can overcome the MRE 513 privilege. Given the fact that there are four separate interests at work, the standard must be one that accounts for the victim's interest in privacy of very sensitive information, society's interest in encouraging people to seek mental health treatment, the state's interest in prosecuting crimes, and the accused's interests in a vigorous defense. Under precedent set by the Court of Appeals for the Armed Forces, if evidence is of a constitutional magnitude, there is no countervailing interest that can prevent its

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[88] 47 M.J. 695, 704 (N-M Ct. Crim. App. 1997); *supra* Part I.A.

[89] *See* United States v. Trammel, 445 U.S. 40, 50 (1980).

[90] *See* Jaffee v. Redmond, 518 U.S. 1, 10-11 (1996).

[91] *See Thompson*, 836 N.W.2d at 483.

[92] *See* Herbert, *supra* note 37 (citing Wendy Murphy, *Gender Bias in the Criminal Justice System*, 20 HARV. WOMEN'S L.J. 14, 16 (1997)) (discussing a case that was dismissed when the victim refused to reveal her pre-assault mental health records, which would have disclosed her private struggle with an eating disorder); Chauncey B. Wood, Note, *Rape Prosecutions and Privileged Psychological Counseling Records: How Much Does a Defendant Have a Right to Know About His Accuser?*, 3 B.U. PUB. INT. L.J. 351, 352 (1993); NAT'L INST. OF LAW ENFORCEMENT & CRIMINAL JUSTICE, U.S. DEP'T OF JUSTICE, FORCIBLE RAPE: A NATIONAL SURVEY OF THE RESPONSE BY PROSECUTORS 23 (1977) (reporting a survey of prosecutors in which 52% of respondents cited victim fear or embarrassment as the predominate reason for withdrawal of rape complaints).

disclosure or admission.[93] However, simply borrowing completely from the MRE 412 jurisprudence is not enough. The addition of the necessity prong ensures that all involved—trial counsel, defense counsel, victim's counsel, and the military judge—consider every aspect before reviewing or disclosing the privileged records. Viewing the constitutionally required standard with these four prongs in mind balances the four competing interests at stake when mental health records are in issue.[94]

IV. The Process

Once the standard for when the Constitution can supersede the psychotherapist–patient privilege is defined, the next question to answer is what process should be used to evaluate the issue? Despite the language in the NDAA that limits MRE 513(e) to only exceptions under the rule,[95] there is no real justification for abandoning the statutory procedure when the grounds asserted are the ubiquitous protections of the Constitution.[96] The current version of MRE 513(e) provides detailed guidance on the mechanics of how to conduct an MRE 513 hearing. The NDAA adds clarity to the procedure by establishing a two-stage analysis to MRE 513(e) in which a threshold showing must first be made before an *in camera* review is conducted and any determination to pierce the privilege is made.

A. Procedural Mechanics

As an initial matter, all practitioners should read and follow MRE 513(e) before filing a motion seeking to pierce the privilege and, certainly, before holding any hearing. Despite the language in the NDAA that suggests the procedure only applies to the listed exceptions, MRE 513(e)(1) states that the process applies to any dispute regarding

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[93] *See* United States v. Ellerbrock, 70 M.J. 314, 318 (C.A.A.F. 2011).
[94] *See* Fishman, supra note 16, at, 62; *see also Jaffee*, 518 U.S. at 11.
[95] *See* Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 537, 128 Stat. 3292, 3369 (2014). The act states that a party seeking to pierce the privilege must show "a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege" and "demonstrate by a preponderance of the evidence that the requested information meets one of the enumerated exceptions to the privilege." *Id.*
[96] *See* SALTZBURG, *supra* note 10.

the production or admission of psychotherapist-patient records.[97] Further MRE 513(e) contains several very important procedural steps that must be followed.[98] At the hearing, all parties—trial counsel, defense counsel, and victim (either alone, through a guardian, or through counsel)—must be given an opportunity to be heard.

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[97] *See* MCM, *supra* note 13, MIL. R. EVID. 513(e)(1).

[98] *See id.*; *see also* 80 Fed. Reg. 23, 6059 (Feb. 4, 2015) (proposing a modification to rule 513). Incorporating the changes proposed on February 4, 2015, and in pertinent part, Rule 513 will require that "(1) in any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling the party must: (A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered or objected to unless the military judge, for good cause shown, requires a different time for filing, and (B) serve the motion on the opposing side and the military judge, and, if practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard Further, (2) before ordering the production or admission of evidence of a patient's records or communication, the military judge must conduct a hearing, which shall be closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient must be afforded a reasonable opportunity to attend the hearing and be heard. However, the proceedings shall not be unduly delayed for this purpose. The right to be heard under this rule includes the right to be heard through counsel, including victims' counsel under 10 U.S.C.S § 1044e (Lexis 2014). In a case before a court-martial composed of a military judge and members, the military judge must conduct the hearing outside the presence of the members; (3) the military judge may examine the evidence or a proffer thereof *in camera* if such examination is necessary to rule on the production or admissibility of protected records or communications. Prior to conducting an *in camera* review, the military judge must find by a preponderance of the evidence that the moving party: (A) showed a specific factual basis demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege; (B) that the requested information meets one of the enumerated exceptions under this rule; (C) that the information sought is not merely cumulative of other information available; and (D) that the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources. (4) Any production or disclosure permitted by the military judge under this rule must be narrowly tailored to only the specific records or communications, or portions of such records or communications that meet the requirements for one of the enumerated exceptions to the privilege under subsection (d) above and are included in the stated purpose for which the records or communications are sought under subsection (e)(1)(A) above. Further (5) to prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence. Finally, (6) the motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise." (emphasis added) (The forgoing includes changes to MRE 513(e) contained in the Manual for Courts Martial Proposed Amendments, 80 Fed. Reg. 23, 6059 (Feb. 4, 2015)).

B. A Threshold Showing Is Required Before Conducting an *in camera* Review

Prior to ordering the production of and unsealing the privileged records, the military judge must require a minimum showing by the proponent.[99] As the Supreme Court has stated, it is not the mere possibility of constitutionally required evidence that must be articulated.[100] Further, the text of the rule requires that the party seeking admission specifically describe the evidence sought and the purpose for which it is sought.[101] Military courts are unwilling to allow the defense to go on a "fishing expedition" into a victim's record based upon mere speculation that those records might contain some helpful cross-examination material.[102] Thus, some initial threshold must be met. This is true because even the court's view of the mental health records results in the revelation of very private information to someone who was not meant to receive it.[103]

Prior to the passage of the NDAA, *United States v. Klemick* was the lone authority that outlined the standard for an *in camera* review under MRE 513.[104] In *Klemick*, the prosecution sought records of the accused's spouse in relation to a child abuse and manslaughter prosecution.[105] The government proffered that the spouse sought mental health services in the months immediately following the death of her son, so those conversations must have included details of what the accused's wife witnessed.[106] The main contention by the defense on appeal was that the military judge improperly decided to conduct the *in camera* review of the records in the first place.[107] The Navy-Marine Corps Court

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[99] *See* § 537; *see also* United States v. Zolin, 491 U.S. 554, 572 (1989); United States v. Klemick, 65 M.J. 576, 580 (N-M Ct. Crim. App. 2006).
[100] Pennsylvania v. Ritchie, 480 U.S. 39, 51-52 (1987).
[101] *See* MCM, *supra* note 13, MIL.R.EVID. 513(e)(1)(A).
[102] *See* United States v. Briggs, 48 M.J. 143 (C.A.A.F. 1998).
[103] *See* State v. Spath, 581 N.W.2d, 123, 126 (N.D. 1998) (quoting State v. Hummel, 483 N.W.2d 68, 72 (Minn. 1992)); Fishman, *supra* note16, at 53 (stating that it is clear courts should not do an *in camera* review simply because the defense asks because "[t]o do so would accord insufficient significance to the privacy of complainants and witnesses whose records are at issue"); *see also* United States v. Shrader, 716 F. Supp. 2d 464 (S.D. W. Va. 2010) (stating that "this Court's review of the . . . files would itself be a breach of the privilege, and the Court declines to undertake such a breach").
[104] *See Klemick*, 65 M.J. at 580.
[105] *See id.* at 578.
[106] *See id*.
[107] *See id*. at 579.

of Criminal Appeals noted the lack of military and federal cases addressing the issue and turned to state appellate courts for persuasive authority.[108] Relying on a Wisconsin decision,[109] the court identified a three-pronged standard to determine when the threshold has been met for an *in camera* review:

> (1) did the moving party set forth a specific factual basis demonstrating a reasonable likelihood that the requested privileged records would yield evidence admissible under an exception to Mil. R. Evid. 513; (2) is the information sought merely cumulative of other information available; and (3) did the moving party make reasonable efforts to obtain the same or substantially similar information through non-privileged sources?[110]

The first prong sets forth the standard that the proponent must meet, while the last two prongs really address the concept of necessity—whether the evidence is available from some other source. The court went on to determine that the proper threshold showing had been made in that case and that the judge did not err in conducting the *in camera* review.[111]

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[108] *See id*.

[109] State v. Green, 646 N.W.2d 298 (Wis. 2002).

[110] *Klemick*, 65 M.J at 580.

[111] *See id*. ("In this case we find that the Government satisfied the three part standard. The death of a child at the hands of his father, followed soon thereafter by a discussion between the parents of the father's treatment of the child and then by psychological counseling for the child's mother, reasonably led to the conclusion that records of that counseling would contain information related to the event."). While the decision does a good job of pointing out the need for a standard to initially be met before piercing the privilege and conducting an *in camera* review, the decision in *Klemick* suffers from one main deficiency. The premise that the privilege can be breached because mental health counseling occurred after a traumatic event so that, therefore, there must be information about the event in the records is flawed. Many state courts have addressed this matter when dealing with similar state privileges. A large number of cases have done so specifically in the arena of sexual assault. As one author stated:

> There appears to be a near unanimous consensus . . . that a defendant must do more than speculate that, because the complainant has participated in counseling or therapy after the alleged assault, the records in question might contain statements about the incident or incidents that are inconsistent with the complainant's testimony at trial. Because this assertion can be plausibly made in every sexual-assault case, if this was enough to trigger an in camera review, a

The NDAA both codified and added to the *Klemick* decision.[112] Under the new additions to MRE 513, a proponent must initially show that: (1) a specific factual basis exists demonstrating a reasonable likelihood that the records or communications would yield evidence admissible under an exception to the privilege; (2) by a preponderance of the evidence, the requested information meets one of the enumerated exceptions; (3) the information sought is not merely cumulative of other information available; and (4) the party made reasonable efforts to obtain the same or substantially similar information through non-privileged sources.[113]

For the first prong, when the reason to breach the privilege is cited as the Constitution, practitioners should evaluate the claim to see if a specific factual basis exists demonstrating a reasonable likelihood that the records or communications are relevant and material and that the balancing test is satisfied. This will give the proponent, the opposition, the victim—either alone or through counsel—and the military judge an opportunity to evaluate the potential for the records to be admissible as required under the suggested standard.

The second prong is apparently part of the concerted effort to focus the court's attention on only the listed exceptions and curtail what Congress saw as a major hole in the privilege, the "constitutionally required" exception.[114] This attempt to strengthen the privilege was taken to reverse what Congress perceived as a rising tide of privileged records being routinely reviewed in military courts.[115] However, as has been previously shown, simply deleting the words "constitutionally required" does not extinguish the fundamental constitutional rights at stake.[116]

> court would be required to conduct the review in virtually every such case.

Fishman, *supra* note 16, at 37-38 (footnote omitted).

[112] *Compare* Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 537, 128 Stat. 3292, 3369 (2014), *with Klemick*, 65 M.J. at 576..

[113] *See* § 537.

[114] *See Military Response to Sexual Assaults* Part 2, CSPAN (Oct. 10, 2014), http://www.c-span.org/video/?322037-2/military-response-sexual-assaults-part-2 (beginning at 1:00:07); *see also* JPP INITIAL REPORT, *supra* note 3, at 116, 123.

[115] *See supra* note 114.

[116] *See supra* Part I.

The final two prongs of the new procedure are simply synonyms for the concept of necessity—specifically that the material sought is unavailable from any other source. The determination to review the documents must be made with an appreciation that even the court's review is a piercing of the privilege by someone who was never intended to review the records. Necessity reminds the court that these records are not to be reviewed *pro forma* and only when absolutely required.

If the proponent can meet this standard, the military judge can conduct an *in camera* review if it is necessary to rule on the issue.[117] Military judges are cautioned to narrowly tailor any resulting production or admission "to only the specific records or communications, or portions of such records or communications, that meet the requirements for one of the enumerated exceptions to the privilege and are included in the stated purpose for which the records or communications are sought."[118] This final caution, and the repeated reference to only the enumerated exceptions, appears to be an effort by Congress to reinforce the strength of the psychotherapist-patient privilege while erecting barriers to the continued use of the deleted "constitutionally required" exception. As stated above, simply striking that language does not eliminate the protections of the Constitution and thereby eliminate the "constitutionally required" exception.[119]

V. Applying the Process

Having determined when the Constitution can overcome the MRE 513 privilege, and what must be demonstrated in order to trigger an *in camera* review, it is now worth examining the application of those concepts in relation to the most common reasons these records are sought: (1) to search for impeachment evidence; or (2) to present evidence that the victim has a mental disease or defect that makes his or her testimony unreliable.

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[117] *See* § 537.
[118] *See id.*
[119] *See supra* Part I.

A. Impeachment

One of the common reasons a party seeks access to psychiatric records is to gather impeachment evidence, particularly inconsistent statements. As noted above, it is not the mere possibility of evidence rising to the level of a constitutional deprivation that must be articulated by the proponent.[120] The text of the rule requires that the party seeking admission specifically describe the evidence sought and the purpose for which it is sought.[121] In addition, the party seeking disclosure must do more than speculate that, because the complainant has participated in counseling or therapy after the alleged assault, the records in question might contain statements about the incident that are inconsistent with the expected testimony at trial.[122] Thus, to succeed, a party must give the court clear direction on what they expect to be in the files and how those statements are relevant and material, and how the balancing test is satisfied such that piercing the privilege is necessary—meaning the information is unavailable from some other means.[123] This can occur in a myriad of ways. Certainly information that the patient recanted to the psychotherapist would qualify. Short of that, there are many different things that could be significant given the facts raised by a party.[124]

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[120] *See* Pennsylvania v. Ritchie, 480 U.S. 39, 51-52 (1987).
[121] *See* MCM, *supra* note 13, MIL.R.EVID. 513(e)(1)(A).
[122] *See* Fishman, *supra* note 16.
[123] *See supra* Part II.B and C.
[124] One court recently addressed the issue as follows:

> We recognize how unlikely it may be that a defendant or defense counsel will *know* in advance what information is in a patient's privileged mental health or psychotherapy records. Nonetheless, in order to gain access to any information in those records, the defendant may (and must) be able to point to *some fact* outside those records that makes it *reasonably likely* that the records contain exculpatory information. We look to our sister states for examples of facts that could reveal a likelihood that the privileged records contain exculpatory evidence. One such example is evidence of prior inconsistent statements. In *State v. Peseti*, the victim's sister testified that the victim had on one occasion "admitted that the incident 'didn't happen.'" 101 Haw. 172, 65 P.3d 119, 129. Similarly, in *Brooks v. State*, 33 So. 3d 1262, 1269 (Ala. Crim. App. 2007), other records produced by the State during discovery included an inconsistent statement by the victim. Another example is strange behavior by the victim surrounding the counseling sessions, such as *Burns v. State*, 968 A.2d 1012 (Del. 2009), where the victim destroyed notes about alleged abuses after an interview with her psychiatrist. *People v. Stanaway*, 446 Mich. 643, 521 N.W.2d 557

Whatever the facts may be, the party seeking disclosure must articulate why a specific factual basis exists, demonstrating a reasonable likelihood that the records or communications would yield evidence that rises to a constitutional magnitude. It is not incumbent on the court to scour the records for every inconsistency or to simply release any statement that may have been made about the offense so the parties may do so. The release should be tied to those specific grounds articulated by the party seeking disclosure and not a broader release to "see what's in the file."

Once the court determines that an *in camera* review is necessary, the records can be examined. The court should concentrate on searching for those items that the proponent established under the "reasonable likelihood" standard were in the privileged documents. Any applicable areas should be identified and then evaluated under the four-pronged relevant, material, balancing test, and necessary standard. If a portion meets that standard, then only that portion should be subject to disclosure. The court should take care to remember the privileged nature of the document and ensure that the review does not become a broader search for any and all inconsistencies or impeaching evidence.

B. Mental Disease or Defect That Makes Testimony Unreliable

The other common reason a party seeks to review psychotherapist-patient records is to search for evidence of a mental disease or defect that makes the witness's testimony less reliable, either as an issue of

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> (Mich. 1994), a case cited by this Court in *Goldsmith*, also provides a useful example of a defendant pointing to actual facts to support a proffer that the mental health records likely contained exculpatory evidence. In that case, the defense's theory was "that the claimant is a troubled, maladjusted child whose past trauma has caused her to make a false accusation." In support of a request to review the claimant's mental health records, the defendant pointed to prior abuse of claimant by her biological father and factual support for sexually aggressive behavior by the victim. Although the trial court denied the defendant's request, the Supreme Court of Michigan held, based on defendant's proffer, that *in camera* review "may have been proper" and remanded for further proceedings, including to further develop the record.

State v. Johnson, 102 A.3d 295, 309-10 (Md. 2014).

competence under MRE 601 or for impeachment under MRE 608(c). The same standard applies to this purpose as noted above. The party seeking disclosure must set forth the specific factual basis demonstrating a reasonable likelihood that the evidence is relevant and material, the balancing test is satisfied, and breaching the privilege is necessary before the records are produced for an *in camera* inspection. The judge must use that same standard to determine what, if anything, to disclose.

At the outset, courts have found that a witness's mental health condition is only relevant to the issue of bias or motive to fabricate under MRE 608(c) or competency to testify under MRE 601.[125] Furthermore, the fact that a witness has some mental disorder does not automatically give rise to a bias or motive to fabricate.[126] The proponent of mental health evidence must establish that there was a real and direct nexus between the witness's disorder and the facts of the case.[127] Whether that nexus exists is a question of logic and common sense answered by the presentation of evidence, not by the incantation of words like "bias" or "motive to fabricate".[128]

When the evidence is being offered on competency to testify, it must relate to the witness's ability to perceive and tell the truth.[129] This is a fine line to walk. Care should be taken to ensure that the evidence remains squarely focused on the issue of competence, which is presumed and is a high bar to overcome under MRE 601.[130] Parties should remain vigilant so that testimony does not stray into prohibited "human lie detector" territory.[131]

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[125] *See* United States v. Smith, 2012 CCA LEXIS 367, at *4 (N-M Ct. Crim. App. Sept. 28, 2012) (citing United States v. Soifer, 47 M.J. 425, 427-28 (C.A.A.F. 1998)).

[126] *See id.* at *9-*10.

[127] *See* United States v. Sullivan, 70 M.J. 110, 115 (C.A.A.F. 2011).

[128] *See Smith*, 2012 CCA LEXIS 367, at *9-*10 (specifically the court found that testimony that a witness had a condition (Borderline Personality Disorder) was not sufficient to make it relevant when there were no facts suggesting that the condition was "triggered" by the facts of this case.); *see id.* at *10-*11; N.G. v. Superior Court, 291 P.3d 328 (Alaska, 2012) (where the victim successfully sought a ruling from the Alaska Court of Appeals reversing a trial court order for the victim to turn over mental health records).

[129] *See Sullivan*, 70 M.J. at 117; *see also* United States v. Butt, 955 F.2d 77, 82 (1st Cir. 1992) (summarizing over forty years of federal jurisprudence).

[130] *See* MCM, *supra* note 13, MIL. R. EVID 601; *see also* United States v. Lemere, 16 M.J. 682 (A.C.M.R. 1983).

[131] *See* United States v. Cameron, 21 M.J. 59, 63 (C.M.A. 1985) (stating "the rule remains that, absent unusual circumstances, opinion testimony on whether or not to believe a particular witness' testimony simply is not deemed helpful to the factfinder, for

It is important to consider this distinction when examining the disclosure of psychotherapist-patient communications under this rationale. When a proponent endeavors to make the initial "reasonable likelihood" showing regarding a witness's mental health condition, the military judge must pay close attention to the relevance prong when determining whether the balancing test is satisfied and disclosure is necessary with the above precedent in mind. If a judge determines that the standard for an *in camera* review is met, the document should be examined with an eye towards whether there was a real and direct nexus between the witness's disorder and the facts of the case at hand, keeping in mind that expert testimony on credibility is typically disfavored. These facts play a significant role in determining whether the information really is relevant to the case.

Finally, when examining a proponent's claim for this type of information, the argument might be made that the party seeking disclosure does not want the confidential communications made to the psychotherapist but merely the diagnosis that psychotherapist made. MRE 513(a) seems to privilege the former and not the latter by stating, "[A] patient has a privilege to disclose and to prevent any other person from disclosing a confidential communication . . . if such communication was made for the purpose of facilitating diagnosis or treatment."[132] However, it would be a curious result, and not in keeping with the public interest behind enacting the privilege, to say that the diagnosis is automatically not covered by the protections of MRE 513 even though

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the factfinders are perfectly capable of observing and assessing a witness' credibility"); *see also* United States v. Jenkins, 54 M.J. 12, 16 (C.A.A.F. 2000) ("This Court has consistently held that a witness may not opine that another witness is lying or telling the truth."); United States v. Birdsall, 47 M.J. 404, 410 (C.A.A.F 1998) ("An expert's opinion evaluating the truthfulness of a witness' story also usurps the jury's exclusive function to weigh evidence and determine credibility"); United States v. Hill-Dunning, 26 M.J. 260, 262 (C.M.A. 1988) ("We have consistently held that the opinions of one witness concerning the credibility or believability of another witness are inadmissible. We do not permit witnesses to pit themselves against one another."); United States v. Scop, 846 F.2d 135, 142 (2d Cir. 1988) ("[E]xpert witnesses may not offer opinions on relevant events based on their personal assessment of the credibility of another witness's testimony"); United States v. Samara, 643 F.2d 701, 705 (10th Cir. 1981) (noting that an expert should not "go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility") (quoting United States v. Ward, 169 F.2d 460, 462 (3d Cir. 1948)).

[132] *See* MCM, *supra* note 13, MIL.R.EVID. 513(a).

the underlying communications are.[133] Such a finding would result in regular disclosure of a large portion of a witness's mental health history and would have the chilling effect that concerned the Court in *Jaffee*.[134]

VI. Conclusion

The lack of appellate case law in the fifteen years since MRE 513 was enacted regarding the parameters of the privilege is frustrating for all involved. That frustration has also been felt by the federal district courts that have struggled with the boundaries of the *Jaffee* privilege in federal court.[135] However, when practitioners take into account the four interests at stake, the significant state case law on the issue, and MRE 412 jurisprudence, as well as the boundaries established in *Pennsylvania v. Ritchie* and *Davis v. Alaska*, a definite framework emerges. When analyzing a MRE 513 issue, all involved should consider how the requested intrusion is relevant and material, whether the balancing test is

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[133] *See* United States v. White, 2013 U.S. Dist. LEXIS 49426, at *23 (S.D.W. Va. Apr. 5, 2013) ("A psychiatric diagnosis is born of and inseparably connected to private communications between a therapist and his or her patient. For this reason, any attempt to draw a line between communications and diagnoses would undermine the basis for recognizing a privilege in the first place."), *rev'd on other grounds*, Kinder v. White, 2015 U.S. App. LEXIS 6681 (4th Cir. Apr. 22, 2015); Caver v. City of Trenton, 192 F.R.D. 154, 159-62 (D.N.J., 2000). In addition, as one court has stated:

> [I]t is clear that the privilege is designed to protect confidential communications made and information given by the client to the psychotherapist in the course of treatment. The psychiatric file is imbued with the privilege because it might contain such confidential information. However, the privilege is not designed to specifically protect the psychotherapist's own opinion, observations, diagnosis, or treatment alternatives particularly when such information finds its way beyond the client's personal file. While such information may be protected from disclosure by some other privilege, we decide that the [psychotherapist-patient] privilege is designed to protect disclosures made by the client. Having said this, we need to look to the precise nature of the files [the treatment facility] seeks to protect, and their actual role in the treatment process.

Swanger v. Warrior Run Sch. Dist., 2014 U.S. Dist. LEXIS 178890, at *7-*8 (M.D. Pa. Dec. 31, 2014). Further the court clarified that "the psychotherapist patient privilege does not extend to information regarding the occurrence of treatment including whether a psychotherapist treated [someone], the dates of such treatment and the length of treatment on each date." *Id.* at 8*-*9 (internal citations omitted).

[134] *See* Jaffee v. Redmond, 518 U.S. 1, 10 (1996).

[135] *See White*, 2013 U.S. Dist. LEXIS 49426, at *35.

satisfied, and whether piercing the privilege is necessary. The records should not be reviewed *in camera* by the military judge unless the moving party can make the reasonable-likelihood showing that the four-pronged standard above is met. If the movant can do so, the judge can review the documents *in camera*, and determine whether the standard is actually met regarding the specific area identified by the proponent and narrowly tailor any resulting disclosure. Following this procedure and using this standard will effectively balance all of the interests involved at the intersection of the Constitution and MRE 513.

OPEN-ENDED PHARMACEUTICAL ALIBI: THE ARMY'S QUEST TO LIMIT THE DURATION OF CONTROLLED SUBSTANCES FOR SOLDIERS

MAJOR MALCOLM WILKERSON*

> *[R]evising, updating or drafting policy that will affect more than 700,000 Soldiers must be thoroughly vetted to prevent unintended consequences . . . .*[1]

I. Introduction

They called him the Wizard.[2] As an Army psychologist in Baghdad during the bloodiest period of Operation Iraqi Freedom (OIF), Captain Peter Linnerooth had an extraordinary ability to connect with suffering Soldiers.[3] He spent over 60 hours each week counseling Soldiers, helping them summon the strength to cope with their haunted lives and confront nightmares over the obliteration of military vehicles by roadside bombs, the grisly bodies of slain comrades, and the death wail of Iraqi children.[4] Healing others took a personal toll. When he returned home to Minnesota, Peter's own post-traumatic stress came with him. He began taking antidepressants and struggled to find normalcy as he moved

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[1] U.S. Dep't of Army, Army 2020 Generating Health & Discipline in the Force Ahead of the Strategic Reset Report 2012, at 85 (2012) [hereinafter Gold Book].

[2] Sharon Cohen, *Vet Who Saved Many in Iraq Couldn't Escape Demons*, ASSOCIATED PRESS, Mar. 18, 2013, http://news.yahoo.com/vet-saved-many-iraq-couldnt-escape-demons-190136480.html.

[3] Mark Thompson, *Dr. Peter J. N. Linnerooth, 1970-2013*, TIME, Jan. 11, 2013, http://nation.time.com/2013/01/11/dr-peter-j-n-linnerooth-1970-2013/.

[4] Cohen, *supra* note 2.

from job-to-job following his exit from active duty military service.[5] His marriage crumbled, and he sought escape through prescription medications, eventually overdosing on pills in his first unsuccessful suicide attempt.[6] In the end, the Wizard could help every Soldier but himself.[7] At age 42, Captain Peter Linnerooth, a veteran of the "Surge" in OIF, a Bronze Star recipient, a father, drew his weapon for the last time, took aim at himself, and ended his life.[8]

Though the tragic tale gained nationwide attention, the conclusion of Peter's story is not unique. Starting in 2008, active-duty and reserve Soldiers, as well as veterans,[9] started committing suicide at an alarming rate. During 2008, the suicide rate for active-duty Soldiers surpassed that of the United States public, a line not crossed since the Vietnam War.[10] As the suicide toll continued to mount,[11] the Army scrambled to quell the rise, commissioning multi-year medical studies[12] and panels of distinguished Soldiers[13] to analyze how best to tackle a problem of epidemic proportions that gripped the nation.

In 2010, one of the panels found what appeared to be a breakthrough. The panel reported a shocking correlation between suicide and prescription drug use, determining that "prescription drugs were involved in almost one third of the active duty suicides" in Fiscal Year (FY) 2009.[14] With this startling link in hand, the panel concluded that a limitation on prescription duration could mitigate the possible deadly connection between prescription drug use and suicide, and it

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[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] According to a 2012 Department of Veteran Affairs study, twenty-two veterans a day commit suicide. This number includes all veterans, not just veterans from the wars in Iraq or Afghanistan. U.S. DEP'T OF VETERANS AFFAIRS, SUICIDE DATA REPORT, 2012, at 15 (2012), *available at* http://www.va.gov/opa/docs/suicide-data-report-2012-final.pdf.
[10] U.S. DEP'T OF ARMY, ARMY HEALTH PROMOTION, RISK REDUCTION, SUICIDE PREVENTION REPORT 2010, at 14, 16 (2010) [hereinafter RED BOOK]; Mike Mount, *Army Suicide Rate Could Top Nation's This Year*, CNN (Dec. 9, 2008, 2:44 P.M.), http://www.cnn.com/2008/HEALTH/09/09/army.suicides/.
[11] GOLD BOOK, *supra* note 1, at 54.
[12] Lizette Alvarez, *Army and Agency Will Study Rising Suicide Rate Among Soldiers*, N.Y. TIMES, Oct. 29, 2008, http://www.nytimes.com/2008/10/30/us/30soldiers.html.
[13] *See* RED BOOK, *supra* note 10.
[14] *Id.* at 56.

recommended prohibiting Soldiers from using lawfully prescribed drugs after one year from the prescription date.[15]

In February 2011, the United States Army Medical Command (MEDCOM) implemented the panel's recommendation, but changed the prohibition on use to six-months, not one year, from the prescription date.[16] This change was a stark departure from existing expiration requirements under federal regulations. Specifically Food and Drug Administration (FDA) regulations require pharmaceutical manufacturers to conduct stability-testing of their drugs to provide an expiration date[17] based on drug efficacy.[18] However, under federal law and regulations, there is no expiration as to the *legality* of use by individuals prescribed a controlled substance.[19]

Implemented through an obscure regulation, MEDCOM Regulation 40-51 (MEDCOM policy), this prohibition fundamentally changed the nature of controlled substances usage in the Army. The MEDCOM policy redefined drug expiration, tying it to prescription date rather than drug efficacy, and it further prohibited the use of "expired" drugs, purportedly making illicit any use outside of the designated time window.

In implementing the change, the MEDCOM policy did so in an unusual way. The Army did not implement a punitive regulation of

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[15] *Id.* at 57.

[16] U.S. Army Medical Command, Reg. 40-51, Medical Review Officers and Review of Positive Urinalysis Drug Testing Results para. 8e (17 Apr. 2013) [hereinafter MEDCOM Reg. 2013].

[17] Expiration Dating, 21 C.F.R. § 211.137(a) (2014) ("To assure that a drug product meets applicable standards of identity, strength, quality, and purity at the time of use, it shall bear an expiration date determined by appropriate stability testing described in § 211.166."); Drugs; Location of Expiration Date, 21 C.F.R. § 201.17 ("When an expiration date of a drug is required, e.g., expiration dating of drug products required by § 211.137 of this chapter, it shall appear on the immediate container and also the outer package, if any, unless it is easily legible through such outer package.").

[18] This designation marks the final date "up to which the manufacturer will guarantee that medicine has full potency." Heidi Mitchell, *Are Expired Medications Ok to Take?*, WALL ST. J., Aug. 25, 2014, http://www.wsj.com/articles/are-expired-medications-ok-to-take-1409005882. However, depending on storage conditions, drugs may often be safely used well past the expiration date. *Id.* In fact, one study run by the FDA and commissioned by the Department of Defense found that eighty-eight percent of a large stockpile of pharmaceuticals stored under excellent conditions could be effectively used five years past the manufacturer's expiration date. *Id.*

[19] *See infra* Part IV.

general applicability to all Soldiers; instead, the Army delegated implementation to MEDCOM.[20] Then MEDCOM changed the standard for medical review officers (MRO) to determine whether a positive urinalysis test for a prescribed controlled substance is authorized or illegitimate.[21] The MEDCOM policy only applied to MROs and was not explicitly punitive.[22]

As with some novel policies implemented in unusual ways, the MEDCOM policy had a major flaw; a violation of the ban could not be construed as a crime under the Uniform Code of Military Justice (UCMJ).[23] Because the MEDCOM policy was not punitive, only applied to a subset of MEDCOM providers, and failed to acknowledge an existing case law-created defense—innocent use—for taking lawfully prescribed controlled substances,[24] commanders lacked a criminal hook to hold Soldiers accountable for policy violations. In short, the MEDCOM policy's unusual implementation method precluded achieving the very goal for which the policy was created.

This article proceeds in ten parts to examine the MEDCOM policy, detail its flaws and unintended consequences, and propose an alternative way to legally reach the Army's goal of limiting controlled substance use by Soldiers. Part II of this article traces the history of drug demand reduction programs in the military. Part III examines the Army's suicide study and implementation of the MEDCOM policy change. Part IV summarizes federal law and regulations regarding the expiration of prescribed controlled substances. Part V describes the current MEDCOM policy and the process of urinalysis testing. Part VI dissects the MEDCOM policy's legality and two possible challenges under either the Takings Clause of the United States Constitution or the Administrative Procedure Act. Part VII examines two legal doctrines that may preclude judicial review for potential litigants claiming an unlawful taking of their prescription drugs: the *Mindes* test and judicial deference to military decisions. Part VIII details how the MEDCOM policy fails to articulate a crime that is punishable under the UCMJ. Part

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[20] All Army Activities Message, 062/2011, 232349Z Feb. 11, U.S. Dep't of Army, subject: ALARACT Changes to Length of Authorized Duration of Controlled Substance Prescriptions in MEDCOM Regulation 40-51, para. 2B [hereinafter ALARACT 062/2011].

[21] MEDCOM REG. 2013, *supra* note 16, para. 9e.

[22] *Id.* para. 3.

[23] UCMJ (2012).

[24] *See infra* Part VIII.

IX suggests a general order from the Secretary of the Army as the best means to implement a ban on the legal use of prescribed controlled substance after a set date, and the appendix contains a proposed general order. Part X briefly examines policy alternatives and concludes the paper.

II. Drug Demand Reduction Programs in the Military

A. The Impetus for Drug Testing Programs

Following a series of drug abuse scandals in the mid-twentieth century, the Department of Defense (DoD) instituted a Drug Demand Reduction Program (DDRP) to combat illegal drug use in the military.[25] During the Vietnam War, one researcher found that almost half of all Soldiers serving in Vietnam illegally used opiates.[26] In response, the Army implemented the first mandatory urinalysis drug-testing program in the military, along with an amnesty and drug-treatment program.[27] Under the amnesty program, over 14,000 Soldiers admitted to being heroin users.[28] Drug abuse in the military was largely considered an Army problem until 1981, when fourteen Sailors were killed in a major Navy mishap on an aircraft carrier and marijuana metabolites were found in the bodies of six of the deceased Sailors.[29] The incident made apparent a wider drug abuse problem in the military, and DoD mandated a DDRP in each military service to deter and detect illicit drug use.[30]

B. The Army's Current Drug Testing Regime

The Army's current DDRP is designed to ensure force readiness and deter drug use while also encouraging and providing drug abuse treatment.[31] The Department of Defense mandates that each military

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[25] Elaine Casey, *History of Drug Use and Drug Users in the United States*, SCHAFFER LIBRARY OF DRUG POLICY, http://www.druglibrary.org/schaffer/history/casey1.htm (last visited May 19, 2015).
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] RED BOOK, *supra* note 10, at 3.
[30] *Id.* at 2; *see also* U.S. Dep't of Def., Instr. 1010.01, Military Personnel Drug Abuse Testing Program (13 Sep. 2012).
[31] U.S. Dep't of Army, Reg. 600-85, The Army Substance Abuse Program para. 4-1(b) (28 Dec. 2012) [hereinafter AR 600-85].

service, including the Army, annually test 100 percent of a unit's end strength,[32] which is the total number of servicemembers assigned to a unit, for illegal drug use through a urine test (urinalysis).[33] Because the program focuses on end-strength and not the testing of individuals, every year at least some Soldiers are not tested, especially those Soldiers in transit to new duty stations.[34]

Following collection, urinalysis samples are sent to specialized DoD drug laboratories for testing.[35] Each urine sample is then screened against a mandatory drug panel of illegal drugs (e.g., cocaine, marijuana, etc.) and drugs the legality of which depends on whether the Soldier had a prescription (e.g., oxycodone, morphine, etc.).[36] Following a subsequent confirmation test, samples that screened positive for prescription drugs are sent to an MRO at each base who determines whether the latter category of drugs have an "authorized" or "illegitimate" basis for use,[37] and positive tests for illegal drugs are "sent directly to the unit commander for action."[38]

III. Rise of the Prescription Expiration Policy

A. The *Red Book* Study

The MEDCOM policy change was an attempt to stem the flood of suicides in the Army. In 2008, the rate of suicide in the Army surpassed the age-adjusted suicide rate for civilians in the United States and brought nation-wide attention to the issue.[39] The Army's Vice Chief of Staff subsequently commissioned a panel to examine the problem and recommend measures to bring down the suicide rate.[40] In 2010, the Army released its multi-year study of suicide in the Army, the *Army Health Promotion, Risk Reduction, Suicide Prevention Report* (*Red*

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[32] RED BOOK, *supra* note 10, at 33, 51-52.
[33] *Id.* at 51-52.
[34] *Id.* For example, in FY 2011, the Army did not test 89,310 Soldiers. GOLD BOOK, *supra* note 1, at 111.
[35] U.S. Dep't. of Def., Status of Drug Use in the Department of Defense Personnel, Fiscal Year 2011 Drug Testing Statistical Report 6-7 (2012).
[36] RED BOOK, *supra* note 10, at 53-54.
[37] MEDCOM REG. 2013, *supra* note 16, para. 8.
[38] *Id.* app. B-2.
[39] RED BOOK, *supra* note 10, at 14-16.
[40] *Id.* at 1-4.

Book).[41] One of the study's notable findings was that there is a strong correlation between prescription drug use and suicide. In FY 2009, for example, "prescription drugs were involved in almost one third of the active-duty suicides."[42] Prescription drugs were connected to other troubling deaths as well. From FY 2006 to FY 2009, prescription drugs were found in the system of thirty-five percent (139 of 397) of Soldiers who died from undetermined or accidental causes.[43]

The *Red Book* also uncovered a startling increase in prescription drug use across the force. Pursuant to the Army's drug testing protocol, controlled substances that may be prescribed by a healthcare provider are reviewed to determine if the use is "authorized" or "illegitimate."[44] In examining a subset of positive urinalysis samples for oxycodone, a powerful narcotic often referred to by the brand name OxyContin,[45] the *Red Book* found that positive samples for oxycodone nearly doubled in a three-year span, rising from 1,909 positive samples in FY 2006 to 3,756 in FY 2009.[46] OxyContin was not the only controlled substance to increase during that same time; other controlled substances tested by the urinalysis program had similar increases as well.[47] As the rate of urinalysis samples testing positive for controlled substances increased, so too did the number of Soldiers lawfully prescribed controlled substances.[48] The rate of "authorized" use for controlled substances skyrocketed from thirty-three percent of samples in FY 2005 to eighty percent of samples in FY 2009,[49] which raised concerns that open-ended medical prescriptions and "MRO authorizations may be masking opiate and other legal drug dependence and illicit drug use."[50] To segregate illegitimate users from authorized users, the *Red Book* recommended restricting access to prescription drugs through an Army-imposed expiration on prescribed controlled substances of one year from the prescription date.[51]

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[41] GOLD BOOK, *supra* note 1, at 5.
[42] RED BOOK, *supra* note 10, at 56.
[43] *Id.* at 56-57.
[44] *Id.* at 54.
[45] *Oxycodone*, DRUGS.COM, http://www.drugs.com/oxycodone.html (last visited May 19, 2015).
[46] RED BOOK, *supra* note 10, at 55.
[47] *Id*. During the same time period, for example, the number of positive urinalysis samples for amphetamines doubled. *Id*.
[48] *Id.* at 55-57.
[49] *Id.* at 57.
[50] *Id.* at 56.
[51] *Id.* at 57.

B. Announcement of the Army's Policy

With only a minor change, the *Red Book*'s recommendation for a prescription drug expiration date was implemented in February 2011.[52] In an All Army Activities (ALARACT) message from Headquarters, Department of the Army, the Army announced that lawfully prescribed drugs would expire six months after the prescription date, not one year as recommended by the *Red Book*.[53] The difference in time between the *Red Book*'s recommendation and the MEDCOM policy that was implemented is likely due to a faulty interpretation of federal regulations. The ALARACT states, "Federal regulations limit the duration of controlled substance prescriptions to six-months (e.g., a prescription must be filled within six-months of the date the prescription is written)."[54] As discussed *infra*,[55] no federal law or regulation mandates an expiration date for the lawful use of a prescribed drug. Confusingly, the parenthetical correctly states a federal regulatory requirement that prescriptions must be filled within six months of the prescription's issuance, but this statement is imprecise because the federal regulation only applies to Schedule III through V, not Schedule II, controlled substances.[56] Taken as a whole, the ALARACT's characterization of federal requirements was misleading regarding the time limit for the lawful use of controlled substances and inaccurate about the filling deadlines for prescriptions.

IV. Prescriptions Under Federal Law and Regulation

A. Introduction

The MEDCOM expiration policy was a startling addition to the federal process for prescribing and issuing controlled substances. Federal laws and regulations impose strict requirements on the provision of controlled substances to patients. Under the Controlled Substances

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[52] ALARACT 062/2011, *supra* note 20, para. 2b.
[53] *Id.* para. 3.
[54] *Id.*
[55] *See infra* Part IV.
[56] *Controlled Substance Schedules*, DRUG ENFORCEMENT ADMINISTRATION, http://www.deadiversion.usdoj.gov/schedules/ (last visited May 19, 2015) [hereinafter *Schedules*].

