



MILITARY LAW REVIEW

ARTICLES

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SPECIALISTS IN MILITARY DEATH PENALTY CASES

Major David D. Velloney

LET'S MAKE A DEAL! THE DEVELOPMENT OF PRETRIAL AGREEMENTS
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MILITARY LAW REVIEW

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BALANCING THE SCALES OF JUSTICE: EXPANDING ACCESS TO MITIGATION SPECIALISTS IN MILITARY DEATH PENALTY CASES

MAJOR DAVID D. VELLONEY¹

On October 27, 1995, Fort Bragg's Towle Stadium was filled with soldiers. At 6:30 in the morning, 1,300 members of the 82d Airborne were gathered for a run. . . . Their commander, Colonel John Scroggins, gave a pep talk over the public address system. . . . [Sergeant] Kreutzer had been in the woods nearby for an hour. It was foggy and still dark, but the stadium, lit by eight banks of lights, was as bright as day. Kreutzer scanned the field through the sight of a Ruger .22-caliber semiautomatic rifle. Slung across his back was a CAR-15 semiautomatic rifle, a far more powerful weapon. At his side were more than 500 rounds of ammunition. . . . His first shot shattered the spine of Chief Warrant Officer Abraham Castillo, who stood about 50 feet from most of the troops. . . . There was a pause of about five seconds, then a second pop. A bullet pierced [Sergeant Matthew] Lewis' chest. . . . The firing became rapid. Soldiers fell all around the infield. . . . Scroggins and his top officers realized they were under fire. They saw muzzle flashes. They sprinted for the woods. One of the first to reach the trees was Major Guy Lafaro.

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As he ran, he noticed the shots were now much louder. Kreutzer had grabbed the CAR-15. He used it to shoot Lafaro. Major Stephen Badger, a career soldier and a father of eight, rushed to within 25 feet of the gunman. Then a bullet drove through his forehead, exiting behind his ear, leaving a hole the size of a hand. He was the last soldier shot. . . . The damage was severe. In all, 18 men aside from Badger sustained wounds Lafaro went into a coma that lasted 45 days. His mother died while he was unconscious. Castillo was paralyzed; a bullet is still lodged in his spine. Badger was dead before he made it to the hospital.²

I. Introduction

On 12 June 1996, a panel of five officers and seven enlisted members unanimously sentenced Sergeant Kreutzer to death. Without consideration of any mitigation evidence as required by the Supreme Court,³ such a result may seem justified to supporters of the death penalty. Certainly, the evidence surrounding murderous events almost always offends human sensibilities. Retribution by killing the offender can seem to be the only appropriate response. Based on the limited evidence presented during Sergeant Kreutzer's short two-day court-martial, the members may have reached an appropriate verdict. However, the constitutional standard expressed in *Lockett v. Ohio*⁴ and its progeny requires presentation of all relevant mitigation evidence. In the words of radio broadcaster, Paul Har-

2. Todd Richissin, *Nobody Listened When a Soldier Warned of His Violent Intentions*, THE NEWS AND OBSERVER (Raleigh, N.C.), Mar. 9, 1997, at A1, LEXIS, News Group File.

3. See generally *Buchanan v. Angelone*, 522 U.S. 269 (1998) (holding that an individualized sentencing determination requires broad inquiry into all relevant mitigation evidence); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (finding the Eighth Amendment violated where jury not properly instructed to consider all mitigating evidence); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (finding error where trial court refused to consider relevant mitigating evidence regarding defendant's emotional disturbance and turbulent family history); *Lockett v. Ohio*, 438 U.S. 586 (1978) (holding that the Eighth and Fourteenth Amendments require full consideration by capital sentencing authority of any aspect of defendant's character or record and any circumstance of the offense that defendant proffers as basis for sentence less than death); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (finding mandatory sentencing schemes unconstitutional and requiring individualized sentencing for all capital cases).

4. *Lockett*, 438 U.S. at 604.

vey, defense counsel in capital cases must ensure that panel members know “the rest of the story.”

The defense efforts in Sergeant Kreutzer’s case appear to have merely scratched the surface of presenting possible mitigation evidence. The trial lasted only nineteen hours, including opening statements, evidence on the merits, recesses, closing arguments, panel instructions, deliberations on findings, presentencing evidence, sentencing arguments, and deliberations on the sentence to death. The entire defense case, guilt and sentencing phases, took only two hours and forty-seven minutes.⁵ Extremely limited extenuation and mitigation testimony reached the ears of the panel members. The defense presented testimony from only “one psychiatrist, a couple of Kreutzer’s friends, a neighbor and his family.”⁶ Some of the witnesses testified on the merits.

Kreutzer’s defense attorneys appear to have failed to fully develop evidence regarding his mental instability and efforts to get help from the Army.⁷ They presented little evidence or testimony discussing results of any “multigenerational inquiry aimed at identifying any genetic predispositions and environmental influences which molded his life.”⁸ Yet, investigative records indicate that Sergeant Kreutzer met with Captain Darren Fong, an Army counselor and social worker, while deployed to the Sinai as part of a multinational peacekeeping force in January 1994. “On July 13, 1994, Fong filed an internal report that stated: ‘Client has inappropriate coping mechanisms in dealing with his anger. This morning, client said

5. Richissin, *supra* note 2. In examining Sergeant Kreutzer’s case and preparing this and other related newspaper accounts, Todd Richissin and *The News and Observer* obtained reports and court records through the Freedom of Information Act. Included among the records were internal Army psychiatric evaluations regarding Kreutzer’s medical history and more than 1,800 pages of investigative and court records. Reporters also interviewed many sources inside and outside the military, including twelve hours of telephone interviews with Kreutzer himself. *Id.* According to Kreutzer’s appellate attorney, the Army Court of Criminal Appeals has now sealed significant portions of the Record of Trial, particularly information pertaining to requests for a mitigation specialist. E-mail from Captain Marc Cipriano, Army Defense Appellate Division Attorney, to author (Nov. 22, 2000) [hereinafter Cipriano E-mail] (on file with author). Therefore, the Richissin article and other news accounts provide most of the factual basis for framing the issues discussed in this article. Captain Cipriano did confirm that the mitigation specialist issue would be addressed on appeal. *Id.*

6. Richissin, *supra* note 2.

7. *Id.*

8. Russel Stetler, Michael N. Burt & Jennifer Johnson, *Mitigation Introduction: Mitigation Evidence Twenty Years After Lockett*, in 1998 CALIFORNIA DEATH PENALTY DEFENSE MANUAL 3 (1998).

he wanted to kill his squad and he had plans using weapons and ammunition.”⁹ Fong eventually concluded that Kreutzer was not a threat, despite records showing Kreutzer’s persistent preoccupation with killing dating back to the beginning of his military service. Fong told Kreutzer that if he again felt he would lose control, he should immediately contact a counselor. Kreutzer’s superiors relied on Fong’s report and dropped the issue, but his subordinates used knowledge of his problems “to further harass him, calling him ‘Crazy Kreutzer’ and laughing that he would one day go on a shooting rampage.”¹⁰

In the weeks leading to the shooting, Kreutzer again began to crumble. He was disciplined in early October 1995 for losing the barrel to an M-60 machine gun. It was a serious mistake, and although the punishment amounted to little more than a notation on his record, Kreutzer took it hard, again crying to other soldiers. A few weeks later, he failed a key inspection, and his squad was about to be disciplined for missing equipment. On October 21, Kreutzer again sought help. Keeping his agreement with Fong, he tried to contact a counselor, then a chaplain. . . . In each case, he was told there was nobody available to speak with him. On October 26, he called Womack’s psychiatric unit and again got no answer. Then he called a friend, Specialist Burl Mays and said he was going to shoot up Towle Stadium. . . . Mays, finding Kreutzer missing from his room early [the next] morning and a will on his desk, told his superiors about the warnings. They dismissed him.¹¹

Defense counsel failed to present Fong as a witness or to explore his statements made after the shooting, such as, “Kreutzer probably has a history of psychological problems, but this was never identified by his answers or my assessment.”¹² The Fong evidence, as well as significant testimonial evidence from fellow soldiers regarding Kreutzer’s mental state, deserved extensive investigation and examination in relation to Kreutzer’s upbringing and psychological development. Arguably, defense counsel should have presented such evidence in extenuation and

9. Richissin, *supra* note 2.

10. *Id.*

11. *Id.*

12. *Id.*

mitigation.¹³ A mitigation specialist on the defense team would have assisted the lawyers in identifying, evaluating, and presenting a more complete social history. The specialist's expertise in crafting "the rest of the story" would have proven invaluable during the presentencing phase of the trial.

Sergeant Kreutzer's appellate attorneys expect to file an appeal to the Army Court of Criminal Appeals in the near future claiming that the trial attorneys "barely broached the subject of Kreutzer's mental instability at the time of the shootings."¹⁴ The claim will likely be couched in ineffective assistance of counsel terminology and will likely criticize the military judge's failure to order funding for a mitigation specialist.¹⁵ Both the general court-martial convening authority, Major General (MG) George A. Crocker, and the military judge, Colonel Peter E. Brownback III, denied as unnecessary pretrial funding requests by Kreutzer's military defense attorneys for a mitigation specialist.¹⁶ Sergeant Kreutzer's trial attorneys cannot discuss their tactical decision-making process until ordered to do so by the appellate court. Thus, it remains difficult to guess why the defense presented such a limited mitigation case or to surmise whether or not a mitigation specialist would have turned the tide in favor of life over death. However, Sergeant Kreutzer's case begs the question of whether a mitigation specialist would have assisted the defense in better meeting the constitutional requirement for consideration of all mitigating factors.

The case provides an excellent factual framework and starting point from which to analyze the current legal landscape regarding use and funding of such specialists in military death penalty cases. Additionally, the case clearly identifies the undue reluctance of convening authorities and military judges to fund mitigation specialists to supplement capital defense teams. This reluctance occurs even in cases where expert assistance appears necessary based on readily available facts alone. Finally, the case highlights that effective assistance of counsel under the Sixth Amend-

13. See generally Todd Richissin, *Murderer and Widow, Forgiven and Forgiving*, BALT. SUN, Feb. 28, 2000, at 1A, LEXIS, News Group File (providing a chronology of facts regarding the crime, Kreutzer's mental instability, the lack of mitigation evidence presented at trial, and the military judge's denial of mitigation assistance); Fern Shen, *Family Says Army Knew of Son's Troubles*, WASH. POST, May 31, 1996, at F03, LEXIS, News Group File (detailing the family's account, prior to trial, of Kreutzer's extensive mental problems).

14. *Widow Forgives Former Soldier Who Killed Her Husband*, AP STATE & LOCAL WIRE, Feb. 29, 2000, LEXIS, News Group File.

15. Cipriano E-mail, *supra* note 5.

16. Richissin, *supra* note 2.

ment¹⁷ includes not only effective representation by counsel, but also adequate access to investigative resources.

Using *United States v. Kreutzer* as a springboard to identify concerns and frame the issues, this article seeks to address the need for increased access to mitigation specialists in military death penalty cases. The article concludes that evolving legal standards and an increasing awareness of the importance of mitigation specialists demand that the military justice system take affirmative steps toward making experts and investigators more readily available to defense counsel in capital cases. The article recommends a three-pronged approach to improving requests for funding and defense counsel access to mitigation specialists. The approach includes a recommended change to Rule for Courts-Martial (RCM) 703.¹⁸ The change proposes granting capital defendants the right to ex parte hearings to demonstrate the need for expert assistance at government expense. The recommendation generally follows the federal model that grants defendants a right to ex parte requests for experts.¹⁹ The second prong suggests that the Court of Appeals for the Armed Forces overturn *United States v. Garries*²⁰ and *United States v. Kaspers*²¹ by finding that all capital cases involve “unusual circumstances.”²² By doing so, the military court could judicially create an absolute right to ex parte hearings regarding expert assistance following capital referrals. The third prong stresses the need for educating convening authorities, staff judge advocates, and military justice managers on the benefits of granting mitigation specialists to defense counsel early in the process of potential capital cases.

Before reaching the analysis of why defense counsel need mitigation experts and how to make them more easily accessible, Section II of the article provides a general background discussion of foundational Supreme Court cases regarding the importance of mitigation evidence in capital

17. U.S. CONST. amend. VI. In pertinent part, the Sixth Amendment states: “In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence.” *Id.*

18. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 703 (2000) [hereinafter MCM].

19. See 18 U.S.C. § 3006A(e)(1) (2000).

20. 22 M.J. 288 (C.M.A. 1986), *cert. denied*, 479 U.S. 985 (1986) (holding ex parte showings of necessity for expert assistance at government expense only appropriate in unusual circumstances).

21. 47 M.J. 176 (1997) (finding no absolute right to ex parte hearings to demonstrate need for expert assistance at government expense).

22. *Garries*, 22 M.J. at 291; *Kaspers*, 47 M.J. at 179-80.

cases. The section also provides an overview of current rules and standards for capital cases and expert assistance requests expressed in the Rules for Courts-Martial²³ and under military case law. Section III surveys recent Court of Appeals for the Armed Forces and service court opinions that directly and indirectly affect the issue of increased access to mitigation specialists. Developments regarding ineffective assistance of counsel and funding of experts drive much of this analysis. Section IV examines evolving standards in the legal community regarding the importance of mitigation experts in death penalty cases. Section V expands on the conclusion reached in Sections II, III and IV that evolving standards require increased access to mitigation specialists. The section establishes why allowing *ex parte* requests will best solve the access problem and sets out two potential models for the military to follow. While concluding that a variation on the federal model provides a more workable solution than the North Carolina model, the section also introduces and recommends the three-pronged approach mentioned above.

II. Survey of Supreme Court Case Law and Military Rules for Capital Cases and Experts

A. Supreme Court Case Law Requiring Extensive Mitigation in Capital Cases

A complete analysis regarding the need for increasing defense access to mitigation specialists in military cases must start with an overview of Supreme Court requirements regarding presentation of mitigating factors and circumstances in capital cases.

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty. . . . [I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the

23. MCM, *supra* note 18, R.C.M. 703, 1004.

individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. The conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long.²⁴

The Supreme Court struck down mandatory sentencing schemes in death penalty cases in *Woodson v. North Carolina*.²⁵ Then the Court continued its theme of ensuring sentencing authorities consider all “compassionate or mitigating factors stemming from the diverse frailties of humankind”²⁶ in *Lockett v. Ohio*²⁷ and *Eddings v. Oklahoma*.²⁸ In *Lockett*, the Supreme Court required for the first time full consideration of all relevant mitigation evidence in death penalty sentencing hearings. “In *Penry v. Lynaugh*,²⁹ Justice O’Connor crystallized the teachings of *Lockett* and *Eddings* as ‘the principle that punishment should be directly related to the personal culpability of the criminal defendant,’ which [can] only be assessed if life history data [is] given meaningful effect.”³⁰ The evolving standards and “enlightened policy”³¹ expressed in the *Lockett* line of cases demand that military practitioners recognize that justice and constitutional case law require full and extensive consideration of all possible mitigation evidence in capital cases.

Even while constructing many procedural bars to overturning death sentences throughout the nineties, the Supreme Court held firm to the principle that the Eighth Amendment³² requires “individualized selection for

24. *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976).

25. *Id.* at 304.

26. *Id.*

27. 438 U.S. 586 (1978)(holding that the Eighth and Fourteenth Amendments require full consideration by capital sentencing authority of any aspect of defendant’s character or record and any circumstance of the offense that defendant proffers as basis for sentence less than death).

28. 455 U.S. 104 (1982) (finding error where trial court refused to consider relevant mitigating evidence regarding defendant’s emotional disturbance and turbulent family history).

29. 492 U.S. 302 (1989) (finding the Eighth Amendment violated where jury not properly instructed to consider all mitigating evidence).

30. Stetler, Burt, & Johnson, *supra* note 8, at 2 (quoting *Penry*, 492 U.S. at 319).

31. *Id.* at 1.

32. U.S. CONST. amend. VIII. The Eighth Amendment states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” *Id.*

society's punishment of last resort."³³ In *Buchanan v. Angelone*,³⁴ the Supreme Court reaffirmed recently that an individualized sentencing determination necessitates a "broad inquiry into all relevant mitigating evidence."³⁵ This need for a broad inquiry supports increased access to mitigation specialists who can provide defense counsel with appropriate approaches to investigating and presenting sentencing evidence.

B. Rules for Courts-Martial in Capital Cases

A review of the general rules regarding military capital cases provides appropriate background for the rest of this section's analysis. Rule for Courts-Martial 1004 governs the specialized procedures that apply in military capital cases. The rule traces its roots to the 1983 Court of Military Appeals decision in *United States v. Matthews*.³⁶ In *Matthews*, the court reversed the death sentence because the members were not required to specifically identify the aggravating factors upon which they based their decision to impose death.³⁷ While the rule-makers drafted RCM 1004 before the court issued its final opinion in *Matthews*, the procedures for capital cases were the subject of extensive litigation at the time of the drafting.³⁸ "The rule was drafted in recognition that, as a matter of policy, procedures for the sentence determination in capital cases should be revised, regard-

33. Russell Stetler, *Why Capital Cases Require Mitigation Specialists*, INDIGENT DEFENSE, July/Aug. 1999, available at <http://www.nlada.org/DMS/Documents/998934720.005>.

34. 522 U.S. 269 (1998) (holding that an individualized sentencing determination requires broad inquiry into all relevant extenuating and mitigating circumstances).

35. Stetler, *supra* note 33 (quoting *Buchanan*, 522 U.S. at 276).

36. 16 M.J. 354 (C.M.A. 1983) (reversing death sentence because members not specifically required to find aggravating circumstances). See generally Dwight Sullivan, *A Matter of Life and Death: Examining the Military Death Penalty's Fairness*, FED. LAW., June 1998, at 38. After giving an overview of the military's death penalty scheme, Sullivan provides an excellent examination of contemporary legal debates regarding capital punishment in the military. Issues addressed in the article include: commanding officers' selection of court-martial members, variable court-martial panel size, absence of meaningful Habeas review, and racial disparity. *Id.*

37. *Matthews*, 16 M.J. at 379.

38. MCM, *supra* note 18, R.C.M. 1004 analysis, app. 21, at A21-69.

less of the outcome of such litigation, in order to better protect the rights of service members.”³⁹

The court issued the *Matthews* decision while RCM 1004 circulated for public comment. The court’s holding invalidated the procedures then in effect and necessitated revision. “However, *Matthews* did not require substantive revision of the proposed RCM 1004,” and President Reagan promulgated the new rule and incorporated it in the 1984 *Manual for Courts-Martial*.⁴⁰

Matthews firmly established that military death penalty cases must comply with the Supreme Court’s Eighth Amendment precedents. The court held that Article 55 of the Uniform Code of Military Justice (UCMJ)⁴¹ provides comparable protection against cruel and unusual punishments. Specifically, the court stated that, “in enacting Article 55, Congress ‘intended to grant protection covering even wider limits’ than ‘that afforded by the Eighth Amendment.’”⁴² The statutory and constitutional protections for service members against cruel and unusual punishments led the court to conclude that all Supreme Court requirements for civilian capital cases apply in courts-martial.⁴³ Thus, *Lockett* and its progeny of cases through *Buchanan*, which require full and extensive consideration of

39. *Id.* at A21-70.

40. *Id.*

41. UCMJ art. 55 (2000). Article 55 states:

Punishment by flogging, or branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a court-martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited.

Id.

42. *Matthews*, 16 M.J. at 368 (quoting *United States v. Wappler*, 9 C.M.R. 23, 26 (C.M.A. 1953)).

43. *Id.* at 368-69.

extenuating and mitigating circumstances, apply to military death penalty cases.⁴⁴

Rule for Courts-Martial 1004 codifies a defendant's right to an unrestricted opportunity to present mitigating and extenuating evidence by establishing specialized procedures for reaching sentences in capital cases.⁴⁵ In *United States v. Simoy*,⁴⁶ the Court of Appeals for the Armed Forces discussed and affirmed the four specific "gates" through which a court-martial panel must pass to arrive at a bona fide death sentence.⁴⁷

First, the panel must unanimously find the accused guilty of a death-eligible offense.⁴⁸ Currently, there are fifteen offenses punishable by death under the UCMJ. Many of the crimes, however, such as desertion, disobeying a superior commissioned officer, and spying, only apply in time of war. In the case of murder, the members must agree unanimously that the accused committed premeditated murder or unlawfully killed another human being during the commission of certain offenses (felony murder).⁴⁹ Although military practice does not follow most civilian jurisdictions in mandating twelve jurors in capital cases,⁵⁰ the rules do require

44. See generally MCM, *supra* note 18, R.C.M. 1004 analysis, app. 21, at A21-70.

The Court of Military Appeals listed several requirements for adjudication of the death penalty, based on Supreme Court decisions: (1) a separate sentencing procedure must follow the finding of guilt of a potential capital offense; (2) specific aggravating circumstances must be identified to the sentencing authority; (3) particular aggravating circumstances used as a basis for imposing the death sentence; (4) the defendant must have an unrestricted opportunity to present mitigating and extenuating evidence; and (5) mandatory appellate review must be required to consider the propriety of the sentence as to the individual offense and individual defendant and to compare the sentence to similar cases within the jurisdiction.

Id. (summarizing *Matthews*, 16 M.J. at 369-77).

45. *Id.* R.C.M. 1004 (a)(3) ("The accused shall be given broad latitude to present evidence in extenuation and mitigation.").

46. 50 M.J. 1 (1998).

47. *Id.* at 2. See generally Major Paul H. Turney, *New Developments in Capital Litigation: Four Cases Highlight the Fundamentals*, ARMY LAW., May 2000, at 63.

48. MCM, *supra* note 18, R.C.M. 1004(a)(2).

49. UCMJ art. 118. The felony murder offenses, which the accused must have been engaged in the perpetration of or attempted perpetration of, include: burglary, sodomy, rape, robbery, or aggravated arson. *Id.*

50. MCM, *supra* note 18, R.C.M. (b) (requiring a minimum of five panel members at all general courts-martial).

unanimity as to guilt as the first prerequisite to a death sentence.⁵¹ The remaining gates occur during sentencing deliberations.⁵²

51. *Id.* R.C.M. 921 (c)(2)(A). Except in capital cases, a finding of guilty results if at least two-thirds of the court-martial members vote for guilt. *Id.* R.C.M. 921(c)(2)(B).

All seven inmates presently on death row at the U.S. Disciplinary Barracks at Fort Leavenworth, Kansas, were convicted of murder under Article 118, UCMJ. Inmates convicted by Army courts-martial include: Dwight J. Loving, Ronald Gray, William Kreutzer, and James T. Murphy. Loving, Gray, and Murphy are African-American; Kreutzer is Caucasian. Murphy remains on death row by choice. The Court of Appeals for the Armed Forces set aside his sentence and remanded the case to the Army Court of Criminal Appeals. He awaits re-sentencing or a reassessed sentence by the Army Court. Inmates convicted by Marine courts-martial include: Kenneth Parker, Wade L. Walker, and Jessie Quintanilla. Parker and Walker are African-American; Quintanilla is Asian. *See* Death Penalty Information Center, U.S. Military, at <http://www.deathpenaltyinfo.org/military.html> (last visited Nov. 11, 2000) (updating the status of military death row inmates).

Since enactment of the UCMJ in 1950, the military services have executed thirteen servicemen. All were found guilty of murder, murder and rape, or attempted murder and rape. The last execution of a member of the armed forces took place on 13 April 1961. Information Paper, subject: Military Capital Cases (11 Apr. 1999), *in* CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, 47TH GRADUATE COURSE MILITARY JUSTICE MANAGEMENT ELECTIVE COURSE OUTLINE (1999).

The history of military capital punishment reveals that the last execution of a marine occurred in 1817. The Navy's last execution occurred in 1847. From 1948 (the year the Air Force came into existence) to date, 3 Air Force personnel have been executed. Since 1916, the Army has executed 191 soldiers. During World War I, 35 soldiers were executed. During World War II, 146 soldiers were executed. Since 1950, the year the UCMJ was implemented, there have been 13 executions, 10 soldiers and 3 airmen. All 13 were executed by hanging. Six were executed at the Federal Prison at Lansing, Michigan. Four were executed at the [U.S. Disciplinary Barracks], Fort Leavenworth, Kansas. Two were executed in Guam and one in Japan. Under the UCMJ for those actually executed, the average time from trial to execution was about four years. The last DOD person executed was Army PFC John A. Bennett, who was hung on 13 April 1961 for rape and the attempted premeditated murder of an eleven-year-old girl. The post-1950 death penalty offenses are as follows:

1950-1	1-Murder	1-Air Force
1954-3	2-Murder & Rape/1-Murder	2-Air Force/1-Army
1955-3	3-Murder	3-Army
1957-3	1-Murder & Rape/2-Murder	3-Army
1958-1	1-Murder	1-Army
1959-1	1-Murder & Rape/1-Murder	1-Army
1961-1	1-Rape & Attempted Murder	1-Army

Id.

Second, following the sentencing hearing in a death case, panel members must unanimously agree that the government has proven at least one specified aggravating factor beyond a reasonable doubt.⁵³ The need for this gate and the list of specific aggravating factors in RCM 1004(c) came to light during appellate litigation of the *Matthews* case.⁵⁴ Third, the members must determine by unanimous vote whether or not the aggravating factors and aggravating circumstances substantially outweigh any extenuating and mitigating circumstances.⁵⁵ The necessity for increased defense access to mitigation specialists revolves around this balancing test. Fairness under our adversarial system requires competent, thorough, and complete presentation of all mitigating evidence to counter the government's constitutionally based responsibility to extensively present evidence in aggravation. Prosecutors must focus extensive time, energy, and resources developing and offering aggravation evidence. Their efforts ensure that cases not only pass through the second gate, but also tip the balance substantially to meet the burden at the third gate.

Finally, even if the members vote unanimously at the first three gates, they must still vote again on an appropriate sentence. No requirement exists for members to vote for death, even though they voted affirmatively at the first three gates. Hence, the fourth gate mandates a final unanimous agreement that the accused should face the death penalty.⁵⁶

C. Rules for Courts-Martial and Recent Cases Controlling Expert Assistance Requests

Before moving from the general rules governing death penalty trials to recent cases shaping capital litigation in the military, one must examine the current legal landscape regarding expert assistance. Any discussion of the relevance and importance of mitigation specialists must start with a general examination of how to request funding to acquire their services.

52. All military courts-martial follow a bifurcated procedure, separating the merits phase from the sentencing phase of the trial. *See id.* R.C.M. 1004(a)(1).

53. *Id.* R.C.M. 1004 (b)(4)(A), 1004 (c).

54. *United States v. Matthews*, 16 M.J. 354, 379 (C.M.A. 1983).

55. MCM, *supra* note 18, R.C.M. 1004 (b)(4)(C). Rule 1004 (c) lists the specific aggravating factors for capital cases. *Id.* R.C.M. 1004(c)(1)-(8). The balancing test at the third gate, however, also includes any aggravating circumstances directly relating to or resulting from the offenses. The rule governing the admissibility of aggravating circumstances applies in all courts-martial. *Id.* R.C.M. 1001(b)(4).

56. *Id.* R.C.M. 1004(b)(7).

Although this overview addresses the status of a defendant's right to make ex parte requests for such assistance, the analysis in Section V covers the proposal linking ex parte hearings to expanded access to mitigation specialists.

The Sixth Amendment grants an accused the right to compulsory process ensuring the presence of witnesses. In military practice, the right to supplement the defense team with expert witnesses and assistance is based on Article 46, UCMJ.⁵⁷ The article provides equal access to witnesses for all parties involved in a court-martial. Specific rights regarding expert witnesses, however, began to crystallize when the Supreme Court decided *Ake v. Oklahoma*.⁵⁸ By the time the Court decided *Ake*, over forty states and the federal government had already granted defendants entitlement to expert psychiatric assistance.⁵⁹ Then in *Ake*, the Court "established the principle that the Due Process Clause of the Constitution includes a right to supplement the defense team with expert assistance when such assistance is necessary to a fair trial."⁶⁰

In 1986, the Court of Military Appeals (now called the Court of Appeals for the Armed Forces) followed the Supreme Court's lead. *United States v. Mustafa*⁶¹ and *United States v. Garries*⁶² firmly establish the right to expert consultants and investigators in military cases. *Garries*, however, makes clear that defense counsel carry the burden of demonstrating why assistance is "necessary" and why they cannot prepare and present the case themselves.⁶³

57. UCMJ art. 46 (2000). "The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." *Id.*

58. 470 U.S. 68 (1985) (finding an indigent criminal defendant entitled to expert assistance at government expense when sanity at time of offense was seriously in question).

59. *Id.* at 79.

60. Major Will A. Gunn, *Supplementing the Defense Team: A Primer on Requesting and Obtaining Expert Assistance*, 39 A.F. L. REV. 143, 144 (1996).

61. 22 M.J. 165 (C.M.A. 1986), *cert. denied*, 479 U.S. 953 (1986) (holding an accused is entitled to investigative or other expert assistance when necessary to prepare an adequate defense).

62. 22 M.J. 288 (C.M.A. 1986), *cert. denied*, 479 U.S. 985 (1986).

63. *Garries*, 22 M.J. at 290-91. *See also* CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, 49TH OFFICER'S GRADUATE COURSE CRIMINAL LAW DESKBOOK D-23 to 26 (Fall 2000) [hereinafter CRIMINAL LAW DESKBOOK].

Rule for Courts-Martial 703(d) controls the process for requesting expert witnesses.⁶⁴ Although RCM 703(d) refers only to expert *witness* requests, the Court of Appeals for the Armed Forces also uses the rule as a basis when defining standards for expert *assistance* requests. Before requesting funding through the military judge, counsel must submit a request to the relevant general court-martial convening authority. The convening authority is the only official authorized to grant funding for expert assistance prior to referral of the case to a court-martial. After referral, the military judge takes control of the case. The judge may revisit any request for funding on the record, but defense counsel must once again demonstrate the necessity for assistance.⁶⁵

Garries and RCM 703(d) do not provide strict guidelines on how to meet the required showing of necessity. In *United States v. Gonzalez*,⁶⁶ however, the military court attempted to “fill the void created by *Garries*, by favorably citing a three-part analysis laid out by the Navy-Marine Court

64. MCM, *supra* note 18, R.C.M. 703(d) states:

(d) *Employment of expert witnesses.* When a party considers the employment at Government expense of an expert necessary, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment. A request denied by the convening authority may be renewed before the military judge who shall determine whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute. If the military judge grants a motion for employment of an expert or finds that the Government is required to provide a substitute, the proceedings shall be abated if the Government fails to comply with the ruling. In the absence of advance authorization, an expert witness may not be paid fees other than those to which entitled under subsection (e)(2)(D) [regarding standard fees and mileage for standard civilian witnesses] of this rule.

Id.

65. *See id.*

66. 39 M.J. 459 (1994) (adopting a three-pronged test for showing why expert assistance is necessary, what expert assistance would accomplish, and why defense counsel is unable to gather and present same evidence).

of Military Review in *United States v. Allen*.⁶⁷ *Gonzalez* provides a starting point for defense counsel to craft their requests.

The apparent key to obtaining assistance is a plausible showing that the expert can supply information or services that counsel cannot get or accomplish on his own. The more detail counsel provides in the request, the greater the chances of success.⁶⁸ *United States v. Short*⁶⁹ demonstrates that only strict adherence to the standard will result in a grant of funding. Because the case law encourages such a detailed explanation, the government tends to insist on a heightened standard for defense counsel compliance with the rule. This strict compliance provides a significant advantage to the government in the reciprocal discovery process.

As discussed in Section V, *ex parte* requests for assistance might level the playing field, particularly in death penalty cases. However, no absolute right to an *ex parte* hearing to demonstrate necessity for assistance exists in military practice. In *Garries*, the Court of Military Appeals held that the right to request expert assistance at an *ex parte* hearing under the federal code, does not apply to the military.⁷⁰ The court recognized “inherent authority in the military judge to permit such a procedure in the *unusual circumstance* where it is necessary to insure a fair trial.”⁷¹ However, the next sentence in the opinion states that “[u]se of an *ex parte* hearing to obtain expert services would rarely be appropriate in the military context because funding must be provided by the convening authority and such a procedure would deprive the Government of the opportunity to consider and arrange alternatives for the requested services.”⁷²

The court then refused to accept the generalization that a capital referral necessarily justifies the expert assistance of an investigator.⁷³ By

67. Gunn, *supra* note 60, at 148 (quoting *Gonzalez*, 39 M.J. at 461 (citing *United States v. Allen*, 31 M.J. 572, 623 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991))).

68. CRIMINAL LAW DESKBOOK, *supra* note 63, at D-23 to 24. The guidance provided to practitioners by the Army Judge Advocate School’s Criminal Law Department suggests the need for a very detailed showing of necessity for a request to pass muster under current case law. *Id.*

69. 50 M.J. 370 (1999) (finding the defense failed to make an adequate showing of necessity when it refused to talk to government expert, did not seek help from more experienced counsel, and successfully elicited needed testimony during cross-examination).

70. *United States v. Garries*, 22 M.J. 288, 291 (C.M.A. 1988).

71. *Id.* (emphasis added).

72. *Id.*

73. *Id.*

implication, the case stands for the proposition that a capital referral alone does not constitute an unusual circumstance. Most recently, in *United States v. Kaspers*,⁷⁴ the court generally affirmed its holding in *Garries*, while acknowledging that the military rule “may burden the defense to make a choice between justifying necessary expert assistance and disclosing valuable trial strategy.”⁷⁵ Both *Garries* and *Kaspers* address the ex parte question in the context of murder trials. However, neither case specifically examines the issue of the right to an ex parte hearing when requesting a mitigation specialist in all capital cases.

III. Analysis of Recent Military Cases Regarding the Need for Mitigation Specialists

A discussion of recent military case law regarding the necessity for mitigation specialists in death penalty cases starts with an examination of ineffective assistance of counsel standards in capital courts-martial. The Supreme Court recognizes that the Sixth Amendment right to counsel requirement mandates provision of adequate resources to present an effective defense.⁷⁶ Surveying how military courts address the issue of funding for mitigation specialists then dovetails into the discussion of ineffective assistance of counsel in each case.

A. *United States v. Loving*

The Supreme Court’s ruling in *United States v. Loving*⁷⁷ validates the current procedural scheme in the military for arriving at a death sentence in a court-martial. In 1988, an eight-member general court-martial at Fort Hood, Texas, convicted Private Dwight Loving of premeditated murder and felony murder under Article 118, UCMJ. Private Loving murdered two taxicab drivers from Killeen, Texas, and he attempted to murder a third. Authorities apprehended him the following day, and he confessed to the killings.⁷⁸ Although *Loving* focuses on the President’s authority to promulgate the aggravating factors listed in RCM 1004, the Supreme

74. 47 M.J. 176 (1997).

75. *Id.* at 180.

76. *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

77. 517 U.S. 748 (1996) (validating President’s authority, under separation of powers doctrine, to prescribe aggravating factors required to permit courts-martial to adjudge death sentences).

78. *Id.* at 751.

Court also affirmed the death sentence by a unanimous vote, without reaching any of the other challenges to the constitutionality of military jurisdiction or procedure in capital cases.⁷⁹

This article focuses primarily on the Court of Appeals for the Armed Forces opinion in *Loving*⁸⁰ regarding ineffective assistance of counsel and mitigation specialists. In one respect, the case illustrates how the Supreme Court's emphasis on ensuring reliability in death cases usually leads to ineffective assistance of counsel claims on appeal. The examination of attorneys' actions, particularly in successful appeals, invariably focuses on inadequate presentation of mitigation evidence. It is "the most common basis for claims of ineffective assistance of counsel in death penalty cases across the country."⁸¹

In the civilian sector, the problem most often results from either a failure to investigate and discover readily available evidence or an improper decision to refrain from presenting mitigating facts.⁸² The military cases discussed in this section indicate similar scrutiny by the Court of Appeals for the Armed Forces regarding the level of investigation expected of counsel in capital cases. Interestingly, the court has not used its interpretive powers to encourage convening authorities or military judges to liberally grant funds for mitigation specialists to assist inexperienced and under-resourced defense counsel.

In *Loving*, an important facet of the ineffectiveness claim centers on defense counsel's failure to investigate and present evidence regarding voluntary intoxication. The court accepted counsel's position that he chose not to present the evidence for strategic reasons. The decision to

79. Cf. *id.* at 774-75. Justice Steven's concurrence, which Justices Souter, Ginsburg and Breyer joined, questioned whether a "service connection" requirement for jurisdiction as delineated in *Solorio v. United States*, 483 U.S. 435 (1987), should apply to military capital cases. *Id.* Following *Loving*, the Court of Appeals for the Armed Forces in *United States v. Curtis*, 44 M.J. 106 (1996), and the Air Force Court of Criminal Appeals in *United States v. Simoy*, 46 M.J. 592 (A.F. Ct. Crim App. 1996), affirmatively detailed facts establishing service connection.

80. *United States v. Loving*, 41 M.J. 213 (1994).

81. Stetler, Burt, & Johnson, *supra* note 8, at 4.

82. Teresa L. Norris, Center for Capital Litigation, *Summaries of All Published Successful Ineffective Assistance of Counsel Claims Since Strickland v. Washington* (Apr. 9, 1997) (unpublished compilation of case summaries, on file with author). Ms. Norris summarizes sixty-five death sentences overturned on appeal between 1985 and 1997 for ineffective assistance of counsel during the penalty phase. Failure to investigate and present mitigation evidence caused most of the deficiencies.

leave out intoxication then led the defense team to cut its mitigation investigation short.⁸³ *Loving* held that the appellant did not satisfy the first prong of *Strickland v. Washington*—demonstrating that counsel’s performance was deficient.⁸⁴ The opinion shows, however, that the Court of Appeals for the Armed Forces considers closely all questions regarding presentation of evidence in the sentencing phase of death penalty trials.⁸⁵ Clearly, a mitigation specialist could have provided Private Loving the needed expertise and resources to discover the witnesses missed by counsel. An expert could also have assisted the defense team to find the best approach for presenting mitigating circumstances at trial.

Loving presents a different scenario than *Kreutzer* and some of the other cases discussed in this article. The appeal tied its ineffectiveness claim to trial defense counsel’s failure to request funds for a mitigation specialist or “present a cohesive, comprehensible background, social, medical, and environmental history.”⁸⁶ Other cases couch their claims of ineffectiveness in the inability of counsel to investigate because of the denial of funding. In any case, the *Loving* court ruled specifically that: “While use of an analysis prepared by an independent mitigation expert is often useful, we decline to hold that such an expert is required. What is required is a reasonable investigation and competent presentation of mitigation evidence.”⁸⁷

This article does not question the factual merits of the court’s holding that counsel were effective and conducted a reasonable investigation and presentation. The *Loving* court’s unequivocal language, however, tends to minimize the increasingly recognized importance of mitigation specialists. Additionally, at the trial court level, the wording arms trial counsel, commanders, and judges with powerful ammunition to reject without consideration defense requests for assistance. In *Kreutzer*, for example, the

83. *Loving*, 41 M.J. at 242.

84. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). *Strickland* held that the benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the result of trial is not reliable. The Supreme Court set out a two-pronged test for reversing a conviction or setting aside a death sentence. First, the defendant must show that counsel’s performance was deficient. Second, the deficient performance must have so prejudiced the defense as to deprive the defendant of a fair trial. *Strickland*, 466 U.S. at 669.

85. The *Loving* decision is also interesting in light of the *Curtis* case discussed later. *United States v. Curtis*, 46 M.J. 129 (1997) (finding counsel ineffective for not presenting evidence regarding intoxication).

86. *Loving*, 41 M.J. at 249.

87. *Id.* at 250.

convening authority relied specifically on the language in *Loving* to summarily deny the defense request for a mitigation expert.⁸⁸ *Loving* represents the current state of the law in military jurisdictions. The remainder of this article demonstrates that the case may not represent the evolving standards in the legal community at large.

B. *United States v. Gray*

*United States v. Gray*⁸⁹ is the most recent death case decided by the Court of Appeals for the Armed Forces. Unfortunately, the court in *Gray* not only appears out of step with evolving standards in the legal community, but also with its own leanings in *United States v. Curtis*,⁹⁰ *United States v. Murphy*,⁹¹ and *United States v. Simoy*.⁹² The court decided all three cases after *Loving*, and it appeared to embrace evolving standards regarding effective representation and presentation of mitigation evidence during capital sentencing hearings.

In *Gray*, the court rejected arguments regarding the failure to provide Specialist Gray with counsel qualified according to American Bar Associ-

88. Memorandum, Commander, 82d Airborne Division, Fort Bragg, North Carolina, subject: Defense Request for Employment of Mitigation Specialist—*United States v. SGT William J. Kreuzer, Jr.*, para. 4 (22 Mar. 1996) (on file with author). The memorandum states in paragraph 3:

a. The defense has failed to establish the necessity of hiring a mitigation specialist. The Court of Appeals for the Armed Forces has held that while a mitigation specialist is often useful, such an expert is not required. Presentation of mitigation evidence is primarily the responsibility of counsel, not expert witnesses. *United States v. Loving*, 41 M.J. 213, 250 (1994).

b. Counsel for the accused have the responsibility of presenting mitigation evidence . . . This evidence can be gathered by defense counsel by interviewing the accused's family, friends, teachers, counselors, pastors, and other acquaintances, as well as reviewing records and other written documents pertaining to the accused. It is reasonable for defense counsel to travel beyond Fort Bragg in order to accomplish this task.

Id.

89. 51 M.J. 1 (1999).

90. 46 M.J. 129 (1997) (*Curtis II*).

91. 50 M.J. 4 (1998).

92. 50 M.J. 1 (1998).

ation Guidelines.⁹³ Although this holding was hardly novel, the court missed an opportunity to expand its emphasis in *Curtis*, *Murphy*, and *Simoy* on ensuring that the military keeps up with evolving legal standards. The *Gray* court declined to exercise its supervisory powers to establish qualification standards for counsel in capital cases. Instead, the judges elected to follow the general guidance for effectiveness of counsel expressed by the Supreme Court in *Strickland v. Washington*.⁹⁴ The *Gray* court also minimized the effect of failing to present evidence of intoxication during the presentencing hearing.⁹⁵ This position seemingly contradicts the apparent leanings in *Curtis*, in which the court emphasized the importance of presenting all mitigation evidence in death cases to ensure reliability.⁹⁶

In 1987, Specialist Gray raped, sodomized, and murdered another soldier's wife and a female civilian taxicab driver. He also raped and attempted to murder a female soldier. The panel found him guilty of two specifications of premeditated murder and one specification of attempted premeditated murder, three specifications of rape, two specifications of burglary, and two specifications of forcible sodomy. In North Carolina state court, he pled guilty to the murder and rape of two additional young women and received two life sentences. The court-martial sentenced him to death.⁹⁷

The Court of Appeals for the Armed Forces considered 101 distinct issues in *Gray*. The key issue for this discussion is Gray's contention that his trial defense counsel failed to investigate the mitigating circumstances

93. *Gray*, 51 M.J. at 54.

94. *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). See also *United States v. Gray*, 32 M.J. 730 (A.C.M.R. 1991). The Army court's opinion is particularly instructive regarding adoption of the ABA Guidelines:

Finally, we emphasize that our focus in Army death penalty cases will be on the quality of representation provided, rather than the qualifications of counsel as specified in the ABA Guidelines. Just as soldiers who are asked to lay down their lives in battle deserve the very best training, weapons, and support, those facing the death penalty deserve no less than the very best quality of representation available under our legal system.

Id. at 732.

95. *Gray*, 51 M.J. at 18-19.

96. *United States v. Curtis*, 46 M.J. 129, 129-31 (1997) (*Curtis II*).

97. *Gray*, 51 M.J. at 11.

of his traumatic family, social, and medical histories. Gray also pointed to his counsel's failure to investigate and present evidence regarding Gray's intoxication at the time of the offenses. In ruling that counsel represented Gray effectively, the court stated, "The problem with appellant's argument is that it equates failure to discover certain facts with failure to conduct a proper investigation."⁹⁸ Then to counter the argument that counsel did not find all available mitigating evidence, the court pointed to the "substantial mitigating evidence presented in this case from appellant's trial psychiatric experts and his family."⁹⁹ Rather than balancing whether a reasonable probability existed that the additional evidence might have changed the result, the court seemed to limit its analysis to whether counsel presented an adequate amount of evidence.

Gray appears to signal a return by the military court to the view that "[d]eath is not different,"¹⁰⁰ when scrutinizing the reliability of a capital sentence. The majority argued that "even the best criminal defense attorneys would not defend a particular client in the same way."¹⁰¹ Later in the opinion, the court found that the military judge erred by not allowing as mitigation evidence a videotape of a network television program dealing with the poor living conditions and social dynamics in Gray's neighborhood. The court held, however, that despite the established principle in *Lockett* that a capital defendant has broad latitude in presenting mitigating evidence, the error was harmless beyond any doubt.¹⁰² Once again, the opinion seems to lean back toward a pre-*Curtis* view of what constitutes an effective presentation of mitigation evidence. The military judge's denial of requests for assistance in *Gray* did *not* include a specific request for a mitigation specialist. However, the tenor of the opinion regarding investigators and psychiatrists indicates a reluctance to provide any assistance to defense counsel absent an extensive showing of necessity on the record.¹⁰³

98. *Id.* at 18.

99. *Id.*

100. *Curtis II*, 46 M.J. at 130 (quoting *United States v. Curtis*, 44 M.J. 106, 167 n.1 (1996) (*Curtis I*)).

101. *Gray*, 51 M.J. at 19 (citing Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, N.Y.U. L. REV. 299, 343 (1983)).

102. *Id.* at 39.

103. *Id.*

C. *United States v. Curtis, Simoy, and Murphy*

In *Curtis, Simoy, and Murphy*, the Court of Appeals for the Armed Forces indicated a desire to bring the military justice system in line with evolving legal standards. The cases seemed to raise the bar with regard to effective assistance of counsel and presentation of mitigation evidence in capital cases. Although the pendulum appears to have swung back in *Gray*, the consistent 3-2 split between the judges in these cases shows at least a persistent concern that the military justice system carefully scrutinizes its procedures in capital cases.

In April 1987, Lance Corporal Curtis murdered an officer and his wife at Camp Lejeune, North Carolina. In June 1996, the Court of Appeals for the Armed Forces affirmed Curtis's conviction.¹⁰⁴ Then the court reversed itself in June 1997, setting aside the death sentence based on ineffective assistance of counsel.¹⁰⁵ Judge Cox represented the "swing" vote in the reversal. In a concurring opinion, he indicated his evolving perspective regarding capital cases in the military. He expressly rejected his initial inclination to view only the circumstances of the crimes, when concluding that no jury would elect to impose anything other than a sentence of death. Then he stated that "time has marched on" since his first consideration of the case in 1991.¹⁰⁶ His opinion expresses a newfound view that "there was no justification for failing to use the evidence of appellant's intoxication during sentencing."¹⁰⁷ He specifically attributes the failure to inexperience. Judge Cox contends:

The sentencing hearing may have been adequate for an absence without leave case, but it was woefully lacking and totally unacceptable in a capital murder case. . . . In my opinion, appellant's sentencing case was not fully developed because trial defense counsel lacked the necessary training and skills to know how to defend a death penalty case or where to look for the type of mitigating evidence that would convince at least one court member that appellant should not be executed.¹⁰⁸

104. *Curtis I*, 44 M.J. at 161.

105. *Curtis II*, 46 M.J. at 130.

106. *Id.* 1997 CAAF LEXIS 38, at *5 (*Editor's Note: The LEXIS electronic database is cited because the Military Justice Reporter excludes inexplicably Chief Justice Cox's concurring opinion at 46 M.J. 130*).

107. *Id.* at *9.

108. *Id.* at *7-8.

Judge Cox recognized that an adequate capital sentencing case includes presentation of all possible mitigating evidence because of the four unanimous votes required to impose death. To save the client's life, defense counsel must only find enough mitigation to influence one vote at one gate.¹⁰⁹ Judge Cox's opinion lends credence to the argument that convening authorities and military judges should liberally grant requests for mitigation specialists to add capital experience to the defense team.

Simoy was another case that recognized evolving legal standards. Although the case was ultimately overturned on an instructional error,¹¹⁰ the appellate courts closely examined ineffective assistance of counsel¹¹¹ and the judge's limitation of mitigation evidence at sentencing.¹¹²

Airman *Simoy* planned a robbery. During the robbery, *Simoy's* brother beat to death a security policeman. *Simoy* encouraged his brother to murder the policeman and to stab a potential witness.¹¹³ The Air Force Court of Criminal Appeals detailed that the entire defense submission on sentencing comprised seven pages of the record. No live witnesses testified for the defense, and counsel only submitted two documents into evidence.¹¹⁴ In concurring opinions at the Court of Appeals for the Armed Forces, three of the five judges agreed that the trial judge erred by limiting the defendant's broad right to present mitigation evidence during sentencing. The trial judge also excluded evidence that the accused's civilian brother would receive a mandatory life sentence in state court.¹¹⁵ Consistent with the court's heightened scrutiny articulated in *Curtis*, the *Simoy* court focused on ineffective assistance during sentencing, and it attempted to allow broad latitude regarding mitigating evidence.¹¹⁶

In *Murphy*, much like *Curtis*, the Court of Appeals for the Armed Forces held that the "appellant did not get a full and fair sentencing hearing."¹¹⁷ In remanding the case, the court pointed to trial defense counsel's failure to explore mental health evidence beyond requesting a

109. *Id.* at *5-6.

110. *United States v. Simoy*, 50 M.J. 1, 2 (1998).

111. *United States v. Simoy*, 46 M.J. 592, 602-07 (A.F. Ct. Crim. App. 1996).

112. *Simoy*, 50 M.J. at 3.

113. *Simoy*, 46 M.J. at 599-601.

114. *Id.* at 632.

115. *Simoy*, 50 M.J. at 3.

116. *See id.*

117. *United States v. Murphy*, 50 M.J. 4, 15 (1998).

sanity board.¹¹⁸ The Judge Advocate General of the Army granted a funding request to conduct a post-trial social history five years after Murphy's conviction for murdering his former wife, five-year old stepson, and biological infant son. The investigation produced new factual evidence regarding a personality disorder and other psychological dysfunction.¹¹⁹

The 3-2 decision in *Murphy* lists "key ingredients" to a reliable capital case: "competent counsel; full and fair opportunity to present exculpatory evidence; individualized sentencing procedures; fair opportunity to obtain services of experts; and fair and impartial judges and juries."¹²⁰ Although Judge Sullivan's dissent perhaps foreshadows an eventual return to a relatively low standard in *Gray*, he points out that the majority in *Murphy* and *Curtis* posit "that military lawyers are, in effect, unqualified to act in capital cases."¹²¹ The majority in *Murphy* states:

The Army Court of Military Review blessed this sentencing effort by characterizing it as "trial defense counsel's tactical judgment." In some cases, this effort might well satisfy the *Strickland* standard for adequate representation. What follows in this opinion, however, demonstrates that a capital case—or at least this capital case—is not "ordinary," and counsels' inexperience in this sort of litigation is a factor that contributes to our ultimate lack of confidence in the reliability of the result: a judgment of death.¹²²

On remand from the Court of Appeals for the Armed Forces, the Army Court of Criminal Appeals returned the *Murphy* case to The Judge Advocate General of the Army. Further, the Army court ordered the case referred to a general court-martial for a *Dubay*¹²³ hearing.¹²⁴ The hearing was required, the court reasoned, in light of the information gained post-trial by a mitigation specialist who was funded pursuant to the appellate court's order. The Army court concluded it could not effectively use its fact-finding powers to determine "whether '[t]he newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for

118. *Id.* at 16.

119. *Id.* at 13-14.

120. *Id.*

121. *Id.* at 28-29.

122. *Id.* at 13.

123. *United States v. Dubay*, 37 C.M.A. 411 (1967).

124. *United States v. Murphy*, 2001 CCA LEXIS 286, at *3 (Nov. 20, 2001).

the accused.”¹²⁵ The rationale for ordering the *Dubay* evidentiary hearing included the need to test this “barrage” of post-trial information ““in the crucible of an adversarial proceeding.”¹²⁶ The court’s emphasis on weighing mitigation evidence in light of cross-examination and contrary testimony by government witnesses shows the importance of handling evidence provided by mitigation specialists at the trial court level. If access to such specialists is delayed until post-trial, then convening authorities and military judges are, in essence, forcing appellate courts to send death penalty cases back to courts-martial for further evidentiary hearings.

Like *Curtis, Murphy* illustrates that a trained mitigation specialist supplementing the defense team at the trial level can greatly assist in uncovering and organizing the presentation of all needed and relevant evidence. If nothing else, the cases show the difficulty that inexperienced military counsel face in preparing and presenting adequate capital sentencing cases. Liberally granting requests for expert assistance in death cases will help solve the unavoidable problem of inexperienced military counsel. It will also go a long way toward validating the fairness and legitimacy of the military’s capital sentencing scheme.

D. Specific Funding Requests at the Appellate Level

Unfortunately, capital defendants appear to have more access to funding for mitigation specialists and other experts once convicted than in preparation for trial. On 15 December 2000, nearly six years after his trial, Sergeant Kreutzer finally obtained funding for a mitigation specialist.¹²⁷ The Army Court of Criminal Appeals granted the request for expert assistance to help appellate defense counsel “conduct an extensive social history investigation and mitigation investigation.”¹²⁸ As discussed in the Introduction, Sergeant Kreutzer intends to argue that the military judge erred by not granting the request for funding back in 1996. Thus, his right to effective assistance of counsel and presentation of a complete case in extenuation and mitigation was effectively denied at the trial level.¹²⁹ The integrity of the military’s capital litigation scheme and constitutional standards call for adequate resources to present a complete defense at trial.

125. *Id.* at *18-19 (quoting *Murphy*, 50 M.J. at 15 (citing R.C.M. 1210(f)(2)(C))).

126. *Id.* at *20 (quoting *Murphy*, 50 M.J. at 15).

127. *United States v. Kreutzer*, No. 9601044 (Army Ct. Crim. App. Dec. 15, 2000) (unpublished).

128. *Id.*

129. *See supra* notes 5-16 and accompanying text.

Sergeant Kreutzer's case is not the first case to demonstrate the reluctance of lower courts and convening authorities to grant funding for needed expert assistance in capital cases.

In 1990, the Court of Military Appeals ordered the Judge Advocate General of the Navy to provide \$15,000 to appellate defense counsel in *Curtis* in response to requests for expert assistance.¹³⁰ The Judge Advocate General of the Army later unilaterally granted funding for expert assistance on appeal in *Loving* and *Murphy*.¹³¹ This appeared to signal recognition, at least in the Army and within the judiciary, of an increased need for specialists to assist military counsel in death cases. In *United States v. Thomas*,¹³² however, the Navy-Marine Corps Court of Military Review quashed any trend toward liberally granting funding themselves or encouraging lower courts to grant funding.

In *Thomas*, the Navy court rejected an expert assistance request for funding of a psychosocial background investigation. On appeal, Sergeant Thomas requested the expert to help his appellate attorneys evaluate the effectiveness of his trial attorneys' unsuccessful presentation of mitigation evidence. Trial defense counsel conducted no psychosocial background investigation.¹³³ The Navy court concluded that counsel conducted an extensive mitigation case at trial and found no showing of necessity as required by *Garries*.¹³⁴

To require psychosocial background investigations based on mere conjecture would be tantamount to a judicial license for a

130. *United States v. Curtis*, 31 M.J. 395 (C.M.A. 1990) (interlocutory order).

131. *United States v. Gray*, 51 M.J. 1, 21-22 (1999). "In 1992, without a court order, the Judge Advocate General of the Army made funding available to two other death-row inmates whose cases were on appeal." *Id.* at 21. The court was referring to the *Loving* and *Murphy* cases. *Id.* at 22. The *Murphy* opinion mentions specifically such funding. *United States v. Murphy*, 50 M.J. 4, 13-14 (1998). The *Loving* opinion, however, does not mention expert funding by the Judge Advocate General of the Army. Rather, the opinion only indicates that funding for psychiatric assistance was refused at the trial level. *United States v. Loving*, 41 M.J. 213, 240 (1994).

132. 33 M.J. 644 (N.M.C.M.R. 1991). Sergeant Thomas murdered his wife in 1987. In 1996, the Court of Appeals for the Armed Forces set aside his death sentence due to an instructional error by the military judge. The judge allowed members to vote on death before voting on aggravating factors and striking the balance between aggravation and mitigation. *United States v. Thomas*, 46 M.J. 311 (1996).

133. *Thomas*, 33 M.J. at 646.

134. *Id.* at 646 (citing *United States v. Garries*, 22 M.J. 288 (C.M.A. 1986), *cert. denied*, 479 U.S. 985 (1987)).

paid fishing expedition. Appellant has fallen far short of meeting his burden. No evidence before us suggests that the requested expert would uncover anything to add to the extensive information already in the record. Appellant's general assertions regarding uniqueness of the sentencing phase of a death penalty case are insufficient to establish the necessity and materiality of the expertise he is requesting.¹³⁵

In *Loving*, as has already been discussed, the Court of Appeals for the Armed Forces specifically held that capital cases do not require mitigation specialists.¹³⁶ Then in *Gray*, the court found against the appellant on all issues regarding funding for experts. The opinion reasoned that counsel did not demonstrate necessity.¹³⁷ Unlike counsel in *Loving* and *Gray*, counsel in *Kreutzer* specifically requested a mitigation specialist at trial.¹³⁸ The Army Court of Criminal Appeals' then granted funding for the expert in *Kreutzer*.¹³⁹ This may signal a new trend toward encouraging military judges and convening authorities to liberalize grants for funding mitigation specialists at the trial court level. Otherwise, the court's order in *Kreutzer* only supports the inequitable result that defendants have more access to assistance after trial than before. Additionally, the *Kreutzer* order states that government appellate counsel did not object to the funding request. They based their reasoning "upon the fact that government funds were provided on appeal in two prior Army capital cases."¹⁴⁰ Although government attorneys in the future may try to distinguish funding grants on appeal from grants at trial, *Kreutzer* arguably indicates an increasing awareness within the Army of the importance of funding mitigation specialists in capital cases.

IV. Evolving Standards Regarding Mitigation Specialists and Representation in Death Cases

The broad inquiry into mitigating evidence required at capital sentencing hearings necessitates experts who can guide and assist counsel in

135. *Id.* at 647.

136. *Loving*, 41 M.J. at 250.

137. *United States v. Gray*, 51 M.J. 1, 30 (1999). *See also* *United States v. Gray*, 40 M.J. 25 (C.M.A. 1994) (denying funding for an investigator).

138. *United States v. Kreutzer*, No. 9601044 (Army Ct. Crim. App. Dec. 15, 2000) (unpublished).

139. *Id.*

140. *Id.* (referring to *Loving* and *Murphy*).

investigating, organizing and presenting relevant evidence. In denying the request in *Thomas*, the Navy court asserted that funding a background investigation based on mere speculation amounts to a “paid fishing expedition.”¹⁴¹ Yet, conducting the type of investigation required to adequately present a capital mitigation case mandates that very fishing expedition. Unfortunately, military defense counsel are neither trained nor competent to conduct the in-depth inquiry needed to develop the sentencing evidence. The Navy court correctly acknowledged “a psychosocial investigation is not within the ken of a competent attorney.”¹⁴² The court then placed counsel between the proverbial rock and a hard place by requiring a clear showing of materiality and necessity before funding the assistance. The court fixes an unreasonable requirement on inexperienced attorneys by mandating a showing of what evidence the specialist will uncover before allowing an attorney the needed consultation.

An increased awareness of the importance of mitigation specialists and qualified counsel pervades contemporary legal thought regarding capital litigation. This section first reviews the American Bar Association’s (ABA) 1997 resolution regarding guidelines for ensuring that experienced counsel represent defendants in capital cases.¹⁴³ Next, the section summarizes the invaluable services provided by mitigation specialists that cannot be replicated by untrained attorneys. Last, the section compares military capital cases and procedures to the recommendations and report on federal death penalty cases adopted on 15 September 1998, by the Judicial Conference of the United States.¹⁴⁴

141. *United States v. Thomas*, 33 M.J. 644, 648 (N.M.C.M.R. 1991).

142. *Id.* at 647.

143. AMERICAN BAR ASSOCIATION, SECTION ON INDIVIDUAL RIGHTS AND RESPONSIBILITIES, REPORT WITH RECOMMENDATIONS ON RESOLUTION NO. 107 OF THE HOUSE OF DELEGATES (approved Feb. 3, 1997) [hereinafter ABA RESOLUTION AND REPORT], <http://www.abanet.org/irr/rec107.html>.

144. SUBCOMMITTEE ON FEDERAL DEATH PENALTY CASES, COMMITTEE ON DEFENDER SERVICES, JUDICIAL CONFERENCE OF THE UNITED STATES, FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION (adopted Sep. 15, 1998) [hereinafter JUDICIAL CONFERENCE RECOMMENDATIONS], <http://www.uscourts.gov/dpenalty> (4Report).

A. American Bar Association's 1997 Resolution Regarding Counsel Qualifications

On 3 February 1997, the ABA passed a resolution calling upon jurisdictions to cease executions until they implement procedures consistent with the ABA's capital litigation policies.¹⁴⁵ Because of the ABA's stature as a professional organization and its shouldering of the responsibility to conduct studies regarding the competence of counsel over the last twenty years, it is "especially well positioned to identify the professional legal services that should be available to capital defendants."¹⁴⁶

In both *Loving* and *Gray*, the Court of Appeals for the Armed Forces specifically refused to judicially implement the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.¹⁴⁷ The ABA adopted the basic guidelines in February 1989 and adopted a specific policy regarding military defendants in 1996.¹⁴⁸ Because of the Supreme Court's view that inexperience alone does not raise a presumption of ineffectiveness, the military court elected not to set mandatory standards. Rather, it decided to continue evaluating counsel based on the quality of their representation under *Strickland*.¹⁴⁹ In each capital case, however, the military court will endeavor to "remain vigilant as to the quality of representation provided."¹⁵⁰ Although the result in *Gray* tends to obscure recent tendencies, the court appears poised to raise the bar of scrutiny in capital cases. Judge Cox's clear concerns expressed in *Curtis* further indicate a desire for qualified representation.¹⁵¹

The ABA's particularized push to establish standards for counsel in military death penalty cases implies an evolving movement within the legal community to ensure that service members receive adequate representation.

[C]ourts have focused particularly on the obligation to investigate the defendant's mental health and deprived background because mitigating evidence drawn from these sources will be

145. ABA RESOLUTION AND REPORT, *supra* note 143.

146. *Id.*

147. *See* United States v. Gray, 51 M.J. 1, 54 (1999); United States v. Loving, 41 M.J. 213, 237 (1994).

148. ABA RESOLUTION AND REPORT, *supra* note 143.

149. *Gray*, 51 M.J. at 54 (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

150. *Id.*

151. *See supra* notes 106-09 and accompanying text.

especially powerful. Experience has demonstrated, however, that other types of mitigating evidence also may be persuasive to the sentencer and that the combination of mitigating evidence presented is critical. . . . Thus, the standard of a reasonable investigation in preparation for the penalty phase should encompass the ABA's view that such an investigation "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor" recognizing that both "mitigating" and "aggravating" evidence are terms that should be broadly defined.¹⁵²

Of course, the key to adequate representation at sentencing remains full and complete presentation of all mitigating evidence. Not adopting the ABA's specific guidelines requiring counsel with extensive litigation and capital experience increases the need to provide understanding and know-how to the defense team through appointment of mitigation specialists.

B. Role and Importance of Mitigation Specialists

The military cases surveyed in Section III clearly show the impact of failing to conduct an extensive investigation in preparation for the sentencing phase of a capital case. Also, "one of the most frequent grounds for setting aside state death penalty verdicts is counsel's failure to investigate and present available mitigating information."¹⁵³

As a practical matter, the defendant probably has little or no chance of avoiding the death sentence unless the defense counsel

152. Stetler, *supra* note 33 (quoting Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, U. ILL. L. REV. 323, 355-56 (1993) (citing AMERICAN BAR ASSOCIATION, GUIDELINES FOR APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES No. 11.4.1(C), (Feb. 1989))).

153. JUDICIAL CONFERENCE RECOMMENDATIONS, *supra* note 144, ¶ I.B.3. The report lists nine cases from 1995 to 1997, which illustrate set asides based on counsel's failure to investigate and present mitigation evidence. *Williamson v. Ward*, 110 F.3d 1508 (10th Cir. 1997); *Hall v. Washington*, 106 F.3d 742 (7th Cir. 1997); *Emerson v. Gramley*, 91 F.3d 898 (7th Cir. 1996), *cert. denied*, 520 U.S. 1122 (1997); *Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995), *cert. denied* 519 U.S. 909 (1996); *Hendricks v. Calderon*, 70 F.3d 1032 (9th Cir. 1995), *cert. denied* 517 U.S. 1111 (1996); *Clabourne v. Lewis*, 64 F.3d 1373 (9th Cir. 1995); *Antwine v. Delo*, 54 F.3d 1357 (8th Cir. 1995), *cert. denied* 516 U.S. 1067 (1996); *Baxter v. Thomas*, 45 F.3d 1501 (11th Cir.), *cert. denied* 516 U.S. 945 (1995); *Jackson v. Herring*, 42 F.3d 1350 (11th Cir.), *cert. denied* 515 U.S. 1188 (1995).

gives the jury something to counter both the horror of the crime and the limited information the prosecution has introduced about the defendant. Thus, defense counsel must conduct extensive investigation into the defendant's background—a task that may be difficult given that, first, law school prepares one to be an advocate, not an investigator, and second, funds may not be available to hire trained investigators. To the extent possible, however, the use of trained investigators, including mental health and mitigation experts, will greatly facilitate gathering information that may be sufficient mitigation to save the client's life.¹⁵⁴

As indicated by the Navy court in *Thomas*, military courts are starting to realize that mitigation specialists provide expertise outside the ken of attorneys.¹⁵⁵ The National Legal Aid and Defender Association posits that the specialized nature of penalty phase investigation requires adequate training, knowledge, and experience not generally possessed by attorneys.¹⁵⁶ “Increasingly, lawyers defending death-penalty cases rely heavily on mitigation specialists, who build psychological profiles, dig up documentation of childhood traumas, and sometimes present expert testimony on behalf of clients.”¹⁵⁷ The key to the success of any mitigation specialist is prior experience in the defense of capital cases.

Mitigation specialists typically have graduate degrees, such as a Ph.D. or masters degree in social work, have extensive training and experience in the defense of capital cases, and are generally hired to coordinate a comprehensive biopsychosocial investigation of the defendant's life history, identify issues requiring evaluation by psychologists, psychiatrists or other medical professionals, and assist attorneys in locating experts and providing documentary materials for them to review.¹⁵⁸

154. Jonathan P. Tomes, *Damned if You Do, Damned if You Don't: The Use of Mitigation Experts in Death Penalty Litigation*, 24 AM. J. CRIM. L. 359, 363 (1997).

155. *United States v. Thomas*, 33 M.J. 644, 647 (N.M.C.M.R. 1991).

156. H. Scott Wallace, Director of Defender Legal Services, National Legal Aid & Defender Association, Affidavit of H. Scott Wallace (n.d.), available at <http://www.nlada.org/DMS/Documents/998935028.947>.

157. Jonah Blank, *Guilty—But Just How Guilty?*, U.S. NEWS ONLINE, Jan. 12, 1998, at <http://www.usnews.com/usnews/issue/980112/12nich.htm>.

158. JUDICIAL CONFERENCE RECOMMENDATIONS, *supra* note 144, ¶ I.B.7.

Extensive multigenerational evidence gathering results in massive amounts of data. The specialists create a summarized chronology, which usually consists of a 100-page linear distillation of patterns of influences in the defendant's life. The pictorial representation illustrates the cumulative effect of influences on his life. The mitigation specialist, unlike the attorney, possesses training and experience that allows him to logically organize and articulate the cumulative effects.¹⁵⁹ "[I]t is never one factor or impairment which results in social dysfunction and ineffectualness, but rather the cumulative effects of these factors."¹⁶⁰

Jonathan P. Tomes provides a comprehensive definition of a mitigation expert: "a person qualified by knowledge, skill, experience, or training as a mental health or sociology professional to investigate, evaluate, and present psychosocial and other mitigating evidence to persuade the sentencing authority in a capital case that a death sentence is an inappropriate punishment for the defendant."¹⁶¹ The limited number of capital cases in the military makes detailing relatively inexperienced counsel unavoidable. Neither mental health professionals nor criminal investigators in the military possess specialized training in death penalty mitigation investigations. However, the defense team need not proceed to trial without an expert qualified in death penalty cases. Liberally granting requests for mitigation specialists soon after preferral of charges will ensure effective representation by discovery of all relevant presentencing evidence before trial.

C. Recommendation of the 1998 Judicial Conference of the United States

On 15 September 1998, the Judicial Conference of the United States adopted extensive recommendations made by the Subcommittee on Federal Death Penalty Cases of the Committee on Defender Services.¹⁶² In response to judicial and congressional inquiries, the recommendations and accompanying report analyzed concerns about quality representation and cost-effectiveness in federal death penalty cases. Some of the factors

159. Dr. Lee Norton, National Legal Aid & Defender Association, Affidavit of Dr. Lee Norton 9 (Mar. 2, 1994) [hereinafter Norton Affidavit] (on file with the author). Dr. Norton was the mitigation specialist requested in *United States v Kreuzer*.

160. *Id.* at 11.

161. Tomes, *supra* note 154, at 367.

162. JUDICIAL CONFERENCE RECOMMENDATIONS, *supra* note 144.

addressed in the report shed light on how convening authorities and military judges should view requests for expert assistance in capital cases.

The average cost for representation (counsel and related services) in an authorized federal death penalty case between 1990 and 1997 was \$218,112. The average cost when the Attorney General elected not to authorize a death-eligible case was \$55,772. The cost when the Attorney General authorized a case, but the prosecution withdrew its request before trial was \$145,806. Also, plea agreements significantly affected the overall costs associated with capital representation. The average cost when a case proceeded to trial was \$269,139. In authorized cases eventually resolved by guilty pleas, representation averaged \$192,333.¹⁶³ “Payment to experts are a substantial component of defense costs in federal death penalty cases [A]bout 19% of payments for representation in federal capital cases for FY 1997 went to services other than counsel: primarily experts and investigators.”¹⁶⁴ In non-capital homicides, non-attorney compensation averaged \$1,515. However, in authorized capital cases that went to trial, non-attorney costs averaged \$53,143. Cases resolved by plea agreements cost \$51,028. Even death-eligible cases where the Attorney General denied authorization cost an average of \$10,094 for experts and investigators.¹⁶⁵

According to the Judicial Conference report, a key factor increasing representation costs is seemingly unlimited prosecution resources.¹⁶⁶ “The Department of Justice reported an average total cost per prosecution of \$365,296, but this figure does not include the cost of investigation or the cost of scientific testing and expert evaluations performed by law enforcement personnel.”¹⁶⁷ Although there is no direct correlation between the government’s cost of prosecuting a capital case in the military and in federal court, the general analogy fits. Furthermore, given the limited number of military death cases, improvement in the military system will only result by learning from the more saturated federal system.

Although the cost for defense counsel in federal cases does not translate into equivalent costs in the military, the expert assistance cost associated with adequate representation under current standards should compare closely. As in the federal system, defense can sometimes use experts pro-

163. *Id.* ¶ I.A.

164. *Id.* ¶ I.B.7.

165. *Id.*

166. *Id.* ¶ I.B.5.

167. *Id.*

vided by the government.¹⁶⁸ No government investigative assets, however, can adequately substitute for a trained mitigation specialist.

Surveying the fiscal requirements of trying capital cases in the federal system illustrates that high costs are simply part of the process. Convening authorities and military judges must recognize that defense attorneys in death penalty cases need adequate resources to meet demanding effectiveness requirements under the Sixth Amendment and today's legal landscape. Additionally, the extensive commitment of resources by the government in capital cases requires at least modest balancing. Particularly in light of the lack of capital experience likely to pervade the defense table in military cases, government officials must liberally authorize funding for assistance early in the trial process. Getting it right the first time will greatly benefit not only the defendant's interests, but also the military justice system as a whole.

A number of judges, particularly those with experience reviewing state death penalty trials in federal habeas corpus proceedings underscored the importance of "doing it right the first time," i.e., minimizing the time-consuming post-conviction proceedings by assuring high quality representation in federal death penalty cases at the trial level. Similarly, a former Florida Attorney General testified before an American Bar Association Task Force studying representation in state death penalty cases that, "[b]eyond peradventure, better representation at trial and on appeal will benefit all concerned."¹⁶⁹

When rejecting the request for expert assistance at the appellate level in *Gray*, the Army Court of Criminal Appeals affirmed its recognition "that counsel may have to spend long hours in a capital case to zealously represent his client."¹⁷⁰ By this statement, the court implied that the attorney had not done enough to justify any need for assistance.¹⁷¹ Without even reaching the burden of inexperience discussed throughout this article already, the increased workload alone calls for government officials to recognize the need for expert assistance. In addition to uncovering crucial

168. *See, e.g.*, *United States v. Loving*, 41 M.J. 213, 240 (1994).

169. JUDICIAL CONFERENCE RECOMMENDATIONS, *supra* note 144, ¶ I.C.1 (quoting Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 65, 69-70 (1990)).

170. *United States v. Gray*, 32 M.J. 730, 736 (A.C.M.R. 1991).

171. *See id.*

evidence, such assistance can streamline the investigative and preparation process for defense attorneys.

Examining the hours billed by defense attorneys in the federal system provides a gauge for determining proportionally how much a military lawyer's workload will increase if detailed to a capital case. Between 1992 and 1997, in federal non-capital homicide cases, the average hours billed was 118 (18 in court, 100 out of court). The average number of hours billed in authorized death penalty cases was 1464 (231 in court, 1233 out of court). In cases that went to trial, the average was 1889 (409 in court, 1480 out of court), and pleas averaged 1262 (61 in court, 1201 out of court).¹⁷² The workload appears to increase fifteen to twenty times in a capital case over a non-capital murder trial. Although assigning extra counsel may ease the load to some extent, the key to efficient and effective representation, particularly at sentencing, includes obtaining expert help.

By making an official recommendation that the federal defender program establish salaried positions for penalty-phase investigators, the judicial conference emphasized the growing importance of mitigation specialists. The commentary to the recommendation refers to mitigation specialists' work as "part of the existing 'standard of care' in federal death penalty cases."¹⁷³

Without exception, the lawyers interviewed by the Subcommittee stressed the importance of a mitigation specialist to high quality investigation and preparation of the penalty phase. Judges generally agreed with the importance of a thorough penalty phase investigation, even when they were unconvinced about the persuasiveness of particular mitigating evidence offered on behalf of an individual defendant.¹⁷⁴

In touting the cost-effectiveness of creating positions for penalty phase investigators, the commentary further points out that adequately trained specialists are in short supply. Of course, providing the required expertise in death penalty cases results in increased costs.¹⁷⁵ For military practice, no Department of Defense agency specifically trains mitigation specialists. Therefore, meeting the current standard of care for capital cases mandates

172. JUDICIAL CONFERENCE RECOMMENDATIONS, *supra* note 144, ¶ I.B.4.

173. *Id.* ¶ II.7.

174. *Id.* ¶ I.B.7.

175. *Id.* ¶ II.7.

that officials liberally grant funding for experts in investigating and presenting mitigation evidence.¹⁷⁶

V. Recommendations for How Best to Increase Defense Access to Mitigation Specialists

Sections II, III, and IV focused on surveying current law, identifying evolving trends, and analyzing the need for increased access to mitigation specialists in military cases. The analysis then concluded that the existing legal landscape calls for expanding the right to use specialized, penalty phase investigators. The question remains, however, of how best to ensure that defense counsel get the needed funding. This section recommends a three-pronged approach to improving requests for funding and defense counsel access to mitigation specialists. The approach includes a recommended change to RCM 703, granting capital defendants a right to an *ex parte* hearing to demonstrate the need for expert assistance at government expense.¹⁷⁷ A recommended executive order to effect the change follows the federal model of allowing an absolute right to an *ex parte* hearing for expert funding requests.¹⁷⁸ The second prong to the overall approach suggests that the Court of Appeals for the Armed Forces reexamine its language in *Garries* and *Kaspers*. The court should find that all capital cases involve “unusual circumstances” for purposes of creating an absolute right to *ex parte* hearings regarding expert assistance. The third prong stresses the need for educating convening authorities, staff judge advocates, and

176. Federal Rule of Criminal Procedure 32(c) already provides for a judicially supervised probation service to prepare presentencing reports for cases in the federal system. The impartial report includes an extensive investigation of any evidence relevant to sentencing, and it is provided to all parties in advance of the penalty phase. *See* FED. R. CRIM. P. 32(c). Standard practice in federal capital cases also calls for a one to two month delay between the merits and penalty phases of trial. This delay allows for preparation of the detailed presentencing report, particularly in death penalty cases. The judicial conference recommendations regarding access to mitigation experts takes on even more significance when considered against the backdrop of the information already provided to defense counsel in the presentencing report. In courts-martial, military defense counsel must proceed almost directly to the presentencing phase, without the benefit of an impartial investigation focused on sentencing factors, including extenuating and mitigating circumstances.

177. *See infra* app.

178. 18 U.S.C. § 3006A(e)(1) (2000).

justice managers on the benefits of granting mitigation specialists to defense counsel early in the process of potential capital cases.

A. Broad Systematic Changes and the Role of Fiscal Responsibility

One suggestion for providing increased access to mitigation specialists involves significantly increasing defense service budgets to allow expert funding without government-side involvement. A disadvantage of this solution is that estimating the cost of potential capital cases in advance and attempting to fence funds may not prove feasible. This is particularly true given the limited number of capital cases in the military and the differences between military services on how they provide representation to capital defendants. Additionally, the high cost of capital cases may necessitate approaching judges and convening authorities for funding beyond budget estimates. Thus, higher budgets alone do not alleviate the need for a solution within the capital litigation process itself.

Similarly, a suggestion for assigning permanent investigators to defense offices has merit in a general sense. The suggestion also mirrors the 1998 Judicial Conference recommendations for the federal defender system.¹⁷⁹ The fluid nature of military assignments, however, creates the problem of never being able to get an investigator to an adequate level of specialized training and experience for capital cases. Creating more permanent positions faces the initial difficulty of squaring mitigation investigators with manpower requirements. Mandating a certain number of psychiatrists, psychologists, or social workers in regions throughout the Department of Defense to train as mitigation investigators runs into the systemic problem of changing units' missions and reallocating resources within organizations not directly tied to the military justice system. A solution most likely to succeed, therefore, must focus on minor changes to the rules governing capital cases.

Another broad-based solution would be automatic funding for mitigation specialists in capital cases. After all, an automatic funding provision would easily answer the mail regarding the established need for increased defense access in military capital cases. Requiring the government to grant requests for a reasonable amount of funding for a mitigation investigator in every capital case, however, ignores the pragmatic reality that every case is different. The facts in particular cases might require different types

179. *Id.*

of experts. In the unlikely event that very experienced military attorneys or even civilian attorneys take a case, there may be a more limited need for mitigation assistance. Arguably, in some cases, the defense will simply not be able to show any need for a mitigation specialist at all.

Similar to *Loving*, a number of state courts have recently examined whether or not refusing to provide funds for mitigation specialists constitutes error. For example, appellate courts in Pennsylvania, Alabama, Ohio, Oregon, and Illinois upheld trial court decisions to deny mitigation experts.¹⁸⁰ On the other hand, “the Supreme Court of Indiana recently found [a] trial court’s limitation of a mitigation expert to twenty-five hours of investigation to be arbitrary and an abuse of discretion.”¹⁸¹ Also, the Supreme Court of Georgia reversed a death sentence by holding that a mitigation expert would have helped the defendant prepare a more meaningful and artful sentencing case.¹⁸² Evolving standards regarding mitigation specialists have not yet led to sweeping judicial and statutory mandates for automatic funding in death cases. Precedent is developing in some states, however, concerning their increasing importance. Additionally, many states now allow defendants to request expert assistance in *ex parte* hearings.¹⁸³ Although these states generally require necessity showings, the *ex parte* procedure assists the defendant greatly in obtaining access to the specialists.

The government’s “substantial interest in protecting its fisc does mitigate in favor of its being allowed notice and some ability to dispute requests that may needlessly drain its resources.”¹⁸⁴ The evolving “stan-

180. Tomes, *supra* note 154, at 374-75. Tomes cites several cases that indicate a reluctance to absolutely require mitigation specialists in capital cases. See *Commonwealth v. Reid*, 642 A.2d 453 (Pa. 1994) (upholding trial court’s refusal to approve county funds for particular psychologist as mitigation expert); *Arthur v. State*, No. CR-91-718 1996 Ala. Crim. App. LEXIS 44 (Ala. Crim App. 1996) (upholding denial to fund expert social worker as mitigation expert when no showing of particularized need); *State v. Lott*, Nos. 66389, 66390, 66588 1994 Ohio App. LEXIS 4965 (Ohio Ct. App. 1994) (holding that mere assertions that expert would be useful not enough to require funding); *State v. Langley*, 839 P.2d 692 (1992) (upholding denial where defendant could not show why particular expertise of investigator necessary); *People v. Whitehead*, 662 N.E.2d 1304 (Ill. 1996) (finding that denial of expert to investigate and prepare mitigation evidence did not deny effective assistance of counsel); *People v. Burt*, 658 N.E.2d 375, 398 (Ill. 1995) (finding that mitigation expert was not essential to marshal evidence in mitigation because defense counsel could obtain and present).

181. Tomes, *supra* note 154, at 375 (quoting *Williams v. State*, 669 N.E.2d 1372, 1384 (Ind. 1996)).

182. *Id.* at 376 (citing *Bright v. State*, 455 S.E.2d 37, 51 (Ga. 1995)).

183. *Id.*

dard of care” in death penalty cases certainly involves the work of mitigation specialists,¹⁸⁵ but the merits of granting funding for particular specialists in particular cases must still face scrutiny at some level. To fashion a rule in the military where the defense has no requirement to justify its “fishing expedition”¹⁸⁶ with at least a minimal showing of necessity, ignores commanders’ and judges’ fiscal and pragmatic responsibilities. It also ignores the Court of Appeals for the Armed Forces’ unequivocal holding in *Loving*, declining to mandate mitigation specialists in all capital cases.¹⁸⁷ Thus, the necessity standards articulated earlier in the article serve some legitimate purpose, even in capital cases. They balance the defendant’s Sixth Amendment right to the tools and “raw materials integral to building an effective defense,”¹⁸⁸ with the government’s interest in preventing the waste of funds.¹⁸⁹ The time has come, however, to recognize the increasingly important role played by mitigation specialists in capital cases. That recognition requires tempering the current reluctance to fund needed specialists by enacting a change to RCM 703, thereby balancing the scales.

B. Recommended Changes Under RCM 703 and Military Case Law

1. Overview of Prongs 1 and 2—RCM 703 Change and “Unusual Circumstances”

Creating a right under RCM 703 to ex parte requests in capital cases will help defense counsel make a more detailed showing of necessity without compromising elements of their case. The change will send a message to military judges regarding the evolving importance of expert assistance during the penalty phase of death cases. Limiting the right for ex parte hearings to capital cases will illustrate to judges and convening authorities

184. *Louisiana v. Touchet*, 642 So. 2d 1213, 1220-21 (La. 1994) (holding that indigent defendant’s expert assistance request may be filed ex parte). (*Editor’s Note: A “fisc” is the state’s treasury.*)

185. JUDICIAL CONFERENCE RECOMMENDATIONS, *supra* note 144, ¶ II.7.

186. *United States v. Thomas*, 33 M.J. 644, 648 (N.M.C.M.R. 1991).

187. *United States v. Loving*, 41 M.J. 213, 250 (1994).

188. *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

189. Donna H. Lee, Note, *In the Wake of Ake v. Oklahoma: An Indigent Criminal Defendant’s Lack of Ex Parte Access to Expert Services*, 67 N.Y.U. L. REV 154, 188 (1992).

that the “death is different” principle¹⁹⁰ applies when considering expert requests.

The change will also signal staff judge advocates and convening authorities that denying requests for expert assistance in capital cases may result in a higher level of judicial scrutiny following referral or at the appellate level. Because funding requests will have a greater chance of success in a one-sided, ex parte hearing, government officials would likely be more reasonable and yielding in response to defense requests to the convening authority. The nature of negotiations with the convening authority over capital case experts would likely shift slightly away from discussions of whether or not the defense gets a specialist. Instead, the discussions would likely focus on how much the defense gets to spend. This shift in focus will help meet the objective of increasing defense access to mitigation specialists, while allowing the government to still exercise fiscal responsibility.

The second prong of the article’s recommendation regarding *Kaspers* and *Garries* is inextricably intertwined with the first prong. Both call for ex parte showings of necessity. The second prong simply suggests a more immediate judicial method for solving the problem of limited access. By expanding its interpretation of “unusual circumstances”¹⁹¹ to always include capital cases, the Court of Appeals for the Armed Forces can essentially implement the recommended changes to RCM 703. The first prong, however, provides an easier and more effective method for amending the rules regarding experts in capital cases. Judge advocates and executive branch officials can control the boundaries of the change to RCM 703 and avoid judicial fiat by the military court. The remainder of this section includes a general discussion of support for ex parte requests arising from the Sixth Amendment and the Supreme Court’s decision in *Ake*. Then the analysis compares the status of ex parte law in the military as surveyed in Section II, with two potential models for crafting the recommended changes to case law and RCM 703.

190. *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976).

191. *United States v. Kaspers*, 47 M.J. 176, 179-80 (1997); *United States v. Garries*, 22 M.J. 288, 291 (C.M.A. 1986), *cert. denied*, 479 U.S. 985 (1986).

2. *Ex Parte Requests Under Ake v. Oklahoma and the Sixth Amendment*

Donna H. Lee argues that *Ake v. Oklahoma* establishes a constitutional mandate for ex parte expert requests.¹⁹² *Kaspers* specifically denies an absolute right to such requests in the military,¹⁹³ and the Supreme Court has not specifically created an absolute constitutional right to ex parte showings of necessity. Lee's compelling arguments regarding the Sixth Amendment guarantee to effective assistance of counsel, however, apply to the current analysis regarding mitigation specialists. "Forcing an attorney to choose between applying for expert assistance and revealing her defense strategy to the prosecution constitutes a state-imposed disability which interferes with a defendant's right to effective assistance of counsel."¹⁹⁴

As Lee asserts, *Ake* clearly establishes a right to needed assistance. Government advocates interested in gaining access to confidential defense information might argue that revealing extensive information in an open hearing is a fair price to pay for getting funding. A fair trial with a reliable result, however, requires effective assistance of counsel, unencumbered by undue government interference.¹⁹⁵ Particularly in a capital trial, the reliable result includes the sentencing phase. Absent ex parte hearings, convening authorities may summarily deny early requests for experts to allow trial counsel extensive discovery of otherwise confidential information. This arguably impairs "the ability of counsel to make independent decisions about how to conduct the defense."¹⁹⁶

In general, defendants do not fare well when they raise ineffective assistance for using mitigation specialists.¹⁹⁷ However, "many more cases involve failing to request the assistance of mitigation experts or failure to call them as witnesses."¹⁹⁸ If counsel limit necessity showings to protect damning confidential or strategic information, they run the risk of not only losing out on an expert, but also being found ineffective. Ex parte

192. Lee, *supra* note 189, at 190-01 (citing *Ake*, 470 U.S. at 82).

193. *United States v. Kaspers*, 47 M.J. 176, 180 (1997).

194. Lee, *supra* note 189, at 182.

195. *Id.* at 182-83.

196. *Id.* at 183.

197. *Tomes*, *supra* note 154, at 385.

198. *Id.* at 386.

requests are a “necessary corollary” to ensuring access to mitigation experts.¹⁹⁹

3. Model 1 for Implementing Ex Parte Procedures—Federal Statutory Rule

Even before *Ake*, Congress established a right to ex parte requests for assistance in the federal system under the United States Code.²⁰⁰ The federal rule provides the first potential model upon which to base new military rules. During hearings by the Senate Judiciary Committee on the Criminal Justice Act of 1964, numerous scholars highlighted the importance of being able to apply for assistance in ex parte hearings. The concerns raised by the academicians, as well as various members of Congress, led to the adoption of the right to request expert assistance ex parte.²⁰¹ One such concern is particularly instructive.

Senator Hruska, acting Chair of the Committee, cautioned that without an ex parte procedure, “the penalty for asking for funds for services may be the disclosure, prematurely, and ill-advisedly, of a defense.” In his judgment, “[t]his would be paying too heavy a price for the funds a defendant is asking for.”²⁰²

The Court of Appeals for the Armed Forces distinguished the federal rule from military practice in *Kaspers*.²⁰³ The court acknowledged, however, that the appellant persuasively argued that “counsel often treads lightly with the famous Sword of Damocles hanging over them when

199. Lee, *supra* note 189, at 186.

200. See 18 U.S.C. § 3006A(e)(1) (2000).

Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary the court . . . shall authorize counsel to obtain the services.

Id.

201. Lee, *supra* note 189, at 157-58. The article provides an excellent summary of pertinent comments from congressmen and scholars regarding how to best ensure adequate services for representation.

202. *Id.* at 158 (quoting *Criminal Justice Act of 1963: Hearings on S. 63 and S. 1057 Before the Senate Comm. on the Judiciary*, 88th Cong. 32-33 (1963)).

203. *United States v. Kaspers*, 47 M.J. 176, 180 (1997).

attempting to justify expert requests to the military judge.”²⁰⁴ Although military practice may not require *ex parte* requests as a general rule, death penalty cases require special consideration. The type of confidential information likely to persuade a military judge to grant a request for a mitigation specialist tends to be particularly sensitive given the high and irreversible stakes in a capital trial. Counsel will often have to weigh whether or not potentially mitigating evidence creates a two-edged sword that also supports execution. The dilemma necessitates *ex parte* hearings to acquire assistance in evaluating the propriety of presenting the evidence.

4. Model 2 for Implementing Ex Parte Procedures—North Carolina Case Law

North Carolina case law,²⁰⁵ as adopted by Louisiana in *Louisiana v. Touchet*,²⁰⁶ provides a second potential model for promulgating a new military rule. A number of states make *ex parte* procedures available statutorily;²⁰⁷ other states make such procedures available through case law.²⁰⁸ Some states, similar to the federal system, grant an automatic entitlement to the defendant for an *ex parte* hearing to show necessity.²⁰⁹ Other states more closely resemble the current military practice of allowing *ex parte* requests only under certain circumstances. There is no readily identifiable procedural trend among the states for how to allow *ex parte* requests.²¹⁰ The North Carolina rule, however, represents an example of how some states split the difference between creating an automatic entitlement to *ex parte* hearings and requiring a threshold showing of unusual circumstances before even allowing an *ex parte* application.

204. *Id.*

205. *State v. Phipps*, 418 S.E.2d 178 (N.C. 1992) (holding that *ex parte* hearings on government funding for expert assistance was within discretion of trial court, but indigent must demonstrate particularized prejudice after initial *ex parte* application). *See also* *State v. Ballard*, 428 S.E.2d 178 (N.C. 1993) (allowing *ex parte* hearings on government funding for expert assistance).

206. 642 So. 2d 1213 (La. 1994).

207. *Id.* at 1218 (referring to California, Kansas, Minnesota, Nevada, New York, and Tennessee).

208. *Id.* (citing cases from Arkansas, Florida, Georgia, Hawaii, Indiana, Michigan, North Carolina, Oklahoma, and Washington).

209. *Id.* at 1226 (referring to California, Kansas, Minnesota, Nevada, New York, and Tennessee).

210. *Id.* (Orticz, J., dissenting).

The North Carolina model is not a major departure from the current military practice of leaving the ex parte decision to the discretion of the trial judge. Unlike the federal rule, North Carolina does not provide for an automatic entitlement to ex parte treatment of necessity showings.²¹¹ North Carolina does entitle a defendant to make an initial ex parte application with the trial court.²¹² This differs from the current military rule, which requires a showing of unusual circumstances before the military judge will even consider an ex parte showing.²¹³

The initial application under North Carolina law must articulate a particularized prejudice to the defendant to keep the funding determination under ex parte proceedings. As interpreted by the Supreme Court of Louisiana when adopting the North Carolina rule, the prejudice showing for this second model does not present a difficult hurdle to cross.

This is not an especially harsh result, as a defendant need only make a showing that certain essential and potentially meritorious elements of his defense will be disclosed to the state if there is a contradictory hearing on the request for funds, and that these elements are not obvious to the state.²¹⁴

Thus, the emphasis under the North Carolina model is on allowing the initial ex parte request and then requiring a relatively low threshold showing of particularized prejudice. Under current military case law,²¹⁵ the defendant is unlikely to even get into the ex parte arena unless he can establish unusual circumstances. Further, *Kaspers* and *Garries* do not clearly establish guidelines for defining what situations fall under the rubric of unusual circumstances.

5. *Selecting the Appropriate Model*

Unfortunately, the North Carolina model does not go far enough to ensure adequate protection of information for defense counsel in capital cases. Therefore, it is unlikely to bring about the desired effect in the military of highlighting the importance of experts in death cases and increas-

211. See 18 U.S.C. § 3006A(e)(1) (2000).

212. See *Touchet*, 642 So. 2d at 1220.

213. See *United States v. Kaspers*, 47 M.J. 176, 179-80 (1997); *United States v. Garries*, 22 M.J. 288, 291 (C.M.A. 1986), cert. denied 479 U.S. 985 (1986).

214. See *Touchet*, 642 So. 2d at 1220.

215. See cases cited *supra* note 213.

ing access to mitigation specialists. The North Carolina model would make an incremental change by adjusting the standard judges use in exercising their discretion on the ex parte decision. The initial entitlement to submit an ex parte application and the low threshold for showing possible prejudice would provide more protection than afforded under the current “unusual circumstances” standard. Because discretion remains with the trial court, however, the change may not send the desired signal regarding more liberal grants of funding for mitigation specialists.

Also, military judges may fail to distinguish between the North Carolina model and the old standard. Judges that are loath to consider ex parte requests because they disadvantage the party that must eventually provide funding may elect to construe the new standard as substantially similar to the old standard. A judge inclined to consider facts and rulings in open court could argue that the rule changes nothing except when the judge considers whether to continue the proceedings in an ex parte fashion. Because capital cases inevitably result in extensive appellate litigation, attorneys would test the bounds of the judge’s ex parte discretion in almost every case.

To minimize confusion, a change to the rules should attempt to avoid applying a completely new legal standard. Although the judge must ultimately exercise discretion in making a ruling on the necessity for an expert, the courts have already established clear methods of analysis for that decision. The North Carolina model changes too little by leaving ex parte discretion in the hands of the trial judge. It changes too much by laying out a completely new legal standard for determining if ex parte proceedings are appropriate. Additionally, because the model establishes no absolute right to an ex parte hearing, the distinction between old and new and any intended consequences may be lost on convening authorities and practitioners.

Owing to the North Carolina model’s shortcomings, a variation of the federal model will best serve the military.²¹⁶ The federal rule sets a clearly delineated standard. Practitioners and convening authorities will neither miss the new rule nor its possible ramifications. A slight variation to the federal rule seems necessary, however, to reach the objective of ensuring that decision-makers treat expert requests in capital cases with increased liberality. Unlike the federal rule, which applies to all cases, the proposed change would apply an absolute right to ex parte procedures only in capital

216. *See infra* app.

cases. This variation logically follows from the increased scrutiny that counsel and judges face in death cases. Applying the change only to capital litigation highlights the Supreme Court's opinion that death should be treated differently, and relevant mitigation encompasses a broader range of possibilities than in a non-capital case.²¹⁷

Using the federal model will also minimize any confusion in applying the new rule. In general, the change will continue to use current legal standards for evaluating ex parte requests. It simply sets a bright line rule by guaranteeing the right to proceed ex parte in capital cases.

Using the variation of the federal model also provides an easy method for the judiciary to go ahead and implement the change through case law. The Court of Appeals for the Armed Forces need only overturn its ruling in *Kaspers* and *Garries* as they apply to capital cases. All capital cases will then fall under the rubric of "unusual circumstances." Given the heightened scrutiny applied to such cases, the ruling does not pose a significant threat to established precedent in non-capital cases. Also, by maintaining the same "unusual circumstances" standard for evaluating whether or not ex parte hearings are appropriate, the federal model avoids the confusion and legal testing likely under the North Carolina model.

Finally, the proposed change will maintain the balancing role of the military judge in evaluating the necessity of experts against the fiscal concerns of the government. By holding the hearings ex parte, the military judge will view all possible justifications for expert assistance. This clear picture of a defendant's case and circumstances should lead to an accurate and complete assessment of need the first time around. Additionally, by keeping the requirement that counsel must first ask the convening authority for funding,²¹⁸ government officials will still have an opportunity to weigh in with their particularized fiscal concerns. They may also suggest and offer alternative experts. Defense counsel will need to show denial by the convening authority before proceeding ex parte to the judge. As part of the record, the military judge will possess the concerns expressed by the convening authority in his initial denial of the expert request. The denial will arm the military judge with the convening authority's concerns, and the more extensive ex parte showing of necessity will ensure that the judge has all relevant defense information. He will then act as a well-informed

217. See *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976).

218. MCM, *supra* note 18, R.C.M. 703(d).

gatekeeper regarding the expert request to satisfactorily balance competing concerns and protect all parties' interests.

C. Access Before Referral and the Importance of Educating Government Officials

Because military judges do not take control of cases before referral to courts-martial,²¹⁹ the ex parte rules discussed in this article only directly assist defense counsel after referral. However, defense counsel must effectively advocate for a non-capital referral prior to the convening authority sending the case to court. With regard to federal cases, "the first job of the defense is to convince the Department of Justice not to certify the case as a capital case. [M]itigation expenses, including the use of increasingly specialized experts, are increasing and are occurring early in the process."²²⁰ "Counsel must conduct a wide-ranging preliminary investigation of facts relevant to sentencing before the Justice Department makes the decision whether to file a notice seeking the death penalty."²²¹ Zealous representation prior to referral in a military case differs little from the job of defense counsel in the federal system before the Attorney General authorizes prosecutors to seek death. Therefore, military defense counsel need access to mitigation specialists even before the Article 32 pretrial investigation.²²²

As previously discussed, allowing capital defendants ex parte access to the military judge should have the secondary effect of causing convening authorities to look more favorably on requests made earlier in the process. If for no other reason than to maintain some control over the power of the purse, government attorneys should increase their willingness to negotiate funding limitations pre-referral. This negotiation will facilitate earlier defense access to experts.

Educating military justice managers, staff judge advocates, and convening authorities regarding mitigation specialists will provide an additional impetus for expanding defense access to experts prior to referral.

219. *See id.* R.C.M. 601.

220. JUDICIAL CONFERENCE RECOMMENDATIONS, *supra* note 144, ¶ I.B.7 (quoting COOPERS & LYBRAND CONSULTING, REPORT ON COSTS AND RECOMMENDATIONS FOR THE CONTROL OF COSTS OF THE DEFENDER SERVICES PROGRAM IV.24 (Jan. 28, 1998)).

221. *Id.* ¶ I.B.6.

222. *See generally*, MCM, *supra* note 18, R.C.M. 405 (detailing pretrial investigation procedures).

Because of the limited number of capital cases in military practice, only the defense services tend to send counsel to focused death penalty training. Continuing legal education courses for justice managers and government attorneys cannot afford to gloss over the increasingly important role of mitigation specialists in capital cases. Recitation of the *Loving* rule,²²³ in which the Court of Appeals for the Armed Forces declined to require mitigation specialists in capital cases, does not adequately address the benefits to both sides of granting funding requests. Instead, the benefits of granting requests for mitigation specialists should be incorporated into all capital litigation training. One clear benefit involves the possibility of presenting more complete information to the convening authority prior to the referral decision. A discerning commanding general will always seek the most information available before acting in his judicial capacity. Also, avoiding a potentially unsuccessful capital referral pays not only fiscal dividends, but avoids unnecessary negative public exposure.

Training courses must discuss the increasing importance of mitigation specialists across the legal landscape. This training should include a lengthy discussion of the role played by such specialists and the type of evidence and information they provide to the defense. Even military case law regarding experts is not as clear as *Loving* might indicate. Government counsel must understand the recent case law granting experts to assist in death penalty cases at the appellate level. Insulating the case for appeal should also concern government counsel and convening authorities. The time, energy, and resources poured into capital prosecutions may be quickly undermined by an unwise decision to save a few dollars on an expert at trial. Finally, with the advent of life without parole as a possible sentence, allowing defense counsel to make a comprehensive mitigation pitch prior to referral may lead to quicker resolution of the case through a pretrial agreement.

VI. Conclusion

Justice and expediency both require that the military justice system get it right the first time in all death penalty cases. As the rest of Sergeant Kreutzer's story unfolds on appeal, the consequences of not getting it right may become evident. An area ripe for challenge in capital cases involves full and complete presentation of all mitigation evidence during the penalty phase. The evolving legal landscape recognizes the increasingly

223. *United States v. Loving*, 41 M.J. 213, 250 (1994).

important role of mitigation specialists in developing the case on sentencing. Although somewhat premature to speculate, a comprehensive and organized presentation of Sergeant Kreutzer's case in extenuation and mitigation may have influenced the ultimate result. Such a complete presentation of the evidence required supplementing the defense team with an experienced and trained death penalty mitigation specialist. The proposed rule for expert assistance requests in capital cases will bring the military in line with progressive jurisdictions and help to avoid inadequate presentencing hearings in the future.

Evolving capital litigation standards and an increasing awareness of the important role played by penalty phase investigators demand that the military justice system take affirmative steps to make mitigation specialists more readily accessible. The three-pronged approach to facilitating more liberal funding grants constitutes a solid first step. Promulgating the new rule provides a relatively limited and unobtrusive way of helping defense counsel obtain access to experts, while signaling a clear recognition by the military services of the increasing importance of experts in capital cases. As expressed by Judge Cox in the first *Curtis* case, death is in fact inevitable.²²⁴ When death results by way of an executioner, however, society demands that the justice system make no mistakes. Reliability in individually selecting defendants for the death penalty requires consideration of all mitigating factors. Reliability in finding and presenting all possible factors requires the assistance of a mitigation specialist.

224. *United States v. Curtis*, 44 M.J. 106, 167 (1996).

APPENDIX

EXECUTIVE ORDER XXXXX
AMENDMENTS TO THE MANUAL FOR
COURTS-MARTIAL, UNITED STATES

By the authority vested in me as President by the Constitution and the laws of the United States of America, including chapter 47 of title 10, United States Code (Uniform Code of Military Justice, 10 U.S.C. §§ 801-946), in order to prescribe amendments to the Manual for Courts-Martial, prescribed by Executive Order 12,473, as amended by Executive Order 12,484, Executive Order 12,550, Executive Order 12,586, Executive Order 12,708, Executive Order 12,767, Executive Order 12,888, Executive Order Executive Order 12, 936, Executive Order 12,960, Executive Order 13,086, and Executive Order 13,140, it is hereby ordered as follows:

Section 1. Part II of the Manual for Courts-Martial, United States, is amended as follows:

a. RCM 703(d) is amended as follows:

(d) *Employment of expert witnesses.* When the employment at Government expense of an expert is considered necessary by a party, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment. A request denied by the convening authority may be renewed before the military judge who shall determine whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute. In cases referred capital, requests to obtain investigative, expert, or other services necessary for adequate representation, which are denied by the convening authority, may be renewed before the military judge in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are relevant and necessary, the military judge shall order the Government to provide funding for the services. If the military judge grants a motion for employment of an expert or finds that the Government is required to provide a substitute, the proceedings shall be abated if the Government fails to comply with the

ruling. In the absence of advance authorization, an expert witness may not be paid fees other than those to which entitled under subsection (e)(2)(D) of this rule.

**LET'S MAKE A DEAL! THE DEVELOPMENT OF
PRETRIAL AGREEMENTS IN MILITARY CRIMINAL
JUSTICE PRACTICE**

MAJOR MARY M. FOREMAN¹

I. Introduction

Pretrial agreements are a part of every trial advocate's practice; in fact, most new trial and defense counsel begin their trial experience with guilty plea cases involving pretrial agreements before moving on to contested cases. Now specifically authorized by Rule for Courts-Martial (RCM) 705,² pretrial agreements have not always been a codified or accepted practice and, despite the provisions of RCM 705, remain a constant source of appellate litigation. What we think of now as the law concerning pretrial agreements evolved slowly since the enactment of the Uniform Code of Military Justice (UCMJ);³ not until 1984 was it made part of the *Manual for Courts-Martial* as RCM 705. Most of what counsel know today as the military judge's "script" for taking a guilty plea as part of a pretrial agreement also evolved over many years of litigation; not until 1982 was it formalized in the *Military Judges' Benchbook*.⁴

While pretrial agreements usually involve a guilty plea, they may also simply involve waiver of certain trial rights, such as the right to trial by members or the right to challenge the admissibility of certain evidence.

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2. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 705 (2000) [hereinafter MCM].

3. 10 U.S.C. §§ 801-946.

4. U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK (1 Apr. 2001) [hereinafter BENCHBOOK].

The rights that an accused might offer to waive are not limited to rights that are exercised at trial;⁵ further, a pretrial agreement does not have to be initiated prior to trial but may be negotiated while the trial is in progress.⁶

Rule for Courts-Martial 705,⁷ which both authorizes and governs the terms of pretrial agreements, provides that—as part of an agreement with the convening authority—an accused may offer to plead guilty, to enter a confessional stipulation, and to fulfill other terms and conditions not otherwise prohibited by that rule.⁸ Convening authorities, in return, may promise to refer the charges to a certain level of court-martial, to refer a capital offense as non-capital, to withdraw charges or specifications, to direct the trial counsel to present no evidence on one or more specifications, and to take specified action on the adjudged sentence.⁹ The agreement must be reduced to writing¹⁰ and must contain all of the agreements between the parties.¹¹ Rule for Courts-Martial 705 also contains a non-exclusive list of prohibited terms or conditions, which will be addressed later in this article.

The purpose of this article is to examine the evolution of the pretrial agreement, with particular focus on the cases from which emerged the present law regarding pretrial agreements. It examines the authority for pretrial agreements, the military judge's role in ensuring compliance with the laws governing pretrial agreements, permissible and prohibited terms of agreements, issues surrounding specific performance of agreements, and post-trial renegotiation of agreements.

II. Background

Pretrial agreements have been used in courts-martial since 1953 and initially developed informally as a matter of trial practice, with no independent legislative or judicial authority. In a letter to staff judge advocates, Major General (MG) Shaw, Acting The Judge Advocate General of the Army, encouraged staff judge advocates to use pretrial agreements for

5. In *United States v. Williams*, 13 M.J. 853 (A.C.M.R. 1982), for example, the accused agreed to testify against a co-accused in return for clemency action.

6. *United States v. Walker*, 34 M.J. 264 (C.M.A. 1992).

7. MCM, *supra* note 2, R.C.M. 705.

8. *Id.* R.C.M. 705(b)(1).

9. *Id.* R.C.M. 705(b)(2).

10. *Id.* R.C.M. 705(d)(2).