Act of 1970 (CSA), specified drugs are prohibited from personal use without prescriptions from authorized practitioners.[57] Drugs prescribed for personal use are classified into schedules based on their accepted medical use, relative abuse potential, and likelihood of causing dependence in a patient.[58] Schedule I substances have no accepted medical use and a high potential for abuse.[59] These are commonly referred to as "street" drugs, such as heroin, marijuana, and cocaine.[60] Schedules II through Schedule V drugs have an accepted medical use and are separated into different schedules based on their relative abuse potential: from Schedule II drugs with the highest abuse potential and psychological effect to Schedule V drugs with low abuse potential and psychological effect.[61]

B. Receiving and Filling Prescriptions

Only a physician (who is authorized to practice medicine in the jurisdiction in which he or she is located) or an authorized researcher may issue patients a prescription for a controlled substance on Schedules II through V.[62] For physicians, the controlled substance must be issued for "a legitimate medical purpose" in "the usual course of his professional practice."[63] This requirement prevents doctors from writing prescriptions disconnected from a patient's medical condition.[64] In writing the prescription, physicians are not required by federal regulations to delineate an expiration date.[65] Once written, a pharmacist is the only individual authorized to fill a prescription.[66] Upon receipt of a valid prescription, a pharmacist may then fill the prescription and

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[57] Controlled Substances Act of 1970, Pub. L. No. 91-513, 84 Stat. 1285 (1970) (codified as amended at 21 U.S.C. § 801 et seq. (1990)) [Hereinafter CSA].
[58] *Schedules*, *supra* note 56.
[59] *Id.*
[60] MEDCOM REG. 2013, *supra* note 16, app. B-2.
[61] *Schedules*, *supra* note 56.
[62] 21 U.S.C. § 353(b)(1)(B) (2012); Persons Entitled to Issue Prescriptions, 21 C.F.R. § 1306.03(a) (2014).
[63] Purpose of Issue of Prescription, 21 C.F.R. § 1306.04 (2014).
[64] *See, e.g.*, *Doctor Found Guilty of Illegal Distribution of Drugs*, DRUG ENFORCEMENT ADMINISTRATION, http://www.dea.gov/divisions/la/2014/la081514.shtml (last visited May 19, 2015).
[65] The physician's prescription must have the date of the prescription; the full name and address of the patient; the drug name, strength, dosage form, and quantity prescribed; the directions for use; and the name, signature, address, and registration number of the prescribing practitioner. Purpose of Issue of Prescription, *supra* note 63.
[66] 21 C.F.R. § 1306.06.

provide it to a patient for use.[67] With limited exceptions,[68] this process applies for all prescriptions.[69]

C. Labeling of Controlled Substance Packages

Federal regulations impose strict labeling requirements for all filled prescriptions. Pharmacists are required to appropriately label all packages containing a controlled substance.[70] But among the eight required labeling fields, no field requires a pharmacist to specify an expiration date for the prescription.[71] Once filled, no federal law or regulation mandates an expiration date for the use of a lawfully

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[67] *Id.*

[68] In three situations, the strict requirements for issuing and filling a prescribed drug are relaxed. First, a physician may administer in the course of his or her professional practice a controlled substance for immediate administration to a patient. Requirement of Prescription, 21 C.F.R. § 1306.11 (2014); Requirement of Prescription, 21 C.F.R. § 1306.21(b) (2014). Second, in an emergency, physicians can provide an oral prescription for a controlled substance to a pharmacist, but the prescription must be promptly reduced to writing and provided to the filling pharmacist within seven days. 21 C.F.R. § 1306.11(d). Finally, in certain institutional settings, such as a hospital, the prescription may be written by the treating physician and filled and administered by the institution. *Id.* §§ 1306.11(c), 1306.21(c).

[69] In addition to mandating prerequisites for the filling of a prescription, federal regulations also dictate which controlled substances may or may not be refilled. Unlike Schedule III through V drugs, Schedule II drugs may not be refilled. Refilling of Prescriptions; Issuance of Multiple Prescriptions, 21 C.F.R. § 1306.12(a) (2014). Instead, each "re-filling" of a Schedule II drug must be done by a new prescription. However, an individual practitioner may issue multiple individual prescriptions to a patient as long as the total supply does not exceed 90 days. *Id.* § 1306.12(b)(1). Among other things, such prescriptions must be provided in the usual course of practice; state the earliest fill date (with the exception of the first prescription if for immediate filling); and not create an "undue risk of diversion or abuse." *Id.* § 1306.12(b)(1)(a)-(e). Prescriptions for controlled substances on Schedule III through V, however, are authorized refills, but prescriptions for substances on Schedules III and IV, but not V, must be "filled or refilled" no "more than six months after the date on which such prescription was issued." 21 C.F.R. § 1306.22. Notably, this requirement is different from the MEDCOM policy's requirement because it is six months to *fill* the prescription for the controlled substance, not *use* it.

[70] Pharmacists must ensure the date of the prescription was filled; the pharmacy name and address; the serial number of the prescription; the name of the patient; the prescribing physician's name; and directions for use and cautionary statements, if any, are on the label. Labeling of Substances and Filling of Prescriptions, 21 C.F.R. § 1306.14(a) (2014); Labeling of Substances and Filling of Prescriptions, 21 C.F.R. § 1306.24(a) (2014).

[71] *Id.*

prescribed controlled substance.[72] As noted, the only expiration date for a controlled substance is tied to a manufacturer's guarantee of the drug's efficacy.[73]

V. The Army's Medical Review Program

A. Purpose of the Medical Review

For all positive urinalysis samples for prescription drugs, the Army requires that MROs review the Soldier's medical records to determine if a valid medical reason exists for the positive sample.[74] In other words, "a positive laboratory test result [for a prescription drug] does not automatically identify [a Soldier] . . . as an illegal drug user."[75] In making their finding, MROs follow a rigid process, a Medical Review (MR), set forth in the MEDCOM policy, which determines if a Soldier's use of a controlled substance is "authorized" or "illegitimate."[76] With the exception of adding an expiration date for prescribed controlled substances and changing the education requirements for MROs, the MR process has remained largely unchanged since 2005.[77]

B. Medical Review Officer Appointment and Qualification

The MR process begins with the appointment of an MRO at Army installations with a Military Treatment Facility (MTF). Each MTF commander is responsible for appointing an MRO.[78] The MRO must be

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[72] E-mail from Major Meghan Raleigh, M.D., to author (Nov. 20, 2014, 14:41 EST) (on file with author) [hereinafter Raleigh E-mail]; *see also* United States v. Bell, 1994 CCA Lexis 32 (A.F. Ct. Crim. App. 1994).

[73] *See* Expiration Dating, *supra* note 17.

[74] MEDCOM REG. 2013, *supra* note 16, para. 2.

[75] U.S. Dep't of Health and Human Serv., Medical Review Officer Manual for Federal Agency Workplace Drug Testing Programs 1 (31 May 2014) [hereinafter HHS MRO Manual].

[76] MEDCOM REG. 2013, *supra* note 16, para. 9e.

[77] *See* MEDCOM Reg. 2013, *supra* note 16; U.S. Army Medical Command, Reg. 40-51, Medical Review Officers and Review of Positive Urinalysis Drug Testing Results (13 May 2011) [hereinafter MEDCOM Reg. 2011]; U.S. Army Medical Command, Reg. 40-51, Medical Review Officers and Review of Positive Urinalysis Drug Testing Results (21 July 2010) [hereinafter MEDCOM Reg. 2010]; U.S. Army Medical Command, Reg. 40-51, Medical Review Officers and Review of Positive Urinalysis Drug Testing Results (30 Mar. 2005) [hereinafter MEDCOM Reg. 2005].

[78] MEDCOM REG. 2013, *supra* note 16, paras. 6b, 7c.

a physician, nurse practitioner, or physician assistant;[79] have knowledge of pharmaceuticals; and have been trained and certified by MEDCOM on the MR system.[80]

C. Medical Review Process

The MR process is decentralized and conducted by individual MROs at each MTF. Following referral of a positive urinalysis sample from the DoD's specialized labs,[81] the MRO determines the schedule of the controlled substance found in the sample.[82] For positive urinalysis samples with drugs on Schedule I, no MR is required unless requested by the referring agency, and the sample is automatically deemed "illegitimate" use.[83] For all other positive samples, the MRO must review the urinalysis test to determine if a valid medical reason for the positive result exists.[84] In making this determination, the MRO reviews the Soldier's electronic or written health record, prescription bottles, and any statements from the Soldier's physician or dentist documenting the drug prescribed or administered and the date of the procedure.[85]

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[79] This is a substantial change from previous MEDCOM 40-51 policies, which required a medical doctor or doctor of osteopathy to perform MRs. *Compare* MEDCOM REG. 2011, *supra* note 77, para. 6b, *with* MEDCOM REG. 2005, *supra* note 77, para. 7a ("In accordance with Federal law, only physicians possessing an M.D. or D.O. degree from an accredited university may serve as an MRO."). This is also a substantial departure from federal civilian agency requirements for MROs. HHS MRO MANUAL, *supra* note 75, at 1.

[80] MEDCOM REG. 2013, *supra* note 16, para. 7.

[81] A unit commander, an Army Substance Abuse Program employee, or a base area code manager may refer a positive urinalysis to an MRO. MEDCOM REG. 2013, *supra* note 16, para. 9a.

[82] MEDCOM REG. 2013, *supra* note 16, paras. 6c(3), 9a.

[83] The drugs are heroin metabolites, cocaine metabolites, or amphetamine and methamphetamine designer drugs. MEDCOM REG. 2013, *supra* note 16, app. B-2. Notably, this paragraph fails to point out marijuana, PCP, and LSD are part of the current drug testing panel and do not require MRO review. This appears to be a drafting error because the following sections of the regulation detail metabolite cut-off percentages for these drugs and explicitly states that such urinalysis positives do not require MRO review before the commander releases the information to law enforcement agencies. MEDCOM REG. 2013, *supra* note 16, app. C. Previous editions had similar drafting errors. MEDCOM REG. 2011, *supra* note 77, app. B (omitting LSD); MEDCOM REG. 2010, *supra* note 77, app. B (omitting LSD).

[84] The drugs are amphetamines, opiates, steroids, synthetic opiates, benzodiazepines, and any other specially requested drug tests. MEDCOM REG. 2013, *supra* note 16, para. 6c(3).

[85] *Id.* para. 9b.

If the test result is validated through the Soldier's medical records (i.e., the Soldier's medical records contain a valid prescription for the applicable drug or drug metabolite),[86] the MRO then uses the date of the urine sample as a proxy for the date of the Soldier's drug use and examines this date in relation to when the prescription was written.[87] Pursuant to the MEDCOM policy, any Schedules II through V drug "will expire six months after [the] last date prescribed," and the use of expired drugs is prohibited under the policy.[88] Thus, a drug sample that tests positive more than six months after the date prescribed is designated as "illegitimate,"[89] whereas a positive test within six months of the prescription is deemed "authorized."[90]

If the test result cannot be validated through the Soldier's medical records, the MRO must arrange for an interview, either in person or over the phone, with the Soldier to determine if there is a valid reason for the positive sample.[91] Before beginning the interview, Soldiers are apprised of their Article 31(b) rights,[92] advised that the MRO is acting as an investigating officer with no patient-provider confidentiality, and given the option whether to provide testimony or evidence to the MRO.[93] If the Soldier provides proof of a valid prescription not captured in the Soldier's military medical records and the use (i.e., the date that the urine sample was provided) was within six months of the prescription date, the use is "authorized."[94] If not, the use is deemed "illegitimate."[95] Notably, the MRO could, on his or her own accord, contact the Soldier's civilian or military healthcare provider to determine if a valid medical reason exists for the positive sample, but this is not required under the MEDCOM policy.[96]

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[86] *Id.* para. 6c(3).
[87] *Id.* para. 8e.
[88] *Id.*
[89] *Id.* para. 8e. Illegitimate use is any use for which there is no valid "prescription(s) or valid medical explanation for a drug(s) that would account for the positive urinalysis test result." *Id.* para. 9e(2).
[90] *Id.* para. 9e(1). Authorized use is defined as one having "a prescription(s) or valid medical explanation for a drug(s) that caused the positive urinalysis result." *Id.*
[91] *Id.* para. 6c(3).
[92] UCMJ art. 31(b) (2012).
[93] *Id.* para. 6c(4).
[94] *Id.* para. 9e(1).
[95] *Id.* para. 8e.
[96] *See* MEDCOM REG. 2013, *supra* note 16.

D. Change in the Medical Review Process

Across the four editions of MEDCOM Regulation 40-51 from 2005 to 2013,[97] the only major policy change was the addition of an "expiration date" for lawfully prescribed controlled substances in 2011.[98] Before this addition, the previous MEDCOM policy held that the use of a prescription at any time was legitimate so long as the use was not beyond a "clearly labeled expiration date."[99] In other words, if a prescribed controlled substance had no "clearly labeled expiration date," a Soldier could lawfully take prescribed controlled substances at any time for his or her medical condition.[100] Because there is no requirement under federal law to put an expiration date on controlled substance labels issued by a pharmacist to a patient nor is there a requirement for such a labeling on prescription drugs in the MEDCOM policy,[101] it is unclear when—if ever—the "clearly labeled expiration date" provision would apply.[102]

Following the *Red Book*'s finding of a dramatic rise in prescription drug abuse by Soldiers and its correlation to suicide,[103] "senior Army leadership . . . directed a change in Army policy."[104] The old MR standard allowing the use of a prescribed controlled substance at any time was castigated by MEDCOM, the agency which wrote and implemented that very same MR standard, as an "open-ended pharmaceutical alibi for the duration of that Soldier's career, long after the clinical indication for the medication had been resolved."[105] The *Red Book*'s findings were based on an examination of 42,028 MRs conducted from FY 2001 to 2009 under the previous MR standard.[106] From that population of positive urinalysis samples, 13,301 samples were deemed "unauthorized" (i.e., drugs used without a valid medical prescription),

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[97] *See supra* note 77.
[98] MEDCOM REG. 2011, *supra* note 77, para. 9e.
[99] MEDCOM REG. 2010, *supra* note 77, para. 8f.
[100] *Id.*
[101] *See* MEDCOM REG. 2013, *supra* note 16.
[102] MEDCOM REG. 2010, *supra* note 77, para. 8f.
[103] RED BOOK, *supra* note 10, at 55-56.
[104] Memorandum from Office of The Surgeon General to Medical Review Officers Serving in the Army Healthcare System, Dep't of Army et al., subject: Interim Guidance for Medical Review Officers re: MEDCOM Regulation 40-51, 13 May 2011 para. 1 (2 Sep. 2011) [hereinafter Interim Guidance].
[105] *Id.* para. 2.
[106] RED BOOK, *supra* note 10, at 55.

23,222 samples were deemed "authorized" (i.e., used with a valid medical prescription), and 5,505 samples were characterized as "unresolved."[107] The *Red Book*'s recommendation for a prescription expiration date was aimed squarely at those 23,222 Soldiers who had a lawful prescription but may not have had a medical basis for the long-term use of a controlled substance.[108] As the *Red Book* put it, "How many of these authorized positive UAs [urinalysis tests] are actually the result of dependence?"[109] To eliminate this "alibi," MEDCOM instituted the new expiration standard, mandating that Schedules II through V prescriptions "will expire six months after [the] last date prescribed."[110]

E. Interim Guidance from the Army's Medical Command

As detailed *infra*,[111] the new expiration policy failed to give commanders a framework to dispose of cases with Soldiers who "illegitimately" used a lawfully prescribed controlled substance. As a result, four months after the major policy change in 2011, MEDCOM issued interim guidance that provided two exceptions to the six-month use window.[112] But just as with the MEDCOM policy itself, the interim guidance failed to provide commanders with a legal framework to dispose of cases.

One of the exceptions provided for use consistent with a provider's instructions when the "clinical indication for treatment with the medication in question is still present."[113] In such cases, the use would be deemed legitimate. However, because MROs are not required to conduct medical examinations of individual Soldiers,[114] and because a mere check of military medical records cannot definitively indicate whether a medical problem has continued or reemerged, the exception failed to segregate drug dependent Soldiers from those with long-term medical conditions, obviating the underlying purpose of the policy change.

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[107] *Id.*
[108] *Id.* at 55-56.
[109] *Id.* at 56.
[110] MEDCOM REG. 2013, *supra* note 16, para. 8e.
[111] *See infra* Part VIII.
[112] Interim Guidance, *supra* note 104, para. 5.
[113] *Id.* para. 3.
[114] *See* MEDCOM REG. 2013, *supra* note 16.

The second exception in the interim guidance expanded the MRO's role as an investigator in order to determine a Soldier's knowledge of the policy change.[115] The interim guidance tasked the MRO with verifying whether the Soldier received notice of the policy change through other sources, such as a "primary care provider, Commander, First Sergeant, or ASAP personnel."[116] If the Soldier was not on notice of the policy change, then the use was deemed a "valid medical use."[117] In such cases, the MRO was required to inform the Solider that subsequent uses of a controlled substance after six months from the prescription date would be considered illegitimate use.[118]

Neither the interim guidance nor the MEDCOM policy itself provides an administrative or criminal mechanism for commanders to dispose of cases tied to the unauthorized use of lawfully prescribed controlled substances.[119] Presumably, the knowledge requirement of the second exception is meant to establish an element of a disobedience or wrongful use offenses, but as detailed *infra*,[120] the exception does not assist commanders in establishing the other necessary criminal elements. In willful disobedience offenses, problems arise because civilian doctors cannot issue lawful commands, intentional defiance of the order by a Soldier is hard to prove, and a military medical provider issuing the command must outrank the Soldier receiving it.[121] In "other lawful orders" offenses, the problem lies in Army medical providers not having a special status to issue orders to Soldiers.[122] And in wrongful use cases, the innocent use defense provides a complete defense for those Soldiers who lawfully used their prescribed controlled substances.[123]

Furthermore, neither of the exceptions is applicable anymore. The latest MEDCOM Regulation 40-51, issued in April 2013, did not incorporate the 2011 interim guidance's exceptions,[124] and under the

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[115] *Id.* para. 5C.
[116] *Id.*
[117] *Id.*
[118] *Id.* para. 5C.
[119] *See infra* Part VIII.
[120] *See infra* Part VIII.B, E.
[121] *See infra* Part VIII.E.
[122] *Id.*
[123] *See infra* Part VIII.B.
[124] *See* MEDCOM REG. 2013, *supra* note 16.

terms of the interim guidance's approval,[125] the interim guidance exceptions are consequently no longer in effect.

VI. Legality of the Medical Command Policy

A. Introduction

As with most major policy changes, MEDCOM's policy revision had unintended consequences. By adding new restrictions on controlled substance use, the Army was inadvertently exposed to other litigation risks. Specifically, the Army's policy could be construed as an unconstitutional taking under the Fifth Amendment to the United States Constitution or as a violation of the Administrative Procedure Act. At first blush, both claims have merit, but neither claim is likely to be successful in court. Ultimately, MEDCOM's policy has a strong likelihood of being upheld as a lawful exercise of the Army's discretion to act on matters concerning the health and welfare of the force—even if it is unenforceable under the UCMJ as it is written.

B. Takings Analysis

By prohibiting the use—which is the only true value—of a prescription drug, the MEDCOM policy has effectively nullified a Soldier's property interest in that drug. Specifically pursuant to the Controlled Substance Act, individuals who lawfully obtain and posses a controlled substance for their own use are classified as "ultimate users."[126] By definition, the ultimate user has all the essential rights of a property owner—to obtain, posses, and use a controlled substance—and, hence, is the property owner of the prescribed medicine.[127]

In impairing the use of personal property, the policy is subject to attack under the Takings Clause of the Fifth Amendment to the United States Constitution.[128] Pursuant to this Clause, private property may not

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[125] Memorandum from MEDCOM Chief of Staff to MEDCOM Regional Commands, Dep't of Army et al., subject: Interim Guidance Approval para. 2 (27 Dec. 2011) ("This approval [of the Interim Guidance] will remain in effect until the next update of MEDCOM Regulation 40-51.").
[126] 21 U.S.C. § 802(27) (2012).
[127] *Id.*
[128] U.S. CONST. amend. V.

be taken by the federal government without just compensation.[129] Fifth Amendment jurisprudence delineates two types of takings: eminent domain and regulatory takings. Based on the inherent authority of a sovereign,[130] eminent domain is the government's authority to seize private property for the public good.[131] The MEDCOM policy, however, does not call for the "intentional appropriation"[132] of controlled substances for public use, so the eminent domain doctrine does not apply.

In addition to eminent domain, courts have held that a government regulation alone may result in a taking of private property.[133] Such regulations are lawful if based on the sovereign's police powers to prevent the use of private property in ways detrimental to public safety or health.[134] While regulations that impose limited burdens on an individual's property rights do not necessarily invoke the Takings Clause,[135] the Supreme Court has not developed a "formula to determine where regulation ends and taking begins."[136] Nonetheless, the Court has found that a regulatory taking occurs when a government policy goes "too far," amounting to a de facto taking of property.[137]

The MEDCOM policy results in a de facto taking of a Soldier's prescription medication because it destroys the only true value of a controlled substance. The value of a controlled substance lies wholly in its use to treat an underlying ailment for which the controlled substance was prescribed. Unlike with personal property, controlled substances sales are "regulated transactions"; individuals may not sell or transfer their controlled substances to another individual.[138] In preventing the use of a lawfully prescribed controlled substance, the MEDCOM policy amounts to a "total deprivation" of a Soldier's property rights, and consequently, it is also a regulatory taking.[139]

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[129] *Id*.
[130] Boom Co. v. Patterson, 98 U.S. 403, 406 (1878).
[131] Eversleigh v. United States, 24 Cl. Ct. 357, 359 (1991).
[132] Vansant v. United States, 75 Ct. Cl. 562, 566 (1932).
[133] Reg'l Rail Reorg. Act Cases, 419 U.S. 102, 125-56 (1974).
[134] *Id*.
[135] United States *ex rel*. Tenn. Valley Auth. v. Powelson, 319 U.S. 266, 284 (1943).
[136] Penn. Cent. Transp. Co. v. N.Y. City, 438 U.S. 104, 124 (1978).
[137] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
[138] CSA, *supra* note 57, § 802(39).
[139] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1017 (1992).

The MEDCOM policy's regulatory taking, however, is lawful because it has two possible public safety bases: 1) to protect Soldiers from the lethal threat of intentional and unintentional overdoses and 2) to separate drug-addicted Soldiers from those Soldiers who still have a legitimate medical need to use prescription medications. And, while done improperly by the current policy's own terms,[140] MEDCOM, as discussed *infra*,[141] has the statutory authority to promulgate a general regulation restricting controlled substance use—at least for MEDCOM Soldiers—pursuant to Article 92 of the UCMJ.[142] As such, MEDCOM may take; the question is whether it must also pay.

The unique legal status of Soldiers also impacts their property rights, which differ from those in civilian life. "Though the Army zealously enforces respect for the right of its individual members to enjoy their property, this right is by no means absolute, and may be restricted when military necessity requires."[143] Over the last century, the Army has regulated Soldiers' ownership and use of personal property. For example, a military court upheld the prohibition on operating a privately owned vehicle by Soldiers in West Germany.[144] To an extent, this restriction is similar to the total loss of use for controlled substances; the value of a car, in most cases, lies in its utility for transportation, which was impaired (if not eliminated) by the restriction. Indeed, most Army posts prohibit items deemed as drug paraphernalia, restricting Soldiers from possessing personal property like rolling papers and smoking pipes.[145] In upholding such regulations, military courts often stress that property-right limitations must be "reasonably necessary" to a legitimate duty.[146] In short, when an order is "found to be reasonably in furtherance of a service's duty to protect the morale, discipline, and usefulness of its members, it may be enforced although in deprivation of an established private right or interest."[147]

Under the Fifth Amendment, any lawful taking by the government requires just compensation to the affected property owner,[148] but the

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[140] *See infra* Part VIII.C.
[141] *See infra* Part IX.C.
[142] UCMJ art. 92 (2012).
[143] United States v. Jordan, 30 C.M.R. 424 (A.B.R. 1960).
[144] United States v. Smith, 26 C.M.R. 20 (C.M.A. 1958).
[145] *See, e.g.*, Memorandum from Commanding General, Fort Hood to Fort Hood et al., subject: Prohibited Substances (15 Dec. 2014) (banning all drug paraphernalia).
[146] United States v. Jordan, 30 C.M.R. 424, 428 (A.B.R. 1960).
[147] United States v. Dykes, 6 M.J. 744, 747 (N.C.M.R. 1978).
[148] U.S. CONST. amend. V.

economic value of a controlled substance is difficult to quantify. The Supreme Court has construed just compensation to mean fair economic compensation for the property at the time of the loss.[149] Generally, the value of a taken item is determined by resort to the fair market value.[150] But controlled substances prescribed to an "ultimate user" may not be sold to another person pursuant to the Controlled Substances Act, and therefore, they have no economic value to any other person.[151] Put simply, controlled substances have no market value. When there is no fair-market value, courts sometime resort to an item's value in the primary market for that item, i.e., the market cost for the government to buy the items from pharmaceutical manufacturers and wholesalers.[152] This latter market, though, is completely inaccessible to Soldiers, undermining its application to a value determination.[153] Courts, consequently, will have a hard time in determining a Soldier's economic loss resulting from the Army's lawful regulatory taking.

Whatever valuation model is used, Soldiers suffering from a taking will likely fall into two groups. First, some Soldiers who are prohibited from using expired controlled substances will likely have continuing medical conditions that require renewed prescriptions. These Soldiers, in practice, would have no loss because controlled substances, by their very nature, are fungible. Consequently, they can simply obtain a new prescription.

Second, some Soldiers prevented from using expired prescriptions will be denied renewed prescriptions due to a lack of a presenting medical condition requiring medication. Among this group, some Soldiers will only suffer a de minimis loss amounting to the leftover prescriptions following a six-month treatment regimen. For this subgroup, the Army presumably can take proactive measures to minimize any loss by ensuring providers practice controlled substance prescription minimization (i.e., only prescribing an amount of controlled substances adequate to treat the medical condition over a six-month

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[149] United States *ex rel.* TVA v. Powelson, 319 U.S. 266, 284 (1943); United States v. Reynolds, 397 U.S. 14, 16 (1970).
[150] United States v. Miller, 317 U.S. 369, 374 (1943).
[151] CSA, *supra* note 57, § 802(10), (27).
[152] Only Drug Enforcement Agency (DEA) registrants may purchase and issue prescriptions (e.g., researchers, pharmacists, and physicians). *Registration Applications Questions and Answers*, DRUG ENFORCEMENT AGENCY, http://www.deadiversion.usdoj.gov/drugreg/faq.htm (last visited May 19, 2015).
[153] *Id.*

period). To the extent courts do not consider leftover prescription drugs to be de minimis or for Soldiers with large amounts of leftover or costly prescriptions, those Soldiers could (at least theortically) file a claim for the loss in federal court.

Soldiers faced with a denial of replacement medications may file suit for their loss under the Little Tucker Act.[154] This Act waives sovereign immunity for claims against the United States founded on the destruction of private property.[155] But jurisdiction alone is not enough to file a claim; the Soldier must also have another source of law providing a cause of action that mandates monetary compensation by the Federal Government.[156] An uncompensated taking under the Fifth Amendment is one such cause of action.[157] Accordingly, Soldiers may file a claim against the United States to recover money damages for the regulatory taking of their private property in federal court.[158] For cases in which damages sought are less than $10,000, which should encompass almost all claims filed against the MEDCOM policy, a Soldier may file in either federal district court or the Court of Federal Claims. As detailed *supra*,[159] the applicable court would face the daunting task of determining the value, if any, of the Soldier's loss.

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[154] 28 U.S.C. § 1346(a)(2) (2012). It is unlikely that other potential causes of action—a Federal Tort Claims Act (FTCA) or a *Bivens* claim—would apply. While the FTCA does provide for the waiver of sovereign immunity for some torts caused by federal employees, the FTCA does not apply to constitutional torts. F.D.I.C. v. Meyer, 510 U.S. 471, 479 (1994). Alternatively, a Soldier's *Bivens* claim is also unlikely to succeed. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). A *Bivens* claim allows a person to sue federal officials for deprivations of her or his constitutional rights. *Id.* at 397. Federal officials, including Army Soldiers, have absolute immunity if they were acting within the scope of employment and "special factors counsel[] hesitation." *Id.* In *Chappell*, the Supreme Court held that "the unique disciplinary structure of the Military Establishment and Congress's activity in the field" were two such special factors. Chappell v. Wallace, 462 U.S. 296, 304 (1983). Furthermore, the Supreme Court in *Stanley* held there is no *Bivens* remedy for injuries that "arise out of or are in the course of activity incident to service." United States v. Stanley, 483 U.S. 669, 684 (1987). Considering the special-factors analysis and the official policy that would make any injury incident to service, a *Bivens* claim is unlikely to be a successful claim in federal district court.

[155] 28 U.S.C. § 1346(a)(2) (2012).

[156] United States v. Mitchell, 463 U.S. 206, 216-17 (1983).

[157] *See* LaChance v. United States, 15 Cl. Ct. 127, 130 (1988) (stating that a Fifth Amendment taking without just compensation claim would have been sufficient for jurisdiction).

[158] 28 U.S.C. § 1346(a)(2) (2012).

[159] *See supra* Part VI.B.

C. Administrative Procedures Act Analysis

As with all new federal regulations, the MEDCOM policy is subject to challenge for failure to follow the Administrative Procedures Act (APA).[160] The APA, in part, lays out the process for federal agencies to make rules.[161] Unlike Little Tucker Act claims, the APA does not provide subject matter jurisdiction over monetary claims.[162] Instead, the APA provides that an individual suffering a "legal wrong" or an adverse affect by an agency action may petition a federal district court for review of the process by which the federal agency made its decision.[163]

The Department of the Army is not per se excluded from review under the APA although the specific functions of courts-martial, military commissions, and a commander's decisions in the field in a time of war are.[164] The MEDCOM policy does not fall under any of these exclusions, so it is not exempted from reviewability pursuant to the exceptions. Under the APA, "[n]otice of a proposed rule, opportunity for public comment, and publication of the final rule are central tenents of the rule making process . . . ."[165] The MEDCOM policy, then, is potentially subject to APA review because it invokes all three of these central tenents—the Army has put in a place a rule without publication in the Federal Register or public comment regarding restrictions on a Soldier's use of controlled substances.[166]

Notably, however, the informal and formal rulemaking provisions of the APA provide a specific exception for "military affairs functions,"[167] and the designation of an agency act as a "military function" is "normally dispositive" to the outcome.[168] While the APA does not define this

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[160] 5 U.S.C. § 551 et seq. (2012).
[161] *Id.*
[162] Crocker v. United States, 37 Fed. Cl. 191 (1997).
[163] 5 U.S.C. § 702 (2012). The term legal wrong includes an action by an agency that is outside of the agency's authority (i.e., outside of the law or regulation). *Id.*
[164] 5 U.S.C. §§ 551(1)(F), (G) (2012).
[165] United States v. Ventura-Melendez, 321 F.3d 230 (1st Cir. 2003).
[166] Roger P. Freeman, *Construction and Application of "Military Function" Exception to Notice and Comment Requirements of Administrative Procedure Act*, 133 A.L.R. FED. 537 (2013).
[167] 5 U.S.C. § 553(a)(1) (2012). The same exception also applies to adjudications. 5 U.S.C. § 554 (2012).
[168] Freeman, *supra* note 166.

term,[169] the failure to include an outright exemption of military departments may indicate that the term was not intended to cover all of a military department's activity.[170] For example, Army Corps of Engineers work on navigable waters has been designated as a civil, not military, function.[171] Nonetheless, DoD has a long-standing assertion, to which courts traditionally defer,[172] that nearly all of its activities fall under the exception.[173]

To be sure, while the Attorney General's Manual on the APA, which is considered an authoritative source on the APA's interpretation, indicates a narrow interpretation of the term,[174] recent cases have been more expansive in detailing the reach of the military functions exception.[175] The Supreme Court, in dicta on a case resting in part on APA jurisdiction, expressed "great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest" and to "professional military judgments" regarding the "control of a military force,"[176] indicating an expansive view of the scope of the military-functions exemption. In the more recent case of *Ventura-Melendez*, the First Circuit upheld the United States Navy's live-fire security zone that prohibited ship traffic, including civilian fisherman, around a naval range in Puerto Rico and the subsequent arrest of civilian protestors who breached the zone.[177] In other words, pursuant to the military functions exception, the court exempted a rule promulgated by the Navy that reached civilian, not just military, conduct from the APA's rulemaking requirements. Given the considerable deference in this attenuated case and the expansive views espoused by the Supreme Court, the MEDCOM policy, which is more closely aligned with military interests and effectively applies to military

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[169] *Id.*

[170] Major Thomas R. Folk, *The Administrative Procedure Act and the Military Departments*, 108 MIL. L. REV. 135, 140 (1985).

[171] *Id.*

[172] Udall v. Tallman, 380 U.S. 1, 16-18 (1965).

[173] *House Committee on Government Operations, Survey and Study of Administration, Organization, Procedure, and Practice in the Federal Agencies*, 85th Cong. pt. 3 (1957).

[174] *See* S. REP. NO. 79-752, at 13-14 (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 1944-45, at 184, 198-99 (1946); U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE APA 26-28 (1947).

[175] *See* McDonald v. McLucas, 371 F.Supp. 837 (S.D.N.Y. 1973) (changing personnel status from missing-in-action to deceased terminated civilian spouse's survivor's benefits); Bridges v. Davis, 443 F.2d 970 (9th Cir. 1971) (barring civilians from military posts).

[176] Winter v. NRDC, Inc., 555 U.S. 7, 24 (2008).

[177] United States v. Ventura-Melendez, 321 F.3d 230, 233 (1st Cir. 2003).

personnel only, can readily meet the requirements of the "military functions" exception. The MEDCOM policy regulates Soldier conduct for the good order and safety of the unit and amounts to the protection of military interests and is almost certain to be deemed a military function, exempting the action from the reach of the APA.

In addition to the military-functions exception, the MEDCOM policy is also exempt under the agency management and personnel provision of the APA. Federal agencies do not have to follow APA rulemaking procedures for rules aimed at internal management and personnel matters provided the regulations do not regulate persons outside of the agency.[178] The MEDCOM policy is only aimed at a Soldier's use of controlled substances, which is a purely internal personnel matter. The narrow applicability to active-duty Soldiers means non-agency persons are not subject to the MEDCOM policy, and challenges to Army personnel policies similar in scope have been held by courts to be outside the APA's purview.[179] Consequently, the Army had no legal duty to follow the APA's rulemaking requirements for the MEDCOM policy change.

VII. Legal Doctrines Precluding Judicial Review

A. Introduction

While claims for violating the APA are unlikely to be successful, a constitutional taking claim pursuant to the Little Tucker Act could potentially win on the merits if the Army does not, according to a court's determination, provide just compensation. A meritorious claim, though, is not enough. Depending on the venue in which Soldiers file their claim—federal district court or the Court of Federal Claims[180]—two other legal doctrines, the non-reviewability of military decisions and judicial deference to the military, will likely preclude compensation as a result of the MEDCOM policy.

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[178] 5 U.S.C. § 553(a)(2) (2012); Joseph v. United States Civil Serv. Comm'n, 554 F.2d 1140, 1153 n.23 (D.C. Cir. 1977).

[179] In two separate cases, one before a federal district court and another before a military appellate court, the courts held that "internal personnel rules" found in Army policies are exempt from the APA's rulemaking provisions. *See* Pruner v. Dep't. of the Army, 755 F. Supp. 362 (D. Kan. 1991); United States v. Morse, 34 M.J. 677 (A.C.M.R. 1992).

[180] Federal district courts and the Court of Federal Claims have concurrent jurisdiction over takings claims that do not exceed $10,000. 28 U.S.C. § 1346(a) (2012). For claims exceeding $10,000, the Court of Federal Claims has exclusive jurisdiction. *Id*.

B. *Mindes* Test

In applicable jurisdictions, the doctrine of non-reviewability of military decisions will preclude servicemembers from bringing a claim in federal district court. This doctrine is set forth in the *Mindes* test, which is employed to determine justiciability of administrative claims against the military.[181] The *Mindes* test involves two distinct steps. First, a court determines if a plaintiff has exhausted all administrative remedies[182] and has alleged a violation by the military of the United States Constitution, a federal statute, or the military's own regulations.[183] The *Mindes* test's second step requires weighing the Soldier's allegations against the reasons for precluding review;[184] the four factors balanced as part of this step are: 1) the nature and weight of the plaintiff's claim; 2) the potential injury to the plaintiff if review is denied; 3) the extent of interference in military matters; 4) and the degree to which military expertise and discretion are involved.[185]

At first blush, the initial step of the *Mindes* test would appear to preclude some, but not all, Soldiers' claims of unconstitutional taking by the MEDCOM policy because a Soldier must prove he or she has exhausted all administrative remedies. However, there are no administrative remedies for constitutional taking claims flowing from the MEDCOM policy. For example, Article 138 claims by Soldiers require a discretionary act by their commanders; however, any injury inflicted by the MEDCOM policy is independent of a commander's actions.[186] Similarly, the takings claim is independent of the final administrative review process provided by the Army Board of Correction for Military Records, which Soldiers must normally exhaust before judicial review.[187] The Army also has no claims process to handle such cases; instead, the Army refers takings claims to federal courts.[188] Normally, the burden of successfully navigating the administrative appeals process and the amount of time required to exhaust administrative remedies would

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[181] Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971).
[182] The Supreme Court's invalidation of a judicial requirement of exhaustion in the civilian context is unlikely to apply to the military. *See* E. Roy Hawkens, *The Exhaustion Component of the* Mindes *Justiciability Test is Not Laid to Rest by Darby v. Cisneros*, 166 MIL. L. REV. 67 (2000).
[183] *Mindes*, 453 F.2d at 201.
[184] *Id.* at 201-02.
[185] *Id.*
[186] 10 U.S.C. § 938 (2012).
[187] 10 U.S.C. § 1553 (2012).
[188] U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS para. 1-4(e)1 (8 Feb. 2008).

preclude a number of claims moving forward, but not for taking claims. Thus, the first step of *Mindes* is met.

The second step of the *Mindes* test tilts towards non-reviewability of the MEDCOM policy. The first and second factor requires examination of the importance of the Soldier's challenge and harm to the Soldier if review is denied. The *Mindes* court separated out constitutional challenges based on their relative weight; for example, the *Mindes* court's comparison of "haircut regulation questions to those arising in court-martial situations which raise issues of personal liberty" implies, at least by juxtaposition, that some constitutional claims are not as strong as others. While property rights are covered in several sections of the Constitution,[189] the property rights at issue in this policy are, as discussed *supra*,[190] relatively limited. The policy only applies to whatever leftover medicine remains after six-months of use, and no lawful secondary market exists for the resale of these items. Because Soldiers are not precluded from receiving a new prescription for a persistent medical condition, any injury to a Soldier will be modest, at best.[191] In short, the policy only marginally infringes on a Soldier's property, and the weight of this claim and potential harm to the Soldier skew toward non-reviewability.

The third *Mindes* factor—potential interference with military matters—is the only factor that favors a Soldier's claim. The court's review of these claims competes with no essential military functions since, in the absence of a framework to dispose of use-violation cases, as detailed *infra*,[192] a determination of "authorized" or "illegitimate" use of a lawfully prescribed controlled substance has little practical effect. Striking down the expiration mandates at most a revision of the MEDCOM policy to excise that portion of the policy. However, the MEDCOM policy, to the extent it is followed voluntarily by Soldiers, might have an impact on the correlation noted by the *Red Book* between prescription drug use and suicide.[193] As detailed *infra*,[194] the underlying

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[189] *See*, e.g., U.S. CONST. art. I, § 8; amend. V.
[190] *See supra* Part VI.B.
[191] The worst potential injury is if the Soldier is refused a new prescription by a healthcare provider. In such cases, however, the underlying medical condition, or at least treatment through a prescription drug, no longer exists, and the Soldier would arguably have no legitimate basis to continue using the prescription drug.
[192] *See infra* Part VIII.
[193] *See* RED BOOK, *supra* note 10, at 56.
[194] *See infra* Part X.

data supporting this correlation is not as strong as initially believed, indicating that the ultimate effect of a judicial ruling on Soldiers may be modest. Indeed, before the 2011 change to the MEDCOM policy, the Army did not have an expiration date for its controlled substances,[195] so reverting to the prior regulatory provision requires no substantial revision to ensure conformity with a judicial ruling. Furthermore, striking the MEDCOM policy would not require judicial oversight during implementation, a persistent worry for federal judges.[196]

Finally, the last factor is strongly in favor of the MEDCOM policy. Determining how to deal with the scourge of suicide and controlled substance abuse in the ranks is quintessentially a military decision. While substance abuse is a problem in civil society, the problem of military suicides is multifactorial and befalls servicemembers at a greater per-capita rate than civilians.[197] As a "separate society" confronting a challenging problem, the military is the institution best suited to determine appropriate solutions to a distinctive military problem.[198] A court would be loathe to overrule military action in this field.

Viewing all four factors, a federal judge is likely to hold the *Mindes* test precludes review. As a balancing test, a purely numerical approach—three factors for precluding review and one factor in favor of review—is unlikely to persuade a judge to rule in favor of either side. Instead, a judge will probably focus on the harm to the plaintiff and the impact on the Army. Thus, the relatively minor injury to the Soldier's property rights and the Army's strong desire to take action against the suicide problem plaguing the ranks will likely lead a judge to preclude review in *Mindes*-test jurisdictions.