11. BENCHBOOK, *supra* note 4, at 20, 24.

speedier disposition of cases. At the same time, he urged caution in the use of such agreements,

exhort[ing] all persons concerned with the administration of military justice to guard carefully every right to which an accused might be entitled, saying: "It would be better to free an offender completely, however guilty he may be, than to tolerate anything smacking of bad faith on the part of the government."¹²

Senior Judge Thomas of the Army Court of Military Review (ACMR) offered the following historical perspective on MG Shaw's letter and its "sanction" of pretrial agreements:

An historical view of the Army's guilty plea program aids in understanding the nature and purpose of the negotiated pretrial agreement. Prior to 1953, less than 10% of accused in Army courts-martial entered pleas of guilty to all charges and specifications. In federal district courts, at that time, over 90% of the defendants plead guilty. Confronted with this disparity, the Acting Judge Advocate General dispatched a letter on 23 April 1953 to Judge Advocates, encouraging them to initiate a guilty plea program within their commands. . . . In May of 1957, The Judge Advocate General set forth additional guidelines. One of these provisions was: "3. The agreement, if made, must be made in writing, unambiguous, and contain no provision circumscribing the rights of an accused."¹³

In one of the first military appellate cases involving pretrial agreements, *United States v. Callahan*,¹⁴ the Army Board of Review (ABR) reassessed the sentence of an accused whose pretrial agreement was conditioned, at least in part, on waiver of his right to present matters in extenuation and mitigation. The ABR noted that it was not their "purpose to assume," nor was it their holding, "that such procedure is other than legal, proper, and under appropriate circumstances, highly desirable."¹⁵ While not expressly approving or disapproving the use of pretrial agreements, this language reflected an initial uneasiness over pretrial agreements that continued through the next few decades. This case also highlighted the

12. *United States v. Callahan*, 22 C.M.R. 443, 447 (A.B.R. 1956) (citing JAGJ 1953/1278, 23 Apr. 1953).

13. *United States v. Elkinton*, 49 C.M.R. 251, 252 (A.C.M.R. 1974).

14. 22 C.M.R. 443 (A.B.R. 1956).

15. *Id.* at 447.

intention of reviewing authorities to carefully scrutinize the explicit or implicit waiver of an accused's rights pursuant to a pretrial agreement.

In the following year, the Court of Military Appeals (COMA) expressly approved the use of pretrial agreements in *United States v. Allen*,¹⁶ but cautioned against allowing such a practice to “transform the trial into an empty ritual.”¹⁷ In *United States v. Watkins*,¹⁸ the court acknowledged the benefits that would accrue to an accused who entered into a pretrial agreement:

In the military service, a practice has been developed which permits an accused to initiate proceedings for leniency in the event that he enters a plea of guilty. This consists of an overture to the convening authority to set the maximum sentence he will affirm if a plea of guilty is entered. A reading of many records in which pleas of guilty have been entered has established that this is a salutary procedure for an accused The procedure offers the accused a chance to make certain that his sentence will not exceed fixed limits and yet leaves him unbridled in the presentation of extenuation and mitigation evidence at the trial The arrangement with the convening authority cannot help but benefit the accused for it reduces his punishment if a guilty plea is entered from the permissible maximum set by law.¹⁹

In Watkins, the appellant challenged the acceptance of his plea of guilty to bribery, alleging that his answers to the law officer during the taking of the plea raised the defense of entrapment. Chief Judge Quinn, one of the two judges in the majority that found that the plea was provident, reached his decision reluctantly, noting that “[t]he negotiated plea program is not quite as salutary as the principal opinion makes it out to be.”²⁰ Judge Ferguson dissented, noting that he would have rejected the plea, and expressing the following concern about the “negotiated guilty plea program:”

Too many records come before us with multiplicitous charges, inconsistencies between the plea and the accused's statements, and minimal presentation of matters in extenuation and mitiga-

16. 25 C.M.R. 8 (C.M.A. 1957).

17. *Id.* at 11.

18. 29 C.M.R. 427 (C.M.A. 1960).

19. *Id.* at 431-32.

20. *Id.* at 432 (Quinn, C.J., concurring).

tion to merit the conclusion that the program is entirely advantageous. Indeed, this case reflects one of the evils arising from that very arrangement.”²¹

Judge Ferguson’s concerns were realized in later cases that ultimately became the cornerstone of the law surrounding pretrial agreements as we know it today.

III. Oversight of the Agreement

Two cases from the late 1950’s typify the uneasiness with which military appellate courts have historically regarded pretrial agreements. In 1957, Private First Class (PFC) Withey pleaded guilty at a general court-martial to wrongfully possessing three marijuana cigarettes. Before his court-martial closed to deliberate on the sentence, the president of the court asked the law officer if the accused understood the effect of his guilty plea and if he was aware of the maximum sentence that the court could adjudge as a result of his plea. After informing the president that the accused did understand the effect of his plea and the maximum punishment authorized, the law officer added that the accused had pleaded guilty pursuant to a prior agreement with the convening authority. The law officer did not disclose the terms of the agreement, but reminded the members of their duty to adjudge a sentence they believed was fair and just. When the law officer asked the president if that information alleviated the court’s concerns, the president of the court replied: “No, it aggravates it. I see absolutely no purpose in having a court-martial if you have predetermined a sentence for the accused.”²² After the court was advised of the maximum confinement sentence of five years, the defense counsel failed to present any matters or argument in extenuation or mitigation, and the court sentenced PFC Withey to three years’ confinement.²³

That same year, Private Welker pleaded guilty to multiple offenses. As in *Withey*, the defense presented no evidence in extenuation and mitigation and made no argument on the sentence. After being informed by the law officer that the maximum punishment included confinement at hard labor for ten years and seven months, the court deliberated for five minutes and sentenced the accused to a dishonorable discharge, total for-

21. *Id.* at 433 (Ferguson, J., dissenting).

22. *United States v. Withey*, 25 C.M.R. 593, 595 (A.B.R. 1958).

23. On appeal, the ABR ordered a sentence rehearing. *Id.* at 596.

feitures, and the maximum authorized confinement.²⁴ On appeal, the COMA noted two facts of particular concern: first, the accused's plea of guilty to one of the charges was "patently inconsistent with the stipulation as to the 'facts;'"²⁵ and second, "the [trial] court surmised from the accused's plea of guilty that he had an agreement with the convening authority as to the maximum sentence and abdicated their function of adjudging an appropriate sentence in the case."²⁶

Withey and *Welker* together demonstrate three of the greatest dangers posed by pretrial agreements: first, that an accused may plead guilty without establishing that he is, in fact, guilty; second, that the convening authority may inadvertently usurp the discretion of the court to adjudge a sentence; and third, that the pretrial agreement may, in effect, effectively weaken the trial process. In the following years, military appellate courts carefully scrutinized each of these concerns.

A. The Military Judge as the Safeguard of the Guilty Plea

Appellate courts have remained sensitive to the danger that, in a rush to secure a favorable agreement, an accused might yield to the temptation to enter an improvident plea. As Judge Ferguson wrote in 1968:

The benefit to the accused is the ceiling [that] is set absolutely on his punishment in return for the plea. The danger inherent in that arrangement is the entry of an improvident plea in order to insure that ceiling, as evidenced by the many cases in which we have been required, on that basis, to reverse and remand.²⁷

The interplay between pretrial agreements and the providence inquiry was first discussed in *United States v. Chancellor*,²⁸ where in his post-trial clemency interview, the accused revealed facts inconsistent with his plea of guilty. At that time, the providence inquiry was limited to pro forma

24. *United States v. Welker*, 25 C.M.R. 151, 152 (C.M.A. 1958).

25. *Id.* at 152-53.

26. *Id.* at 153 (quoting *United States v. Buckland*, No. CM 394524 (A.B.R. 19 Feb. 1957) (unpublished)).

27. *United States v. Cummings*, 38 C.M.R. 174, 175 (C.M.A. 1968). *See infra* text accompanying note 137 (discussing *Cummings*, which was reversed for other reasons).

28. 36 C.M.R. 453 (C.M.A. 1966).

advice provided in the *Military Justice Handbook*²⁹ in which the accused was informed of the maximum punishment that might be imposed and was asked whether he understood the meaning and effect of his plea of guilty. That procedure was followed at trial in *Chancellor*, but after trial the accused asserted his innocence and specifically denied the specific intent required to establish guilt. Defense counsel confirmed that the accused had maintained his innocence throughout the judicial process and stated that “he, for good and sufficient reasons, recommended a guilty plea in spite of accused’s protestations of innocence.”³⁰

The COMA reversed. In its majority opinion, the court examined Article 45, UCMJ,³¹ which imposes upon the court the duty to accept a guilty plea only after the accused admits committing the acts charged. Citing testimony before the House Armed Forces Service Committee, Judge Ferguson wrote that there should be “a colloquy between the court and the accused at the taking of the plea and the record transcribed verbatim and not just have a form which is printed and says that the accused was informed of his rights.”³² The court noted that, as a result of the standard practice, “the accused is not advised of the elements of the offense and his guilt in fact is not always established on the record.”³³

Judge Ferguson’s recommendation was apparently met with less than full cooperation by the services. Three years later, in 1969, the COMA again faced the issue of an improvident plea, this time holding as law what they had three years earlier urged the services to do in *Chancellor*. In the landmark case of *United States v. Care*,³⁴ the accused pleaded guilty to desertion as part of a pretrial agreement, but on appeal contended that a plethora of bad advice from his defense counsel had prompted him to enter a plea of guilty, notwithstanding a self-avowed absence of any intention on

29. U.S. DEP’T OF ARMY, PAM. 27-9, LEGAL SERVICES, MILITARY JUSTICE HANDBOOK: THE LAW OFFICER (30 Apr. 1958) [hereinafter MILITARY JUSTICE HANDBOOK].

30. *Chancellor*, 36 C.M.R. at 454.

31. MANUAL FOR COURTS-MARTIAL, UNITED STATES (1951) [hereinafter 1951 MCM].

32. *Chancellor*, 36 C.M.R. at 456 (quoting Hearings on H.R. 2498 Before the House Armed Services Comm., 81st Cong. 1054 (1950) (statement of Mr. Felix Larkin, Assistant General Counsel, Department of Defense)).

33. *Id.*

34. 40 C.M.R. 247 (C.M.A. 1969). For an excellent discussion of *Care* and its progeny, see Major Terry L. Elling, *Guilty Plea Inquiries: Do We Care Too Much?*, 134 MIL. L. REV. 195 (1991).

his part to remain away permanently.³⁵ The court found error in the law officer's failure to inform Private Care of the elements constituting the offense and failure to establish the factual components of the guilty plea, but held that the evidence as a whole—including the wording of the specification—established that Private Care knew what he was pleading guilty to and established his guilt for those charges.³⁶ The court held, however, “that further action is required toward the objective of having court-martial records reflect fully an awareness by an accused pleading guilty of what he is admitting that he did and intended and of the law that applies to his acts and intentions.”³⁷

Chastising the services for ignoring their recommendation in *Chancellor*, the court mandated the following:

[T]he record of trial for those courts-martial convened more than thirty days after the date of this opinion must reflect not only that the elements of each offense charged have been explained to the accused but also that the military trial judge or the president has questioned the accused about what he did or did not do, and what he intended (where this is pertinent), to make clear the basis for a determination by the military trial judge or president whether the acts or the omissions of the accused constitute the offense or offenses to which he is pleading guilty.³⁸

Much of the confusion that existed before *Care* resulted from a lack of definitive guidance available to law officers conducting courts-martial. Law officers were generally company-grade judge advocates appointed to preside over the courts-martial in their respective jurisdictions. Neither the 1951 nor the 1969 *Manual for Courts-Martial* made reference to pretrial agreements, and the scripts provided in the 1958 *Military Justice*

35. *Care*, 40 C.M.R. at 249. Care alleged by affidavit: that his counsel failed to explain the elements of desertion to him; that his counsel advised him that contesting the charge would delay trial for four months; that his counsel told him that inevitably he would be convicted and receive the maximum sentence, but by a negotiated pretrial agreement he could limit the confinement portion of his sentence to two years; that this advice from his counsel resulted in his pleading guilty; and that, if he were tried again, he would plead not guilty. The defense counsel responded with an affidavit denying Care's allegations. *Id.*

36. *Id.* Judge Ferguson, who wrote the majority opinion in *Chancellor*, maintained in his *Care* dissent that a reversal was warranted because the law officer failed to conduct a proper inquiry. *Id.* at 254 (Ferguson, J., dissenting).

37. *Id.* at 253.

38. *Id.*

*Handbook*³⁹ and the 1969 *Military Judges Guide*⁴⁰ were cursory at best. The 1951 *Manual* provided that an accused could enter a plea of guilty, but that “the court may refuse to accept a plea of guilty and should not accept the plea without first determining that it is made voluntarily with understanding of the nature of the charge.”⁴¹ The 1951 *Manual* also provided that if the accused “has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect . . . the court shall proceed as though he had pleaded not guilty.”⁴² It provided no further guidance.

The corresponding *Military Justice Handbook*,⁴³ which was the law officer’s only framework for conducting a court-martial, similarly provided little direction regarding how to determine the providence of a plea; it provided only a script that required that the law officer ask the accused whether the accused understood that the plea of guilty admitted every act or omission of the charged offense, that no further proof was required for conviction, that the accused was legally entitled to plead not guilty, and that a certain maximum punishment was authorized. The script did not provide for any inquiry by the law officer regarding the conduct underlying the offenses or the voluntariness of the plea.

In response to *Chancellor and Care*, the 1969 *Manual* added significant language regarding a court’s duty to ensure the factual basis for a guilty plea, providing that the court “must question the accused about what he did or did not do and what he intended (where this is pertinent) to determine whether the acts or omissions of the accused constitute the offense or offenses to which he is pleading guilty.”⁴⁴ The 1969 *Manual* also directed the court to not only advise the accused that if accepted his plea of guilty waived his rights against self-incrimination, his right to a trial of the facts, and his right to confront the witnesses against him, but also to determine whether the accused consciously and knowingly waived those rights.⁴⁵

39. MILITARY JUSTICE HANDBOOK, *supra* note 29.

40. U.S. DEP’T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES GUIDE (19 May 1969) [hereinafter MILITARY JUDGES GUIDE]. The *Military Judges Guide* replaced the *Military Justice Handbook*.

41. 1951 MCM, *supra* note 31, ¶ 70.

42. *Id.*

43. MILITARY JUSTICE HANDBOOK, *supra* note 29, at 23.

44. MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 70(b) (rev. ed. 1969).

45. *Id.*

*The Military Judges Guide*⁴⁶ was published in May, 1969, three months before the COMA issued its opinion in *Care*. Subsequent changes to the *Military Judges Guide* included additional guidance for the providence inquiry and a requirement that the military judge “elicit the facts leading to the guilty plea by conducting a direct and personal examination of the accused as to the circumstances of the alleged offense(s) and other matters leading to his plea.”⁴⁷ It further provided, “Such questions should be aimed at developing the accused’s version of what happened in his own words, and determining if his acts or omissions encompass each and every element of the offense(s) to which the guilty plea relates.”⁴⁸

B. The Military Judge as the Safeguard of the Pretrial Agreement

While the decision in *Care* provided specific guidance to courts-martial regarding the taking of a guilty plea, the trial court’s role in scrutinizing the specific terms of a pretrial agreement remained unclear. Article 45, UCMJ, established the requirement for provident pleas, but it did not address taking pretrial agreements in connection with guilty pleas.

In 1976, in the case of *United States v. Elmore*,⁴⁹ Judge Fletcher of the COMA wrote in a concurring opinion that:

The ambiguity and apparent hidden meanings which lurk within various pretrial agreement provisions . . . lead me to conclude that henceforth, as part of the *Care* inquiry, the trial judge must shoulder the primary responsibility for assuring on the record that an accused understands the meaning and effect of *each* condition as well as the sentence limitations imposed by any existing pretrial agreement.⁵⁰

Elmore involved an agreement term that was not discussed during the providence inquiry. While the court found that the condition did not violate the law or public policy, Judge Fletcher recognized the problems inherent in the trial court’s failure to inquire into the specific terms of the pretrial agreement and feared that, at some point, the court would be left to decide what the parties did—or did not mean—by those terms. In his con-

46. MILITARY JUDGES GUIDE, *supra* note 40.

47. *Id.* at 3-3 (C2, 14 May 1970).

48. *Id.*

49. 1 M.J. 262 (C.M.A. 1976).

50. *Id.* at 264 (Fletcher, J., concurring).

curing opinion, Judge Fletcher wrote that the providence inquiry must include scrutiny of each term of the agreement, and the military judge must strike from the agreement any conditions he feels violate “appellate case law, public policy, or the trial judge’s own notions of fundamental fairness.”⁵¹ His proposed inquiry also included assurances from both sides that the written agreement encompassed all of the understandings of the parties and that the judge’s interpretation of the agreement comported with that of the parties.

Eight months later, the COMA decided *United States v. Green*,⁵² where Judge Fletcher, now writing for the majority, held that:

[A]s part of all *Care* inquiries . . . the trial judge shall ascertain whether a plea bargain exists, and if so, shall conduct an inquiry into the pretrial agreement in accordance with the *Elmore* guidelines previously enunciated We will view a failure to conduct a plea bargain inquiry as a matter affecting the providence of the accused’s plea.⁵³

While providing the first substantial guidance for the providence inquiry in cases involving pretrial agreements, the *Green* decision also led to two years of trial-level uncertainty and appellate controversy over *Green*’s actual application.⁵⁴ This controversy surfaced one year after *Green*, when the ACMR issued its decision in *United States v. Crowley*.⁵⁵ In *Crowley*, the accused alleged on appeal that the trial judge had violated the requirements of *Green* by failing to explain the significance of not entering into a stipulation of fact, by failing to ensure that the accused understood the sentence limitations imposed by the pretrial agreement, by failing to ask counsel whether their understanding of the terms and conditions of the pretrial agreement comported with his own, and by failing to obtain the assurances of counsel that the written agreement encompassed all of their understandings. The Army court found that these errors could be cured through affidavits so long as there was substantial compliance with *Green*, holding: “The *Green* decision does not require a perfect plea bargain inquiry If the military judge has conducted an inquiry which is in sub-

51. *Id.*

52. 1 M.J. 453 (C.M.A. 1976).

53. *Id.* at 456.

54. See Captain Glen D. Lause, *Crowley: The Green Inquiry Lost in Appellate Limbo*, ARMY LAW., May 1979, at 10.

55. 3 M.J. 988 (A.C.M.R. 1977).

stantial compliance with the *Green* guidelines, we hold that the plea can be considered provident.”⁵⁶

The Army court’s “substantial compliance” standard was rejected three months later, however, when the COMA decided *United States v. King*.⁵⁷ Rejecting counsel’s argument that “substantial compliance” would suffice, the court held that only strict compliance with *Green* was acceptable and that the court would not “attempt to ‘fill in’ a record left silent because of the trial judge’s omission or to develop a sliding scale analysis whereby ‘substantial compliance’ becomes our standard of review.”⁵⁸ The court performed an about-face, however, in 1979, when in *United States v. Hendon*,⁵⁹ it held that the accused’s guilty plea was provident despite numerous *Green* omissions by the trial judge.⁶⁰

Even before the “appellate limbo” created by *Elmore*, *Green*, *King*, and *Hendon*,⁶¹ the Army Trial Judiciary struggled to provide consistent guidance to the bench. A 1957 Department of the Army (DA) message⁶² required law officers to conduct an “out-of court hearing” to determine whether the accused understood the pretrial agreement; however, that message was rescinded in 1965 by another DA message⁶³ that required only that the agreement be discussed in the Staff Judge Advocate’s (SJA) Review and attached thereto. A 1966 memo from the Chief Judicial Officer cited both DA messages and provided that law officers should inquire into the terms of a pretrial agreement when “it appears to them that the interest of justice requires such an inquiry.”⁶⁴ The Chief Judicial Officer issued yet another memo in February 1968, rescinding the 1966

56. *Id.* at 995.

57. 3 M.J. 458 (C.M.A. 1977).

58. *Id.* at 459.

59. 6 M.J. 171 (C.M.A. 1979).

60. *See* Lause, *supra* note 54, at 12.

61. Lause refers to *Hendon* as the “un-King” decision. *Id.*

62. Message No. 552595, 8 May 1957, Headquarters, Department of Army, The Judge Advocate General, subject: Guidance for Procedures Applicable in Cases Where an Offer of a Plea of Guilty for a Consideration is Accepted.

63. Message No. 736536, 15 Oct. 1965, Headquarters, Department of Army, The Judge Advocate General, subject: Pretrial Agreements (directing that pretrial agreements in effect at the time of the convening authority’s action must be mentioned in the SJA Review and attached to the review as an enclosure, but need not be made an appellate exhibit in the case).

64. U.S. DEP’T OF ARMY, UNITED STATES ARMY JUDICIARY: INQUIRY AS TO PRETRIAL AGREEMENTS (15 Feb. 1966).

memo and providing, in light of *Cummings*,⁶⁵ “that law officers, in determining the providency of a guilty plea, should inquire as to whether there is a pretrial agreement in connection with the plea and if there is one, should also inquire into its terms, its legality, and the accused’s understanding thereof.”⁶⁶

This flurry of trial judge memoranda was followed by the 1969 *Manual* and the 1969 *Military Judges Guide*, which did not adequately address pretrial agreements.⁶⁷ The military judge’s script for the providence inquiry included only an inquiry into the existence of a pretrial agreement and provided that if one existed, “the military judge should inquire into its terms, its legality, and the accused’s understanding thereof.”⁶⁸

In response to *Green*⁶⁹ and *King*,⁷⁰ however, the Army Trial Judiciary issued a multitude of amending and rescinding memos that eventually led to a standardized boilerplate script in 1982, when the Trial Judiciary issued a new version of *DA Pamphlet 27-9, Legal Services: Military Judges’ Benchbook (Benchbook)*.⁷¹ The *Benchbook* script incorporated the *Green* and *King* inquiries into the terms of the agreement and standardized the military judge’s inquiry into the terms of the pretrial agreement in conformance with *Green* and *King*.

The 1984 *Manual for Courts-Martial* codified the procedure mandated by case law in RCM 705, which required that the parties inform the military judge of the existence of a pretrial agreement.⁷² Similarly, RCM 910(f)⁷³ requires that the parties inform the military judge of a plea agreement and provides that the military judge may accept the pretrial agreement only if it complies with RCM 705. The military judge must ensure that there has been a “meeting of the minds” and that the terms comport

65. 38 C.M.R. 174 (C.M.A. 1968).

66. U.S. DEP’T OF ARMY, UNITED STATES ARMY JUDICIARY: INQUIRY AS TO PRETRIAL AGREEMENTS (5 Feb. 1968).

67. MILITARY JUDGES GUIDE, *supra* note 40.

68. *Id.* at 3-5 (C5, 14 May 1970).

69. 1 M.J. 453 (C.M.A. 1976).

70. 3 M.J. 458 (C.M.A. 1977).

71. U.S. DEP’T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES’ BENCHBOOK (May 1982). The *Military Judges Benchbook* replaced the *Military Judges Guide*.

72. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 705(d)(f)(2) (1984) [hereinafter 1984 MCM].

73. MCM, *supra* note 2, R.C.M. 705(d)(f)(1).

with the intent of the parties, or allow the accused to withdraw from the pretrial agreement.⁷⁴

C. The Court as the Sole Source of the Adjudged Sentence

1. Trial Before Military Judge Alone

Green's impact on pretrial agreements was not limited to defining the scope of the providence inquiry; it also resolved whether the military judge would view the quantum portion of the pretrial agreement before announcing the sentence.

It was, and still is, standard practice for a military judge in a court-martial with members to view the quantum portion of the pretrial agreement during the taking of the plea. However, the institution of trial by military judge alone, authorized by the 1968 Military Justice Act,⁷⁵ raised the issue of whether the trial judge, in his capacity as sentencing authority, should know the quantum portion of the pretrial agreement in advance of announcing his own sentence. Absent dispositive guidance to the contrary,⁷⁶ many military judges sitting alone as courts-martial routinely viewed the quantum portion of the pretrial agreement during the taking of the plea.

In *United States v. Villa*,⁷⁷ the COMA upheld this practice, holding that, in accordance with *Care*, “[p]art of the judge’s inquiry is necessarily directed to the accused’s understanding of the punishment to which he will be subject as a result of his plea of guilty.”⁷⁸ The court continued, “[D]isagreement as to the meaning and scope of the sentence is not uncommon.”⁷⁹ Noting also that the factors taken into account by the con-

74. *Aziz v. Carver*, 36 M.J. 1026, 1028 (N.M.C.M.R. 1993).

75. Military Justice Act of 1968, Pub. L. No. 90-632, 1968 U.S.C.C.A.N. (82 Stat.) 1335.

76. The *Military Judges Guide* encouraged military judges sitting alone to not view the quantum before announcing the sentence. MILITARY JUDGES GUIDE, *supra* note 40, 3-5 (C2, 14 May 1970).

77. 42 C.M.R. 166 (C.M.A. 1970).

78. *Id.* at 168.

79. *Id.*

vening authority in entering into the agreement with the accused often differ from the matters considered by the judge in sentencing, the court stated:

We are also convinced that both the convening authority and the military judge [will] treat the sentence provision as important only to the effectuation of the agreement, and not as an order or wish on the part of the convening authority to influence the judge in his own determination of an appropriate sentence.⁸⁰

Judge Ferguson, in his *Care* dissent, said: "I believe that [this] practice is fraught with danger and should be discontinued. The very fact that my brothers find it necessary to discuss at length the problems involved is, in my opinion, indicative of the potential for prejudice to an accused."⁸¹ Judge Ferguson also noted that the *Military Judges Guide*⁸² discouraged the military judge from reviewing the quantum portion of the agreement before announcing the sentence. He wrote, "[I]n my opinion, [it is] asking too much to expect [the military judge] to maintain an impartial disposition relative to sentence after he learns, through perusal of the pretrial agreement, that the initial appellate authority has already determined an appropriate sentence."⁸³

Judge Fletcher, writing for the majority in *United States v. Green*,⁸⁴ adopted Judge Ferguson's approach and held, "Inquiry into the actual sentence limitations specified in the plea bargain should be delayed until after announcing sentence where the accused elects to be sentenced by the military judge rather than a court with members."⁸⁵ Judge Fletcher emphasized not the military judge's ability to determine the providence of the plea or to adjudge an appropriate sentence, but rather "the perceived fairness of the sentencing process."⁸⁶ The 1982 *Benchbook* incorporated this change, and in its script, provided for the judge's viewing of the quantum portion of the pretrial agreement only after announcing the sentence. Similarly, the 1984 *Manual for Courts-Martial* included RCM 910(f)(3), which provided that, in a trial by military judge alone, the military judge

80. *Id.* at 169.

81. *Id.* at 170 (Ferguson, J., dissenting).

82. MILITARY JUDGES GUIDE, *supra* note 40.

83. *Villa*, 42 C.M.R. at 171.

84. 1 M.J. 453 (C.M.A. 1976).

85. *Id.* at 456.

86. *Id.* at 455.

shall not examine any sentence limitation contained in the agreement until after announcement of the sentence.⁸⁷

2. Trial Before Court Members

Guilty pleas taken before members created their own set of problems, most dealing with the perils of whether members should be advised of the existence of a pretrial agreement, whether members should be informed of the lesser maximum punishment authorized under the agreement, and whether counsel could “hoodwink” the members into adjudging a sentence that counsel knew would not be approved under the pretrial agreement.⁸⁸

*United States v. Withey*⁸⁹ was returned for a rehearing on the sentence due in part to the members’ knowledge of the existence of a pretrial agreement.⁹⁰ Other cases in which the court surmised that the members suspected the existence of a pretrial agreement support the notion that the members should not be so informed.⁹¹ *United States v. Welker*⁹² was also returned for a rehearing on the sentence, in part due to the court’s finding that the members were aware of the existence of a pretrial agreement. The court also noted that connected to this disclosure appeared to be a “tendency on the part of defense counsel to present no evidence, and to make no argument, in mitigation when there is an agreement with the convening authority on the plea and the sentence”⁹³ and that “[a] continuation of these trends may require reexamination of the practice of negotiating agreement on the plea and the sentence with the convening authority.”⁹⁴

Whether the members could be informed of the maximum punishment agreed to by the convening authority was resolved in *United States v. Sanchez*.⁹⁵ There, the ABR considered whether the court should be

87. 1984 MCM, *supra* note 72, R.C.M. 910(f)(3).

88. *United States v. Wood*, 48 C.M.R. 528, 531 (C.M.A. 1974).

89. 25 C.M.R. 593, 595 (A.B.R. 1958).

90. As previously discussed, the case was also returned for a rehearing on sentencing due to defense counsel’s failure to present matters in extenuation and mitigation. *See supra* notes 22-23 and accompanying text.

91. *United States v. Allen*, 25 C.M.R. 8, 10 (C.M.A. 1957) (members deliberated for eight minutes); *United States v. Welker*, 25 C.M.R. 151, 152 (C.M.A. 1958) (members deliberated for five minutes).

92. *Welker*, 25 C.M.R. at 151, 152.

93. *Id.* at 153.

94. *Id.*

95. 40 C.M.R. 698 (A.B.R. 1969).

informed that the maximum punishment that the members could adjudge was that agreed to by the convening authority in a pretrial agreement. Holding that “the provisions of a pretrial agreement made by a convening authority are irrelevant in determining the maximum sentence imposable by a court-martial,” the ABR found that “a pretrial agreement is merely a voluntary limitation by the convening authority, in advance of trial, upon his statutory discretion regarding the adjudged sentence,” and therefore does not affect the range of punishment available to the members.⁹⁶

The issue then arose whether defense counsel could argue for a specific sentence with the knowledge that the pretrial agreement precluded such a sentence. In *United States v. Wood*,⁹⁷ defense counsel elicited from the accused at trial that he would rather spend five years in jail than receive a dishonorable discharge. The judge considered this testimony inconsistent with the plea, as the pretrial agreement provided that the convening authority “would approve no punishment in excess of a suspended bad-conduct discharge, confinement at hard labor for one year, and forfeiture of all pay and allowances.”⁹⁸ The judge excused the court members and chastised the defense counsel for eliciting testimony that was “not true.”⁹⁹ He then “denounced defense counsel and the accused for ‘attempting to perpetrate’ a ‘fraud’ on the court members.”¹⁰⁰ On appeal, the COMA held the following:

If it is right as a matter of law for the Government to disregard the agreement when instructing the members as to the limits of the sentence, is it not equally right for the accused to disregard the agreement in his argument as to the kind of sentence that should be adjudged? To allow the Government the right to disregard the agreement so that the sentence will be determined on the basis of the maximum punishment allowed by the law increases the likelihood that the adjudged sentence will not be less than that provided by the agreement; to deny the accused the right to disregard the agreement in making his case before the court increases the likelihood even more. One is impelled to ask whether such one-sided application of the agreement is fair.¹⁰¹

96. *Id.* at 699.

97. 48 C.M.R. 528, 531 (C.M.A. 1974).

98. *Id.* at 529.

99. *Id.* at 530.

100. *Id.*

101. *Id.* at 532.

Next in *Wood*, The COMA reviewed many of its recent decisions regarding pretrial agreements, pointing out, as it did in *Watkins*,¹⁰² that “the agreement leaves the accused ‘unbridled,’ and allows him to ‘bring before the court-martial members any fact or circumstance which might influence them to lessen the punishment.’”¹⁰³ Concluding that the trial judge erred in characterizing the defense counsel’s conduct in *Wood* as a fraud upon the court members, the COMA held, “Whether sentence is imposed by the judge alone or by the court members, the determination is not on the basis of the limits provided by the agreement, but as provided by law.”¹⁰⁴ Counsel are free to present a sentencing case as they would in a trial without such an agreement, so long as the evidence elicited during sentencing does not appear to impeach the findings of the court. In fact, the COMA emphasized that defense counsel “must do all he can to obtain the court’s independent judgment as to what constitutes a fair sentence for the accused”¹⁰⁵ and “can disregard the agreement by trying to convince the judge or court members that [the accused] is worthy of greater leniency.”¹⁰⁶

This approach was ultimately codified in the 1984 *Manual for Courts-Martial*. Rule for Courts-Martial 705(e), which is based on *Green* and *Woods*, provides that “no member of a court-martial shall be informed of the existence of a pretrial agreement.”¹⁰⁷

IV. Terms of the Agreement

A. Early History

Early caselaw on pretrial agreements expressed a reluctance to permit such agreements to incorporate terms touching on the fundamental rights of the accused. In *United States v. Callahan*, the ABR cautioned against

102. *United States v. Watkins*, 29 C.M.R. 427 (C.M.A. 1960).

103. *Wood*, 48 C.M.R. at 532 (quoting *Watkins*, 29 C.M.R. at 431-32).

104. *Id.*

105. *Id.* at 533.

106. *Id.*

107. MCM, *supra* note 2, app. 21 (Analysis, R.C.M. 705(e)). *See also* *United States v. Jobson*, 31 M.J. 117 (C.M.A. 1990) (member who had read about the pretrial agreement in the newspaper was not disqualified to serve as a court member); *cf.* *United States v. Schnitzer*, 44 M.J. 380 (1996) (testimony regarding co-accused’s pretrial agreement was elicited by the government during trial; this constituted improper outside influence on sentencing but did not rise to plain error).

allowing the use of pretrial agreements to infringe on the soldier's fundamental rights of due process.¹⁰⁸ Similarly, in *United States v. Cummings*, the COMA noted: "plea arrangements are not designed . . . to 'transform the trial into an empty ritual.' They should concern themselves with nothing more than the bargaining on the charges and sentence, not with ancillary conditions regarding waiver of fundamental rights."¹⁰⁹ Still uncomfortable with the concept of such bargaining within the military, Judge Ferguson wrote in *United States v. Schmeltz*:¹¹⁰ "This Court has never expressed full satisfaction with the practice of plea bargaining in the armed services. It has, however, repeatedly stated that pretrial agreements should concern themselves only with bargaining on the charges and sentence."¹¹¹

This narrow interpretation of the matters subject to negotiation in a pretrial agreement did not last. Chief Judge Suter of the ACMR, referring to Judge Ferguson's comments in *Schmeltz*, noted ten years later that:

Recent decisions by the Court of Military Appeals have not observed such a limitation upon the terms of a pretrial agreement. In *United States v. Schaffer*, 12 M.J. 425, 428 (C.M.A. 1982), the Court expressly acknowledged a judicial willingness to accept more complex pretrial agreements, especially when that complexity is proposed by an accused and his counsel. Moreover, the Court has recognized that flexibility and imagination in the plea-bargaining process is allowed as long as the trial and appellate processes are not rendered ineffective and their integrity is maintained. While the decisions concerning pretrial agreements have not been models of clarity, we believe they evince a reluctance to engage in pro forma rejections of pretrial agreements and invite this court to examine the provisions of pretrial agreements in light of the greater flexibility accorded such agreements.¹¹²

The appellate courts have regularly visited the issue of permissible and impermissible terms of the pretrial agreement. In 1984, the newly created

108. 22 C.M.R. 443 (A.B.R. 1956).

109. 38 C.M.R. 174, 177 (C.M.A. 1968) (citing *United States v. Allen*, 25 C.M.R. 8, 11 (C.M.A. 1957)).

110. 1 M.J. 8 (C.M.A. 1975).

111. *Id.* at 11.

112. *United States v. Jones*, 20 M.J. 853, 855 (A.C.M.R. 1985) (citations omitted).

Rules for Courts-Martial included RCM 705,¹¹³ which specifically listed examples of permissible and impermissible terms. As counsel continue to develop more novel and more complex approaches to obtaining pretrial agreements, however, the issue of whether a specific term is permissible remains a source of appellate litigation.

B. Fundamental Rights That May Not Be Waived Under R.C.M. 705(c)

The United States Supreme Court held in *United States v. Mezzanatto*¹¹⁴ that a criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution. The Court also noted that, “absent some affirmative indication of Congress’s intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties.”¹¹⁵

Rule for Courts-Martial 705(c) precludes certain rights from waiver as part of a pretrial agreement by providing that:

A term or condition shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; [or] the complete and effective exercise of post-trial and appellate rights.¹¹⁶

Thus, terms or conditions that attempt to restrict an accused’s right to present matters in extenuation and mitigation or restrict the right to counsel would be unenforceable. Before the enactment of the Rules for Courts-Martial in the 1984 *Manual*, however, there was no such express prohibition. Consequently, the courts litigated the propriety of these terms on a case-by-case basis.

113. 1984 MCM, *supra* note 72, R.C.M. 705(c).

114. 513 U.S. 196 (1995).

115. *Id.* at 201.

116. MCM, *supra* note 2, R.C.M. 705(c)(1)(B).

1. Extenuation and Mitigation

In *United States v. Callahan*,¹¹⁷ the accused agreed to abstain from presenting mitigation evidence during sentencing in order to obtain a favorable pretrial agreement, a common practice at his installation. The ABR found that the accused's "election" not to present mitigation evidence, "encumbered as it was by the compulsion of this improper pretrial agreement—amounted to an unwarranted and illegal deprivation of the accused's right to military due process."¹¹⁸ The ABR noted that The Judge Advocate General had previously discouraged such a term in a policy statement published in JAG "Chronicle" in 1953.¹¹⁹ The ABR pointed out that the 1951 *Manual* not only gave the accused the right to present evidence in extenuation and mitigation, but also "expressly facilitates the admission of such evidence by relaxing the rules of evidence."¹²⁰ The ABR also noted that "this right is an integral part of military due process, and the denial of such a right is prejudicial to the substantial rights of an accused."¹²¹ Similarly, the court in *United States v. Allen*¹²² disapproved of the defense counsel's failure to present extenuation and mitigation evidence and expressed its concern with ensuring an effective trial practice, particularly in the context of a pretrial agreement. Rule for Courts-Martial 705(c)(1)(B)¹²³ now prohibits any term that deprives the accused of his right to complete sentencing proceedings, including the right to present matters in extenuation and mitigation.¹²⁴

2. Lack of Jurisdiction

The same year that the COMA decided *Allen*, the ABR decided *United States v. Banner*,¹²⁵ a case in which the accused agreed to waive a lack of jurisdiction motion as part of a pretrial agreement. On appeal, the ABR found that there was no personal jurisdiction and held that "neither the law nor policy could condone the imposition by a convening authority

117. 22 C.M.R. 443 (A.B.R. 1956).

118. *Id.* at 448.

119. *Id.* at 447 (citing 36 JAG CHRONICLE 183 (4 Sept. 1953)).

120. *Id.* at 448.

121. *Id.*

122. 25 C.M.R. 8 (C.M.A. 1957).

123. MCM, *supra* note 2, R.C.M. 705(c)(1)(B).

124. An accused, however, may waive his right to request out-of-area witnesses as a permissible condition of the agreement.

125. 22 C.M.R. 510 (A.B.R. 1956).

of such a condition,”¹²⁶ and that “just as the submission of matters of mitigation should not be precluded by pretrial agreements, the litigation of issues of jurisdiction should not be hampered.”¹²⁷ Rule for Courts-Martial 705(c)(1)(B)¹²⁸ now precludes pretrial agreement terms that waive the right to challenge the court’s jurisdiction.

3. *Post-Trial and Appellate Rights*

Waiver of appellate rights was litigated a year later in *United States v. Darring*,¹²⁹ where separate from his pretrial agreement, the accused waived his right to appellate counsel immediately after trial, based on his counsel’s advice that “there was little that an appellate defense counsel could do for him”¹³⁰ in light of his guilty plea. The court found that the accused’s waiver was not made knowingly given the inadequacy of his counsel’s advice, which was premature because it was given before post-trial review and action by the convening authority. While the court recognized that in some cases this waiver might be appropriate, it held that “a decision not to request appellate counsel should be predicated only upon the merits of an individual case and the accused’s own desires.”¹³¹ It discouraged policies requiring an accused to waive appellate representation as flying “in the teeth of our decision in *United States v. Ponds* . . . in which we held that a preliminary waiver of a right to petition this Court for review is a nullity.”¹³²

In *Ponds*, the court found that while an accused may waive appellate process by not initiating review before the appellate court in a timely matter, any agreement between the accused and the convening authority to waive appellate representation that is “complete to the extent of purporting to provide a consideration to the accused is, for appellate purposes a legal nullity.”¹³³ Similarly, the court in *United States v. Mills* found unenforceable an agreement that “would tend to inhibit the exercise of appellate

126. *Id.* at 519.

127. *Id.* (citation omitted).

128. MCM, *supra* note 2, R.C.M. 705(c)(1)(B).

129. 26 C.M.R. 431 (C.M.A. 1958).

130. *Id.* at 433.

131. *Id.* at 434.

132. *Id.* at 435 (citing *United States v. Ponds*, 3 C.M.R. 119 (C.M.A. 1952)).

133. *Ponds*, 3 C.M.R. at 121.

rights.”¹³⁴ Rule for Courts-Martial 705(c)(1)(B)¹³⁵ now explicitly prohibits any term in a pretrial agreement that deprives the accused of the complete and effective exercise of post-trial and appellate rights.

4. Speedy Trial

Waiver of speedy trial was first addressed in *United States v. Cummings*,¹³⁶ where the court held that the waiver by the accused of his right to raise the issues of lack of speedy trial or denial of due process was void as contrary to public policy. After a lengthy discussion of pretrial agreements and the concerns raised in *Darring*, *Ponds*, *Callahan*, and *Banner*, Judge Ferguson again voiced his concern and his view of the permissible terms of such agreements.

We reiterate our belief that pretrial agreements are properly limited to the exchange of a plea of guilty for approval of a stated maximum sentence. Attempting to make them into contractual type documents [that] forbid the trial of collateral issues and eliminate matters which can and should be considered below, as well as on appeal, substitutes the agreement for the trial and indeed, renders the latter an empty ritual. We suggest, therefore, that these matters should be left for the court-martial and appellate authorities to resolve and not be made the subject of unwarranted pretrial restrictions.¹³⁷

Rule for Courts-Martial 705(c)(1)(B) now bars waiver of speedy trial as a pretrial agreement term.¹³⁸ Notwithstanding this general prohibition, the issue of waiver of speedy trial has arisen recently in *United States v. McLaughlin*¹³⁹ and *United States v. Benitez*.¹⁴⁰ In *McLaughlin*, the accused offered to waive a speedy trial issue as part of his pretrial agreement. At trial, the military judge asked defense counsel if he wished to raise a speedy trial motion, and defense counsel stated that he did not. Because the appellant failed to present a colorable claim entitling him to relief, the Court of Appeals for the Armed Forces (CAAF) affirmed the

134. 12 M.J. 1, 4 (C.M.A. 1981).

135. MCM, *supra* note 2, R.C.M. 705(c)(1)(B).

136. 38 C.M.R. 174 (C.M.A. 1968).

137. *Id.* at 178.

138. MCM, *supra* note 2, R.C.M. 705(c)(1)(B).

139. 50 M.J. 217 (1999).

140. 49 M.J. 539 (N-M. Ct. Crim. App. 1998).

findings and the sentence, but held that the military judge “should have declared the speedy trial provision unenforceable, while upholding the remainder of the pretrial agreement,” and should have asked the defense counsel if he wished to raise a speedy trial motion.¹⁴¹

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) was less tolerant in *Benitez*. There, the service court set aside the findings and sentence after the accused entered a pretrial agreement offering to waive “all non-constitutional or non-jurisdictional motions,”¹⁴² finding that the accused had a colorable speedy trial issue and that “[t]he law in this area has been well-settled for a long time.”¹⁴³

C. Rights That May Be Waived

While RCM 705(c) prohibits waiver of certain rights, the question of which matters are proper subjects of waiver as part of a pretrial agreement continues to spark litigation.

1. Blanket Waivers

The ACMR initially rejected a blanket waiver of all non-jurisdictional motions in *United States v. Elkinton*.¹⁴⁴ There, the pretrial agreement contained a condition then known as the “Hunter provision,”¹⁴⁵ a term that waived all motions except jurisdiction and that was intended to apply to all motions that are automatically waived upon the entry of a guilty plea. Citing *Cummings*,¹⁴⁶ the Army court strongly voiced its discomfort with the provision’s blanket waiver of evidentiary motions, stating that “[s]uch attempts on the part of the government to require an accused to bargain

141. *McLaughlin*, 50 M.J. at 219.

142. *Benitez*, 49 M.J. at 541. The Navy-Marine Corps court noted this provision was overbroad, “since it does not expressly include any of the prohibited conditions set forth in Rule for Courts-Martial 705(c)(1)(B).” *Id.*

143. *Id.*

144. 49 C.M.R. 251 (A.C.M.R. 1974).

145. Major Nancy Hunter, *A New Pretrial Agreement*, ARMY LAW., Oct. 1973, at 23, 24.

146. *United States v. Cummings*, 38 C.M.R. 174 (C.M.A. 1968).

away his right to raise a legal issue have been uniformly condemned.”¹⁴⁷ While the court ultimately found no prejudice in *Elkinton* given the specific facts of his case,¹⁴⁸ Senior Judge Thomas again emphasized in his closing comments that “we condemn the use of pretrial agreements of the type in issue.”¹⁴⁹ While the court found the blanket waiver of all non-judisdictional motions to be “contrary to public policy and therefore void,”¹⁵⁰ it did not establish whether waiver of certain evidentiary motions, if specified individually, was permissible.

The “Hunter provision” came before the COMA one year later in *United States v. Holland*.¹⁵¹ There, the court looked specifically at a provision that required the accused to enter a plea of guilty before presenting evidence on any motions other than jurisdiction. The court held, “Our approval of these arrangements in subsequent opinions . . . was not intended either to condone or to permit the inclusion of indiscriminate conditions in such agreements, even when initiated by the accused.”¹⁵² The court struck down the provision, holding that although “well-intentioned, the limitation on the timing of certain motions controlled the proceedings” and constituted “an undisclosed halter on the freedom of action of the military judge.”¹⁵³ As one scholar commented, the *Holland* decision does not provide that a waiver of motions in a pretrial agreement is invalid, nor does the decision suggest that *Cummings* supports such a position. Rather, the court found this particular provision invalid “because it compromise[d] the effectiveness and integrity of the trial process by attempting to command control of judicial discretion.”¹⁵⁴

The CAAF has taken a less paternalistic view of blanket waivers in recent years. One such waiver survived judicial scrutiny in *United States v. Rivera*,¹⁵⁵ where the appellant agreed “to make no pretrial motions.”¹⁵⁶ While the CAAF found that “[o]n its face, this agreement was too broad”¹⁵⁷ and could conceivably violate the rights to due process and the

147. *Elkinton*, 49 C.M.R. at 254.

148. Trial counsel and defense counsel submitted a jointly-signed affidavit which stated, in part, that “the only motion the defense deemed worthy of litigation was one of speedy trial which in fact was raised at the trial level.” *Id.* at 255.

149. *Id.*

150. *Id.* at 254.

151. 1 M.J. 58 (C.M.A. 1975).

152. *Id.* at 59.

153. *Id.* at 60.

154. Captain Robert M. Smith, *Waiver of Motions*, ARMY LAW., Nov. 1986, at 10, 15.

155. 46 M.J. 52 (1997).

156. *Id.* at 53.

rights to challenge jurisdiction and speedy trial, the court found the provision enforceable because the “appellant had not identified any issue that he was precluded from raising,”¹⁵⁸ and because the record was devoid “of any evidence of coercion, overreaching, or an attempt to enforce the agreement in a manner contrary to RCM 705(c)(1)(B).”¹⁵⁹

Similarly, in *United States v. Forester*,¹⁶⁰ the appellant’s pretrial agreement provided that he waived “any and all defenses that [he] may present regarding any of the agreed-upon facts during all phases of trial, including the providence inquiry and the case-in-chief.”¹⁶¹ Finding that the “[a]ppellant did not set up any matter inconsistent with his guilty plea that would have required the military judge to inquire into the existence of a defense,”¹⁶² the CAAF held that it “will not overturn a guilty plea based on the ‘mere possibility’ of a defense.”¹⁶³ While finding the provision overly broad, the court cited *Rivera* in concluding that “because appellant has not contended that he was precluded by the waiver provision from asserting any defense, he has not shown that he was prejudiced by the inclusion of the provision.”¹⁶⁴

Notwithstanding the courts’ initial discomfort with blanket waivers, they have upheld waivers of certain individual motions such as search and seizure motions,¹⁶⁵ hearsay objections,¹⁶⁶ the right to challenge venue,¹⁶⁷ and Article 13, UCMJ, issues.¹⁶⁸ The courts have also upheld waivers of specific rights, including the right to trial by members,¹⁶⁹ the right to challenge an out-of-court identification,¹⁷⁰ the right to investigation of the

157. *Id.* at 54.

158. *Id.*

159. *Id.* at 55.

160. 48 M.J. 1 (1998).

161. *Id.* at 2.

162. *Id.* at 3.

163. *Id.*

164. *Id.* at 4.

165. *United States v. Jones*, 23 M.J. 305 (C.M.A. 1987).

166. *United States v. Gibson*, 29 M.J. 379 (C.M.A. 1990).

167. *United States v. Kitts*, 23 M.J. 105 (C.M.A. 1986).

168. *United States v. McFadyen*, 51 M.J. 289 (1999). However, the military judge must inquire into the circumstances of the pretrial punishment and the voluntariness of the waiver and ensure that the accused understands the remedy to which he would be entitled if his motion were successful. *Id.*

169. *United States v. Burnell*, 40 M.J. 175 (C.M.A. 1994); *United States v. Zelenski*, 24 M.J. 1 (C.M.A. 1987); *United States v. Schmelz*, 1 M.J. 8 (C.M.A. 1975).

170. *United States v. Jones*, 23 M.J. 305 (C.M.A. 1987).

charges under Article 32, UCMJ,¹⁷¹ and the right to confront and cross-examine witnesses.¹⁷²

2. Historical Development of Waivers

The COMA discussed the significance of the origin of such waivers in *United States v. Jones*.¹⁷³ There, the accused agreed to waive his right to challenge the legality of any search and seizure and the legality of any out-of-court identification. During the providence inquiry, the defense counsel assured the court that the waiver provision originated with the accused in order to induce the convening authority to accept his offer. The court found such waiver proper, “so long as this provision is shown to have voluntarily originated from [the accused]”¹⁷⁴ and the record establishes that “the agreement was a freely conceived defense product.”¹⁷⁵ The court made a similar finding in *United States v. Schaffer*,¹⁷⁶ upholding the accused’s waiver of the Article 32 investigation so long as that waiver is “proposed by an accused as part of a plea bargain which is scrutinized carefully in a providence inquiry.”¹⁷⁷

The decision of the COMA in *United States v. Burnell*¹⁷⁸ marked a change in the court’s view regarding the significance of which party proposed the terms in a pretrial agreement. In *Burnell*, the court held that “the Government, when considering a proposed pretrial agreement, is not prohibited from insisting that an accused waive his right to trial by members.”¹⁷⁹ So long as the accused freely and voluntarily enters the agreement, the government may propose the waiver and the convening authority may refuse to accept the agreement without it; “just as a convening authority has no duty to enter into a pretrial agreement, neither does an accused.”¹⁸⁰ Similarly, it is not inappropriate for the government to raise

171. *United States v. Schaffer*, 12 M.J. 425 (C.M.A. 1982).

172. *United States v. Hanna*, 4 M.J. 938, 940 (N.M.C.M.R. 1978).

173. 23 M.J. 305 (C.M.A. 1987).

174. *Id.* at 306.

175. *Id.*

176. 12 M.J. 425 (C.M.A. 1982).

177. *Id.* at 429.

178. 40 M.J. 175 (C.M.A. 1994).

179. *Id.* at 176.

180. *Id.*

the sentence limitation of a proposed pretrial agreement if the accused elects to be tried by members.¹⁸¹

The cases of *Jones*, *Schaffer*, and *Burnell* were tried before the 1984 *Manual* became effective. Under the 1984 *Manual*, any party to the agreement—the convening authority, staff judge advocate, or the trial counsel—could negotiate the terms of the agreement with the defense, so long as the accused initiated the offer and the negotiations.¹⁸² The 1994 *Manual* expanded this by providing that any of the parties may initiate pretrial agreement negotiations, and that “either the defense or the government may propose any term or condition not prohibited by law or public policy.”¹⁸³

Some matters are considered so fundamental to the integrity of the judicial process that the courts have held that in order to effectively waive the right to present such matters as part of a pretrial agreement, the military judge must inquire into the facts underlying the waived matter and ensure that the accused fully understands and consents to the matter being waived. In *United States v. McFadyen*,¹⁸⁴ the CAAF held that while waiver of a pretrial punishment motion under Article 13, UCMJ,¹⁸⁵ does not violate public policy, the military judge faced with such a waiver “should inquire into the circumstances of the pretrial confinement and the voluntariness of the waiver and ensure that the accused understands the remedy to which he would be entitled if he made a successful motion.”¹⁸⁶

D. Waiver of Unlawful Command Influence

Waivers of unlawful command influence pose a more difficult problem. The CAAF recently held in *United States v. Weasler*¹⁸⁷ that the accused could lawfully waive an unlawful influence claim regarding the

181. *United States v. Andrews*, 38 M.J. 650 (A.C.M.R. 1993). See also *United States v. Zelenski*, 24 M.J. 1, 2 (C.M.A. 1987) (service or command policies requiring waiver of members are permissible so long as the waiver is a “freely conceived defense product,” but “will be closely scrutinized”).

182. 1984 MCM, *supra* note 72, R.C.M. 705(d).

183. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 705(d)(1) (1994) [hereinafter 1994 MCM].

184. 51 M.J. 289 (1999).

185. MCM, *supra* note 2.

186. *McFadyen*, 51 M.J. at 291.

187. 43 M.J. 15 (1995).

preferral of the charges. In *Weasler*, the company commander was scheduled to take leave before preferral of the charges, so she instructed her executive officer to sign the charge sheet when it arrived. Appellant moved to dismiss the charges on the basis of unlawful command influence. The military judge granted a continuance to secure the testimony of the executive officer. During the continuance, appellant offered to waive the motion to dismiss in return for a favorable sentence limitation. The court found: "This case does not involve the adjudicative process. Here the issue is whether coercion influenced preferral of charges."¹⁸⁸ It continued, "Where there is coercion in the preferral process, 'the charges are treated as unsigned and unsworn,' but the 'failure to object' constitutes waiver of the issue."¹⁸⁹ The court held that, because the waiver originated with the defense and because "there was no unlawful command influence that affected either the findings or the sentence in this case,"¹⁹⁰ the waiver was valid.