While the *Mindes* test is likely to bar judicial review, the *Mindes* test does not apply universally across all federal courts. Two-thirds of federal appellate courts follow the test,[199] but the Supreme Court has

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[195] *See* MEDCOM REG. 2010, *supra* note 77; MEDCOM REG. 2005, *supra* note 77.
[196] Gilligan v. Morgan, 413 U.S. 1, 10 (1973).
[197] RED BOOK, *supra* note 10, at 14, 16.
[198] Parker v. Levy, 417 U.S. 733, 743 (1974).
[199] Penagaricano v. Llenza, 747 F.2d 55 (1st Cir. 1984) (applying *Mindes*); Williams v. Wilson, 762 F.2d 357 (4th Cir. 1985) (applying *Mindes*); Schultz v. Wellman, 717 F.2d 301 (6th Cir. 1983) (applying *Mindes*); Nieszner v. Mark, 684 F.2d 562 (8th Cir. 1982) (applying *Mindes*); Wenger v. Monroe, 282 F.3d 1068 (9th Cir. 2002) (applying *Mindes*); Lindenau v. Alexander, 663 F.2d 68 (10th Cir. 1981) (applying *Mindes*); Stinson v. Hornsby, 821 F.2d 1537 (11th Cir. 1987) (applying *Mindes*).

never addressed it.[200] The Court of Federal Claims has not adopted the *Mindes* test.[201] Since the vast majority of active-duty Army installations are in *Mindes* jurisdictions,[202] the test would likely apply to most cases and preclude judicial review in federal district court. For those Soldiers filing claims in a jurisdiction that does not follow *Mindes* or in the Court of Federal Claims, the doctrine of judicial deference to the military would, nonetheless, likely preclude compensation.

C. Judicial Deference to the Military

The Supreme Court has consistently applied a high level of deference to review of military actions.[203] This deference has been characterized by some legal commentators as the "highest degree of deference,"[204] and it has even been criticized by others as "judicial abdication."[205] The Court itself, however, has clearly stated this deference does not bar all claims: "[T]his Court has never held . . . that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service."[206] Lower courts have struggled in applying this "highest degree of deference" rule because it does not produce meaningful standards to apply in cases.[207] The juridical underpinning of deference to military authorities—separation of powers considerations and institutional inability—are no more help than the Court's own decisions in determining an appropriate standard of

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[200] Hawkens, *supra* note 182, at 69.

[201] The Court of Federal Claims treats nonjusticiable claims under *Mindes* as a motion for failure to state a claim upon which relief can be granted. Bond v. United States, 47 Fed. Cl. 641, 647 (2000).

[202] Troy C. Wallace, *Command Authority: What Are the Limits on Regulating the Private Conduct of America's Warriors?*, ARMY LAW., May. 2010, at 13, 19 n.105 (noting *Mindes* jurisdictions include Alabama, Arizona, California, Colorado, Florida, Georgia, Louisiana, Maryland, New Mexico, North Carolina, Oklahoma, South Carolina, Texas, and Virginia).

[203] *See, e.g.*, Parker v. Levy, 417 U.S 733 (1974); Rostker v. Goldberg, 453 U.S. 57 (1981); Chappell v. Wallace, 462 U.S. 296 (1983).

[204] The Honorable Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 29 WAKE FOREST L. REV. 557, 557 (1994).

[205] C. Thomas Dienes, *When the First Amendment is Not Preferred: The Military and Other 'Special Contexts'*, 56 U. CIN. L. REV. 779, 779 (1988). Major John P. Jurden, *Spit and Polish: A Critique of Military Off-Duty Personal Appearance Standards*, 184 MIL. L. REV. 1, 26 (2005).

[206] *Chappell*, 462 U.S. at 304-05.

[207] Seth Harris, *Permitting Prejudice to Govern: Equal Protection, Military Deference, and Exclusion of Lesbian and Gay Men from the Military*, 17 N.Y.U. REV. L. & SOC. CHANGE 171, 208 (1990).

review.[208] Nonetheless, existing court precedent makes it highly unlikely that a Soldier's taking claim would be reviewable in federal court.

The Supreme Court's separation of powers basis for military deference is predicated on a textual reading of the Constitution. Because of the Constitution's grant of plenary authority over the military to the political branches, the Court has held these branches alone are vested with setting military policy, providing little space for judicial review.[209] "Judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."[210] Indeed, the Court has reasoned that a more expansive use of judicial review of military policy might lead to continuing judicial oversight of the military, which in and of itself would violate the separation of powers principle.[211]

The second basis for deference is the judiciary's institutional inability to evaluate military decisions. The Court has concluded that the military is a "specialized society separate from civilian society,"[212] with different constitutional parameters that "render permissible within the military that which would be constitutionally impermissible outside it."[213] The Supreme Court, whose current Justices have no previous military service,[214] are outsiders looking in at any military action, making review of this separate society particularly difficult. In this vein, the Court has stated it would give "great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest" and to the "essentially professional military judgments" concerning the "composition, training, equipping, and control of a military force."[215] The Supreme Court has not been coy in its basis for deference in this area: "[it is] difficult to conceive of an area of governmental activity in which the courts have less competence,"[216] and

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[208] Jurden, *supra* note 205, at 23-24.
[209] U.S. CONST. art. I, § 8, cls. 12-14; art. II, § 2, cl. 1; *Chappell*, 462 U.S. at 301-02.
[210] Rostker v. Goldberg, 453 U.S. 57, 70 (1981).
[211] Gilligan v. Morgan, 413 U.S. 1, 10 (1973).
[212] Parker v. Levy, 417 U.S. 733, 743 (1974).
[213] *Id.*
[214] Andrew Cohen, *None of the Supreme Court Justices Has Battle Experience*, THE ATLANTIC, Aug. 13, 2012, *available at* http://www.theatlantic.com/national/archive/2012/08/none-of-the-supreme-court-justices-has-battle-experience/260973/ [herinafter A. Cohen].
[215] *Gilligan*, 413 U.S. at 10.
[216] *Id.*

the Court is "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have."[217]

This unique level of deference does not amount to judicial abdication. Even with great deference in place, courts have, on occasion, reviewed and struck down unlawful military policies.[218] The Supreme Court has held that in doffing their civilian clothes Soldiers "may not be stripped of their basic rights"[219] even if those rights are more limited than in the civilian context.[220] Indeed, the military appellate courts in particular have been wont to strike down military orders that too broadly sweep into the private affairs of servicemembers.[221]

In the unlikely event that a Soldier's taking without just compensation claim makes it to trial in either the Court of Federal Claims[222] or federal district court, under the high-level of deference espoused by the Supreme Court, the claim's chances of success are remote. Because no federal statutory or regulatory authority delineates the expiration of a lawfully prescribed controlled substance, MEDCOM does not directly conflict with any specific congressional dictate, and separation of powers is minimally relevant. The issue underlying the policy—suicide—is a multifactorial one that is plaguing the "separate society" of the military at a greater rate than comparable civil society,[223] indicating a uniquely military problem. Given the lack of military experience in current Justices of the Supreme Court and existing precedent lending support to great deference to the military on martial matters, there is little doubt that institutional incompetence would compel a court to bar compensation and defer to the Army's judgment that the MEDCOM policy is necessary to confront the suicide epidemic.

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[217] United States v. Stanley, 483 U.S. 669, 683 (1987); Jurden, *supra* note 205, at 27 ("Indeed, *Parker*'s lasting legacy seemingly is that courts routinely dispense with the need for the military to demonstrate a nexus between their regulations and the purposes they seek to promote.").

[218] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[219] Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962).

[220] Parker v. Levy, 417 U.S. 733, 743 (1974).

[221] *See*, e.g., United States v. Milldebrandt, 25 C.M.R. 139 (C.M.A. 1958) (invalidating order for servicemember to report personal financial transactions to commander while on leave); United States v. Smith, 1 M.J. 156 (C.M.A. 1975) (striking down regulation prohibiting all loans between servicemembers without prior command approval).

[222] The Court of Federal Claims applies the Supreme Court's great deference standard to the military's discretionary decisions, but the Court of Federal Claims will review a military decision to ensure the military's own procedures are followed in a particular case. Bond v. United States, 47 Fed. Cl. 641, 650 (2000).

[223] Mount, *supra* note 10; RED BOOK, *supra* note 10, at 14, 16.

VIII. Problems for Commanders in Disposing of Cases

A. Introduction

The fundamental problem with the MEDCOM policy is that it provides few options for a commander to dispose of policy violations. Unless withheld by superior authority, commanders have near unfettered discretion to dispose of breaches of the UCMJ.[224] The key, of course, is that the alleged act must be a crime. Violations of MEDCOM Regulation 40-51 cannot be appropriately labeled as criminal. As set forth *infra*,[225] violating the policy is not a breach of a general regulation, wrongful use of a controlled substance, or within the orbit of the general article of Article 134. The only potential criminal violation is failure to follow a personal order from a military healthcare provider to the patient regarding the use of prescribed drugs. Such violations, however, will have problems of evidentiary proof and are unlikely to be of widespread applicability.[226] In the absence of a potential disobedience crime, the only legal option left to a commander is to take no UCMJ action against a Soldier who violated the policy.

Outside of criminal mechanisms, commanders are also limited in employing administrative remedies for policy violations. Normally, commanders faced with cases difficult to prove beyond a reasonable doubt may employ administrative measures, which have a lesser standard of proof, to dispose of the case.[227] Such measures cannot be applied here, however, because, with the exception of MROs assigned to MEDCOM, Soldiers have not violated an Army policy. The MEDCOM policy only applies to MROs, not all Soldiers,[228] and Soldiers have no duty to obey a regulation that explicitly does not apply to them. Consequently, commanders struggling with how to deal with breaches of

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[224] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 306 (2012) [hereinafter MCM].
[225] *See infra* part VIII.B, C, D.
[226] *See infra* Part VIII.E.
[227] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (6 June 2011) (RAR 6 Sep. 2011) [hereinafter AR 635-200]; U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION (19 Dec. 1986) [hereinafter AR 600-37].
[228] MEDCOM REG. 2013, *supra* note 16, para. 3.

the MEDCOM policy may at most counsel their Soldiers on the importance of responsible prescription drug use.

B. Wrongful Use

Violating the MEDCOM policy cannot be construed as wrongful use of a controlled substance under the UCMJ.[229] For use of a controlled substance to be wrongful, the MCM sets forth four elements: 1) an accused used a controlled substance; 2) an accused knew he used a controlled substance; 3) an accused knew the controlled substance was contraband; and 4) the use was wrongful.[230] The first three elements are easily met for policy violations determined through a urinalysis. For the first element, use of a controlled substance can be proven through urinalysis test results and expert testimony,[231] and, for the second element, the Soldier's knowledge of the substance used can be inferred through the Soldier's prescription from a medical provider, testimony of the prescribing medical provider, or receipt of the controlled substance by the Soldier from a pharmacist. Finally, the Soldier's knowledge that the controlled substance is contraband, a substance that is "illegal to use"[232] without a legitimate prescription, can be shown through testimony of the prescribing medical provider or pharmacist who filled the prescription.

However, the last element poses an insurmountable problem for deeming such violations as wrongful use. Taken to its logical extreme, the MEDCOM policy would eliminate the innocent-use defense.[233] The use of a controlled substance is wrongful if and only if it is "without legal justification or authorization."[234] In cases with no "evidence to the contrary," the wrongfulness of a Soldier's use of a controlled substance may be inferred based on the circumstances.[235] However, if the

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[229] MCM, *supra* note 224, pt. IV, ¶ 37.
[230] *Id*. pt. IV, ¶ 37b(2); U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 3-37-2c (10 Sep. 2014) [hereinafter BENCHBOOK].
[231] *See* United States v. Campbell, 52 M.J. 386 (C.A.A.F. 2000).
[232] MCM, *supra* note 224, pt. IV, ¶ 37.b.(2); BENCHBOOK, *supra* note 230, para. 3-37-2c n.3.
[233] *See* United States v. Walters, 22 C.M.R. 255 (C.M.A. 1973); United States v. West, 34 C.M.R. 449 (C.M.A. 1964).
[234] MCM, *supra* note 224, pt. IV, ¶ 37.c.(5); United States v. Harper, 22 M.J. 157, 162 (C.M.A. 1986).
[235] United States v. Ford, 23 M.J. 331, 332 (C.M.A. 1987); *see also* BENCHBOOK, *supra* note 230, para. 3-37-2 n.6.

controlled substance used by a Soldier was "duly prescribed"[236] by a physician and the prescription was not obtained by fraud, the use is considered innocent.[237] In such cases, the permissive inference of wrongfulness fails, and the prosecution "must affirmatively prove" the wrongfulness of use.[238]

Once the innocent use defense is raised, the prosecution must prove wrongfulness by establishing the accused fraudulently obtained and used the prescription or by "establishing that the drug was not prescribed for legitimate medical purposes, and the accused was aware of this fact."[239] Or to put it another way, the accused must have known that the doctor medically should not have prescribed the drug. Without more evidence, mere violation of MEDCOM's policy does not establish fraudulent obtainment or use or establish an illegitimate medical purpose for the prescription.[240] To put it simply, the word "wrongful" cannot be construed to make such use in violation of a (probably non-binding MEDCOM policy), in fact, legally "wrongful." And given the defense of innocent use is provided by case law, a regulation employed as a mechanism to make such use wrongful will fail in court, especially in light of the wide latitude given to this defense by military courts.[241]

C. General Regulation

A violation of the MEDCOM policy may appear punishable for failure to follow a general regulation; however, the policy does not meet

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[236] "[D]uly prescribed means no more than prescribed by a physician for legitimate medical purposes." United States v. Moore, 24 C.M.R. 647, 649 (A.F.B.R. 1957).
[237] *Id.*
[238] *Id.*
[239] *Id.*
[240] The limited case-law pertaining to illegitimate medical purposes focuses on the basis for which a doctor prescribes a drug. For example, courts have held using anabolic steroids prescribed by a German doctor for bodybuilding and morphine prescribed by a Korean doctor for drug addiction are for nonmedical purposes and, therefore, are wrongful uses. United States v. Commander, 39 M.J. 972, 978 (A.F.C.M.R. 1994); United States v. Moore, 24 C.M.R. 647, 649 (A.F.B.R. 1957); United States v. Pariso, 65 M.J. 722, 724 (A.F. Ct. Crim. App. 2007); United States v. Gerds, 2012 CCA Lexis 450, at *9 (A.F. Ct. Crim. App. Nov. 29, 2012).
[241] Indeed, the *Lancaster* court held that the use of leftover prescription drugs for an ailment different than the one prescribed, but that still treated the same underlying symptom for which the drug was originally prescribed, is not per se wrongful use, indicating the scope of the innocent-use defenses. United States v. Lancaster, 36 M.J. 1116 (A.F.C.M.R. 1993).

the requisite elements for such a violation.[242] As set forth in the *MCM*, a violation of a general regulation requires three elements: 1) a lawful general regulation; 2) that an accused had a duty to obey; and 3) the accused violated the regulation.[243] While the third element can be easily meet through urinalysis evidence furnished by an MRO, the first two elements cannot be established. Under the *MCM* and case-law, lawful general regulations must: 1) be issued by competent authority;[244] 2) prohibit specific conduct;[245] 3) apply to a specified group, which includes the alleged violator;[246] 4) establish criminal sanctions, not mere policy guidance;[247] 5) not conflict with regulations from superior authority;[248] and 6) not already be prohibited by the punitive articles of the UCMJ.[249]

Under these six criteria, MEDCOM Regulation 40-51 is not a lawful general regulation and Soldiers, outside of those serving as MROs, do not have a duty to obey it. The policy does not establish any criminal sanctions, which is required for general regulations. Within the fourteen pages of the policy,[250] no specific acts are deemed punitive, and explicit enunciations of the punitive nature of the regulation or specified paragraphs within the regulation are required for general regulations to rise above "mere policy guidance."[251] By the policy's own terms, the MEDCOM policy only applies to the exceedingly small subset of Soldiers serving as MROs, not to all Soldiers in the Army.[252] Consequently, only those Soldiers in MRO billets would be among a specified group for which the general regulation applied and having a corresponding duty to obey the terms of the regulation. All other Soldiers in the Army would not be in the specified group and would have no obligation to obey a MEDCOM policy.

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[242] MCM, *supra* note 224, pt. IV, ¶ 16.a.(1).
[243] *Id.*
[244] The *MCM* enumerates several individuals with authority to issue general regulations, including the Secretary of the Army, a general court martial convening authority, and a general officer in command. *Id.*
[245] *See* United States v. Baker, 40 C.M.R. 216 (C.M.A. 1969).
[246] *See* United States v. Jackson, 46 C.M.R. 1128 (A.C.M.R. 1973).
[247] *See* United States v. Green, No. 20010446, 2003 CCA Lexis 137 (A. Ct. Crim. App. June 6, 2003).
[248] *See* United States v. Green, 22 M.J. 711 (A.C.M.R. 1986).
[249] *See* United States v. Curry, 28 M.J. 419 (C.M.A. 1989).
[250] *See* MEDCOM REG. 2013, *supra* note 16.
[251] *See Green*, 2003 CCA Lexis 137.
[252] MEDCOM REG. 2013, *supra* note 16, para. 3.

The MEDCOM policy, however, does pass the other elements required for general regulations. First, the policy provides a specific prohibition on conduct, requiring Soldiers to not use their prescribed controlled substances after six months from the prescription date.[253] Second, the policy does not conflict with regulations from superior authority. In fact, the policy implements guidance from Headquarters, Department of the Army in ALARACT 062/2011.[254] Third, the policy does not prohibit conduct already specified in the punitive articles of the UCMJ. As set forth *infra*,[255] a violation of the MEDCOM policy standing alone does not meet the elements of any crime set forth in the UCMJ. Fourth, competent authority issued the policy because the commanding general of MEDCOM is both a general court martial convening authority (GCMCA) and a general in command.[256] Of course, this order would only extend to the GCMCA's MROs because, pursuant to the MEDCOM policy's own terms, it only extends to those individuals in MEDCOM serving in MRO billets.[257]

D. Article 134, UCMJ—General Article

The "General Article" provides for criminalizing behavior that is not otherwise covered in Article 134 if 1) a Soldier did or failed to do something and 2) the Soldier's conduct was prejudicial to good order and discipline or service discrediting.[258] The key proof issue for such crimes is the second element.[259] For good order and discipline charges, a

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[253] *Id*. para. 8e.

[254] ALARACT 062/2011, *supra* note 20, para. 2A.

[255] *See supra* Part VIII.B, D, E.

[256] Headquarters, U.S. Dep't of Army, Gen. Order No. 1994-4 (18 Feb. 1994). Even though the MEDCOM Commanding General did not personally sign the regulation, it is issued under his name, which has been held sufficient for a valid regulation. United States v. Bartell, 32 M.J. 295 (C.M.A. 1991) (upholding a general order signed "by direction").

[257] MEDCOM REG. 2013, *supra* note 16, para. 3. Whether a Medical Corps Soldier who is assigned to a non-Medical Corps billet (i.e., a brigade surgeon) even has a duty to obey a punitive policy issued by a General Court-Martial Convening Authority who is outside of that Soldier's chain of command (i.e., The Surgeon General) is beyond the scope of this article.

[258] MCM, *supra* note 224, pt. IV, ¶ 60.a.

[259] The preemption doctrine would not bar charging a violation of the MEDCOM policy as a crime. This doctrine prohibits using Article 134 for crimes properly charged under Articles 80 to 132, the punitive articles. MCM, pt. IV, ¶ 60.c.(5)(a). Preemption requires that Congress intended the punitive articles to cover a class of offenses completely. United States v. Kick, 7 M.J. 82, 85 (C.M.A. 1979). While violating the MEDCOM

Soldier's conduct must be "directly prejudicial" to a unit's good order and discipline, not "remote or indirect."[260] While seemingly broad in scope, not every irregular or improper act is a punishable offense.[261] As for service discrediting charges, the Soldier's conduct must have a "tendency to bring the service into disrepute or . . . tend[] to lower it in public esteem."[262] The public does not need actual knowledge of a Soldier's act for it to be service discrediting.[263]

Existing societal norms regarding the use of prescribed controlled substance make a violation of the general article of Article 134 an untenable charge. Because use of a prescribed controlled substance from a healthcare provider for the treatment of a medical ailment is an accepted and established practice in the United States and in the Army,[264] a Soldier's use of a prescribed drug after six months from the prescription date would not have a directly prejudicial impact on a unit's discipline. From the battlefield to the garrison, Soldiers regularly interact with other Soldiers who are using prescribed controlled substances for their medical ailments.[265] Without more, mere violation of a medical policy that only applies to MROs[266]—and does not apply to all Soldiers—would have no impact on the good order and discipline of a unit.

Furthermore, a member of the American public would not look askance at any Soldier for the use of a prescribed controlled substance

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policy does not likely breach any punitive articles of the UCMJ, with the possible exception of a disobedience crime, the closest criminal analogue is wrongful use. The legislative history of Article 112a does not reflect Congress's intent to cover all drug offenses that might be prosecuted under Article 134, so the Article 134 charge would not be preempted. *See* United States v. Erickson, 61 M.J. 230 (C.A.A.F. 2005).

[260] MCM, *supra* note 224, pt. IV, ¶ 60c(2).

[261] United States v. Sadinsky, 34 C.M.R. 343 (C.M.A. 1964).

[262] MCM, *supra* note 224, pt. IV, ¶ 60.c.(3).

[263] United States v. Phillips, 70 M.J. 161 (C.A.A.F. 2011).

[264] *NABP, Stakeholders Release Consensus Document on the Challenges and "Red Flag" Warning Signs Related to Prescribing and Dispensing Controlled Substances*, REUTERS, Mar. 12, 2015, http://www.reuters.com/article/2015/03/12/nabp-consensus-doc-idUSnPn5Nyr3C+91+PRN20150312 (setting forth guidelines for health care practitioners "to ensure that all controlled substances are prescribed and dispensed for a legitimate medical purpose, as well as to provide guidance on which red flag warning signs warrant further scrutiny.").

[265] *See, e.g.*, *Blanchfield Army Community Hospital Pharmacy Limits Controlled Substances*, U.S. DEP'T OF ARMY, http://www.campbell.amedd.army.mil/pao/PR1125%20.pdf (last visited May 19, 2015).

[266] MEDCOM REG. 2013, *supra* note 16, para. 3.

after six-months from the prescription date. Members of the public, which all Soldiers were members of before joining the Army, have no expiration date for their use of lawfully prescribed controlled substances[267] and, logically, would not reasonably consider a Soldier's use of a controlled substance for a legitimate medical condition after six-months from prescription as anything but normal.

E. Personal Order

In a limited number of cases, violating a personal order to comply with the expiration prohibitions from the MEDCOM policy may be a lawful basis for punishment. Orders-violation crimes come in two types: willful disobedience to orders from superior commissioned officers and failure to obey an "other lawful order."[268] Both disobedience crimes are related to the violation of a personal order and would not be based on violating the MEDCOM policy.[269] The willful violation of a lawful order requires four elements: 1) an accused received a lawful command from a superior commissioned officer, 2) that an accused knew at the time that the officer was his superior commissioned officer; 3) an accused had a duty to obey the order; and 4) that an accused willfully disobeyed the order.[270] Willful disobedience is defined as "intentional defiance of authority";[271] mere forgetfulness is not enough.[272] Unlike willful disobedience crimes, violations of "other lawful orders" do not require a command from a superior officer nor willful disobedience. All other elements for these crimes are the same.

Though theoretically possible, willful disobedience crimes are unlikely to appear in practice because of issues proving the first and fourth elements. For the first element, violations will most likely ensnare enlisted Soldiers, warrant officers, and junior company-grade officers because a majority of military medical providers are captains and above in the Medical Corps (MC).[273] Consequently, senior company-grade

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[267] Raleigh E-Mail, *supra* note 72.
[268] MCM, *supra* note 224, pt. IV, ¶ 14.a.(2), 16.a.(2).
[269] *See* United States v. Ranney, 67 M.J. 297 (C.A.A.F. 2009).
[270] MCM, *supra* note 224, pt. IV, ¶ 14.b.(2).
[271] BENCHBOOK, *supra* note 230, para. 3-14-2c.
[272] MCM, *supra* note 224, pt. IV, ¶ 14.c.(2).(f).
[273] *Medical Corps Officer Careers & Jobs*, U.S. DEP'T OF ARMY, http://www.goarmy.com/careers-and-jobs/browse-career-and-job-categories/medical-and-emergency/medical-corps-officer.html (last visited June 5, 2015).

officers and above that violate the personal order of a military medical provider who is junior to them in grade or rank cannot meet the first element. The relative ranks of MC officers to their military patients are not the only problem with the first element. Civilian doctors employed by the Army are not superior commissioned officers. Because civilian doctors do not have UCMJ authority to command Soldiers regarding the expiration of prescription drugs,[274] they cannot issue a personal order in accordance with Article 90(2). Finally, the requirement for "intentional defiance" sets a high-bar for the Government in proving a Soldier's intent, making it difficult to establish in court. Thus, violators of personal orders are limited to junior Soldiers and officers who receive commands from their military medical providers and subsequently display indicia of "intentional defiance" to the personal order. Logically, cases meeting these conditions will be exceedingly rare.

Assuming that the person issuing the order and the person receiving the order are in the same military service, because military and civilian doctors do not have a special status to issue orders, Soldiers cannot be prosecuted for violating the "other lawful orders" of their military medical providers. While willful obedience crimes require superior rank, other lawful orders crimes do not require a Soldier issuing an order to be superior in rank to the Soldier receiving the order, eliminating the relative rank issue between patient and provider. However, a military medical provider lacks a special status under the law that would require another Soldier to obey him or her, unlike, for example, military police Soldiers in the performance of their duties have when dealing with superiors.[275]

IX. A Better Tool to Meet the Army's Intent

A. Introduction

While legal, the problem with the MEDCOM policy is that it is an inappropriate tool to regulate prescription drug use. A better policy tool exists. Instead of promulgating the policy through an obscure MEDCOM regulation, pursuant to Article 92 of the UCMJ,[276] the Secretary of the Army has the authority to issue a general order

[274] MCM, *supra* note 224, pt. IV, ¶ 16.b.(2).(a).
[275] *Id*. ¶ 16c(2)(c)(i).
[276] UCMJ art. 92 (2012).

regulating prescribed controlled substance use in the Army, providing commanders a criminal and administrative means to deal with Soldiers who violate the general order. The appendix contains a proposed general order from the Secretary of the Army. Issuing the order from the service secretary, instead of a general court martial convening authority, ensures a uniform system across the Army that all Soldiers have a duty to obey. The Army would not be blazing a novel legal trail by regulating prescription drug use through a general order. In fact, the Secretary of the Navy recently issued a general order barring the use of prescribed controlled substances by Sailors and Marines for the purpose of becoming intoxicated.[277]

B. Scope of the General Order

Because of gaps in the current MEDCOM policy, the general order should not merely recite the current policy restrictions. The Army has two basic means to control a Soldier's prescription drug usage: 1) enforcing limits on the amount of controlled substances a military provider may prescribe or 2) limiting the time for which Soldiers may take their prescriptions. The current MEDCOM policy relates only to the latter; it does not provide guidance or restrictions to military providers on prescription dosages. In part, the failure to address the first pathway is due to the policy mechanism employed. Because the prohibition is contained in a regulation regarding the evaluation of urinalysis test results, there is no logical way to implement a policy minimizing prescription dosages.[278] However, by failing to address this pathway, the Army loses the ability to limit any constitutional taking concerns and decrease ongoing prescription drug costs. Accordingly, the general order should include a mandate, with limited exceptions, that military providers only prescribe the minimum dosage necessary to treat the underlying medical condition.

The general order should also cover a glaring hole in medical surveillance from the current MEDCOM policy—prescriptions from civilian providers. Because there is no Army-wide policy requiring Soldiers to submit civilian prescriptions to their chain-of-command, MROs are left the burdensome task of tracking down Soldiers with

[277] U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 5300.28D, MILITARY SUBSTANCE ABUSE PREVENTION AND CONTROL para. 5c (23 May 2011).
[278] *See* MEDCOM REG. 2013, *supra* note 16.

positive urinalysis results for Schedules II through V controlled substances to determine if they were issued any prescriptions from civilian providers.[279] Employing MROs in this investigative method is a poor, and perhaps inappropriate, use of an MRO's time. This surveillance provision would also be particularly helpful for posts without an MTF, such as Fort Drum, New York, [280] or assignments in areas, such as recruiting detachments,[281] that may lack a nearby Army post and where Soldiers may receive almost wholly civilian-provided healthcare. The Navy has also pioneered in the area of prescription drug surveillance. In 2009, the Chief of Naval Operations issued an order requiring Sailors to turn in their prescriptions for controlled substances prescribed by civilian providers regardless of who paid for the prescription drugs.[282] Along with improving medical surveillance in the ranks, the general order would improve continuity of care as Soldiers move from post-to-post because military providers would have a more complete picture of their patients' medical history. Implementing the expiration policy along with these two other measures—improving medical surveillance of civilian-provided prescriptions and limiting dosage to the minimum required to treat the underlying condition—has a higher likelihood of reducing the use of controlled substances in the Army and suicides.

C. Lawfulness of the General Order

All orders from a commander, including the Secretary of the Army, are presumed lawful even if the order interferes with a Soldier's private rights or personal affairs.[283] An order's lawfulness turns on the purpose for which the order was issued.[284] Lawful orders must be "reasonably

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[279] *Id.* para. 9d.

[280] *U.S. Army Medical Treatment Facilities*, U.S. DEP'T OF ARMY, http://evans.amedd.army.mil/newcomer/milhosp2.htm (last visited May 19, 2015).

[281] *U.S. Army Recruiting Command Organization Chart*, U.S. DEP'T OF ARMY, http://www.usarec.army.mil/downloads/hq/USAREC_org_chart.pdf (last visited May 19, 2015).

[282] U.S. DEP'T OF NAVY, CHIEF, NAVAL OPERATIONS INSTR. 5350.4D, NAVY ALCOHOL AND DRUG ABUSE PREVENTION AND CONTROL para. 6i (4 Jun. 2009) ("Members shall report all prescription medications received from non-military Medical Treatment Facilities (MTFs) to their chain of command and ensure they are entered into their military health record.").

[283] MCM, *supra* note 224, pt. IV, ¶ 14.c.(2).(a); United States v. Hughey, 46 M.J. 152, 154 (C.A.A.F. 1997).

[284] Jurden, *supra* note 205, at 26.

necessary" to the completion of a military mission or promote the morale, discipline, and usefulness of the unit.[285] Additionally, such orders must be "directly connected with the maintenance of good order in the service."[286] Courts routinely defer to military determinations that internal policies are rationally related to their aims.[287] In fact, lawfulness is not even an element of disobedience offenses; the lawfulness of an order is a matter of law determined by a military judge.[288] This statutory hurdle exists, at least in part, because "[o]bedience to lawful orders is at the very heart of military discipline."[289] Indeed, the seminal Supreme Court case on military obedience, *Parker v. Levy*, held that the necessity of obedience to orders and discipline in the military allows the restriction of constitutionally guaranteed rights even though such action would be impermissible in a civilian setting.[290]

D. Challenges to the General Order

A Soldier accused of violating an order can challenge the order's legality, but the Soldier bears the burden of rebutting the presumption of an order's lawfulness.[291] Lawful orders have five main elements: 1) the order was issued by competent authority; 2) the order contains a specific mandate to do or not do something; 3) a rational relation between the order and a military duty; 4) the order cannot require the commission of an illegal act; and 5) the order cannot impermissibly intrude on a Soldier's constitutional or statutory rights.[292] The general order readily meets four of the five elements:

1. Element One: Competent Authority

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[285] MCM, *supra* note 224, pt. IV, ¶14.c.(2).(a).(iii).
[286] *Id.* at ¶ 14.c.(2).(a).(iii).
[287] Jurden, *supra* note 205, at 27 ("Jurisprudence in the wake of *Parker v. Levy* virtually has obliterated the need for the military truly to articulate a rational basis for the internal regulations it promulgates."); *see, e.g.*, United States v. Young, 1 M.J. 433 (C.M.A. 1976).
[288] 10 U.S.C. § 851(b) (2012); United States v. New, 55 M.J. 95, 105 (C.A.A.F. 2001).
[289] Colonel Michael J. Hargis et al., *Annual Review of Developments in Instructions 2005*, ARMY LAW., Apr. 2006, at 80, 80.
[290] Parker v. Levy, 417 U.S. 733, 757 (1974).
[291] *See* United States v. Hughey, 46 M.J. 152, 154 (C.A.A.F. 1997).
[292] United States v. Deisher, 61 M.J. 313, 317 (C.A.A.F. 2005).

The *MCM* specifically provides that a Secretary of a Military Department, such as the Secretary of the Army, may issue a general order.[293]

2. Element Two: Specific Mandate

The order is a specific mandate for three actions: 1) all Soldiers to not use a prescribed controlled substance after 180 days from the prescription's fill date, 2) all Soldiers to turn in all prescriptions from civilian providers to military healthcare personnel, and 3) for military healthcare personnel to only provide sufficient prescription drug dosages to treat the underlying medical condition. Because the order is "specific, definite, and certain" as to the permissible and impermissible acts, the order does not suffer from vagueness.[294]

3. Element Three: Rational Relation

The general order easily meets the requirement of a rational relation between the order and military duty because it has multiple military purposes that are directly tied to the good order and discipline of the force. The order attacks the correlation between prescription drug use and suicide, major problems that the Army has not successfully reigned in. The order ensures the proper use of controlled substances in the ranks, engendering trust among Soldiers. It protects Soldiers and civilians from the unlawful diversion of controlled substances by Soldiers or third parties, ensuring the Army's place as a responsible institution in local communities. The order improves the fitness of the force by enhancing medical knowledge regarding military patients and improving continuity of care as Soldiers move from post to post. Finally, in an era of diminishing funds,[295] the order reduces costs for prescription drugs, freeing money, albeit probably small amounts, for other uses. All of these justifications are rationally related to the three mandates in the general order.

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[293] MCM, *supra* note 224, pt. IV, ¶ 92.

[294] United States v. Womack, 29 M.J. 88, 90 (C.M.A. 1989).

[295] Michelle Tan, *Chief: Sequestration Could Create 'Hollow Army'*, ARMY TIMES (Jan. 22, 2015 5:25 P.M.), http://www.armytimes.com/story/military/capitol-hill/2015/01/22/odierno-sequestration-hollow-army/22156079/.

4. Element Four: Ban on Illegal Acts

None of the three mandates in the general order require commission of an illegal act.[296]

5. Element Five: Intrusions on Private Rights

The three mandates in the general order circumscribe a Soldier's property rights only to the extent a court finds that the MEDCOM policy results in a taking of property without just compensation. The Fifth Amendment only provides for the right to just compensation for property seized by the government;[297] this is not a broader constitutional right to own property.[298] The potential population of Soldiers whose property was taken by the MEDCOM policy is likely small. At most, this general order would only apply to the subset of Soldiers who were denied a new prescription for a controlled substance because their medical providers had concluded that they lack an underlying medical condition necessitating the prescription drug. For all other Soldiers impacted by the MEDCOM policy, there is no intrusion on the property rights set forth in the Fifth Amendment. For those Soldiers whose property a court determines was taken without just compensation, as outlined *supra*,[299] the order's three acts rationally relate to military duties and thus do not impermissibly interfere with private rights. In the military, constitutional rights are balanced against the necessity for military duties to maintain an effective fighting force; as long as an order is rationally related to the military purpose, what might be constitutional violations in the civilian community may be permissible.[300] Military purposes include, among other things, ensuring the health of the force, preventing conduct detrimental to the service, and protecting civilians from harm.[301]

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[296] *See supra* Part VI, IX.C.

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

[298] *See* Kelo v. City of New London, 545 U.S. 469 (2005) (upholding a city's right to seize private property for private commercial development).

[299] *See supra* Part IX.D.3.

[300] Womack, 29 M.J. at 90 ("[T]he Armed forces may constitutionally prohibit or regulate conduct which might be permissible elsewhere."); United States v. Padgett, 48 M.J. 273, 276 (C.A.A.F. 1998) ("An order purporting to regulate personal affairs is not lawful unless it has a military purpose.").

[301] United States v. Dumford, 30 M.J. 137, 138 n.2 (C.M.A. 1990) ("We have absolutely no doubt that preventing a servicemember who has HIV from spreading it to the civilian population is a public duty of the highest order and, thus, is a valid military objective."); United States v. New, 55 M.J. 95, 107 (C.A.A.F. 2001) ("[W]e held that the order in

Though constitutional rights are more limited in the military, there are nonetheless bounds. "While an order may reasonably limit the exercise of an individual service person's rights, it may not arbitrarily or unreasonably interfere with the private rights or personal affairs of military members."[302] One legal commentator, however, has argued that the rational relationship bar is so low that "almost any order . . . can be justified . . . in furtherance of a service's duty to protect the morale, discipline, and usefulness of its members."[303] Low bar notwithstanding, military courts have occasionally struck down regulations that sweep too far into the personal affairs of Soldiers. For example, an order directing a Soldier to report all private financial transactions,[304] a regulation prohibiting private loans without command consent,[305] and a regulation prohibiting alcohol "in the system" at all times during the duty day[306] were all struck down by military courts for sweeping too far into the private affairs of Soldiers.

Even though the general order may regulate private rights for a limited subset of Soldiers, the order's narrow tailoring ensures minimal intrusion on individual rights. Given the deference to the military's justifications for the order, a court is unlikely to strike down the general order. If challenged, the issue would be largely one of first impression. The only marginally related decision of authority, *United States v. Spencer*, was a case regarding medical surveillance that is distinguishable from the proposed order. Unlike *Spencer*, in which an order to turn over all civilian medical records to a military clinic was held to be overbroad, the proposed order only requires the turn-in of prescriptions from civilian providers, which has a clear nexus to the Army's specific ability to evaluate the medical necessity of the use of controlled substances.[307]

The proposed general order in the appendix also meets the requirements set forth in case law discussed *supra*.[308] Based on the

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McDaniels [an order for a Marine not to drive his vehicle because he had been diagnosed with narcolepsy] was within military authority because it protected other persons.").

[302] United States v. Wine, 28 M.J. 688, 689 (A.F.C.M.R. 1989).

[303] Captain Frederic L. Borch, III, *Trial Defense Service Note: The Lawfulness of Military Orders*, ARMY LAW., Dec. 1986, at 47.

[304] *See* United States v. Milldebrandt, 25 C.M.R. 139 (C.M.A. 1958).

[305] *See* United States v. Smith, 1 M.J. 156 (C.M.A. 1975).

[306] *See* United States v. Wilson, 30 C.M.R. 165 (C.M.A. 1961)

[307] *See* United States v. Spencer, 29 M.J. 740 (A.F.C.M.R. 1989).

[308] *See supra* Part VIII.C.

totality of the document,[309] the general order provides clear criminal sanctions, not mere policy guidance,[310] by explicitly prohibiting Soldiers from using expired controlled substances, requiring Soldiers to turn in civilian-provided prescriptions, and mandating that military healthcare providers prescribe no more than the minimum adequate amount of controlled substances to treat the underlying medical condition. The applicable population for the three requirements—active-duty Soldiers—are clearly specified in the order. No punitive articles of the UCMJ cover the three limitations in the order.[311] And finally, the general order does not detract from the effectiveness of other regulations because the highest officer in the Department would issue it.[312]

X. Conclusion

At a minimum, MEDCOM must issue clarifying guidance to MROs on the proper standards for adjudicating cases. Given the oblique way in which the interim guidance was rescinded (i.e., publishing a new MEDCOM Regulation 40-51 that did not include the two exceptions), MROs, at least in some cases, are applying two different MR standards for cases, resulting in inequitable treatment for similarly situated Soldiers. This issue is illustrated by two recent cases at Fort Carson, Colorado. In both cases, the Soldiers had used their lawfully prescribed controlled substance outside of the six-month window established in the current MEDCOM policy.[313] In one case, an MRO deemed a Soldier's use of a controlled substance authorized because the Soldier's medical provider had documented that the Soldier still had a medical need for the treatment and had, accordingly, given the Soldier permission to continue to use it.[314] This rationale reflects the first exception to the interim guidance, which, by the time of the case in late 2013, was no longer applicable.[315] In the second case, another MRO at Fort Carson determined a Soldier's use was illegitimate because there was no

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[309] United States v. Nardell, 21 C.M.R. 322, 327 (C.M.A. 1972).
[310] *See* United States v. Green, No. 20010446, 2003 CCA Lexis 137 (A. Ct. Crim. App. June 6, 2003).
[311] *See supra* Part VIII.
[312] *See* United States v. Green, 22 M.J. 711 (A.C.M.R. 1986).
[313] Based on the author's experience as a Trial Counsel with the 2d Brigade, 4th Infantry Division, MROs at Fort Carson would apply different standards for review of positive samples for prescribed controlled substances.
[314] *Id*.
[315] Interim Guidance, *supra* note 104, para. 3.

prescription within six months of the urinalysis.[316] This determination reflects the current standard from the MEDCOM policy.[317] Because two MROs from the same post with similar cases reached two different results, it is possible that this type of error is happening Army-wide. The Army must take immediate action to fix this problem. Clarifying the standard of review, however, still leaves commanders in the lurch for determining how to dispose of cases for which traditional administrative and criminal tools simply do not work.

Lending more credence for change, support for the policy across other branches of the Army is crumbling. Late in 2014, the Army's Criminal Investigation Command took the step of disavowing the policy.[318] The new approach unfounded any criminal offense for which a Soldier was titled because of a violation of the MEDCOM policy.[319] This approach incorporates the innocent-use defense; only if a Soldier does not have a prescription for the controlled substance or if the Soldier has a prescription and obtained more of the medication illegally will a Soldier be titled for wrongful use of a controlled substance under Article 112a of the UCMJ.[320] The MEDCOM policy's loss of support by the Army's lead military criminal investigative organization for drug crimes should sound its death knell.

Though beyond the scope of this paper, the Army must also unwind any previous adverse action taken against Soldiers under the flawed MEDCOM policy. At the unit-level, commanders must vacate previous administrative actions, such as letters of reprimand,[321] based on violations of the MEDCOM policy. The Office of the Judge Advocate General should review for post-trial relief all court-martial convictions from 2011 to 2015 to identify erroneous convictions based on the MEDCOM policy.[322] For Soldiers no longer in the military, the Army Board of Correction for Military Records and other administrative

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[316] *Id.*
[317] MEDCOM REG. 2013, *supra* note 16, para. 9e.
[318] Based on the author's experience as a Trial Counsel with the 2d Brigade, 4th Infantry Division and in the 63rd Graduate Course at The Judge Advocate General's Legal Center and School, CID revised its "titling" policy for Soldiers who violated the MEDCOM policy. This change resulted in all previous "foundings" of violations of article 112a of the UCMJ for breach of the MEDCOM policy being "unfounded."
[319] *Id.*
[320] *Id.*
[321] *See, e.g.*, AR 600-37, *supra* note 227.
[322] *See* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-39 (3 Oct. 2011).

review boards must undo any previous administrative actions taken against Soldiers pursuant to the MEDCOM policy.[323]

The simplest fix for the troubled MEDCOM policy is to revert to the prior standard, which did not mandate an expiration date for the use of lawfully prescribed controlled substances.[324] The change would align Army policy with federal regulatory and statutory standards for prescription drug use and eliminate any litigation risk based on an unconstitutional regulatory taking. Of course, this change would obviate the goal of reducing the correlation between suicides and prescription drug use by Soldiers.

Given the changes in data supporting the *Red Book's* findings in 2010, this rollback deserves a thorough review. Since the MEDCOM policy went into effect in early 2011, the number of suicides in the Army, at least for the active-duty force, peaked in 2012 and has subsequently fallen.[325] In 2014, there were 135 suicides by active-duty Soldiers compared to the 165 suicides that marked the apex of the epidemic in 2012.[326] Following the *Red Book* and *Gold Book*'s recommendation, the Army instituted numerous policy changes to decrease the number of suicides, including new suicide prevention campaigns and programs that encourage Soldiers to voluntarily surrender prescription drugs at "take back days" at military pharmacies to minimize the presence of extraneous controlled substances in the home.[327] In short, given all the changes the Army implemented, it is

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[323] *See, e.g.*, U.S. DEP'T OF ARMY, REG. 15-185, ARMY BOARD FOR CORRECTION OF MILITARY RECORDS (31 Mar. 2006).

[324] Because neither physicians nor pharmacists are required to provide expirations for controlled substances, the previous standard's exception for use unless beyond a "clearly labeled expiration date" should be rescinded. *See* MEDCOM REG. 2013, *supra* note 16, para. 8f.

[325] Lolita C. Baldor, *Military Suicides Up Slightly in 2014*, ASSOCIATED PRESS, Jan. 13, 2015, *available at* http://www.militarytimes.com/story/military/pentagon/2015/01/16/defense-department-suicides-2013-report/21865977/; Lisa Ferdinando, Army News Serv., *Number of Suicides in Army Drops in 2013*, U.S. DEP'T OF ARMY (Feb. 3, 2014), http://www.army.mil/article/119301/.

[326] *Id.*

[327] Patricia Kime, *DoD: Military Suicide Rate Declining*, MILITARY TIMES (Jan. 16, 2015, 4:01 P.M.), http://www.militarytimes.com/story/military/pentagon/2015/01/16/defense-department-suicides-2013-report/21865977/.

unclear what effect, if any, the MEDCOM policy itself had on the recent drop in active-duty Soldier suicides.[328]

Prescription drug use across the Army is also far less than originally estimated in 2010. In 2008, DoD survey data indicated a sharp rise in prescription drug use by servicemembers, growing from two percent in 2002 to eleven percent in 2008.[329] In 2013, DoD reviewed its methodology from 2008 and issued a disclaimer that methodology changes to the 2008 survey made the results questionable.[330] A subsequent DoD survey found a drop, not an increase, in prescription drug use from 2002, dipping from 2 percent in 2002 to 1.3 percent in 2011.[331] Given the connection between suicide and prescription drug use was based on an observed correlation, not established causation, and the retraction of survey data indicating a pervasive prescription drug problem in the military, the basis for the prescription expiration is not as strong as originally believed.

If the Army desires to retain this policy, the current MEDCOM regulation must be rescinded and a general order instituted in its place. While individual commanders could issue personal orders to each and every Soldier in their commands to not use prescribed controlled substances six-months after the prescription date, the potential for minor, but legally significant, differences in orders from different commanders and proving the elements of a disobedience crime for a mobile population are precisely the reason why the Army must have one order, enshrined in a general order, applicable to all Soldiers at all times. As it stands, the current MEDCOM policy provides an insufficient basis by which a commander can determine how to dispose of cases. Further, even if the policy had a sufficient legal basis for commanders to act on cases, it also has significant policy gaps; the policy does not improve medical surveillance of Soldiers with prescriptions from civilian providers, nor does it limit the dosages prescribed by uniformed providers to Soldiers to minimize leftover prescriptions. In sum, the MEDCOM policy is, in multiple respects, an inadequate tool for the stated policy ends.

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[328] *See* RED BOOK, *supra* note 10; GOLD BOOK, *supra* note 1.
[329] U.S. DEP'T OF DEFENSE, 2011 DEPARTMENT OF DEFENSE HEALTH RELATED BEHAVIORS SURVEY OF ACTIVE DUTY MILITARY PERSONNEL, at ES-5 (2013).
[330] *Id.* at ES-16.
[331] *Id.* at ES-5.

The appendix contains a proposed general order from the Secretary of the Army that solves the MEDCOM policy's program gaps and legal problems. The general order lawfully imposes a mandatory expiration date, addressing the suicide correlation found by the *Red Book*. The general order applies Army-wide and provides commanders a lawful basis to dispose of cases by Soldiers alleged to have violated the policy, imperiling any Soldiers who may be using prescription drugs as cover for their drug dependency. The general order improves medical surveillance of prescription drug use by mandating Soldiers turn-in all civilian provider prescriptions and requiring uploading those prescriptions into medical databases, improving continuity of care across the Army. The general order also cuts down on potential distribution of prescription drugs to others, including civilians in the local community, by limiting the dosage prescribed to ensure only a minimum amount of leftover drugs following a treatment regime; such a policy supports the Army's reputation and obligation as a responsible institution in the community. Given the Army's historical experience with drug use in the ranks, especially during the Vietnam conflict, the general order bolsters fellow Soldiers' trust and confidence that their comrades are appropriately using prescription controlled substances. And finally, a modest fiscal benefit may result from reducing the number of prescription controlled substances paid for by the Army.

Implementing a new policy will cause some turmoil. Commanders and MROs will need training on the new standard, and in the short run, the change will likely increase the administrative processing times for positive urinalysis samples. Military healthcare providers will likely have an increase in visits for prescription refills and processing civilian prescriptions turned in by Soldiers. However, the onus of the administrative burden will fall squarely on the person best positioned to shoulder it—the Soldier with a prescription. That Soldier will have the individual responsibility to take the prescription in accordance with the Army's expiration policy and to provide proof of any prescriptions from civilian providers. In the long run, this should reduce the processing time for MROs, who would no longer have to contact Soldiers about civilian prescriptions, enable commanders to adequately supervise and control prescription drug use in their formations, and ensure military healthcare providers have an adequate opportunity to monitor the safe use of prescription drugs by their patients.

In a valiant effort to stem the tide of suicides, the Army has taken many measures to reduce unnecessary, tragic deaths like Captain Peter

Linnerooth's.[332] Each of these measures, however, must be done in a fair and legal manner. The current MEDCOM policy is neither. Suffering from unintended consequences, glaring policy gaps, and insufficient legal analysis, the MEDCOM policy cannot stand.

[332] *See* RED BOOK, *supra* note 10; GOLD BOOK, *supra* note 1.

Appendix

GO 2015-__

GENERAL ORDER
NO. 2015–__ }

HEADQUARTERS
DEPARTMENT OF THE ARMY
WASHINGTON, DC,

1. Purpose. This General Order regulates prescribed controlled substance use in the Army to ensure the good order and discipline of units. Prescribed controlled substances are those items listed on the Drug Enforcement Agency's Schedules II through V.

2. Applicability. This General Order applies to all Soldiers on active-duty in the United States Army.

3. Statement of Military Purpose and Necessity. This General Order ensures the good order and discipline of Army units by setting conditions for the safe use of prescribed controlled substances by Soldiers pursuant to a legitimate medical need. The suicide epidemic plaguing our Soldiers is correlated with the long-term use of prescription controlled substances. Given the rise of prescription drug use in the Army and civil society over the last decade, this General Order will also cut down on the potential diversion of controlled substances to other Soldiers and civilians by limiting the supply of prescription drugs, ensuring the Army's reputation as a responsible institution in our local communities. And as the Army's experience in Vietnam has illustrated, illegal drug use is a scourge in our ranks that undermines the trust and confidence among Soldiers that is so critical to our military effectiveness. As a mobile population, this General Order ensures Soldiers will receive improved continuity of medical care because military medical providers will have a better understanding of their patients's medical history. And in an era of fiscal constraint, this General Order will reduce medical costs and thereby ensure funding to train, deploy, and defeat our enemies.

4. Prohibited activities.

a. All controlled substances lawfully prescribed to Soldiers by healthcare providers, including civilian healthcare providers, will expire 180 days after the prescription's fill date. Soldiers are not authorized to use expired controlled substances.

b. Soldiers will provide a copy of all current controlled substances prescribed by a civilian provider to their servicing military healthcare provider. The military healthcare provider will ensure the Soldier's prescription is entered into the appropriate military healthcare databases and will ensure the Soldier understands the Army's expiration policy for prescribed controlled substances. For Soldiers assigned to areas without access to military healthcare providers, those Soldiers will provide a copy of their current controlled substance prescriptions from civilian providers to the Office of the Surgeon General of the Army.

c. Uniformed military healthcare providers may only prescribe the minimum necessary controlled substances to treat a Soldier's underlying medical condition. At most, a uniformed military healthcare provider can issue a prescription for a controlled substance adequate for 180 days of treatment.

5. Punitive Order. Paragraph four of this General Order is punitive. Soldiers who violate paragraph four may be punished under the Uniform Code of Military Justice.

6. Individual Duty. All Soldiers to whom this General Order applies are charged with the individual responsibility to know and understand the prohibitions specified in paragraph four.

7. Commanders and supervisors.

a. This General Order imposes a time limitation on prescriptions; however, it will not be construed as a limitation on access to medical care. Commanders of Soldiers with medical conditions necessitating long-term treatment will ensure their continued access to medical services, including controlled substance prescriptions, in accordance with a medical provider's instructions for care.

b. Commanders and military and civilian supervisors will encourage, but not require, Soldiers with expired controlled substances to turn in all unused drugs for safe disposal to either their local military law enforcement organization or the pharmacy at the closest Military Treatment Facility (MTF).

c. Commanders and military and civilian supervisors must ensure that all their assigned Soldiers know and understand this policy.

d. Installation commanders will ensure the local military law enforcement organization complies with all controlled substance take-back requirements under federal laws and regulations.

e. MTF commanders will ensure all on-site pharmacies have established a controlled substances take-back program in accordance with federal laws and regulations.

8. Effective date. This General Order will be effective ninety days from the date of publication to provide Soldiers time to turn in their civilian prescriptions for inclusion in their military healthcare records.

9. Waiver authority. For Soldiers with conditions necessitating long-term treatment or in areas that prevent timely access to medications (e.g., on a contingency operation), the commander of the nearest MTF, or his designee, may issue an exception to this policy. If there is no local MTF, an O-5 medical service or medical corps officer assigned to the local command may issue an exception to this policy. This exception must be annotated in Soldiers's healthcare records by their servicing military healthcare provider or a designated medical service officer.

John M. McHugh
Secretary of the Army

MILITARY CONSTRUCTION PROJECTS: EXPLORING ALTERNATE FUNDING SOURCES IN TIMES OF FISCAL AUSTERITY

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> *This will be a tough budget year, and almost every area of government will be affected by the austere funding levels caused by Sequestration. However, this legislation prioritizes spending to protect critical programs, including infrastructure for our troops, programs for our military families, and the quality care our nation's veterans deserve.*[1]

I. Introduction: Military Construction During Sequestration and Fiscal Austerity[2]

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[1] Press Release, U.S. House of Representatives, House Appropriations Committee to Consider Fiscal Year 2014 Military Construction (May 14, 2013), *available at* http://www.appropriations.house.gov/news/ documentsingle.aspx?DocumentID=333737. Congressman Hal Rogers of the House Appropriations Committee commented on the impacts of Sequestration on projected Military Construction (MILCON) initiatives.

[2] *See* Paul M. Johnson, *A Glossary of Political Economy Terms*, AUBURN UNIV. DEP'T OF POLITICAL SCI., http://www.auburn.edu/~johnspm/gloss/sequestration (last visited Mar. 18, 2014) (providing a historical review of the term "sequestration"). The Budget Control Act (BCA) has been referred to using various forms of the word "sequestration."

Military Construction (MILCON), a congressionally appropriated funding measure for major construction projects, encompasses a wide expanse of Department of Defense (DoD) spending. Diminished MILCON funding can devastate vital "quality of life" infrastructure programs, including family housing, military medical treatment facilities, DoD schools, servicemember work centers, and Veterans Affairs (VA) construction.[3] Despite the importance of these projects, in this era of fiscal austerity, and as Congressman Hal Rogers noted above, Congress will continue to scrutinize funding for these programs now and in the future.[4]

Proper MILCON funding ensures a strong and stable national defense by providing for the military's overall infrastructure. Springing from the congressional budget process, fiscal law considerations drive military spending.[5] The United States government's monetary resources are declining, and the military must seek new and innovative ways to fund MILCON projects with lesser appropriations. In certain circumstances, Congress has allowed government agencies to partner with the private sector to bridge funding gaps. During this period of fiscal austerity, Congress needs to expand the DoD's ability to leverage the private sector's funding resources by allowing the military to engage in more robust private partnership ventures. This will strengthen the military's ties with the private sector and will alleviate the demand for dwindling appropriated funds.

To support this proposition, this paper will explore a number of issues. The current fiscal environment and state of disrepair of many military buildings require a renewed look at alternate funding streams. Because of the Anti-deficiency Act (ADA), the military has been reluctant to partner with the private sector for fear of impermissibly augmenting MILCON projects. The United States Air Force Academy (USAFA) encountered such difficulties during one of its recent MILCON endeavors. There have been limited instances when Congress has provided statutory authority to engage in public-private partnerships, and those statutes assuage ADA concerns. For instance, the Military

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[3] *See generally* DANIEL H. ELSE, CHRISTINE SCOTT & SIDATH VIRANGA, CONG. RESEARCH SERV., R42586, MILITARY CONSTRUCTION, VETERAN AFFAIRS, AND RELATED AGENCIES: FY 2013 APPROPRIATIONS 1 (2012).

[4] Press Release, *supra* note 1.

[5] *See generally* OSCAR R. GONZALES, CONG. RESEARCH SERV., RL34709, ECONOMIC DEVELOPMENT ASSISTANCE FOR COMMUNITIES AFFECTED BY EMPLOYMENT CHANGES DUE TO MILITARY BASE CLOSURES (BRAC) 1 (2011).

Housing Privatization Initiative has substantially increased the quality of military family housing while saving appropriated funds. In another example, Congress has authorized the establishment of congressionally chartered organizations; this legislatively conferred status has allowed these entities to use federal and nonfederal monies to build and maintain their infrastructure.

Additionally, Congress has strongly supported the Fisher House program and has allowed it to combine appropriated and donor funds to assist wounded servicemembers and their families. Finally, Congress—noting a severe lack of appropriated funds—enacted a law that specifically *required* the use of private-sector funds to supplement appropriations set aside for the presidential-library program. In light of these examples, the conclusion is clear: it is time to extend more of these public-private partnership opportunities to MILCON so the military can fully benefit from these synergistic relationships.

II. Indicators of Decreased MILCON Appropriations

A. The Reality of Sequestration and Inadequate MILCON Funding

The 2013 Budget Control Act (BCA)[6] required across-the-board budgetary cuts to all non-exempted executive agencies and also required the DoD to modify its budget downward to FY 2008 spending levels.[7] The BCA capped future military expenditures to ensure the defense budget "remain[s] essentially flat for the next five years."[8] In response, Secretary of Defense Chuck Hagel commented, "To implement the steep and abrupt reductions that have been required under Sequestration, we've had to make very difficult decisions to reduce, stop and defer many activities and programs that keep our military prepared to fight."[9]

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[6] 2 U.S.C.A. §901a (West 2013).

[7] Todd Harrison, *Center for Strategic and Budgetary Assessments: Analysis of the FY 2013 Defense Budget and Sequestration*, CTR. FOR STRATEGIC & BUDGETARY ASSESSMENTS 3 (2012), http://www.csbaonline.org/ wp-content/uploads/ 2012/08/Analysis-of-the-FY-2013-Defese-Budget.pdf. Mr. Harrison is a senior fellow for Defense Budget Studies, Center for Strategic and Budgetary Assessments; his biography is available at http://www.csbaonline.org/about/people/tharrison/.

[8] *Id.* at 17.

[9] Amanda Terkel, *Sequestration Damaging to Military Readiness*, HUFFINGTON POST, Jul. 22, 2013, http://www.huffingtonpost.com/2013/07/22/sequestration-military-readiness_n_3635686.html.

Secretary Hagel's comments suggest that the DoD will have to continue protecting the United States with far fewer resources than in past years.

The joint chiefs testified to Congress on sequestration's projected impacts.[10] While military personnel (MILPER) and operations and maintenance (O&M) appropriations received intense focus, the service chiefs also addressed the repercussions of MILCON cuts.[11] The service chiefs warned of the long-term impacts of decreased funding for ship-building, dormitory and barracks upgrades, and training-range construction; in the future, the military's overall quality of life will decline and its ability to achieve mission objectives will degrade.[12] Congress also learned that infrastructure issues—specifically the quality of life aspects of both family housing and military work centers—were common concerns to all the services.[13] But even with those warnings, MILCON funding is nevertheless projected to decrease.[14]

Beyond the testimony of the joint chiefs, the numbers demonstrate sequestration's impact. In May of 2013, for example, the United States House Appropriations Committee released the initial FY 2014 Military Construction and Veterans Affairs Appropriations bill for subcommittee review. This legislation specifically addressed cuts to family housing, military medical facilities, and DoD schools. Congress proposed a $646 million cut to MILCON programs, encompassing large, small, and rehabilitation projects. The bill additionally cut funding for ten proposed military-construction projects and reduced funding for six others. In addition, military family housing lost $106 million from the previous fiscal year, the VA construction fund did not provide funding for any major new hospital construction projects, and the Arlington National Cemetery incurred a $93.9 million cut from the previous fiscal year.[15] The final 2014 MILCON and Veterans Affairs Appropriation Bill

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[10] Amaani Lyle, *Service Chiefs Testify on Risks of Sequestration*, ARMED FORCES PRESS SERV., http://www.af.mil/ News/ArticleDisplay/tabid/223/Article/467469/service-chiefs-testify-on-risks-of-sequestration.aspx (last visited Nov. 7, 2013).

[11] *Id.*

[12] *Id.*

[13] DANIEL H. ELSE, CONG. RESEARCH SERV., RL31039, MILITARY HOUSING PRIVATIZATION INITIATIVE: BACKGROUND AND ISSUES 2 (2001).

[14] Andrew Tightman, *Top Brass Claims Personnel Costs are Swamping DoD, but Budget Figures Say Otherwise*, ARMY TIMES, Nov. 24, 2013, http://www.armytimes.com/article/20131124/BENEFITS02/ 311240019.

[15] Press Release, *supra* note 1.

approved a spending level that fell $1.4 billion below the President's request for these programs.[16]

The impacts are profound; twenty-three percent in FY 13 and beyond, outpacing the other DoD appropriation reductions.[17] Congress has permitted the MILPER, research and development, and O&M budgets some funding flexibility, while MILCON has remained rather static.[18] These facts demonstrate a stark future when the military may have to scale back future MILCON plans.[19] With decreased appropriations, adequate MILCON funding is becoming an unfortunate and unevenly impacted casualty of fiscal austerity.

B. Base Realignment and Closure Initiatives and Global Realignment

Base Realignment and Closure (BRAC) initiatives and MILCON budgets are intertwined concepts; the shuffling and consolidating of personnel, goods, and equipment are long and costly endeavors. Since the 2005 Defense BRAC implementation, the DoD has had to build new infrastructure for displaced missions and personnel while simultaneously winding down operations on bases facing closure.[20] In an incredibly lengthy appropriations process, President Obama requested $34.5 billion in the *2011* MILCON budget to fund the *2005* BRAC's recommendations.[21]

Rather than focusing on base closures, the 2005 BRAC instead acted as a springboard for a new expeditionary force concept and thus concentrated more on shifting forces and installation assets for rapid

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[16] Press Release, House Passes Fiscal Year 2014 Military Construction and Veterans Affairs Appropriation Bill (Jun 4, 2013), *available at* http://appropriations.house.gov/news/documentsingle.aspx?DocumentID=336730.

[17] *See* Harrison, *supra* note 7, at 4 (emphasizing the unequal budget cuts across the DoD's various appropriations). Mr. Harrison proposes that this is a result of long-range strategic planning emphasizing technology while leveraging a smaller total force and already existing MILCON infrastructure. Research, Development, Test, and Evaluation (RDT&E) funding is reduced by three percent. Military Personnel funding is seven percent less from previously accounted reductions in force, and the Operations and Maintenance (O&M) budget receives a four-percent reduction. *Id.*

[18] *Id.*

[19] *Id.*

[20] DANIEL H. ELSE, CONG. RESEARCH SERV., R42376, MILITARY CONSTRUCTION: A SNAPSHOT OF THE PRESIDENT'S FY 2013 APPROPRIATIONS REQUEST 9 (2012).

[21] *Id.*

global mobility.[22] The GAO reported that many bases would gain missions and over 123,000 additional personnel.[23] For military families, the consequences of the BRAC pose significant challenges in ensuring the availability of affordable and adequate housing.[24] Simultaneously, the BRAC would leave a large footprint of unused infrastructure that would require continued care and upkeep.[25] In fact, the 2005 BRAC only eliminated a small percentage of excess DoD infrastructure.[26] Until BRAC rounds are coupled with corresponding military troop reductions, BRAC measures will only increase demands on MILCON appropriations.[27] Thus, the 2005 BRAC has increased the need for more infrastructure, thereby increasing the demand for MILCON funding.[28]

C. Military Housing and Quality of Life

The DoD has recognized military family housing to be patently inadequate.[29] The military owns over 257,000 individual units worldwide, and they have fallen into various states of disrepair.[30] In the span of 30 years, over 50 percent of those units have lacked adequate maintenance and modernization.[31] Under the traditional approach to MILCON funding, it would cost $25 billion in appropriations and take over 20 years to improve that housing.[32] Under these projections, the DoD—at least under its conventional funding procedures—would incur astronomical costs to provide statutorily required quality housing that is "comparable to that available in the local community."[33]

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[22] GONZALES, *supra* note 5, at 1.
[23] *Id.*
[24] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-352, MILITARY HOUSING PRIVATIZATION: DOD FACES NEW CHALLENGES DUE TO SIGNIFICANT GROWTH AT SOME INSTALLATIONS AND RECENT TURMOIL IN THE FINANCIAL MARKETS 26 (2009) [hereinafter GAO-09-352].
[25] GONZALES, *supra* note 5, at 1.
[26] ELSE, *supra* note 19, at 11.
[27] *Id.* at 10.
[28] *Id.*
[29] GAO-09-352, *supra* note 24, at 5.
[30] *Military Housing Privatization*, OFF. OF THE DEPUTY UNDER SEC'Y OF DEF. INSTALLATIONS & ENV'T, http://www.acq.osd.mil/housing/faqs.htm#4 (last visited Mar. 19, 2014).
[31] *Id.*
[32] *Id.*
[33] NAT'L ASS'N OF HOME BUILDERS, MILITARY FAMILY HOUSING STANDARDS STUDY 3 (2001), http://www.acq.osd.mil/housing/docs/FH%20Stds%20Study%20-Rev%20Oct%202003.pdf.

Additionally, the requirement to keep pace with the private sector is not a static target. Up until 2001, legislation enacted in the 1970s mandated the *maximum* limits for the construction and improvements of family housing based on pay grade and the number of occupants per household.[34] Relying on authority that had remained unchanged for three decades, the DoD essentially treated square footage as the only variable influencing quality of life.[35] While the amount of livable space for a military family is important, Congress wanted to expand the definition of what constitutes quality of life.[36]

To remediate these housing inadequacies, Congress crafted legislation to help the military build and rehabilitate military housing "more rapidly than was possible using traditional funding and military construction methods."[37] A complete departure from previous legislation, Congress suggested that newly constructed or renovated properties should not focus purely on square footage but instead on broad notions of room pattern and floor area that is comparable to local private communities.[38] Congress also authorized the Military Housing Privatization Initiative (MHPI) to incorporate appropriated funds with private investment to create adequate family housing.[39]

In sum, this is an era of fiscal austerity. And this is a compelling reason to immediately explore alternative funding streams. Congress should allow the DoD to use private partnerships and donor gifts to complete underfunded MILCON projects. But to do so, Congress must also examine the restrictions that the ADA's augmentation prohibition imposes upon the DoD.

III. Fiscal Law

At first glance, allowing the combination of appropriations with nonfederal sources to fund projects seems relatively simple and could save taxpayer money. This type of legislation, however, is the exception and not the rule. This is because congressional control of appropriations,

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[34] *Id.* at ix (2001).
[35] *Id.*
[36] *Id.*
[37] GAO-09-352, *supra* note 24, at 9.
[38] HOME BUILDERS, *supra* note 33, at ix.
[39] ELSE, *supra* note 13, at 2.

generally, and the ADA, specifically, act to discourage innovative ways of funding new MILCON projects.

A. The Appropriations Clause

The United States Constitution states, "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[40] This clause gives the Congress the "power of the purse" and acts as a check on executive power.[41] Throughout history, the executive has generally tested Congress's appropriation power in two ways. First, the executive has obligated funds in excess of its allotted appropriations, thereby leaving Congress little choice but to pay any overruns.[42] Second, the executive has mixed monies from multiple appropriations to fund a singular project.[43] Such actions tend to undermine congressional authority to control the expenditure of monies to fund the executive.[44]

Furthermore, the United States Supreme Court has affirmed Congress's "power of the purse." In 1850, the Court succinctly summarized Congress's budgetary control: "However much money may be in the Treasury at one time, not a dollar of it may be used in the payment of any thing not . . . previously [appropriated]. Any other course would give . . . dangerous discretion."[45] Over 80 years later, the Court elaborated that Congress's appropriation process is "a restriction upon the disbursing authority of the Executive department" and that "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress."[46]

Finally, the Court has held that "Congress may attach conditions on the receipt of federal funds" as long as those conditions are "related to a

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[40] U.S. CONST. art. I, § 9, cl. 7.
[41] Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1343 (1988).
[42] Raymond Natter, Why Furloughed Federal Employees Cannot Volunteer to Provide Service to the Government Without Pay 1–2 (2013) (unpublished manuscript), *available at* http://www.bsnlawfirm.com/ newsletter/OP0413_Natter.pdf.
[43] *Id.* at 2.
[44] *Id.* at 1.
[45] Reeside v. Walker, 52 U.S. 272, 291 (1850).
[46] *See* Cincinnati Soap Co. v. United States, 301 U.S. 308, 320 (1937) (reinforcing that congressional control of funding through the appropriation process as settled in *Reeside*); *see also* Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 425 (stating that any money, the rights of which have been vested in the United States and housed in the Treasury, can only be given to the original owner through appropriation by law).

national concern."[47] Congress can require that its appropriations be (1) used for a specific purpose, (2) used only during a particular period of time, or (3) capped at a maximum amount. These restrictions allow Congress to effectuate policy objectives and prioritize federal programs.[48] When executive agencies use money in ways contrary to these principles, various violations of the Anti-deficiency Act (ADA) may occur.

B. The ADA, Appropriated Funds, and MILCON

The ADA is a body of statutory authority that acts as a safeguard against potential executive abuses of appropriated funds.[49] It prohibits executive agencies from "augmenting" funds beyond congressionally appropriated amounts.[50] Unless Congress provides an exception, agencies may not supplement their appropriations with outside sources of money.[51] Any funds received from outside sources must immediately be deposited with the Treasury.[52] The DoD is subject to these rules, and MILCON funding follows the appropriations process.

Military construction projects are funded through Title I and Title IV of the Military Construction, Veterans Affairs, and Related Agencies Appropriations Act.[53] Military construction is further approved and delineated through the annual appropriations cycle in the National Defense Authorization Act (NDAA).[54] The NDAA includes the military construction, family housing, DoD Housing Improvement Fund, and

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[47] South Dakota v. Dole, 483 U.S. 203, 206 (1987).
[48] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 1–5 (3rd ed. 2004).
[49] *See* 10 U.S.C.A. § 2601 (West 2014); 1 W. FED. ADMIN. PRAC. § 531 (West 2014) (providing statutory and administrative guidance of how 31 U.S.C.A. §§ 1341, 1342, and 1511–17 work together to form the body of law known as the ADA).
[50] Carrier-Provided Computers for Electronically Filing Tariffs With the Interstate Com. Comm'n, B-239903, 1991 WL 135554 (Comp. Gen. June 28, 1991). If a specific amount has been appropriated for a project, but a governmental agency then adds money provided from another source, this could be viewed as an impermissible MILCON augmentation in violation of the Anti-deficiency Act (ADA).
[51] *Id.*
[52] 31 U.S.C.A. § 3302 (West 2014).
[53] ELSE, *supra* note 20, at 7.
[54] *Id.* at 8.

BRAC MILCON appropriations.[55] The amounts assigned to these appropriations are congressionally set. If the DoD accepted additional funds from outside of these appropriations, this would constitute augmentation. Without other statutory authority, the DoD must use only these appropriations to fund MILCON activities to support the total force.[56]

IV. The United States Air Force Academy and the Anti-deficiency Act

The United States Air Force Academy (USAFA) dealt squarely with the ADA and the augmentation issue. While the ADA does not prohibit military partnerships with the private sector in a general sense, its practical effect discourages these very useful relationships. The ADA consequently impeded the building of USAFA's Center for Character and Leadership Development (CCLD).[57]

The CCLD's initial design was completed in December 2010 and contract proposals began in March 2011, but the initial bids came back much higher than anticipated, averaging $10 million higher than the government's estimate.[58] The CCLD's roof design constituted the majority of the cost overrun; after multiple design revisions, the project's design was consequently curtailed, which resulted in a base bid that satisfied the appropriated amount.[59] The USAFA Endowment then presented a $12 million gift offer to the Air Force, $8 million of which was made available to fund the design with the originally envisioned roof.[60]

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[55] *Id.* at 6. Additional subaccounts under the Military Construction Appropriations Account include the North Atlantic Treaty Organization Security Investment Program, The Homeowners Assistance Fund, and Chemical Demilitarization Construction. *Id.*

[56] *Id.* at 7.

[57] *See The Center for Character & Leadership Development*, U.S. AIR FORCE ACAD., http://www.usafa.edu/Commandant/cwc/index.cfm?catname=cwc (providing a description of the CCLD's stated purpose, mission, and vision statements). The CCLD serves as a focal point of USAFA's commitment to developing leaders of character.

[58] *See* Memorandum from HQ USAFA/JA Legal Office to HQ USAFA/A7, subject: Clarification of Issues Related to Design of the Donor Component of Center for Character and Leadership Development (CCLD) Project (15 Sept. 2011) [hereinafter HQ USAFA/JA Memo] (on file with the author) (outlining the design and fiscal issues surrounding the CCLD project).

[59] *Id.*

[60] *Id.*

USAFA accepted the gift money pursuant to 10 U.S.C. § 2601, which states:

> The [service] Secretary concerned may accept, hold, administer, and spend any gift, devise, or bequest of real property, personal property, or money made on the condition that the gift, devise, or bequest be used for the benefit, or in connection with, the establishment, operation, or maintenance, of a school, hospital, library, museum, cemetery, or other institution or organization under the jurisdiction of the Secretary.[61]

Even with the statute's expansive language, USAFA found itself potentially running afoul of the ADA: namely, the use of gift money to augment a specific appropriation, which had been specifically enacted to build the CCLD.[62] As such, USAFA could certainly accept the donor money but could not use it in the most effective way to complete the project.[63] In times past, USAFA used such monies to upgrade items such as carpeting, lighting, and other fixtures to existing structures. In the case of this particular project, USAFA would be leveraging donor money in a substantial upgrade to the CCLD. To avoid augmentation, USAFA spent several hundred thousand dollars and countless hours designing alternate roof plans that were never used.[64] That money and time could have been better used to perfect the original project that was ultimately funded with a combination of appropriated and gift monies.[65] Military installations truly benefit and save money when they are allowed to work with interested donors and private partnerships.[66] They should not be dissuaded from this practice because of unnecessary ADA hurdles. The following examples demonstrate the extraordinary initiatives that can be

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[61] 10 U.S.C.A. § 2601(a) (West 2014).

[62] *See* 10 U.S.C.A. § 2601(2) (providing that gifts shall not be accepted if the acceptance thereof is inconsistent with applicable law and regulations).

[63] *See* HQ USAFA/JA Memo, *supra* note 58 (opining that it was unable to find a statutory exception that would allow augmentation of the MILCON appropriation for the CCLD).

[64] Telephone interview with Mr. Brian X. Bush, Senior Legal Advisor, HQ USAFA/JA (Sept. 23 2013).

[65] *Id.*

[66] USAFA has access to a number of alternative funding streams provided in the form of § 501(c)(3) non-profit organizations in which donors and benefactors can contribute. Information on the USAFA Endowment and the USAFA Association of Graduates, which provide such support, can be found at http://www.usafa.org/AOG.

achieved when Congress grants greater freedom to innovate with the private sector.

V. Potential Alternatives and Challenges: Models for Future Funding Streams

In certain instances, Congress has allowed the combination of appropriated funds with private money to complete governmental buildings, and these examples could serve as templates for wider MILCON applications. For instance, Congress approved the Military Housing Privatization Initiative (MHPI) to combine appropriated funds with private enterprise to improve family housing.[67] Second, Congress has created congressionally chartered organizations (CCOs) that can receive financial support from federal and nonfederal resources.[68] Third, the Fisher House Program combines appropriations with donor funds to provide wounded servicemembers and their families a home-like environment for convalescence.[69] Finally, the enactment of the Presidential Library Act, despite that program's importance to the public good, expressly requires private sector funds to supplement taxpayer-backed appropriations. These are models that could be used to mitigate the loss of appropriated funds.

A. The Military Housing Privatization Initiative

In 1996, Congress authorized the MHPI as a speedy and economical solution to create housing for military members and their families by leveraging appropriated funds with private investment.[70] In a very particularized sector of MILCON, the MHPI sought to increase the quantity and quality of family housing offered on DoD installations.[71] The MHPI gave the DoD the ability "to entice private investment by

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[67] ELSE, *supra* note 13, at 1–2.
[68] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-549, CONGRESSIONALLY CHARTERED ORGANIZATIONS: KEY PRINCIPLES FOR LEVERAGING NONFEDERAL RESOURCES 1 (2013).
[69] THE FISHER HOUSE, http://www.fisherhouse.org (last visited Mar. 18, 2014).
[70] National Defense Authorization Act for FY 1996, Pub. L. No. 104-06, §§ 2801 *et seq.*, 110 Stat. 186 *et seq.* (codified at 10 U.S.C. §§ 2871-2885 (2000)), *amended by* National Defense Authorization Act for FY 2001, Pub L. No. 106-398, § 2806.
[71] ELSE, *supra* note 13, at 3–4.

encouraging it to act like private enterprise" when contracting for the construction of military housing.[72]

The MHPI includes a variety of "alternative authorizations" as real estate, investment, and other financial tools, which effectively allow the DoD to adjust the amount needed in an appropriation to fund a family housing project.[73] The services have used these alternative authorizations to bargain with contracting offerors, giving the government and the contractor increased contracting flexibility.[74] Ultimately, the DoD can exercise any combination of these authorizations to structure the contractual terms with the private sector.[75]

While the MHPI shows incredible promise and effectively combines appropriated funds and private enterprise, some of the outcomes have been mixed. For instance, while the GAO's review of the MHPI revealed that seventy percent of the privatization projects had exceeded the DoD's expected occupancy rate of ninety percent, all the services also had a number that fell below this goal.[76] The GAO reported that the DoD made significant progress in transferring inadequate military family housing from its inventory, but the privatization process had taken longer than anticipated.[77]

The GAO also noted that these partnerships have the potential to expose the DoD to unpredictable market forces. Privatization is essentially a business venture with the contractor that carries inherent risk.[78] A down economy could endanger the overall aims of ensuring adequate quality of life for servicemembers and their families.[79] But

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[72] *Id.* at 4.

[73] *Id.* at 5. "Alternative authorizations" allow the DoD to bargain with potential contractors and encourage participation by offering a variety of incentives. There are a variety of alternative authorizations, including, *inter alia*, the conveyance of federal property to private ownership, relaxation of federal building specifications, direct deposits of rents collected, Government-backed loan guarantees for construction and guarantees for minimum occupancy rates. *Id.*

[74] *Id.* at 10.

[75] GAO-09-352, *supra* note 24, at 10.

[76] *Id.* at 6. The GAO noted that although many of the ongoing projects were only slightly below the DoD's expected occupancy rate of 90%, the services reported that even slightly lower-than-expected occupancy rates could lead to insufficient revenue generation to meet multiple project expenses. *Id.* at 21.

[77] *Id.* at 17.

[78] *Id.* at 37.

[79] *Id.*

overall, the MHPI has improved the living conditions for military members, while simultaneously reducing the need for appropriated funds.[80] Showing its approval of the MHPI, Congress made the MHPI legislative authorities permanent in 2004.[81] With the future of full appropriations in doubt, the MHPI concept should be expanded beyond family housing to other MILCON obligations.

B. Congressionally Chartered Organizations

Another solution to allow the combination of MILCON and private funds could be accomplished through the creation of a congressionally chartered organization (CCO). These organizations take on many forms and functions, and are probably best known for promoting patriotic, charitable, educational, and other public good activities, but they are not limited to those purposes.[82] All CCOs are entities that are in part privately funded but operate under some level of government oversight, either through appointed board leadership or promulgated regulation.[83] They also possess broad authority to receive financial support from both federal and nonfederal resources to meet their core missions.[84]

Congress lauded a number of CCOs for their business practices and promoted their expansions so they could aid the government in the construction and care for federal buildings.[85] Touting that "[CCOs] serve many diverse purposes and benefit from broad bipartisan support," the assigned House Committee highlighted the Presidio Army Post as an example.[86] The Presidio Army Post successfully converted a series of failing buildings into a set of mixed-use, financially independent facilities, and the effort saved taxpayers $1 billion in capital costs and $45 million in the Post's annual operating costs.[87]

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[80] *Id.* at 16–17.
[81] *Military Housing Privatization*, *supra* note 29.
[82] RONALD C. MOE, CONG. RESEARCH SERV., RL30340, CONGRESSIONALLY CHARTERED NONPROFIT ORGANIZATIONS ("TITLE 36 CORPORATIONS"): WHAT THEY ARE AND HOW CONGRESS TREATS THEM 1 (2004).
[83] GAO-13-549, *supra* note 68, at 4–5.
[84] *Id.* at 2.
[85] H.R. REP. NO. 112-151 (2011), *reprinted in* 2011 WL 2853753.
[86] *Id.*
[87] *Id.*

But with a proposed expansion of CCOs to encompass a wider array of building construction, Congress expressed concern:

> An underlying question is whether these . . . are areas that should be left to the private sector or whether they are examples of public private partnerships that enable the government to cost-share with the private sector. Beneath this question is the fundamental issue, "What ought government do?" The same question also applies to prospective museums and presidential memorials authorized by Congress to be built on or near the National Mall. The costs associated with constructing these museums and memorials place enormous additional pressure on already tight budgets to operate, maintain, and renovate existing assets and facilities.[88]

This issue admits no simple resolution. Admittedly, the projects involved in CCOs are generally considered public interest, but the benefits of these partnerships are undeniable. The GAO studied four successful CCO programs—the Smithsonian Institute, the National Gallery of Art, the United States Holocaust Memorial Museum, and the Presidio Trust—and compiled six principles to guide future CCOs in leveraging resources through nonfederal partners.[89] These principles include the following: (1) make partnering decisions in line with the mission, (2) ensure top leadership support for partnering arrangements, (3) assess and manage risks, (4) select complementary partners and appropriate projects, (5) manage partnering arrangements, and (6) evaluate the partnering arrangements.[90] Applying these principles, the concern raised by Congress can be, to a degree, mitigated.

These principles that constitute successful CCOs could easily be applied in a military context, similarly to how the MHPI has fundamentally changed the notions of what the military must do alone and what can be improved with public-private partnerships. The military is already involved in the CCO process, but in a very limited fashion.[91]

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[88] *Id.*
[89] GAO-13-549, *supra* note 68, at 5.
[90] *Id.* at 17.
[91] MOE, *supra* note 82, at 6. From a military context, Congress and the DoD have previously conferred CCO status upon the Civilian Marksmanship Program. Both the Air Force Sergeants Association and the American GI Forum have either applied or been accepted into CCO status under the Title 36 non-profit organization. *Id.* at 13.

Expanding the military's footprint into the CCO construct would synergistically save taxpayer money while giving private enterprise an interest in military operations.