Writing for the majority, Judge Crawford distinguished between unlawful command influence in the preferral or referral of charges and unlawful command influence that may permeate the findings and sentence of a court-martial. The opinion cited the court's earlier holding in *United States v. Hamilton*¹⁹¹ that "defects in the forwarding process are waived if not challenged at trial."¹⁹² The *Weasler* court thus held that an accused may waive such defects as part of a pretrial agreement so long as the defects relate to the accusatory process—the process of getting the charges to trial—rather than the adjudicative process—the actual litigation of the facts in issue and determination of the sentence.

Judge Wiss, while concurring in the result, vigorously objected to the majority's rationale.

The *greatest* risk presented by unlawful command influence has nothing to do with the stage at which it is wielded; it has nothing to do with whether an accused is bludgeoned with it or whether, in an exercise of ironic creativity, an accused is able to turn the tables and actually use it to his advantage. Instead, it is in its insidiously pernicious character.¹⁹³

188. *Id.* at 18.

189. *Id.* at 19.

190. *Id.*

191. 41 M.J. 32, 36 (C.M.A. 1994).

192. *Weasler*, 43 M.J. at 19.

193. *Id.* at 21 (Wiss, J., concurring).

Chief Judge Sullivan also wrote a separate concurring opinion, noting “the ‘contract’ rationale proffered by the majority is dead wrong.”¹⁹⁴

The defense counsel in *Weasler* cited *United States v. Corriere*¹⁹⁵ in support of the accused’s waiver of unlawful command influence. In *Corriere*, the ACMR held that the accused’s waiver of an unlawful command influence issue was permissible as a *sub rosa* term of a pretrial agreement because it was clear from the record that “the waiver of motions was a freely conceived defense product, in the best interests of the accused, and part of a ‘strategic defense initiative’ to achieve a successful case outcome.”¹⁹⁶ The unlawful command influence alleged by the accused arose from his arrest during a mass apprehension at Pinder Barracks in Germany.¹⁹⁷ After sending the case back for a limited rehearing to determine the existence, if any, of a *sub rosa* or “gentlemen’s” agreement regarding the unlawful command influence, the court found that Captain Corriere was aware of the motion and of its waiver as part of a pretrial agreement, and that he was a party to the waiver.¹⁹⁸

In *Corriere*, the Army court referred to its earlier decision in *United States v. Treagle*,¹⁹⁹ which vacated the sentence after a guilty plea due to evidence of unlawful command influence that was first raised on appeal. In *Treagle*, the appellant established that, on multiple occasions, the convening authority directed his subordinate commanders to “apprise company level commanders of the general inconsistency of recommending a GCM or BCD and discharge of the accused, and then testifying to the effect that the accused should be retained.”²⁰⁰ Appellate defense counsel offered evidence of how these comments were perceived by company commanders and noncommissioned officers as discouraging favorable character testimony at courts-martial. The situation was aggravated when, after trial, the division command sergeant major distributed a memorandum throughout the division containing such statements as: “Once a soldier has been ‘convicted,’ he then is a convicted criminal. There is no way he can be called a ‘good soldier’ . . . The NCO Corps does not support

194. *Id.* (Sullivan, C.J., concurring).

195. 24 M.J. 701 (A.C.M.R. 1987).

196. *Id.* at 707.

197. *See* *United States v. Cruz*, 25 M.J. 326 (C.M.A. 1987) (outlining the circumstances surrounding the apprehension).

198. *Corriere*, 24 M.J. at 707.

199. 18 M.J. 646 (A.C.M.R. 1984).

200. *Id.* at 649.

'convicted criminals.'"²⁰¹ Finding the claim of unlawful command influence colorable, the court vacated the sentence.

The Army court's decision in *Treacle* clearly establishes that a guilty plea does not by itself waive a colorable claim of unlawful command influence. While *Corriere* stands for the proposition that unlawful command influence may be waived under certain circumstances, as a practical matter, such waivers should be made part of a written pretrial agreement.

The *Weasler* court warned subsequently, "Our holding in this case does not foreclose the Court from stepping in when there are actions by commanders that undermine public confidence in our system of justice or affect the rights of an accused."²⁰² Clearly, whether an unlawful command influence claim may be waived as part of a pretrial agreement depends on the nature of the conduct alleged and its impact on the integrity of the military justice system. In *Corriere*, the Army court allowed a *sub rosa* agreement to waive unlawful command influence because the record contained sufficient evidence to establish that the claim was without merit, and the accused willfully, knowingly, and voluntarily chose to waive raising it. In *United States v. Bartley*,²⁰³ however, the CAAF set aside both the findings and the sentence after evidence of unlawful command influence was revealed on appeal, despite an apparent *sub rosa* waiver as part of a pretrial agreement. As recently as 1999, in *United States v. Sherman*,²⁰⁴ the CAAF returned a case for a *DuBay* hearing to determine whether a *sub rosa* agreement to waive unlawful command influence existed.

While a knowing waiver of an unlawful command influence motion that does not relate to the adjudicative process may be permissible, the waiver must be disclosed to the military judge at trial. When unlawful command influence is waived *sub rosa*, the trial court is unable to determine whether the waiver was made freely and knowingly, and whether the waiver is permissible given the court's guidance as to the types of unlawful command influence that may be waived. If the court is unable to discern the voluntariness of the waiver or the nature of the unlawful command influence alleged, its only remedy is to remand the case for a rehearing. This remedy is required because "deprivation of the opportunity to present

201. *Id.* at 651.

202. *United States v. Weasler*, 43 M.J. 15, 19 (1995).

203. 47 M.J. 182 (1997).

204. 51 M.J. 73 (1999).

evidence on the issue of unlawful command influence constitutes prejudicial error.”²⁰⁵

E. Misconduct Provisions

Rule for Courts-Martial 705(c)(2)(D) permits a term promising “to conform the accused’s conduct to certain conditions of probation by the convening authority as well as during any period of suspension of the sentence.”²⁰⁶ Before the inclusion of this provision in the 1984 *Manual*, the courts viewed such “misconduct provisions” warily because of their susceptibility to ambiguity.

The COMA first addressed the issue of the accused’s conduct before and after trial in *United States v. Cox*.²⁰⁷ The court held that the convening authority’s performance of the terms of a pretrial agreement was not conditional upon the accused’s good conduct between the trial and final action. Instead, the court concluded, “[w]e reject any interpretation that produces an implied covenant or condition of good behavior in the pretrial agreement.”²⁰⁸

In *United States v. Lallande*,²⁰⁹ the court considered a post-trial “misconduct provision” as a term of the pretrial agreement in which the accused agreed to several terms and conditions of probation. Specifically, the accused agreed to “conduct himself in all respects as a reputable and law-abiding citizen,” to not associate with known drug users, and to submit to search at any time without a warrant, when requested by his commanding officer.²¹⁰ In return, the convening authority agreed to suspend execution of certain portions of the accused’s sentence. While the court expressed concern with the vagueness of the provision, it found that the accused consented to (and in fact, offered) the provision, and that the provision did not require the accused to “surrender a constitutional right that could affect his

205. *United States v. Alexander*, 19 M.J. 614, 616 (A.C.M.R. 1984) (case returned for limited rehearing into unlawful command influence where the military judge’s “unduly restrictive ruling . . . effectively deprived the appellant of his opportunity to litigate his motion”).

206. MCM, *supra* note 2, R.C.M. 705(c)(2)(D).

207. 46 C.M.R. 69 (C.M.A. 1972).

208. *Id.* at 70, 71.

209. 46 C.M.R. 170 (C.M.A. 1973).

210. *Id.* at 173.

guilt or the legality of his sentence.”²¹¹ Rather, it was similar to terms used in civilian criminal practice and was appropriate for use in courts-martial, notwithstanding its waiver of fundamental probation rights. The court specifically rejected appellant’s argument on appeal that these conditions violated public policy, comparing them to similar federal probation terms and finding that “the convening authority has power to impose at least the same conditions allowable to a judge in a federal civilian criminal court.”²¹²

In *United States v. Goode*,²¹³ the accused agreed that he would not commit “any act of misconduct” between the date of trial and the date of the convening authority’s action. When the accused went AWOL for three days in the month following trial, the convening authority rescinded those portions of the sentence that he had agreed to suspend as part of the pretrial agreement and did not suspend the accused’s punitive discharge, as the agreement provided. On appeal, the accused argued that the convening authority was required to conduct a hearing to determine whether the accused engaged in misconduct before deciding to not fulfill his part of the agreement. The COMA upheld the validity of the “misconduct provision,” and it found that the accused was not entitled to a formal hearing before the convening authority on the question of a departure from the terms of his pretrial agreement in the action on the sentence. The *Goode* court added, however, that the “[r]easons for the departure from the agreed sentence must appear in the post-trial review and the accused must be given the opportunity to rebut them.”²¹⁴

The COMA again looked at misconduct provisions in *United States v. Dawson*,²¹⁵ where the court asked if post-trial misconduct provisions were “void as a matter of public policy or law.”²¹⁶ Such provisions, like the one in *Goode*, bound the convening authority to the sentence limitation only if the accused did not commit “any violation of the Uniform Code of Military Justice”²¹⁷ between the date of trial and the date of the convening author-

211. *Id.*

212. *Id.* Judge Duncan specifically disagreed with this position in his dissent, stating, “Unlike federal district judges, convening authorities have not been specifically granted the power by Congress to set *terms and conditions of probation as they deem best.*” *Id.* at 176 (Duncan, J., dissenting).

213. 1 M.J. 3 (C.M.A. 1975).

214. *Id.* at 6.

215. 10 M.J. 142 (C.M.A. 1981).

216. *Id.* at 144.

217. *Id.* at 143.

ity's action. In *Dawson*, illegal drugs were discovered in Private Dawson's clothing upon his arrival at the confinement facility immediately after trial. Consequently, the SJA advised the convening authority that he was no longer bound by the agreement. This advice was provided to defense counsel, who challenged the finding of criminal knowledge required to establish Private Dawson's culpability. The convening authority withdrew from the agreement and approved the adjudged sentence.²¹⁸

The COMA found the misconduct provision unenforceable because it provided no means or standards for determining whether the accused had actually committed misconduct in violation of the provision. Citing *Goode*, the government argued that the parties "intended the convening authority to be the ultimate finder of fact based on the post-trial review and rebuttal submitted by defense counsel."²¹⁹ Writing for the majority, Judge Fletcher offered several reasons to find the provision void. Of greatest importance, the agreement did not address whether the accused could withdraw his plea of guilty should the convening authority activate the misconduct provision.²²⁰ Moreover, the court found that the provision allowed the convening authority "to summarily punish service members for violations of the Code."²²¹ Enforcement of the agreement also required a contractual application of the clause that was contrary to the court's attempts to prevent "a marketplace mentality from pervading the plea-bargaining process and to prevent contract law from dominating the military justice system."²²² Finally, the provision purported to waive "constitutional and codal rights of similar magnitude, which concern subsequent alleged violations of the military criminal code."²²³

In light of *Dawson* and *Goode*, the Rules for Courts-Martial now allow a pretrial agreement term that requires the accused to conform his "conduct to certain conditions of probation . . . provided that the requirements of RCM 1109 [are] complied with before an alleged violation of

218. *Id.*

219. *Id.* at 146.

220. *Id.* at 146-47.

221. *Id.* at 147

222. *Id.* at 150.

223. *Id.*

such terms may relieve the convening authority of the obligation to fulfill the agreement.”²²⁴

F. Public Policy and *Sub Rosa* Agreements

In addition to the terms prohibited by RCM 705 and by appellate case law, courts also look to whether a pretrial agreement is fundamentally fair and in accordance with public policy in determining its enforceability. The COMA held in *United States v. Green*²²⁵ that trial judges must ensure that pretrial agreements comply “with statutory and decisional law as well as adherence to basic notions of fundamental fairness.”²²⁶ As the Navy-Marine Court of Military Review (NMCMR) noted in *United States v. Cassity*,²²⁷ however, “determining what provisions violate ‘public policy’ is potentially more troublesome” than determining what provisions violate appellate case law.²²⁸

The NMCMR in *Cassity* articulated its framework for determining the propriety of a pretrial agreement as follows:

The United States Court of Military Appeals has observed that a pretrial agreement that “substitutes the agreement for the trial, and indeed, renders the latter an empty ritual” would violate public policy. Beyond that, however, the Court of Military Appeals “has not articulated any general approach to pretrial agreement conditions that can be used to determine which conditions are permissible and which are to be condemned.” An analysis of the cases suggests, however, that the court will disapprove those conditions that it believes are misleading or [abridge] fundamental rights of the accused.²²⁹

224. MCM, *supra* note 2, R.C.M. 705(c)(2)(D). Rule for Courts-Martial 1109 sets out the requirements for vacation of suspension of the sentence of a court-martial where there is a violation of the conditions of the suspension. *Id.* R.C.M. 1109. *See also* *United States v. Perlman*, 44 M.J. 615, 617 (N-M. Ct. Crim. App. 1996) (doubtful that accused can waive full extent of rights under R.C.M. 1109 as part of a pretrial agreement).

225. 1 M.J. 453 (C.M.A. 1976).

226. *Id.* at 456.

227. 36 M.J. 759 (N.M.C.M.R. 1992).

228. *Id.* at 761.

229. *Id.* (citing FRANCIS A. GILLIGAN & FREDERICK I. LEDERER, COURT-MARTIAL PROCEDURE sec. 12-25.20 (1991)).

In addition to finding waivers of specific rights unenforceable, as discussed earlier, the courts have found certain types of agreements, though not involving waiver of specific rights, contrary to public policy and fundamental fairness.

One problem area has been agreements that involve a promise to testify against another accused. Although a permissible term under RCM 705(c)(2)(B),²³⁰ an agreement to testify should be limited to a promise to provide truthful testimony. In *United States v. Gilliam*,²³¹ the COMA held as contrary to public policy an agreement that required an accomplice to testify a certain way against the accused in exchange for a reduced sentence to confinement. In this case, one of the appellant's two accomplices agreed to testify against the appellant in exchange for such a confinement cap. The accomplice agreed "to render testimony . . . which would establish conspiracy and premeditation by such individuals and would be able to identify the implements used by [the second accomplice] and [appellant]."²³² The court found this improper, because it required the accomplice to testify in a certain manner and thereby made the accomplice an "incompetent witness"²³³ against the appellant. Finding that the agreement required the accomplice to testify without regard to his oath as a witness, the court held that "[s]uch limitations and conditions on the giving of testimony should play no part in a pretrial agreement."²³⁴

Similarly, *United States v. Stoltz*²³⁵ involved an agreement between a witness and the convening authority in which the convening authority granted the witness immunity in return for the witness' promise to testify in accordance with his pretrial statement. The COMA found that the agreement required the witness "to testify under oath to the particular matters extracted from his written pretrial statement . . . regardless of the truth of the matters concerning which he had knowledge,"²³⁶ and reversed the decision.

An even more egregious pretrial agreement existed in *United States v. Scoles*,²³⁷ where the agreement provided for reduction of the accomplices'

230. MCM, *supra* note 2, R.C.M. 705(c)(2)(B).

231. 48 C.M.R. 260 (C.M.A. 1974).

232. *Id.* at 263.

233. *Id.*

234. *Id.* at 264.

235. 34 C.M.R. 241 (C.M.A. 1964).

236. *Id.* at 244.

237. 33 C.M.R. 226 (C.M.A. 1963).

confinement sentence by one year for each occasion that the accomplice testified against his co-accused. Finding that the agreement “offer[ed] an almost irresistible temptation to a confessedly guilty party to testify falsely in order to escape the adjudged consequences of his own misconduct,”²³⁸ the COMA found that this agreement violated public policy and reversed.

Agreements involving indeterminate terms may also be found to be fundamentally unfair. In *United States v. Spriggs*,²³⁹ the pretrial agreement provided for suspension of confinement and punitive discharge until such time as appellant completed a sexual offender program at his own expense. Because of the financial difficulties resulting from his no-pay status, the appellant began, but was unable to complete the sexual offender program. The convening authority vacated the suspension, and appellant was placed in confinement. The COMA held that a condition that could take the appellant up to fifteen years to complete—the sexual offenders program and follow-up—was an “unreasonably long” period of time within the meaning of RCM 1108(b).²⁴⁰

In *United States v. Gansemer*,²⁴¹ the COMA found that a pretrial agreement, in which the accused waived his right to an administrative separation board if the court did not adjudge a punitive discharge, did not violate public policy considerations or due process. Judges Wiss and Sullivan, however, while agreeing with the holding of the court due to the absence of prejudice, found this was an inappropriate purpose for pretrial agreements because it “seeks to use these criminal proceedings as a vehicle for the accused’s waiving his right to due process at a future administrative proceeding.”²⁴²

Terms involving fines are sometimes included in pretrial agreements. In a case not involving a pretrial agreement, but indicative of the court’s view of fine provisions, the Army Court of Criminal Appeals (ACCA) held in *United States v. Smith* that “there is no legal requirement that an accused realize an unjust enrichment from the offense(s) he committed before a fine may be adjudged.”²⁴³ The military judge, after Smith was convicted of felony murder, adjudged a fine that Smith was required to pay by the time he was considered for parole; otherwise he would be further confined

238. *Id.* at 232.

239. 40 M.J. 158 (C.M.A. 1994).

240. *Id.* at 162.

241. 38 M.J. 340 (C.M.A. 1993).

242. *Id.* at 344.

243. 44 M.J. 720, 722 (Army Ct. Crim. App. 1996).

for fifty years from that date, until the fine was paid or until Smith died, whichever occurred first. The court found the contingent confinement provision of the adjudged fine to be “void as a matter of public policy” because it presented an “undue intrusion into the parole authority of the Secretary of the Army . . . and the Army Clemency and Parole Board.”²⁴⁴

In *United States v. Marsters*,²⁴⁵ the Coast Guard Court of Military Review found that a waiver of the right to civilian and individual military counsel was an unenforceable term of an agreement. In *United States v. Sharper*,²⁴⁶ the Army Court of Military Review approved of the *Marsters* holding.

In *United States v. Cassity*,²⁴⁷ the NMCCA found an agreement unenforceable because of a provision concerning the relationship between a discharge and the adjudged confinement. The appellant’s pretrial agreement stated that, in exchange for a guilty plea, the convening authority would suspend a bad-conduct discharge provided that more than four months’ confinement was also adjudged. At trial by military judge alone, trial counsel argued for a bad-conduct discharge and three months’ confinement, while defense counsel argued for no bad-conduct discharge in return for “the maximum jail time allowed.”²⁴⁸ The appellant received less than four months’ confinement, and the convening authority did not suspend the bad-conduct discharge. Finding that “[t]he agreement here, when taken together with the parties’ arguments, reduced the sentencing process to a paradox,”²⁴⁹ the court agreed with the trial judge’s conclusion that “the condition on suspension was fundamentally unfair and violated public policy.”²⁵⁰ The NMCCA in *Cassity* ultimately proposed the following standard for determining whether an agreement violates public policy: “Pretrial agreement provisions are contrary to ‘public policy’ if they interfere with court-martial fact-finding, sentencing, or review functions or

244. *Id.* at 725.

245. 49 C.M.R. 495 (C.G.C.M.R. 1974).

246. 17 M.J. 803 (A.C.M.R. 1984).

247. 36 M.J. 759 (N.M.C.M.R. 1992).

248. *Id.* at 763.

249. *Id.* at 764. As noted by the court, the paradox referred to by the military judge was “a product of the ignorance of the military judge as to the terms of the sentence limitation before announcement of the sentence, linkage between the various forms of punishment, and the argument of the counsel in this case.” *Id.*

250. *Id.* at 765.

undermine public confidence in the integrity and fairness of the disciplinary process.”²⁵¹

The courts have applied a similar analysis to the enforceability of *sub rosa* agreements. The COMA first addressed such agreements in *United States v. Troglin*,²⁵² where the defense counsel’s agreement to waive three pretrial motions as part of the pretrial agreement was never reduced to writing and was unbeknownst to the accused at the time of trial. Two of the motions involved speedy trial and former jeopardy. The court held that “the facts of this case are sufficiently similar to those presented in *Cummings* to justify the same result.”²⁵³ The court found the unwritten nature of the agreement “all the more insidious since, being unrecorded, it was ostensibly hidden from the light of judicial scrutiny.”²⁵⁴

Both the *Manual for Courts-Martial* and the *Benchbook* incorporate the foregoing guidance. Rule for Courts-Martial 705(c)²⁵⁵ now provides that the accused must freely and voluntarily agree to each term in a pretrial agreement; RCM 705(d)(2) requires that “all terms, conditions, and promises between the parties shall be written;”²⁵⁶ and RCM 910(f)(3) mandates that, if a plea agreement exists, the military judge shall require disclosure of the entire agreement before the plea is accepted. The *Benchbook* further requires the military judge to inquire of both parties and the accused as to the existence of any agreement not contained in the written pretrial agreement.²⁵⁷ While this guidance seems clear, its practical application continues to generate litigation, in part because there is no specific requirement that pretrial agreements not involving a guilty plea be disclosed to the

251. *Id.* at 762.

252. 44 C.M.R. 237 (C.M.A. 1972).

253. *Id.* at 242.

254. *Id.* As one commentator recognized, while *Troglin* “reaffirms the public policy of ensuring the effectiveness of appellate review by prohibiting waiver of the right to present motions that will not be waived at trial and therefore, may be raised on appeal in the first instance,” it is unclear how the court would have held had the accused been aware of the waiver of former jeopardy and had he acknowledged such waiver at trial. See Smith, *supra* note 154, at 10, 14.

255. MCM, *supra* note 2, R.C.M. 705(c).

256. *Id.* R.C.M. 705(d)(2). See also *United States v. Mooney*, 47 M.J. 496 (1998). The COMA found no prejudice to the appellant when the military judge accepted his guilty plea in accordance with an oral pretrial agreement that was fully disclosed at trial and was otherwise permissible under R.C.M. 705. *Id.*

257. BENCHBOOK, *supra* note 4, at 20, 24. In a contested trial, the *Benchbook* does not provide for an inquiry into the existence of any pretrial agreements.

military judge.²⁵⁸ Nonetheless, the courts have uniformly condemned *sub rosa* agreements, whether involving a plea agreement or a pretrial agreement that does not involve a guilty plea.

In *United States v. Elmore*,²⁵⁹ the COMA qualified its decision in *Troglin* by holding that it “would not hesitate to strike down such a [gentlemen’s] agreement, if the undisclosed meaning violated public policy.”²⁶⁰ The ACMR, in *United States v. Corriere*,²⁶¹ interpreted the COMAs’ decision in *Elmore* to require scrutiny of the unwritten agreement itself before determining whether its existence is legally objectionable.²⁶² In *Corriere*, discussed earlier in the context of waiver of unlawful command influence, the appellant alleged that his defense counsel had agreed not to raise issues at trial concerning “discovery, constitutional issues, and unlawful command influence”²⁶³ and that this agreement was made without appellant’s knowledge. While acknowledging that *Troglin* required that “unwritten or so called gentlemen’s agreements. . . be revealed to the trial judge,”²⁶⁴ the court in *Corriere* held that “whether in a particular case a *sub rosa* agreement is legally objectionable depends on the nature and content of its specific provisions.”²⁶⁵ The court returned the case to The Judge Advocate General for corrective action, not because of the existence of a *sub rosa* agreement per se, but because the record was unclear as to the terms of the unwritten agreement involved. The court noted that “if these type provisions cannot be included in a plea bargain, they cannot be the subject of a *sub rosa* agreement upon which the plea bargain is conditioned.”²⁶⁶

That the courts have not adopted a per se rule requiring corrective action in cases involving *sub rosa* agreements is illustrated in *United States v. Myles*.²⁶⁷ In *Myles*, the COMA found a *sub rosa* plea agreement that called for the government’s withdrawal of certain charges and specifica-

258. As noted by Judge Vowell in *United States v. Rhule*, 53 M.J. 647 (Army Ct. Crim. App. 2000), RCM 705 does not explicitly require disclosing pretrial agreements not involving a guilty plea to the military judge. Similarly, RCM 910(f) requires only that plea agreements be disclosed. MCM, *supra* note 2, R.C.M. 910(f).

259. 1 M.J. 265 (C.M.A. 1976).

260. *Id.* at 264.

261. 20 M.J. 905 (A.C.M.R. 1985), *aff’d*, 24 M.J. 701 (A.C.M.R. 1987).

262. The court also cited *United States v. Myles*, 7 M.J. 132 (C.M.A. 1979).

263. 20 M.J. 905, 907 (A.C.M.R. 1985), *aff’d*, 24 M.J. 701 (A.C.M.R. 1987).

264. *Id.*

265. *Id.* at 908.

266. *Id.* Specifically cited were issues regarding unlawful command influence and the admissibility of a pretrial statement by the accused.

267. 7 M.J. 132 (C.M.A. 1979).

tions in return for the accused's plea of guilty to the remaining offenses. Distinguishing the case from *Green*²⁶⁸ and *King*,²⁶⁹ which required judicial inquiry into each term of a plea agreement, the court held, "This was not a case of judicial error, but of counsel error."²⁷⁰ Finding no prejudice to the appellant, the court affirmed the findings and sentence. The court, however, made clear its view of counsels' knowing nondisclosure of an agreement to the court.

[T]his finding does not in any way place our condonation on the practice followed by the counsel herein. Circumstances similar to this nondisclosure of a pretrial agreement could give rise to the assertion that counsel did not act within the parameters of the American Bar Association Code of Professional Responsibility as adopted by the armed services.²⁷¹

As discussed above, *sub rosa* agreements involving waiver of unlawful command influence issues are especially problematic and must be avoided. The court set aside the findings and sentence in *United States v. Bartley* upon discovery that the appellant's pretrial agreement may have involved the *sub rosa* waiver of an unlawful command influence motion.²⁷² While the appellant's guilty plea was found to be provident and voluntary, the court reversed because it was unable to ascertain whether the alleged unlawful command influence had induced the guilty plea.²⁷³ Similarly, the court ordered a *DuBay* hearing in *United States v. Sherman*²⁷⁴ to determine whether a *sub rosa* agreement had prevented the accused from raising an unlawful command influence motion as part of a pretrial agreement. Thus, while not all *sub rosa* agreements will result in corrective action, those involving unlawful command influence that is not adequately developed on the record will most likely result in remand or reversal.

The ACCA addressed *sub rosa* agreements most recently in *United States v. Rhule*,²⁷⁵ in which the appellant's forum selection was the product of a *sub rosa* agreement. Rhule, a warrant officer assigned to Fort Clayton,

268. 1 M.J. 453 (C.M.A. 1976).

269. 3 M.J. 458 (C.M.A. 1977).

270. *Myles*, 7 M.J. at 133.

271. *Id.* at 134.

272. 47 M.J. 182 (1997).

273. *Id.* at 187.

274. 51 M.J. 73 (1999).

275. 53 M.J. 647 (Army Ct. Crim. App. 2000).

Panama, entered into a pretrial agreement with the convening authority in which he agreed to plead guilty to several offenses and to be tried by military judge alone. During the providence inquiry, however, he made statements inconsistent with his pleas, and the military judge ultimately found his pleas improvident and entered pleas of not guilty.²⁷⁶

Defense counsel was aware that Rhule had engaged in additional misconduct that might result in additional charges should the trial be delayed, and that a delay of several weeks was probable if Rhule did not proceed to trial immediately. As the military judge was in Panama only on temporary duty, defense counsel was also aware that the government was anxious to try the case, and that trial counsel might be amenable to dismissing several of the charges should Rhule proceed to trial immediately before the same judge. After consultation with appellant, defense counsel offered to proceed to a judge-alone trial immediately, and the trial counsel agreed to dismiss several charges in return. This agreement was neither reduced to writing nor brought to the attention of the military judge.²⁷⁷

While appellant did not raise the impropriety of such an agreement on appeal, the Army court suspected the existence of a *sub rosa* agreement and ordered affidavits. Most troubling to the court was appellant's affidavit, in which he expressed concern about his decision to be tried by military judge alone, notwithstanding his counsel's advice. As noted by the court, "The appellant's affidavit reflects the problem with *sub rosa* agreements in general, but particularly so with regard to agreements involving waivers of trial rights."²⁷⁸ When the existence of a pretrial agreement is brought to the attention of the military judge, the court may then examine any waivers to expose and resolve any conflicts.²⁷⁹

In *Rhule*, the appellant apparently had a conflict with his waiver of trial by members, but the military judge was unable to resolve this conflict due to his lack of awareness of the agreement. While the court found no prejudice to the appellant in this case, Judge Vowell reminded counsel that: "pretrial agreements, like plea agreements, must be disclosed to the military judge. As our superior court noted in *Green*, judicial scrutiny at the trial level will enhance public confidence in the bargaining process and

276. *Id.* at 650.

277. *Id.* at 650-51.

278. *Id.* at 652.

279. *Id.*

will permit clarification of any ambiguities that ‘lurk within the agreements.’”²⁸⁰ Judge Vowell continued:

We recognize that, in the “give and take” of preparations for any criminal trial, counsel may come to common understandings. We do not wish to discourage counsel from discussing the issues and arriving at mutually agreeable decisions. Nor do we wish to discourage counsel from agreeing to contest at trial only those issues that are truly in dispute and central to the fact-finding process. What we do wish to discourage is the formation of secret or undisclosed agreements that involve such terms or conditions as those listed in R.C.M. 705(c)(2).²⁸¹

The clear message from the courts is that a pretrial agreement may exist only between the accused and the convening authority.²⁸² Secret, *quid pro quo* agreements between counsel concerning fundamental rights such as forum selection, witness production, stipulations, and waiver of procedural rights are contrary to the disclosure provisions of the Rules for Courts-Martial. They undermine public confidence in the integrity of the court-martial process, and they may implicate professional and ethical standards. *Sub rosa* agreements involving claims of unlawful command influence will not be tolerated, regardless of a showing of prejudice. While *Myles* and *Rhule* were affirmed notwithstanding the existence of *sub rosa* agreements, parties should avoid entering into such agreements as they violate the Rules for Courts-Martial and potentially jeopardize the finality of the case.

F. Stipulations of Fact

Most pretrial agreements require that the accused enter into a written stipulation of fact with the trial counsel concerning the facts and circumstances underlying the offenses to which the accused is offering to plead guilty.²⁸³ This document is usually drafted by the trial counsel and generally contains aggravation and other evidence allowed under RCM 1001,

280. *Id.* at 655 (citing *United States v. Green*, 1 M.J. 453, 456 (C.M.A. 1976)).

281. *Id.* at 653-54.

282. MCM, *supra* note 2, R.C.M. 705(a).

283. A pretrial agreement may require that the accused enter into a stipulation of fact concerning offenses for which he also enters a confessional stipulation. See *United States v. Bertelson*, 3 M.J. 314, 315 (C.M.A. 1977). This article does not address confessional stipulations.

often in an effort to avoid having to call impact witnesses or present evidence of injury or trauma. The use of a stipulation of fact is expressly authorized by RCM 705(c)(2)(A),²⁸⁴ and the government is permitted to require a stipulation of fact as part of a pretrial agreement.²⁸⁵ Often in issue, however, is whether uncharged misconduct may or should be included in the stipulation of fact, and whether the facts offered by the trial counsel are matters “directly relating to or resulting from”²⁸⁶ an offense of which the accused has been found guilty.

Uncharged misconduct that is not related to the charged offenses is generally not permitted at trial; however, the trial counsel will often attempt to include such uncharged misconduct in a stipulation of fact to ensure that the defense does not “beat the deal,” or achieve a sentence lower than the agreed cap. When confronted with a stipulation of fact, the military judge is required under RCM 811²⁸⁷ to inquire as to whether the parties understand and agree to the uses of the stipulation of fact, as well as its contents.

Before 1988, different views existed among practitioners and military judges regarding the authority of the military judge to deal with inadmissible evidence contained in a stipulation of fact. As former trial judge Colonel (COL) Herbert J. Green wrote in 1988, military case law was divided, at best.²⁸⁸ One view was that the military judge had no authority to rule on the admissibility of matters contained in a stipulation of fact, as this would improperly involve the military judge in the negotiation of the pretrial agreement. As COL Green noted, this view and its supporting cases held that “the proper place to consider the contents of stipulations is in counsel’s office prior to trial. The military judge is not an arbiter in pre-

284. MCM, *supra* note 2, R.C.M. 705(c)(2)(A).

285. *See also* United States v. Harrod, 20 M.J. 777, 779 (A.C.M.R. 1985) (“The government is prohibited neither by law nor by public policy from requiring an accused, pursuant to the terms of an pretrial agreement, to stipulate to aggravating circumstances surrounding the offenses to which the accused will plead guilty.”); United States v. Sharper, 17 M.J. 803, 807 (A.C.M.R. 1984) (“a comprehensive stipulation of fact promotes a fair and just trial by ensuring that the sentencing authority will consider not just the bare conviction of the accused, but those facts ‘directly related to the offense for which an accused is to be sentenced so that the circumstances surrounding the offense or its repercussions may be understood’”) (citing United States v. Vickers, 13 M.J. 403, 406 (C.M.A. 1982)).

286. MCM, *supra* note 2, R.C.M. 1001(b)(4).

287. *Id.* R.C.M. 811.

288. Colonel Herbert J. Green, *Stipulations of Fact and the Military Judge*, ARMY LAW., Feb. 1988, at 40.

trial negotiations and by entertaining such motions, he improperly inserts himself into such negotiations.”²⁸⁹ This view was adopted in 1984 by the ACMR in *United States v. Taylor*,²⁹⁰ where the court held that, if the parties could not agree to the contents of the stipulation, it should not be admitted into evidence.

A contrasting view was that a military judge’s refusal to rule on a motion regarding admissibility of evidence, including that contained in a stipulation of fact, was “an abrogation of his responsibility to ensure cases are fairly decided upon relevant, admissible evidence.”²⁹¹ This view was adopted by the ACMR in its 1987 decision, *United States v. Glazier*, which held, “A procedure which places an accused in a position wherein he or she may be required to agree to the admission of inadmissible uncharged misconduct in order to benefit from a pretrial agreement is fundamentally flawed.”²⁹² By this approach, the military judge would be required to rule on any defense motion to redact statements contained in a stipulation of fact. Uncertain, however, was whether the military judge also had the actual authority to redact evidence he found inadmissible, or if he was limited to merely informing the accused of his ruling and allowing the parties to then react accordingly.

The COMA resolved this matter in 1988 when *Glazier* came before it for review. The court expressly rejected *Taylor* for its holding that the military judge cannot act on objections to matters contained in the stipulation. In *Glazier*, the stipulation of fact was silent regarding whether the parties stipulated to the admissibility of the facts contained therein, or merely to the accuracy of the facts. The court found that in the absence of a “provision dealing with the admissibility of any of the facts contained therein . . . admissibility of any fact so stipulated is governed by the Military Rules of Evidence.”²⁹³ The military judge in *Glazier* had denied the defense motion for the redaction of several statements in the stipulation of fact. The court held that “it is true that if an accused withdraws from the stipulation, it fails, as does the agreement underlying the stipulation. However,

289. *Id.*

290. 21 M.J. 1016 (A.C.M.R. 1986).

291. *United States v. Glazier*, 24 M.J. 550, 554 (A.C.M.R. 1987), *aff’d*, 26 M.J. 268 (C.M.A. 1988).

292. *Id.* at 554.

293. 6 M.J. 268, 270 (C.M.A. 1988).

merely because counsel, with the consent of the accused, agreed that something is true does not make that fact *per se* admissible.”²⁹⁴

In his concurring opinion in *Glazier*, Chief Judge Everett went one step further and wrote that, even if the motion had been successful and the statements had been redacted, such altering of the stipulation would not entitle the government to withdraw from the pretrial agreement. Thus, it is the government’s burden to include in the stipulation of fact a provision regarding admissibility of the matters contained therein; otherwise, as in *Glazier*, the accused may object to inadmissible matter contained in the stipulation, and, at least according to Chief Judge Everett, he would not lose the benefit of his agreement inasmuch as “making such an objection successfully does not violate a pretrial agreement requiring the accused to enter into a stipulation of fact and does not entitle the government to abrogate the pretrial agreement.”²⁹⁵ The COMA ultimately found that the challenged misconduct in the stipulation was admissible in sentencing and therefore provided no relief.²⁹⁶

The court in *Glazier* indicated, however, that there is no prohibition against including otherwise inadmissible evidence in a stipulation of fact if both parties consent to the inclusion, especially “in a negotiated guilty plea where the accused is willing to stipulate to otherwise inadmissible testimony in return for a concession favorable to him from the Government, assuming no overreaching by the Government.”²⁹⁷ Relying on the *Glazier* decision, the ACMR in *United States v. Vargas* found that, while the stipulation of fact contained otherwise inadmissible evidence, that evidence “established a continuing and pervasive criminal enterprise by the appellant” and was therefore not “so unreasonable as to be unconscionable.”²⁹⁸

The COMA was faced with the same issue two years later in *United States v. Mullens*,²⁹⁹ which went to trial before the COMA’s decision in *Glazier*. In *Mullens*, the stipulation of fact had been signed by both parties and did not contain any provision concerning “‘judicial modification of the stipulation’ of fact.”³⁰⁰ At trial, defense counsel objected to certain acts of

294. *Id.*

295. *Id.* at 271 (Everett, C.J., concurring).

296. *Id.* at 270.

297. *Id.*

298. 29 M.J. 968, 971 (A.C.M.R. 1990).

299. 29 M.J. 398 (C.M.A. 1990).

300. *Id.* at 399.

uncharged misconduct contained in the stipulation, but the military judge, citing *Taylor*,³⁰¹ refused to rule on the objection. In accordance with *Glazier*, which rejected the *Taylor* rationale, the COMA held that Article 51(b), UCMJ, requires a military judge to rule on defense objections to a stipulation of fact and that the military judge should have done so in *Mullens*.³⁰²

The court has recently indicated that certain impermissible evidence may not be included in a stipulation of fact. In *United States v. Clark*,³⁰³ the CAAF found that the military judge erred by admitting a stipulation of fact that contained a reference to the accused's having taken a polygraph examination. Citing the Supreme Court's decision in *United States v. Sheffer*,³⁰⁴ upholding Military Rule of Evidence 707's ban against the use of polygraph evidence in courts-martial, Judge Effron for the majority held that the military judge should have struck the reference to a polygraph test from the stipulation. Senior Judge Everett, while concurring in the result, disagreed with the majority's conclusion that the military judge erred, noting that the Supreme Court has upheld the right of a defendant to waive the exclusion of otherwise impermissible evidence.³⁰⁵

V. Specific Performance of the Pretrial Agreement

The Supreme Court, in *Santabello v. New York*,³⁰⁶ recognized the right of a defendant to the benefit of his bargain in a plea agreement. This, of course, assumes that the defendant performs in accordance with his promises and satisfies his end of the deal, which Santobello had done. The Supreme Court vacated the lower court's judgment and remanded *Santabello* after the prosecutor failed to fulfill his part of the bargain.³⁰⁷

301. See *United States v. Taylor*, 21 M.J. 1016 (A.C.M.R. 1986).

302. As in *Glazier*, the court ultimately found no prejudice, as the uncharged misconduct was proper aggravation evidence under RCM 1001(b)(4). *Id.*

303. 53 M.J. 280 (2000).

304. 523 U.S. 303 (1998).

305. *Clark*, 53 M.J. at 284 (Everett, S.J., concurring). In *United States v. Mezzanatto*, 513 U.S. 196 (1995), the Supreme Court held that the defendant could waive his right against the government's use of statements he made during pretrial agreement negotiations, evidence otherwise barred by Federal Rule of Evidence 410. See *infra* text accompanying note 371.

306. 404 U.S. 257 (1971).

307. *Id.* at 263.

Rule for Courts-Martial 705(d)(4) permits either an accused or a convening authority to withdraw from a pretrial agreement. The power of a convening authority to withdraw, however, is more limited than that of an accused.³⁰⁸ Rule for Courts-Martial 705(d)(4)(B) provides, in part, that the convening authority may withdraw from a pretrial agreement “at any time before the accused begins performance of promises contained in the agreement, [or] upon the failure by the accused to fulfill any material promise or condition in the agreement.”³⁰⁹ While the appellate courts initially expressed reluctance in applying contract law principles to pretrial agreements, they have consistently applied the concept of “detrimental reliance” in the context of RCM 705 to determine whether ordering specific performance is appropriate when the convening authority unilaterally withdraws from an otherwise enforceable pretrial agreement.³¹⁰

The first case in which a military appellate court ordered, in effect, specific performance of a pretrial agreement was *United States v. Penister*, where, in an opinion written by Chief Judge Everett, the COMA gave a convening authority the choice of standing by his original pretrial agreement or withdrawing and dismissing the charges.³¹¹ The accused had agreed to enter pleas of guilty to an aggravated assault charge in return for the convening authority’s referral of the charges to trial by special court-martial. At trial, the accused entered pleas of guilty as agreed. During the providence inquiry, he stated that while he did not specifically remember firing the weapon involved in the assault, he did remember seeing the victim fall out of a chair after being shot, and that he was confident after reviewing all of the evidence that he had unlawfully fired the weapon and that he was guilty of the charged offense. Upon completion of the providence inquiry, the trial counsel requested that the military judge reject the plea of guilty, arguing that the accused’s statements during the providence inquiry failed to establish specific intent. The military judge agreed and rejected the plea. The accused then entered pleas of guilty to a lesser-

308. MCM, *supra* note 2, R.C.M. 705(d)(4)(A), 910(h)(1).

309. *Id.* R.C.M. 705(d)(4)(B).

310. In *Cummings*, Judge Ferguson warned against allowing pretrial agreements to become “contractual type documents” that substituted for the trial process itself. 38 C.M.R. 174, 178 (C.M.A. 1968). Similarly, Judge Fletcher expressed his concerns that a “market-place mentality” would “pervad[e] the plea-bargaining process” in *United States v. Dawson*, 10 M.J. 142, 150 (C.M.A. 1981). Chief Judge Sullivan flatly rejected the “contract rationale proffered by the majority” in *Weasler*, as “dead wrong.” 43 M.J. 15, 21 (1995). The court has, nonetheless, adopted many aspects of contract law, including the concept of detrimental reliance, in determining the enforceability of pretrial agreements and the intent of the parties.

311. 25 M.J. 148, 153 (C.M.A. 1987).

included offense to save the pretrial agreement, but the government withdrew from the agreement, withdrew the charges, and re-referred them to trial by general court-martial.³¹² Before his second trial, the accused entered into a new pretrial agreement with a new convening authority. Before trial began, however, he requested specific performance of the original agreement. The military judge denied the motion, and the accused entered pleas of guilty pursuant to the new pretrial agreement. The military judge accepted the accused's plea and entered findings of guilty.³¹³

On appeal, the COMA found that "the judge's erroneous rejection of the guilty plea was not a 'failure by the accused,'"³¹⁴ and that the accused had done "all within his power to assure fulfillment of the pretrial agreement . . . [but that] trial counsel—a representative of the convening authority—initiated action that prevented fulfillment of a condition of the pretrial agreement."³¹⁵ While recognizing the military judge's duty to ensure a provident plea, the court also noted that the military judge "may not arbitrarily reject a guilty plea."³¹⁶ Accordingly, the court held that the convening authority was not free to withdraw from the original pretrial agreement and that the accused was entitled to relief. The COMA affirmed the lower court ruling, which set aside the findings and the sentence, and returned the record of trial to the convening authority, "who was authorized either to direct special court-martial proceedings or to dismiss the charge and specification."³¹⁷

Three months after deciding *Penister*, the COMA decided *United States v. Manley*³¹⁸ where it found that an appellant had completed his performance under a pretrial agreement and was therefore entitled to the agreement's promised benefit. The accused entered into a pretrial agreement to plead guilty to several charges and specifications in return for the government's agreement not to present evidence at trial about an additional charged offense.³¹⁹ At trial, the military judge found the accused's guilty plea to one of the charges improvident; however, the trial counsel indicated that the convening authority would be bound by the agreement nonetheless. The trial counsel modified the pretrial agreement in accordance with

312. *Id.* at 151.

313. *Id.*

314. *Id.* at 153.

315. *Id.* at 152.

316. *Id.*

317. *Id.* at 149.

318. 25 M.J. 346 (C.M.A. 1987).

319. The agreement also included a sentence limitation.

the accepted plea and entered into a revised stipulation of fact, which deleted all references to the circumstances surrounding the improvident offense. Before proceeding, however, trial counsel informed the court of “changed circumstances” and that the government no longer intended to be bound by the amended pretrial agreement.³²⁰ Over defense objection, the military judge agreed, and the case proceeded to trial two weeks later.

On appeal, the COMA held that while the government could have withdrawn from the agreement when the appellant’s plea was determined improvident, it instead elected to modify the pretrial agreement and entered into a revised stipulation of fact. As such, “the accused not only had begun performance of the promises contained in the agreement—as that agreement had been modified at trial—but he had completed his performance.”³²¹ Citing *Penister* with approval, the court held that in accordance with RCM 705(d)(5), “a convening authority may not withdraw after an accused has performed all the material promises and conditions in the agreement.”³²²

The most recent case discussing specific performance of a pretrial agreement is *United States v. Villareal*.³²³ In that case, the CAAF held that the accused failed to demonstrate substantial prejudice as a result of the convening authority’s withdrawal and was not entitled to relief. The convening authority withdrew from a pretrial agreement based on pressure he received from the victim’s family, as well as advice he received from his “old friend and shipmate,”³²⁴ the superior convening authority. After the withdrawal, the case was transferred to a different convening authority.

On appeal, the appellant argued that unlawful command influence had caused the revocation of his pretrial agreement. The court addressed the unlawful command influence issue separately, finding that transferring the charges to a new convening authority cured any appearance of unlawful command influence.³²⁵ Writing for the majority, Chief Judge Cox noted that “appellant knew of the withdrawal from the pretrial agreement before

320. *Id.* at 349.

321. *Id.* at 351.

322. *Id.*

323. 52 M.J. 27 (1999).

324. *Id.* at 29.

325. *Id.* at 30. Judges Sullivan and Effron vehemently disagreed with this finding. Judge Effron commented that the original convening authority’s failure to transfer the case with the pretrial agreement placed appellant in the unfair position of having to negotiate a new agreement. *Id.* at 32.

he had an opportunity to rely on it in a manner that would legally prejudice his right to a fair trial.”³²⁶ Citing *Penister*,³²⁷ he agreed that “under certain circumstances, specific performance of a preexisting pretrial agreement will be ordered when an accused has relied upon the agreement and performed some affirmative act or omission equating to detrimental reliance.”³²⁸ In support of its finding of no detrimental reliance, Chief Judge Cox pointed out that no “pleas of guilty were entered in reliance on the agreement’s mitigating action,” but the court addressed no other factors that might constitute detrimental reliance in such cases.³²⁹

In an earlier case, *Shepardson v. Roberts*,³³⁰ Chief Judge Everett articulated additional factors that the CAAF might consider in determining whether specific performance was appropriate. In *Shepardson*, shortly after the accused and the general court-martial convening authority entered into a pretrial agreement, the convening authority was replaced.³³¹ The new convening authority ultimately withdrew from the pretrial agreement, advising defense counsel that in his opinion, the pretrial agreement did not “meet a standard of fairness to both the accused and the United States.”³³² At trial, the accused raised the issue of a pre-existing pretrial agreement, and the court allowed both parties to present argument. In the end, the court allowed the government to withdraw from the pretrial agreement.³³³

On appeal, the court briefly discussed detrimental reliance, which “includes any action taken by an accused in reliance on a pretrial agreement which makes it significantly more difficult for him to contest his guilt on a plea of not guilty.”³³⁴ Chief Judge Everett noted that, while the accused averred that he had made incriminating admissions because of his pretrial agreement, the military judge indicated that he would exclude any evidence of such admissions, thereby preventing such “reliance” from becoming detrimental. He distinguished this from a case where an accused, in reliance upon his pretrial agreement, provides “detailed infor-

326. *Id.* at 31.

327. 25 M.J. 148 (C.M.A. 1987).

328. *Villareal*, 52 M.J. at 30, 31.

329. *Id.* at 31.

330. 14 M.J. 354 (C.M.A. 1983).

331. The court’s opinion indicated that this change was unrelated to the original general court-martial convening authority’s exercise of discretion as a general court-martial convening authority. *Id.*

332. *Id.* at 355.

333. *Id.*

334. *Id.* at 358.

mation—perhaps in the form of a confessional stipulation—which was not previously available to the Government and would materially aid its case.”³³⁵ The court recognized that where an accused has “let the cat out of the bag,” he may then be “practically and psychologically . . . in an inferior position either for plea bargaining or for defending his case.”³³⁶ Finding no such detrimental reliance in *Shepardson*, the court denied the accused’s petition for relief.³³⁷

Before *Villareal* and *Shepardson*, in *United States v. Kazena*,³³⁸ the convening authority withdrew from a pretrial agreement when the accused engaged in additional misconduct after entering the pretrial agreement, but before referral of charges. The convening authority then entered into a subsequent pretrial agreement that included a charge related to the additional misconduct. On appeal, the appellant challenged the failure of the convening authority to take the action promised in the original agreement. The COMA found that the appellant failed to demonstrate detrimental reliance in that he had no realistic expectation, based on the additional charge, of receiving the benefit of his original agreement. Moreover, the appellant failed to “show that he was hindered in the preparation of his defense because of his reliance on the earlier agreement.”³³⁹ In his concurring opinion, Chief Judge Everett noted appellant’s “failure to call witnesses as to guilt or innocence who might otherwise have been available,”³⁴⁰ indicating a lack of detrimental reliance.

While the court has attempted—through *Kazena*, *Shepardson*, and *Villareal*—to define detrimental reliance, it has set a high standard. *Villareal*, which resulted in a three-two split on the court, held that even the appearance of unlawful command influence in withdrawing from a pretrial agreement is not sufficient to overcome a lack of detrimental reliance. Although Chief Judge Fletcher argued persuasively in the *Dawson* case that contract law principles should not be applied within the military justice system,³⁴¹ reading *Penister* and *Villareal* together invariably leads to

335. *Id.*

336. *Id.*

337. *Id.*

338. 11 M.J. 28 (C.M.A. 1981).

339. *Id.* at 33.

340. *Id.* at 35 (Everett, C.J., concurring).

341. See *United States v. Dawson*, 10 M.J. 142, 150 (C.M.A. 1981); see also *United States v. Penister*, 25 M.J. 148 (C.M.A. 1987).

the conclusion that contract principles do apply, at least insofar as the lawfulness of unilateral withdraw.³⁴²

Noteworthy in this context is *United States v. Bray*,³⁴³ where the accused pleaded guilty as part of a pretrial agreement but then withdrew to pursue a defense suggested by a defense sentencing witness. Later, the accused again decided to plead guilty and renegotiated a new agreement with the convening authority for a higher sentence cap than contained in the original pretrial agreement. Citing *Shepardson* and *Penister*, Bray argued on appeal that, because “he began performance of his promises and did everything within his power to assure fulfillment of the initial pretrial agreement,” he should receive the benefit of the lower sentence cap.³⁴⁴ The CAAF, however, agreed with the lower court’s finding that the appellant had withdrawn from his original pretrial agreement at his own risk, “as a result of informed, counseled choices he made, and for which he alone is responsible.”³⁴⁵ The court further held that “having properly withdrawn from a pretrial agreement, a convening authority can enter a new agreement with a higher sentence limitation than in the original agreement.”³⁴⁶ The court also noted that appellant had not shown detrimental reliance on the first pretrial agreement.³⁴⁷

VI. Post-Trial Negotiation

Pretrial agreements are, by definition, agreements made before completion of the trial. As discussed above, most involve waiver of certain rights, before or during trial, in return for specific action by the convening authority. Nevertheless, in its 1999 term, the CAAF decided two cases out of the same general court-martial jurisdiction upholding negotiation of agreements after trial. These decisions continue to reflect the CAAF’s rejection of Judge Ferguson’s restrictive view of pretrial agreements in

342. Indeed, the COMA held in *United States v. Acevedo*, that “we look to the basic principles of law when interpreting pretrial agreements.” 50 M.J. 169, 172 (1999).

343. 49 M.J. 300 (1998).

344. *Id.* at 307.

345. *Id.*

346. *Id.*

347. *Id.*

*Cummings*³⁴⁸ and allow a great deal of flexibility in negotiations between the accused and the convening authority.

In *United States v. Dawson*,³⁴⁹ the pretrial agreement provided that the first thirty days of any adjudged confinement would be converted into one and a half days of restriction for each day of confinement and that any confinement in excess of thirty days would be suspended. At trial, Private Dawson received 100 days of confinement and was placed on restriction immediately after trial, as provided under the agreement. While on restriction, she missed a muster and was informed that a proceeding would be held to vacate the suspended sentence based on her breaking restriction. She then absented herself from her unit and was eventually placed in desertion status.³⁵⁰

During her absence and without counsel present, the command held a proceeding under RCM 1109 and vacated the suspended sentence. Private Dawson was eventually apprehended, placed in confinement, and charged with unauthorized absence. At this point, the convening authority had not yet taken initial action on the sentence concerning the original offenses. Private Dawson, in an initiative separate from her RCM 1105 matters on the original charges, entered into an agreement with the convening authority in which she agreed (after the fact) to waive her right to be present at the hearing to vacate the original suspension. She also agreed that the convening authority would no longer be bound by the pretrial agreement, that the convening authority could approve the original sentence in return for his agreement to withdraw the new charge for unauthorized absence, and that she would receive day-for-day credit toward her sentence for all of the time served in confinement for the post-trial offense. Her defense counsel specifically requested that the convening authority approve this agreement.³⁵¹

Judge Effron wrote for all five judges of the court and opened his discussion by stating that *Dawson* “does not involve post-trial renegotiation of a judicially approved pretrial agreement; nor does it otherwise threaten to undermine the purposes of the judicial inquiry under *United States v. Care . . .*”³⁵² Rather, the post-trial agreement in *Dawson* “involves sepa-

348. See *United States v. Cummings*, 38 C.M.R. 174 (C.M.A. 1968) (citing *United States v. Allen*, 25 C.M.R. 8 (C.M.A. 1957)).