C. The Fisher House and the Non-appropriated Fund Instrumentality

The Fisher House presents yet another funding model that the military could use to fully leverage the private sector. To provide the families of wounded military members temporary lodging during times of convalescence, Congress drafted unique legislation for the Fisher House program, where new home construction could be funded in part with appropriations. [92] On the whole, the Fisher House program consists of gift money, non-appropriated funds, and appropriated funds; when a Fisher House is built and gifted to the military, it is supported through congressionally approved non-appropriated funds and through donor money.[93]

Like homes built under the MHPI, Fisher Houses are often found on military reservations. Under 10 U.S.C. § 2493, Fisher Houses are to be "located in proximity to a health care facility of the Army, the Air Force, or the Navy," [94] so they may provide families convenient access to their wounded servicemembers. Structured as a non-appropriated fund instrumentality (NAFI), Fisher Houses can accept money, property, and services while also collecting fees for their use.[95]

As a general matter, NAFIs like the Fisher House provide the DoD a limited ability to conduct certain base functions as a business enterprise.[96] It would appear as though the NAFI could provide the final solution to the MILCON augmentation problem; the DoDI plainly states, "NAFI program objectives are implemented using a combination of APF, NAF, and private resources."[97] Furthermore, the NAFI Group IV and V

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[92] THE FISHER HOUSE, http://www.fisherhouse.org/about/faqs (last visited Mar. 18, 2014).
[93] *Id.*
[94] Fisher Houses: Administration as Nonappropriated Fund Instrumentality, 10 U.S.C.A. § 2493 (West 2013).
[95] *Id.*
[96] U.S. DEP'T OF DEF., INSTR. 1015.15, ESTABLISHMENT, MGMT., AND CONTROL OF NONAPPROPRIATED FUND INSTRUMENTALITIES AND FIN. MGMT. OF SUPPORTING RES. para. 5.7.12.1.1 (17 Oct. 2006) [hereinafter DoDI 1015.15].
[97] *Id.* para. 5.2.

programs fund a variety of MILCON-related activities, such as temporary duty-related lodging, lodging facilities connected to permanent changes of station, and medical treatment facility support.[98] Upon a closer inspection of a NAFI's scope, however, it is easy to see that NAFIs have not been leveraged to their full potential for all MILCON projects.

NAFIs are usually limited to very particularized programs, such as military morale programs, golf course and bowling center care, child development, and exchange concessionaires.[99] Even Group IV and Group V NAFs—which are directly connected to the construction of buildings on military installations—tend to cover only non-essential billeting functions.[100] The NAFIs have not been fully exploited to address work centers and other mission-oriented buildings. If appropriations continue to dwindle and BRACs act to expand the military's footprint, an expansion of NAFI programs could provide much needed support to all military building initiatives.

D. The Presidential Library Program and Section 501(c)(3) Organizations

The 1955 Presidential Library Act (PLA) is yet another example of legislation that encourages a combination of congressional appropriations, gift funds, and private sources to meet a public good.[101] Congress acknowledged that presidential libraries serve a vital public interest, but it also found that funding them could be quite difficult. The presidential library system cost only $63,745 in 1955 but ballooned to $15,734,000 in 1985.[102] In 1986, Congress amended the PLA to encourage private funding streams to help shift the construction and operating costs of these libraries from the taxpayer to endowment funds.[103] Since then, presidential libraries have enjoyed partnerships—

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[98] *Id.* para. 5.2.1.3.
[99] *See id.* para. 5.2.1.1–5.2.1.2 (describing "Group I and Group II" NAFI activities).
[100] *Id.* para. 5.2.1.3.
[101] WENDY R. GINSBERG & ERIKA L. LUNDER, CONG. RESEARCH SERV., R41513, THE PRESIDENTIAL LIBRARIES ACT AND THE ESTABLISHMENT OF PRESIDENTIAL LIBRARIES 1 (2010).
[102] *Id.* at 10.
[103] *Id.*

usually with § 501(c)(3) charitable organizations—to fund purchases of land, construction, and equipment.[104]

Subsequent amendments to the PLA not only indicate the program's overall success using donor funds but also show a growing congressional reliance on this construct. Congress increased the original private funding requirement from 20% to 40% in 2003. In 2008, Congress again increased the 40% endowment threshold to 60% for overall project funding. Strikingly, the only area where Congress had required appropriated funding in lieu of endowments—the preservation of presidential documents, deemed an inherently governmental function to remain with the National Archives—has sorely languished. In fact, Congress challenged the National Archives to act more like its private endowment donors and find more ways to lower its costs while performing its document-preserving function.[105]

The PLA plainly states that appropriated funds are in short supply, and the reluctance to provide taxpayer-backed support will continue well into the future. This exact scenario now falls squarely on the DoD. The PLA allows the government to partner with private entities to create buildings that are suitable for the public and serve a common good. As seen with the CCLD at USAFA, this analogous partnering framework worked well in a MILCON context, but there were far too many barriers and ADA concerns. These successes should serve as a catalyst to encourage more statutorily acknowledged military-private ventures and future donor relationships to accomplish MILCON projects.

VI. Conclusion

Adequate MILCON funding provides a sound infrastructure to support all service-members from cradle to grave. Military hospitals, DoD schools, work centers, family housing, the VA, and military cemeteries all depend on fully funded MILCON measures. As the United States enters a time of fiscal austerity and appropriations continue to diminish, the military's infrastructure is at grave risk. The solution to this problem is clear: Congress needs to statutorily expand the DoD's ability to leverage the private sector and its resources.

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[104] *Id.* at 15.
[105] *Id.* at 14.

Without new authority, the ADA will continue to discourage the military from fully engaging in partnerships or using donor funds to accomplish MILCON goals. The difficulties USAFA experienced in contracting for the CCLD plainly identify the ADA's dissuasive effect. It is a shame that USAFA had to waste money creating multiple proposals to try and satisfy the ADA, especially when USAFA's 501(c)(3) donors were simply trying to help and not usurp congressional control of appropriated funds.

This type of statutory authority is not a novel idea; it only needs to be extended for wider MILCON applications. Congress has encouraged these activities with various agencies in the past, and the results have been astounding. Because of the MHPI, the DoD and the private sector have raised the quality and quantity of military housing, while simultaneously lowering the dependence on appropriated funds. Organizations such as the Smithsonian Institute and the Presidio Trust have used their CCO status to combine donor and appropriated funds to build and renovate multiple facilities. Additional NAFI programs like the Fisher House could allow the DoD to use appropriated, non-appropriated, and private funds in the most effective ways possible to complete MILCON projects. Finally, the PLA exemplifies why promoting partnerships with the private sector is so critical to MILCON. The PLA removed the ADA augmentation threat, saved millions of dollars in appropriated funds, and ensured the successful construction and maintenance of numerous buildings.

In the final analysis, fiscal austerity will remain painfully persistent in the years to come. But the solutions are clear, and multiple examples provide a roadmap for new legislation. With new statutory authority based on these examples, Congress has the power to unshackle the DoD from the unintended consequences of the ADA. Congress can unlock the potential that exists between the military and private sector for future MILCON projects. When that occurs, the DoD's infrastructure will be secured, and the military can then focus on its most important mission: to protect the United States of America.

A BETTER UNDERSTANDING OF BULLYING AND HAZING IN THE MILITARY

MAJOR STEPHEN M. HERNANDEZ*

> *The fellows have talked terribly to me ever since the fight, for they say that I dropped out because I did not want to fight, and not because I was knocked out. I think they just wanted to kill me, if possible or come as near it as possible. There is no use of talking. The fellows here are brutes, and they have evil in their minds* – Oscar L. Booz, 7 August 1898.[1]

> *I get treated like shit . . . the NCOs make fun of me all day. . . they fuck me over all day . . .* [2] *but I get the shit smoked out of me cuz of stupid shit they do . . . or make me do, anyways being Chen and Chinese in this platoon is a no go . . .* – Danny Chen, 27 September 2011[3]

I. Introduction

Private (PV2) Danny Chen ran to his guard tower in Afghanistan on the morning of October 3, 2011, only to hear his name yelled by his squad leader from 100 yards away. He reported, as ordered, and was berated for not wearing his Advanced Combat Helmet (ACH) into the guard tower by not only his squad leader but also by two Specialists who had been giving him a hard time for quite some time. This might be an acceptable form of correction if not for the fact that there were many other young Soldiers who did the same thing PV2 Chen was accused of doing; they would carry their ACH in their hands and put it on after getting in the tower to avoid getting tangled in the netting that hung low

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1 PHILIP W. LEON, BULLIES AND COWARDS, THE WEST POINT HAZING SCANDAL, 1898–1901, at 1 (2000).

2 Danny Chen, *Comment to Shaun Raphael Lim on Facebook* (Sept. 27, 2011, 8:24 and 8:33), http://www.facebook.com.

3 Danny Chen, *Comment to Alex Torres on Facebook* (Sept. 27, 2011, 8:34), http://www.facebook.com.

over the tower entrance. As a result, PV2 Chen was "smoked"[4] by his squad leader, a Staff Sergeant, and the two Specialists, who made him do pushups and flutter kicks for several minutes after which he was ordered by these same three individuals to low crawl over coarse gravel and in full gear to the guard tower nearly 100 yards away. As he low crawled, the two Specialists threw rocks at him and yelled many of the same names they had called PV2 Chen before: "chink, egg roll," and "fortune cookie."[5] One of the Specialists dragged him by the carrying handle of his body armor. Finally, he was dragged up the stairs by the Specialists and left to perform tower watch.[6]

In the forty-three days he had been with his unit, PV2 Chen had been the subject of a litany of other incidents and many smoke sessions, including when a Specialist struck him in the thighs as he was made to stand against a wall, knees bent. He had also been dragged on his back, wearing nothing but a t-shirt, for forty yards by his roommate, who was a Sergeant team leader. For some, it was no surprise that a few hours after being dragged up the tower on October 3, 2011, PV2 Chen was dead from a self-inflicted gunshot wound to the head.[7]

The media coverage that ensued described PV2 Chen's ordeal as: "hazing" and "mistreatment."[8] Other sources called it: "bullying," "inappropriate conduct,"[9] "maltreatment," "assault."[10] At trial,[11] the

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[4] Will J., *Definition of Smoke*, ONLINE SLANG DICTIONARY (May 18, 2011), http://www.onlineslangdictionary.com/meaning-definition-of/smoke ("to administer disciplinary punishment through physical exercise. Military slang.").

[5] These set of facts are based on the author's recent professional experience as Trial Counsel for a series of courts-martial arising out of the death of Private (E-2) Danny Chen that took place from 16 April 2012 through 31 December 2012. All of the opinions expressed by the author related to these cases are only those of the author and not of anyone else [hereinafter Professional Experience Chen Trial Counsel].

[6] *Id.*

[7] *Id.*

[8] Bill Murphy Jr., *8 Troops Charged in Death of Fellow GI*, 9 STARS & STRIPES 1, 1–2 (2011).

[9] *Pentagon Officials Underscores Zero Tolerance Policy for Bullying*, U.S. DEP'T OF DEF. (Dec. 21, 2011), http://www.defense.gov/news/newsarticle.aspx?id=66573.

[10] Doug Chin, *Stop Racial Hazing in the Mil. Save Lives. Rest in Peace Danny Chen and Harry Lew*, INT'L. EXAMINER (Oct. 17, 2012), http://proxy.its.virginia.edu/login?url=http://search.proquest.com/docview/1115475342?accountid=14678.

[11] Professional Experience Chen Trial Counsel, *supra* note 5.

Government argued that PV2 Chen was "subjected to mistreatment"[12] and died because he was "hazed, humiliated and hounded."[13]

Was PV2 Chen hazed or was he bullied? Does it matter? Is there a meaningful distinction? What were the panel members thinking at the time of trial? Perhaps one was thinking, "Well, I was hazed and I did not die." Or was another thinking, "I was hazed and it made me better"?

At the time of the trials against eight of his platoon mates, the Army had no bullying policy, but as a result of the new focus caused by such incidents, the Army has just recently developed a revised hazing policy and for the first time ever instituted a bullying policy.[14] All military leaders and counsel need to understand what bullying and hazing conduct really is; otherwise, many will continue to confuse hazing with bullying, or with a host of other names. While the intent of the actions against PV2 Chen can be debated, and the outcome of trial may not have been different, the lesson is clear: if a clear definition of bullying and hazing had been in the Army's vernacular at the time, it would have been a clearer argument for the Government to make at trial, and perhaps the misconceptions held by leaders at all levels might have been made clearer.

Furthermore, clear objective standards of what hazing and bullying are would prevent military leaders from subjectively constructing what hazing and bullying mean. It is the author's opinion that a misunderstanding and misapplication of hazing and bullying is a result of too many untrained leaders being left in a position in which they must define words like: "cruel, abusive, oppressive," and "demeaning." If the requirement is to stop something, it in turn requires a clear definition of what it is that must stop. For instance, imagine the effectiveness of a military justice system that simply had vague or no definitions for sexual offenses. The goal must be an objective standard that establishes a clear rule and that any conduct that controverts this rule would also be a clear violation.

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[12] Drew Brooks, *Jurors Return Mixed Verdicts in Staff Sgt. Andrew J. Van Bockel Hazing Case*, FAYETTEVILLE OBSERVER, Nov. 21, 2012, http://www.fayobserver.com/articles/2012/11/20/1219030?sac=fo.military.html.

[13] David Zucchino, *Danny Chen Suicide: Sergeant Guilty of Assault but Not Homicide*, L.A. TIMES, July 30, 2012, http://www.articles.latimes.com/2012/jul/30/nation/la-na-nn-danny-chen-suicide-case-verdict-20120730.html.

[14] U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-19 (6 Nov. 2014) [hereinafter AR 600-20 para. 4-19].

Evidence-based studies[15] and state policies distinguish bullying and hazing conduct, and they should serve as a model for the military. The lack of clearly developed hazing and bullying definitions leads to disparate military policies, vagueness, misapplication, and a failure to put anyone on notice of what is considered good or bad behavior. It is time to develop an evidence-based objective definition of hazing and bullying so that the difference between the two is clear, just as nearly all of the fifty states have done.[16]

This article examines the differences between bullying and hazing and argues for better definitions. Section II begins with a close examination of the scholarly definitions of, and distinctions between, hazing and bullying and the studies on both that have been conducted by academic researchers, followed in Section III by a historical overview of hazing and bullying in the military. Section IV argues for three necessary changes to improve the military's current bullying and hazing policies, as well as highlighting two state laws that, according to researchers, represent our nation's best hazing and bullying laws. Section V concludes by proposing a bullying and hazing policy that is clear and that is based on more proven strategies, laws, and policies.

II. Distinguishing Bullying from Hazing

A. What Is Hazing?

Despite no federally accepted definition of hazing, the state of Florida's anti-hazing statute has been touted by researchers as one of the nation's best.[17] In conformity with the generally agreed upon research definition, Florida defines hazing as "any action or situation that recklessly or intentionally endangers the mental or physical health or

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[15] Katharine B. Silbaugh, *Bullying Prevention and Boyhood*, 93 B.U. L. REV. 1029, 1033 (2013) (defining evidence-based programs and research). "Often laws also require schools to adopt bullying prevention curricula, and in some cases require that those curricula be evidence based." *Id.* at 1037; *see* also *id*. at 1044 (defining evidence-based research as those "driven to embrace efforts whose efficacy is based in research" and stating that "[r]eforms that work, according to research, are efforts to create a healthy whole school climate of belonging and inclusiveness").

[16] *Compare* U.S. DEP'T OF HEALTH & HUMAN SERVS. (Dec. 17, 2013), http://www.stopbullying.gov [hereinafter stopbullying.gov], *with Hazing*, STOPHAZING (Dec. 17, 2013), http://www.stophazing.org/laws.html.

[17] Telephone Interview with Dr. Mary Madden, Ph.D., Assoc. Professor and Co-Director of Nat. Collaborative for Hazing and Prevention Research, Univ. of Me. (Nov. 14, 2013).

safety of a person for purposes including, but not limited to, initiation or admission into or affiliation with any organization operating under the sanction of a postsecondary institution."[18] It is not a defense to hazing that the victim's consent "had been obtained, the conduct or activity that resulted in the death or injury was not . . . sanctioned . . . by the organization, or that the conduct or activity that resulted in death or injury of the person was not done as a condition of membership to an organization."[19]

Common hazing practices include the following acts: beating, paddling, whipping and striking, blood pinning, branding, tattooing, burning, excessive calisthenics, confinement to restricted areas, consumption of non-food substances, and immersion in noxious substances.[20] In group settings, such as fraternities and other student groups, hazing practices include alcohol consumption, humiliation, isolation, sleep-deprivation, and sexual acts.[21]

B. What Is Bullying?

There is no federal definition of bullying.[22] Additionally, "there is no uniformly used definition across states, though many states have adopted, through a variety of methods, definitions that resemble the one commonly used in the academic literature."[23] Bullying is commonly defined as "the repeated and intentional exposure of an individual or group to physical and/or emotional aggression including teasing, name calling, mockery, threats of violence, harassment, taunting, social exclusion and spreading rumors in which there is a power differential between the aggressor (one or more) and the victim (one or more)."[24] The underlying themes in all bullying definitions currently accepted by academic researchers, including Dr. Dan Olweus ("one of the foremost researchers in bullying research"[25]), is that bullying is aggressive

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[18] FLA. STAT. ANN. § 1006.63 (West 2011).
[19] *Id.*
[20] Elizabeth J. Allan & Mary Madden, *The Nature and Extent of College Student Hazing*, 24 INT'L J. ADOLESCENT MED. HEALTH 1, 1 (2012).
[21] *Id.* at 1.
[22] Samantha Neiman et al., *Bullying: A State of Affairs*, 41 J.L. & EDUC. 603, 609 (2012).
[23] *Id.*
[24] *Id.* at 607–08.
[25] Samuel S. Underwood, Teacher Empathy and Its Impact on Bullying in Schools (2010) (published Ph.D. dissertation, Tenn. State Univ.) (on file with Univ. of Va. L. Sch. Library).

behavior that is (a) intended to cause distress or harm, (b) created by an imbalance of power, and (c) repeated over time.[26]

Bullying is frequently "indirect, or subtle in nature" but some direct forms of bullying include: "hitting, spitting, shoving, name calling, demanding money, stabbing, choking, or burning."[27] Indirect ways may include "isolating, excluding, humiliating, manipulating, blackmailing or writing hurtful or wrongful postings."[28]

C. What Is the Difference?

While there is not one official definition of either hazing or bullying among the research community, there are common characteristics that are generally agreed upon by various scholars and found in the vast amount of academic and scientific literature dealing with these topics. Researchers generally distinguish hazing from bullying in the following ways: (1) hazing is harassment by a group of senior ranking members against a group of newcomers,[29] while bullying is harassment by a few individuals against isolated individuals; (2) hazing takes place publicly, while bullying occurs privately; (3) new arrivals and subordinates can never haze superior ranking members, but they can bully them; (4) the hazing behavior occurs in the same manner with little change year after year, whereas bullying is not limited and can be original in its methods; (5) hazing terminates at the end of the initiation, whereas bullying continues indefinitely; (6) hazing eventually seeks to include the victim in group solidarity, whereas bullying excludes the victim from group

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[26] Susan P. Limber & Mark A. Small, *State Laws and Policies to Address Bullying in Schools*, 32 SCH. PSYCHOL. REV. 445, 447 (2003).

[27] Jana L. Pershing, *Men and Women's Experiences with Hazing in a Male-Dominated Elite Military Institution*, 8 MEN & MASCULINITIES 470, 478 (2006).

[28] Neiman et al., *supra* note 22, at 608-09.

[29] *See* Kristina Ostvik & Floyd Rudmin, *Bullying and Hazing Among Norwegian Army Soldiers: Two Studies of Prevalence, Context, and Cognition*, MIL. PSYCHOL., 2001, at 18-19 (Nor.); *see also* Allan & Madden, *supra* note 20, at 1 ("Hazing could be generally defined as any activity expected of someone joining or participating in a group (such as a student club or team) that humiliates, degrades, abuses, or endangers regardless of a person's willingness to participate."); *see also* Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment "Because of Sex,"* 79 U. COLO. L. REV. 1151, 1184 (2008) ("Hazing is any activity that a high status member orders other members to engage in or suggests that they engage in that in some way humbles a newcomer who lacks the power to resist because he or she wants to gain admission into a group.").

solidarity; (7) hazing may be used to socialize new members and increase morale, whereas bullying decreases morale.[30]

D. The Consequences of Bullying and Hazing

In addition to the physical effects of hazing and bullying, research shows that both are also linked to "psychological distress, low self esteem"[31] and "increased illness . . . like depression and anxiety."[32] The victimization can lead to internal and external isolation,[33] including social isolation, which a growing body of research shows "is a severe form of stress for humans to endure."[34] Throughout the United States, hazing-related deaths on college campuses are at an all time high,[35] and hazing and bullying that result in death or suicide have been reported in armies across the world.[36] Other serious effects include post traumatic stress disorder, physical injury, or death. Unfortunately, it is "often incidents like these that wake up communities and schools to implement more effective approaches to control these situations."[37] Indeed the Army's most recent change in policy followed a series of high profile hazing cases.[38]

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[30] Ostvik & Rudmin, *supra* note 29, at 18-19.

[31] Jennifer Holmgren et. al, Decreasing Bullying Behaviors Through Discussing Young-Adult Literature, Role-Playing Activities, and Establishing a School-Wide Definition of Bullying in Accordance with a Common Set of Rules in Language Arts and Math (2011) (published project, Saint Xavier Univ.) (on file with Univ. of Va. L. Sch. Library).

[32] James K. Wither, *Battling Bullying in the British Army 1987 - 2004*, 1 J. OF POWER INST. IN POST-SOVIET SOCIETIES 7 (2004) (U.K.).

[33] Colleen Creamer Fielkow, Note, *Bullies, Words, And Wounds: One State's Approach in Controlling Aggressive Expression Between Children*, 46 DEPAUL L. REV. 1057, 1107 (1997).

[34] Hara Estroff Marano, *Big Bad Bully*, PSYCH. TODAY (Nov. 16, 2013), http://www.psychologytoday.com/articles/200910/big-bad-bully.

[35] Chad William Ellsworth, Definitions of Hazing: Differences Among Selected Student Organizations (2004) (published M.A. thesis, Univ. of Md.) (on file with Univ. of Va. L. Sch. Library) ("Hollman remarked that since 1990 more alcohol and hazing related deaths have occurred on campuses throughout the United States than throughout the rest of the recorded history of higher education.").

[36] Ostvik & Rudmin, *supra* note 29.

[37] Creamer Fielkow, *supra* note 33, at 1107.

[38] Professional Experience Chen Trial Counsel, *supra* note 5.

E. The Prevalence of Hazing

While the prevalence of hazing in the U.S. military is unknown, and no studies to date have been conducted amongst the military population, studies done on similar populations suggest that that prevalence could be high. In one of the most expansive research projects on hazing, academic researchers analyzed 11,482 surveys from undergraduate students enrolled in fifty-three U.S. colleges and universities.[39] Nine out of ten students did not consider themselves to have been hazed,[40] but in actuality, fifty-five percent of respondents reported that they had experienced at least one hazing behavior in relation to their involvement in a campus club, team, or student organization.[41] This demonstrates a lack of understanding of what hazing is amongst a similar age group as servicemembers.

Of those who labeled their experiences as hazing, ninety-five percent said they did not report the events to campus officials, and in particular, thirty-seven percent stated they failed to report the incident because they did not want to get members of their group in trouble.[42] The positive results of hazing were more often cited by students than the negative results, and numerous students justified hazing practices based on their perception that it promotes bonding or group unity.[43] This statistic gives credence to the common defense used by many servicemembers accused of hazing: we are not hazing; we are training or making this Soldier stronger.[44] The correlation between military and college culture is further verified by studies of U.S. Military Academy students that indicate that hazing and bullying activity is "viewed as a critical component of resocializing new initiates."[45]

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[39] ELIZABETH J. ALLAN & MARY MADDEN, HAZING IN VIEW: COLLEGE STUDENTS AT RISK, INITIAL FINDINGS FROM THE NATIONAL STUDY OF STUDENT HAZING 2 (2008).
[40] *Id.* at 33.
[41] *Id.* at 14 (for each affiliation with a team or organization that the students identified with, the participants were given a list of behaviors, most of which met the definition of hazing that was decided on by undergraduate student focus groups, as well as after a review of the literature related to hazing and the expertise of the Research Advisory Group).
[42] *Id.* at 28.
[43] *Id.* at 27.
[44] Professional Experience Chen Trial Counsel, *supra* note 5; *see also infra* notes 56-57.
[45] Pershing, *supra* note 27, at 473.

F. The Prevalence of Bullying

A Norwegian Army study of 696 Norwegian soldiers ranging in age from eighteen to twenty-seven years old found that a total of twelve percent of respondents claimed that they had been the victims of academically defined bullying while in the Army, and fifty-three percent had reported that they were witnesses to bullying in the Army.[46] Of those, sixty-three percent of victims and sixty-two percent of witnesses reported that the bullying took place in the barracks.[47] Fifty-eight percent of the victims and sixty-seven percent of witnesses reported that the bullies came from the same unit as the victim, and forty-eight percent of the victims and forty-one percent of witnesses reported "that bullying was done by the victims' own roommates."[48] Similarly, a 2003 British Army survey found that forty-three percent of a sample of 2000 soldiers responded that bullying was a problem and five percent claimed to be victims of it.[49] This problem is likely larger in the U.S. military than these foreign samples.[50]

III. Overview of Past and Current Solutions in the Military

A. History of Policies and Attempts at Resolution

The negative effects of hazing or maltreatment[51] date back to the Revolutionary War and possibly longer.[52] A movement toward change did not occur until 1874 when Congress created the Hazing Law, which banned hazing of any kind and made it an offense triable by court-martial.[53] This proved insufficient, as in 1901, a congressional inquiry

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[46] Ostvik & Rudmin, *supra* note 29, at 21.
[47] *Id.* at 22.
[48] *Id.*
[49] Wither, *supra* note 32, at 2.
[50] Pamela Lutgen-Sandvik & Sarah J. Tracy et. al, *Burned by Bullying in the American Workplace: Prevalence, Perceptions, Degree and Impact*, 44 J. MGMT. STUDIES 837, 851 (2007). In a study comparing U.S. prevalence to Scandinavian prevalence, the "US had a significantly higher prevalence of bullying for nearly all points of comparison. For example, 46.8 per cent [sic] of the US, 15.8 per cent [sic] of the Danish, and 24.1 per cent [sic] of the Finnish reported experiencing one negative act at least weekly." *Id.*
[51] United States v. Finch, 22 C.M.R. 698, 700-01 (N.B.R. 1956).
[52] Judith Ann Johnson, Military Aristocrat or Warrior-Monk? The Religious and Ethical Formation of the American Military Officer (2002) (published Ph.D. dissertation, Claremont Univ.) (on file with Univ. of Va. L. Sch. Library).
[53] *Id.*

was initiated to investigate the death of former West Point Cadet Oscar Booz and over 100 other cases of hazing; the inquiry included interviews of almost the entire West Point student body, which included senior cadet and future general, Douglas MacArthur.[54]

Booz entered the Academy in the fall of 1898, but four months later, he left the school in weakened health. He died in December of 1900 from tuberculosis of the larynx. His father cast the blame for his son's death on the time, as a cadet, that he was doused and drugged with Tabasco sauce and punched over the heart.[55] Booz claimed his son had also received two black eyes, loosened two teeth in a fight, had hot grease from a candle poured over him, was called names, was ordered to fight another cadet, and was not allowed to read his Bible.[56] A fellow classmate told Congress, "Oscar, instead of showing himself to be a man of spirit and courage, responded in an unmanly manner."[57] MacArthur told the committee that hazing makes "a man lose his rough edges, his conceit."[58] MacArthur refused to give the name of any culprit, but did admit that as a cadet, he had been brought to convulsions and lost consciousness as a result of hazing.[59]

The result was a change in the regulations,[60] only to be followed by two other congressional investigations in 1908 and 1910.[61] In 1910, West Point enacted an anti-hazing policy that required suspension for acts of hazing.[62] The struggle between the long-held belief that hazing

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[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.* at 207.
[58] *Id.* at 209.
[59] *Id.*
[60] *Id.* at 211. (arguing that the change was met with resistance.) "In 1902, for example, the Corps of Cadets (through their senior leaders), told the Superintendent that they were willing to cease physical expressions of hazing for plebes; however, they would not accept restrictions against annoying, harassing, or bracing plebes." *Id.* at 210.
[61] *Id.*
[62] *Id.* at 211. ("Any cadet who should invite, order, or compel a candidate, new cadet or fourth class man to engage in any form of physical exercise (except at authorized drill), eat or drink any-thing . . . or shall strike, treat with violence, or offer bodily harm to a candidate, new cadet, or fourth class man or shall invite, order, compel or permit a candidate, new cadet, or fourth class man to sweep his (the senior cadet's) room or tent, make his bed, clean his arms, equipment or accouterments, bring water, or perform for him any other menial service, or to do for him anything incompatible with the position of a cadet and gentleman shall (even without intent to humiliate a candidate, new cadet, or fourth class man), be summarily suspended and turned back to join the next class.").

was good versus the constant oversight of Congress lingered for years, and was not hidden in even the more senior circles. For example, Superintendent Samuel Tillman, in his 1918 annual report, "cited a definite advantage to be gained from hazing, specifically: the quicker attainment by a new man of the mental and physical bearing of a West Point cadet."[63] Historians believe that through the years, officials at the Academy "played less of a neutral role than a silently supportive one, because they actually believed in the value of hazing to build character."[64]

Despite attempts by leaders at different levels,[65] abusive antics continued at the service academies, setting a negative standard for the military, in particular officer leadership.[66] At the service academies, the recitation and memorization of useless information was considered permissible and commonplace because, as the Staff Judge Advocate opined in 1946, the "hazing or harassing of 4th classmen" that was prohibited "included some form of physical, exercise or exertion, or tasks of servitude," thus since these useless recitation requirements did not cross that "physical" line, they were permissible.[67] Soldiers, cadets, leaders and their support staff continued to find ways around labeling it hazing despite the complaints of cadets about the rigors of activities such as useless memorization.

In the military, prior to the 1950 enactment of the Uniform Code of Military Justice (UCMJ), the practice was to treat abuse and current day maltreatment "as a violation of Article 96 (the General Article)" with no specific definition of the maltreatment type-offense.[68] Case law and legislative history prior to and after the 1950 enactment of Article 93, maltreatment, UCMJ, is "sparse."[69] The general public heard little about military hazing until the late 1950s and 1960s when military training

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[63] *Id.*
[64] *Id.*
[65] Captain Christopher H. Engen, Accepted Form of Hazing or Leader Development Tool? The History and Evolution of Fourth Class Knowledge 6-7 (unpublished project, U.S. Military Acad.), *available at* http://digital-library.usma.edu/cdm/ref/collection/p16919coll1/id/28.
[66] United States v. Sojfer, 44 M.J. 603, 608 (N-M. Ct. Crim. App.1996) ("The pre-UCMJ cases generally dealt with situations where officers maltreated enlisted personnel.").
[67] Engen, *supra* note 65, at 11.
[68] United States v. Finch, 22 C.M.R. 698, 701 (N.B.R. 1956).
[69] United States v. Carson, 55 M.J. 656, 658 (Army Ct. Crim. App. 2001). *Cf. Sojfer*, 44 M.J. at 608 (asserting that maltreatment cases were not very developed in the case law and that a majority of cases dealt with commander maltreatment of subordinates).

practices were spotlighted following the drowning deaths of six Marine recruits at Parris Island and the unusually rigorous artillery training at Officer Candidate School conducted by Vietnam War returnees.[70]

Hazing, in all its forms, was banned at the Academy in 1978 following the recommendations of a committee that was created by the Army Chief of Staff to look into the Academy's procedures[71] and a Government Accounting Office (GAO) Report.[72] Following the committee's recommendation, useless-fact memorization was eliminated, a hazing tradition that had lasted for over a century. The committee also commented that the Academy lacked "long range planning" and was "not institutionally sensitive to the need for change."[73] The Academy's attempt towards change, particularly the abolishment of hazing, was highlighted by the admission of its first female cadet in the fall of 1976.[74]

Despite years of incidents and efforts made to curb the tide, the problem of abusive tactics still remained in the military, as seen through some highly publicized events like the 1989 incident involving Gwen Dreyer (a female midshipman who was tied to a urinal)[75] and the 1991 Tailhook scandal.[76] Scandals involving gender and sexual issues, such as Tailhook[77] and the Dreyer incident, brought the pandemic of abusive

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[70] Hank Nuwer, *Hazing: Separating Rites from Wrongs*, AM. LEGION MAG., July 2001, at 2.

[71] Engen, *supra* note 65, at 14.

[72] U.S. GEN. ACCOUNTING OFFICE, GAO-148057, DOD SERVICE ACADEMIES MORE CHANGES NEEDED TO ELIMINATE HAZING (1992) ("[I]n a 1975 GAO report . . . we noted that it was difficult to differentiate hazing from activities permitted under the various fourth class systems.") [hereinafter GAO-148057].

[73] Johnson, *supra* note 52, at 233.

[74] *Id.*

[75] In 1989, Gwen Dreyer, a female student at the Naval Academy was chained to a urinal, as well as mocked and harassed by a group of male students, for throwing a snowball at a male student during a snowball fight. She then had photos taken of her by male superiors as she was chained. She resigned from the Academy and her story gained wide circulation. *Id.* at 228.

[76] Johnson, *supra* note 52.

[77] In 1991 the Tailhook Association convention in Las Vegas, Nevada, brought the depraved nature of hazing incidents to light for all Americans and led to "something different happening." *See* Norman Kempster, *What Really Happened at Tailhook Convention Scandal: The Pentagon Report Graphically Describes How Fraternity-Style Hi-jinks Turned into Hall of Horrors*, L.A. TIMES, Apr. 24, 1993, at 1 ("Approximately 200 Navy and Marine aviators waited in a third-floor corridor for a woman to approach and would then grab, pinch, and grope the breasts, buttocks and legs of the stunned woman."); *see also* Johnson, *supra* note 52. These raucous acts led to "at least 83 women" being assaulted, and revelations that these fraternity style antics "were far from

behavior to the forefront of American public life and was cited as a culprit for a "breakdown in discipline."[78] A 1992 GAO Report involving hazing at the military academies concluded that there was a need to sharpen and focus the definition of hazing[79] because of the difficulty in distinguishing hazing from permissible conduct.[80] The Department of Defense (DoD) responded by saying "that they were working to ensure the distinctions were understood."[81]

In 1997, the DoD issued an anti-hazing policy. It was brought on by yet another high profile incident, the 1993 Marine Corps "blood pinning" video that circulated nationwide in 1997, which showed numerous Marine Corps parachutists having their wings pinned to their chest with such force that it sent them writhing in pain.[82] Then-Secretary of Defense William Cohen issued a policy memorandum[83] prohibiting hazing, which is now encapsulated in Army Regulation (AR) 600-20's paragraph 4-19[84] and in similar sister-service regulations.[85] Before the issuance of this anti-hazing policy, all similar misconduct was dealt with under Article 93, maltreatment,[86] as well as other punitive articles, like Article 128, assault or battery.[87] This remains the case today, with the only change being that practitioners can now charge hazing and bullying offenses under Article 92, failure to obey a lawful general regulation.[88] Until November 2014, there had never been an anti-bullying policy in

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unprecedented." Kempster, *supra* note 77, at 1. This was the first time in military history that hazing was cited as sexual harassment, as well as the culprit for a "breakdown in discipline." Johnson, *supra* note 52, at 230. The aspects of good-natured fun was finally viewed as an offense "against common human decency" and served as the impetus needed to bring hazing activities in the military to the forefront of the conversation. *Id.*

[78] Johnson, *supra* note 52, at 230.

[79] GAO-148057, *supra* note 72.

[80] *Id.*

[81] *Id.* at 105.

[82] Tucker Carlson, *Emasculating the Marines: The Hysteria Over Hazing*, WKLY. STANDARD, Feb. 17, 1997, at 27.

[83] *Id.*

[84] AR 600-20 para. 4-19, *supra* note 14.

[85] U.S. DEP'T. OF AIR FORCE, POL'Y., HAZING (30 Oct. 1997); U.S. COAST GUARD, COMMANDANT INSTR. M1600.2, DISCIPLINE AND CONDUCT para. 2C (Sept. 2011); U.S. MARINE CORPS, ORDER 1700.28B, HAZING (20 May 2013); U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 1610.2A, Department OF THE NAVY POLICY ON HAZING (15 Jul. 2005).

[86] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 17 (2012).

[87] *Id.* ¶ 54.

[88] *Id.* ¶ 16.

any of the services, and as of the date of this article, the Army appears to be the only branch of service to have published one.[89]

B. Current Policies Aimed at Resolution

Since no comparison can be made of the service's anti-bullying policy (the Army is the only one with such a policy), the author conducted a review and comparison of the different services' hazing policies (see the appendix). Comparing the common themes and words in those regulations, as well as the Army's current bullying policy, reveals vague adjectival requirements, over breadth, exceptions to the rule, intent requirements, dissimilar policies, and includes other words that do not meet the academically accepted definition of hazing. While the Army makes a better attempt with its revised hazing and new bullying policy,[90] it also fails to clearly define hazing and bullying as agreed by the academic researchers and experts. A close look at the comments of senior leaders relating to bullying and hazing incidents lends credence to the argument that confusion remains and that there is a growing need for clarity.[91]

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[89] During the course of this article, the author made numerous attempts to find a history of bullying within the military and has found nothing to show that any U.S. military anti-bullying policy has ever existed within military literature. In November 2014, the Army issued Army Regulation 600-20, which appears to be the first and, currently, only anti-bullying policy in the military.

[90] It is the author's opinion, based on the research that the author conducted, that while the Army follows the following academically accepted aspects of hazing and bullying, it does not go far enough: 1) hazing need not be committed in the physical presence of the victim; it may be accomplished through written or phone messages, text messages, email, social media, or any other virtual or electronic medium. 2) Without outside intervention, hazing conduct typically stops at an identified end-point, while 3) bullying will typically continue without any identifiable end-point. 4) Hazing is directed at new members of an organization or individuals who have recently achieved a career milestone. *Cf.* AR 600-20 para. 4-19, *supra* note 14.

[91] *See* Karen Parrish, *Panetta 'Will Not Tolerate' Bullying, Hazing*, AM. FORCES PRESS SERV. (Dec. 27, 2011), http://www.defense.gov/News/NewsArticle.aspx?ID=66609. The title of the article suggests that leaders recognize that there is a difference between bullying and hazing and that both have negative effects, yet there was no anti-bullying policy in place at the time. In this same article, Secretary of Defense Panetta said, "I will not tolerate any instance where one service member inflicts any form of physical or psychological abuse that degrades, insults, dehumanizes or injures another service member." *Id*. The Secretary uses specific, not vague, adjectival phrases, such as degrades, but fails to categorize such acts as either bullying or hazing, labeling it simply inappropriate behavior. *Id.* Later in this same article, the Chairman of the Joint Chiefs of Staff, Army General Martin E. Dempsey, "spoke out strongly against hazing and bullying

An examination of Army Regulation (AR) 600-20 shows that the Equal Opportunity (EO) policy,[92] the hazing policy, and the nascent bullying policy are very similar.[93] Still, there is a lack of clear definitions because terms found in chapter 6 of AR 600-20, such as "offensive behavior," are not defined. Similarly, in paragraph 4-19 of AR 600-20 terms such as "suffer, cruel, oppressive, humiliating, or demeaning" are not defined. Furthermore, there is a lack of guidance as to the objective or subjective nature of either the EO or hazing policy in

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after the charges were announced," which shows that the Chairman himself, or his spokesperson, knows that there is a difference between bullying and hazing, but again, no anti-bullying policy was in existence. *Id. Cf.* Letter from General Raymond T. Odierno et al, to Members of the U.S. Army, Hazing (Jan. 13, 2012) (no mention of bullying is made in this letter).

[92] *Compare* U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY chapter 6 (6 Nov. 2014) [hereinafter AR 600-20 ch. 6] ("The EO Program formulates . . . a comprehensive effort to maximize human potential and to ensure fair treatment . . . and to . . . sustain effective units by eliminating discriminatory behaviors or practices that undermine teamwork, mutual respect, loyalty, and shared sacrifice . . . . The U.S. Army . . . will provide an environment free of unlawful discrimination and offensive behavior."), *and id.* (defining discrimination as "any action that unlawfully or unjustly results in unequal treatment of persons or groups based on race, color, gender, national origin, or religion" and defining disparaging terms, equal opportunity, gender discrimination, prejudice, etc), *with* AR 600-20 para. 4-19, *supra* note 14 ("everyone is expected to do what is right by treating others as they should be treated with dignity and respect." Hazing is defined as "any conduct . . . [that] causes another service member . . . to suffer or be exposed to an activity that is cruel, abusive, humiliating, oppressive, demeaning or harmful. . . ."), *and id.* (defining bullying is defined as "any conduct . . . [that] causes another service member . . . to suffer or be exposed to an activity that is cruel, abusive, humiliating, oppressive, demeaning, or harmful behavior, which results in diminishing the other Servicemember's dignity, position, or status.").

[93] AR 600-20 chapter 6 requires "fair treatment" and prohibits "disparaging terms." AR 600-20 ch. 6, *supra* note 92. The prohibition against hazing proscribes humiliating and harmful acts but so does bullying. AR 600-20 para. 4-19, *supra*, note 14. Bullying similarly results in the diminishing of the person's dignity, position, or status, but hazing and violating the equal opportunity policy can do this as well. Army Regulation 600-20, paragraph 4-19, defines hazing as "any conduct whereby one service member … regardless of Service or rank, unnecessarily causes another service member to suffer or be exposed to an activity that is cruel, abusive, oppressive, or harmful." Bullying has a very similar definition with the only distinction being that bullying "results in the diminishing of the Servicemember's dignity, position or status." But it can clearly be argued that hazing does the same thing. Army Regulation 600-20, paragraph 6-1(a), further holds the purpose of the EO program is to "create and sustain effective units by eliminating discriminatory behaviors or practices that undermine teamwork, mutual respect, loyalty and shared sacrifice of the men and women of America's Army." These are small samples of the elements that both commanders and trial counsel must define on a daily basis in determining the difference among EO, hazing, and, in the Army's case, bullying.

the AR, which is an element of the UCMJ offense of maltreatment.[94] The danger of allowing the incorporation of the military's EO policy with the bullying and hazing policies is that, as some academic institutions have found when they sought to combine harassment policies with bullying, the results can lead to "confusion and incorrect assumptions about the nature of bullying"[95] or hazing.