349. 51 M.J. 411 (1999).

350. *Id.* at 411.

351. *Id.* at 411-12.

352. *Id.* at 412-13.

rate, post-trial proceedings that are subject to appellate review, but are not subject to review by the military judge who presided over the trial.”³⁵³ While the terms of the post-trial agreement clearly implicated those of the pretrial agreement by requiring the accused to remain bound by them while relieving the convening authority of his obligations, the real changes involved matters arising post-trial that were independent of the trial and solely within the convening authority’s discretion. Both the RCM 1109 vacation proceeding and the convening authority’s decision regarding the disposition of the post-trial offense of unauthorized absence were matters before the command, and Private Dawson freely chose to negotiate with the command regarding these matters.³⁵⁴ While it is unclear whether her defense counsel advised her to enter such an agreement, the court viewed her counsel’s endorsement of the agreement as evidence that Private Dawson made this decision with the advice of counsel. The command decisions involved in this post-trial agreement, therefore, did not require inquiry by a military judge.³⁵⁵

Argued a day later and decided the same day as *Dawson*, *United States v. Pilkington*³⁵⁶ also involved post-trial negotiation with the convening authority. In this case, however, the accused offered post-trial to exchange his suspended bad-conduct discharge for a cap on his term of confinement. The original agreement provided that in return for the appellant’s pleas, the convening authority would suspend any adjudged discharge for a period of twelve months following trial. Lance Corporal Pilkington’s sentence included a bad-conduct discharge and 150 days of confinement. After trial and contrary to his defense counsel’s advice, the accused offered to exchange the suspension of the punitive discharge for a ninety-day cap on his term of confinement. The CAAF looked to *Dawson* and its holding that “because an arms-length negotiation had been conducted, there was no reason not to affirm [appellant’s] decision to enter into the agreement,”³⁵⁷ Judge Cox, writing for the majority in a three-two split, defined the issue as “whether appellant was operating of his own free will by proposing this new agreement while being confined.”³⁵⁸ Noting that Lance Corporal Pilkington had received the advice of his counsel and already knew the elements of his adjudged sentence, the court found that

353. *Id.* at 413.

354. Judge Effron wrote that, “In that regard, it is important to note that a vacation proceeding is collateral to the court-martial and is held within the command structure.” *Id.*

355. *Id.*

356. 51 M.J. 415 (1999).

357. *Id.* at 416.

358. *Id.*

it “was solely [his] choice to approach the convening authority to bargain for less confinement . . . and it is not for us to substitute our judgment on this personal matter in place of his.”³⁵⁹

Judges Sullivan and Efron filed a joint dissent, writing, “Judicial scrutiny of a pretrial agreement is well established in the military justice system . . . [whereas] the majority allows alteration of the pretrial agreement in this case by means of a post-trial modification without such judicial scrutiny.”³⁶⁰ In response to the majority’s sanctioning of “such an alteration, simply because appellant submitted a request to do so,”³⁶¹ the dissent noted that “[m]utual assent of the parties is not sufficient to render a pretrial agreement valid.”³⁶² Distinguishing this case from *Dawson*, Judges Sullivan and Efron found that Lance Corporal Pilkington’s pretrial agreement was “undermined and turned into an ‘empty ritual’ because the post-trial agreement supplanted it.”³⁶³

VII. Trends

Several trends are evident in the cases dealing with pretrial agreements. Chief Judge Everett noted in *United States v. Schaffer*³⁶⁴ that “many courts and legislatures now seem willing to allow increasing flexibility in plea bargains.”³⁶⁵ He expressed a similar view in his concurring opinion in *United States v. Mitchell*,³⁶⁶ where he took issue with the majority’s holding that “we cannot condone a command practice which expands the normal scope of plea bargaining,”³⁶⁷ language that echoes the holdings of *Cummings*³⁶⁸ and *Holland*.³⁶⁹ His approach to the role of the pretrial agreement in military criminal litigation marked a noticeable turn from the conservative *Cummings* court, which discouraged the use of the pretrial agreement for anything but bargaining on the charges and sentence. Chief

359. *Id.*

360. *Id.* at 417 (Sullivan and Efron, JJ., dissenting).

361. *Id.*

362. *Id.*

363. *Id.*

364. 12 M.J. 425 (C.M.A. 1982).

365. *Id.* at 427.

366. 15 M.J. 238 (C.M.A. 1983).

367. *Id.* at 240.

368. *See* *United States v. Cummings*, 38 C.M.R. 174 (C.M.A. 1968) (citing *United States v. Green*, 25 C.M.R. 8 (C.M.A. 1957)).

369. *See* *United States v. Holland*, 1 M.J. 58 (C.M.A. 1975).

Judge Everett wrote in *Mitchell* that “[as] long as the trial and appellate processes are not rendered ineffective and their integrity is maintained . . . some flexibility and imagination in the plea-bargaining process have been allowed by our Court.”³⁷⁰

The Supreme Court made similar comments about pretrial agreements in *United States v. Mezzanatto*.³⁷¹

The plea bargaining process necessarily exerts pressure on defendants to plead guilty and to abandon a series of fundamental rights, but we have repeatedly held that the government “may encourage a guilty plea by offering substantial benefits in return for the plea.” “While confronting a defendant with the risk of more severe punishment clearly may have a ‘discouraging effect on the defendant’s assertion of his trial rights, the imposition of these difficult choices [is] an inevitable’—and permissible—‘attribute of any legitimate system which tolerates and encourages the negotiation of pleas.’”

Another discernible trend is in the area of blanket waivers where the courts have recently taken a less paternalistic view of their role in policing the terms of pretrial agreements. Where the ACMR found the blanket waiver in *Elkinton* to be “contrary to public policy and therefore void,”³⁷² the CAAF, in both *Rivera* and *Forester*, found similar waiver provisions, while overly broad, to be enforceable so long as the provisions did not prejudice the appellant’s exercise of his rights.³⁷³

Similarly, recent decisions place responsibility squarely on the parties to draft pretrial agreements that clearly communicate their intent. Applying a contract law framework to interpreting pretrial agreements, the CAAF looks to the “four corners” of the pretrial agreement and the conduct of the parties at trial to determine the intended result.

In *United States v. Acevedo*,³⁷⁴ for example, the pretrial agreement provided for suspension of a dishonorable discharge. It did not specify whether a bad-conduct discharge, if adjudged, would be suspended. The

370. *Mitchell*, 15 M.J. at 241 (Everett, C.J., concurring).

371. 513 U.S. 196, 209-10 (1995) (internal citations omitted).

372. *United States v. Elkinton*, 49 C.M.R. 251, 254 (A.C.M.R. 1974).

373. *United States v. Rivera*, 46 M.J. 52, 54 (1997); *United States v. Forrester*, 48 M.J. 1, 4 (1998).

374. 50 M.J. 169 (1999).

accused was sentenced to a bad-conduct discharge, which the convening authority approved. The court rejected appellant's claim that the discharge should have been suspended and, while indicating that the trial judge might have created a clearer record on this point, held that "[t]he plain language of appellant's pretrial agreement does not prohibit the approval of an unsuspended bad-conduct discharge."³⁷⁵ While the language was ambiguous, the CAAF was able to ascertain the intent of the parties by examining the record, in which defense counsel indicated his understanding that a bad-conduct discharge, if adjudged, would not be suspended.³⁷⁶

The dissenters in *Acevedo* took a more paternalistic approach, interpreting the agreement to provide that a suspended dishonorable discharge was the most severe form of discharge that the appellant could receive and that an unsuspended bad-conduct discharge is more severe than a suspended dishonorable discharge. The majority flatly rejected this interpretation, holding that "while the terms of the agreement, as proposed by the defense, create something of crapshoot with respect to discharge, ours is not to second-guess the parties in this regard."³⁷⁷ The companion case to *Acevedo*, tried before the same trial judge one day later, *United States v. Gilbert*,³⁷⁸ involved the same language in its pretrial agreement and yielded the same result.

The Coast Guard Court of Criminal Appeals took a similar approach to interpreting ambiguous terms in a pretrial agreement a year before *Acevedo*, in *United States v. Sutphin*.³⁷⁹ There, the service court held that an adjudged fine must be set aside when there is no evidence that the accused understood that he could receive a fine under the terms of his pretrial agreement. In *Sutphin*, the pretrial agreement categorized the types of punishment affected by the pretrial agreement, including a category named "forfeiture or fine." That category included a limitation on forfeitures of pay and allowances but did not mention the possibility of a fine. The last category provided that "[a]ll other lawful punishments, if adjudged, may be approved."³⁸⁰ The military judge did not inquire as to whether the

375. *Id.* at 172. The court also noted several avenues of relief that defense counsel could have pursued but did not, such as informing the court of any discrepancy between his and the court's understanding of the pretrial agreement, or raising the matter in appellant's R.C.M. 1105 or 1106 matters. *Id.* at 173.

376. *Id.*

377. *Id.* at 174.

378. 50 M.J. 176 (1999).

379. 49 M.J. 534 (C.G. Ct. Crim. App. 1998).

380. *Id.* at 535.

accused understood his pretrial agreement to allow imposition of a fine; however, when defense counsel stated for the record his calculation of the maximum punishment, it did not include a fine. Trial counsel concurred with the defense's calculation. In holding that the pretrial agreement precluded approval of a fine, the Coast Guard court relied on *United States v. Williams*, in which the COMA held that "a general court martial may not include a fine in addition to total forfeitures in a guilty-plea case unless the possibility of a fine has been made known to the accused during the providence inquiry."³⁸¹ The court also noted that the conduct of the parties at trial indicated their understanding that the pretrial agreement precluded the convening authority from approving a fine.³⁸²

In *United States v. Mitchell*,³⁸³ the CAAF addressed the enforcement of an agreement in which the intent of the parties was clear, but deprived the accused of the benefit of his bargain. Based on the application of an Air Force regulation unbeknownst to any of the parties to the pretrial agreement, the appellant's service terminated after his trial, and he entered a no-pay status. This frustrated the intent of the pretrial agreement, which was designed to allow the appellant's family to continue to receive his pay and allowances.³⁸⁴ The crafting of the monetary terms of the pretrial agreement were premised on all parties' understanding that appellant's enlistment extension was effective, and that he would therefore continue to draw pay and allowances even if confined. Based on the application of the Air Force regulation, this intent was frustrated when appellant unexpectedly entered a no-pay status. The CAAF returned the case to the Air Force court and held that, if the Secretary of the Air Force was unable to provide sufficient relief to appellant, the lower court "may set aside the findings, as well as the sentence, and authorize a rehearing based on appellant's improvident plea."³⁸⁵

The *Mitchell* decision stood in stark contrast to *United States v. Williams*,³⁸⁶ a case decided by the NMCCA just four months earlier. In *Williams*, the appellant entered into a pretrial agreement that required him to plead guilty to numerous bad check offenses. In return, the convening

381. *Id.* (citing *United States v. Williams*, 18 M.J. 186, 189 (C.M.A. 1984)).

382. *Id.*

383. 50 M.J. 79 (1999).

384. The offenses for which Master Sergeant Mitchell was tried occurred on 12 July 1994, before the effective date of Article 58(b), UCMJ, which now provides for automatic forfeiture of pay and allowances in conjunction with confinement. UCMJ art. 58(b) (2000).

385. *Mitchell*, 50 M.J. at 83.

386. 49 M.J. 542 (N-M. Ct. Crim. App. 1998), *rev'd* 53 M.J. 293 (2000).

authority would agree to suspend any fine or forfeitures for a period of twelve months and to waive automatic forfeitures pursuant to Article 58b, UCMJ. The appellant stated in a post-trial affidavit that the only reason he entered into the pretrial agreement was in return for these financial concessions. The appellant was on legal hold at the time of his court-martial, as his term of service had expired two weeks earlier. Unbeknownst to all parties to the agreement, a Department of Defense regulation provided that sailors in a legal hold status, who are later convicted of an offense under the UCMJ, forfeit the right to accrue pay or allowances after their conviction.³⁸⁷

The NMCCA held that “the convening authority did not have a duty to determine the collateral consequences of the appellant’s legal hold status”³⁸⁸ to ensure that the bargain would be meaningful. Because the court found that “the Government did not actively induce the appellant to enter into a potentially ineffective pretrial agreement through misrepresentation,” the pretrial agreement was held valid and enforceable.³⁸⁹ The decision was short-lived, however. In August 2000, the CAAF reversed *Williams*, holding:

Where, as here, an accused pleads guilty relying on incorrect advice from his attorney on a key part of the pretrial agreement (entitlement to pay), and the military judge shares that misunderstanding and fails to correct it, a plea can be held improvident. Ignorance of the law on a material matter cannot be the prevailing norm in the legal profession or in the court-martial process.³⁹⁰

Decided the same day as *Williams*, *United States v. Hardcastle*³⁹¹ was a CAAF case that involved a similar fact pattern. Lance Corporal Hardcastle’s pretrial agreement contained two forfeiture provisions providing that the convening authority would defer and waive forfeitures in excess of \$400 pay per month so that the accused could support his wife and son. During the providence inquiry, the military judge indicated that the terms were proper and that it was the understanding of all of the parties that the accused would be able to receive \$400 pay per month under the agreement. Unbeknownst to any of the parties, the accused’s enlistment expired eleven

387. *Id.* at 545.

388. *Id.* at 547.

389. *Id.*

390. *United States v. Williams*, 53 M.J. 293 (2000).

391. *United States v. Hardcastle*, 53 M.J. 299 (2000).

days after trial, resulting in a no-pay status; as a result, he was unable to receive the \$400 pay per month for which he had bargained. Citing *United States v. Bedania*,³⁹² in which the court held that relief is appropriate when the appellant's misunderstanding of a major collateral consequence of his conviction is induced by the military judge's comments during the providence inquiry, the CAAF set aside the findings and the sentence and returned the case to The Judge Advocate General of the Navy.³⁹³

Hardcastle relied upon *United States v. Olson*,³⁹⁴ a case in which the appellant's pretrial agreement included a promise to "make restitution to the United States of any monies owed by him as a result of the charges against him."³⁹⁵ Under the agreement, Olson pleaded guilty and agreed to make restitution for the false claim specification that originally alleged \$1806 worth of bad vouchers, but that was amended before trial to reflect only \$646.50. After trial, the local finance office administratively recouped an additional \$1107.07 and advised the appellant that he could contest this action through administrative channels. The appellant protested this action and requested that the military judge and the convening authority order a subsequent hearing to litigate the providence of his guilty plea, in light of the unforeseen recoupment from his pay.

Citing *Bedania* for the proposition that "an accused is not entitled to relief when, after pleading guilty, he discovers that there are unforeseen collateral consequences of his conviction,"³⁹⁶ the court found that "instead of being collateral to the court-martial, the financial obligation to 'make restitution' has been interjected into the criminal proceeding by the pretrial agreement and by the parties' interpretation of the agreement."³⁹⁷ Accordingly, the *Olson* court found that a "meeting of the minds never occurred with respect to the restitution provision" and that "appellant is entitled to have his pleas of guilty withdrawn or to have the agreement conformed, with the Government's consent, to appellant's understanding."³⁹⁸

392. 12 M.J. 373, 376 (C.M.A. 1982).

393. Based on *Mitchell*, the government conceded on appeal that "because appellant did not receive the benefit of his bargain, his pleas were improvident." *Williams*, 53 M.J. at 302.

394. 25 M.J. 293 (C.M.A. 1987).

395. *Id.* at 294.

396. *Id.* at 297.

397. *Id.*

398. *Id.* at 298.

The court's remedy was to set aside the adjudged \$1000 fine as a means of providing the appellant with the benefit of his bargain.³⁹⁹

Chief Judge Everett noted in *Schaffer* that “despite our pronouncements [to limit pretrial agreements to bargaining only on the charges and the sentence], increasingly sophisticated plea bargains have been devised.”⁴⁰⁰ The forfeiture provisions in *Hardcastle*, designed to avoid the consequences of Articles 57(a) and 58(b), UCMJ,⁴⁰¹ are an example of such complex terms. The *Hardcastle* case serves as a warning that, where complex bargaining terms are part of the pretrial agreement, all parties must understand the rules and regulations that govern those terms if the accused is to receive the benefit of the agreement. While the *Acevedo* and *Gilbert* decisions reflect the court's increasingly hands-off role in interpreting pretrial agreements, *Hardcastle* and *Olson* demonstrate the court's willingness to step in when the parties fail to demonstrate clearly a meeting of the minds as to the underlying terms of the pretrial agreement.

Consistent throughout the development of case law surrounding the pretrial agreement, however, has been the CAAF's opposition to provisions that impinge upon the fundamental rights of an accused. Specifically, the court has focused on the accused's right to fully prepare his defense fully and to litigate matters fully—such as unlawful command influence—that are inherent in a fair trial and a reliable result. While Chief Judge Everett encouraged a more liberal use of pretrial agreements in *Mitchell*, he agreed with the majority's holding that the convening authority's agreement to grant clemency, if trial were completed within fifteen days of referral, was objectionable due to its “tendency to discourage an accused from carefully preparing his defense and fully litigating his case at the court-martial.”⁴⁰² Whether such terms violate public policy or threaten fundamental rights inherent in a fair trial remains a matter of case-by-case analysis.

The CAAF decision in *United States v. Davis*⁴⁰³ perhaps best demonstrates the court's present view towards its role in overseeing pretrial agreements. In *Davis*, the accused entered into a pretrial agreement that provided for a confessional stipulation and an agreement to present no evidence on the merits. Sergeant Davis entered pleas of not guilty but also

399. *Id.*

400. *United States v. Schaffer*, 12 M.J. 425, 427 (C.M.A. 1982).

401. UCMJ arts. 57(a), 58(b) (2000).

402. *United States v. Mitchell*, 15 M.J. 238, 240 (C.M.A. 1983).

403. 50 M.J. 426 (1999).

agreed to a confessional stipulation that established virtually every element of each charged offense. In return, the convening authority agreed to limit his sentence to confinement. On appeal, Sergeant Davis asserted that his pretrial agreement “‘turned his court-martial into an empty ritual,’ deprived him of due process in violation of RCM 705(c)(1)(B) . . . [,] circumvented Article 45(a), U.C.M.J., 10 U.S.C. 845(a), R.C.M. 910(c), and *United States v. Care*, 18 U.S.C.M.A. 535, 40 C.M.R. 247 (1969); and compromised the integrity of the court-martial.”⁴⁰⁴ Based on his failure to establish what, if any, evidence he would have presented had the military judge rendered the agreement illegal, and in the absence of any evidence of government overreaching, the CAAF found no prejudice and granted no relief. While the court noted that “we do not condone or encourage [the procedures employed in this case], we are satisfied that no relief is warranted.”⁴⁰⁵ Thus, *Davis* is consistent with the trend, and it exemplifies the CAAF’s increasingly hands-off approach when reviewing pretrial agreements.

VIII. Conclusion

Judge Ferguson of the COMA, in a dissenting opinion in *United States v. Villa*⁴⁰⁶ wrote: “The pretrial agreement itself is an aberration in the law, peculiar to military justice alone. It has been employed in military trials since 1953. Although this court has approved its use, such approval has not been without reservation.”⁴⁰⁷ Judicial fears concerning the propriety of such agreements and their potential for abuse gave rise to a long journey for the pretrial agreement, from the conservative views of the *Ferguson* court, to the more expansive interpretations under Chief Judge Everett, to the decisions of the current CAAF dealing with complex factual scenarios and bargaining agreements that far surpass the parameters initially set by the courts first dealing with pretrial agreements in the 1960s and 1970s.

While the *Military Judges’ Benchbook* and caselaw now provide much more guidance and uniformity than existed when the plea bargain first made its appearance in 1953, counsel continue to formulate new ways of negotiating that continue to challenge the appellate courts to define and

404. *Id.* at 428

405. *Id.* at 431.

406. 42 C.M.R. 166 (C.M.A. 1970).

407. *Id.* at 172 (Ferguson, J., dissenting).

delineate further the convening authority's power to strike a deal with an accused.

While the COMA initially expressed great concern with the potential for abuse in the pretrial negotiation process and for violation of the rights of the accused, today's CAAF has allowed the playing field to develop substantially, moving away from holding pretrial agreements to the letter of the RCM and applying instead a due process, fundamental fairness analysis to determine their validity. By departing from a strict adherence to negotiating solely on the charges and the sentence, the CAAF has paved the way for much broader discretion on the part of convening authorities for entering into pretrial agreements with innovative terms. Its decision in *Davis* makes clear that even a term found to be contrary to public policy will not invalidate a pretrial agreement absent prejudice to the accused. Given such parameters, the playing field has never before been so broad, affording both the accused and the convening authority unlimited opportunities to bargain with each other within the confines of fair play.

IN DEFENSE OF THE GOOD SOLDIER DEFENSE¹RANDALL D. KATZ² & LAWRENCE D. SLOAN³

The trial counsel . . . in a court-martial at Fort Anywhere has presented the government's case-in-chief. . . . The government rests and trial counsel prepares to "cut another notch in the handle of his pistol," quite secure in the knowledge that the facts will carry the day. The defense case consists of four witnesses—the accused's platoon sergeant, platoon leader, first sergeant, and company commander. Collectively, they testify that the accused is the best soldier they have ever seen; that he sets the example for his peers, subordinates, and superiors; and that on a scale of one to ten . . . the accused is nothing less than a nine. The defense case never remotely addresses the facts of the alleged drug offenses. In final argument . . . [d]efense counsel argues that before a finding of guilty can be returned the members must be convinced of the accused's guilt beyond a reasonable doubt and that the character evidence he presented raises such a doubt. . . . Approximately fifteen minutes later the members return and announce the finding: Not Guilty.⁴

I. Introduction

The above example illustrates the potential impact of the good soldier defense on the results of a court-martial. What is commonly referred to as the good soldier defense involves the presentation by an accused service

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4. Captain Robert Smith, *Military Rule of Evidence 404(a)(1): An Unsuccessful Attempt to Limit the Introduction of Character Evidence on the Merits*, 33 FED. B. NEWS & J. 429 (1986). This quote provides a significantly abridged excerpt from a hypothetical situation described by Captain Smith.

member of evidence that highlights his good military character in an effort to convince members of the court-martial panel that he did not commit the crime of which he is accused. The accused submits written performance evaluations and oral testimony during trial to showcase his good military character. The military justice system has a strong tradition of permitting this evidence to be considered at courts-martial; such evidence has been permissible for almost seventy-five years. Recently, however, there has been increased criticism of the good soldier defense. While there are certainly valid arguments that can be made for both retaining and prohibiting the defense, the authors of this article believe that the good soldier defense serves a valid purpose and should be maintained.

Part II of this article begins with an overview of the contours and operation of the good soldier defense. It discusses Military Rule of Evidence (MRE) 404(a), which permits the introduction of evidence of good military character, and the manner in which the courts have interpreted this rule. Part II concludes with a comparison of MRE 404(a) and its counterpart in the Federal Rules of Evidence (FRE). Part III then turns to a discussion of the controversy surrounding the good soldier defense. This section advances four arguments that weigh strongly in favor of maintaining the good soldier defense, and then identifies the primary arguments raised by the critics of the defense. While these criticisms appear valid on their face, they can all be credibly rebutted.

II. The Good Soldier Defense

A. What is the Good Soldier Defense?

What is commonly termed the “good soldier defense” refers to an accused service member’s introduction of evidence of good military character in an attempt to convince the military judge or members that he did not commit the offense for which he is charged. Generally, the introduction of evidence of a defendant’s good military character is intended to provide the basis for an inference that the accused is too professional a soldier to have committed the offense with which he is charged.⁵ The good soldier defense is not an affirmative defense. It will not be sufficient to exonerate a service member who is shown or admits to having committed all the ele-

5. See Lieutenant Colonel Paul A. Capofari, *Military Rule of Evidence 404 and Good Military Character*, 130 MIL. L. REV. 171, 171 (1990).

ments of the crime for which he is charged.⁶ Instead, defense counsel rely on the good soldier defense to create sufficient doubt in the minds of the judge or jury such that they could find reasonable doubt that the accused committed the charged offense.⁷

The Supreme Court has recognized that evidence of the character of the accused “alone, in some circumstances, may be enough to raise a reasonable doubt of guilt.”⁸ This quoted language has been incorporated into the military judge’s instructions related to character evidence.⁹ It is obviously preferable for the defense to utilize other means of creating doubt regarding the accused’s guilt in addition to character evidence, but the defense may create sufficient doubt relying solely on character evidence. Therefore, although the good soldier defense is not an affirmative defense, the accused may rely solely on good character evidence for his defense.

One must remember that the military trial process is a bifurcated one in which the determination of guilt or innocence is separate from sentencing.¹⁰ While evidence of good military character can be relevant at both stages of the process, the good soldier defense refers generally to use of evidence of good military character during the assessment of guilt or innocence.¹¹ Thus, the following discussion of the good soldier defense specifically addresses the use of character evidence for the purpose of assessing the guilt or innocence of the accused. Even though similar evidence bearing on the character of the accused may be introduced at both phases of the process, there is not much criticism of the use of such evidence during the sentencing phase. The use of character evidence by a guilty defendant, in order to mitigate the harshness of his punishment dur-

6. This is in marked contrast to an affirmative defense, such as self-defense, which allows a defendant to be exonerated even though all the elements of the crime can be proved beyond a reasonable doubt.

7. Military trials place the same burden of proof on the prosecution as do civilian criminal courts in this country. The prosecutor must prove guilt beyond a reasonable doubt.

8. *Michelson v. United States*, 335 U.S. 469, 476 (1948).

9. See U.S. DEP’T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES’ BENCHBOOK ¶ 7-8-1 (1 Apr. 2001).

10. See 3 FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE § 23-11.00 (1999).

11. See *id.*

ing the sentencing phase, is a far less controversial practice and will not be the focus of this article.

Typically, the defense presents character evidence through the live testimony of superior officers of the accused, or from associates of the accused. In *United States v. Vandelinder*,¹² the Court of Military Appeals (COMA) (the predecessor of the Court of Appeals for the Armed Forces (CAAF)) made it clear that in addition to live testimony, enlisted performance reports could be admitted as evidence of good military character. Writing for the *Vandelinder* majority, Chief Judge Everett pointed out that:

The admissibility of these opinions [about a service member's military character contained in Enlisted Performance Reports] fulfills an important purpose . . . by permitting a service-member to reap the benefits of the "good military character" he has demonstrated in years past, even though because of death, distance, or other reasons, his former superiors and associates may be unavailable to testify for him at his trial.¹³

Specific instances of conduct described on the reports, however, cannot be admitted¹⁴ per MRE 405(a) and (b).¹⁵ Standard military appraisal forms contain five categories: (1) professional performance,¹⁶ (2) military behavior,¹⁷ (3) leadership and supervisory ability,¹⁸ (4) military appearance,¹⁹ and (5) adaptability.²⁰ All of these categories, however, may not be admissible for good soldier defense purposes. Chief Judge Everett observed: "Admittedly, a diversity of views may exist as to the precise limits of 'good military character.' Perhaps, it does not include all the five 'traits' rated on the Reports of Enlisted Performance; or perhaps it includes

12. 20 M.J. 41 (C.M.A. 1985).

13. *Id.* at 46.

14. *See id.*

15. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL R. EVID. 405(a) and (b) (2000) [hereinafter MCM].

16. *See Vandelinder*, 20 M.J. at 42-43. Professional performance is defined on the form as "skill and efficiency in performing assigned duties." *Id.* at 48.

17. *See id.* at 42-43. Military behavior is defined on the form as "how well the member accepts authority and conforms to the standards of military behavior." *Id.* at 48.

18. *See id.* at 42-43. "Leadership and supervisory ability" is defined on the form as "the ability to plan and assign work to others." *Id.* at 48.

19. *See id.* at 42-43. Military appearance is defined as the "member's military appearance and neatness in dress." *Id.* at 48.

20. *See id.* at 42-43. Adaptability is defined as "how well the member gets along and works with others." *Id.* at 48.

additional ‘traits.’”²¹ Ultimately, the discretion lies with the military judge in each individual case to discern which categories are relevant to a pertinent trait.

B. When Is the Good Soldier Defense Available?

Military Rule of Evidence 404(a) permits the admissibility of evidence of good military character during the trial phase of a court-martial. To properly comprehend MRE 404, one must have a basic understanding of the history of character evidence in the military justice system. Prior to the enactment of the MRE in 1980, paragraph 138f of the 1969 *Manual for Courts-Martial* addressed the admissibility of character evidence and provided:

To show the probability of his innocence, the accused may introduce evidence of his own good character, including evidence of his military record and standing as shown by authenticated copies of efficiency or fitness reports or otherwise and evidence of his general character as a moral, well-conducted person and law abiding citizen. However, he may not, for this purpose, introduce evidence as to some specific trait of character unless evidence of that trait would have a reasonable tendency to show that it was unlikely that he committed the offense charged. For example, evidence of good character as to peaceableness would be admissible to show the probability of innocence in a prosecution for any offense involving violence, but it would not be admissible for such a purpose in a prosecution for a nonviolent theft.²²

This paragraph provided defense counsel a great deal of leeway in presenting character evidence. Such a favorable disposition to the admissibility

21. *Id.* at 45.

22. See MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 138f (1969).

of character evidence is consistent with the practice and tradition of the military justice system.

The first *Manual for Courts-Martial (Manual)* to specifically provide for the introduction of character evidence was the 1928 *Manual*.²³ Paragraph 113b of the 1928 *Manual* stated, “The accused may introduce evidence of his own good character, including evidence of his military record and standing, in order to show the probability of his innocence.”²⁴ The 1949 *Manual* expanded on this provision with language very similar to that quoted from the 1928 *Manual* in the preceding paragraph.²⁵ The early precedents set by the COMA support the conclusion that courts-martial have traditionally been very receptive to the introduction of character evidence by the accused.²⁶ Thus, courts-martial historically permitted the accused

23. The first *Manual for Courts-Martial* to contain rules of evidence was the 1921 *Manual*. See Capofari, *supra* note 5, at 173. Prior to that, the *Manual* simply stated that the rules of evidence at courts-martial would be the same as those used by the federal district courts. The 1921 *Manual* did not specifically address the use of good character evidence by the defense. See *id.*

24. MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 113b (1928).

25. See MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 125b (1949). The 1949 *Manual* provided that:

In order to show the probability of his innocence, the accused may introduce evidence of his own good character, including evidence of his military record and standing and evidence of his general reputation as a moral well-conducted person and law abiding citizen. However, if the accused desires to introduce evidence as to some specific trait of character, such evidence must have a reasonable tendency to show that it was unlikely that he committed the particular offense charged. For example, evidence of reputation for peacefulness would be admissible in a prosecution involving any offense involving violence, but it would be inadmissible in a prosecution for a non-violent theft.

Id. The 1951 *Manual for Courts-Martial* modified this provision slightly by changing the word “reputation” in the first sentence to “character.” See MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 138f(2) (1951).

26. See *United States v. Harrell*, 26 C.M.R. 59 (C.M.A. 1958); *United States v. Presley*, 9 C.M.R. 44 (C.M.A. 1953); *United States v. Browning*, 5 C.M.R. 27 (C.M.A. 1952).

to introduce evidence of specific traits and evidence of general good character as a soldier.²⁷

Following this long-standing history of permitting nearly all forms of character evidence to be introduced in courts-martial, MRE 404(a) was enacted. The rule provides:

(a) *Character evidence generally.* Evidence of a person's character or a trait of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

(1) *Character of the accused.* Evidence of a pertinent trait of the character of the accused offered by an accused, or by the prosecution to rebut the same.²⁸

The basic rule laid out in MRE 404(a) is that evidence of the character of an accused is not admissible to prove that he or she acted in conformance with that trait on a particular occasion. Despite this blanket prohibition on the introduction of character evidence when deciding the merits of a case, the language in MRE 404(a)(1) provides an exception whereby the accused may introduce evidence that relates to a pertinent trait. Military Rule of Evidence 404 provides little guidance as to what constitutes a pertinent trait, which will qualify for admission at trial under MRE 404(a)(1). The drafters of MRE 404, however, provided the following analysis of the new rule:

(a) *Character evidence generally.* Rule 404(a) replaces 1969 Manual [paragraph] 138f and is taken without substantial change from the Federal Rule. Rule 404(a) provides, subject to three exceptions, that character evidence is not admissible to show that a person acted in conformity therewith. Rule 404(a)(1) allows only evidence of a pertinent trait of character of the accused to be offered in evidence by the defense. This is a significant change from [paragraph] 138f of the 1969 Manual which also allows evidence of "general good character" of the accused to be received in order to demonstrate that the accused is less likely to

27. See Capofari, *supra* note 5, at 175 ("Courts-martial always have been receptive to character evidence offered by the accused, and the accused always was permitted to offer general character [evidence], not only as to a specific trait, but also as to one's general good character as a soldier.").

28. See MCM, *supra* note 15, MIL. R. EVID. 404(a)(1).

have committed a criminal act. Under the new rule, evidence of general good character is inadmissible because only evidence of a specific trait is acceptable. *It is the intention of the Committee, however, to allow the defense to introduce evidence of good military character when that specific trait is pertinent. Evidence of good military character would be admissible, for example, in a prosecution for disobedience of orders.*²⁹

While the drafters explicitly stated in their analysis that they were significantly changing the law, they also provided that evidence of good military character would be admissible when found to be pertinent. Neither the plain language of the rule, nor the drafters' analysis provides guidance as to when good military character would be a "pertinent trait." It has been left to the military courts to interpret the meaning of this language. Through a series of cases discussed below, the COMA has developed a broad interpretation of "pertinent," such that today evidence of good military character is likely to be found relevant for most courts-martial.

The COMA first had the opportunity to interpret the new MRE 404 in *United States v. Clemons*.³⁰ In *Clemons*, the accused was charged with larceny, unlawful entry, and wrongful appropriation in connection with the theft of a cassette player and television set.³¹ Clemons admitted taking the property, but claimed he did so as part of his tour of duty as charge of quarters in order to teach a lesson to those who left their valuables unsecured and to secure these items to protect them from theft.³² To support this defense, he sought to have several noncommissioned officers testify as to his "good military character and his character for lawfulness."³³ The trial court, relying upon MRE 404(a), excluded this evidence that Clemons was a good soldier. The COMA unanimously agreed that this exclusion of character evidence was reversible error and overturned Clemons' conviction.³⁴

Writing for the court in *Clemons*, Judge Fletcher focused on the relationship between the character evidence and the nature of the defense raised by Clemons in holding that "it is clear that the traits of good military

29. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 404 Analysis, apps. 22-32 (1984) (emphasis added).

30. 16 M.J. 44 (C.M.A. 1984).

31. *See id.* at 44.

32. *See id.* at 45.

33. *Id.* at 44.

34. *Id.* at 48.

character and character for lawfulness each evidenced ‘a pertinent trait of the character of the accused’ in light of the principal theory of the defense case.”³⁵ Chief Judge Everett wrote a concurring opinion, which seemed to foreshadow the court’s future treatment of character evidence when he stated:

it is hard to understand how evidence of a defendant’s character as a law-abiding person—or, indeed, his general good character—would not be pertinent in the present case or, indeed, in almost any case that can be imagined. This seems especially true in light of the great weight that for decades has been attributed to character evidence in trials by courts-martial.³⁶

The next case to reach the COMA concerning character evidence was *United States v. Piatt*.³⁷ Sergeant Piatt was a Marine Corps drill instructor who was accused of ordering two trainees to assault a third trainee in order to improve the derelict trainee’s behavior.³⁸ Sergeant Piatt claimed that he did not intend to have the two trainees physically assault the third, but merely intended to have them verbally address the third trainee. In support of this defense, Sergeant Piatt attempted to have witnesses testify as to their “opinions of appellant’s character as a drill instructor and his dedication to being a good drill instructor.”³⁹ Relying on MRE 404(a), the trial court denied the admissibility of the character evidence. Again, a unanimous COMA found this to be reversible error after focusing on the nature of the offense and the defense to be raised by the accused.⁴⁰ The court found that:

trial defense counsel correctly pointed out that the charges against appellant arose in the context of the performance of his military duties as a drill instructor. As past character for performing such duties in a proper manner would tend to undermine the implication that he willfully departed from normal standards in training. . . . his character as a good drill instructor was clearly

35. *Id.*

36. *Id.* at 49.

37. 17 M.J. 442 (C.M.A. 1984).

38. *See id.* at 444.

39. *Id.* at 445.

40. *Id.* at 446 (“In this context, a person’s military character is properly considered a particular trait of his general character and a fact which may be relevant at a court-martial depending upon the issue for which it is offered.”).

pertinent to the question of his intent to do the charged offenses.⁴¹

On the same day *Piatt* was decided, the court also decided *United States v. McNeill*.⁴² In *McNeill*, the court utilized the same logic found in *Piatt* to hold that a drill instructor accused of sodomizing one of his trainees was entitled to have the benefit of evidence of his character as a drill instructor introduced as part of his general denial of the charges.⁴³

Clemons, *Piatt* and *McNeill* all dealt with character evidence in connection with offenses that involved the performance of military duties. In *United States v. Kahakauwila*,⁴⁴ the court was faced for the first time with a non-duty offense. Marine Corporal Kahakauwila was convicted of purchasing drugs from an undercover informant in the barracks in violation of Uniform Code of Justice (UCMJ) Article 92. The accused sought to introduce testimony from witnesses who would testify that his work performance was excellent, his military appearance was outstanding, and his conduct as a squad leader was very dependable.⁴⁵ The COMA found that the trial court erred in excluding the character evidence on the grounds that “[e]vidence of the accused’s performance of military duties and overall military character was admissible to show that he conformed to the demands of military law and was not the sort of person who would have committed such an act in violation of regulations.”⁴⁶

In another drug case, *United States v. Vandelinder*,⁴⁷ the court recognized that the admissibility of character evidence in a drug case “should not hinge on whether the prosecution is under Article 92 or Article 134; or

41. *Id.*

42. 17 M.J. 451 (1984).

43. The procedural history of *McNeill* is somewhat unique in that the trial judge prohibited the admission of the character evidence at trial and a verdict of guilty was returned. At the sentencing phase, the defense was permitted to introduce character evidence to mitigate Sergeant McNeill’s sentence. Upon hearing the character evidence, the members of the court-martial inquired of the judge how they could reconsider their findings of guilt. The military judge told the members they could reconsider their findings, but the character evidence could not be considered. *See* Capofari, *supra* note 5, at 180.

44. 19 M.J. 60 (C.M.A. 1984).

45. *See id.* at 61.

46. *Id.* at 62.

47. 20 M.J. 41 (C.M.A. 1985).

under . . . Article 112a.”⁴⁸ The trial court found that the alleged drug purchases by the accused were not uniquely military misconduct and, thus, good military character was not pertinent. The COMA disagreed, stating that “[t]he Drafters Analysis makes clear that—whatever the term ‘trait’ means in [MRE] 404(a)(1)—‘good military character’ is a ‘trait.’ We can only conclude that this trait was ‘pertinent’ to the charge against Vandelinder.”⁴⁹ Thus, *Vandelinder* and *Kahakauwila* firmly established that evidence of good military character is pertinent even when the accused is charged with an offense, such as drug possession, which appears to have only a limited nexus to the accused’s military duties.

The COMA continued its expansive reading of “pertinent trait” in *United States v. Court*,⁵⁰ where it held that the trial judge improperly excluded evidence of the accused’s military proficiency even though the offense did not involve the defendant’s military duties and occurred off-base. Captain Court was accused of conduct unbecoming an officer and a gentleman as a result of his behavior towards a fellow officer’s wife while off-base and off-duty. Chief Judge Everett, writing for the court, held:

We agree with defense counsel’s argument at trial that appellant’s “integrity both as an officer and as a member of the community are in question here.” Therefore, in addition to presenting whatever other evidence was available to show that he did not commit the alleged indecent assault or attempted rape, appellant was entitled to argue—and to present evidence in support of such a position—that he was such an outstanding officer that, by virtue of this fact alone, a factfinder could infer that he would not have engaged in activity unbecoming an officer and a gentleman.⁵¹

48. *Id.* at 44. Article 92 prohibits failing to obey an order or regulation. See UCMJ art. 92 (2000). Article 134 is a general article that disciplines “all disorders and neglects to the prejudice of good order and discipline in the armed forces, [and] all conduct of a nature to bring discredit upon the armed forces.” See *id.* art. 134. This general article can be used to punish drug offenses, as in *Vandelinder*, where the court stated that the defendant was being prosecuted under this article for the “possession, sale or transfer of a controlled substance.” *Vandelinder*, 20 M.J. at 44. Article 112a, however, specifically prohibits the wrongful use or possession of controlled substances. UCMJ art. 112(a).

49. *Vandelinder*, 20 M.J. at 44.

50. 24 M.J. 11 (C.M.A. 1987).

51. *Id.* at 13 (quoting defense counsel).

Judge Cox concurred in part and dissented in part, but agreed with Chief Judge Everett that the character evidence should not have been excluded at trial. Judge Cox espoused an even broader view of the pertinent nature of good military character when he stated:

I further agree that evidence of appellant's military record and military character should have been admitted. I do so without hesitation because, in my judgment, the fact that a person has given good, honorable, and decent service to his country is always important and relevant evidence for the triers of fact to consider. Commanders consider it not only when deciding the appropriate disposition of a charge, but also when deciding to approve or disapprove sentences; and I believe that court members and military judges also should consider it when deciding whether a particular person is innocent or guilty of an offense. The evidence may have little weight; indeed, it may have none. But if an individual has enjoyed a reputation for being a good officer or [service member], that information should be allowed into evidence.⁵²

The cumulative effect of this line of cases is to firmly establish that good military character will almost always be found to be a "pertinent trait" as that term is used in MRE 404(a)(1) and therefore admissible when offered by the defense. The court generally requires a nexus between the defendant's good military character and the offense with which he is charged, but it has been quite liberal in finding such a nexus.

There is some evidence to suggest that Judge Susan Crawford, currently Chief Judge of the CAAF, believes that a more restrictive test should be applied to determine the admissibility of good character evidence. In a concurring opinion in *United States v. Brewer*,⁵³ Chief Judge Crawford disagreed with the rest of the court on the following issue:

Rather than being based on [MRE] 404(a)(1) and the Analysis, the cases cited by the majority find their genesis in an interpretation of a selected few decisions of federal courts of appeals. *See, e.g., United States v. Clemons*, 16 M.J. 44, 47 (CMA 1983) . . . Even under the most expansive reading of [MRE] 404(a)(1), not all the testimony submitted by the defense should have been

52. *See id.*

53. 43 M.J. 43 (1995).

admitted into evidence. Appellant was charged with conduct unbecoming an officer and making a false statement. To counteract those charges the defense introduced the following evidence: appellant performed his duties in a superb manner; there was no problem concerning his duty performance; he was extremely honest; he was of high moral character; and he was “a fine man.”⁵⁴

Judge Crawford seems to be questioning the foundation of the line of cases beginning with *Clemons* discussed above. Since she does not appear to have the support of the other current members of the court on this issue, it seems likely that a broad interpretation of the admissibility of evidence of good military character will continue to be used by the CAAF.

Before completing this overview of the operation of the good soldier defense, it must be pointed out that the good soldier defense is not without peril to the accused. An accused service member who introduces evidence of good military character must be aware that this defense can also serve as an avenue for the prosecution to introduce negative character evidence that might not otherwise have been admissible at trial.⁵⁵ The Supreme Court has identified this trade-off by stating that “the price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him.”⁵⁶

In the 1995 case of *United States v. Brewer*,⁵⁷ the CAAF laid down two principles that may allow damaging cross-examination of character witnesses even though the defense has attempted to carefully limit the scope of the questioning of such witnesses on direct examination.⁵⁸ First, the trial counsel may inquire as to the basis of good character testimony by asking whether the witness is aware of uncharged misconduct committed by the accused after the period during which the witness formed his opin-

54. *Id.* at 49 (Crawford, J., concurring).

55. See Majors Long & Henley, Note, *Testing the Foundation of Character Testimony on Cross Examination*, *ARMY LAW.*, Oct. 1996, at 17, 25. Majors Long and Henley note that: “The defense may pay a high price for testimony regarding the accused’s duty performance and other evidence of good character. Such evidence may open the door to damaging cross-examination despite a careful attempt to limit the scope of the questions on direct examination.” *Id.*

56. *Michelson v. United States*, 335 U.S. 469, 479 (1948).

57. 43 M.J. 43.

58. See *id.* at 46.

ion.⁵⁹ Second, if the defense counsel elicits testimony from a character witness regarding the accused's duty performance, this opens the door to cross-examination regarding the accused's good military character and overall officership.⁶⁰ Defense counsel must carefully consider the potential ramifications of introducing evidence of good military character before he does so.⁶¹ The accused must ensure that he has consistently displayed good military character before he can safely introduce into evidence select examples of such.

C. What Constitutes a Good Soldier?

There is no precise definition of what, exactly, a "good soldier" entails for purposes of presenting good soldier defense evidence. General categories of qualities that constitute a good soldier can be discerned, however, from evidence defendants have presented at courts-martial. These categories, examined in more detail below, include soldier character in time of war and soldier competency, including dependability, leadership and initiative, performance and proficiency, and promptness.⁶²

1. Character in Times of War

This is perhaps the quintessential definition of a good soldier: a soldier that can be counted on by others in times of war and conflict. Courts-martial regularly admit evidence of battlefield performance.⁶³ *United States v. Crum* is illustrative: "The defense counsel also was able to minimize the appellant's culpability and to highlight his good record of wartime service in Panama and Kuwait."⁶⁴ Another defendant presented the following character evidence when charged with shooting two Vietnamese civilians in a U.S. base camp during the Vietnam War: "The accused in the past had been a good soldier and had served in combat many times during

59. *See id.*

60. *See id.*

61. For a more complete discussion of this subject matter and the *Brewer* case, see Majors Long & Henley, *supra* note 55, at 17.

62. *See* Elizabeth Lutes Hillman, Note, *The "Good Soldier" Defense: Character Evidence and Military Rank at Courts-Martial*, 108 *YALE L. J.* 879, 894-900 (1999).

63. *See* *United States v. Crum*, 38 M.J. 663, 665 (A.M.C.R. 1993); *United States v. Condron*, 37 C.M.R. 688, 690 (A.B.R. 1967); *see also* Hillman, *supra* note 62, at 895-96.

64. *See Crum*, 38 M.J. at 665.

his Vietnam tour and had been wounded some weeks before the day of the tragic incident.”⁶⁵

A related use of the good soldier defense involves presenting evidence that the compatriots of the accused would want to go to war with him and would trust him on the battlefield.⁶⁶ One commentator, in discussing the importance of war-time character, noted that “most service members would agree that describing a fellow soldier as someone with whom they would want to go to war with is a powerful statement of good military character”⁶⁷ Defendants have presented evidence stating “that if . . . (the witness) had to go to war, he would want to be deployed with appellant”⁶⁸ and “if we were to go to war, PFC Hallum is the type of soldier medic I would want by my side.”⁶⁹

2. *The Competent Soldier*

The concept of the competent soldier is quite broad, encompassing, but not limited to, a soldier’s dependability, leadership and initiative, performance and proficiency, and promptness.⁷⁰ Good soldier evidence has been presented in all of the above categories.

The dependable nature of the soldier is often presented as part of the defense case-in-chief. Witnesses have testified that the “appellant performed his job well, was dependable, reliable,”⁷¹ “[the defendant] ‘was the only man I could depend on,’”⁷² the defendant “was very dependable,”⁷³ and “he’s a professional NCO and that if he comes back . . . he’s going to fall back into place and we’re going to continue where we left off.”⁷⁴

65. See *Condron*, 37 C.M.R. at 690.

66. See *United States v. True*, 41 M.J. 424, 427 (1995); *United States v. Hallum*, 31 M.J. 254, 255 (C.M.A. 1990).

67. See *Hillman*, *supra* note 62, at 895.

68. See *True*, 41 M.J. at 427.

69. See *Hallum*, 31 M.J. at 255.

70. See *Hillman*, *supra* note 62, at 895.

71. See *True*, 41 M.J. at 427.

72. See *United States v. Craddolph*, 36 C.M.R. 688, 689-90 (A.B.R. 1966).

73. See *United States v. White*, 36 M.J. 306, 307 (C.M.A. 1993).

74. See *United States v. Brown*, 41 M.J. 1, 7 (C.M.A. 1994) (Crawford, J., dissenting).

Soldiers also present evidence of leadership and initiative as part of their good soldier defense. In *United States v. Brown*, the accused, who was defending against a positive drug urinalysis, had his chaplain supervisor testify that Brown had “lots of initiative, no problems with supervision. Never had a problem with him at all. In fact . . . accountability was the thing that impressed me about him.”⁷⁵ Similar character evidence was offered in *United States v. Hallum*: “[H]e has always had a take charge and accomplish the mission attitude. . . . [T]o me he has the knowledge and what it takes to be a very effective Combat Medic.”⁷⁶

A typical good soldier character defense may include evidence of a soldier’s promptness and readiness for duty. The following is an example of an exchange at trial:

Supervisor: He was much more accountable than [sic] normally you would see an NCO do. He always was—always making me aware of what he had to do, where he was going to be at certain times, when he would be back. That sort of thing

Q. When he showed up at these times, was he always in a condition that he could perform his mission?

A. I’d never seen anything that I would consider any kind of impairment.

Q. And this was throughout the entire time?

A. The entire time.⁷⁷

Testimony of soldier proficiency and performance has also been considered “good soldier” evidence. The case of *United States v. White*⁷⁸ provides an example of proficiency. As part of his defense to wrongful use of cocaine, Medic White presented good soldier evidence from his commanding officer that White “was clinically very proficient” and was “a very determined individual. If he wanted something, he would go after it.”⁷⁹

75. *See id.*

76. 31 M.J. 254, 255 (C.M.A. 1990).

77. *See Brown*, 41 M.J. at 7.

78. *See* 36 M.J. at 307.

79. *See id.*

Although there is no specific iteration of what, exactly, constitutes a good soldier for purposes of the good soldier defense, the aforementioned guidelines provided by case law, common practice and common sense can guide decisions of good soldier evidence admissibility.

D. Comparison to Civilian Treatment: Federal Rule of Evidence 404(a)(1)

The Military Rules of Evidence are explicitly based upon the Federal Rules of Evidence. In fact, MRE 404(a) and FRE 404(a) are almost identical.⁸⁰ Although the rules are textually similar, civilian courts do not typically allow evidence of a defendant's general character to be admitted, subject to certain limited exceptions under FRE 404.⁸¹ The civilian rationale for this exclusion is that people do not always act in accordance with their character propensities.

[Federal Rule of Evidence] 404(a) might seem to establish a rule of exclusion that is not only counterintuitive[,] but also contrary to the usual practice and social and business relationships of judging persons by their past behavior. Past conduct or performance is usually thought to be one of the best predictors of future behavior. But while a person's propensities are a useful gauge of likely behavior patterns over a period of time, they are less accurate when used to decide what happened on one particular occasion because people do not always act in accordance with their propensities.⁸²

80. Compare FED. R. EVID. 401(a)(1) with MCM, *supra* note 15, MIL. R. EVID. 401(a)(1).

81. These limited exceptions include:

(1) FRE 404(a)(1) allows a criminal defendant to put on evidence of a "pertinent" trait of character, such as his disposition to be honest or peaceable as proof that he was unlikely to have committed the crime charged. For example, [if] the defendant was charged with assault, he can show peacefulness; and (2) FRE 404(a)(2) authorizes a criminal defendant to introduce evidence of a "pertinent" character trait of a crime victim, such as evidence that an alleged assault victim was inclined toward violence.

CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE 204 (2d ed. 1999).

82. See *id.* at 203; see also *Campbell v. Greer*, 831 F.2d 700, 707 (7th Cir. 1987) ("Moral conduct in one situation is not highly correlated with moral conduct in another.").

Military courts, however, interpret MRE 401(a)(1) more broadly than civilian courts interpret FRE 401(a)(1). The differentiation lies in the military's interpretation of the Drafters' Analysis of MRE 404(a)(1) and the special context of military justice and military society. While military and civilian courts have some similar purposes, such as imposing punitive justice and deterring future transgressions, there are additional considerations, not present in civilian courts, which military judges must take into account:

Courts-martial are part of a disciplinary scheme relied upon to maintain good order among troops, to preserve the obedience and conformity deemed necessary to successful military action, and to eliminate from the military those individuals who pose a risk to other [service members] or to national security itself [A] broader variety of acts are deemed criminal under military law than under civilian criminal codes. . . . The good soldier defense takes advantage of this special military context by emphasizing an accused's loyalty to the armed forces and military performance. The defense counters wrongdoing with proof that an accused has been a "good soldier" during her military career.⁸³

It is because of these differing demands in the court-martial setting that the military and civilian interpretations of a similarly worded rule of evidence have diverged. The arguments in favor of the good soldier defense, including the one above that alludes to the special context and separateness of military society, are discussed in the next section.

III. The Debate

The good soldier defense has been used in the military justice system for almost seventy-five years. During this time, there have been those who have criticized the admissibility of character evidence, but it generally has been accepted as firmly imbedded in the military justice system. Recently, however, there has been an increasing amount of attention focused upon the good soldier defense, and consequently, a greater number of observers

83. See Hillman, *supra* note 62, at 886.

have questioned its utility. This recent attention to the military justice system in general,⁸⁴ and the good soldier defense in particular, has come about as the result of a number of high profile courts-martial which have garnered significant main-stream, civilian press coverage. The court-martial of Sergeant Major of the Army Gene McKinney for sexual harassment and that of Marine E-6B pilot Richard Ashby brought the U.S. military justice system onto the front pages of newspapers around the world. This public attention caused greater numbers of people outside the military justice system to become aware of some of its unique features, including the good soldier defense.

While there are valid arguments that can be made for both retaining and prohibiting the good soldier defense, the authors of this article believe that the good soldier defense serves a valid purpose and should be preserved. This section begins by advancing four arguments that weigh strongly in favor of maintaining the good soldier defense. The section then identifies and rebuts the primary arguments raised by critics of the good soldier defense. When viewed in their totality, the costs of the good soldier defense are outweighed by the benefits it provides.

A. The Case for the Good Soldier Defense

There are four primary arguments that support the admissibility of evidence of good military character. This section parses out the logic behind them. It begins by laying out the separate society argument, which points to the separate nature of military life as a justification for a system of military justice that differs from its civilian counterpart. It then turns to

84. See Lieutenant Colonel Denise R. Lind, *Media Rights of Access to Military Criminal Cases*, 163 MIL. L. REV. 1, 2 (2000). Lind explains:

This information explosion is coupled with an increased interest by the media in criminal trials. Military criminal trials are no exception. Military cases are attracting local and national media interest. As the armed forces grow smaller, fewer people have experienced military life. Thus, the military justice system is foreign to more and more Americans. People are interested in learning about how military justice works. The media sells its product by generating news that is interesting to the public. Public interest in military justice not only involves individual cases being investigated or prosecuted, but also, the rules and policies unique to military life.

Id.

a discussion of the unique nature of certain military offenses that make character evidence especially relevant to their adjudication. The third argument is based on the concept of the soldier under surveillance; because service members are constantly observed by their peers and superiors, there is a strong foundation on which these people can base testimony regarding the military character of the accused. The final argument highlights the long-standing tradition of allowing service members to introduce evidence of their good character, and it counsels against breaking that tradition. Each of these will be addressed in turn.

1. Separate Society

The military is a different society from civilian society. Different norms, rules of conduct, and legal precedents apply. Independent, appointed Article III judges do not preside over courts-martial; rather, active duty military officers serve as judges. Acts not punishable as crimes in civilian society are deemed criminal under military law, such as absence without leave,⁸⁵ disobedience of orders,⁸⁶ dereliction of duty,⁸⁷ disrespect,⁸⁸ desertion,⁸⁹ mutiny,⁹⁰ and conduct unbecoming an officer and a gentleman.⁹¹ There is no random jury selection in the military,⁹² and service members' rights are limited by their status as soldiers.⁹³ As such, sol-

85. See UCMJ art. 86 (2000) (criminalizing the offense of being absent without leave (AWOL)); see also Major General William A. Moorman, *Fifty Years of Military Justice, Does the Uniform Code of Military Justice Need to Be Changed*, 48 A.F. L. REV. 185, 189 (listing offenses cited herein).

86. See UCMJ arts. 90 (criminalizing disobedience of superior commissioned officer); 91 (criminalizing willful disobedience of lawful order of a warrant officer, non-commissioned officer, or petty officer); 92 (criminalizing disobedience of lawful order issued by a member of the armed forces).

87. See *id.* art. 92(3) (criminalizing dereliction in the performance of duties).

88. See *id.* arts. 89 (criminalizing disrespect toward superior commissioned officer); 91 (criminalizing treating with contempt or disrespectfulness in language or deportment toward a warrant officer, noncommissioned officer or petty officer while that officer is in the execution of office).

89. *Id.* art. 85 (criminalizing desertion).

90. *Id.* art. 94 (criminalizing the acts of mutiny or sedition).

91. *Id.* art. 133 (criminalizing conduct unbecoming an officer and a gentleman).

92. See *id.* art. 25; see also Hillman, *supra* note 62, at 886.

93. See Hillman, *supra* note 62, at 886.

diers' rights, for example in regards to the First Amendment, are narrower than civilians' rights.⁹⁴

The Supreme Court has adopted a standard of deference towards the military justice system that is not applied to civilian federal courts.⁹⁵ The Court specifically recognized the military as a separate society when it stated that "the military constitutes a *specialized community* governed by a *separate* discipline from that of the civilian."⁹⁶ The Court extends great deference to the military because it is

difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.⁹⁷

The Court's decision in *Rostker v. Goldberg*⁹⁸ exemplifies this deference to the military's separate society:

In *Parker*, the Court rejected both vagueness and overbreadth challenges to provisions of the Uniform Code of Military Justice, noting that "Congress is permitted to legislate both with greater breadth and with greater flexibility" when the statute governs military society, and that "[while] the members of the military are not excluded from the protection granted by the First Amendment, the *different character of the military community and of the military mission requires a different application of those protections.*"⁹⁹

94. See, e.g., *Brown v. Glines*, 444 U.S. 348 (1980) (upholding regulations imposing a prior restraint on the right to petition of military personnel).

95. See *Rostker v. Goldberg*, 453 U.S. 57, 64-72 (1981).

96. *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953) (emphasis added).

97. *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973).

98. 453 U.S. 57 (1981).

99. *Id.* at 66 (quoting *Parker v. Levy*, 417 U.S. 733, 756, 758 (1974)) (emphasis added). The *Rostker* court stated:

The operation of a healthy deference to legislative and executive judgments in the area of military affairs is evident in several recent decisions of this Court In *Middendorf v. Henry*, 425 U.S. 25 (1976), the Court

In a recent article discussing the fiftieth anniversary of the UCMJ, Major General William A. Moorman expanded on the integral importance of the “separate society” concept to the military justice system:

The primary purpose of the military justice system is to maintain good order and discipline by holding military offenders accountable for their misconduct. Discipline is vital to the effectiveness of every military unit. As George Washington noted in 1759, “Discipline is the soul of an army. It makes small numbers formidable; procures success to the weak, and esteem to all.” Commanders must be able to ensure their personnel will perform their duties and follow orders, often in situations involving life and death. No civilian parallel can be drawn. Civilian employers can’t compel subordinates to perform tasks resulting in substantial likelihood of death, much less come to work on time.¹⁰⁰

The military is a separate society because it has special needs and considerations not present in civilian society: the military must maintain good order among its troops, preserve the obedience and conformity necessary to engage in successful military action, and eliminate those individuals who pose a risk to national security.¹⁰¹ These special needs, in turn, require different rules and procedures. Since the military is a separate society, different rules can and should apply.

One such rule is the good soldier defense: allowing soldiers to present evidence of good military character as a defense in military courts-martial. The COMA asserted a separate society justification for the good soldier

99. (continued)

noted that in considering due process claims in the context of a summary court-martial it “must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, U.S. Const., Art. I, § 8,” concerning what rights were available. *Id.* at 43. Deference to the judgment of other branches in the area of military affairs also played a major role in *Greer v. Spock*, 424 U.S. 828, 837-38 (1976), where the Court upheld a ban on political speeches by civilians on a military base, and *Brown v. Glines*, 444 U.S. 348 (1980), where the Court upheld regulations imposing a prior restraint on the right to petition of military personnel.

Id. at 66-67.

100. See Moorman, *supra* note 85, at 187-88 (emphasis added).

101. See Hillman, *supra* note 62, at 886.

defense in *United States v. Kahakuawila*: “The peculiar nature of the military community makes similar interpretation [of MRE 404(a)(1)] inappropriate.”¹⁰² The distinct nature of military society, and its substantive differences from civilian society, serve as a basis for the existence of an evidentiary rule allowing for the “good soldier” to introduce character evidence in his defense.

2. Unique Nature of Military Offenses

Another factor that weighs in favor of maintaining the availability of the good soldier defense is the unique nature of the crimes punishable by the military justice system. Military law penalizes a number of crimes that relate directly to the character of the accused. These are offenses that have no counterpart in the civilian criminal justice system. Article 133 of the UCMJ, which punishes conduct unbecoming an officer and a gentleman, is one such charge.¹⁰³ The CAAF has held that in order to convict a service member under Article 133, “the [offending] conduct must . . . be shown to dishonor the individual” and to “seriously compromise his standing as an officer.”¹⁰⁴ Such a showing of dishonor calls the character of the accused into question. Since the character of the accused is at issue with charges such as conduct unbecoming, he should be permitted to introduce evidence concerning that subject.

Even one of the most outspoken critics of the good soldier defense has stated, “Courts-martial for offenses defined as ‘military’ present the strongest case for admitting evidence of good military character.”¹⁰⁵ She continues by conceding that “[a]dmitting generic good military character evidence in courts-martial for military-specific offenses seems consistent with the intent and meaning of MRE 404(a)(1); surely ‘military character’ is a pertinent trait when a service member is accused of being disrespectful, disloyal, sloppy, or otherwise unsoldierly.”¹⁰⁶ This particular critic believes the good soldier defense should be available only to service members charged with offenses defined as “military.” The difficulty with this

102. See 19 M.J. 60, 61 (C.M.A. 1984) (emphasis added); see also Hillman, *supra* note 62, at 890 n.59.

103. See UCMJ art. 133 (2000) (criminalizing conduct unbecoming an officer and a gentleman).

104. *United States v. Timberlake*, 18 M.J. 371, 375 (C.M.A. 1984).

105. Hillman, *supra* note 62, at 900.

106. *Id.*

view is that it becomes nearly impossible to draw a meaningful line between “military” and “non-military” offenses.

The Supreme Court was faced with this difficulty when attempting to distinguish “service connected” from “non-service connected” offenses for determining the jurisdiction of the military justice system.¹⁰⁷ Faced with this challenge in *Solorio v. United States*,¹⁰⁸ the Supreme Court opted to avoid the quagmire of drawing artificial lines between “service connected” and “non-service connected” offenses and instead expanded military courts-martial jurisdiction to include nearly all offenses committed by a member of the armed services.¹⁰⁹ In an analogous manner, it is only practical to avoid attempting to divide the punitive articles of the UCMJ into “military” and “non-military” offenses, and instead allow evidence of good military character to be introduced at all courts-martial.

Because courts-martial often carry greater penalties and can have a greater impact on the career of the accused than a conviction for the same offense in a civilian court, the military justice system should retain the good soldier defense. Unlike defendants in civilian criminal tribunals, those court-martialed for even relatively minor offenses may find that it costs them their careers.¹¹⁰ Civilians on trial for misdemeanors, such as low-level drug possession, are often found guilty and sentenced to probation, with no adverse effect on their current employment. A service member charged with the same offense may be able to similarly avoid serving time in prison, but is likely to be discharged from the armed forces and thereby deprived of his livelihood. The increased consequences of courts-martial when compared to comparable civilian offenses, weighs in favor of permitting the accused to introduce potentially exculpatory evidence of his good military character. Thus, the unique nature of certain military offenses and the potential for increased consequences for their violation

107. See *Solorio v. United States*, 483 U.S. 435 (1987).

108. *Id.*

109. See *id.* at 439 (eliminating the requirement that offenses subject to prosecution at court-martial be “service connected,” thereby greatly increasing the jurisdiction of the military justice system).

110. See Hillman, *supra* note 62, at 907 (“[C]ourts-martial are often charged with determining whether a service member should be retained in the military, in addition to imposing traditional criminal sanctions. This aspect of a sentencing decision is not required in civilian trials.”).

justify permitting the accused to introduce evidence of his good military character.

3. *Soldier Under Surveillance*

A third reason the good soldier defense should be maintained is that evidence of character can be especially valuable when examined in the military context. The nature of military service and the lifestyle inherent in that service create a situation where the supervisors and peers of a service member are well placed to evaluate the service member's character. The heart of this argument is the concept of the "soldier under surveillance." This concept was eloquently described by Dean John Wigmore,¹¹¹ a legal scholar specializing in evidence who also served as a major in the Army's Judge Advocate General's Corps during World War I. Dean Wigmore wrote:

The soldier is in an environment where all weaknesses or excesses have an opportunity to betray themselves. He is carefully observed by his superiors—more carefully than falls to the lot of any member of the ordinary civil community; and all his delinquencies and merits are recorded systematically from time to time on his 'service record,' which follows him throughout his army career and serves as the basis for the terms of his final discharge. The certificate of discharge, therefore, is virtually a summary of his entire service conduct, both as a man and as a soldier.¹¹²

In *United States v. Kahakauwila*,¹¹³ the COMA recognized the principle outlined by Dean Wigmore when it asserted:

The military rule is taken from the Federal Rules of Evidence. However, the peculiar nature of the military community makes similar interpretation inappropriate. Unlike his civilian counterpart, the conduct of a military person is closely observed both on

111. In his civilian life, John Wigmore was Dean of Northwestern Law School. See Capofari, *supra* note 5, at 173 n.8 (1990). While in the military during World War I, Major Wigmore wrote Chapter XI of the 1921 *Manual for Courts-Martial*. He is the only individual with a by-line in the *Manual for Courts-Martial*. See *id.*

112. John Henry Wigmore, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 59, at 462-63 (3d ed. 1940).

113. 19 M.J. 60 (C.M.A. 1984).

and off duty, and such observation provides the material upon which performance reports and other evaluations are based.¹¹⁴

Members of the armed services are formally reviewed throughout their career through periodic fitness reports. This creates a situation where there is a detailed written record of a service member's conduct and where a service member's superiors are forced to continually evaluate that individual. This leaves supervisors well qualified to testify about a subordinate's character.

It is not solely superior officers who are in a position to provide meaningful character evidence. A service member's peers are also uniquely positioned to observe the accused's character. Members of the military are frequently stationed in, or deployed to, remote areas where they are forced to live in difficult conditions in close proximity to their peers. Such deployments can often be physically and mentally demanding and, therefore, create a situation where a service member's true character will reveal itself to his peers. As one commentator has observed, "in the close and disciplined environment of the military community it requires far more effort for a person to be known as a good soldier than it does to be known as a good person in a civilian neighborhood."¹¹⁵ An accused's peers and superiors are thus both uniquely positioned to provide relevant and credible evidence of his good military character.

4. Tradition

As discussed above, the military justice system has a long-standing tradition of allowing the defendant to introduce character evidence.¹¹⁶ Given the strong respect for tradition in the armed forces, the tradition of permitting accused service members to introduce evidence of good military character that may serve to exonerate them should not be lightly discarded. Outside of the courts-martial setting, the military places a heavy emphasis on character and expects service members to conduct themselves in an honorable manner. The soldier who is diligent in acting in a manner consistent with good character throughout his career should be permitted to use that behavior in his defense. It would send a mixed signal for the

114. *Id.* at 61.

115. Smith, *supra* note 4, at 429.

116. The admissibility of good military character evidence was first explicitly provided for in the 1928 *Manual for Courts-Martial*. See *supra* note 24 and accompanying text.

military to demand that a soldier comport himself in a manner consistent with good character and then turn around and inform him that evidence of such behavior is not significant should he find himself subject to a court-martial. We should maintain the tradition of allowing those who have made the sacrifices inherent in serving this country the opportunity to have that service considered by the court-martial panel.

B. Case Against the Good Soldier Defense & Rebuttal

In opposition to the four primary arguments supporting the good soldier defense, there are four adverse arguments advanced in favor of abolishing or limiting the defense. This section presents and then rebuts these four arguments. The discussion begins by presenting the argument that a good character defense is not available under civilian society's evidentiary rules, and thus, should not be available in the military. The second argument is that the good soldier defense, as applied, creates unique gender discrimination problems in sex-offense cases. Next, the third argument asserts that the good soldier defense should be abolished because there is no specific, uniform standard of what constitutes a good soldier. Finally, the section concludes by examining the argument that the good soldier defense only benefits higher ranking officers and creates unfair advantages based on race, gender, and status. A detailed rebuttal follows each argument.

1. Not Available in Civilian Society

The first criticism lodged against the good soldier defense is that it is not available in civilian society.¹¹⁷ The evidentiary rationale for the good soldier defense, the argument reasons, completely disregards civilian justifications for not allowing such evidence.¹¹⁸ Civilian courts reason, as did Supreme Court Justice Jackson, that "the overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of the issues, unfair surprise and undue prejudice."¹¹⁹ Proponents of this argument assert that there is no proper justification for the good soldier defense because "even conceding the unique nature of military discipline and the need for a sep-

117. See Hillman, *supra* note 62, at 890.

118. See *id.*

119. See *Michelson v. United States*, 335 U.S. 469, 475-76 (1948).

arate legal system, no compelling rationale exists for a judicial interpretation of character admissibility so at odds with federal rules and civilian evidentiary procedure.”¹²⁰

Some commentators do not even concede the separate society issue, and have stressed that the military is not a separate society: “Although some service members . . . live and work in environments isolated from civilian life, casting the entire American military, a postmodern force of scattered troops, complex missions, and gender and racial diversity, as wholly ‘separate’ from civilian communities overstates the case.”¹²¹ If a separate military society still exists, its critics add, “its circumstances and the [service members] who are subject to its constraints are not so remote from modern civil society as to justify such a dramatically different rule.”¹²² Thus, because there is no compelling rationale for the good soldier defense and because the separate society argument does not justify a wholly different rule, the good soldier defense should be eliminated, and the military should conform to the civilian interpretation of FRE 401(a)(1).

The problem with this argument is that it implicitly assumes that civilian society’s evidentiary rulings and practices are always superior to those of the military. This assumption, however, cannot be validly asserted for two reasons: first, military practices are sometimes more advanced than those used in civilian courts and, second, the military is, as aforementioned, a wholly separate society.

Scholars, military justice practitioners, and commentators consider some protections afforded by the military justice system more advanced than those used in civilian courts.¹²³ Military members enjoy a more generous right to counsel than their civilian counterparts. Every accused service member is entitled to free military defense counsel and, unlike civilian practice, entitlement to free counsel is not based upon economic status.¹²⁴ Article 31 warnings against self-incrimination are also more extensive than civilian *Miranda* warnings because they are mandated when a service member is suspected of an offense, not just when the accused is in custody.¹²⁵ The Article 32 investigation is also considered more advanced

120. Hillman, *supra* note 62, at 890.

121. *Id.*

122. *Id.*

123. *See e.g.*, Moorman, *supra* note 85, at 189.

124. *See id.*

125. *See id.*

than civilian grand jury practice.¹²⁶ An Article 32 investigation has been described as

more protective of the accused in many respects than federal grand jury proceedings. In the military, an independent investigating officer is appointed to conduct the inquiry to determine if sufficient evidence exists to support a prosecution unlike the civilian sector in which a federal prosecutor controls the proceeding. And a military accused, unlike his civilian counterpart, is entitled to be present throughout the proceeding with legal representation, is entitled to present evidence on his own behalf, and may subject prosecution witnesses to cross-examination.¹²⁷

Thus, the assumption that the civilian justice system is always superior to the military justice system is unfounded and unduly conclusive. The impression that justice is either lacking or diminished in the military has no foundation in fact.¹²⁸ The aforementioned examples demonstrate that military procedures are not inferior simply because they do not follow the law and letter of the civilian system.

Military defendants should be able to use the good soldier defense because the military is a distinct society, and different rules and norms apply.¹²⁹ As argued above, the Supreme Court provides substantial deference to military jurisprudence because it specifically recognized that “the military constitutes a *specialized community* governed by a *separate* discipline from that of the civilian.”¹³⁰ The separate discipline and specialized community of the military, not present in civilian society, justify some differing evidentiary rules and procedures, including the good soldier defense.

The argument that the military is not a separate society is at odds with Supreme Court precedent and common sense. Military members lead very different lives than their civilian counterparts. As one commentator wittingly stated: “No civilian parallel can be drawn. Civilian employers can’t compel subordinates to perform tasks resulting in substantial likelihood of

126. *See id.*

127. *Id.*

128. *See id.*

129. *See supra* Part III(A)(1).

130. *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953) (emphasis added).

death, much less come to work on time.”¹³¹ Moreover, service members are subject to direct orders, stricter discipline, regimented schedules, restricted living conditions, dress codes, and are constantly on-call in case of national emergency or other important duties that need to be performed. These are just a few of the many differences that make the military a separate society. These differences, and the different needs of military society, allow character evidence to be more trustworthy in the military setting because the accused is in a regimented atmosphere where his character is under constant surveillance.

2. *Inequality in Sex Offense Cases*

The second argument against the good soldier defense concerns sex offenses and gender issues. It is asserted that in courts-martial for sex offenses, good soldier evidence may confuse issues and make a conviction more difficult to obtain. This, in turn, may lead to a prejudice against females in the military and dissuade them from bringing charges.¹³² This is especially significant, according to proponents, because of the high number of sex crimes and offenses reported to, and tried by, the military.¹³³

Since sex offense cases, such as rape, involve “battles of credibility between the accused and the prosecution’s witnesses,”¹³⁴ good soldier evidence may mislead the jury, confuse the issues, and complicate the trial. Supporters of this argument point to the fact that “military judges admit evidence of good military character without any empirical data that ‘good soldiers’ rape, or commit other sex crimes, with any less frequency than ‘bad’ soldiers or ‘good civilians.’”¹³⁵ Furthermore, proponents take issue with the fact that only “bad soldiers” can be found capable of rape. “Given the number of alleged rapes that are prosecuted under both civilian and military law in which the men implicated would otherwise appear to be ‘good’ persons, this evidentiary doctrine allows irrelevant evidence . . . to taint the judgment of a court-martial.”¹³⁶

131. See Moorman, *supra* note 85, at 187-88.

132. See Hillman, *supra* note 62, at 904-05.

133. See *id.* at 904.

134. *Id.*

135. See *id.* at 905.

136. See *id.*

Using a high-profile example in her criticism of the good soldier defense, Elizabeth Hillman points to the recent sexual harassment case against Sergeant Major of the Army Gene McKinney.¹³⁷ In 1998, McKinney was tried on charges of sexual misconduct.¹³⁸ Six service women provided “damning” testimony against him.¹³⁹ McKinney presented good soldier evidence and former superiors and subordinates testified in his favor. McKinney was acquitted on all counts except one charge of obstruction of justice, and he was sentenced to a minor reduction in rank.¹⁴⁰

Hillman concluded, and some commentators asserted, that “McKinney . . . was seen as benefiting from military law that allowed the jury to consider his character and military record as the grounds for finding reasonable doubt as to his guilt”¹⁴¹ and that “defense lawyers relied on McKinney’s testimony and service record by invoking military rules that allowed the jury to use his outstanding military reputation as grounds for reasonable doubt that he might have committed any of the crimes.”¹⁴² Those arguing against the good soldier defense conclude from the McKinney court-martial experience that McKinney took “full advantage” of the good soldier doctrine and that the good soldier “defense worked so well for McKinney [that] it has disturbing implications for the roles of rank, gender and race in military justice.”¹⁴³ These disturbing implications, it is argued, should lead to the elimination of the good soldier character defense.

Hillman’s argument can be criticized on the ground that there is no causal link between the introduction of character evidence and the accused’s acquittal. In other words, it is wholly unfair to criticize the McKinney decision because we do not know the actual cause of, or reason for, the acquittal. Here, Hillman makes an unfounded assumption that McKinney was acquitted only because he presented good soldier defense evidence. Hillman seems to ignore the possibility that McKinney may actually have been innocent of the charges leveled against him, or that the

137. *See id.* at 879-81.

138. *See id.*; *see also* Bill McAllister, *McKinney Not Guilty on Sexual Misconduct: Sergeant Major Convicted of Obstruction*, WASH. POST, Mar. 14, 1998 at A1.

139. *See* Hillman, *supra* note 62, at 880.

140. *See id.*

141. *Id.* *See also* Bob Hohler, *Some Say McKinney Verdict Could Have Chilling Effect*, BOSTON GLOBE, Mar. 15, 1998 at A9.

142. McAllister, *supra* note 138, at A1.

143. Hillman, *supra* note 62, at 881.

prosecution simply failed to present sufficient evidence to meet its burden of proof.

The good soldier defense is not a one-way street: the prosecution can rebut good soldier evidence and minimize its effect. Rebutting the evidence allows prosecutors to discredit, in effect, the good soldier evidence, making the defendant's case more difficult for the defense. This may be especially damaging for the defense in sexual-assault cases. Once the defendant opens the door and introduces "good character" evidence, the prosecution has the opportunity to rebut character evidence the defendant puts into issue. "[T]he prosecution may rebut the defense's good character evidence—and that rebuttal can be in the form of general testimony or of specific instances of misconduct [under MRE 405(a)]."¹⁴⁴ The prosecution can rebut in two ways: through cross-examination or by calling the prosecution's own opinion and character witnesses.¹⁴⁵

This allows the panel members the opportunity to hear both sides of the character issue and come to a more informed conclusion. Military prosecutors assert that it is not difficult to overcome the good soldier defense:

[Trial counsel should] scour the accused's past for evidence of misconduct and to conduct extensive interviews at the current and most recent duty stations. Some good character evidence is "an inch deep" and, on probing, witnesses will withdraw their endorsements or moderate their vouching for the accused. *Not only is the good soldier defense beatable—it most often is—but counsel should be armed to defeat it, even when it seems to the trial counsel that it is not logical for the defense to present in the first place.*¹⁴⁶

Thus, trial counsel may use good, old-fashioned investigative work and cross-examination of character witnesses to defeat the presumptions that good soldier character evidence raises, especially in sexual assault cases. By taking the time to rebut the defense, good soldier evidence may actually work to the advantage of the prosecution by making the prosecution's case

144. Smith, *supra* note 4, at 429.

145. See Stephen R. Henley, *Developments in Evidence III—The Final Chapter*, ARMY LAW., May 1998, at 1, 8.

146. Lawrence J. Morris, *Keystones of the Military Justice System: A Primer for Chiefs of Justice*, ARMY LAW., Oct. 1994, at 15, 22.

more damaging through rebuttal character evidence. The Supreme Court reiterated this point by stating that “the price a defendant must pay for attempting to prove his good character is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him.”¹⁴⁷

3. *The Need for Uniformity*

Criticism has been lodged against the good soldier defense primarily because it remains unclear precisely what characteristics make for a good soldier. “[V]agueness is a troubling feature of military law in general, and the evidentiary doctrine that allows admission of general good character is no exception.”¹⁴⁸ One critic has specifically asserted, “Opinions of military courts, treatises, and military evaluations describe military character in disparate ways. These descriptions draw attention to the contradictions contained within the concept as well as the absence of definable, military specific aspects of military character.”¹⁴⁹

As the discussion in Part II¹⁵⁰ indicated, there are a wide variety of character traits used in courts-martial to demonstrate the good character of the accused. While there are common themes, there is nothing close to a uniform standard of what type of evidence may be offered to show good military character. This can be attributed to the large variety of occupations fulfilled by members of the armed forces:

No single description can encompass the variety of personalities and “characters” that make up a successful modern fighting force. The intrepid captain of a nuclear submarine, the cerebral code-breaker, the ace fighter pilot, the meticulous supply sergeant, the reckless paratrooper, the selfless medic—although each is a key part of the armed forces, they share few essential character traits as a group.¹⁵¹

Critics of the good soldier defense believe that because there are a multitude of traits presented as evidence of good military character at courts-

147. *Michelson v. United States*, 335 U.S. 469, 492 (1948).

148. Hillman, *supra* note 62, at 899.

149. *Id.* at 894.

150. *See supra* Part II(C).

151. Hillman, *supra* note 62, at 896.

martial, the assertion of the good soldier defense is “inevitably incoherent.”¹⁵²

It cannot be disputed that there is no uniform standard for what constitutes a good soldier, but this should not be used to invalidate the entire concept. Quite to the contrary, it would seem that the wide diversity of occupations available in today’s modern military would necessitate numerous iterations of the good soldier defense. Today’s service member is as likely to be an expert with a computer as he is an expert with a rifle. While there may be some overlap, the characteristics which make one a good Navy SEAL (Sea, Air, Land) are different from the characteristics which make one a good network administrator. The military justice system must remain flexible enough to account for these differences. There should not be a specific, complete, single list of good soldier traits—every case has individualized circumstances, and military judges must use their discretion to decide whether or not to admit evidence. The notion that there must be a single uniform standard of what constitutes a good soldier should be resisted.

At the same time, however, there is a general conception of what traits constitute a good soldier to guide the decision maker.¹⁵³ Although today’s armed forces are more diverse, varied and complex than ever, the aforementioned general essential traits of a good soldier can be used as a guide. For example, the captain of a nuclear submarine and a military cook have very different duties, but each may be regarded as a “good soldier” in their own way. They could both be loyal to the United States, maintain grace under pressure, assist when called upon, supervise subordinates well, and be dependable and highly adaptable to adverse circumstances.

Chief Judge Everett, in a case involving a service member accused of wrongfully possessing, transferring and selling controlled substances, opined:

Testimony about someone’s “good military character” almost inevitably is somewhat imprecise—just as is lay opinion testimony that a car was being operated at a high speed or that “a person was drunk” Nevertheless, a court-martial member or

152. *Id.* (“Because the good soldier defense admits evidence of so many different traits, assertions of ‘good military character’ are inevitably incoherent.”).

153. *See supra* Part II(C).

military judge . . . will be aided by such testimony in deciding whether an accused is a person who would be unlikely to engage in drug transactions.¹⁵⁴

The lack of specificity in determining what constitutes a good soldier is not a weakness of the defense. Rather, it is a strength. It not only allows individualized determinations and judicial discretion in deciding whether to admit good soldier evidence, but it also sends a message of fairness—that the defense is available to all in the armed forces, both the cook and captain, regardless of rank or status.

4. The Defense Benefits Only Higher Ranking Officers

Another charge leveled against the good soldier defense is that it unfairly benefits those of higher rank. Hillman asserts that “the primary beneficiaries of the good soldier defense are soldiers whose long and impressive military records can overwhelm the testimony [of their accusers].”¹⁵⁵ There is both a quantitative and a qualitative element to this alleged disparity in the utility of the good soldier defense for low and high ranking service members. The quantitative element arises from the fact that

[t]he longer a soldier’s length of service, the more assignments, commanders’ affidavits, evaluations, and awards that can be admitted as evidence of good military character. This accumulation of evidence of good military character is more likely to sway a court-martial than the evidence available to a service member with low rank and little military experience.¹⁵⁶

The qualitative element of the disparity is attributable to the fact that “evidence of good military character is qualitatively better for more senior accused service members, since they have the benefit of contact with higher ranking superiors, whose evaluations carry greater weight with a military fact-finder.”¹⁵⁷ All of this leads critics of the good soldier defense

154. See *United States v. Vandelinder*, 20 M.J. 41, 45 (C.M.A. 1985).

155. See Hillman, *supra* note 62, at 907.

156. *Id.*

157. *Id.*

to assert that it provides senior officers with a privilege that is not afforded to other service members facing courts-martial.

A corollary to the argument that the good soldier defense unfairly benefits high-ranking officers also suggests that it unfairly benefits white males. Currently, there are relatively few women¹⁵⁸ and minorities¹⁵⁹ who occupy senior positions in the military. Because the good soldier defense unfairly privileges those of higher rank, and because those of higher rank are primarily white males, it is asserted that the good soldier defense is biased against women and minorities. Hillman asserts that such a disparity creates the impression that “rank and gender carry guarantees of immunity from criminal conviction” that is “corrosive” both to “good order and high morale among troops” and to the concept that “the perception of equal justice under the law is as important as its reality.”¹⁶⁰

Assertions that the good soldier defense is unfair because it only benefits higher ranking officers are unfounded. Military Rule of Evidence 404(a) makes no reference to the rank of the accused.¹⁶¹ Similarly, judicial interpretation of MRE 404(a) has not in any way limited the availability of the good soldier defense to those of high rank. Quite to the contrary, the majority of the test cases described in Part II(A), which served to elucidate the Military Court of Appeals’ interpretation of the new MRE 404(a), involved accused service members of lower rank.¹⁶² *Clemons*, *Piatt* and *McNeil* all concerned sergeants, and *Kahakauwila* concerned a private. This is certainly not a precise evaluation, but it is convincing anecdotal evidence to suggest that even those of lower rank are able to utilize good character evidence. The authors are not aware of any empirical data on the use of the good soldier defense, but given the large number of lower ranking service members relative to the number of higher ranking members, it

158. See OFFICE OF THE SECRETARY OF DEFENSE, POPULATION REPRESENTATION IN THE MILITARY SERVICES B-38 (1997) (reporting that in 1996 there were only seventeen female general officers, two of which were above the one-star rank, out of 855 total general officers).

159. See *id.* at B-39 (reporting that in 1996 there were forty-three black, eight Hispanic, and eight “other” general officers out of a total of 855 general officers).

160. Hillman, *supra* note 62, at 907.

161. See MCM, *supra* note 15, MIL. R. EVID. 404(a).

162. See *United States v. Kahakauwila*, 19 M.J. 60 (C.M.A. 1984); *United States v. McNeil*, 17 M.J. 451 (C.M.A. 1984); *United States v. Piatt*, 17 M.J. 442 (C.M.A. 1984); *United States v. Clemons*, 16 M.J. 44 (C.M.A. 1983).

seems likely that lower ranking individuals are using the defense more frequently than those of higher rank.

While the good soldier defense is equally available to all members of the armed forces, it must be conceded that it will inevitably be a more effective tool for some service members. Those who have distinguished themselves over long careers and those who have served in combat will have a greater quality and quantity of character evidence to introduce in their defense and will thus have a greater opportunity to convince the members of the panel of their good character. While critics of the good soldier defense consider this to be inequitable, it is an entirely appropriate result.

The lieutenant colonel who has provided a lifetime of honorable service is entitled to present stronger evidence of good character than that which would be available to a first lieutenant charged with the same offense. Certainly, those who point to the inequitable nature of the character evidence available to service members of different rank do not believe that it is unjust that those who cannot muster any evidence of good character are unable to use the good soldier defense. This would seem to be the next logical step in the reasoning employed by these critics. Just as it is perfectly fair that the person who cannot provide evidence of their good character is prevented from using the good soldier defense, it is equally just that a soldier who has distinguished himself over a long career or in combat will be able to present a more effective good soldier defense. It is perfectly acceptable that certain service members will be better positioned to use certain tools in their defense more effectively than others.

The concern expressed that the good soldier defense is more effective for higher ranking officers who tend to be white males, and that this will create a perception that rank, gender, and race provide greater protection from court-martial, is misplaced. The relative lack of minority and female representation in the higher ranks is certainly an area of concern for the armed forces, but one that is beyond the scope of this discussion. Suffice it to say that this is a problem that is currently being addressed, and certainly the demographic of the higher ranks will more closely resemble that of the military as a whole in the coming decades. This should serve to mitigate future accusations that the good soldier defense is perceived as being biased based on race or gender.

Even if this perception does exist, the authors disagree with the emphasis Hillman places on this perception when she states that “the per-

ception of equal justice under the law is as important as its reality.”¹⁶³ Certainly the perception of the military justice system held by its constituents and outside observers is important, but it cannot take precedence over the ultimate goal of producing justice. It is unjust to deny good soldiers the opportunity to have their honor and service considered at courts-martial simply out of fear that this could create what might be a negative perception of the military justice system.

V. Conclusion

In the summation of her article criticizing the good soldier defense, Elizabeth Hillman states: “Senior [service members] accused of misconduct are allowed to place their thumbs on the scales of justice through the good soldier defense. Military judges should right the balance.”¹⁶⁴ Hillman touches on perhaps the ultimate justification for the good soldier defense: viewed on the scales of justice, the benefits of the defense certainly outweigh the arguments presented against it.

The good soldier defense is both a powerful sword and a shield. As a sword, it allows defendants to introduce evidence to assert their good character; as a shield, it protects the accused against inferences and evidence that they committed the charged offenses. As such, the good soldier defense plays an important role in the military justice system. As outlined above, accused service members should continue to be allowed to present good soldier evidence because the military is a separate society, military offenses are unique, soldiers’ character can be measured more reliably under the surveillance of the military, and accused soldiers have historically been allowed to present good soldier character evidence.

Criticisms presented against the good soldier defense—that it is not available in civilian society and may be inequitable in sex-offense cases, for example—are unconvincing when thoroughly examined. The importance of the good soldier defense necessitates that it be preserved. On balance, the scales of justice are tilted on the side of fairness when the good soldier defense is available to the dedicated men and women who serve this country in uniform.

163. Hillman, *supra* note 62, at 910.

164. *See id.* at 911.

**DOES ONE ILLEGALITY MERIT ANOTHER?
THE LAW OF BELLIGERENT REPRISALS IN
INTERNATIONAL LAW**

ANDREW D. MITCHELL¹

I. Introduction

A special feature of international law is its lack of an effective enforcement mechanism. The law of reprisals results from that weakness, providing States a limited power of self-help to force other States to obey international law. It permits a State to take extraordinary measures, indeed measures that would otherwise be unlawful, against another State in response to a prior illegal act of the State to which the reprisal is directed. Although reprisals may have a useful deterrent effect, they can cycle out of control into an orgy of violence, and even when they do not, they typically inflict great suffering on innocents. For these reasons, successive international treaties have limited their use. Some argue that restrictions on reprisals have now gone too far, however, and are wholly out of step with political and military realities.

This article begins by defining belligerent reprisals. It then examines the conditions on the use of reprisals, including persons and objects protected from reprisals by various treaties. Once the law on reprisals is outlined, arguments for and against reprisals are critiqued to determine whether the limitations on reprisals in international law are appropriate. Finally, the article considers possible future developments and makes recommendations for clarification of certain areas of international law.

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II. Belligerent Reprisals

One must distinguish reprisals from related notions and what may appear to be related situations. *The Naulilaa Case (Portugal v. Germany)*² contains the classic definition of reprisal and its elements. This was an arbitration established in accordance with the Versailles Treaty.³ The *Naulilaa* tribunal stated:

Reprisals are an act of self-help on the part of the injured states, responding after an unsatisfied demand to an act contrary to international law on the part of the offending State They would be illegal if a previous act contrary to international law had not furnished the reason for them. They aim to impose on the offending State reparation for the offense or the return to legality in avoidance of new offenses.⁴

Reprisals are related but distinct from the concept of retorsion—acts that “are generally not unlawful and which are taken in response to behavior which itself is not necessarily illegal.”⁵ In contrast, reprisals involve acts that would normally be illegal. Reprisals are also distinct from

2. Responsabilité de L'Allemagne a Raison des Dommages Causés dans les Colonies Portugaises du Sud de L'Afrique, 8 Trib. Arb. Mixtes 409 (1928) (Portugal v. Germany) (*The Naulilaa Case*), reprinted in 2 R. Int'l Arb. Awards 1011 (1949).

3. C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 455, 460 (1952).

4. *The Naulilaa Case*, 8 Trib. Arb. Mixtes at 422-25, reprinted in 2 R. Int'l Arb. Awards at 1026. This is similar to the definition by the Institut de droit international:

Les représailles sont des mesures de contrainte, dérogoires aux règles ordinaires du droit des gens, décidées et prises par un Etat, à la suite des actes illicites commis à son préjudice par un autre Etat, et ayant pour but d'imposer à celui-ci, par pression exercée au moyen d'un dommage, le retour à la légalité.

[Reprisals are measures of coercion, derogating from the ordinary rules of the law of the people, determined and taken by a State, following the commission of illicit acts against it by another State, and having as their aim to impose on the second State, through pressure exerted by means of harm, a return to legality.]

38 ANNUAIRE 708-11 (1934).

5. Christopher Greenwood, *The Twilight of the Law of Belligerent Reprisals*, 20 NETH. Y.B. INT'L L. 35, 38 (1989).

another form of self-help, acts of self-defense.⁶ Both involve the application of armed force by a State, and share certain preconditions to their use.⁷ The difference is the purpose of the two actions.⁸ In self-defense, force is applied to counter “an immediate and physical danger” to the State, whereas reprisals coerce another State to abide by international law.⁹ Of course, reprisals are also a form of future self-defense in the sense that they may protect the State from violations of international law in the future.¹⁰

Certain rules of war are structured in such a way that their violation by one party releases other parties to the conflict from the rule. A standard reservation to the Geneva Gas Protocol of 1925¹¹ provides that the Protocol will cease to bind the State if an enemy State breaches its obligations. In effect, this agreement becomes a “prohibition on the first use of gas,”¹² so that States that are attacked with a weapon prohibited by the Protocol may respond in kind without needing to rely upon the doctrine of reprisals. Indeed, Article 60(5) of the 1969 Vienna Convention on the Law of Trea-

6. See generally Report of the International Law Commission (32d sess.), 2 Y.B. INT'L L. COMM'N 1, 53–54 (1980).

7. Derek W. Bowett, *Reprisals Involving Recourse To Armed Force*, 66 AM. J. INT'L L. 1, 3 (1972). These include a prior violation of international law by a State, an attempt to obtain relief by other non-forceful measures, and a proportionate response. *Id.*

8. William V. O'Brien, *Reprisals, Deterrence and Self-Defense in Counterterror Operations*, 30 VA. J. INT'L L. 421, 423 (1990).

9. FRITS KALSHOVEN, *BELLIGERENT REPRISALS* 26 (1971). See also Byard Q. Clemmons & Gary D. Brown, *Rethinking International Self-Defense: The United Nations' Emerging Role*, 45 NAVAL L. REV. 217, 243 (1998). The author discusses *The Caroline* case of 1837, where U.S. Secretary of State Daniel Webster asserted that self-defense may be exercised only when the “necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.” *Id.*

10. Edward Kwakwa, *Belligerent Reprisals in the Law of Armed Conflict*, 27 STAN. J. INT'L L. 49, 50 (1990); Bowett, *supra* note 7, at 3.

Within the whole context of a continuing state of antagonism between states, with recurring acts of violence, an act of reprisal may be regarded as being at the same time both a form of punishment and the best form of protection for the future, since it may act as a deterrent against future acts of violence by the other party.

Id.

11. Protocol for the Prohibition of the Use of Asphyxiation, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 94 L.N.T.S. 65 (1929).

12. Greenwood, *supra* note 5, at 38.

ties states, inter alia, that treaty provisions prohibiting reprisals are not, without more, terminated or suspended because of material breach.¹³

This article is limited to the notion of belligerent reprisals that occur during a pre-existing armed conflict. A debate is currently ongoing concerning non-belligerent reprisals and the United Nations Charter.¹⁴ Briefly, the United Nations Charter is a clear expression of the collective will of nations to find alternatives to the use of force.¹⁵ Article 2 of the Charter states, “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 manner inconsistent with the Purposes of the United Nations.” Article 2 quite clearly suggests that reprisals using force are not permitted under the Charter.¹⁶ Article 2 is modified by Article 51 of the Charter, however, which states that “nothing in the present Charter shall impair the inherent right of individual . . . 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.” It might be argued that although reprisals using force are illegal under the Charter, perhaps their functional equivalent could be permitted if characterized as an act of self-defense.¹⁷ This question, which involves non-belligerent reprisals, is beyond the scope of this article.

III. Conditions on the Recourse to Reprisals

The *Naulilaa Incident*, referred to at the beginning of Section II, specified now well-accepted limits on the use of reprisals. Specifically, reprisals (1) can only be executed by agencies or instrumentalities of a State; (2) must be proportionate; and (3) must follow a failed attempt to resolve the

13. Vienna Convention on the Law of Treaties, 1969, 1155 U.N.T. S. 331, 346; YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 196 (3rd ed. 2001).

14. See generally NICHOLAS GREENWOOD ONUF, *REPRISALS: RITUALS, RULES, RATIONALES* 35-62 (Center of International Studies, Woodrow Wilson School of Public and International Affairs, Research Monograph No. 42, 1974).

15. Leah M. Campbell, *Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan*, 74 TUL. L. REV. 1067, 1078 (2000).

16. Onuf, *supra* note 14, at 35.

17. See DINSTEIN, *supra* note 13, at 172-73 (discussing “interceptive self-defence”); Robert W. Tucker, *Reprisals and Self-Defense: The Customary Law*, 66 AM. J. INT’L L. 589 (1972).

violation by peaceful negotiation.¹⁸ Applying these rules to the facts in *Naulilaa*, the tribunal found Germany's reprisal illegal, since the acts were not a proportionate response and had not been preceded by any attempts at negotiation.¹⁹ This formulation is important because it sets out the conditions for recourse to reprisals. While treaties have significantly changed the scope of the persons and objects that may be the subject of reprisals, they have not altered these principles relating to recourse to reprisals in general, which remain governed by customary international law.²⁰ This article considers these elements in some detail below.

A. Prior Violation of International Law

The State that is the subject of a reprisal must be the State that perpetrated the prior violation of international law or its ally.²¹ The prior violation must be of the law regulating the conduct of war²²—not simply a violation of the laws regulating resort to force.²³ Therefore, a State cannot use the doctrine of reprisals to justify otherwise unlawful means or methods of warfare against a State whose only illegal act was initiating a war of aggression. This is because the law regulating the conduct of war applies to all parties regardless of any breach of the laws regulating resort to

18. Kwakwa, *supra* note 10, at 52. A similar formulation is found in section 905 of the Restatement (Revised) of the Foreign Relations Law of the United States:

(1) Subject to subsection (2), a state victim of a violation of an international obligation by another state may resort to countermeasures that might otherwise be unlawful, if such measures: (a) are necessary to terminate the violation or prevent further violation, or to remedy the violation; and (b) are not out of proportion to the violation and the injury suffered. (2) The threat or use of force in response to a violation in international law is subject to prohibitions on the threat or use of force in the United Nations Charter as well as to Subsection (1).

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 905 (1987) (Unilateral Remedies).

19. H. BRIGGS, *THE LAW OF NATIONS* 953 (1952).

20. Greenwood, *supra* note 5, at 39.

21. *See id.* at 40; M. GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 410-11 (1959).

22. *Ius in bello*.

23. *Ius ad bellum*.

force.²⁴ Indeed, as Sir Hersch Lauterpacht recognized, this is necessary to avoid the ridiculous situation “in which one side would be bound by the rules of warfare without benefiting from them and the other side would benefit from them without being bound by them.”²⁵ It also prevents each side from accusing the other of aggression and invoking the doctrine of reprisals to avoid the law regulating the conduct of war.²⁶

B. Proportionality

Although it is clear that reprisals must be proportionate, there is some disagreement as to what act or object the reprisal needs to be measured against.²⁷ The traditional view is that reprisals should be proportionate to the initial violation of international law.²⁸ McDougal and Feliciano argue, however, that the reprisal must be sufficient but not excessive in forcing compliance with international law, not necessarily proportionate to the initial violation.²⁹

While it is appropriate to bear the purpose of the reprisal in mind, it does not seem correct to suggest, as McDougal and Feliciano do,³⁰ that reprisals may exceed the initial violation in terms of violence. This would clearly increase the risk of escalating the conflict. Instead, the purpose should impose an additional limitation on the use of the reprisal so that the

24. United States v. List, 15 Ann. Dig. & Rep. Pub. Int'l Cases 632, 637 (1948).

Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, pmbl., 1125 U.N.T.S. 3 [hereinafter Protocol I].

25. Hersch Lauterpacht, *The Limits of the Operation of the Law of War*, 30 BRIT. Y.B. INT'L L. 206, 212 (1953). See also Christopher Greenwood, *The Relationship Between ius ad bellum and ius in bello*, 9 REV. INT. STUD. 221 (1983).

26. Greenwood, *supra* note 5, at 41.

27. *Id.* at 43.

28. OXFORD MANUAL, THE LAWS OF WAR ON LAND art. 86 (1880).

29. M. McDUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 682 (1961).

30. *Id.*

reprisal must not exceed either the initial violation or the minimum level of force required to induce compliance with international law.³¹ Even so, determining whether a reprisal is proportionate can still be a crude exercise,³² particularly when reprisals are not in kind, for example where a State attacks enemy soldiers with prohibited weapons in retaliation for enemy attacks on civilian targets.

C. Last Resort

Reprisals must only be used after the State attempts other reasonable methods of seeking redress short of force that have failed. In circumstances where there is a need to act quickly to protect civilians or troops from further injuries arising from violations of international law, or where it is clear that the enemy will not respond to other approaches, no other attempts may be required before resort to reprisal is permissible.³³ The requirement of last resort remains appropriate as a general rule, however, because it recognizes the drastic nature of reprisals and the likelihood of horrific consequences.

IV. Persons and Objects Protected Against Reprisals

A. Geneva Conventions of 1929

The 1899 and 1907 Hague Regulations on the Law of Land Warfare³⁴ contained no direct reference to reprisals, possibly out of concern that doing so would be seen as condoning their use. Article 27 of the Hague Regulations of 1907, however, implicitly prohibited reprisals against cultural property.³⁵ The frequent use of reprisals during the First World War,³⁶ particularly against prisoners of war, led to the first explicit prohibition on

31. Greenwood, *supra* note 5, at 43.

32. The *Ardeatine Caves* case involved a German reprisal, the slaughter of 355 Italian prisoners in response to a bomb attack by the Italian Resistance that killed thirty-three German military policemen. 15 Ann. Dig. & Rep. Pub. Int'l Cases 471 (1948). The court found the reprisal disproportionate not only because of the relative difference in numbers, but also because of the difference in the ranks of those killed. *Id.*

33. KALSHOVEN, *supra* note 9, at 340.

34. Hague Convention No. II with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevans 247; Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct 18, 1907, 36 Stat. 2277, 1 Bevans 631.

35. KALSHOVEN, *supra* note 9, at 66-67.

36. For example, the burning of the University of Louvain as a reprisal against the

their use against particular targets in Article 2 of the 1929 Convention Relative to the Treatment of Prisoners of War.³⁷ This Convention prohibited reprisals against prisoners of war,³⁸ an arguably legal practice under international law until that time. Although the prohibition was unanimously accepted by the Convention, arguments were made against it, including the assertion that no army “could reasonably be expected to renounce in war so effective and powerful a weapon for the redress or cessation of a reported intolerable wrong upon its own nationals at the hand of the enemy as immediate or threatened reprisal on enemy units in its own hands.”³⁹ Curiously, it was not included in the Geneva Conventions of 1864 and 1906 dealing with the wounded and sick, perhaps due to an oversight.⁴⁰

B. Geneva Conventions of 1949

In response to the horrors of the reprisals that had occurred during the Second World War, new treaties were prepared prohibiting reprisals against new classes of targets. The adoption of the 1949 Geneva Conventions⁴¹ represented a significant development in the law of reprisals. They prohibited:

36. (continued)

alleged firing on German troops by Belgian non-combatants. *See infra* note 91 and accompanying text.

37. Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 2 Bevans 932.

38. “[M]easures of reprisal against [prisoners of war] are forbidden.” *Id.* art. 2(3).

39. KALSHOVEN, *supra* note 9, at 74 (quoting the Tenth International Conference of the Red Cross).

40. COMMENTARY, GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 244 (J. Pictet ed., 1952).

41. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilians in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

- (1) reprisals against soldiers who are wounded or sick, medical personnel, or medical buildings or equipment;⁴²
- (2) reprisals against naval personnel who are wounded, sick, or shipwrecked, naval medical personnel, hospital ships or equipment;⁴³
- (3) reprisals against prisoners of war;⁴⁴ and
- (4) reprisals against civilians and their property in occupied territory and internment.⁴⁵

These Conventions significantly clarified the law of reprisals and outlawed the practice in relation to an expanded class of legally protected persons.⁴⁶ Most of the expansion resulted from the Fourth Geneva Convention, which prohibited reprisals against civilian internees and inhabitants of occupied territories. These were previously some of the most common targets for reprisals.⁴⁷ The prohibition of reprisals against the sick and wounded was also an important development, as earlier Geneva Conventions did not cover these reprisals. Today, almost all nations accept the four Geneva Conventions,⁴⁸ and their provisions may constitute *ius cogens* obligations.⁴⁹

42. "Reprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention are prohibited." Geneva Convention I, *supra* note 41, art. 46.

43. "Reprisals against the wounded, sick and shipwrecked persons, the personnel, the vessels or the equipment protected by the Convention are prohibited." Geneva Convention II, *supra* note 41, art. 47.

44. "Measures of reprisal against prisoners of war are prohibited." Geneva Convention III, *supra* note 41, art. 13(3).

45. "Reprisals against protected persons and their property are prohibited." Geneva Convention IV, *supra* note 41, art. 4(1). "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." *Id.* art. 33(3).

46. Kwakwa, *supra* note 10, at 57.

47. *Id.*

48. At the time of writing, 189 States were parties to the Geneva Conventions of 1949.

49. Also *ius cogens* [compelling law]. See L. Alexidze, *Legal Nature of Jus Cogens in Contemporary International Law*, 172 RECUEIL DES COURS 223, 262-63 (1981); A. ROBERTS & R. GUELF, DOCUMENTS ON THE LAWS OF WAR 1970 (2d ed. 1989).

C. Additional Protocols of 1977

While the 1949 Geneva Conventions significantly expanded the class of persons and property protected from reprisals, unmentioned was whether civilians and civilian objects in enemy, non-protected territory should also be protected from reprisals. The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable to Armed Conflicts, Geneva, 1974-1977, resolved this issue. The Conference resulted in two additional protocols to the Geneva Conventions of 12 August 1949, of which Protocol I was particularly important in relation to reprisals.⁵⁰ Protocol I applies between parties to the Protocol in cases of international armed conflicts, and by virtue of Articles 1(4) and 96(3), applies between a party to the Protocol and a national liberation movement as defined by those two provisions.⁵¹ It should be noted, however, that the United States is not a party to Protocol I and that other countries have made reservations with respect to the articles addressing reprisals.⁵² This article next describes briefly those Protocol I provisions relevant to reprisals.

Article 20 of Protocol I prohibits reprisals against persons and objects protected by Part II of Protocol I. This includes the wounded, the sick and shipwrecked, and those medical and religious personnel, buildings, vehicles and aircraft protected by Articles 8 through 34 of Protocol I. This prohibition is uncontroversial and simply extends the proscriptions on reprisal in the First and Second Geneva Conventions to a broader range of persons and objects involved in the care of the wounded, sick and shipwrecked.⁵³

Article 51(6) of Protocol I contains what appears to be an extremely broad prohibition on reprisals: "Attacks against the civilian population or

50. Protocol I, *supra* note 24; Protocol Additional to the 1949 Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 609 (Protocol II).