All branches of service should avoid the tendency of mixing terms found in hazing, equal opportunity, and bullying into one policy that creates "overly broad and arbitrary policies."[96] To avoid such problems, researchers in the academic setting have called for policies to contain "a precise definition . . . that is consistent with the definition commonly used by researchers."[97] Clearer definitions would give leaders the right tools and would help avoid potential legal challenges of these policies for issues of vagueness and over breadth.[98]

On October 2, 2012, a group of legislative officials sent letters to the DoD General Counsel asking for support to include a hazing statute in the UCMJ in response to recent hazing incidents, such as in the case of PV2 Chen.[99] The National Defense Authorization Act (NDAA) of 2013 also contained language that required an evaluation of the definition of hazing contained in the August 28, 1997 Secretary of Defense Policy Memorandum.[100] While recent military efforts, such as the Army's publication of a new regulation, is a good step forward, the DoD must realize that to sustain an effective policy, clearer academically accepted definitions are needed.

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[94] *Cf.* MCM, *supra* note 85, ¶ 17 (noting that maltreatment requires that "cruelty oppression, or maltreatment . . . be measured by an objective standard").

[95] Limber & Small, *supra* note 26, at 447–48.

[96] Nan Stein, *A Rising Pandemic of Sexual Violence In Elementary And Secondary Schools: Locating a Secret Problem*, 12 DUKE J. GENDER L. POL'Y 33, 46 (2005).

[97] Limber & Small, *supra* note 26, at 453.

[98] United States v. Sweney, 48 C.M.R. 476 (A.C.M.R. 1974) (The appellant argued that what was prohibited by the regulation is unascertainable because of its vague terms and that the regulation included innocent conduct within its prohibitions, thus making the policy void because it was overbroad).

[99] Press Release, Representative Judy Chu, Congressmembers Urge Department of Defense to Support Making Hazing a Crime (Oct. 2, 2012), *available at* https://chu.house.gov/press-release/congressmembers-urge-department-defense-support-making-hazing-crime.

[100] National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 534, 126 Stat. 1632, 1727 (2013).

IV. Recommended Changes

A. The New Jersey Anti-Bullying Law[101]

In December of 2011, the Department of Education (DoE) released the results of a two-year study that was conducted jointly by the DoE and the Department of Health and Human Services' first "Federal Partners in Bullying Prevention Summit."[102] The study examined the viability of state anti-bullying laws and policies, as well as the effects of states' laws that incorporated the DoE's recommended policies.[103] Led by experts, the DoE identified sixteen key components and school district policy subcomponents within existing state laws that according to experts, created stronger laws.[104] The sixteen key components were: (1) purpose, (2) scope, (3) prohibited behavior, (4) enumerated groups, (5) district policy, (6) district policy review, (7) definitions, (8) reporting procedures, (9) investigations, (10) written records, (11) sanctions, (12) mental-health referrals, (13) communications, (14) training and prevention, (15) transparency and monitoring, and (16) legal remedies.[105] The study concluded that Maryland and New Jersey were the "only states with legislative language encompassing all of the key components."[106] Additionally, the researchers identified the states with the most expansive of the sixteen components, and again, New Jersey ranked at the top.[107] While much work is left to be done and while not all sixteen components may apply to the military, the DoD can learn lessons from the state of New Jersey and should adopt a policy that either is similar to or adds to the closest of all seemingly federally approved state laws.

B. The Florida Anti-Hazing Law[108]

Currently, forty-four of the fifty states have anti-hazing laws.[109] Using Secretary Duncan's analysis above, states' laws can be a useful

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[101] 2010 N.J. Sess. Law Serv. ch. 122 (West).
[102] U.S. DEP'T OF EDUC., ANALYSIS OF STATE BULLYING LAWS AND POLICIES ix (2011).
[103] *Id.*
[104] *Id.* at xiii.
[105] *Id.* at xii.
[106] *Id.* at xiii.
[107] *Id* at 44; *see also New Jersey Law*, BULLY POLICE USA, http://www.bullypolice.org/nj_law.html (last visited Feb. 28, 2014) (grading New Jersey's anti-bullying law as the highest possible grade of an A++).
[108] FLA. STAT. ANN. § 1006.63 (West).

tool in helping to draft an evidence-based military anti-hazing policy. The state of Florida's anti-hazing law has been in place since 2005[110] and is seen as one of the "most advanced hazing laws" because it addresses hazing at both public and private universities, and it contains a written hazing definition with an enumeration of appropriate punishments.[111]

With alarming statistics like nine out of ten college-aged students who do not consider themselves victims of hazing despite experiencing classic hazing behaviors, [112] the military must create an anti-hazing policy that mirrors a proven law, like that of Florida. Dr. Mary Madden, a leading researcher in the area of hazing, recommends the state of Florida's anti-hazing law.[113] She describes the benefits of this law, as: (1) identification that the injurious behavior can be not only physical but mental, (2) clearly stated policies that are implemented with consistency (i.e., two schools implement the same punishment for similar hazing activity), and (3) publication of consequences and punishments so that others can see that there are consequences and that similar future misconduct can be discouraged.[114]

Both the hazing and bullying laws described above lay out an objective standard that DoD can learn and improve upon. The military would benefit from more precise definitions like those used by the states of Florida and New Jersey. Further, the military can use the recommendation of researchers who have frequently suggested that a "precise definition of terms, especially hazing . . . and bullying" is necessary.[115] Giving commanders and leaders a more objective scientific

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[109] Isabel Mascarenas, *Florida's Anti-hazing Law Among Toughest Nationwide*, 10 NEWS (May 3, 2012, at 7:06 p.m.), http://www.wtsp.com/news/article/253824/8/Floridas-anti-hazing-law-among-toughest-nationwide.

[110] Elia Powers, *Testing an Anti-Hazing Law*, INSIDE HIGHER ED. (Jan. 31, 2007), http://www.insidehighered.com/news/2007/01/31/hazing.html (stating "Florida passed one of the country's toughest anti-hazing laws…").

[111] Hailey Beitman, *Next Wave Anti-hazing Laws*, Apr. 6, 2012, http://news.jrn.msu.edu/bullying/2012/04/06/united-states-hazing-laws/.

[112] Allan & Madden, *supra* note 20, at 6.

[113] Interview with Dr. Mary Madden, Ph.D., *supra* note 17.

[114] *Id.*

[115] Nelda Cambron-McCabe & Ellen V. Bueschel, *Where does Tradition End and Hazing Begin? Implications for School District Policy*, 196 EDUC. L. REP. 19, 26 (2005); *see also* Holmgren, *supra* note 31, at 34 ("The solutions that research does support include compelling a common definition, using literature and role-playing and peer mediation); *see also* Ellsworth, *supra* note 35, at 31 ("It is also reported that it was the responsibility of the leadership at the academies to effectively define hazing activities, because the distinction between hazing activities and legitimate fourth class

definition will provide them with the clarity that they need to enforce and identify hazing and bullying behavior, and avoid any wiggle room.

C. The Use of Evidence-Based Research

The challenge for the military, as in other organizations,[116] is selecting a policy that is supported by scientifically proven results and that demonstrates positive outcomes; otherwise the military is left wasting money and time. While budding military anti-bullying or anti-hazing policies are grounded in well-intentioned motives, policy makers "should investigate whether or not the intervention is based on research, if it promotes prosocial behavior, and if there is documented outcome data."[117] Many states have mandated that school boards and officials implement local, or use state-enacted, bullying or hazing policies that are developed through consultation and insight from experts in the field.[118] For example, the state of Massachusetts requires that the Department of Education consult with the "department of public health, the department of mental health, the attorney general . . . and experts on bullying" to "compile a list of evidence-based curricula, best practices and academic based research that shall be made available to all schools."[119] In Mississippi, the state's school districts are required to "incorporate evidence-based practices" into the school district policies.[120] It is

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indoctrination was unclear."); *id*. at 39 ("In order to effectively confront hazing, a common definition and set of perceptions about hazing and unacceptable hazing activities should be established."); Kristin E. Bieber, Do Students Understand What Researchers Mean by Bullying? 53 (2013) (published Ph.D. dissertation, Univ. of Neb.) (on file with Univ. of Va. L. Sch. Library) ("These discrepant definitions of bullying suggest that researchers must be very specific about what is meant by bullying when asking students to report how often they bully others or are bullied."); Chris Lee, *Exploring Teachers Definitions of Bullying*, 11 EMOTIONAL & BEHAVIORAL DIFFICULTIES 61, 62 (2006) (U.K.) ("The need for a definition is located in distinguishing between bullying, other forms of aggression and acceptable behaviors. . . . Much of the terminology that informs definitions generate as many questions as it provides answers.").

[116] Susan M. Swearer et al., *What Can Be Done About School Bullying? Linking Research to Educational Practice*, EDUC. RESEARCHER, Jan. 2010, at 38, 43 ("One challenge however is getting educators to adopt such evidence based programs. [One researcher] found that educators preferred to adopt anti-bullying programs in their schools that their colleagues anecdotally reported were effective over programs that were scientifically shown to be effective.").

[117] *Id*.

[118] *E.g.*, MISS. CODE ANN. § 37-11-54 (West 2013)*; see also, e.g.*, MASS. GEN. LAWS ANN. ch. 71, § 370 (West 2013).

[119] *Id*. § j.

[120] MISS. CODE ANN. § 37-11-54 (West 2013).

uncertain as to whether DoD plans a review and assessment of the bullying and hazing policies, but if and when that occurs, DoD should consult experts and incorporate evidence-based practices to improve its current policies.

States whose definitions rely on studies and research-based models to form policy generally find greater success in applicability and understanding.[121] While states' adoption of laws is not the only cure for hazing or bullying behavior, Education Secretary Arne Duncan believes that "officials can use these examples as technical assistance in drafting effective anti-bullying laws, regulations, and policies."[122] Through the enactment of anti-bullying laws in forty-nine out of the fifty states, legislators have increasingly sought to enact laws [123] that have, effectively, required that they draw upon research.[124] Since there are no recent empirical studies involving the active duty military community,[125] and no scholars have spent time looking into hazing in the U.S. military setting,[126] it would be beneficial for the military to use state laws and policies that already build on scientifically proven results.

D. Dispelling Acceptability in Our Ranks

The findings of the studies discussed in this article suggest that hazing and bullying can find a level of acceptability within the ranks.[127] The idea that group unity and bonding gets stronger with hazing or bullying pervades the minds of our youngest military men and women, and goes back to the days when "prototypes" for the armed services "included young men seeking to become warriors."[128] The 1992 GAO survey showed that "15.7 percent of men and 5.4 percent of women view plebe year as a rite of passage." [129] This mindset has been around the service

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[121] *See* Silbaugh, *supra* note 15; *see also* Swearer, *supra* note 116.

[122] Letter from Secretary Arne Duncan, Sec'y of Educ, to Governors and Chief State School Officers (Dec. 16, 2010), *available at* http://www2.ed.gov/policy/gen/guid/secletter/101215.html [hereinafter Key Policy Letter].

[123] Silbaugh, *supra* note 15, at 1033; *see also* stopbullying.gov, *supra* note 16 (containing a list of all states that have anti-bullying policies, with the exception of Montana).

[124] MISS. CODE ANN. § 37-11-54 (West 2013); MASS. GEN. LAWS ANN. ch. 71, § 370 (West 2013).

[125] Pershing, *supra* note 27, at 473.

[126] Nuwer, *supra* note 70, at 6.

[127] Ostvik & Rudmin, *supra* note 29, at 25.

[128] LEON, *supra* note 1, at 166.

[129] Pershing, *supra* note 27, at 482; *see also* GAO-148057, *supra* note 72.

academies for over a century.[130] Yet to date, there have been no military studies that have tested and proved the hypothesis that "individuals who undergo an unpleasant experience increase their liking for the group."[131]

This "severity attraction hypothesis" has been tested more recently by academic researchers whose findings support a conclusion that group attractiveness did not increase when the initiation was more severe.[132] A recent study examined 167 college athletes who had undergone "an effortful, painful, or humiliating experience inflicted by more senior members of a team" and evaluated whether this increased new members' attraction to the team.[133] In this study, researchers found that the "more hazing activities student athletes reported seeing or doing, the less cohesive they perceived their team to be in sport-related tasks."[134]

Education is key to countering the severity-attraction hypothesis.[135] "There needs to be clearer definitions and policies as well as education efforts to teach the population about what the consequences of bullying and hazing are" and that show that the theory of severity attraction has no proven validity.[136] Furthermore a key aspect of change will need to include more clearly defining acceptable forms of training versus hazing and bullying.

E. Increased Awareness and Understanding Among Military Leaders

> "How about shaving someone's eyebrows to celebrate service selection? While it could potentially be

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[130] Johnson, *supra* note 52, at 230 (noting that the Navy Inspector General concluded in 1989, after another serious hazing incident at the Naval Academy, that most viewed hazing "as a type of baptism or initiation rite" and that "[w]hile such initiation might look like a punishment, it is actually a ritual for tempering the soul of the initiate, preparing the recruit for the reward of entry into the fraternal collective"); *see also id.* at 207 ("Oscar Booz was called out to fight according to an immemorial custom in the Corps of Cadets because he refused to obey an order given him by an upperclassmen. . . . [And] instead of showing himself to be a man of spirit and courage," Oscar Booz "responded in an unmanly way.").

[131] Elliott Aronson & Judson Mills, *The Effect of Severity of Initiation on Liking*, J. ABNORMAL & SOC. PSYCHOL., 1959, at 177.

[132] Ellsworth, *supra* note 35.

[133] ALLEN & MADDEN, *supra* note 39.

[134] *Id.*

[135] Interview with Dr. Mary Madden, Ph.D., *supra* note 17.

[136] *Id.*

> demeaning and shaving is outlawed in the SECNAV instruction, it's OK that SEAL candidates have been subjected to this because it's unique to the requirements of being in the special forces community," said Rear Admiral Ted Carter, the Navy's commander of the Navy Office of Hazing Prevention. When asked by a reporter, "What about covering sailors with grease?" he said, "that depends on the type of grease," though none is defined in the instruction.[137]

Statements like these illustrate the confusion and consequences of poorly defined definitions and policies that plague all levels of military leadership. A study conducted in 2005 into the attitude of school teachers "found that many teachers were unaware that their students were involved in bullying" and "one of the main reasons . . . was the inability to differentiate bullying from other activities."[138] A leader and pioneer in bullying research,[139] Dr. Dan Olweus identified that one of the core elements necessary to the success of a bullying intervention program in schools is the support from school administrators and the awareness and involvement of the teachers and parents.[140] Similarly, military leadership's support and understanding is integral in successful bullying and hazing intervention. Studies have found that leaders "lack of consensus on bullying invites confusion and disagreement about the legal obligations schools and communities have in order to prevent bullying and support students involved in bullying."[141]

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[137] Jacqueline Klimas, *Hazing or Harmless? Navy Leaders Try to Stamp Out Hazing, But Many Sailors Question the Rules*, NAVY TIMES, July 7, 2013, at 18.
[138] Underwood, *supra* note 25.
[139] *See* Abby J. S. Hallford, An Analysis of Bullying Legislation Among the Various States (2002) (published Ph.D. dissertation, The Univ. of Tulsa) (on file with Univ. of Va. L. Sch. Library); *see also* Karin E. Tusinski, The Causes and Consequences of Bullying (2008) (published Ph.D. dissertation, Univ. of Mo., St. Louis, Mo.) (on file with Univ. of Va. L. Sch. Library).
[140] Fielkow, *supra* note 33, at 1092.
[141] Bieber, *supra* note 116.

V. Conclusion

A. Coordinated Approach

The military must clarify the definitions of both bullying and hazing, as well as lead a coordinated service-wide response to the deficiencies identified by recent cases and investigations.[142] To be a successful program, the text of the policy is not the only critical element. As the British Army learned, "to escape the imposition of external oversight" the DoD's policies to combat bullying and hazing must be "backed by a real commitment on the part of leaders at all levels to enforce them, as well as continued improvements that build on" the measures put in place to counter this decrepit behavior.[143] The process of having leaders who are committed to "developing and applying the policy is at least as important as its actual contents."[144] Furthermore, all branches of service must be committed to clear policies against such behavior, and must also be proactive in gathering "data to assess the extent" of bullying and hazing, as well as training and using appropriate experts to train on how to prevent this conduct.[145]

B. Difficult Changes

The military faces an "unenviable predicament." It has to reassure parents that their sons and daughters will not be brutalized during training, while at the same time ensuring that all services "are adequately prepared for the rigors of combat."[146] It is important that DoD follow the DoE's advice[147] in consulting the appropriate experts and using the appropriate resources available to develop a policy that would have a

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[142] Wither, *supra* note 32, at 1 ("The final investigation report, released in March 2004 was damning on the failings of the preceding 15 years. Among the issues were the longstanding inadequacy of funding for welfare and supervisory resources in training and the absence of a coordinated, organization wide response to deficiencies identified by previous investigations.").

[143] *Id.* at 10.

[144] Denise Salin, *The Prevention of Workplace Bullying as a Question of Human Resource Management: Measures Adopted and Underlying Organizational Factors*, 24 SCANDINAVIAN J. MGMT. 221, 223 (2008) (Fin.).

[145] Scott D. Camassar, *Cyberbullying And The Law: An Overview of Civil Remedies*, 22 ALB. L.J. SCI. & TECH. 567, 572 (2012).

[146] Wither, *supra* note 32, at 10.

[147] Key Policy Letters, *supra* note 122.

"positive ripple effect."[148] In the 1992 response to the GAO investigation into hazing at the service academies, the DoD said that "it would work in conjunction with the services on continually refining the understanding of what constitutes approved behavior."[149]

The Supreme Court has ruled against schools that act with "deliberate indifference in the face of actual knowledge" of a hostile environment that is "so severe, pervasive and objectively offensive, as to deprive the victim of the educational opportunities provided by the school."[150] While the DoD is far from acting with "deliberate indifference," the failure to implement policies that set clear objective standards for misconduct that has been ongoing for over 100 years can be suggestive of complicit indifference each time another incident occurs.

When Congress met in 1901 to inquire into the "hazing" actions of the West Point class, it undoubtedly sought to identify solutions to prevent this misconduct for future military leaders. The adoption, publication, and enforcement of a refined and proven anti-bullying and anti-hazing policy would deliver the right message by more clearly defining and publishing prohibited conduct, as well as outlining the clear consequences for such behavior.[151] Together with the recent changes DoD is seeking, the New Jersey anti-bullying and the Florida anti-hazing laws offer a clear and effective example that DoD can build and work from so that disparate, vague, and misapplied policies can be remnants of the past. Clear and proven policies can provide practitioners, leaders, victims and offenders the tools necessary to identify appropriate and inappropriate conduct, and stem the tide that has run from the days of Oscar Booz to those of Danny Chen.

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[148] Lee, *supra* note 115, at 69.
[149] GAO-148057, *supra* note 72, at 98.
[150] Neiman, *supra* note 22, at 622 (citing Flaherty v. Keyston Oaks School Dist., 247 F. Supp.2d 693 (W.D. Pa. 2003) (noting that in *Flaherty*, the court held that "Title IX could provide a private remedy against a school for creating a hostile environment by failing to take disciplinary action against offending students," but the plaintiff must "show that the harassment is so severe, pervasive, and objectively offensive as to deprive the victim of the educational opportunities" and that "the school acted with deliberate indifference in the face of actual knowledge of such conduct.").
[151] Key Policy Letters, *supra* note 122.

APPENDIX: ARMED SERVICES HAZING POLICY/REGULATION COMPARISON

Major Tenet of Reg/Policy	Army**	Navy	Marines*	Air Force	Coast Guard***
Introductory Comments	X	X	X	X	X
Regardless of svc/rank	X	X	X	X	
Suffer or be exposed	X	X	X	X	X
Activity = cruel, abusive, oppressive, harmful, humiliating, demeaning	X	X	X	X	X
Activity can be verbal/ psychological	X	X	X	X	X
On or off duty	X				
Consent is not a defense	X	X	X	X	X***
Reprisal prohibited	X	X	X		
CMD Authorized Exception (e.g., operational activities, corrective training, counseling, athletics)	X	X	X	X	X
Duty to Rpt/ Investigate	X	X****	X*****	X	X
Punitive Policy	X	X	X		
Victim-Witness Assistance Available		X	X		
Prohibited Activities	Physically striking, to inflict pain, piercing skin, forcing to consume excessive amounts of food or drink, or encouraging other to engage in illegal, demeaning, dangerous activity; Physical presence not required, can occur through non-direct mediums	Like Army with exception of the non-direct medium clause, but adds the following: verbally berating for sole purpose of belittling or humiliating, abusive/ ridiculous tricks, threaten-ing bodily violence, branding, taping, tattooing, shaving, greasing, painting, excessive physical exercise and blood wings	Same as Navy w/ except-ion of no mention of "blood wings"	Hitting, striking, tattooing, branding, shaving, "blood pinning," and forcing alcohol consump-tion	Same as Navy but adds the following: mean tricks, throwing over ship/pier, group wrestling, targeting a particular member, encouraging full disrobing, restraining other than for law enforcement purpose, touching, striking or threatening offensively
Bullying	X**				

*= Marine policy references resources, dangers of hazing, and makes the EO branch lead agency, and sets training and reporting requirements.
** = Army Regulation is the only one of the service regulations/policies that includes a bullying clause.
***= Coast Guard policy allows a person who consents to being hazed to be held liable for consenting.
**** = Navy policy mentions report only and a duty to investigate is not clearly outlined.
*****= Marine policy says to report only.

THE SECOND MAJOR GENERAL JOHN L. FUGH SYMPOSIUM

Introduction

On May 14, 2014, the Center for Law and Military Operations (CLAMO) at the Judge Advocate General's Legal Center and School (TJAGLCS) hosted the second Major General John L. Fugh Symposium on Law and Military Operations. The Symposium honors the memory of Major General John L. Fugh, the Judge Advocate General of the Army from July 26, 1991, to September 30, 1993, and the first Chinese-American to become a general officer in the Army.

The Symposium topic was *Legal Issues Associated with the Use of Force Against Transnational Non-State Actors*. The Symposium consisted of three moderated discussion panels, each consisting of three panelists, and one session of open discussion. Each panel focused on a specific aspect of the overall symposium topic. The fifty-five symposium attendees included judge advocates from the U.S. Army, Navy, and Marines; civilian legal advisors to the Department of the Army and Department of Defense; military legal advisors from Canada, Israel, and the United Kingdom; law professors and academics; and representatives from non-governmental organizations.

The following article is an edited transcript of the panelist presentations and subsequent discussion. The views presented were diverse. Suffice it to say, there was no consensus achieved on many of the issues discussed. No viewpoints or positions put forward during the Symposium are attributable as an official position or opinion of CLAMO, TJAGLCS, the U.S. Army, Office of the Joint Chiefs of Staff, or the U.S. Department of Defense.

Panel 1

Professor Jeffery Kahn; Professor Robert Chesney; Brigadier General Richard Gross, U.S. Army

Question: Is the use of force against al Qaeda and associated forces, globally, justified in the context of a continuing transnational armed conflict? If so, how is this conflict to be characterized—international

armed conflict, non-international armed conflict, or a new category of transnational armed conflict?

I. The Martens Clause[1] and the Tension Between Human Rights and Sovereignty

> *[P]opulations and belligerents remain under the protection and empire of the principles of international law.*

The original Martens Clause contains a peculiar phrase: populations and belligerents remain "under the protection and empire of the principles of international law." Martens undoubtedly meant to emphasize a unity of purpose in that pairing, but there is a tension that speaks to the issue before this panel. It is the tension between human rights (protection) and sovereignty (empire). And it has only become more difficult since the first Hague Convention.

The ordinary rule in a free state governed by law is that whatever has not been prohibited is permitted. This is a way of thinking that is thought to unleash innovation, creativity, and human ingenuity.

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[1] The Martens Clause has formed a part of the laws of armed conflict since its first appearance in the preamble to the 1899 Hague Convention (II) With Respect to the Laws and Customs of War on Land:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.

Convention with Respect to the Laws and Customs of War on Land (Hague II), Pmbl., July 29, 1899, 32 Stat. 1803.

The Clause was based upon and took its name from a declaration read by Professor von Martens, the Russian delegate at the 1899 Hague Peace Conferences. Martens introduced the declaration after delegates at the Peace Conference failed to agree on the issue of the status of civilians who took up arms against an occupying force. *See* Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 37 INT'L REV. OF RED CROSS 125 (1997).

In wartime, that is not always desirable. The Martens Clause reverses this presumption. It rejects the view that because a specific practice or tactic or action is not prohibited, it is therefore permitted. Quite the opposite, it reminds us that an exhaustive accounting of inhumanity is impossible and that, therefore, a general rule must apply to limit the ingenious human cruelty during wartime.[2] Even if no specific provision might protect a particular group of belligerents or suspected belligerents or innocent civilians, the Martens Clause reminds all that these groups "remain under the protection and empire of the principles of international law . . . , the laws of humanity and the requirements of the public conscience."

Many know Martens as Friedrich Fromhold von Martens. But he was also known as Fyodor Fyodorovich Martens. He was the leading international legal scholar of imperial Russia, a classic scholar-diplomat.

As it turns out, just as Martens was at the peak of his career, shortly after having successfully negotiated the inclusion of the Martens Clause, the Russian Empire was being torn apart. Everyone remembers something of the Russian Revolution. But few recall the history of transnational terrorism that preceded 1917 or the futile attempts of the Russian state to stop it. There were so many terrorist organizations—with names like "The People's Will" or "The Black Hundreds" —that it is hard to keep them straight. These were transnational non-state actors if ever there were any. Their leaders could be found in the British Library in London, the boulevards of Paris and Berlin, and, of course, throughout the expanse of the Russian Empire. Terrorist cells were

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[2] Bruno Zimmermann, *Article 1—General Principles and Scope of Application*, *in* COMMENTARY ON THE PROTOCOL ADDITIONAL OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 38-39 (Yves Sandoz et al. eds. 1987).

> There were two reasons why it was considered useful to include this clause, yet again, in Protocol I to the 1949 Geneva Conventions. First, despite the considerable increase in the number of subjects covered by the law of armed conflict, and despite the detail of its codification, it is not possible for any codification to be complete at any given moment; thus the Martens clause prevents the assumption that anything which is not explicitly prohibited by the relevant treaties is therefore permitted. Secondly, it should be seen as a dynamic factor proclaiming the applicability of the principles mentioned, regardless of subsequent developments in the types of situations or technology.

Id.

carefully organized for maximum tactical advantage and minimum risk of infiltration. Dostoyevsky has written about this. No cell member knew more than one person from another cell.

By any measure, these terrorists were more successful at their stated goals than Al-Qaeda has been with its objectives. By the time of the Second Hague Peace Conference in mid-1907, these terrorists had succeeded (on the fifth attempt) in assassinating the Tsar.[3] Terrorists also killed his son, the Grand Duke.[4] Further, terrorist attacks took the life of the last Tsar's Education Minister,[5] two Interior Ministers,[6] his Prime Minister,[7] and well over a thousand other government officials.[8] Thousands of civilians were killed or wounded in the course of this campaign.[9] During 1907, this averaged 18 casualties a day.[10] In the two years following the second Hague Peace Conference, from January 1908 to May 1910, 732 government officials and 3,051 citizens were killed and 4,000 wounded in terrorist attacks.[11] Keep in mind that the Russian Revolutions do not even begin until 1917.

A year before the Tsar's death, Russia's special police force—the so-called Third Department—was subsumed into the Ministry of the Interior, and its Gendarmerie placed under the control of the Ministry of War.[12] After the Tsar's death, the so-called temporary regulations were put into place under which military field courts could try civilians for select state crimes in closed proceedings conducted not just under military law, but the military law applicable in time of war (while, at the same time, a soldier or officer would be tried under the military law

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[3] Alexander II was killed by a bomb in 1881. Four attempts occurred immediately prior to this one, to which may also be added a separate attempt in 1866.

[4] The Grand Duke, Sergei Aleksandrovich, was assassinated in February 1905.

[5] The Education Minister, Nikolai Bogolepov, was assassinated in February 1901.

[6] Dmitrii Sipiagin was assassinated in April 1902. Vyachaslav Plehve was assassinated in July 1904.

[7] Prime Minister Stolypin was shot and killed in September 1911.

[8] Between February 1905 and May 1906, Jonathan Daly approximates 1,075 state officials killed or wounded. Jonathan Daly, *Police and Revolutionaries*, in 2 THE CAMBRIDGE HISTORY OF RUSSIA 647 (Dominic Lieven ed. 2006). In 1906, he states that "as many as" 1,126 government officials were killed and 1,506 wounded. *Id.* at 648.

[9] ANNA GEIFMAN, THOU SHALT KILL: REVOLUTIONARY TERRORISM IN RUSSIA, 1894-1917, at 264 n.59 (1993).

[10] *Id.* at 21.

[11] DOUGLAS SMITH, FORMER PEOPLE: THE FINAL DAYS OF THE RUSSIAN ARISTOCRACY 58 (2012).

[12] Daly, *supra* note 8, at 637-39.

applicable in time of peace!).[13] Between July 1906 and April 1907, these courts "were obliged to pass judgment in no more than two days and to carry out the sentence (usually death) within one day." They were responsible for the execution of "as many as 1,000 alleged terrorists."[14]

Now, compare the timeline of F.F. Martens's participation in the First and Second Hague Peace Conferences in 1899 and 1907 with the number of Russian ministers and civilians killed by terrorist bombings. Consider the duration and intensity of these hostilities. Could it be said (however anachronistically) that Russia was in an armed conflict with one or more organized armed groups?

It is anachronistically because if Martens was asked this question, he would think it utterly ridiculous. The concept of sovereignty under international law at that time would have seen no applicability for the Martens Clause or the Hague Conventions in an internal conflict in a state. That is because the concept of sovereignty was at its height, and protection of human rights, or the idea that a certain minimal set of rights are inherent in human existence and not given or taken away at the whim or caprice of the state, would have been impossible for him to comprehend. So, in a sense, this a short tour of a history that did not occur.

But how could Martens write this famous clause while living in and under an empire besieged by transnational terrorists who were granted no quarter by a Tsarist regime that did not hesitate to use military courts and summary executions? This is not unlike Thomas Jefferson writing about the uncivilized cruelty of the British treatment of American prisoners of war in the same letters in which he boasts of the scorched earth annihilation of entire settlements of American Indians.[15]

So now fast forward one hundred years. Imagine the same level of violence occurring with the same regularity, but in 2017. Imagine the same sort of non-state organized groups.

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[13] William C. Fuller Jr., *Civilians in Russian Military Courts, 1881-1904*, 41 RUSS. REV. 288, 292 (1982). Of 73 trials of members of the People's Will terrorist organization conducted in the 1880s, 42 were held in military courts. *Id.* at 293.

[14] Daly, *supra* note 8, at 648. During the period of the use of summary military courts-martial, August 1906 to April 1907, more than 1,000 people were shot or hanged as revolutionaries, terrorists, or expropriators. Geifman, *supra* note 9, at 227.

[15] JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 35 (2012).

It is plausible that an armed conflict of a sufficiently sustained and intense nature sufficient to introduce the provisions of Common Article 3 of the Geneva Conventions[16] could be said to exist. That would imply the existence of a non-international armed conflict (NIAC) against a non-state actor. It is also possible that such a group or groups could obtain sufficient control over set territory to establish the predicates for the application of Additional Protocol II[17] to the conflict. In such a circumstance, customary international law, as well as domestic law (which itself must comply with International Human Rights Law (IHRL)) would govern the use of force, targetability, and detention powers employed by the state.

There is an inherent imbalance in the status of parties to a NIAC. And as customary international law does not change this legal status, there is an inherent imbalance of rights but not of core obligations. There has been a tremendous change from the time of Martens because "protection" and "empire" have shifted in importance. The value of sovereignty has gone down while "protection," the value of human rights, has gone up.

If states came to the aid of the sovereign, the armed conflict would remain a NIAC. No new body of law would be added to the mix. If states came to the aid of the heretofore unprivileged belligerents, the armed conflict may well become an international armed conflict (IAC). Much of the same customary international law would apply, as would the treaty law of IAC, displacing, as *lex specialis*, the domestic law and, where applicable, the IHRL.

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[16] *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea art 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S 85 [hereinafter Geneva II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

[17] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP 2].

It may also be the case that the degree of violence is deemed too sporadic, at too low a level of intensity, to constitute an armed conflict. In such a case, only domestic law and IHRL would apply.

A few concluding words. It may once have been the case that the Law of Armed Conflict (LOAC) was a legal regime mutually exclusive of all others, domestic law as well as IHRL. In the same way, a state's absolute sovereignty—recognized as the core and concrete basis of the law of nations—excluded the intrusive power of any other authority, save that imposed by the overpowering force of arms. But now we recognize that sovereignty is not absolute. We recognize this as a matter of theory; federalism is, at its essence, a repudiation of absolute sovereignty. We recognize this as a matter of principle, as well. The greatest sea change in public international law has been the recognition that individual human beings are not merely objects of international law, but subjects of international law. Absolute sovereignty is incompatible with this notion. Of course, "absolute sovereignty" was redundant to Martens's generation of public international lawyers; it was impossible for sovereignty to be anything other than absolute.

The erosion of state sovereignty is related to the emergence of the individual as an international law subject. This is also both a cause and an effect of the erosion of the notion that the LOAC displaces all other law. In a world in which humans have rights that are neither granted by states, nor removable at their whim, it follows that the LOAC can only be a law that is given priority in case of its conflict with other laws, but that it has no more absolute power than that of the concept of sovereignty.

The concept of transnational armed conflict would go too far for most states—including the United States—with regard to both the state sovereignty and individual rights sides of a necessary balance. A transnational armed conflict pays minimal regard to an inherent right of sovereignty in states; it would seem to be for the State Party to the "transnational armed conflict" to decide if another state is unwilling or unable to pursue the former's non-state adversaries. Likewise, it diminishes the heightened respect for individuals as rights-bearing creatures under international law.

Retaining the IAC/NIAC binary system, a binary system within another binary system of LOAC vs. law enforcement, conforms more to the goals of these legal systems and provides needed flexibility.

Assertion of the existence of a NIAC in one part of the world, against a non-state opponent with sufficient organization and control to be viewed within the lens of an armed conflict, does not exclude the possibility that the same opponent, operating elsewhere in the world, may not have the same level of organization or control there. In fact, such discernment is to be encouraged, not discouraged.

If we look at the sort of conflict that the Russian Empire faced and lost, that sort of discernment and careful analysis maximizes the advantages of a world organized under the concepts of state sovereignty, without minimizing the essential protections of international human rights.

II. Targeting—LOAC and National Self-Defense

During America's first war on terrorism in the 1980s, the Reagan Administration grappled with how best to respond to the threat presented by the network of groups and individuals in Lebanon that eventually coalesced into Hezbollah. In addition to the Marine barracks bombing in Beirut that killed 241 servicemembers, there were numerous other attacks against U.S. interests in the region. Secretary of Defense Caspar Weinberger, reflecting the then-dominant institutional military viewpoint regarding the lessons of Vietnam, argued that there was not (or, at least, should not be) any such thing as the isolated, surgical use of force, and hence opposed Secretary of State George Shultz's recommendation of military action.

A Marine officer serving on the National Security Council, Oliver North, believing that President Ronald Reagan was seeking a suggestion to break this impasse between his cabinet members, proposed a covert action program to target the leadership of the emerging Hezbollah group. The Deputy Director of the CIA reacted strongly to this proposal and invoked the lessons learned by the CIA during the 1970s, when criticism

from the Church Committee investigation[18] led to an executive order banning the use of "assassination" as an instrument of foreign policy.[19]

The Director of the CIA was uncertain as to whether this executive order would apply to the proposal in issue, however, and forwarded the matter to the General Counsel of the CIA, Stanley Sporkin. Mr. Sporkin reportedly concluded that the proposed use of force against terrorists who had previously killed Americans would be in the furtherance of national self-defense, and it would not constitute the form of lethal force, used for foreign policy purposes, that is prohibited by the executive order. The plans that were formulated, following the issuance of this opinion, never came to fruition, however, apparently due to the lack of credible proxy forces necessary to carry out such attacks.

This model of lethal force effectively sat unused until the 1990s, when al Qaeda emerged as a threat to the United States. It is clear from the 9/11 Commission Report that the Clinton Administration wrestled with the same questions the Reagan Administration dealt with in Lebanon. And, though the resulting debate seems never to have been resolved to the complete satisfaction of all involved, the administration did embrace the Sporkin opinion and adapt it to various operations directed toward Osama bin Laden, often making it clear that force was to be used as a last resort. After the 1998 U.S. Embassy bombings in East Africa, moreover, the Clinton Administration explicitly and publicly asserted the right to use lethal military force, launching multiple cruise missiles against al Qaeda targets in Sudan and Afghanistan.

These attacks raised questions concerning the governing legal paradigm. Was the administration claiming the existence of an ongoing armed conflict, and did the LOAC allow for the targeting of al-Qaeda leaders? Were the strikes, instead, somehow governed by International Human Rights Law (IHRL)? Or did these attacks simply represent an exercise of self-defense under Article 51[20] of the U.N. Charter, occurring

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[18] In 1975, the Senate established a committee, chaired by Senator Frank Church, to investigate governmental intelligence activities, including alleged assassination attempts. ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, AN INTERIM REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. NO. 94-465 (1975).

[19] Exec. Order No. 12,333, 3 C.F.R. 200 (1981), *amended by* Exec. Order No. 13,284 (2003), Exec. Order No. 13,335 (2004), Exec. Order No. 13,470 (2008).

[20] "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations,

within a legal void in which neither the LOAC nor IHRL applied? Notwithstanding the legitimacy of these questions, however, as these initial strikes were not followed by others, no sustained public debate of these issues ensued.

Substantial analysis of these questions did finally arise after 9/11. The Bush Administration quickly accepted the validity of the LOAC paradigm, arguing the existence of an ongoing armed conflict with al Qaeda. And military action in Afghanistan soon provided the additional complication of large-scale detention operations to the debatable questions concerning lethal targeting.

Issues associated with detainee operations had the effect of forcing sustained legal debate, as the detainees in question brought habeas cases in federal court (normally a venue reluctant to tackle questions of national security). Years of litigation and controversy culminated, eventually, in what appeared, for a time, to be a general consensus as to the legitimacy of the government's position (supported by each branch of the federal government, as well as by presidential administrations of both political parties). The appearance of stability was an illusion, however. The cases concerned involved detainees largely captured in Afghanistan, usually linked either to the Taliban or al Qaeda. Such fact patterns are increasingly distant from the center of gravity with respect to counter-terrorism actions today.

Currently, the United States is facing a growing threat from groups loosely affiliated with al Qaeda, located outside Afghanistan and sometimes lacking direct ties to al Qaeda's senior leadership. The United States increasingly targets these groups' members in locations such as Yemen, Pakistan, and Somalia.

Is there a need for the existence of a "transnational" category of NIAC in order to provide a legal basis for the targeting of these individuals outside Afghanistan? Perhaps not, given the sustained and relatively intense fighting occurring in the relevant areas (Yemen, Pakistan, and Somalia). A NIAC status may attach in each location, even if one rejects the model of a single, global NIAC.

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until the Security Council has taken measures necessary to maintain international peace and security." U.N. Charter art. 51.

Another question still remains, however: to what extent does IHRL impact the LOAC in these settings? A recent decision by a court in the United Kingdom,[21] holding that certain human rights laws had a bearing on the detention of captured insurgents in Afghanistan, highlights the possibility that IHRL and the LOAC might be viewed as not mutually exclusive. This, in turn, could lead to interpretations of what is deemed to be the "governing" law that would have aspects of both IHRL and the LOAC apply to any given conflict scenario, when, in fact, it would be most inappropriate to apply IHRL to any number of conventional combat operations. At the same time, this approach may also lead to scenarios in which LOAC considerations might affect the interpretation of human rights law in undesirable ways. For example, consider the current administration's broad definition of "imminence" in conjunction with the determination of the existence of an "imminent threat," a critical human rights law concept that constrains a state's use of lethal force. Blending LOAC and human rights law may well result in a concept of "imminence" that has no real temporal limits, at least as contemplated under IHRL.

III. Post-2014 Legal Landscape

As we plan for a reduction in forces in Afghanistan, beginning in 2014, the question of the future legal state of affairs for the United States in Afghanistan looms large for government lawyers. Military attorneys, as well attorneys from the Department of Justice and National Security Council, among others, are attempting to reach a consensus on the way ahead for the reduced U.S. footprint in Afghanistan in 2015 and beyond.

Three main questions must be answered: What is the law going to look like in Afghanistan moving into 2015? What is the law going to look like outside Afghanistan and the "hot battlefield"? What is the law related to Guantanamo and the detainees still present there?

The future state of affairs in Afghanistan should become apparent soon. Specifically, these matters will be addressed: the number of U.S. and coalition forces that will remain; the nature of the Bilateral Security Agreement between the Afghan government and the United States,

[21] Serdar Mohammed v. Ministry of Defence, [2014] EWHC (QB) 1369 (Eng.) (holding that detention beyond ISAF's 96-hour detention policy had no legal basis under either Afghan or international law).

which will speak to the operations or missions that will follow; and the Status of Forces Agreement between NATO and the Afghan government. Once these agreements are in place, we will have a better idea of the legal landscape in Afghanistan. This will also help clarify the questions concerning the nature of the law applicable outside Afghanistan, generally, and particularly with regard to Guantanamo and the detainees there.