51. Protocol I, *supra* note 24, arts. 1(4), 96(3).

52. "The U.S. does not support [those provisions] of Article 51 and subsequent Protocol I . . . prohibiting the use of reprisals and [does] not regard such prohibitions to reflect customary international law." Michael J. Matheson, Department of State Legal Adviser, *Comments to the Humanitarian Law Conference*, in 2 AM. U.J. INT'L L. & POL'Y 419, 426. See also YORAM DINSTEIN, *supra* note 17, at 197. "Countries making reservations in respect to the articles addressing reprisals include Germany and the United Kingdom. Although worded differently, both countries have reserved the right to take reprisals against countries making serious and deliberate attacks against their: civilians, civilian population, or civilian objects." *Id.*

53. Greenwood, *supra* note 5, at 53.

civilians by way of reprisals are prohibited.”⁵⁴ It has been argued, however, that this article should be read in conjunction with Article 51(5)(b)⁵⁵ to make legitimate those attacks justified by military necessity.⁵⁶ This argument is somewhat disingenuous, given that Article 51(5) clearly gives examples rather than an exhaustive list of illegal indiscriminate attacks. Further, Article 51(5) is clearly concerned with so-called “collateral damage” rather than acts of reprisal directed primarily towards civilians. Finally, normal principles of construction would suggest that the specific wording of Article 51(6) on reprisals would prevail over any implications on reprisals that one might attempt to draw from the discussion of indiscriminate attacks in Article 51(5)(b).

Article 52(1) of Protocol I states, “Civilian objects shall not be the object of attack or reprisals.”⁵⁷ Civilian objects are defined as all objects that are not military objectives.⁵⁸ This provision recognizes that reprisals against civilian objects often result in incidental loss of lives and often affect the important interests of civilians. Interestingly, the International Committee of the Red Cross did not propose the prohibition of reprisals on

54. Protocol I, *supra* note 24, art. 51(6).

55. *Id.* art. 51(5)(b).

Among others, the following types of attacks are to be considered as indiscriminate . . . (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Id.

56. Kwakwa, *supra* note 10, at 60.

57. Protocol I, *supra* note 24, art. 52(1).

58. *Id.* art. 52(2).

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

Id. “In the case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.”
Id. art. 52(3).

civilian objects.⁵⁹ Arguably, such a prohibition encourages States to take reprisals against civilian persons, rather than civilian objects, in cases where the States' civilians suffer as victims of illegal attacks.⁶⁰ Permitting the right of reprisal against civilian objects, therefore, could ultimately result in a mitigation of the loss suffered by the civilian population. This argument essentially maintains that States are likely to agree to reprisals that are not as hideous as the original act complained of, so long as they are permitted to do something close or related to the original act. This view may or may not be correct, but it gives little guidance as to how many classes of legally protected persons or objects there should be. At its extreme, the argument suggests there should be only one class of legally protected persons because any extension could result in States choosing to ignore all the prohibitions.

Article 53 of Protocol I prohibits making "historical monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples . . . the object of reprisals."⁶¹ This prohibition is made "[w]ithout prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and other relevant international instruments."⁶² Article 4 of the Convention on the Protection of Cultural Property prohibits "any act directed by way of reprisals against cultural property."⁶³

In relation to Article 53 of Protocol I, the lesser of two evils argument again arose. Specifically, the delegates debated whether all places of worship should be protected, or whether protection should be limited to those

59. See COMMENTARY ON THE ADDITIONAL PROTOCOLS 982-86 (Y. Sandoz, C. Swinarski & B. Zimmerman eds., 1987); see also Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 250 n.58 (2000) ("The steering committee of ICRC experts on customary rules of international humanitarian law took the position that the prohibition on reprisals against civilian objects . . . is contentious and has not yet matured into customary law.").

60. Kwakwa, *supra* note 10, at 63.

61. Protocol I, *supra* note 24, art. 53.

62. *Id.*

63. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, art. 24, 249 U.N.T.S. 240. Cultural property is defined as:

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art;

places of worship that made up the cultural heritage of a people. The rapporteur stated that those who wished

to include all places of worship adduced both religious reasons and traditions of immunity and asylum to support their proposal. Those who wished to limit the objects protected . . . to [those with] considerable historical, cultural, and artistic importance argued that the immunity of these latter objects would inevitably be undermined if all local churches and other places of worship were included.⁶⁴

Protocol I does not directly withdraw protection for cultural objects and places of worship when they are used for military purpose, for example a church spire being used by snipers. It does so indirectly, however, since Article 53 of Protocol I is expressly subject to the Hague Convention, Article 11 of which provides for the loss of immunity where such objects are used for military purposes.⁶⁵

As an additional restriction upon reprisals, Article 54(4) of Protocol I provides that objects indispensable to the survival of the civilian popula-

63. (continued)

manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above; (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a); (c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as "centres containing monuments."

Id. As with Protocol I, the United States is not a party to the Convention on the Protection of Cultural Property. President Clinton sent the Hague Cultural Property Convention to the Senate for its advice and consent to ratification in 1999. According to the President's letter of transmittal, U.S. military policy and conduct of operations are entirely consistent with the Convention's provisions. *See* President's Letter of Transmittal, Hague Cultural Property Convention (Jan. 6, 1999).

64. VI OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 224, CDDH/SR.42, Annex (1974-77) [hereinafter OFFICIAL RECORD OF THE DIPLOMATIC CONFERENCE].

65. Kwakwa, *supra* note 10, at 66.

tion “shall not be made the object of reprisals.”⁶⁶ Such objects include “foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.”⁶⁷ It is clearly the corollary of the desire to protect civilians recognized in Article 51, since reprisals against objects indispensable to the civilian population lead to the same outcomes as attacks on civilians.

Article 55(2) of Protocol I states, “Attacks against the natural environment by way of reprisals are prohibited.”⁶⁸ The elusive Article 55(1) offers the only guide to the meaning of “natural environment.”

Care must be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.⁶⁹

Perhaps some of the uncertainty about this prohibition arises because the term “natural environment” was not particularly well understood even at the Diplomatic Conference. Kalshoven observed that “the Conference started from the premise that ‘the natural environment’ was a value worth being protected against intolerable damage, and left it at that.”⁷⁰

Finally, Article 56(4) of Protocol I prohibits making works and installations containing dangerous forces the object of reprisals.⁷¹ Article 56(1) defines “dangerous forces” to include such things as “dams, dykes and nuclear electrical generating stations . . . [where] attack may cause the release of dangerous forces and consequent severe losses among the civilian population.”⁷²

66. Protocol I, *supra* note 24, art. 54(4).

67. *Id.*

68. *Id.* art. 55(2).

69. *Id.* art. 55(1).

70. Frits Kalshoven, *Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974-1977*, 9 NETH. Y.B. INT'L L. 107, 103 n.55 (1978); Kwakwa, *supra* note 10, at 49 n.92.

71. Protocol I, *supra* note 24, art. 56(4).

72. *Id.* art. 56(1).

V. Evaluating the Law on Reprisals

A. The Current Position

As discussed in Part IV, Protocol I dramatically reduced the scope of persons and objects that can legitimately be made the subject of reprisals. At the time of writing, 157 states were parties to Protocol I, although a number of countries are conspicuously absent.⁷³

For those countries bound by Protocol I, in cases of land warfare, reprisals may only be taken against: (1) members of an enemy's armed forces actively engaged in hostilities or other persons who are participating directly in hostilities even if they are not members of an enemy's armed forces; and (2) military objectives, meaning "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."⁷⁴

In cases of air and naval warfare, the scope for reprisals is broader. Article 49(3) states:

The provisions of [Part IV, Section I (containing all of the reprisal provisions except Article 20)] apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.⁷⁵

This means that the reprisal provisions in Protocol I, other than Article 20, do not apply to ship-to-ship, ship-to-air, or air-to-air combat unless the combat has an attendant effect on civilians or civilian objects on land.⁷⁶ Therefore, a State's navy or air force is permitted to subject civilian aircraft and merchant ships to reprisals.⁷⁷ Why different rules should apply to air

73. These countries include Afghanistan, France, India, Iran, Iraq, Israel, Pakistan, and the United States.

74. Protocol I, *supra* note 24, art. 52(2).

75. *Id.* art. 49(3).

76. Greenwood, *supra* note 5, at 53-54.

77. N. Ronzitti, *The Crisis in the Law of Naval Warfare*, in *THE LAW OF NAVAL WARFARE* 48-50 (N. Ronzitti ed., 1988).

and naval warfare remains unclear.⁷⁸ Future international agreements should remove this anomaly because the civilian persons and objects Protocol I seeks to protect against reprisals require protection in the air and at sea just as they do on land.

B. Deterrence or Escalation?

Some commentators have suggested that after Protocol I, “the future of belligerent reprisals as an institution of international law must be in doubt.”⁷⁹ Protocol I changed dramatically the law of belligerent reprisals and has been heavily criticized on a number of grounds. Protocol I is commonly criticized because it removes an important sanction of States to deter unlawful behavior. Indeed, the Diplomatic Conference recognized that there was a need to create an alternative means of redress for States given the dramatic restrictions on their right to reprisals. The result was the insertion of Article 90 in Protocol I.⁸⁰

Article 90 provided for the establishment of an International Fact-Finding Commission to inquire into facts alleged to be grave or serious breaches of the Geneva Conventions or Protocol I and to “facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol.”⁸¹ The Commission has jurisdiction when both parties to a conflict recognize its competence.⁸² Such recognition is separate from signing or ratifying Protocol I, and it may be ongoing or limited (for example, for the purposes of a particular conflict or investigation).⁸³ Where both parties to a conflict have not accepted the competence of the Commission in advance, the Commission may only institute an inquiry with the consent of both parties.⁸⁴ The Commission was officially constituted in 1991 after twenty States parties recognized its compe-

78. See SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (L. Doswald-Beck ed., 1995). It is unclear why reprisals were not dealt with in this work, which represents the only major attempt to restate the law of armed conflicts at sea.

79. Greenwood, *supra* note 5, at 56.

80. Protocol I, *supra* note 24, art. 90.

81. *Id.* art. 90(2)(c).

82. *Id.* art. 90(2)(a).

83. At the time of writing, fifty-seven countries have recognized the competence of the International Humanitarian Fact-Finding Commission. International Humanitarian Fact-Finding Commission, *States Parties*, at <http://www.ihffc.org/en/index.htm> (last modified Mar. 8, 2000).

84. Protocol I, *supra* note 24, art. 90(2)(d).

tence.⁸⁵ The Commission has never once been called upon, and one commentator derided it as “an almost toothless tiger.”⁸⁶

While the International Fact-Finding Commission may not be the strongest mechanism for enforcing the law of armed conflict, the arguments against this Protocol I creation presuppose that reprisals would be more effective. Some commentators suggest that the execution or threat of reprisal encourages an adversary to refrain from or discontinue violations of the laws of war. In other words, reprisals provide an important deterrent or compliance effect. For example, during the Second World War, President Roosevelt threatened reprisals against the Axis Powers if they used poison gas:

[T]here have been reports that one or more of the Axis powers were seriously contemplating use of poisonous or noxious gases or other inhumane devices of warfare. . . . We promise to any perpetrators of such crimes full and swift retaliation in kind. . . . Any use of gas by any Axis power, therefore, will immediately be followed by the fullest possible retaliation upon munition centers, seaports, and other military objectives throughout the whole extent of the territory of such Axis country.⁸⁷

Some argue that this threat compelled the Axis Powers to refrain from using poison gas during the Second World War.⁸⁸ Moreover, even if war crimes are committed, it could be argued that reprisals deter the bolder and more ruthless violations of the law. These arguments in favor of reprisals can never be proven, however, and numerous examples suggest they are wrong.

During the Iran-Iraq conflict,⁸⁹ the belligerents frequently bombarded each other's civilian populations in reprisal, with no discernible impact on their enemy's behavior.⁹⁰ Similarly, in the First World War, the German High Command burned the University of Louvain on 26 August 1914 in reprisal for the alleged firing on German troops by Belgian civilians, but

85. *See id.* art. 90(1)(b).

86. Greenwood, *supra* note 5, at 57.

87. 8 STATE DEP'T. BULL. 507 (1943).

88. H. Almond, *Remarks*, 74 PROC. AM. SOC'Y INT'L L. 211 (1980).

89. Iran and Iraq are not parties to Protocol I.

90. Frits Kalshoven, *Belligerent Reprisals Revisited*, 21 NETH. Y.B. OF INT'L L. 43, 54 (1990).

this only increased Belgian resistance.⁹¹ In the Second World War, German forces fighting on the Eastern front scaled back their reprisals after the Winter of 1941-42, realizing that they were hardening Russian resistance.⁹² Kalshoven, in his classic text on belligerent reprisals, refers to the “incontestably dubious efficacy of reprisals against the civilian population and civilian objects.”⁹³ Given that the deterrent effect of reprisals is at most equivocal, these examples support the current restrictions on reprisals in international law.

Contrary to arguments in favor of reprisals as a means of deterrence, many reprisals may lead to a chain of violent conduct and counter-reprisals.⁹⁴ This dangerous potential becomes evident when reprisals are used as a form of revenge. Coster posits that “[s]ocially approved, controlled and limited acts of revenge” are examples of “safety-valve institutions” within society and can play a positive role.⁹⁵

An illustration of safety-valve mores which provide a sanctioned outlet for hostilities against the original object is supplied by the institution of the duel both in Europe and in nonliterate societies. Dueling brings potentially disruptive aggressive self-help under social control and constitutes a direct outlet for hostilities between members of the society. Socially controlled conflict “clears the air” between the participants and allows a resumption of their relationship. If one of the participants is killed, his kin and friends are assumed not to continue the hostility against his adversary: the affair is then “socially closed” and relations can resume.⁹⁶

91. BERNARD BRUNGS, HOSTAGES, PRISONER REPRISALS, AND COLLECTIVE PENALTIES 316-41 (1969).

92. *Id.* at 462. A similar reaction was found in the Netherlands. *Id.* at 465.

93. KALSHOVEN, *supra* note 9, at 26.

94. The greatest weakness of reprisals “is the fact that those to whom it is applied may have so little sense of measure that they will reply with still other violations and start down the incline that leads to a war of savagery.” E. Stowell, *Military Reprisals and the Sanctions of the Laws of War*, 36 AM. J. INT’L L. 643, 649 (1942).

95. LEWIS COSTER, THE FUNCTIONS OF SOCIAL CONFLICT 42 (1964).

96. *Id.*

Regardless of any “safety-valve” role that duels might play within a society, they offer a poor analogy for acts of revenge.

Revenge involves unilateral determinations of right and wrong—in the case of reprisal, determining when the laws of war have been broken and what response is appropriate. No neutral and independent authority determines whether a prior violation of the law has occurred,⁹⁷ and no understanding exists between the parties regarding the significance of any reprisal. For example, the poison gas claims made during the Iran-Iraq conflict were unequivocally denied. The enemy, therefore, denied the legitimacy of reprisals based on these claims.⁹⁸ This illustrates how the subjective decision regarding permissible reprisals can be contested by the State subject to the reprisal, which may view it as “arbitrary or self-serving violence.”⁹⁹ In this case, not only does the reprisal fail to contribute to future compliance with international law, but also the State subject to the reprisal views itself as having been wronged, contributing to the likelihood of another round of revenge.¹⁰⁰ Indeed, the Lieber Code of 1863 warned that “[u]njust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine wars of savages.”¹⁰¹ This continued exchange of violence is particularly likely when large groups such as States are involved. Thus, far from “clearing the air,” reprisals may perpetuate violence through an open-ended series of aggressive exchanges.

C. The Law/Realpolitik Tension

Some commentators suggest that politically unrealistic limitations on reprisals will increase the likelihood of serious breaches of international humanitarian law:

If there are serious and long term attacks upon the civilian population of a country at war, in breach of the provisions of the Protocol, it is likely that public opinion would demand that similar action be taken against the enemy and there is an argument for suggesting that this latter action should be controlled by legal

97. Greenwood, *supra* note 5, at 42.

98. *Id.* at 41.

99. Kwakwa, *supra* note 10, at 74.

100. Onuf, *supra* note 14, at 7.

101. U.S. Dep’t of Army, Gen. Orders No. 100, art. 28(2) (1863), *reprinted in* THE LAWS OF ARMED CONFLICT (D. Schindler & J. Toman eds., 3rd ed. 1988).

norms rather than becoming uncontrolled and unlawful retaliation.¹⁰²

Breaches of Protocol I by an enemy could create significant pressure for retaliations in kind. However, there will always be pressure on States to abandon the rules of armed conflict in war whether as revenge for countrymen killed according to the laws of war by the enemy or when compliance with the laws of war requires greater military casualties in order to minimize the loss of civilian life. In either case, speculation as to public opinion or “the likelihood of popular demands for revenge”¹⁰³ should not guide the development of the laws of war.

Some argue also that reprisals avoid giving a significant military advantage to the aggressor in a conflict.¹⁰⁴ From this perspective, reprisals “equalize the position of the belligerents by releasing the one from obedience to the law which the other has flouted.”¹⁰⁵ This appears to be the view of the U.S. Joint Chiefs of Staff, who regard the limitations on reprisals resulting from Protocol I to be “unacceptable from the point of view of military operations.”¹⁰⁶

The military disadvantage flowing from compliance with Protocol I is difficult to establish. For example, special protection ceases when civilians take a direct part in hostilities, or works and installations containing dangerous forces are being used “in regular, significant and direct support of military operations and if such attack is the only feasible way to termi-

102. Kalshoven, *supra* note 70, at 58 (quoting David Hughes-Morgan). These comments are similar to comments of the United States delegation to the Diplomatic Conference:

In the event of massive and continuing violations of the Conventions and the Protocol, this series of prohibitions of reprisals may prove unworkable. Massive and continuing attacks directed against a nation's civilian population could not be absorbed without a response in kind. By denying the possibility of a response and not offering any workable substitute, the Protocol is unrealistic and, in that respect, cannot be expected to withstand the test of future armed conflict.

OFFICIAL RECORD OF THE DIPLOMATIC CONFERENCE, *supra* note 64, para. 81, *cited in* Greenwood, *supra* note 5, at 58.

103. Greenwood, *supra* note 5, at 58.

104. Kwakwa, *supra* note 10, at 76.

105. EVELYN SPEYER COLBERT, *RETALIATION IN INTERNATIONAL LAW* 2 (1948).

106. A.D. Sofaer, *The Rationale for the United States Decision Not to Ratify*, 82 AM. J. INT'L L. 784, 785 (1988).

nate such support.”¹⁰⁷ In all but the most extraordinary circumstances, therefore, no significant military advantage arises from violating the Protocol I prohibitions on reprisals.¹⁰⁸

D. The Old and New Schools

The doctrine of reprisals developed in a time when duties under international law were owed to another State and based almost exclusively on notions of reciprocity. Under this classical school of international law, the relationship between States was considered in contractual terms, so that violation by one State of its obligations to the other justified a corresponding violation by the second State towards the first.¹⁰⁹ In contrast, the modern school of international law, particularly international human rights law, considers that a State has obligations not only to other States with whom it trades or interacts, but also to individuals and the international community as a whole.

While it is possible to view civilians as targets based on a principle of collective responsibility,¹¹⁰ this view runs directly counter to the United Nations Charter, which declares the resolve of the peoples of the United Nations to “reaffirm faith in fundamental human rights, [and] in the dignity and worth of the human person.”¹¹¹ A principle of collective responsibility also generally overestimates the ability of civilians to control the way in which their State conducts war. While one may wish all individuals to have a government responsive to their wishes, it is naïve to believe that this exists everywhere. Kalshoven notes that “in many (perhaps most)

107. Protocol I, *supra* note 24, art. 56(2)(c).

108. Kalshoven, *supra* note 70, at 57.

109. Remigiusz Bierzanek, *Reprisals as a Means of Enforcing the Laws of Warfare: The Old and the New*, in *THE NEW HUMANITARIAN LAW OF ARMED CONFLICT* 235 (Antonio Cassese ed., 1979).

110. Major General Halleck stated that “all the members of a town or corporation are held responsible in damages for the neglect or carelessness of their agent; so, in a war, a city, an army, or an entire community, is sometimes punished for the illegal acts of its rulers or individual members.” H. Halleck, *Retaliation in War*, 6 *AM. J. INT’L L.* 107, 110-11 (1912).

111. U.N. CHARTER, pmb. See Bierzanek, *supra* note 109, in *THE NEW HUMANITARIAN LAW OF ARMED CONFLICT*, *supra* note 109, at 244.

Under customary international law, members of the enemy civilian population are legitimate objects of reprisal. The United States nonetheless considers reprisal actions against civilians not otherwise legitimate

countries the population is an instrument in the hands of those in power, rather than the other way round.¹¹²

A belief in human rights suggests that, at least in the context of military operations, a distinction needs to be drawn between humans as individuals and humans as part of a wider collective.¹¹³ For this reason, international humanitarian law classifies individuals as combatants or non-combatants. These humanitarian obligations owed by States to the international community as a whole support the prohibition against civilian reprisals in Protocol I and, because of the impracticability of distinguishing between civilians and civilian objects, the prohibition on reprisals against civilian objects.

VI. Conclusion

While the international community must continue to search for more effective means to enforce international law, the successive reduction in the class of individuals and objectives that may be the subject of reprisals is both workable and appropriate. The uncertain potential of the doctrine of reprisals to make a positive contribution to the maintenance of international law cannot outweigh its certain potential for abuse.¹¹⁴ Advances in

111. (continued)

objects of attack to be inappropriate in most circumstances. For nations party to [Geneva Protocol] I, enemy civilians and the enemy population are prohibited objects of reprisal. The United States has found this new prohibition to be militarily unacceptable because renunciation of the option of such attacks "removes a significant deterrent that presently protects civilians and other war victims of all sides of a conflict."

U.S. DEP'T OF NAVY, NAVAL WARFARE PUBLICATION 1-14M, COMMANDERS HANDBOOK ON THE LAW OF NAVAL OPERATIONS para. 6.2.3.3 (n.d.) (citing Sofaer, former Legal Adviser to the State Department). See also A.R. Thomas & J.C. Duncan, *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, 73 J. INT'L L. STUD. (1999).

112. Kalshoven, *supra* note 70, at 60.

113. Kwakwa, *supra* note 10, at 74.

114. EVELYN SPEYER COLBERT, RETALIATION IN INTERNATIONAL LAW 200 (1948).

the destructive firepower of military technology only heighten this abusive potential.

More appropriate enforcement mechanisms are found at an international level. These include admittedly imperfect bodies such as the International Fact-Finding Commission and the International Criminal Court. Rather than lament their imperfections, we should recognize how they reinforce modern conceptions of international law where States owe duties to the international community. They can be no less effective than the practice of reprisals they replace, and they will result in much less bloodshed.

**THE TWENTY-NINTH KENNETH J. HODSON LECTURE
ON CRIMINAL LAW¹**

HONORABLE ROBINSON O. EVERETT²

SENIOR JUDGE, UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

How pleased and privileged I feel to have been invited to give the Hodson lecture this year. I recall that in the 1970's I lectured here once at The Judge Advocate General's (JAG) School and discussed *Parker v. Levy*,³ and that was a memorable experience for me. Most important, by presenting this lecture today, I help honor the memory of a Judge Advocate General for whom I have always had the greatest respect and admiration and whose contributions to military justice are legendary. Although I did not have as close a contact with Ken Hodson as did my colleague Walter Cox, who at one time served as his aide, I certainly had ample opportunity to observe his immense talent and his dedication to military justice.

Because my career as a judge advocate began in 1951, only a few months after the Uniform Code of Military Justice (UCMJ or Code) took effect, I decided that my Hodson lecture would center on some personal reflections concerning military justice and would conclude with a brief look to the future.

During law school, I received no instruction about military justice and courts-martial. In retrospect, this seems ironic since I believe courts-martial were the first national courts—courts established by an act of a national legislative body, the Continental Congress, rather than by a state legislature. In my last semester in law school at Harvard, my evidence teacher was Professor Edmund M. Morgan, whom Secretary Forrestal had

1. This article is an edited transcript of a lecture delivered on 6 April 2001 by the Honorable Robinson O. Everett, Senior Judge, United States Court of Appeals for the Armed Forces, to members of the staff and faculty, distinguished guests, and officers attending the 49th Graduate Course at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. The Kenneth J. Hodson Chair of Criminal Law was established at The Judge Advocate General's School on 24 June 1971. The chair was named after Major General Hodson who served as The Judge Advocate General, United States Army, from 1967 to 1971. General Hodson retired in 1971, but immediately was recalled to active duty to serve as the Chief Judge of the Army Court of Military Review. He served in that position until March 1974. General Hodson served over thirty years on active duty, and he was a member of the original staff and faculty of The Judge Advocate General's School in Charlottesville, Virginia. When the Judge Advocate General's Corps was activated as a regiment in 1986, General Hodson was selected as the Honorary Colonel of the Regiment.

appointed to chair a drafting committee for what became the UCMJ; but I don't believe that I heard Professor Morgan mention this project. I do recall that a fellow law student, John Gibbons, who later served as Chief Judge of the 3rd Circuit, told me that he was doing a law review note on a proposed code of justice for all the armed services.

The Korean War began during the week that I graduated from law school and I realized then that I might soon be in the armed forces. Sub-

2. LL.M., Duke Law School; J.D., Harvard Law School, *magna cum laude*; A.B., Harvard Law School, *magna cum laude*. In September 1950, Judge Everett became an assistant professor at the Duke Law School. Then he served on active duty with the Air Force for more than two years during the Korean War and was assigned to the Judge Advocate General's Department. Upon his release from active duty, he became a commissioner of the United States Court of Military Appeals. In the fall of 1955, he returned to Durham, North Carolina, to practice law and subsequently joined a firm with his parents. From 1955-1980 he was engaged in private law practice in North Carolina and at various times in the District of Columbia. Also, he was an officer of and counsel for various business organizations and nonprofit corporations. After rejoining the Duke law faculty on a part-time basis in 1956, he has served continuously on that faculty. He became a tenured professor in 1967. He presently serves as a full-time law professor on the Duke law faculty. In 1956, Judge Everett published a textbook, *Military Justice in the Armed Forces of the United States*, and he has written numerous articles on military law, criminal procedure, evidence, and other legal topics. As associate editor of *Law and Contemporary Problems*, a legal periodical published at Duke, he edited and prepared forewords for various symposia on many topics. From 1961-1964, Judge Everett served part-time as a counsel to the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, and from 1964-1966 he was a consultant for that Subcommittee. During this period he participated actively in extensive studies and hearings, which helped lead to enactment of the Military Justice Act of 1968. Judge Everett was a member of the Air Force Reserve from August 1950 when he enlisted as a private, until April 1978, when he retired as a colonel. Judge Everett was president of the Durham, North Carolina, Bar and from 1978-1983 was a member of the Council of the North Carolina State Bar. He is currently a member of the North Carolina IOLTA Board of Trustees. From 1973-1977, he was a member of the American Bar Association's Standing Committee on Military Law and from 1977-1979 he chaired that Committee. For many years he has been a member of the American Law Institute, and he is a life member of the National Conference of Commissioners on Uniform State Laws. He has chaired various sections and committees for the Federal Bar Association and in September 1987 received the Association's Earl W. Kintner Award for his service. He is an American Bar Fellow. For many years, he has been the Chair of the North Carolina Committee on Legal Assistance for Military Personnel. In February 1980, President Carter nominated Judge Everett to the United States Court of Military Appeals, and he assumed office on 16 April 1980. At that time he was designated to serve as Chief Judge, a position which he held until his term expired on 30 September 1990. He then became a Senior Judge and continued to serve in active service on the court until 1 January 1992, when the court reached its full membership. As a retired Senior Judge, he is periodically requested to serve on the court when necessary.

3. 417 U.S. 733 (1974).

sequently, during the luncheon break on the second day of my Bar exam, I enlisted in the Air Force reserve and thereafter applied to be a judge advocate. Ultimately, I was commissioned as a judge advocate and ordered to active duty. Instead of being sent to a JAG school for training, I was to learn my duties by means of on-the-job training. When I reported in at Amarillo Air Force Base (AFB), Texas, I discovered that everyone was trying to learn how to apply the recently enacted UCMJ.

None of us really understood the importance of innovations contained in the Code. For example, the right to defense counsel was made available in general and special courts-martial and without respect to indigency. This, of course, was before *Gideon v. Wainwright*⁴ was decided. The Code's Article 31(b) warning, which must be given to anyone who is accused or suspected of a crime, preceded *Miranda v. Arizona*,⁵ and was later cited by the Supreme Court in seeking to justify the warning requirement imposed there.⁶ Moreover, even today the *Miranda* warning requirement is much narrower than Article 31(b), which does not apply only to custodial interrogation.

Free military counsel on an appeal from conviction where the sentence included a punitive discharge or a year or more of confinement was another protection that went far beyond that available in state and federal criminal appeals either in 1950 or even today. Automatic appellate review, which included free records of trial and consideration of appropriateness of sentence and not only of the sufficiency of government evidence, but also the weight of its evidence, provided extra protection for service members. The Article 32 investigation constitutes an important screening device to protect accused persons prior to trial and also offer an accused discovery of the prosecution case, which usually is not available through grand jury review and otherwise in civilian court systems.

Some of the practices I encountered at that time would not be tolerated today. For example, at my base the trial counsel and the staff judge advocate conferred to determine what officers should be appointed as court-martial members. I served as defense counsel for a year, but because of some confusion in my records, I was not certified as a defense counsel by The Judge Advocate General, and the court-martial orders had to designate a certified co-counsel to serve with me. I never won a complete

4. 372 U.S. 335 (1963).

5. 384 U.S. 436 (1966).

6. *See id.* at 489.

acquittal, but gradually I began to get lighter sentences, whereupon I was switched over to the prosecution side.

Early in 1952, the Air Force established at Amarillo AFB the 3320th Retraining Group to rehabilitate enlisted persons convicted by court-martial and to restore them to active duty. Almost a decade later when Amarillo AFB was closed down, this retraining program was transferred to Lowry Air Force Base in Colorado, and subsequently it was consolidated into an inter-service retraining project at Charleston, South Carolina, which I believe the Navy [today] manages. In creating its retraining program in 1952, the Air Force truly pioneered and paved the way for similar endeavors in civilian penal systems. Currently, when recruitment shortfalls may be in prospect, rehabilitating experienced persons convicted of drug offenses may again become very important.

In the fall of 1953, after being released from active duty, I had the privilege of serving as a commissioner to Judge Paul W. Brosman, one of the three original judges of the Court of Military Appeals. The judges were very unique and interesting people. Chief Judge Robert E. Quinn was a trial court judge when appointed to the Court of Military Appeals, but previously he had been lieutenant governor and governor of Rhode Island and during World War II had served as a Navy captain. Judge George Latimer came to the Court of Military Appeals from the Utah Supreme Court, and during World War II he had served overseas as an Army colonel. Judge Brosman had been dean of the Tulane Law School when appointed to the court, but had actually been called to active duty during the Korean War as an Air Force Reserve colonel and was playing a major role in the selection of judge advocates for the recently created Air Force Judge Advocate General's Department. Thus, unlike any other judge in the court's history, Judge Brosman went on to the court directly from active military status, and he remained a member of the Air Force Reserve until his untimely death in December 1955.

Consistent with his great interest in military justice, President Truman interviewed each of the judges before appointing them to the court, and I assume that appointing a judge with experience in each of the armed services was intended to emphasize that the new Code was applicable to all the services. Although fifteen years was to be the term of office for a judge of the Court of Military Appeals, the terms of the first judges were staggered—with fifteen years for Chief Judge Quinn, ten years for Judge Latimer, and five years for Judge Brosman. Incidentally, I have heard that the Court of Military Appeals got its splendid courthouse at 450 E Street,

N.W. as a result of a personal appeal by Chief Judge Quinn to President Truman, wherein Quinn suggested that if the new court was to be the Supreme Court for service members, it should have its own courthouse and that the courthouse just vacated by the D.C. Circuit would be especially suitable. Truman agreed and that was the end of the matter.

Chief Judge Quinn never moved to Washington during his two decades of service as a judge and instead flew down for court sessions and would usually stay at the Army-Navy Club. Judges Brosman and Latimer, on the other hand, lived near each other out in the Chevy Chase area and sometimes drove to work together. Fortunately, Quinn had an excellent Clerk of Court, Fred Proulx, who also was from Rhode Island. Of the three judges, Judge Brosman was the most scholarly and was especially precise and colorful in the language of his opinions. Chief Judge Quinn was probably the most result-oriented of the three, and Judge Latimer was probably the most pro-government. Interestingly, unlike almost every other federal court at the time, appointments to the court were subject to a political test [because] not all the judges could be appointed from the same political party; Judge Latimer was a Republican, while Quinn and Brosman were Democrats.

Incidentally, my appointment to serve as a commissioner to Judge Brosman was a real fluke. When I was on leave shortly before leaving active duty in 1953, I had gone to Washington, and while there I visited the Court of Military Appeals to seek admission to its Bar. Judge Brosman swore me in and thereafter asked whether I would be interested in serving as his commissioner, a position which had become vacant. When I asked what was a commissioner, I was told that it was a GS-13 position; and when I asked what was a GS-13, I was told that it was the equivalent to being somewhere between the rank of major and lieutenant colonel. Since I was only a lieutenant, this sounded like a great “jump promotion,” and so I accepted Judge Brosman’s offer and spent the next two years as his commissioner, which was in many ways equivalent to being his law clerk.

Since it was newly created and was interpreting a new statute, the Court of Military Appeals faced many new challenges, and this made it an interesting place to serve. The judges were not bound by extensive precedent and so—in Judge Brosman’s words—it was a court “freer than most.” Some guidance was provided by cases interpreting the Articles of War and

Articles for the Government of the Navy and by the legislative history of the Uniform Code, but even so, the court had room to be innovative.

I recall that in 1954 the court had some novel cases involving the insanity defense and the test to be applied in determining mental responsibility. These issues arose shortly after the Court of Appeals for the District of Columbia had applied in *United States v. Durham*⁷ a new and very controversial test of insanity—a test which did not focus on knowledge of right and wrong or ability to adhere to the right, but instead on whether the criminal act was the “product” of a mental disease. In *United States v. Dorothy K. Smith*,⁸ insanity had been relied on as a defense by the self-made widow of an Army colonel whom she had fatally stabbed with an Okinawa ceremonial sword. One interesting aspect of her case was that Mrs. Smith’s father was Walter Krueger, an Army lieutenant general, who had held an important position under General MacArthur. A sanity board of three colonels concluded that she was mentally responsible, but a general who had treated Mrs. Smith as a patient years before, testified at trial that she had been insane when she killed her husband. She was convicted and given a life sentence.

The other case involved Clarice Covert, who was the wife of a member of the Air Force. When she came in to see her psychiatrist for a routine appointment, she told him that the night before she had stabbed her husband several times with a knife and then had slept in bed with the cadaver for the rest of the night. The doctor was incredulous, but asked that military police check her account, and they found her husband’s corpse in the bed. At her subsequent trial for murder, some experts testified that she had been sane at the time of the homicide, and others testified that she was not mentally responsible. The court-martial found her guilty and also sentenced her to life imprisonment. The Court of Military Appeals affirmed the conviction of Dorothy K. Smith but reversed that of Clarice Covert because of instructional error and ordered a new trial.

Ultimately in both cases, the Supreme Court later ruled that the courts-martial lacked jurisdiction to try civilian dependents for murder; and since both homicides had occurred overseas, no American state or fed-

7. 214 F.2d 862 (D.C. Cir. 1954).

8. 10 C.M.R. 350 (A.B.R. 1953).

eral court could try these women. Thus, the ultimate result was crime without punishment.

Another issue I recall concerned the Article 31(b) warning and whether a warning was necessary when an undercover agent was questioning a service member suspected of a crime. The Court's conclusion was that the Code's language should not be applied literally, and that the warning was not necessary. Obviously, if the warning were required by the Code, the use of undercover agents would be severely restricted.

While working for Judge Brosman, I wrote a textbook, *Military Justice in the Armed Forces of the United States*. My purpose was to provide a readable explanation of how military justice had developed and an account of its major features. I discovered that finding a publisher for the book was as hard as writing the book, if not harder. Perhaps someday I can update my 1956 book and describe some of the later developments in military justice.

Soon after serving with Judge Brosman, I conceived another project, of which I am reminded when I see announcements about the television series *JAG*. Some of the cases that came to the court involved factual situations and issues that I thought would be of interest to the general public. One example is the alleged "brainwashing" of Americans captured by the North Koreans. With this in mind, I mentioned the idea of a television series based on courts-martial to a friend who was working at CBS, and then I recruited another friend with literary talents to review some case files at the Court of Military Appeals and to prepare some scripts. Unfortunately, my intended screenwriter married someone and because of domestic responsibilities could not complete her task, and I ultimately abandoned the project and my dreams of being a producer.

My first contact with General Hodson was the result of service in the 1960s as a counsel to Senator Sam Ervin's Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary. I had testified before the Subcommittee on some topics concerning criminal procedure, and the Subcommittee Chief Counsel invited me to serve on a part-time basis as a counsel for the Subcommittee. My anticipated tasks involved some issues of criminal procedure.

Soon after accepting the invitation, I had dinner with an Air Force colonel, Leroy Kahn, under whom I served in the Air Force Reserve. When I described my new position as a Senate counsel, Colonel Kahn said

half-jokingly something to the effect that while the Subcommittee was studying constitutional rights, it should look at the constitutional rights of service members. To his surprise, I responded that I thought this was a great idea and that I would pass it on to Senator Ervin. Colonel Kahn was probably shocked at what his chance remarks might have unleashed. In any event, Senator Ervin reacted very favorably to the idea. This was quite foreseeable because Ervin had a well-established interest in the welfare of service members. His own record in World War I had been unique, and I understand that among the U.S. Senators who had served in that war, he was the most decorated. Furthermore, he was a ranking member of the Senate Armed Service Committee.

Senator Ervin—whom some have called “The Last of the Founding Fathers”—announced at the outset of the hearing that “[w]ithout justice there can be no discipline and without discipline there can be no justice”. On that premise, in the winter of 1962, the Subcommittee conducted extensive hearings on the constitutional rights of service members and placed special emphasis on military justice. Detailed questionnaires were sent to each of the three military departments in order to ascertain differences of approach among the services. In addition, field trips were made by Subcommittee staff members—including one to Europe. In connection with the Army’s responses to the Subcommittee, General Hodson played a major role, and he was greatly respected by all who came in contact with him. Unlike some who appeared before the Subcommittee and were primarily interested in maintaining the status quo, he was genuinely interested in discovering defects in military justice and correcting them.

One area in which the armed services had different approaches was with respect to plea bargaining. The Army had authorized pretrial agreements between the accused and the convening authority, whereby the convening authority agreed that if the accused pled guilty, no more than a specified sentence would be approved. Thus, the accused in return for pleading guilty was assured of a ceiling on sentence, but could try to “beat the deal” at the trial level. The Navy soon followed the Army’s example; but for many years the Air Force refused to allow plea bargaining except with approval from The Judge Advocate General himself.

It is important to remember that the Army approved pretrial agreements a decade before the Supreme Court decided *Santobello v. New York*,⁹ wherein Chief Justice Burger’s opinion for the Court described the advan-

9. 404 U.S. 257 (1971).

tages of plea bargaining and allowed it to be done overtly—rather than covertly—as was the practice in many states and federal courts. Ultimately, the Air Force changed its position and allowed plea bargaining at the base level, although I understand that concern still exists as to possible disparities between different installations in entering plea bargains.

Senator Ervin was troubled by a jurisdictional gap that had been created by Supreme Court decisions in *Toth v. Quarles*,¹⁰ and *Reid v. Covert*.¹¹ The former concerned crimes by service members who later had been discharged, and the latter dealt with crimes committed by civilian dependents accompanying the armed forces overseas. In each instance, the Supreme Court ruled that the exercise of military jurisdiction was unconstitutional. Senator Ervin introduced bills that in both situations would have authorized federal district courts to exercise criminal jurisdiction. Although these bills were not passed then by Congress, in November 2000—more than three decades later—Congress wisely closed the jurisdictional gap by enacting legislation of the type Senator Ervin had proposed.

Senator Ervin was also concerned about the possibility that other-than-honorable administrative discharges might be used to bypass safeguards that the UCMJ provided for punitive discharges. Indeed, in addressing a group of lawyers, The Judge Advocate General of the Air Force had adverted to this alternative. For example, what if a service member who had been tried and acquitted by a court-martial for crimes that authorized a bad-conduct discharge was later brought before an administrative board to be processed for an other-than-honorable discharge—at one time called an undesirable discharge—because of the same alleged misconduct? In any event, Senator Ervin proposed some legislation to avoid possible abuse of administrative separation procedures, but none was enacted. However, I believe that the Subcommittee's investigation probably led to some improvement in military administrative procedures involving service members.

The Subcommittee held further hearings in 1966, and ultimately its efforts resulted in enactment of the Military Justice Act of 1968. My understanding is that General Hodson was delegated authority by the Pentagon to work out some mutually acceptable reforms of military justice with Larry Baskir, who had become Chief Counsel for the Subcommittee, was later Deputy General Counsel of the Army, and now is Chief Judge of

10. 350 U.S. 11 (1955).

11. 354 U.S. 1 (1957).

the Court of Federal Claims. In any event, the 1968 legislation made important changes by broadening the right of accused service members to be represented by trained military counsel, changing “law officers” into “military judges” and providing these “judges” for special courts-martial as well as for general courts-martial.

A similar change was made as to members of “Boards of Review,” who became “appellate military judges” on “Courts of Review.” Of special importance was the Act’s authorization for service members to waive trial by court-martial members and be tried by military judge alone. In light of the important improvements in military justice, which resulted from the work of Senator Ervin’s Subcommittee, I think it would be fortunate if in the near future some other congressional committee would undertake a similar intensive study of military justice and the rights of service members.

Military justice received a hard blow in 1969 when the Supreme Court decided *O’Callahan v. Parker*,¹² which held that courts-martial only had jurisdiction over offenses which were “service-connected.” In a footnote to the Court’s opinion, Justice Douglas referred to “so-called military justice,” and the impression conveyed is that service members should be subject to this unjust system no more than absolutely necessary. I recall that at the 1970 meeting of the American Bar Association in St. Louis, I participated in a panel along with General Westmoreland and others and harshly criticized Justice Douglas’ opinion in *O’Callahan* for conveying an unfair impression of military justice. As I learned later to my horror, Justice Douglas was in the room at the time, and so I hoped I would never have any occasion to argue before him.

In a later conversation with Colonel Frederick Bernays Wiener, an authority on military law who had successfully argued *Reid v. Covert*, I was told that he had talked about *O’Callahan* with Dean Erwin Griswold, who was then Solicitor General, and that he had expressed to Griswold the view that it was unfortunate that Griswold himself had not argued *O’Callahan* for the government. In any event, I believe Griswold did personally argue two later cases which presented *O’Callahan* issues, and that he suc-

12. 395 U.S. 258 (1969).

ceeded in obtaining Supreme Court rulings that the *O'Callahan* decision did not apply overseas and did not apply retroactively.

During the early 1970's, I learned that after completing his tour of duty as Judge Advocate General, General Hodson had become Chief Judge of the Army Court of Military Review. His assuming this position was important in enhancing the stature of that court and was still another action on his part to improve the military justice system. In my view, the precedent he established of having a general officer head the Army Court of Military Review—now Army Court of Criminal Appeals—has increased the effectiveness of that court and the respect given to it and its counterparts in the other services.

In April 1980 when I became Chief Judge of the Court of Military Appeals, the caseload of that court was dramatically increasing—especially because of the war on drugs. Moreover, relations between the Pentagon and the court had become strained, and the [Department of Defense (DOD)] General Counsel, Deanne Siemer, had suggested the abolition of the Court of Military Appeals and the transfer of its jurisdiction to some other court, such as the Fourth Circuit. My appointment was only to fill an unexpired term of thirteen months, although a subsequent statutory change in December 1980 increased it to ten years. To say that the situation was challenging would be an understatement.

Some of our most interesting issues concerned the application of *O'Callahan*. Frankly, I took a broad view of “service-connected”—perhaps because my view of military justice was more favorable than that of Justice Douglas. Indeed, on one occasion I was asked if I thought *any* action by a service member was not service-connected, and I replied that the best example would be a crime committed by a service member who was attending law school pursuant to an excess leave program. Ironically the Supreme Court overruled *O'Callahan* in 1987 in *Solorio v. United States*,¹³ where I had written the opinion for our court and in which we had taken a broad view of service-connection. Obviously the Supreme Court finally decided that drawing a line between service-connected offenses and other offenses was not worth the attendant uncertainty and that it was bet-

13. 483 U.S. 485 (1987).

ter to predicate court-martial jurisdiction on military status. My confidence in military justice is such that I am convinced this was a wise choice.

The drug war also gave rise to a variety of Fourth Amendment issues. Is compulsory submission of a urine sample for testing an unreasonable search and seizure? To what extent should efforts to locate drugs be analogized to health and welfare inspections? Here again our court, recognizing the legitimate concerns about the effects of drug use on military readiness, took a broad view of the reasonableness of the searches being performed. However, at the same time we construed broadly the term “search.”

Some other important legislation for military justice was enacted in 1983 when Congress provided for appellate review by the Supreme Court of cases in which the Court of Appeals for the Armed Forces—then the Court of Military Appeals—had granted review. This change made it easier to obtain from the Supreme Court its answer to legal questions raised in a court-martial. Note, however, that the Court of Appeals for the Armed Forces is gatekeeper for the Supreme Court, which is not authorized to undertake direct review of a court-martial case denied review by [the Court of Appeals for the Armed Forces]; and I believe this role of gatekeeper for access to the Supreme Court is almost unique among appellate courts.

In the mid-1980's, our three judge court was confronted with a situation in which for some eighteen months only Judge Cox and I were actually able to serve. This situation was the result of a retirement of Judge Cook, a disability retirement of Judge Fletcher, and delay in filling vacancies. Meanwhile our caseload had almost doubled and had gone well over 3000 petitions for review in one year. That probably is almost three times the number of petitions currently being reviewed by the court each year. Fortunately, however, the number of petitions finally peaked, and meanwhile Judge Cox and I were able to keep cases moving. Incidentally, I should note that the state of discipline revealed by the records of trial when I first became a judge was at best disappointing, but later it seemed to have improved significantly.

Because I felt that military justice was high quality, but that the general public seemed to have a different impression, I believed it important to provide opportunities for the public to learn more about the system. Thus, at the suggestion of Professor Steve Saltzburg, who was then on the faculty of the University of Virginia Law School, I arranged for our court to hear an actual argument here at Charlottesville. Once we had opened

the door, a flood of invitations came in for us to hear arguments elsewhere, and the court heard actual cases at West Point, Wake Forest, the Air Force Academy, and various other law schools and military installations. This was the origin of Project Outreach, which provided a valuable model for other courts.

At a reception I was talking to Tim Dyk, a Washington attorney, who did First Amendment work for at least one television network. Incidentally, he is now a judge on the federal circuit. In any event, Tim was dejected because of his inability to persuade the Supreme Court or the Article III federal courts to allow televising of oral arguments. I told Tim that our court—as an Article I court—was not bound by the policies of the Judicial Conference and that I felt we would be willing to allow some experiments with televised arguments. The result was that several of the arguments of the Court of Military Appeals were televised, and from all I have heard, the reaction was favorable. Incidentally, before we had the first televised argument, I received a letter from Senator Nunn and Senator Warner, the chair and ranking minority member respectively of the Senate Armed Services Committee, expressing concern about our decision to allow televised arguments. I hand-carried a letter to the Senators expressing our court's view that we took pride in the military justice system and wanted to let the public know more about it, and that for this reason we were allowing television of the argument. I heard nothing further from Capitol Hill.

Histories are written of various courts, and I concluded it would be worthwhile to have someone writing a history of our court. Initially I asked a staff member to be our court historian in addition to his other duties. However, in a subsequent discussion with “Doc” Cooke, the DOD official who oversees the administrative support provided the court by the Pentagon, it was suggested to me that we should seek a professional historian to write the history of the court. In turn, he requested the DOD historian and the Air Force historian to help our court find the best person for the task; and with their expert advice we chose Professor Jonathan Lurie, a legal historian at Rutgers University.

Lurie undertook the task with vigor and within a decade had published two books—*Arming Military Justice* and *Pursuing Military Justice*—which trace the history of military justice in America from 1775 until the beginning of my term of service as chief judge in 1980. Within the past few weeks, Professor Lurie has completed condensing these books into a paperback titled *Military Justice in America*, and thereby has provided an

accessible, readable history of our system of military justice and of the first three decades of the Court of Military Appeals. I am proud that our court induced the writing of the history of military justice by a distinguished legal historian, and I hope that at some future time Dr. Lurie will chronicle some of the developments in military justice after 1980.

When I was serving on Judge Brosman's staff in the early 1950's, I heard some references to a committee of distinguished lawyers that the court had appointed to advise it. However, after a few years that court committee had ended its service. More than thirty years later during my term on the court, I persuaded my two fellow judges that we should create another court committee to advise us. The chair was James Taylor, Jr., who after retiring as Deputy Judge Advocate General of the Air Force, had become a professor and associate dean at Wake Forest Law School. The nine-member committee included Robert Duncan, former Chief Judge of our court, and several distinguished legal scholars—two of whom, Dan Meador and Steve Saltzburg, were then on the law faculty of the University of Virginia. The advice I received from the court committee was valuable. The committee made a report to the court and thereafter ended its service. However, I would suggest that in the future the Court of Appeals for the Armed Forces consider periodically obtaining outside advice as to its method of operating.

As a result of the experience of having only two judges serving actively for many months during the mid-1980's, I decided that some solution should be sought for the problem of vacancies. Actually the [UCMJ], when enacted in 1950, contained authority in Article 67 (a)(4) for the President to "designate a judge of the United States Court of Appeals" if a "judge of the Court of Military Appeals was temporarily unable to perform his duties because of illness or other disability." However, the Code provision had many defects, was probably unconstitutional, and had never been used.

After the court made Congress aware of the problem, the UCMJ was amended to allow the chief justice to designate Article III judges to hear cases when—because of illness or other disability, recusal, or a vacancy—our court would not have available all its active judges.¹⁴ Congress also made provision for senior judges of our court to sit under similar circumstances. As a result of this legislation, Judge Cox and I have sat with the court as senior judges on many occasions and Senior Judge Bill Darden has

14. See U.C.M.J. art. 142(f) (2000).

sat on at least one occasion. Several distinguished Article III judges have also heard cases with the court. For example, Judge David Sentelle of the District of Columbia Circuit wrote the opinion of the court in *United States v. Lonetree*,¹⁵ the case of the Marine guard who gave Soviet agents access to the American embassy in Moscow.

Let me now turn to the future. Various changes in military justice have been suggested—some as a result of changes being made in military justice in other countries and treaties the United States has entered or may enter. Senior Judge Cox is chairing a commission established by the non-profit Institute for Military Justice to propose changes in the Uniform Code, and his commission has proposed issues, solicited suggestions, and conducted a hearing in March 2001. I think that this examination of military justice is desirable, and it is somewhat reminiscent of the examination made by Senator Ervin's Subcommittee in the 1960's. Let me mention the suggestions I made to Judge Cox's commission.

My first suggestion is that a change be made in the current UCMJ provisions whereunder in general and special courts-martial an accused either is tried by the court-martial members and, if convicted, sentenced by these members or else is tried by the military judge and, if convicted, sentenced by the judge. The UCMJ provides no specific option for an accused to be tried by the members and, if convicted, to be sentenced then by the judge.

I am not advocating now that in all cases sentencing be done by the military judge, but only that the accused be provided the *option* to have his or her guilt determined by the members and, if convicted, nonetheless choose to have any sentencing done by the judge. You may ask me why not go further and have all sentences determined by the judge—as occurs in criminal trials in federal district courts and in most state courts? Perhaps to some extent I am a traditionalist in wishing to retain for an accused the opportunity to be sentenced by his comrades if they have found him guilty, rather than to be sentenced by a judge who may be unfamiliar with local conditions and may even come from another armed service. In any event, for the present I would prefer giving the accused the choice I have suggested, rather than eliminating all sentencing by court-martial members.

Some might argue that an accused already has an implicit right to waive sentencing by the court-martial members or, at the least, that an accused may enter an agreement with the government—with the military

15. 35 M.J. 396 (C.M.A. 1992).

judge's consent—for sentencing to be done by the judge, although guilt has been determined by the court-martial members. Even if this contention is accepted, it would still be best to have this option clearly authorized by the UCMJ.

What are the disadvantages of providing this option to an accused? Some may contend that it will discourage an accused from electing to waive trial by court members in order to assure that sentencing will be done by a judge if the accused is convicted. I would reply that this is an inadequate justification and that an accused who disputes his or her guilt should not be under pressure to waive trial by court-martial members in order to obtain sentencing by a military judge.

In connection with sentencing, I should note that when sentencing is done by a military judge, I have no objection if the judge refers to the sentencing guidelines used in the federal courts for analogous crimes, but I oppose the suggestion some have made that mandatory sentencing guidelines should be used in courts-martial in order to provide predictability. In my view, such predictability would come at too high a price, and I would prefer to continue the present system which places reliance on the judgment and experience of court-martial members and military judges—with the additional safeguard that appropriateness of sentences is subject to review by the Courts of Criminal Appeals.

Random selection of court-martial members has been recommended by some, but was not favored by a DOD commission that recently made a report on the subject. To some extent, I share that commission's apparent concern about possible interference with military operations if court members are selected randomly. I suspect, however, that this danger of interference has been exaggerated. For the present, I would propose that random selection be specifically authorized for use by a convening authority who chooses to do so instead of using the criteria for selection set out in Article 25(d) of the UCMJ. Perhaps a convening authority already has the power to use random selection, and I believe that random selection has been used a few times on a test basis. However, if so, the convening authority's power should be made more explicit. Let me also emphasize that I strongly favor decisions of the Court of Appeals for the Armed Forces which discourage a convening authority from selecting court mem-

bers with a purpose to achieve a particular result—a practice which I believe was widespread in earlier times.