It may be an oversimplification to view the conflict occurring inside Afghanistan and the conflict with al Qaeda, as a whole, as two separate conflicts, with the implication that as Afghanistan winds down, we might consider that a separate conflict continues to exist with al Qaeda in various other locations around the world. A good counter-argument to this premise is that, as the current conflict began with the Taliban and al Qaeda in Afghanistan at the same time, as the intensity of this conflict fades, we will no longer find ourselves involved in an armed conflict. This would obviously have a dramatic impact on detention operations at Guantanamo, as well as on operations both within and outside Afghanistan's borders.

While this question has yet to be definitively answered, U.S. and coalition operations in Afghanistan, post-2014, will likely not look like combat operations, at least with regard to offensive operations. Counter-terrorism efforts may still exist, however, and some may argue that these are indistinguishable from offensive combat operations.

Beyond that, to what extent will coalition forces attack an imminent threat, rather than wait for the threat to come to them? The potential threats to the Afghan government and the coalition will be well represented by the Haqqani Network, the Tehrik-e Taliban in Pakistan, and the Islamic Movement of Uzbekistan. The U.S. government will have to grapple with how its forces and their Rules of Engagement (ROE) will address the potential threat that these groups represent. This, in turn, will be significantly impacted by the answer to the question of whether a state of armed conflict is said to exist in Afghanistan. The ROE will very much be driven by the language of the agreements between the United States and Afghanistan although some would argue that the concept of national self-defense would potentially override any such agreement if a threat to U.S. forces were to arise.

This is not to say that legal advisors at the highest levels of government are waiting to learn the nature of the mission before

engaging in an analysis of the law that may potentially be applicable to this mission. Ideally, government policy makers and attorneys are working, in tandem, to formulate the mission for U.S. and coalition forces in Afghanistan after 2014.

For actions outside Afghanistan, the 2001 Authorization for the Use of Military Force (AUMF) is the focus of much analysis and debate. At the moment, we have a fairly transparent definition of al-Qaeda, the Taliban, and associated forces. This definition is based on Supreme Court case law, referred to publicly by the Secretary of Homeland Security, Jeh Johnson, and the Attorney General, Eric Holder. It includes groups whose connection to the same al Qaeda that planned 9/11 may not be as clear cut as many would like.

The AUMF needs to be critically assessed and updated before we move into 2015, based on the ongoing debate in Congress concerning whether this law actually still applies to the terrorist groups we now find ourselves targeting in 2014.

In May 2013, President Obama stated:

> The AUMF is now nearly 12 years old. The Afghan war is coming to an end. Core al Qaeda is a shell of its former self. Groups like AQAP must be dealt with, but in the years to come, not every collection of thugs that labels themselves al Qaeda will pose a credible threat to the United States.
>
> Unless we discipline our thinking, our definitions, our actions, we may be drawn into more wars we don't need to fight, or continue to grant Presidents unbounded powers more suited for traditional armed conflicts between nation states.
>
> So I look forward to engaging Congress and the American people in efforts to refine, and ultimately repeal, the AUMF's mandate. And I will not sign laws designed to expand this mandate further. Our systematic effort to dismantle terrorist organizations must continue.

> But this war, like all wars, must end. That's what history advises. That's what our democracy demands.[22]

As of yet, we do not know what will take the place of the AUMF, and the job of a military attorney is to advise on the law "as is," and what a commander may or may not do. There is much ongoing debate within Congress and the Administration. Robert Chesney, Jack Goldsmith, and others recently authored an excellent article[23] on what the next generation AUMF could possibly look like in order to effectively counter evolving terrorist groups. Options include giving it a geographic limitation, a modifiable list of targetable groups, and/or a sunset provision.

It is clear from the President's remarks, however, that his intent is to eventually repeal the AUMF's mandate. There is also the question going forward of whether military forces, rather than law enforcement assets, should be used at all in counter-terrorism operations.

The challenge with the approach used, whether through law enforcement or military action, is that nations approach international law differently. If all coalition partners in Afghanistan were asked their mission, their answers would range from war to nation-building to law enforcement missions, which would then be reflected in their ROE and caveats to the coalition ROE.

This same principle holds true when looking at possible justifications for intervention in other countries' conflicts, such as Syria. Some countries tout humanitarian intervention and a Responsibility to Protect as a justification to intervene despite these "norms" not being recognized as legal bases for such under international law. There is a danger here, as many of the same arguments being espoused by some to justify a military intervention in Syria (against the Asad regime)[24] are similar to those set forth for the Russian intervention in Ukraine. As mentioned previously,

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[22] President Barack Obama, Remarks by the President at the National Defense University (May 23, 2013), *available at* https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university [hereinafter President Obama NDU Speech].

[23] ROBERT CHESNEY, JACK GOLDSMITH, MATTHEW C. WAXMAN, & BENJAMIN WITTES, A STATUTORY FRAMEWORK FOR NEXT-GENERATION TERRORIST THREATS (2013).

[24] These remarks occurred prior to the current military operations against the Islamic State of Iraq and Syria (ISIS, also known as IS or ISIL), operations based on different legal justifications.

however, this justification for intervention will likely become more common as the value of national sovereignty decreases.

Another critical issue in the use of force analysis is that of maintaining the distinction between law and policy in order to avoid the ever present danger of conflation. There is much public discussion regarding the approach to targeting outside the "hot" battlefield of Afghanistan, and much of this involves policy, rather than law. For example, the focus on reducing civilian casualties in kinetic strikes to zero may result in an incorrect assumption that zero civilian casualties, rather than the LOAC principle of proportionality, constitutes the legal standard. A long-term risk, then, is that policy will translate into state practice and that this will affect customary international law and the LOAC in unintended ways.

The third question regarding post-2014 detention operations at Guantanamo will turn, in part, on whether we are dealing with Taliban or al Qaeda detainees. Administration officials have mentioned, on numerous occasions, the impending end of the armed conflict in Afghanistan, with al Qaeda. In 2012, then Department of Defense General Counsel Jeh Johnson gave a speech at the Oxford Union in which he discussed what he believed to be the inevitable end to armed conflict with al-Qaeda:

> I do believe that on the present course, there will come a tipping point—a tipping point at which so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States, such that al Qaeda as we know it, the organization that our Congress authorized the military to pursue in 2001, has been effectively destroyed.
>
> At that point, we must be able to say to ourselves that our efforts should no longer be considered an "armed conflict" against al Qaeda and its associated forces; rather, a counterterrorism effort against *individuals* who are the scattered remnants of al Qaeda, or are parts of groups unaffiliated with al Qaeda, for which the law enforcement and intelligence resources of our government are principally responsible, in cooperation with the international community—with our military

> assets available in reserve to address continuing and imminent terrorist threats.[25]

One of the traditional principles of the LOAC is the release of detainees, upon termination of the conflict. If the President declares an end to the armed conflict in Afghanistan, we will have to make some decisions regarding the detainees in Guantanamo, but it does not necessarily follow that these detainees will be released immediately.

Jeh Johnson noted in his speech that the end of fighting in World War II did not lead to the immediate release of German detainees; some were held for years following the war's end.[26]

Question: In Jeh Johnson's speech, he said that the end will not be determined by al Qaeda surrendering on the USS Missouri. *What will be the measure of the end of the conflict with al Qaeda?*

There is a frustration at the national level, leading to much debate, with the use of military power as an instrument of national power. High-level military officials have frequently stated that we cannot kill our way out of the problem with terrorist groups. There has to be a concerted, full spectrum effort to address the underlying causes of terrorism, including building up our partner nations' capacities to deal with such threats. It takes all departments and agencies of the government, working together, to construct and execute a cohesive strategy for dealing with terrorism, rather than simply reacting to events after they occur. The AUMF is a great example of a hurried response to a traumatic event. Our response, and the legal basis for it, might well have looked very differently had there been more time to consider an overarching strategy to meet the evident terrorist threat.

The question of detainees leads back to the issue of the bleeding of IHRL into the LOAC, which was raised in the recent United Kingdom

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[25] Jeh Johnson, Gen. Counsel, U.S. Dep't of Def, Remarks at the Oxford Union: The Conflict Against Al Qaeda and its Affiliates: How will it End? (Nov. 30, 2012), *available at* http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/.

[26] *See* Ludecke v. Watkins, 335 U.S. 160 (1948) (holding that the President's authority to detain German nationals continued for over six years after the fighting with Germany had ended).

court decision regarding an Afghan detainee.[27] Because nations often fight in coalitions, and these nations bring their own body of laws with them, we cannot ignore the impact that these decisions will have on U.S. forces. Adjustments will necessarily have to be made in the manner in which U.S. forces operate in a coalition environment.

Panel 2

Brigadier General (Ret.) Kenneth Watkin, Canada; Major General Den Efrony, Israel Defense Force; Professor Rachel VanLandingham

Question: Assuming there does exist some form of armed conflict with al Qaeda and its associated forces, what LOAC is applicable?

I. To What Extent Does the LOAC Apply to an Armed Conflict with al Qaeda?—Defining Armed Conflict and its Threshold Application

The nature of warfare, regardless of the "type" of war (i.e., international or non-international armed conflict), has not changed. It is still a brutish, violent exercise to destroy one's enemy. This remains true with counter-terrorist[28] and counterinsurgency operations.[29] The most prominent type of warfare has always been against non-state actors. State military forces prefer to fight conventional wars, but reality does not always match this desire.[30] Even in the 1970s and 80s, when terrorism was often thought of almost exclusively in terms of criminal activity, there were operations conducted against non-state actors that did not fit comfortably into this view. For example, *Operation Eagle Claw*,

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[27] *See supra* note 21 and accompanying text.

[28] DEP'T OF DEF, DICTIONARY OF MILITARY AND ASSOCIATED TERMS 55 (15 Mar. 15), *available at* http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf (defining counter-terrorism as "[a]ctions and operations taken to neutralize terrorists and their organizations and networks in order to render them incapable of using violence to instill fear or coerce governments or societies to achieve their goals[,] . . . [a]lso called CT").

[29] U.S. DEP'T OF ARMY, FIELD MANUAL 3-24, COUNTERINSURGENCY glossary-4 (15 Dec. 2006) (defining "counterinsurgency" as "[t]hose military, paramilitary, political, economic, psychological, and civic actions taken by a government to defeat insurgency").

[30] JACK S. LEVY & WILLIAM R. THOMPSON, CAUSES OF WAR 12 (2010) ("There has been a shift in the nature of warfare over time—away from the great powers, away from Europe, and, increasingly, away from state-to-state conflict and toward civil war, insurgency, and other forms of intrastate and trans-state warfare.").

the ill-fated Iran hostage rescue mission to gain the freedom of American diplomats held by Iranian students, was carried out in 1980.

In 1982, Israel invaded Lebanon and expelled the Palestinian Liberation Organization (PLO), a terrorist group that also had conventionally organized units (with tanks and artillery).[31] That invasion led to the creation of Hezbollah, an organized resistance movement that eventually forced the Israel Defense Forces (IDF) to withdraw from Lebanon. The tactics of that non-state group included the 1983 Marine barracks bombing carried out with vehicle-borne, improvised explosive devices. It is this period that also saw the start of the modern concept of suicide bombing, and one that introduced the notion that terrorist groups could use elevated levels of violence associated with armed conflict. It is these uses of explosives that have introduced increased levels of deadly violence, and this has been a game changer in terms of the way states react to these small groups. Special Forces units were created in many state armed forces (particularly in the United States), and these have proven to be exceptionally capable of addressing such threats.

An increasing requirement for states to confront non-state actors in the post 9/11 period has led to the question of whether the resulting NIACs are internal or transnational in character? The answer very much depends on perspective. If the conflict is in one's own country, it is ordinarily seen as internal in nature, often involving a policing response. The default position is that states will favor a human rights based law enforcement response in their own territory. However, if the conflict involves an expeditionary deployment, as is normally the case when North American military forces are involved, the violence is often seen as more transnational in nature. This, in turn, can lead to the view that the operation is governed by armed conflict rules. For example, when the United States sends its armed forces outside its borders, this is often seen as the United States going to "war," rather than participating in law enforcement-based operations.

Given the unique nature of NIAC, a key question that arises is whether Human Rights Law (HRL) applies to any form of armed conflict that might be waged against al Qaeda? However, this would appear to be a given, and the real issue is not whether HRL applies, but how much of the LOAC applies to an armed conflict with al Qaeda. What has

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[31] DANIEL BYMAN, A HIGH PRICE: THE TRIUMPHS & FAILURES OF ISRAELI COUNTERTERRORISM 67 (2011).

historically skewed the discussion concerning the operation of these bodies of law is the question of whether human rights treaties apply extraterritorially. The U.S. position is that they do not.[32] However, from a customary international law perspective, HRL does apply extraterritorially. The extraterritorial applicability of HRL is referred to in the *Restatement of Foreign Relations Law of the United States*.[33] Human rights norms are also found in humanitarian law treaties. This can be seen in Geneva Convention IV,[34] Additional Protocol I, Article 75, and Additional Protocol II, Article 4.[35] Additionally, in terms of acceptance, the *Operational Law Handbook*, produced by the U.S. Army's Judge Advocate General's Legal Center and School, has an entire chapter on human rights, highlighting that operational necessity required the application of HRL as a matter of practice in Iraq and Afghanistan.[36]

So, the question to ask is why, at the upper, strategic levels of the U.S. government, there is an argument about whether human rights treaties apply, when at the ground level, where the warfighters operate, they already apply HRL? Human rights are, in reality, an inherent part of contemporary U.S. operations.

II. The 1995 *Tadić* Decision and Its Impact on the LOAC

The more challenging question is not whether HRL applies to NIAC, but when and how the LOAC applies. Here, a challenge arises, in that states have historically not wanted to apply the LOAC to internal

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[32] U.N. Human Rights Comm., *Concluding observations on the fourth periodic report of the United States of America*, ¶ 4, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014).

[33] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 (1986).

[34] EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 4 (1993) (noting that Geneva Convention IV is referred to as a "bill of rights for the occupied population, a set of internationally approved guidelines for the lawful administration of the occupied territories").

[35] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 75, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP 1]; AP 2, *supra* note 17, art. 4 (requiring Parties to the Protocol to provide humane treatment to anyone not otherwise entitled to greater protection under the Geneva Conventions or the Protocol).

[36] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 45-54 (2013).

conflicts. That is why Common Article 3[37] is so sparse in terms of enumerated treaty rights. Further, as was articulated in the 1995 ICTY *Tadić* decision,[38] the NIAC paradigm does not incorporate all LOAC provisions.[39] Some states, like the United States, adopt a policy approach of applying the principles and spirit of LOAC on all military operations.[40] However, for those lawyers who advocate for an exclusive *lex specialis* approach, the question has to be asked as to how that principle applies when LOAC is being adopted only as a matter of policy? In legal terms, a policy cannot win out over the *lex generalis* of human rights law. Further, if there is no armed conflict, the LOAC cannot apply[41] although some authors suggest it does as a matter of policy.[42] It was during the operationally complicated period of the 1990s that this gap-bridging approach of applying LOAC, as a matter of policy, was adopted due to the uncertainty as to when an armed conflict existed. For example, in 1999, the U.N., struggling with this same issue, developed the *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law* to assist in identifying when the LOAC applied in a given situation.[43] There should also be little doubt that HRL continues to apply during armed conflict.[44]

A particular legal challenge is that of defining the legal threshold for the existence of an armed conflict. Ten years ago, the International Committee of the Red Cross (ICRC) argued that Common Article 3 should be applied at the lowest level of violence possible in order to facilitate its application. This was argued from a humanitarian

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[37] *See* Geneva I, *supra* note 16, art. 3; Geneva II, *supra* note 16, art 3; Geneva III, *supra* note 16, art. 3; Geneva IV, *supra* note 16, art 3.

[38] Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 96-127 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) [hereinafter Tadić].

[39] *Id.* ¶¶ 96-127.

[40] U.S. DEP'T OF DEF., DIR. 2311.01E, DOD LAW OF WAR PROGRAM para. 4.1 (15 Nov. 2011).

[41] Tadić, *supra* note 38, ¶ 67 ("International humanitarian law governs the conduct of both internal and international armed conflicts . . . for there to be a violation of this body of law, there must be an armed conflict.").

[42] Jordan J. Paust, *Self-Defense Targetings of Non-state Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANS. L. & POL. 237, 260 (2009-2010) ("Article 51 self-defense actions provide a paradigm that is potentially different than either a *mere* law enforcement or war paradigm. . . .").

[43] BRUCE OSWALD, HELEN DURHAM & ADRIAN BATES, DOCUMENTS ON THE LAW OF UN PEACE OPERATIONS 201-05 (2010).

[44] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Reports 136 (July 9).

perspective, as governments were refusing to recognize the existence of even intense internal armed conflicts. However, post-9/11, this argument changed, in part, in order to contend that there existed no armed conflict with al Qaeda in third states, and as a result of the *Tadić* decision. The *Tadić* case identifies the intensity of a conflict, as well as the organization of the armed groups involved, as the criteria used to determine the existence of a conflict. This test is often used to suggest that there is now a higher threshold standard for armed conflicts. Unfortunately, this approach does not fully reflect other approaches, such as the *Abella* case, where the conflict was more limited both in time and intensity but where the LOAC was still held to apply.[45]

A key challenge exists when there is an attempt to apply the *Tadić* criteria in the context of a "one off" defensive use of force in responding to a non-state actor attack. Does the LOAC or HRL govern such a use of force? One of the criticisms of attempting to apply *Tadić* to such a situation is the perception that a contractual approach of offer and acceptance is required, meaning that the state has to wait for the enemy to offer up a certain level of violence, and then accept this by responding with force. In brief, an armed conflict would not exist until a response takes place. However, the *Tadić* criteria must be understood in the context in which the decision was rendered.

The *Tadić* case did not arise in a situation involving the use of force in self-defense under Article 51of the U.N. Charter.[46] Rather, it arose in the context of a Euro-centric notion of an insurgent group, with headquarters and uniformed armed forces participating in a much broader conflict. Thus, an armed conflict might be considered to exist at the point at which a defensive response is justified under Article 51 of the United Nations Charter. Reliance on the *Tadić* criteria is also problematic if the requirement to have a hierarchical organization comes to be viewed as absolute in order to demonstrate group organization.

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[45] Juan Carlos Abella v. Argentina, Inter-Am. Ct. H.R. (ser. L.) No. 55, ¶ 1 (Nov. 18, 1997).

[46] U.N. Charter art 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.")

The reality of warfare is that when non-state actors are threatened, they will change to cellular organizations; they will hide. Then as soon as they are able to discover a safe haven or to reconstruct, they will again develop a hierarchical organization. As a result, both cellular and hierarchical organizations can meet the *Tadić* criteria. Indeed, some non-state actors adopt hybrid organizations, combining both hierarchical and cellular structures.

To the extent that there is discussion concerning "voids" in the law, it centers on the application of treaty law. However, this theoretical void is actually filled with customary international law. And increasingly, the perceived void is addressed through a dialogue about the applicability of HRL.

III. Defense of Nationals, Hostage Rescue, and Self-Defense

Contemporary operations are also causing greater discussion about what law applies to hostage rescue operations. These operations are not traditional state-on-state conflicts but do involve the use of force in defense of nationals. While the traditional dialogue about acting in self-defense deals with state versus state conflict, there is a sound, strong body of state practice of conducting such rescues. Importantly, hostage rescues may not involve armed conflict. Some hostage rescues, such as the iconic 1976 Entebbe raid[47] and the 2000 Sierra Leone operation,[48] did occur in the context of an armed conflict. However, the 2012 rescue of U.S. national Jessica Buchanan in Somalia was a law enforcement matter.[49] How is the Buchanan rescue considered law enforcement, but the Entebbe and Sierra Leone operations viewed as occurring within the context of armed conflicts? The question then becomes: What factors distinguish law enforcement activities from armed conflicts? The Somalia operation was of a law enforcement nature, carried out against a criminal gang. That gang had no political motive. In contrast, Entebbe was an IAC, justified under Article 51 or customary international law.

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[47] Operation Entebbe was a counter-terrorist hostage-rescue mission carried out by the Israel Defense Forces (IDF) at Entebbe Airport in Uganda on July 4, 1976.

[48] In September 2010, British Special Air Service soldiers conducted a hostage-rescue mission, *Operation Barras*, against an armed militia, the "West Side Boys," who were holding members of the Royal Irish Regiment.

[49] See JESSICA BUCHANAN, ERIK LANDEMALM & ANTHONY FLACCO, IMPOSSIBLE ODDS: THE KIDNAPPING OF JESSICA BUCHANAN AND HER DRAMATIC RESCUE BY SEAL TEAM SIX (2013).

The first individuals killed during the operation were Ugandan troops who were assisting the terrorists holding the hostages within the airport terminal.[50] This was a situation of state-on-state violence, and it was therefore an IAC although the hostilities lasted only 90 minutes.

This raises the issue of whether a use of force can be justified on the basis of Article 51, or the customary law of defense of nationals, in the context of a law enforcement operation. If an organized group does not have a political agenda (i.e., it is a criminal enterprise), and it is operating in an "ungoverned space," that is, a space with no effective territorial government able to enforce the law, a state has the right to protect its nationals, who may be threatened by such a group. Of course, the ability to conduct such a law enforcement operation will be driven, in part, by geography but also by a state's capability to conduct the operation. These two factors will likely result in military special forces being deployed for such a purpose.

In the contemporary security environment, transnational criminal organizations are non-state actors capable of posing a significant threat. This raises the issue of whether a law enforcement or armed conflict response is appropriate when dealing with these "criminal insurgents." To answer this question, one must look at the non-state actor organization, its political motivation, if any, and the intensity of the violence in issue. It is the political factor that separates warfare from armed conflict. However, such a determination can be difficult. A key factor may well be when a transnational criminal organization (e.g., a drug cartel organization in Mexico) interferes with state governance to the extent that its activities take on the characteristics of an insurgency, as opposed to criminal conduct.

There is also a commonality that exists between hostage rescues carried out in either conflict or law enforcement scenarios. Hostage rescue situations can be characterized as law enforcement even when carried out by military forces. Domestically, the hostage rescue role is often assigned to police forces (e.g., the FBI), but extraterritorially, the military is frequently tasked to perform this function. However, when the military conducts a law enforcement-related rescue, this operation is governed by HRL, rather than the LOAC. In this context, the idea of

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[50] IDDO NETANYAHU, YONI'S LAST BATTLE: THE RESCUE AT ENTEBBE, 1976, at 39 (2002) (noting that the Ugandan army was in control of the building where the hostages were being held and were aiding in guarding them).

protecting nationals, and the threat that non-state actors pose internationally, is changing the dialogue concerning whether HRL or the LOAC is applicable to such military operations.

IV. Case Study—Rescue of Hostages in Sierra Leone: Law Enforcement Action or Armed Conflict?

An example of the complexity of international hostage rescue operations can be seen in the 2000 *Operation Barras*, which was conducted in Sierra Leone. A key question is whether this was carried out in the context of an armed conflict, or as a British-led law enforcement operation conducted in a foreign country. It was an operation involving state armed forces, an organized armed group, and a considerable level of violence. The West Side Boys were an organized armed group of 600 personnel, with a political agenda, operating in Sierra Leone and had originally taken eleven British soldiers and one Sierra Leonean soldier hostage. A four-hour rescue operation by the Special Air Service (SAS)/Special Boat Service (SBS) and elements of the Parachute Regiment was conducted to rescue the six soldiers who had not been released through negotiation. The British ground forces were supported by close air support provided by helicopters, as well as by indirect mortar fire. During the operation, ten percent of the British soldiers involved were wounded, and one was killed. It has been widely reported that twenty-five Sierra Leoneans were killed.[51] However, a South African pilot flying a Sierra Leonean helicopter (the sole contribution by that country to the operation) indicates that he killed approximately fifty to sixty rebels, while the British gunships and main attack force likely killed an additional forty personnel.[52]

Thus, significant military action was carried out within a country, albeit with the consent of the Sierra Leone government. This latter fact, then, raises the issue of whether it was an act of self-defense under Article 51. This is a separate issue, however, from that of whether it constituted an armed conflict. On a *de facto* basis, this military action took on the characteristics of an armed conflict, in terms of the level of force used and the nature of the group holding the hostages. One could

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[51] WILLIAM FOWLER, OPERATION BARRAS, THE SAS RESCUE MISSION: SIERRA LEONE 2000 58 (2005).

[52] AJ VENTER, GUNSHIP ACE: THE WARS OF NEALL ELLIS, HELICOPTER PILOT AND MERCENARY 262 (2011).

argue that the U.K. was rightfully acting to defend its nationals, even though Sierra Leone had consented to the use of force. The British forces were dealing with an organized armed group that was exceedingly dangerous, and there was no other means available to rescue the hostages. While some might argue that this was a law enforcement operation, the better view is that this incident reached the level of an armed conflict, justifying the use of LOAC rules.

V. Strategic Legal Conflict and Human Rights

The reality is that there exists a strategic legal conflict between HRL and LOAC advocates. This has, in fact, become an important issue that impacts how operations are conducted and assessed. However, there is also an increasing recognition that other bodies of law, such as the international law governing self-defense and domestic law, can apply as well. The interaction between these various bodies of law has evolved to the point that military lawyers frequently have to assess how they interface. In effect, lawyers have to deal with various bodies of law when "fighting at the legal boundaries." Examples of domestic law impacting international operations can be seen in the U.K. case of *Serdar Mohammed and Ministry of National Defence*[53] and the U.S. case of *Munaf v. Geren*,[54] both of which dealt with the handling of Afghan detainees. The *Serdar Mohammed* case is unique in that it held that the legal basis for detainees had to be found in Afghan domestic HRL and that there existed no authority to detain Afghans under LOAC treaty law or customary law. Israel also has a body of domestic law that applies to "unlawful combatants." Fighting at the boundaries occurs when these laws come together and overlap and interact.

Contemporary operations also demand that soldiers have a full understanding of the strategic consequences of what they do on the battlefield and, in particular, the use of deadly force. This idea was first introduced as the concept of the "strategic corporal," meaning that decisions made at the lowest level can have strategic effect.[55] Law is the ultimate strategic discipline, and this means that there must be a full

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[53] Serdar Mohammed v. Ministry of Defence, [2014] EWHC (QB) 1369 (Eng.).
[54] Munaf v. Geren, 553 U.S. 674 (2008).
[55] Charles C. Krulak, *The Strategic Corporal: Leadership in the Three Block War*, MARINE CORPS GAZETTE, Jan. 1999.

understanding of not only LOAC issues, but the HRL issues that apply in this type of conflict as well.

Finally, human rights and the LOAC are forced to interact, due to the nature of the conflict with al Qaeda. There has been an interesting "narrative" regarding drones that has played out in current events, as the U.S. has withdrawn from Afghanistan. This narrative suggests that al Qaeda is just a small terrorist group, not unlike those that operated in Europe in the 1970s and 1980s. A U.S. government adoption of this approach would mean that once al Qaeda Central is destroyed, the armed conflict is over. For some human rights advocates, the equating of al Qaeda to a criminal organization means that an armed conflict cannot exist, and that, therefore, drones cannot be used to strike al Qaeda targets. However, the reality is that the operational situation is much more complicated than this. The Sunni Salafi jihadists have global aspirations and seek to create a caliphate. They are a diverse group whose philosophy and ideology follow the basic doctrine of communist revolutionary warfare theory.[56] They are insurgents who sometimes engage in terrorist activities, rather than terrorists who sometimes engage in insurgent activities. As an insurgency, this means that the conflict with al Qaeda is, ultimately, a battle of governance, with terrorists operating from an "ungoverned space." Governance is not uniquely about armed conflict. It is about policing and law enforcement—winning by a police-primacy approach. This approach privileges capturing over killing. The strategic goal is one of reaching an end state of normalcy, which ultimately means maintaining order through law enforcement.

VI. Case Study—Israeli Legal Challenges

In an article on the historical evolution of the legal divide between classifying conflicts as either international or non-international armed conflicts, Rogier Bartels stated:

> In the summer of 2006, the world witnessed a situation that undoubtedly reached the threshold of armed conflict. As yet, however, the conflict between Israel

[56] NORMAN CIGAR, AL-QA'DA'S DOCTRINE FOR INSURGENCY 20-22 (2009); MICHAEL W. S. RYAN, DECODING AL-QAEDA'S STRATEGY: THE DEEP BATTLE AGAINST AMERICA 204-30 (2013).

> and Hezbollah (or according to some, the conflict between Israel and Lebanon) has not conclusively been identified as one of the two (existing) types of conflict under international humanitarian law (IHL): as either an international armed conflict (IAC) or a non-international armed conflict (NIAC).[57]

The Second Lebanon War in 2006 was no doubt an armed conflict, but against whom? Was it against the terrorist organizations supported by Iran and located in Lebanon? Was it against the country in which it occurred and in which its government participated? What type of armed conflict was it: IAC, NIAC or a new category?

To better understand the legal complexities arising from Israel's conflicts, a short overview of these operations is necessary. Israel is in an ongoing armed conflict with the Hezbollah terrorist organization, which primarily operates inside Lebanon. Hezbollah is the dominant military and political force in Lebanon, an even stronger one than the Lebanese Army. It functions according to a strict hierarchy, with internal discipline and operational plans. Yet, it is still a terrorist organization, recognized as such by the United States, Australia, and, at least partially, the EU. Hezbollah is also fully financed and supported by Iran, serves in Lebanon's coalition government, in some eight ministries, and provides social and welfare services upon which the South Lebanese population heavily relies.

Hezbollah has always been intent on attacking Israel and its citizens, even following Israel's U.N.-recognized withdrawal from South Lebanon in 2000. The peak of violence occurred in July 2006, when Israel responded to a Hezbollah attack on IDF soldiers inside Israel, kidnapping several soldiers and causing the death of ten others. This triggered the Second Lebanon War, during which Hezbollah fired over 4,000 missiles at Israeli civilians. Today, the hostilities continue, and Hezbollah is re-arming. There are over 100,000 missiles and rockets pointed at Israel, mostly located in densely populated areas. Hezbollah also engages in hostile acts against Israel from locations outside of Lebanon, to include Syria, where it has been a major supporting force to the Assad regime.

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[57] Rogier Bartels, *Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide Between International and Non-international Armed Conflicts*, INT'L REV. OF THE RED CROSS, Mar. 2009.

This situation raises interesting legal issues. Clearly the organizational structure of Hezbollah and the intensity of its actions against Israel constitute unambiguous evidence of the existence of an armed conflict.

The same is true with regard to the hostilities being waged by Hamas and other terrorist organizations based in the Gaza strip on Israel's southern border. Hamas, too, is a terrorist organization, yet it is also the de facto ruling authority of an area outside Israel's borders. It engages in foreign relations and makes official visits to countries like Russia, Turkey, Qatar, and others. Hamas conducts ongoing rocket strikes at civilian populations in Israel and systematically attacks IDF forces near the border. Since taking power in Gaza in 2006, Hamas has orchestrated intense military operations in 2008, 2012, and 2014. Since November 2012, it has launched regular shelling from the Gaza Strip. Again, this is clearly an armed conflict.[58]

In summary, Israel faces two completely separate armed conflicts on its northern and southern borders. Each one raises its own unique legal issues and challenges. In a geographical sense, one conflict is occurring, primarily, in state territory, while the other occurs in a *sui generis* type of territory, which is not considered a state. In both instances, there are examples of spillover into neighboring territories. The actors in the conflict also have different characteristics. One is a terrorist organization, heavily linked to the governmental mechanisms of the state in which it is located; the other is a terrorist organization and a de facto ruling authority.

If there exists an armed conflict with Lebanon, as well as with Hezbollah, are these two separate armed conflicts, or one and the same? If separate, the conflict with Lebanon would clearly be an IAC. Regarding the conflict with Hezbollah, however, one could argue both ways; it is a cross-border conflict against an organization that has elements reflecting an organized military, but it is not a state versus state conflict.

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[58] For more information, see *The Gaza Operation 2008-2009: Factual and Legal Aspects*, ISR. MINISTRY OF FOREIGN AFFAIRS, http://www.mfa.gov.il/mfa/foreignpolicy/terrorism/palestinian/pages/operation_in_gaza-factual_and_legal_aspects.aspx.

In 2005, the Israeli Supreme Court issued an opinion in a case involving targeting determinations.[59] The court viewed the conflict with the Palestinian terrorist organizations to be one governed by IAC rules but recognized the difficulty in definitively classifying the nature of the conflict. This determination was not without its problems, and it may need to be revisited given current circumstances.[60] As a matter of policy, Israel generally applies the rules of both IACs and NIACs to its ongoing conflict with the Palestinian terrorist organizations.

Where there are uncertainties, Israel has arrived at solutions that would meet the most stringent legal requirements. With regard to the detention of unlawful combatants, for example, Israel has legislation providing for such detention in a way that meets the standards of both IACs and NIACs.[61]

Moreover, with regard to the conduct of hostilities, there are many similar aspects in both conflicts. In each case, these organizations act as proxies of other states and embed themselves and their operations deep in residential areas. Hezbollah constructs residential buildings in South Lebanon villages and uses these for weapons storage and as launching pads. Embedding weapons and engaging in other operational activity in the heart of a residential neighborhood means that civilian casualties are likely unavoidable, particularly in Lebanon. This results in the fact that the principle of proportionality and the question of human cumulative proportionality are real concerns for Israel.

VII. Targeted Killing of Leaders

The notion of killing individual human beings as a way of tamping down an insurgency is an interesting idea. If the legal community constructs its legal architecture on the assumption that this approach will not succeed, lawyers may find themselves in disagreement with those in the military leadership who view history differently.

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[59] HCJ 769/02, Public Committee against Torture in Israel v. Government of Israel (2) PD 459 [2006] [hereinafter Pub. Comm. v. Israel].

[60] For more information, see *Aerial Strikes Against Terrorists: Some Legal Aspects*, ISR. DEF. FORCE MILITARY ADVOCATE GEN., http://www.law.idf.il/592-6584-en/Patzar.aspx.

[61] For more information, see Dvir Saar & Ben Wahlhaus, Preventive Detention for National Security Purposes—The Israeli Experience (May 2, 2015) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2601838.

For example, a recent *Washington Post* article[62] discussed how the killing of two dozen leaders unhinged the Revolutionary Armed Forces of Columbia and degraded its capacity. Is the U.S. legal community making a mistake by being too dismissive of the military reality that killing specific individuals may actually be successful? From a legal perspective, it is permissible to kill the enemy in an armed conflict who is a member of an organized armed group or a civilian taking a direct part in hostilities.

The act of targeting specific individuals should be taken cautiously, as the situation might not improve when other leaders assume command. Those taking up the cause may be even worse than those whom they replace. This goes to the nature and structure of the organization itself. If it is a small group—very individually focused in terms of accomplishments, leadership, or ideology—killing certain leaders may be a way to successfully prosecute the conflict. But the enemy facing the United States is not like this. Al Qaeda is able to generate more and more leaders. Take the Pakistani Taliban, for example. When Baitullah Mehsud, the leader of Tehrik-i-Taliban Pakistan, was killed in 2009, three or four nominees were immediately available to fill his position. Such targeting decisions are group-dependent, but it is ultimately a policy choice, or a command choice.

Some argue that if targeted killing becomes a tool in the commander's toolkit, it should be employed in a manner consistent with the principles of international humanitarian law. There is never a situation to which no law applies. However, there are grey zones, such as transnational NIAC, when Common Article 3 provisions apply. A determination of the customary international law applicable to any given situation is very fact-specific and labor-intensive. Does Article 75 of Protocol I apply?[63] Is there relevant state practice? For example, to how many hours of sunlight is a detainee entitled? These are situations to which the Martens Clause applies. If there is nothing directly on point, look to HRL to discern the governing norms. Each situation requires a very fact-specific and time-consuming analytical process.

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[62] Dana Priest, *Covert action in Colombia: U.S. Intelligence, GPS bomb kits help Latin American nation cripple rebel forces*, WASH. POST, Dec. 21, 2013.

[63] Article 75 sets forth the fundamental humanitarian protections to be afforded all persons who are in the power of a Party to an international armed conflict. AP 1, *supra* note 35, art. 75.

VIII. Continuous Combat Function

A continuous combat function is demonstrated through conclusive behavior—a direct participation in hostilities on a recurring basis. When this occurs, an individual is a de facto member of a non-state armed group. As such, he is targetable under international law. The cook who has been recruited into the armed forces is, at the end of the day, like a lawyer who is commissioned. They are both, in essence, riflemen. If they find themselves in a situation of hostilities, they will employ their rifles. They can be called upon by a commander to advance military goals. Moreover, even if the cook is but a contractor cook, the ICRC and the international community would agree that this contractor is not immune from an attack. He may become a casualty—collateral damage resulting from an attack on a legitimate military target. He is a civilian accompanying the armed force.

This same logic applies to a non-state armed group. If the cook does nothing but cook, he is performing a function that does not constitute a direct participation in hostilities, and he cannot be directly targeted. However, if the cook also functions as a rifleman, he is engaged in a continuous combat function and can be targeted at any time.

IX. War by Principled Analogy

The LOAC lacks exact rules concerning its particular application to non-state armed groups operating transnationally. However, the U.S. self-defense response to 9/11 and other acts of war committed by al Qaeda and its associated forces are sufficiently similar to situations regulated by the existing law to make the extant *jus in bello*, as well as *jus ad bellum* and the law of neutrality.

This application of existing relevant law involves what has been called a process of translation.[64] The United States' armed conflict against al Qaeda and associated forces can also be viewed as a war by principled analogy. The prevalence of analogies in the U.S. approach to

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[64] Harold Hongju Koh, Former Legal Advisor, U.S. Dep't of State, Speech at the Oxford Union: How to End the Forever War? 3 (May 7, 2013), *available at* http://opiniojuris.org/wp-content/uploads/2013-5-7-corrected-koh-oxford-union-speech-as-delivered.pdf.

warfare today does not reflect a disregard or manipulation of the law. Rather, it highlights an attempt to, in a principled fashion, apply the law.

The last decade of armed conflict against al Qaeda and its associated groups has been unconventional in many respects, including, but not limited to, the transnational character of the enemies. What makes them unconventional is their decentralized organizational structure, which has been enhanced through the use of modern technology, like the Internet. It is also unconventional due to the enemy's tendency, prompted by its asymmetrical disadvantages, to wage war using the tactic of terror and to otherwise disregard the LOAC. This unconventional nature of al Qaeda and its associated groups makes determining applicable rules exceedingly difficult, but not impossible.

Yet one should not equate unconventional with new. While the coordinated acts of terrorism on September 11, 2001, against the Twin Towers and the Pentagon seemingly resulted in an unprecedented level of death and disruption from any one coordinated terrorist operation, violence at such an extreme scale is, unfortunately, not new. In fact, non-state perpetrators have nefarious parallels in history. While these parallels are not exact, they are sufficient to make reasoned judgments regarding their relevance and may impact how to legally deal with today's enemies.

Going back to the use of analogies: in a January 2014 article in *The New Yorker*, David Remnick asked President Obama about the seeming resurgence of al Qaeda, mentioning the al Qaeda flag flying over Fallujah and an al Qaeda flag being carried by various groups in Syria.[65] President Obama responded with the following statement:

> The analogy we use around here sometimes, and I think is accurate, is if a JV [junior varsity] team puts on Lakers uniforms, that doesn't make them Kobe Bryant. I think there is a distinction between the capacity and reach of a bin Laden and a network that is actively planning major terrorist plots against the homeland, versus jihadists who are engaged in various local power struggles and disputes, often sectarian. Keep in mind, Fallujah is a profoundly conservative Sunni city in a

[65] David Remnick, *Going the Distance: On and Off the Road with Barack Obama*, THE NEW YORKER, Jan. 27, 2014.

> country that, independent of anything we do, is deeply divided along sectarian lines. And how we think about terrorism has to be defined and specific enough that it doesn't lead us to think that any horrible actions that take place around the world that are motivated in part by an extremist Islamic ideology are a direct threat to us or something that we have to wade into.[66]

This analogy raises the legal question of which non-state armed groups constitute "associated forces" with a sufficient enough nexus to make their members lawful targets under the LOAC? To frame the question another way, when would alignment with an existing belligerent (i.e., co-belligerency), plus specific entry into the fight against the United States, make "associated forces" lawful targets under the LOAC?

X. Law of War Principles and Current Events

This debate is currently raging with respect to Boko Haram,[67] and the public outcry to do something about the worsening situation in central Africa. But under what law would the United States deploy military forces?

The Obama administration has recently used the World War II example of U.S. Army Air Forces specifically targeting the plane of Japanese Admiral Yamamoto in the Pacific to legally justify personal targeting, or status-based targeting. Yet, this example may not accurately use a principled analogy and warrants more rigorous review, particularly, if the same legal rationale is going to be used against Boko Haram, ISIS, and others.

In the collection of thirteen major administration speeches on the war against al Qaeda, the term "principle" is used almost 90 times. The prevalence of the word signifies the unconventional nature of this fight,

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[66] *Id.*

[67] A militant Islamic group in Nigeria, which was declared a terrorist organization by the United States in 2013. *See* Press Release, U.S. Dep't of State, Terrorist Designations of Boko Haram and Ansaru (Nov. 13, 2013), *available at* http://www.state.gov/r/pa/prs/ps/2013/11/217509.htm. Boko Haram made headlines in April 2014 when it attacked two boarding schools and kidnapped over 200 schoolgirls in its campaign against Western education, which it believes corrupts the moral values of Muslims, especially women.

the undeveloped nature of international law, and the pragmatic reality of the wide latitude intentionally given to military commanders and national decision makers. Whether this is a positive or negative step is another issue altogether, but it likely is not effective unless it provides for advancing the attainment of national interests. What is important is that, while latitude exists, there are no law-free zones. Even the grey zones are regulated by the principles of the LOAC; yet the rules of translation, with their heavy use of analogies, remain opaque and controversial; this leads to an understandable sense of arbitrariness and ambiguity.

Thus, in all situations regarding the U.S. response to al Qaeda, regardless of whether it is characterized as an IAC, NIAC, or transnational conflict, the fundamental principles of the LOAC apply. There is never an actual gap in the applicable law if it is viewed at an abstract or high enough level, as the principles of distinction, unnecessary suffering, humanity, proportionality, and military necessity unceasingly apply.

The Martens Clause highlights the complementary nature of HRL when the LOAC is silent on an issue. These principles apply to all uses of armed force, not just those wielded by the U.S. military, as the CIA General Counsel and others have acknowledged. In 2012, Stephen Preston, former General Counsel of the CIA, stated that the basic principles of the LOAC apply to the now acknowledged CIA drone operations.[68] This emphasis on LOAC principles, as opposed to rules, does not indicate a reluctance to comply with the LOAC; it is a realistic acknowledgement that the law of war must sometimes be applied in the form of general principles. Applying these customary principles during operations is where the rubber meets the road.

XI. LOAC Principles Direct Participation in Hostilities

The direct participation in hostilities (DPH) controversy is an excellent example for analyzing LOAC principles and the resort to analogy. Applying the distinction principle to members of a non-state armed group who do not wear uniforms requires application by analogy.

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[68] The Honorable Stephen W. Preston, General Counsel, Central Intelligence Agency, Remarks at Harvard Law School: CIA and the Rule of Law (Apr. 10, 2012), *available at* https://www.cia.gov/news-information/speeches-testimony/2012-speeches-testimony/cia-general-counsel-harvard.html

Even the ICRC agrees that there exist belligerent individuals who are not civilians nor combatants, but who sporadically directly participate in hostilities. Individuals who are part of a non-state armed group can be targeted at any time even when not engaging in hostilities. This is analogous to the situation in which members of states' armed forces can be targeted, as opposed to civilians, who can never be made objects of lawful targeting unless they directly participate in hostilities.

But this is where the analogy road diverges. The United States takes the faithful path and analogizes to the entire composition of state militaries, understanding that just because a person is a military lawyer, for example, and does not necessarily exhibit a "continuous combat function" (an extra-legal phrase coined by the ICRC),[69] this does not mean that they are not a member of an armed force who can be lawfully targeted. It is one's agency-based membership in the armed forces that allows one to be ordered to take up a weapon, or give such an order to others. It is that willingness to further a group's violent aims that underscores why the LOAC allows status-based or membership targeting. The fact that someone's primary function is as an al Qaeda cook does not automatically equate to placement into the civilian category. This is perhaps where the ICRC approach is too narrow.

Common Article 3 of the 1949 Geneva Conventions applies to NIACs, but it is only a statement of general principles. Armies and armed forces function on regulations and details. Given this fact, where does an army turn to for rules governing the detention of al Qaeda and Taliban fighters in Afghanistan or Guantanamo Bay? A legitimate question arises as to which rules supplement Common Article 3. The conditions for the detention of belligerents can be analogous to Prisoners of War (POWs) for the Third Geneva Convention to rules detailing how to intern civilians under the Fourth Geneva Convention or to the sparse details found in article 5 of Additional Protocol II.[70]

This war by principled analogy is an extremely fact-specific one, and this frustrates efforts to reduce its inherent complexity in order to feed today's appetite for simplistic sound bites. When fighting an organized

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[69] Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities, Under International Humanitarian Law*, 90 INT'L REV. RED CROSS 991, 994 (2008).

[70] AP 2, *supra* note 17, art. 5 (providing minimum standards of treatment for persons deprived of their liberty for any reason related to the armed conflict).

enemy that uses armed force to the degree of a nation state, with sufficient intensity and duration, the *lex specialis* of the LOAC applies, as appropriately supplemented by international human rights law.

XII. International Humanitarian Law (IHL) by Analogy and Military Necessity

The application of IHL, by analogy, is often seen in international doctrine and operational production—distinction, proportionality, and military necessity. Distinction and proportionality are different from military necessity in that they directly translate into rules that govern military conduct. Some consider IHL as the delicate balance between military necessity and humanity. Some argue that military necessity is not a standalone principle, as it has already been incorporated within the entire body of customary and treaty-based IHL. Thus, it is argued, it can never be considered due to the danger of it eclipsing all other principles.

Military necessity still has a role to play, especially in NIACs, where the body of specific rules is not as robust. For example, the United States has allowed the ICRC access to detainees at the Bagram Detention Facility in Afghanistan since 2002 based on customary international law and Common Article 3 obligations. Both Geneva Conventions III and IV state that ICRC access can be limited, even denied, for reasons of imperative military necessity. What if, under military necessity, U.S. forces interrogated an individual for a month without any outside influences (including the ICRC) in order to gain actionable intelligence? Could it lawfully deny an ICRC visit after week two, due to military necessity? After week three? This is still a real question without a real answer. What is reasonable in this situation in light of the other principles in issue? What does humanity require? What do humane treatment standards require?

Finally, if military necessity is not a principle applicable in an armed conflict, what are the principles of humanity and proportionality meant to constrain? Why apply the principles of humanity or proportionality if there is no military necessity to be moderated by these principles?

Under the Lieber Code,[71] application of the principle of military necessity was a significant step forward in regulating the violence of armed conflict. It constituted a limitation on what nations and military commanders could do in war. A commander must now articulate the nexus between his military action, the objective of his action, and the strategic and operational end state. Military necessity thus serves as a limitation on conduct on the battlefield, not just as a balancing factor, and remains an important principle in today's war by analogy.

Panel 3

Professor Mary Ellen O'Connell; Professor Jordan Paust; and Professor Rosa Pauks

Question: Absent the existence of an armed conflict, what is the legal basis for the use of force against terrorism; and what law regulates such use of force?

I. Security Advantages of Compliances with Authentic International Law

The United States and its allies are at a significant turning point with respect to national security policy. Momentous changes are coming to Afghanistan; national security issues are emerging that were not even hinted at on 9/11. Consider the issues of Russia and its neighbors; China and its neighbors; Ebola and other health issues; North Korea and Iran; climate change; immigration from Africa to Europe and from Central America to the United States; and cyber security, to name some obvious examples. Yet, international law specialists in the area of the use of force seem to have a single focus on militant groups, arguing for greater rights to attack them with military force. Militant groups are indeed on the list of concerns, but they are not the only—or even the most important—issue.

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[71] The Lieber Code was prepared by Francis Lieber and issued as General Orders No. 100 by President Abraham Lincoln in 1863 at the height of the American Civil War. It was an attempt to codify rules regulating the conduct of military forces during wartime. "Military necessity" is specifically addressed in articles 14-16. President Abraham Lincoln, Gen. Order No. 100, arts. 14-16 (1863), *available at* http://avalon.law.yale.edu/19th_ century/lieber.asp.

As a result of this focus on militant groups, international law specialists seem to be fighting old legal battles that began at the end of the Cold War and in the aftermath of 9/11. These battles consist of asserting expansive rights to use military force regardless of whether the use of force results in actual military success.

President Obama and others have, of course, pointed out that militant groups are not one large, existential threat. Indeed, even Islamic militant groups represent considerable diversity. Boko Haram in Nigeria, for example, may have some association with al Qaeda but requires a very different response than that required for al Shabab or the various groups in Yemen seeking to secede or take over that government. In Iraq, ISIS was banished from al Qaeda but came to control a third of that country by June 2014, as Iraqi Sunnis with military training from the days of Saddam Hussein joined in a defensive alliance against Shi'a and the brutal government of Nouri al-Maliki. The United States had an opportunity to prevent the loss of much territory and many lives but did little to urge respect for Sunni human rights under international law.

The causes behind other militant groups also have little or no connection to al Qaeda. This is true of violent groups in the Congo, Libya, Mali, Lebanon, and Gaza. The nuclear questions at issue in North Korea and Iran are truly existential and unrelated to al Qaeda. Moreover, one of the causes of today's national security crises is global crime. Another is climate change. Droughts, floods, pests, disease, storms, earthquakes, and tsunamis are all linked to warming temperatures. Governments must deal with natural disasters at an unprecedented scale, and conflicts over scarce resources are occurring in Sudan, South Sudan, and other locations.

This is a snapshot of the complex issues on our national security agenda. All of these issues will require the tools of international law. Yet, in the United States, instead of developing international law and enhancing it to better support international cooperation in problem solving, international law has been diminished. It has been disrespected and is now weaker than twenty-five years ago. Notice the argument Russia has put forward with respect to its intervention in Ukraine. It has asserted a right to intervene to protect human rights. The NATO states made this same argument regarding their intervention in Kosovo. Yet, NATO countries now demand that Russia respect the very principles of sovereignty and territorial integrity that they disregarded in Kosovo. The United States insists that Iran agree to more open inspections and limits

on its ability to create nuclear fuel. Yet, the United States vetoes attempts by the Security Council to hold it to its international law obligations evolving from decisions of the ICJ concerning the unlawful use of military force. In reality, the United States requires both the legal instrumentality of the binding treaty and the habit of respect for treaties to deal with nuclear proliferation and numerous issues of similar importance.

And treaties are only one source of international law. Rules of customary international law and the general principles of international law also play a critical role in supporting order and security in the world. Yet, we have seen, since the end of the Cold War, increased suspicion regarding rules of customary international law. As for general principles, these are barely mentioned. It may be that a good number of international lawyers are unaware of these principles. Beyond treaties, customary rules, and general principles, international law also has important processes. Indeed, the enforcement process is essential to the explanation of why international law is law. But, again, many appear to be ignorant of the manner in which international law enforcement works. The international law literature also suggests that, while there is much focus on military force, few are knowledgeable regarding the alternative regime of peaceful countermeasures.

Perhaps the most important fact regarding countermeasures and other peaceful means of enforcement is that they are readily available, while the right to use military force is highly restricted. Despite this, for the United States and for a number of its allies, pursuing military force appears all too tempting, in part because the peaceful alternatives are unknown and unpracticed. Being unaware of, or uninterested in, the alternatives to the use of force also means that we lack the skills to use these alternatives effectively. Thus, when we do use them, they fail and are abandoned. Take the history of attempts to settle the Syrian civil war. The world apparently has no mediator who can succeed. In the past, U.N. Secretary General Perez de Cuellar was able to successfully negotiate the end of civil wars throughout Central America and Africa. Where is his successor? Where is Nelson Mandela's successor? Some of the most talented people are gone, but we do not see others filling the breach even though this is what effective international law requires. Instead of focusing on the critical tools of peaceful settlement and substantive international rules, we continue to concentrate on making arguments for the legal right to use military force, arguments that pre-9/11 would have been wholly rejected.

In this context, we still wish to communicate to Russia that committing aggression in Ukraine is an anathema. For this, however, we require a consensus as to what constitutes "aggression." According to United Nations General Assembly Resolution 3314, aggression is any serious violation of Article 2(4) of the U.N. Charter.[72] In this regard, there are only two express exceptions to the Charter's ban on the use of force. Both are narrow. To use force lawfully, there must be a Security Council authorization to do so. Failing this, in even more exceptional circumstances, there must be a right, under Article 51 of the Charter, to use force in self-defense.[73] We seem prepared to cite this law to Russia, but do not hold ourselves to these same rules.

Interestingly, the one place where the United States is engaged in combat today, Afghanistan, the legality of using force is not based on Charter provisions. Rather, the use of force is based on an invitation of the elected government of Afghanistan to do so. Accordingly, it is an intervention by invitation. This basis may not be as solid as some appear to believe. An excellent article, written in the 1980s, by Louise Doswald-Beck of the International Committee of the Red Cross, questioned whether intervention by invitation is really consistent with fundamental rules.[74] Intervention in a civil war, even with a government's invitation to do so, conflicts with the principle of self-determination. On its face, such an intervention also conflicts with Article 2(4). Note the case of Syria, today, where only that government has the legal right, under international law, to request outside assistance. Yet, while Western governments heavily criticize Iran for its assistance of the government of Syria, under the intervention by invitation argument, Iran's assistance is lawful.

Turning to the argument that seems to dominate discussion: the right of self-defense under the U.N. Charter article 51. Organizers of this panel seemed to have self-defense in mind when they formulated a series of questions filling a page-and-a-half for the speakers to consider. Rather than go through the many hypotheticals among the questions, it

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[72] "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. CHARTER art. 2., para. 4.

[73] *See* U.N. Charter art. 51.

[74] Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. YBK. INT'L L. 189 (1989).

will be more efficient to set out the actual rules governing self-defense and to illustrate these using real-world examples. Article 51 provides for the inherent right of self-defense by states, acting alone or collectively, "if an armed attack occurs."

It was the British academic Derek Bowett who first asserted that states could use armed force in self-defense even in the absence of an armed attack. He was defending an unlawful use of force by the British in 1956 when they, along with the French and Israelis, attacked Egypt to regain control of the Suez Canal. Citing the Caroline incident of 1837, Bowett attempted to justify the use of force against Egypt, arguing that states could use force in self-defense in situations of necessity in the absence of an armed attack.[75]

Bowett's argument was seriously flawed; it begged the question of what constitutes a situation of "necessity." Five years after his book appeared, another British academic, Ian Brownlie, published a book responding to Bowett—making it clear that Bowett's interpretation was simply wrong.[76] Brownlie provided a rich and detailed account of the U.N. Charter negotiations, demonstrating that Article 51 was intended to mean precisely what it said. A state may act in individual or collective self-defense if an armed attack occurs, until the Security Council acts. This provision was written by the U.S. delegation, and a member of the delegation, Senator Harold Stassen, is on record confirming that lawful self-defense is triggered by an armed attack.

Twenty years after Brownlie's book, the International Court of Justice (ICJ) explained that, indeed, an armed attack, or its equivalent, did serve as the lawful basis for action in self-defense. Moreover, the reference to the term "inherent right" in Article 51 is to the general principles of law pertaining to "necessity" and "proportionality." Bowett had then, in essence, taken the law back 100 years prior to the Charter being adopted when he posed his interpretation of the right to engage in self-defense. The ICJ has held, in the *Nicaragua*[77] case, that an "armed attack" must be a "significant attack." Moreover, if the state that has been attacked determines to respond with military force in self-defense

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[75] DEREK BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW (1958).

[76] IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES (1963); s*ee also* OLIVIER CORTEN, THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW (2010).

[77] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. Reports 14 (June 27) [hereinafter Nicar. v. U.S.].

on the territory of the attacking state, the defending state must undertake an analysis of the law of state responsibility. Under the general principle of "attribution," the defending state may only attack a state responsible for the armed attack. The questionable assertion made after 9/11—that terrorist groups somehow exist beyond borders (apparently in the ether)—is simply incorrect when, in fact, all human beings live in some space associated with a sovereign state. In the case of Afghanistan, Britain produced a White Paper linking al Qaeda to Afghanistan's government, the Taliban. This connection may not have been as solid as this report indicated at the time. Moreover, the ICJ ruled, in the Genocide case, [78] that the test of "attribution" is a state's "control" of those committing the unlawful acts in issue, not its mere "coordination" with such individuals, the standard apparently used by the U.K. in producing its White Paper.

In addition to satisfying the principle of "attribution," a state using force in self-defense must also assess whether the use of such force is required as a last resort and, if so, whether it is likely to succeed in achieving the defensive military objective. These are the elements of "necessity" that apply to any decision to resort to force. In the case of Afghanistan, there exists doubt as to whether the use of force in 2001 was required as a last resort. Even if this was the case, however, following the fall of Kabul, the U.S. decision to continue fighting went beyond that degree of the use of force necessary for its defense. "Last resort" and the "chance of successful self-defense" have come to contemporary international law from the ancient "just war" doctrine. Today, we associate these elements with the general principle of "necessity." (The ICJ refers to the principle of "necessity," restricting resort to war, as a rule of customary international law; it actually exists more in the form of a general principle of law).

This analysis has one more step. The defender, using force, must assess whether the use of force will be "proportionate" in terms of the cost incurred compared with the value of the military objective. In other words, will the value of success be outweighed by the cost in terms of loss of life and property that will inevitably result?

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[78] Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. and Montenegro), 2007 I.C.J. 43 (Feb. 26).

In sum, international law imposes strict rules on states resorting to the use of armed force. While we were asked to discuss the law governing the conduct of a resort to armed force in violation of international law, we should discuss the lawful alternatives available to states facing a national security challenge but which have no right to resort to military force. Many seem to think that states have only two options respecting major security challenges: go to war or do nothing. For years, arguments have been consistently put forward for the expansive interpretation of the law concerning the resort to force. These arguments have, for example, resulted in memos asserting that it is a lawful act of self-defense to fire a missile at an individual, when that person poses an "imminent threat" due solely to the fact that he may one day place a bomb on an airplane. However, not only does the phrase "imminent threat" not appear in Article 51—quite the opposite—defining "imminent" in this way is a complete departure from the obvious meaning of the term.[79]

In fact, international law offers methods short of the use of armed force that can prove highly effective in responding to national security challenges, methods that, at the same time, serve to support respect for the rule of law in the world. Here are three major categories of alternatives to the use of military force—and three case studies where these methods have proven to be successful. The first example is that of law enforcement. Law enforcement cooperation has the best track record of success against terrorism. Second, countermeasures serve as the general-purpose method for bringing pressure to bear against law violators, and third, the positive incentives of economic development, education, criminal justice support, health care support, and disaster relief constitute viable alternatives to the use of force to achieve security goals.

Three case studies demonstrate the power of these approaches: The first is the practice of law enforcement in Yemen following the 2000 attack on the *USS Cole* in the Port of Aden. The FBI worked with Yemeni criminal authorities, who clearly required assistance. With the help of the FBI, most of the individuals connected with the attack on the *Cole* were arrested, tried, and imprisoned. Many later escaped through a

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[79] *See also* U.S. DEP'T OF JUSTICE, WHITE PAPER ON LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A US CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QAIDA OR AN ASSOCIATED FORCE, *available at* http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf (undated white paper).

variety of means, but these incidents coincided with the U.S. invasion of Iraq in 2003, when U.S. efforts in Yemen and elsewhere were largely abandoned.

Second case study: Iraq 2003. The United States and U.K. found no weapons of mass destruction in Iraq. Why? The U.S. military had successfully maintained an embargo from 1990 until 2003—preventing equipment and parts for weapons of mass destruction from reaching Iraq. This is a good model going forward.

The third example is the problem of piracy off the coast of Somalia. This problem has been addressed through the cooperation of NATO, the EU, India, and other countries. The U.S. Navy reported no pirate attacks off the coast of Somalia in 2013, while in 2009, 117 ships had been attacked. This approach to handling the piracy problem—cooperative policing, using naval and other military assets—holds great promise for other national security challenges.

In brief, the security challenges of the future need to be addressed with more sophisticated approaches. The linkages between following the law and having robust rules that command respect must be better understood. Indeed, international law, in general, requires far greater understanding and commitment in order to realize the security advantages inherent in its compliance.

II. Thinking Outside the Box

With respect to use of force, in the future, there may be an increase in authorizations of the use of force by regional organizations, as under Articles 52 and 53 of the U.N. Charter, when the Security Council is veto-deadlocked and cannot act. In the *U.S. Army Field Manual 27-10*, paragraph 8 addresses war under regional authorization,[80] such as the Organization of American States' authorization for the use of limited force and interdiction of Soviet missiles bound for Cuba or NATO's authorization for the use of force in Kosovo.

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[80] U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 8 (1956) ("Instances of armed conflict without declaration of war may include…the exercise of armed force pursuant to . . . the performance of enforcement measures through a regional arrangement.").

Article 2, paragraph 4 of the U.N. Charter can also be read as not proscribing all uses of force, but only three specific types, leaving some room for possible uses of force that are not in violation of Article 2.

With respect to the law enforcement paradigm, the caution is that, under international law, to engage in law enforcement in a foreign state, a state must have the consent of the highest level of the government of that state. This is why the self-defense paradigm is very important, as a state does not need the consent of a foreign state to engage in lawful measures of self-defense in that state against non-state actors engaged in armed attacks.

Regarding Article 51 of the U.N. Charter, some disagree with the ICJ conclusion that there is a "gravity" requirement; that is, in order for an armed attack to occur, a substantial use of force must be involved. The current U.S. administration, as well as former State Department legal advisors Harold Koh and William Howard Taft IV, have argued that "gravity" is not such a requirement, but that this consideration does raise the matter of the proportionality of the response to an attack.

For example, if non-state actors launched several missiles across the border from Juarez, Mexico, into El Paso, Texas, killing people at Fort Bliss, the United States does not require the consent of the Mexican government to engage in lawful measures of self-defense. Mexico has previously consented in the U.N. Charter; Article 51 is consent in advance, by treaty, to lawful measures of self-defense.

Looking back at the 1837 *Caroline Case*, the British did not require U.S. consent to attack non-state actors who were directly participating in the rebellion. Lord John Campbell wrote:

> Although the *Caroline* lay on the American side of the river when she was seized, we had a clear right to seize and destroy her. She had been previously engaged in three transits to help the rebels. The rebels had been involved for a long time, already engaging in armed attacks, trying to take over the government of Canada. We had a clear right to seize and destroy her, just as we might have taken a battery erected by the rebels on the American shore, the guns of which had been fired against the Queen's troops in Navy Island.

When the British Canadians engaged in self-defense, they were not at war with the United States; no one believed that the United States and Great Britain were at war or that prior consent was needed to engage in lawful measures of self-defense.

As a rhetorical question, Lord Ashburton wrote to Secretary of State Daniel Webster, "If cannon are moving and setting up in a battery and are actually destroying life and property by their fire, when begins your right to defend yourself?" In fact, there was not necessarily U.S. disagreement regarding the right of self-defense in this case. The concern focused on the method and means of the force used under the principle of "proportionality." The United States felt as if the British could have waited until the vessel was in their territorial waters to launch an attack and that there resulted needless destruction and the death of two people. In brief, the British could have acted in a more proportionate manner under the circumstances.

Further points: Under the U.N. Charter, there is no need to be at war with the state from which attacks emanate; there is no need for consent from the foreign state in which the non-state actor acts; and there is no need for imputation or attribution to the state of the non-state actor attacks.

When addressing state attribution for self-defense, the test is not "effective control"; the test recognized in *Nicaragua v. United States*[81] is one of "substantial involvement" by the state in the non-state actor attacks. A portion of the *Nicaragua* opinion uses the standard of "effective control" when addressing state responsibility with respect to specific Law of War or human rights violations. However, addressing the imputation of non-state actor actions to a state for self-defense, the ICJ quotes the 1974 U.N. General Assembly Declaration on Aggression and the standard of a state's "substantial involvement" with the armed attacks in establishing attribution for self-defense purposes.

In any event, there is no need for attribution to a territorial state in order to engage non-state actors in self-defense. In the example of missiles being fired from Juarez, Mexico, the United States, in responding to non-state actors, would not be attacking Mexico or Mexican territory. A U.S. response would have to be proportionate, however. A disproportionate response that destroys half of Juarez,

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[81] *See supra* note 77.

Mexico, would alter the conclusion that the United States was engaged in a rightful measure of limited use of force in self-defense against non-state actors who were firing the missiles to one that viewed the United States as using force against the State of Mexico itself. This was the situation that was involved in the *Congo* case,[82] where there was no recognition of attribution of the non-state actor attacks to the state, but where there was, nevertheless, a massive, disproportionate, use of force that involved, among other things, the seizing of airports.

The right to engage non-state actors in self-defense needs to be operationalized. Article 51 does not say, "in case an armed attack occurs by a State." International law has recognized for the last 300 years that there may be formal actors, other than a state to which that law applies. International law has never been applied, solely, state to state. The United States has conducted, under international law, war with Indian nations and tribes to which the Law of War applied. The British government has entered into over 500 treaties with African nations and tribes.

In engaging non-state actors in self-defense outside the context of war, there are opportunities to borrow from the Law of War, such as adopting or expanding upon the principle of proportionality or borrowing specific forms of permissible engagement. There are opportunities to think outside the box, or even multiple boxes, in the future development of the law. In operationalizing self-defense concepts, the focus could be on someone who is a direct participant in the armed attack, borrowing from the concept of DPH, identifying a person with a continuous armed attack function, or borrowing from a continuous combat function.

With respect to the applicability of HRL to self-defense use of force actions, the U.N. Charter creates a mandatory obligation, universally applicable under Articles 55(c) and 56, to take joint and separate actions to effectuate human rights. Under Article 103 of the U.N. Charter, Charter-based HRL prevails over any other ordinary law, such as international agreements on the Law of War. So whether one views the Law of War as *lex specialis* or not, under the U.N. Charter, there exists a human rights override, at least in terms of customary human rights, rights infused in Articles 55(c) and 56. The United States is bound to not arbitrarily kill or detain those who have human rights protections,

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[82] Case Concerning Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 1 (Dec. 19).

arguably a much lower standard than that imposed by the Law of War. Thus, by adhering to the Law of War, a U.S. commander would meet human rights standards. As a consequence, the existence of HRL in an operational setting poses no problem for this commander. For the British operating under the European Convention on Human Rights, however, this may well not be the case.

In assessing the applicability of HRL, it is important to consider to whom it applies. In General Comment No. 31 regarding the International Covenant on Civil and Political Rights (ICCPR),[83] the U.N. Human Rights Committee recognized that persons who possess human rights outside of both a state's territory and occupied territory are those under the state's effective control or actual power. This does no inhibit the U.S. battlefield commander from engaging individuals who are shooting at U.S. soldiers, as these shooters would not be under the effective control of the United States. And while HRL does protect detainees, these detainees possess basically identical protections under Common Article 3 of the 1949 Geneva Conventions, which applies customary international law protections to all armed conflicts.

Admittedly, the law is full of ambiguity. What is due process or equal protection? However, simply because a particular interpretation is logical or plausible does not mean that it is acceptable as a matter of law. The principal test for the interpretation of treaties is that of "ordinary meaning"; that is, the generally shared meaning of an otherwise ambiguous treaty term or phrase over time. For example, Article 31 of the Vienna Convention on Treaties refers to this general rule of interpretation. The test for the existence of customary international law is whether a principle in issue reflects the general pattern of state practice (not a particular state's practice) and general *opinio juris* (not an argument as to what is logical or plausible in some other sense). Of course, state practice and/or *opinio juris* can expand or contract over time.

With respect to state responsibility and whether or not attribution should attach for self-defense purposes: If a state knowingly allows its territory to be used for armed attacks by a non-state actor, this is considered to constitute aggression—if such attacks have occurred in

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[83] U.N. Human Rights Comm., *General Comment No. 31, Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

violation of the U.N. Charter. The test is not control of a non-state actor by a state, but a state's "substantial involvement" with a non-state actor, including knowingly allowing this non-state actor to use its territory for attacks against others.

In terms of when the right of self-defense exists, Article 51 of the U.N. Charter speaks to the inherent right of self-defense and sets forth an express limitation on this right with the use of the phrase, "if an armed attack occurs." Then, there is the matter of what constitutes an "imminent threat." Logically, an imminent "threat" is a not yet realized threat, as opposed to a threat of an imminent "armed attack." And while this latter phrase may find acceptance as a basis for a self-defense use of force by those who would recognize the concept of "anticipatory self-defense" under the Charter, the Charter is the authoritative source on this issue, and its text uses the limiting language of "if an armed attack occurs"—not "if an attack may occur."

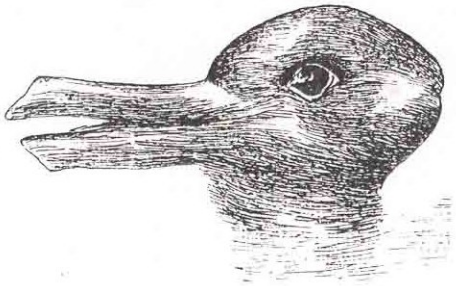
So, the bottom line is: When does an "armed attack" commence? Certainly, not only when weapons have been fired. Determining the existence of an "armed attack" will involve inquiry and choice; it can potentially be a very fluid process.

III. The Duck-Rabbit: Smart Arguments and Unsatisfying Answers

There has been a near total fragmentation of international consensus on the most basic threshold questions: What is an armed conflict? When does an armed conflict start, and when does it stop? Does *any* armed attack automatically create an armed conflict? Who counts as a combatant? What constitutes "direct participation in hostilities"? What are the temporal and spatial boundaries of a given armed conflict? We have been going around in circles on these same questions for a really, really long time.

Formalists can look at the law and make smart arguments, but they do not come up with very satisfying answers. Some, like Harold Koh, reason by analogy or try to conduct principled translation exercises, but they also do not produce satisfying answers. Analogy has limitations. For every analogy or metaphor, a different analogy or metaphor can push us in the other direction. The chain of legal and logical syllogisms can start getting so long that you can start with existing legal paradigms, and come out with almost any result you want. This is an enormous problem.

Consider the following illustration:



Ludwig Wittgenstein famously used the image of a duck-rabbit to introduce his theory of language games,[84] and it emphasizes the point that language cannot be divorced from the social practices in which it is embedded. Thus, he notes that if the picture above is surrounded by other images that are clearly ducks, quacking and walking like ducks, the viewer will surely conclude, "Obviously, the picture is of a duck amongst ducks." On the other hand, if the picture above is surrounded by bunny rabbits, hopping around with big ears and doing rabbity things—walking and talking like a rabbit—the viewer will surely conclude, "It is self-evident that this is a picture of a rabbit." But ultimately, it is indeterminate: the duckness or rabbitness of the figure is entirely dependent on context.[85]

Why introduce the duck-rabbit? Because ultimately, we have no greater ability to find definitive legal answers to the very difficult international law questions we have been addressing today—questions we have been asking for the last decade—than we have had the ability to provide a definitive answer to the question of whether the image above is "really" a duck or "really" a rabbit.

The U.S. executive branch is currently taking a position on what constitutes an armed conflict that has put it increasingly at odds with most U.S. allies and many European and non-Western lawyers, political

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[84] LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (1953).

[85] *See generally*, Rosa Brooks, *Duck-Rabbits and Drones: Legal Indeterminacy and Targeted Killing*, 25 STAN. L. & POL'Y REV. 301 (2014).

figures, and judges. United States reasoning by analogy has reached its limit.

Certainly, it is accurate to say that we are not in a "law-free zone"; there are buckets and bushels of law. What has been lost is the *rule* of law; at the moment, we do seem to be in a rule of law-free zone.

Consider the definition of rule of law in the Army JAG Corps' *Rule of Law Handbook*, which breaks down the rule of law into seven effects:

- The state monopolizes the use of force in the resolution of disputes.
- Individuals are secure in their persons and property.
- The state is itself bound by law and does not act arbitrarily.
- The law can be readily determined and is stable enough to allow individuals to plan their affairs.
- Individuals have meaningful access to an effective and impartial legal system.
- The state protects basic human rights and fundamental freedoms.
- Individuals rely on the existence of justice institutions and the content of law in the conduct of their daily lives.[86]

With that understanding of the rule of law in mind, consider the issue of targeted killings: the use of lethal force across borders to target specific individuals outside of "hot" battlefields—outside of traditional territorially defined battlefields. On a formalist legal analysis, there are compelling arguments, made by the U.S. government, that these strikes are perfectly lawful: the United States is simply targeting enemy combatants during an armed conflict.

But one can make an equally compelling argument, using similar formalist analysis, to reach the opposite conclusion. One might argue, for instance, that even if there is an armed conflict between the U.S. and al Qaeda (which many states argue is *not* the case today), the armed conflict cannot extend in such an unbounded way to Yemen or Somalia

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[86] CTR. FOR LAW & MILITARY OPERATIONS, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, RULE OF LAW HANDBOOK: A PRACTITIONER'S GUIDE FOR JUDGE ADVOCATES (2011), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/rule-of-law_2011.pdf.

or to people or groups such as Somalia's Al-Shabaab. If the armed conflict between the United States and al Qaeda cannot extend this far, or if those targeted are not combatants in an associated force of al Qaeda, or combatants at all, nor civilians directly participating in hostilities, U.S. targeted strikes do not constitute the lawful targeting of enemy combatants in wartime. Instead, such strikes are simply an act of murder.

Everything hinges on a series of threshold distinctions: Armed conflict or not? Associated forces or not? Combatants or not? Duck or rabbit? And, at the moment, there is no principled way to answer these questions. There is no answer, except to say, "I'm right, you're wrong; we're the United States, so deal with it." And this is hardly consistent with the rule of law. If there is no principled basis for deciding what is a duck and what is a rabbit, there is no predictability; state action is arbitrary; the state itself is not rule-bound in any meaningful sense, and those wrongly targeted have no recourse whatsoever.[87]

Of particular concern are the precedents set for other states by U.S. targeted strikes. Even with an enormous amount of faith in the U.S. government and military officials making targeting decisions—even if we assume that these decisions are made in a very careful, conscientious, and good faith way and that virtually every single individual who has been targeted and killed deserved his or her fate—it is nevertheless uncomfortable to imagine other states following suit. Say Vladimir Putin is targeting dissidents in eastern Ukraine. While the United States and others would argue that these people are peaceful activists, Putin might claim they are anti-Russian terrorists and that he has a highly refined targeting process, based on intelligence information, which he regrettably cannot share, that indicates that those targeted people are not peaceful dissenters but are, in fact, enemy combatants. Say Putin asks the world to trust him. How would we react to that?

Once set, precedents can come back to bite us. When it comes to targeted killings, the lack of constraint and the lack of clear, principled rules may well come back to bite the United States.

As noted, there is not a principled way to resolve these challenges using formalistic, legalist analysis, nor even through reasoning by

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[87] *See also* Rosa Brooks, *Drones and the International Rule of Law*, 28 J. OF ETHICS & INT'L AFFAIRS 83 (2014).

analogy. For targeted killings, what happens when the person targeted could, with equal plausibility, be said to be either a duck or a rabbit?

Humans are creatures who draw lines and create categories; that is part of what it is to be human. And that is what the law is all about. Humans have always sought to draw lines between war and what is not war. At some point, those lines always stop working, and so new and different lines are drawn. But societies have always sought to draw lines between war and peace. For instance, when Navajo warriors left their own territory and set out on raids, they would literally begin to speak a different dialect, a "twisted language." When the warriors returned from the raid, they would literally draw a line in the desert, face enemy territory, turn around, step over the line, and resume their everyday language.

The 1949 Geneva Conventions are, in some sense, our modern version of this ritualistic attempt to draw lines. But reality always messes it up at a certain point because things change, and the lines previously drawn do not really work anymore. The previous categories stop working.

That is our current situation. Technological and political changes have created a situation in which the traditional lines and categories separating war and "not war" have lost any clarity. But we should remember that God did not draw these lines or create these categories: humans did. States and people drew the lines, and states and people can change them.

The answers to the very difficult questions we have been discussing today will not come through more careful parsing of current law. There is a messy terrain somewhere between traditional state-on-state armed conflict and mere law enforcement, and there needs to be a set of norms that actually work for what states reasonably need to do in this messy middle ground, norms which respect core rule of law and human rights principles.

Nobody particularly wants to engage in a blank slate exercise, but it might be time to shift the discussion from, "How can we use these existing legal paradigms to answer these questions?" to "What if we were starting from scratch? What rules do we want, given our values, and given the threats?" Such an exercise would at least help provide a

standard by which we could judge current small interpretive moves, and incremental proposals for change.

Ultimately, the utility of the current discussion may be exhausted—and although it provides full employment for lawyers, it is not desirable for the same conversation to continue for another ten years.

This is not an argument for discarding the existing body of rules; international law provides perfectly adequate answers in many situations. However, changing technologies and changing threats challenge our ability to meaningfully apply the existing paradigms in the situations we are discussing here today. There are some gaps—and the question is, how will those gaps be filled?

The U.S. policy on detention has evolved in a disaggregated, decentralized kind of way. On the detention side, some would say U.S. policy evolved accidentally and somewhat haphazardly to a hybrid point. Some would also argue that the United States is in the midst of trying to do the same thing on the targeting side, moving toward a middle ground or hybrid position where targeting occurs only under certain conditions involving a near certainty of no civilian casualties or actual threat to U.S. lives, a policy that is far different from that of ordinary status-based targeting.

There has been less development of targeting issues than detention issues because the U.S. policy constraints put forth by President Obama at his National Defense University speech[88] depend, critically, on everyone (1) agreeing that there is an armed conflict, and (2) accepting the "associated forces" idea. The U.S. policy constraints would be workable, if there was a clarity and consensus on who is a civilian, what a threat is, and what "imminent" means. The conversations inside and outside the executive branch are the right conversations in that the United States does not need to alter international law in order to fix the rule of law gaps in U.S. policy. There are some fairly simple and straightforward things that the executive branch could simply choose to do, or that Congress could choose to impose, that would address eighty-five percent of the criticism in terms of improved accountability, oversight mechanisms, and greater transparency.

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[88] President Obama NDU Speech, *supra* note 22.

In regard to rule of law, people can have different understandings about what the underlying purpose of the body of law is, and that different underlying purpose can really push them in different directions as to where they are going with the substantive law.

The Declaration of Independence is a rule of law document. "We hold these truths to be self-evident, that all men are created equal and endowed by their creator with certain unalienable rights, among them life, liberty and the pursuit of happiness." People should not be deprived of their liberty or be killed without any ability to say, "Hold on, wait, I am the wrong guy and you made a mistake!" The United States has done a good job of ensuring the rule of law domestically—we have done a good job of ensuring that the state cannot swoop down and just detain or kill someone. However, as the international system grows more and more interconnected, the ability of one state to reach into another state and do just this to the people residing in that other state is increasing. Such actions would be clearly offensive to the rule of law if done by an individual's own state, and it is hardly less so when done by another powerful state.

The goal of rule of law is to ensure that there exists no zone where people can be killed for reasons that they do not know, based on criteria they do not know, adjudicated in a process that is secret, by people whose identities are secret, with no ability to challenge the process or results, and with no ability to seek recompense for a mistake or abuse. The profound challenge is how to regulate the exercise of raw power and lethal force by those who have it in an interconnected international system in a manner that is still respectful of the fact that states *do* need the flexibility to respond to threats that are real, non-trivial, and changing. Our goal should be to have no "rule of law-free zones," where death can come from the sky without the targeted individual having the ability to know why.

The Israeli Supreme Court decision on targeted killings[89] represents an effort to make targeted killing compliant with core rule of law norms. That decision might not be 100 percent successful from an implementation or doctrinal perspective, but it says that there cannot be a rule of law free zone. People should not just be killed in the abstract. The Israeli Supreme Court declared that there does need to be some kind of accountability, some kind of independent mechanism for review.

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[89] Pub. Comm. v. Israel, *supra* note 59.

The goal is not necessarily to end war. To constrain does not necessarily mean to reduce. To constrain means to ensure that the use of force by states, including powerful states, is rule bound in a way that is meaningful, provides protection against arbitrary uses of lethal force, and ensures accountability and sufficient predictability in order that individuals and other states understand those types of actions that will get them into trouble.

One last metaphor: Tennis. People think tennis has clear and settled rules. There are arguments about whether a ball was in or out, but everyone understands the game being played. But change occurs. One day, somebody comes along with a graphite racquet, instead of a wooden racquet, and everyone asks, "Wait, is this still tennis?" Then rules adapt to reflect the fact that, now, there is a different kind of racquet. Then someone suggests drawing a squiggly line over here, around the service box, instead of a straight line, and so on. At a certain point, there might be so many changes that we would say, "This just isn't tennis anymore; this is now some other game." And if it is some other game, no amount of careful reading of the rules of tennis will help us figure out what to do.

The law is a game, too; a game with lethal consequences because it is linked to the instruments of coercion. Increasingly, there are issues in international law about which we have people saying, "Wait, this just doesn't look like tennis anymore." "This just doesn't look like war anymore." When we reach that point, we can either keep on trying to extrapolate from a set of rules designed for something different, or at some point, we can recognize that this is now a different kind of game that is being played. But we must still ensure that this different game has clear rules, for the stakes are still extremely high.

Conclusion

This Fugh Symposium focused on one of the most perplexing of contemporary subjects: *Legal Issues Associated with the Use of Force Against Transnational Non-State Actors.* Three panels of highly qualified experts wrestled to provide reasoned responses to these three questions:

"Is the use of force against al Qaeda and its 'associated forces,' globally, justified in the context of a continuing transnational armed conflict? If so, how is this conflict to be characterized—international

armed conflict, non-international armed conflict, or an entirely new category of 'transnational armed conflict'?"

"Assuming there does exist some form of armed conflict with al Qaeda and its associated forces, what substantive Law of Armed Conflict is applicable to this conflict?"

"Absent the existence of any form of armed conflict, what is the legal basis for the use of force against terrorism (terrorists), and what law regulates such a use of force?"

As reflected in the preceding pages, the views of the panelists were diverse and far ranging in nature. The three questions noted above were examined in some detail. In the case of each, no consensus was reached; no definitive answers were provided. This is merely a reflection of the uncertainty surrounding the topic of this symposium as a whole. While all can agree that the violent actions of non-state actors pose a threat to the stability of the international community—and must be countered; there exists no agreement with regard to those relevant principles of both *jus ad bellum* and *jus in bello* applicable to state actions taken to deal with non-state, transnational threats.

It is apparent that there is sharp disagreement regarding the U.S. contention that it remains engaged in an ongoing transnational "armed conflict" with al Qaeda and its "associated forces." Indeed, it was repeatedly noted that the majority of states would oppose such a view. Yet, even among those states that would take this position, there is clearly a lack of agreement concerning the necessary legal basis for engaging in the use of force against al Qaeda members, globally, as well as the relevant LOAC or IHRL, if any, applicable to such use of force operations. As noted by one of the panelists, the matter of whether something is deemed a "rabbit" or a "duck" is fully dependent upon the context in which one makes such a determination. That is, the image and actions of al Qaeda—and other similar organizations—are subject to varying state contextual interpretations. It is the result of this fact, then, that it has proven to be impossible to arrive at definitive legal answers to the specific questions dealt with by the Fugh Symposium panelists. One certainty, however, is that there must be a continued effort to do so. These answers might well be found in an evolving consensus concerning the appropriate application of existing international norms. Yet again, there may be a call for the codification of new legal principles, concepts deemed more accurately attuned to the changing nature of conflict itself.

The hope is that the Fugh Symposium deliberations will serve as a substantive contribution to the discussions regarding these matters that are certain to follow.

By Order of the Secretary of the Army:

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