The Army has adopted procedures to assure fixed terms in office for military judges. To me this seems desirable and should be followed by the other services.

In its consideration of petitions for review, the Court of Military Appeals—now the Court of Appeals for the Armed Forces—has been paternalistic in many ways. Frequently it has considered issues not specifically raised by an accused or his counsel, and the doctrine of waiver has not been vigorously applied with respect to errors unassigned by the defense counsel. Some have criticized this practice, but I believe that it accords with congressional intent and helps maintain confidence in the fairness of the military justice system. I hope it will continue.

For many years, the Court of Military Appeals . . . considered that Congress had assigned it a supervisory power and responsibility with respect to the military justice system. Perhaps the pioneer opinion in that regard was rendered in *United States v. Bevilacqua*.¹⁶ I took a similar view in *Unger v. Ziemniak*,¹⁷ which involved the court-martial of a female naval officer who refused to provide a urine specimen for analysis. The accused was being tried by a special court-martial and therefore, if convicted, was not facing a sentence which would have made her case eligible for appellate review by our court. Lieutenant Unger petitioned our court for an extraordinary writ to prohibit her trial, and relying in part on the All Writs Act,¹⁸ our court considered the petition, but denied it on the merits.

Another case involving a petition for extraordinary relief arose when the members of the Navy-Marine Corps Court of Military Review sought and obtained from the Court of Military Appeals an extraordinary writ prohibiting the Secretary of Defense or his subordinates from questioning these military appellate judges about their reasons for setting aside the homicide convictions of Dr. Billig, a naval surgeon, several of whose patients had died at Bethesda Naval Hospital.¹⁹ A recent decision by the

16. 18 C.M.A. 10 (1968).

17. 27 M.J. 349 (C.M.A. 1989).

18. 28 U.S.C. § 1651(a) (2000).

19. See *United States Navy-Marine Corps Court of Military Review v. Carlucci*, 26 M.J. 328 (C.M.A. 1988); see also *Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982); *McPhail v. United States*, 1 M.J. 457, 460 (C.M.A. 1976); *United States v. Frischholz*, 36 C.M.R. 306 (C.M.A. 1966).

Supreme Court in *Clinton v. Goldsmith*²⁰ has created uncertainty as to the scope of the authority of the Court of Appeals for the Armed Forces in cases like this.

Perhaps because I wrote the opinion reversed in the *Goldsmith* case,²¹ I disagree with the result reached there, and I think that even under the existing provisions of the [UCMJ], a strong argument can be made that the Court of Appeals for the Armed Forces had implicit authority to issue the writ that was ultimately set aside.²² More important, I would suggest that Congress should now explicitly confer upon that court a broad supervisory role as to military justice and provide it broad power to grant extraordinary relief as to any court-martial proceeding or Article 32 investigation.

In California and some other states, extraordinary writs—such as writs of mandamus and writs of prohibition—are an important part of the judicial review process. I would recommend that the Court of Appeals for the Armed Forces be granted similar powers to those exercised by appellate courts in those states. I realize that General Prugh, in a recent article in the *Military Law Review*, has made clear that he believes the Court of Appeals for the Armed Forces should not be authorized to issue extraordinary writs and that these writs have the potential to be disruptive and to interfere with the power of commanders. Many others may agree with him; I, however, am convinced that, if used with discretion, extraordinary writ power can be helpful in obtaining swift solutions of urgent problems. Admittedly, conferring explicit supervisory responsibility over military justice would increase the court's workload, but my examination of the current workload indicates to me that this increase would not result in an undue burden on the court.

I have two other proposals related to the Court of Appeals for the Armed Forces. First, I would recommend that centralized judicial review be provided as to military administrative action and that such review be channeled through the correction boards directly to the Court of Appeals for the Armed Forces. My analogy would be to the procedure for review of personnel action involving federal employees, whereunder a board conducts initial review and appeal is directly to the federal circuit. Currently there is often great confusion as to the proper procedure to be employed by a service member who believes he or she has been wronged by military

20. 526 U.S. 529 (1999).

21. See *Goldsmith v. Clinton*, 48 M.J. 84 (1998).

22. Cf. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

administrative actions concerning such matters as promotion, separation, and characterization of a discharge.

As was recently acknowledged by a DOD commission established at the direction of Congress, currently there is confusion as to the proper forum, exhaustion of remedies, and other matters relating to such claims. In my view, centralized review of such claims would be fairer and more expeditious—especially if the centralized review included discretionary judicial review by the Court of Appeals for the Armed Forces. The expertise of that court as to matters affecting service members and the experience of its judges and staff would facilitate fair and quick consideration of errors in military administrative actions affecting service members. Although the workload of the Court would be increased, I believe that this increase could also be accommodated.

Finally, to resurrect a proposal that goes back to a time even preceding enactment of the UCMJ, I would urge that the judges of the Court of Appeals for the Armed Forces be granted Article III status, that is, life tenure. Since the judges' pay during active service already is equivalent to that of federal circuit court judges, no extra cost would result in that regard, but the judges would not face the current uncertainty as to reappointment. Moreover, if given Article III status, the judges would participate in the Judicial Conference and be brought more fully into the federal judicial mainstream.

Those then are a few suggestions that I hope will be of some value. Let me close by reiterating my appreciation of the opportunity to appear here today and honor the memory of General Hodson.

**A WAR OF NERVES: SOLDIERS AND PSYCHIATRISTS IN
THE TWENTIETH CENTURY¹**

REVIEWED BY MAJOR SUSAN L. TURLEY²

I was confronted by cases of combat neurosis who told me that they saw nothing in what they were doing that justified the risks they were being asked to take. In effect, they had seen enough of death to know that they preferred life. What was I to do with deviant behavior like that?³

[I]s it better to be crazy, or is it better to be dead?⁴

In Arizona, Claude Maturana sits on death row, condemned for murdering a teenage boy in 1990. Maturana's guilt is not in doubt, but whether he'll ever be executed is. State prison doctors have diagnosed Maturana as too mentally ill to be executed.⁵ They have treated his delusions—but not so that he understands his crimes and his sentence, the standard for competence to be executed. In fact, Arizona couldn't find an in-state doctor willing to make Maturana well enough to die. All who declined cited ethical prohibitions against participating in executions, including restoring competency.⁶

1. BEN SHEPHARD, *A WAR OF NERVES: SOLDIERS AND PSYCHIATRISTS IN THE TWENTIETH CENTURY* (2001).

2. United States Air Force. Written while assigned as a student, 50th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. SHEPHARD, *supra* note 1, at 345 (quoting Major (MAJ) Gordon S. Livingston, regimental surgeon in Vietnam to the 11th Armored Cavalry Regiment, commanded by then Colonel (COL) George S. Patton, Jr.).

4. Nightline, *Insanity in the Courtroom*, Jan. 24, 2001 (quoting lawyer Ron Kuby on medicating criminals to restore competence for execution), available at http://abcnews.go.com/sections/nightline/nightline/nl010123_weston_feature.html.

5. Alfred M. Freedman, M.D., *The Doctor's Dilemma: A Conflict of Loyalties*, 18 *PSYCHIATRIC TIMES*, Jan. 2001, at <http://www.mhsource.com/pt/p010101b.html>.

6. *Id.* Dr. Freedman, a past president of the American Psychiatric Association (APA), points to a 1995 American Medical Association report proscribing treatment aimed at restoring competence for execution and the APA's ethical pronouncement that psychiatrists should not assist with executions. Arizona finally located a Georgia prison doctor who said Maturana was competent enough to be executed even without treatment. *Id.*

Maturana's case illustrates how doctors and lawyers in the new millennium still wrestle with one of the ethical dilemmas at the heart of *A War of Nerves: Soldiers and Psychiatrists in the Twentieth Century*, Ben Shephard's history of military psychiatry. As the title suggests, the skirmishes involved are not necessarily traditional military battles (although combat and its impact on those who fight are central to the book). Instead, Shephard examines moral and medical conflicts like the one underlying the Maturana controversy—the clash between therapy to restore a mentally wounded soldier to something approaching normal functioning and treatment to return that same soldier to his military role as “potential cannon fodder.”⁷

Early on, Shephard describes how the British Army castigated a World War I doctor who classified a number of troops as unfit for battle due to shell-shock and exhaustion. In the eyes of British officers, steeped in the “stiff upper lip” tradition, a doctor might rightly sympathize with his patients—but he far overstepped his bounds if he tried to prevent the commander from sending those same men out to fight.⁸ Shephard then traces how each succeeding generation of military psychiatrists grappled with this conflict, up through Vietnam and the Gulf War.⁹

A doctor in Normandy bluntly admitted that military psychiatrists had to forego the traditional therapeutic goal of restoring the patient to a life worth living and instead had to learn “to extend an *invitation to death*.”¹⁰ In contrast, a Vietnam doctor questioned:

Is the military psychiatrist justified in rapidly treating combat fatigue? Is the physician ethical in using his patient's guilt about deserting his comrades and his identification with his unit in order to have him quickly returned to combat, where he might soon be killed? . . . Should not the psychiatrist affirm . . . that the

7. SHEPHARD, *supra* note 1, at 259. Military lawyers should understand the conflict: the competing needs of the individual and the institution, the dilemma of “Who's my patient (or client), and where do I owe my allegiance?”

8. *Id.* at 43.

9. For example, MAJ Livingston eventually could no longer reconcile his medical ethics with his disgust at a war in which COL Patton “received numerous decorations while pursuing unrelentingly the one major criterion by which commanders' performance is judged: the body count.” *Id.* at 345. After a public protest during Patton's change-of-command ceremony, the West Point graduate and 82d Airborne Division veteran was sent home as an “embarrassment to the command” and allowed to resign in lieu of being court-martialed. *Id.* at 346.

10. *Id.* at 227 (quoting Dr. Philip S. Wagner).

patient's own self-interest lay in expunging all sense of guilt or obligation to others and in seeing, in a clear-eyed way, what is best for him?¹¹

Shephard chronicles this and other battles of the mind for two reasons—to dispel many of the entrenched misconceptions about military psychiatry,¹² and to emphasize the failure to understand and grasp the lessons of past wars—especially the warning that *meaning* well does not always equate to *doing* well when it comes to treating combat's mental ravages.¹³ He largely succeeds on both counts.

For the lay person, psychiatry's stereotypes conjure up Sigmund Freud asking questions about one's mother and showing inkblot pictures. Adding the military to the picture evokes Klinger bucking for a Section 8 discharge and sessions with Dr. Sydney Friedman on *M*A*S*H* or Joseph Heller's infamous *Catch-22*. For military lawyers and commanders, mental-health experiences are often limited to fitness-for-duty evaluations, discharges, and perhaps the occasional court-martial sanity board. But even for the military psychiatry neophyte, Shephard's meticulously researched and documented book is both fascinating and accessible—mainly because he emphasizes anecdotal rather than clinical evidence and people rather than case files.

Admittedly, as Shephard recognizes, reading about war's horrors cannot compare to enduring them. Still, he has a storyteller's grasp of the immense power of personal experiences in helping the reader understand and accept his contentions. His deft use of compelling vignettes ensures that neither the book's length (473 pages) nor its occasional dry exposition of competing psychological theories becomes an obstacle. Additionally, Shephard comes much closer to vanquishing the misconceptions about military psychiatry by relying on first-hand accounts rather than using only official bureaucratic documentation. Through the eyes of individual soldiers and doctors, he covers the history of war neuroses and their treat-

11. *Id.* at 345 (quoting Navy physician Ransom J. Arthur).

12. *Id.* at xix.

13. *Id.* at xxi.

ment, from shell-shock to battle fatigue to post-traumatic stress disorder (PTSD).

Some stories Shephard recounts are so harrowing as to be almost unimaginable: An Eighth Air Force B-17 pilot sees the plane in front of him explode on his tenth mission, and,

what he took for a piece of debris flew back towards him. It turned out to be the body of one of the gunners, which hit directly in the Number Two propeller. The body was splattered over the windscreen and froze there. In order to see, it was necessary for the pilot to borrow a knife from the engineer and to scrape the windscreen. He had a momentary twinge of nausea, but the incident meant little to him. As he did not know the man, the horrifying spectacle was at a psychological distance.¹⁴

Other accounts are less gruesome but no less memorable, such as that of Irish doctor Billy Tyrell, who took command of his unit three times after shelling wiped out his superiors. In July 1915, he and other officers were discussing strategy in a dugout when a German shell killed three of them and wounded three more. Tyrell, whose sole injury was singed hair, was able to carry on without falling apart only because the situation and his command responsibilities demanded that he do so.¹⁵ Then,

I mustered what remained of my Battalion behind the line, two Officer boys and less than 300 men and proceeded to march them out. Just before dawn we met our quartermaster, who had heard something of what had happened and came out to meet us. He brought up all the Officers' horses and there were no Officers to ride them. When I saw the horses and realised [sic] what had happened, it finished me. I broke down and I do not mind telling you I cried for a week.¹⁶

Shephard rightly asserts that, just as war impacts each man differently, the military psychiatrist's role differs in every war, because society and the military are different in every war.¹⁷ However, *A War of Nerves*

14. SHEPHARD, *supra* note 1, at xviii. Two missions later, however, the pilot's crew was injured, his plane damaged, and he himself emotionally traumatized. Now, haunted by memories of the first incident, he was incapable of flying. *Id.*

15. *Id.* at 35.

16. *Id.* at 36.

17. *Id.* at xxii.

also proves the truth of the old cliché that the more things change, the more they remain the same. Just as Claude Maturana's case demonstrates that some battles are constant in both peacetime and war, Shephard shows us that advancing weapons technology, increasingly far-flung battlefields and shifting alliances often change only the way psychiatric conflicts manifest themselves—not the conflicts themselves.

Military psychiatry's first and most enduring campaign has been the effort to understand how and why war wounds men's minds. Shephard begins with shell-shock in World War I, where the sheer numbers of psychological casualties (by one estimate, 24,000 British troops fell victim to shell-shock in the first four months of 1916)¹⁸ forced military doctors to explore as never before why some men broke down and others did not. What circumstances induced so many possible triggers—leadership, group morale, training, societal class, upbringing, intelligence, heredity, character, physiology, sheer exhaustion, new weaponry—to combine to produce the necessary mental catalysts?

The symptoms of shell-shock were incredibly wide-ranging, including losing the senses of sight, smell, taste, and hearing; amnesia; hysteria and intense crying—or catatonic stupor; uncontrollable shaking or partial paralysis; amnesia; vomiting; bizarre movements, such as walking like a trapeze artist on a tight rope; and inability to speak, defecate or urinate.¹⁹ Confronted with such diverse and previously unseen symptoms, the military—its doctors, lawyers, commanders, bureaucrats, and even its troops—were understandably confused:

Depending on the circumstances, a shell-shocked soldier might earn a wound stripe and a pension (provided his condition was caused by enemy action), be shot for cowardice, or simply be told to pull himself together by his medical officer and sent back to duty. . . . [A]t the front, . . . doctors continued to label patients "Mental" or "Insane" or even "GOK" (God Only Knows) . . .²⁰

This confusion begat other predicaments. Lawyers battled over combat trauma's role in the courtroom. From 1914-18, more than 300 Englishmen were court-martialled and subsequently executed for desertion,

18. *Id.* at 38.

19. *Id.* at 1-2.

20. *Id.* at 29.

cowardice or related offenses.²¹ Public outcry over the execution of mentally ill men led the British Army to institute rudimentary sanity boards in 1918.²² If a condemned prisoner's mental competency was in doubt or he was identified as a possible shell-shock victim, he could only be executed if a medical board found him responsible for his actions.²³ By World War II, Britain had abandoned desertion as a capital crime.²⁴

While the public approved of these attempts to balance the scales of justice, the sentiment among the line troops wasn't always so favorable: "If a man lets his comrades down[,] he ought to be shot. If he's a loony, so much the better."²⁵ Shephard puts that seemingly heartless remark in its context—an expression of the exasperation of commanders trying to stop "wastage," or psychiatric casualties.²⁶ To many commanders, psychiatrists' only usefulness was minimizing wastage—convincing men that it was *not* better to stay alive by remaining crazy. Shephard theorizes that frustration over lost manpower, rather than sheer callousness or arrogance, may explain General George S. Patton's infamous slapping of a hospitalized battle-fatigue casualty.²⁷

Regardless of the truth of that explanation, this nonjudgmental attitude gives Shephard the credibility needed to bolster his second premise: that in military psychiatry, as in life, the road to hell is often paved with good intentions. Almost all the doctors, lawyers, commanders, politicians and bureaucrats in *A War of Nerves* were trying to do what they believed was best. Few intended to cause harm—but the harm occurred nonetheless.

Commanders who pressured doctors to return psychiatric casualties to the front didn't necessarily want to see their troops dead—they were just trying to accomplish the mission. They understood that when one soldier was found unfit to carry a gun or when one pilot was grounded, someone else had to step in and take his place. Then, as now, they frequently didn't

21. *Id.* at 67.

22. One study found that fewer than one-tenth of the soldiers executed for desertion in 1917 received any kind of medical examination. *Id.* at 69. These men didn't get to decide whether it was better to be crazy or dead—they ended up being both.

23. *Id.* at 70.

24. *Id.* at 238.

25. *Id.* at 71 (quoting a complaint voiced to Dr. H.W. Hills, neurologist to Britain's Fourth Army in 1918).

26. *Id.* at 45.

27. *Id.* at 219.

appreciate “support” disciplines like medicine and the law getting in the way of their objectives.

On the other hand, Shephard demonstrates that doctors did not always do mentally wounded troops a favor by removing them from the fray. Especially in borderline cases, a soldier sometimes truly did need to return to battle to confront and overcome his fear. Depriving him of that chance could create guilt that was more debilitating than any other trauma.²⁸

The dichotomy between intentions and results came to the forefront again as desertion reached epidemic proportions in WWII—an estimated 25,000 British troops simply walked away in North Africa in 1942 and a thousand a month in Italy during 1944-45.²⁹ As British commanders clamored for the deterrent impact of executing a few carefully chosen deserters, the arguments for and against restoring capital punishment could be lifted from today’s headlines: some crimes require the ultimate penalty, or men will judge the price of committing them to be less than the benefits. In WWII, prison sentences were often no more than six months, so it’s hardly surprising that deserters preferred sitting in a safe, dry, warm jail to risking death on the front lines. Britain abolished the death penalty for desertion to make the system more just, yet commanders knew that when deserters essentially went scot-free, the impact on morale and the increased danger to those who stayed to fight were devastating. Opponents, however, argued that executions were not effective deterrents. Additionally, because the legal system seldom accurately and equitably considered mental factors, the courts applied the death penalty unfairly and unjustly. Research and statistics often backed them up.³⁰

Other dilemmas Shephard examines include the question of predisposition, that is, whether some men were just more vulnerable to breakdowns; the interplay of leadership, group morale and mental fitness; the difficulties of helping veterans, especially prisoners of war, adjust to society; the chronic struggle to distinguish between the truly ill and malingerers; the role of selection, or how to weed out those men most at risk; whether paying pensions to mentally disabled veterans actually exacerbated their illnesses; the unique psychological challenges of aircrews; and

28. *Id.* at 224. In 1944, future comedian Spike Milligan broke down on the Italian battlefield. He called his evacuation from the front “one of the saddest days of my life. . . . I felt as though I was being taken across the Styx. I’ve never got over that feeling.” *Id.* at 220.

29. *Id.* at 239-40.

30. *Id.* at 241-42. No one resolved the controversy sixty years ago either.

how to treat veterans experiencing guilt over committing war-time atrocities. Each presents another absorbing case study of the conflict between the needs of the one and the needs of the many, of why that which benefits the individual does not always serve the institution and vice versa, and how good intentions are not always good enough.

A War of Nerves is not perfect. Shephard devotes more than three-fourths of the book to the two World Wars and their aftermaths. Vietnam, perhaps the most mentally and emotionally controversial war ever, merits less than one-tenth, fewer than forty pages. As a twentieth century history, the book stops too soon, ignoring military operations other than war, the operational engagements of choice during the final decade. The tensions of Haiti, Grenada, Somalia, and Kosovo; the stress of recurring deployments and high operations tempo; the trauma of incidents such as the Blackhawk shootdown and the Khobar Towers bombing would all seem to offer fertile and fascinating territory that Shephard leaves unexplored.³¹

The book's quality also drops sharply in the last few chapters. One reason may be that the material (military and social psychiatry during the 1980s and 1990s, including the Falklands and the Gulf War) just isn't as interesting as the preceding conflicts. More likely, however, it's because Shephard departs from the fairly objective narrative he uses in earlier chapters and replaces it with a soapbox tirade, especially in the last chapter. In the chapter entitled *The Culture of Trauma*, Shephard lambastes "traumatology"—whether purportedly linked to war, child abuse, rape, or civilian disasters—and its alleged evils,³² but the chapter is long on harangue and short on persuasion.

Certainly, flaws in the last twenty years of trauma-related psychiatry aren't hard to find. Shephard rightfully crucifies some of the hysterical child sexual abuse witch-hunts of the past two decades.³³ Moreover, anyone with any experience with the Veterans Administration (VA) is unlikely to dispute Shephard's contention that the VA hospital system is a self-per-

31. For example, during one Army division's deployment to Haiti, two soldiers committed suicide, while more than a thousand others sought mental health counseling. Donna Miles, *Deployment: Are You Ready?*, SOLDIERS, March 1995, at 37.

32. SHEPHARD, *supra* note 1, at 385.

33. *Id.* at 390.

petuating bureaucracy whose effectiveness often leaves much to be desired.³⁴

Shephard is less convincing, however, when he argues that “the invention of PTSD had simply turned a generation of veterans into hopeless, dependent welfare junkies”³⁵ or that the rehabilitative regime for Vietnam vets were “disastrous failures”³⁶ that became a “haven for malingerers.”³⁷ He serves up lots of rhetoric but little evidence. More importantly, he fails to demonstrate why any reader outside the psychiatric community should care. Shephard’s ability to draw the lay reader into the world of military psychiatry, to show how it has affected us all, deserts him in this last chapter.

Still, Shephard’s book offers valuable insights. Judge advocates will benefit from the struggles of the military justice system to fairly balance good order and discipline with mitigating mental factors. Any leader who guides troops in stressful situations can learn from Shephard’s exploration of the many factors that determine the limits of men’s endurance. Malingering, mental breakdowns, heroism, therapy (whether to serve the soldier or the service), and courts-martial are all either tools or results (or both) of each man’s battle with fear.

Along with professional benefits, everyone who reads *A War of Nerves* should profit on a personal level, beginning with an increased gratitude for the sacrifices of those who have gone before. The book also evokes a renewed recognition that, although we are “warrior” airmen, soldiers, sailors or marines willing to fight and die as necessary, combat should always be our last resort, not our goal. Lastly, we can all benefit from a better comprehension of man’s mental frailties—the vulnerabilities of even those who appear strong and unshakable. A little more appreciation, a little more tolerance, a little more understanding—whether for ourselves or others—are never bad things.

34. *Id.* at 392-93.

35. *Id.* at 393.

36. *Id.* at 392.

37. *Id.* at 395.

WAGING MODERN WAR¹REVIEWED BY CAPTAIN HEATHER L. BURGESS²

*Future battlefields are more likely to resemble Kosovo than the Iraqi desert. There will be clouds, vegetation, villages and cities, and civilians whom we don't want to harm. There will be environmental hazards like toxic chemical or nuclear storage to limit our strikes. And there will be laws, journalists, and widespread public visibility of actions.*³

Waging Modern War is a compelling view of the future of United States military operations from the perspective of a strategic commander. Using Operation Allied Force⁴ as the “best, most recent example”⁵ of modern war, retired General Wesley K. Clark defines the modern battlefield and advocates changes the United States, particularly the military, must make in order to fight and win future conflicts. Part forward-looking treatise, part after-action review, *Waging Modern War* analyzes the future of conflict in a fascinating, eminently readable account of the political, operational, and strategic complexities General Clark faced as the North Atlantic Treaty Organization (NATO) Supreme Allied Commander, Europe (SACEUR) during Operation Allied Force. Uncannily timely, *Waging Modern War* provides valuable insight into the difficult issues the United States currently faces in Operation Enduring Freedom.⁶

What is modern war? After a brief review of the history of twentieth century conflict, General Clark theorizes that the fundamental purpose and

1. GENERAL WESLEY K. CLARK, *WAGING MODERN WAR* (2001).

2. United States Army. Written while assigned as a student, 50th Judge Advocate Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. *Id.* at 433. This review was written in the immediate aftermath of the horrific terrorist attacks on New York City and Washington, D.C., on 11 September 2001.

4. Operation Allied Force is the official name for the NATO bombing of the Federal Republic of Yugoslavia from 24 March 1999 to 9 June 1999, undertaken to end Serb ethnic cleansing in Kosovo.

5. CLARK, *supra* note 1, at xxiv.

6. Operation Enduring Freedom is the official name for the ongoing United States war on global terrorism, which began with military operations against the al Qaeda terrorist network and the Taliban government of Afghanistan on 7 October 2001.

character of war have changed. He asserts that modern war is essentially the diplomacy tool of last resort, to be used when the United States and its allies cannot deter, dissuade, or compel through any other means.⁷ As a result, unlike the global conflict of World War II or the conventional force-on-force success of Operation Desert Storm, modern war is “limited, carefully constrained in geography, scope, weaponry, and effects.”⁸ According to General Clark, modern war is the result of the convergence of a number of factors, including history, culture, NATO, the media, and technology, which have fundamentally changed both how and why we fight. He ultimately concludes that despite the success of Operation Allied Force, the United States, particularly its military leadership, has not acknowledged these characteristics of modern warfare in its planning and doctrine, and it must make significant changes to succeed in what he terms “the difficult region” of “not quite war-not quite peace” that will comprise the majority of future conflicts.⁹

General Clark is undoubtedly qualified to make such an assessment. A United States Military Academy graduate and Oxford-educated Rhodes scholar, he went on to command a mechanized infantry company in Vietnam, earning a Purple Heart and a Silver Star. He later served as a West Point instructor, a White House fellow, a special assistant to then-SACEUR General Alexander M. Haig, and he commanded at the battalion, brigade, division, and theater levels. He also ran the National Training Center, he served on the Army and Joint staffs, and he drafted the Army’s lessons learned from both Grenada and Operation Desert Storm.¹⁰

In atypical fashion for a retiring general,¹¹ General Clark offers only a glimpse into his personal background and military career, spending less than fifteen pages on the subject. Although his life is admittedly not the intended focus of the book, the few vignettes General Clark offers about his upbringing and early military career are clearly not written with the

7. CLARK, *supra* note 1, at 13.

8. *Id.* at xxiv.

9. *Id.* at 454, 458.

10. *See id.* at 19-24.

11. *See, e.g.*, GENERAL H. NORMAN SHWARTZKOPF WITH PETER PETRE, IT DOESN’T TAKE A HERO (1992); GENERAL COLIN POWELL WITH JOSEPH E. PERSICO, MY AMERICAN JOURNEY (1995).

same passion he devotes to his primary topic. This omission leaves the reader wanting more.¹²

General Clark's detailed examination of Operation Allied Force begins nearly five years before the war itself. As the J-5¹³ from April 1994 until assuming command as SACEUR in March 1997, General Clark became intimately familiar with the Balkan conflict. In July of 1995, with the situation in Bosnia rapidly deteriorating, U.S. and NATO diplomats were seeking a U.S.-brokered peace agreement with President Slobodan Milosevic and the Serbs. General Clark pressed for and achieved an unprecedented quasi-diplomatic role for himself, working directly with Ambassador Richard Holbrooke and Secretary of State Madeline Albright. He spoke directly with President Milosevic and other high-ranking Serb officials, drafting and negotiating critical parts of what would become known as the Dayton Agreement. When General Clark speaks of modern war as a diplomatic tool, he does so with the weight of experience, and his account of the Dayton peace process is fascinating.

General Clark had no way of knowing at Dayton that less than four years later he would lead a NATO military operation to enforce it. With waging war as his clear focus, General Clark uses his experience from the events leading up to and including Operation Allied Force as an illustration of the characteristics, purposes, and difficulties of modern war. In his view, the fundamental difference between traditional conflict and modern war is the dominance of political and strategic concerns over military operational and tactical considerations.¹⁴ For General Clark, his "double-hatted" command as SACEUR and Commander in Chief, U.S. European Command (CINCEUR) exacerbated this difference.¹⁵ He effectively supports this thesis, striking an appropriate balance between detail and tedium as he describes how he was forced to make critical operational decisions in the face of often-divergent political and strategic views.

Effective targeting is key to the success of any military campaign, and General Clark devotes a commensurate amount of the book to discussing

12. At least one other reviewer has criticized the relatively short amount of space that General Clark devotes to his personal biography, writing that "his evident love of soldiering and his quick intelligence are not matched by any penchant for self-analysis." Roger Cohen, *Catch-23*, N.Y. TIMES, Sep. 2, 2001, at 10 (Book Review).

13. The J-5 is the Director for Strategic Plans and Policies on the Joint Staff. CLARK, *supra* note 1, at 30.

14. *Id.* at 10.

15. *Id.* at 77.

targeting in Operation Allied Force. His command perspective of the law of war's role in targeting analysis should be of particular interest to judge advocates. Long before the operation in Kosovo began, General Clark knew that political leaders in both the United States and NATO would want to retain approval of potential targets. He attributed this to two factors: the need for the targets to "withstand the legal test of the Geneva Convention and international law," and the fact the targets themselves represented significant political statements.¹⁶ To satisfy Washington, General Clark had to submit specific targets to the Chairman of the Joint Chiefs of Staff, who in turn had to take them to the White House for approval. As part of that approval process, General Clark was required to assess potential collateral damage and civilian casualties using, in part, a mathematical formula designed to estimate the numbers of people in various buildings.¹⁷

This process, which a clearly frustrated General Clark calls "political calculus," continued throughout the war with varying success.¹⁸ Despite his attributing the need for such calculations to politics, weighing the military necessity of targets against potential collateral damage is the crux of the proportionality analysis required to justify targets under the law of war.¹⁹ Strikingly, General Clark minimizes the legal and ensuing moral imperative of this analysis, merely acknowledging the "reasonableness" of ensuring that proposed targets satisfied law of war considerations.²⁰ He maintained an aggressive targeting stance throughout Operation Allied Force, believing Allied forces needed to strike targets in downtown Belgrade to "make an impact."²¹ He attributes Washington and NATO opposition to such targets to the political dynamics of allied warfare rather than the law, arguing, "NATO's greatest vulnerability was unintentional injuries to innocent civilians."²² To demonstrate the dominance and effect of this purportedly political consideration on military operations, General Clark examines several of the more highly publicized instances of allegedly excessive collateral damage, including the bombing of the Chinese

16. *Id.* at 175.

17. *Id.* at 179.

18. *Id.*

19. See Randy W. Stone, Comment, *Protecting Civilians During Operation Allied Force: The Enduring Importance of the Proportional Response and NATO's Use of Armed Force in Kosovo*, 50 CATH. U.L. REV. 501 (2001).

20. CLARK, *supra* note 1, at 175.

21. *Id.* at 213.

22. *Id.* at 296.

embassy, a Serb police station, and two near misses of International Committee of the Red Cross (ICRC) convoys.

Each incident, General Clark claims, caused immediate political scrutiny that directly impacted operational momentum. After the alleged near misses of the ICRC convoys, for example, one leader suggested that the allies “stop bombing trucks, period.”²³ In General Clark’s estimation, the political scrutiny was expected but unwarranted, given the fact that out of nearly 1000 targets struck, “there had been only eight incidents of serious civilian losses.”²⁴ While the raw numbers support General Clark’s argument, his focus on politics ignores the critical role of law of war analysis to the moral imperative of U. S. military operations. Believing strongly in the importance of certain controversial (and perhaps legally questionable)²⁵ targets to the strategic success of the overall air campaign, General Clark appears to view law of war analysis as a politically driven operational constraint.

General Clark’s perspective is internally inconsistent, not only in the context of his discussion of Operation Allied Force, but also in his larger view of modern war. As he rails against largely legal targeting and operational constraints, he argues that Operation Allied Force itself was “morally and legally necessitated” by the Serbs’ inhumane treatment of the Kosovars.²⁶ In his conclusion, General Clark goes even further, writing that the United States derives its strength in the world from a “solid ethical

23. *Id.* at 298.

24. *Id.* at 297. The International Criminal Tribunal for the former Yugoslavia estimates that approximately 500 civilians died during Operation Allied Force. International Criminal Tribunal for the former Yugoslavia, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign*, at <http://www.un.org/icty/pressreal/nato061300.htm> (last visited Sept. 19, 2001). Although General Clark does not discuss specific operational numbers in his book, the report cites NATO sources claiming, “NATO aircraft flew 38,400 sorties, including 10,484 strike sorties.” *Id.*

25. Following the war, the Federal Republic of Yugoslavia made several complaints to the International Criminal Tribunal for the former Yugoslavia alleging NATO war crimes. Among those complaints were that NATO had deliberately targeted civilians in violation of the law of war. The committee appointed to review the complaints reviewed five of what it termed the “most problematic” incidents in detail, most of which involved so-called “dual-use” targets (targets with both a military and civilian purpose) or outright accidents, such as the bombing of the Chinese embassy. *See generally id.* (providing detailed analysis and explanation of the complaints). The committee did not recommend prosecution of NATO officials or commanders; however, their exhaustive review of the targeting issue highlights the importance of law of war analysis in future operations.

26. CLARK, *supra* note 1, at 189.

basis for its power . . . and a moral force that extends our influence.”²⁷ “[I]nternational law,” he writes, is an “American value” supporting that basis and force.²⁸ Under General Clark’s own premise, the United States’ diligent observation of international law is an asset, not a hindrance. There is no doubt that targeting implicates delicate political considerations, largely driven by the media’s real-time reporting of events. The law, however, is something that commanders such as General Clark can also use to their advantage to achieve ultimate success on the modern battlefield.²⁹

General Clark’s analysis of the constraints of modern warfare is not limited to targeting issues. In further support of his theory that larger political and strategic concerns will dominate the modern battlefield, General Clark also discusses Washington’s lack of support for the use of ground forces. From the moment Serb atrocities in Kosovo began to emerge in December 1998, General Clark pushed Washington’s political and military leaders for a commitment in the region.³⁰ He met resistance at every turn, particularly from the Joint Chiefs of Staff, who felt that Kosovo was not in our “national interest” and would adversely impact “readiness.”³¹ Even after the bombing campaign was well underway, General Clark still lacked a unifying NATO political strategy and any commitment for ground forces.³² Fortunately for all concerned, Milosevic capitulated to NATO demands before ground forces became necessary.

General Clark’s candid account of the political difficulties he faced securing support for the use of ground forces provides a rare glimpse into the inner workings of both Washington and NATO. As SACEUR, General Clark was in the difficult position of reporting to Washington while being responsible to the demands of the other eighteen NATO nations, a phenomenon he comments on several times throughout the book.³³ This already difficult task was made more so by divergent opinions within Washington itself, and an apparently constant lack of support from senior military

27. *Id.* at 461.

28. *Id.*

29. Of course, there is not universal consensus that lawyers should be involved in military operations. One reviewer claims that General Clark’s portrayal of Operation Allied force shows that lawyers have become “tactical commanders” with a “remarkably direct role in managing combat operations.” Richard K. Betts, *Compromised Command: Inside NATO’s First War*, FOREIGN AFFAIRS, July/Aug. 2001, at 126.

30. CLARK, *supra* note 1, at 119.

31. *Id.* at 165.

32. *Id.* at 252-53.

33. *See, e.g., id.* at 98, 140.

officers and Pentagon officials, to include then-Secretary of Defense William Cohen.³⁴ In contrast, General Clark received support for the use of ground forces from then-President William J. Clinton, several members of Congress, and the Department of State.³⁵ General Clark's account of balancing these varied and often conflicting interests illustrates the difficulties of managing allied warfare. His lessons learned are of particular value in the context of the almost global alliance involved in Operation Enduring Freedom.

General Clark's criticism of Pentagon officials is similarly candid. Although his prose is colored with obvious personal animosity for some of the prominent actors, General Clark effectively supports his contention that much of the Pentagon's resistance to the use of ground forces is attributable to a combination of "innate conservatism"³⁶ and a desire to protect people and resources in an era of budget constraints. He argues persuasively that the limited war in Kosovo was not adequately resourced because it did not fit into the two Major Theater of War (MTW) planning concept then in effect. Ironically, General Clark was the J-5 when the Pentagon developed the "two-MRC strategy."³⁷ He maintains, however, that it was "intended to be a strategy for employing the forces—it was meant to defend the size of the military."³⁸ The two-MRC focus should not be an issue in future conflicts in light of current Secretary of Defense Donald H. Rumsfeld's proposed change in force structure.³⁹ General Clark's assertion that reluctance to use ground forces may be an "emerging pattern"⁴⁰ in modern conflict will likely hold true, however, for conflicts that begin without a direct attack on the United States, such as that which provoked Operation Enduring Freedom.

Throughout the book, General Clark enlivens his complex subject matter by describing his recollections in a mixture of first-person narrative and essay-type commentary. This technique proves especially effective,

34. *Id.* at 169.

35. *See id.* at 169, 223, 253, 330.

36. *Id.* at 119.

37. *Id.* at 36. "Two MRC" stands for two Major Regional Contingencies. *Id.*

38. *Id.*

39. The new guidance replaces the "two-MRC strategy" with one that "would prepare forces to defend the U.S., deter in four critical regions, prevail in two overlapping conflicts, while leaving the President the option to commit forces in either of those conflicts to impose our will on the adversary—including regime change and occupation." *Hearing Before the Senate Committee on Appropriations Subcommittee on Defense, 107th Cong.* (Sept. 5, 2001) (prepared testimony of Secretary of Defense Donald H. Rumsfeld).

40. CLARK, *supra* note 1, at 438-39.

even chilling, when General Clark recalls his several conversations with former Serbian President Slobodan Milosevic at Dayton and in the months leading up to the war itself.⁴¹ Unfortunately, it serves as a distraction from General Clark's intended focus when he recalls vicious disagreements with various Washington officials in minute, vivid detail. General Clark, perhaps deservedly bitter following his summary removal from command following Operation Allied Force, allows recollections seemingly unrelated to his primary subject to dominate portions of the text, detracting from his overall effectiveness.⁴²

Despite his obvious contempt for certain officials, General Clark goes to great lengths to make *Waging Modern War* accessible to a wide range of readers. He provides an easy-to-use cast of characters and a list of acronyms at the very beginning of the book.⁴³ Before introducing new concepts or terms, General Clark carefully provides sufficient history or background for a reader unfamiliar with the military to understand his analysis.⁴⁴ While the book is accessible, however, General Clark does not footnote his material, making *Waging Modern War* a less than ideal research tool.

Waging Modern War is worth reading as a detailed account of Operation Allied Force and a compelling theory of modern war. Well written and engaging throughout, General Clark does an exceptional job of making his complex topic accessible to everyone, not just students of military history. His insight is particularly valuable now as we fight the next modern war, Operation Enduring Freedom. Although different from Operation Allied Force in terms of scope and basis, the global war on terrorism presents many of the same fundamental issues for U.S. military forces. The operation has political and strategic components that will dominate tactical and

41. See, e.g., *id.* at 40, 68, 122. Mr. Milosevic is currently pending trial for war crimes at the International Criminal Tribunal for the former Yugoslavia in The Hague. See International Criminal Tribunal for the Former Yugoslavia, *Amended Indictment for Slobodan Milosevic et al.*, at <http://www.un.org/icty/indictment/english/mil-ai010629e.htm> (last visited Sept. 19, 2001).

42. For example, General Clark recounts one late-April 1999 conversation with General Hugh Shelton, Chairman of the Joint Chiefs of Staff, up to and including alleged "verbatim guidance" from Secretary Cohen, which was, "Get your f_____ face off the TV. No more briefings, period. That's it." CLARK, *supra* note 1, at 408. One reviewer noted that General Clark's anger at various officials was so obvious that it was apparently what "drove him to his pen." Cohen, *supra* note 12, at 10.

43. CLARK, *supra* note 1, at ix, xv.

44. See, e.g., *id.* at 14 (discussing the background and mechanics of the NATO alliance), 32 (providing a general breakdown and history of the conflict in the Balkans).

operational concerns, made all the more complex by an unprecedented global alliance. Like Operation Allied Force, the enemy situation also defies traditional military planning and operations. Moreover, sensitive legal issues surround targeting and rules of engagement decisions, and the United States must avoid unnecessary civilian casualties to maintain the moral high ground. General Clark's astute analysis of these and other issues make *Waging Modern War* a must read for military leaders and judge advocates alike.

**WHILE GOD IS MARCHING ON: THE RELIGIOUS
WORLD OF CIVIL WAR SOLDIERS¹**

REVIEWED BY CAPTAIN KEVIN J. HUYSER²

*The army is the most outlandish place on earth[;] no man ever
live religious that comes in the army.*

—Milton Bailey, *Forty-Third Indiana*³

I. Introduction

From Milton Bailey's perspective, the "armey" during the Civil War may have indeed been a "most outlandish" place to experience religion. But Steven E. Woodworth in his new book, *While God Is Marching On: The Religious World of Civil War Soldiers*, provides an interesting and compelling case for the position that not only did many Civil War soldiers "live religious," but a religious worldview played a central and vital role in their lives.

A seemingly expansive topic, Woodworth clearly states in the preface what is, and is not, included in the term "religion." As Woodworth puts it, his study is not one of "unusual religious groups and practices . . .," but rather a look at the "mainstream religion" of the "overwhelming majority of Civil War soldiers . . . Protestant Christianity."⁴ Woodworth makes good on this promise as indeed the comments and thoughts expressed and developed are almost exclusively mainstream Christianity.

Woodworth also promises to have common soldiers tell their own stories about the role of religion in their lives, as expressed in their diaries and letters.⁵ Here, again, Woodworth is true to his word, as soldiers' views dominate the book with only periodic references to the thoughts and statements of political, military, and religious leaders, as well as other civilians.

1. STEVEN E. WOODWORTH, *WHILE GOD IS MARCHING ON: THE RELIGIOUS WORLD OF CIVIL WAR SOLDIERS* (2001).

2. United States Air Force. Written while assigned as a student, 50th Judge Advocate Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. WOODWORTH, *supra* note 1, at 150.

4. *Id.* preface.

5. *Id.*

As Woodworth shares the religious views expressed by Civil War soldiers, he fully supports his thesis that a Christian worldview, present since the founding of America, played a significant and moving role in the lives of many Civil War soldiers.

This book review focuses on Woodworth's organization of the material in support of his thesis, his methodology of extensively quoting from the diaries and letters of soldiers to emphasize key points, and his balanced presentation of the religious views of both the Union and Confederate forces. Together these characteristics assist the reader in gaining a better understanding of the religious world of the Civil War soldier and, as a result, the Civil War itself.

II. Woodworth's Organization

Woodworth organizes his book in a logical, "building block" manner that makes the book easy to follow and, in the end, supports his thesis. He divides his work into two main parts. Part One, "The Religious Heritage and Beliefs of the Civil War Soldiers," comprises approximately one-third of the book and explores the core Christian beliefs and experiences of the majority of soldiers that fought for the Union and Confederate armies. With this foundation, Woodworth, in Part Two, "The Civil War Soldiers, Their Religion, and the Conflict," examines the impact of this Christian worldview upon the soldiers' thoughts and experiences during the conflict.

Instead of simply launching into the Civil War and the religious views of its soldiers, Woodworth begins by looking at the common Christian heritage, beliefs, and practices of the war's participants. In the book's opening chapter, Woodworth argues America has had a distinct and influential religious heritage since its beginnings. Building on this religious heritage, Woodworth quickly moves ahead to the Second Great Awakening and examines its impact on American spirituality through revivals, weekly worship services, and family prayers. While Woodworth also addresses slavery—the single most divisive issue between Northern and Southern Christians—his emphasis is on the similarities in the religious beliefs and practices of the opposing societies and forces.

In the remainder of Part I, Woodworth addresses more specifically these common and shared core Christian beliefs and practices. Describing basic Christian tenets, with scores of comments from both Union and Confederate soldiers to amplify points, Woodworth explains such beliefs as

God's sovereignty, heaven and the life to come, the means of salvation through faith in Christ's one sacrifice on the cross, and the supremacy of the Bible as God's Holy Word. Woodworth then follows with instruction on the Christian practices of prayer, worship and observance of the Sabbath, and the avoidance of the main worldly vices of the day (that is, cursing, cards, gambling, and alcohol).

As Woodworth's book is not an apologetic of Protestant Christianity or a deep theological work, he keeps his doctrinal descriptions and explanations rather simple. Indeed, those familiar with Christianity may find some of Woodworth's explanations elementary and unnecessary, such as when he explains the meaning and origins of Sabbath observance.⁶ Yet, by first providing background information on the fundamental Christian beliefs and practices the Civil War's soldiers brought to the conflict, Woodworth better equips the reader to appreciate the book's later discussions of religion's vital role in the camps and on the battlefields.

In Part Two, Woodworth focuses more specifically on the soldiers' religion during the Civil War years. Except for a couple of brief interludes in Chapters 8 and 9, where Woodworth discusses the roles of chaplains and missionaries, he tracks the religious thoughts of Union and Confederate soldiers chronologically through the various stages of the war. He begins with a broad look at Northern and Southern Christian views at the war's outbreak. Woodworth again highlights the similarities in the religious beliefs of the opposing sides and concludes, not surprisingly, that a majority on each side of the conflict saw their cause as justified by God.

Woodworth then breaks with the chronological timeline of the war and addresses, in separate chapters, the roles of chaplains and missionaries and the presence each provided as "organized religion" in the camps. While these two chapters seem out of place initially, Woodworth connects these groups to the everyday soldier by focusing on their impact in the camps. For example, in Chapter 8, "Civil War Chaplains," Woodworth provides numerous statements from soldiers detailing both positive and negative experiences with unit chaplains.⁷ Likewise, in Chapter 9, "Army

6. *Id.* at 78. Woodworth assumes the reader is unaware of even the most basic Biblical terms and Christian beliefs, like that of Sabbath observance. He explains that the word *Sabbath* comes from the Hebrew word meaning "rest" and the requirement to observe and keep the Sabbath day holy originates from the Ten Commandments found in the Bible's Book of Exodus.

7. *Id.* at 150-56.

Missionaries and the U.S. Christian Commission,” Woodworth turns to the soldiers’ statements to explain the overall influence of missionary groups.⁸

While Woodworth states chaplains and missionaries had an overall positive effect in the religious lives of soldiers, he points out that their numbers were simply too small to satisfy all the spiritual needs of the huge Civil War armies. As a result, Woodworth concludes that religion, if it was to be had in the camps and battlefields, “would be largely what those 3 million [soldiers] made of it or allowed it to be.”⁹ Realizing the minimal presence of “organized religion” in Civil War camps, the reader gains a greater appreciation for the responsibility the soldiers assumed in furthering religious growth and satisfying individual spiritual needs. The reader also understands Woodworth’s placement of Chapters 8 and 9, not as illogical detours, but as additional “building blocks” in support of his thesis.

In the remaining chapters, Woodworth returns to the chronological timeline of the war, with the reader better prepared to grasp religion’s role in the lives of soldiers, as well as the soldiers’ role in religion. When looking at religion in the camps and battlefields, for example, Woodworth emphasizes and examines the religious reawakening that became known as “The Great Revival.” Woodworth compares it to the experiences many of the soldiers may have encountered in the days of the Second Great Awakening, previously discussed in the book’s first chapter. The movements differed, as Woodworth points out, in that the Great Revival flourished despite the lack of “organized religion” in the Civil War camps. Woodworth asserts that the soldiers themselves played a significant role in the Great Revival and described it as the “sum total of a great many personal revivals in individuals soldiers,”¹⁰ which continued through the end of the war.¹¹

Having explained the fundamental religious beliefs and practices of the Civil War’s soldiers and emphasized the impact and pervasiveness of the Great Revival in the various armies, as well as the soldier’s role in it, Woodworth logically turns in the book’s final chapters to a more general look at Northern and Southern Christian views at the concluding stages of the war. As Woodworth explores the struggle many Christians had in making sense of God’s purpose in such a lengthy and bloody war, with North-

8. *Id.* at 170-74.

9. *Id.* at 174.

10. *Id.* at 217.

11. *Id.* at 253.

ern Christians generally feeling chastened¹² and Southern Christians forsaken,¹³ the reader appreciates even more the important role religion played in the lives of the war's participants. So significant and firm were these religious beliefs and practices, the reader is not surprised when Woodworth concludes that at the end of the conflict "[l]ittle of real importance had changed in the religious world of the Civil War soldiers."¹⁴

III. Woodworth's Methodology

The greatest strength of Woodworth's work is his reliance upon and use of primary sources to describe religion's role in the lives of Civil War soldiers. Using the diaries, letters, and other correspondence of everyday soldiers, Woodworth includes a significant number of direct quotes. While the number of quotes may be greater than some historical works, Woodworth provides sufficient contextual comment and transition so that the quotations are not disjointed, out of place, or distracting. Woodworth recognizes that common individuals living at the time of the Civil War can best express their own religious beliefs and experiences, and he lets them do so. The effective use of these primary source materials not only boosts Woodworth's credibility,¹⁵ but also provides concrete and oftentimes emotional examples of the importance the Christian religion played in the lives of many soldiers.

An example of Woodworth's methodology and its emotional impact occurs in Chapter 2, "The Acts of a Sovereign God." There Woodworth highlights the trust, confidence, and peace that flowed from one's belief in a personal and Sovereign God. To drive home his point, Woodworth includes an excerpt from the final letter John W. Mosely, Fourth Alabama, wrote to his mother after he was wounded badly at Gettysburg. Mosely wrote confidently, "My Dear Mother, . . . Do not mourn my loss. I had hopes to have been spared, but a righteous God has ordered it otherwise and I feel prepared to trust my case in his hands."¹⁶

12. *Id.* at 264.

13. *Id.* at 286.

14. *Id.* at 293.

15. Reviewing the book's bibliography, the reader is struck by the sheer volume of primary sources, published and unpublished, in comparison to the listed secondary sources. The primary sources outnumber the secondary sources approximately eight to one. Of course, as Woodworth notes in the preface, he "cast his research net for all soldiers," some of whom had little or nothing to say about the subject of religion. *Id.* preface, bibliography.

16. *Id.* at 33.

While Woodworth emphasizes common soldiers' religious views, he doesn't do so exclusively. Woodworth also shares the thoughts of other individuals, but never to a degree that overshadows the soldier. For example, Woodworth begins Chapter 13, "Northern Christians View the Concluding Stages of the War," with a series of quotes from a sermon by Chaplain N.G. Collins of the Fifty-Seventh Illinois. Woodworth does so to sum up the views of many Union soldiers at the midpoint of the Civil War—the rightness of their cause. But after the chaplain is permitted to speak, Woodworth immediately returns to the beliefs of the soldier. He quotes Union soldier Alfred L. Hough, who wrote, "This is a terrible ordeal we are going through, but out of this darkness we will appear brighter and better, so I believe, and every day I have a more religious feeling, that this war is a crusade for the good of mankind."¹⁷

Ultimately, it is the soldiers' descriptions of their religious beliefs and experiences that give Woodworth credibility in claiming religion played a vital role in the lives of Civil War soldiers. Time and again, Woodworth highlights a soldier's statement that so captures the essence of prayer or the power of salvation or the peace in the life hereafter, that one cannot deny religion's impact in the lives of these men. And time and again, soldiers of both the Northern and Southern armies expressed strikingly similar statements of faith—soldiers that fought ferociously against each other in some of the most bloody and destructive battles in American history.

IV. Woodworth's Balance

Adding to Woodworth's credibility is his balanced presentation of the religious views of both the Union and Confederate soldiers. Woodworth's balance is evident in two separate ways. First, and most obviously, Woodworth strives to voice equally the religious beliefs of soldiers and other individuals from both the North and South. Given the common and shared beliefs of the opposing forces, arguably the task of balance is not overly difficult. Yet, two issues—slavery and the ultimate defeat of the Confederate cause—make the task of balance a little more difficult. Woodworth meets this challenge without losing his critical judgment.

For example, Woodworth justifiably criticizes Southern Christians that defended the practice of slavery. He claims they defended the "pecu-

17. *Id.* at 257-58.

liar institution” on a superficial reading of Scriptures¹⁸ or by retreating into “wholesale pietism” by arguing the Bible was, at worst, silent on the subject of chattel slavery, meaning the Church should remain out of what was a political matter.¹⁹ But Woodworth also explains a minority Southern Christian view that used Scriptures to advocate for the reform of slavery—a position that did not differ from that of many Northern Christians. These Christians tried to encourage slave owners to treat slaves more humanely, to teach slaves to read so they could study the Scriptures, and to keep slave families intact.²⁰ Ultimately, however, Woodworth concludes that the vast majority of Southern Christians turned to an even stronger defense of slavery, chastising those who voiced opposition and developing a “regional bunker mentality,” to combat the growing abolition movement in the North.²¹

Woodworth also criticizes prior historical works that have claimed Southern soldiers were more devoted to God—a claim that grew out of the myth of the “Lost Cause” in the South.²² In Woodworth’s estimation, these previously uncontested assertions resulted in a general misconception even among some historians, that the great religious revivals in the army camps were limited primarily or totally to the Confederate side.²³ Yet while Woodworth criticizes these works, he doesn’t deny or minimize the impact of the spiritual revivals that took place in the Southern camps. In fact, Woodworth concedes the soundness of the factual information these authors gathered on the Confederate armies,²⁴ which his own research supported. But whereas these prior authors sought to support the false claim that the Confederate soldiers were more devoted to God and therefore more justified in their cause to fight,²⁵ Woodworth’s goal was to explore the mainstream religious world of all Civil War soldiers. With a broader purpose, Woodworth concludes “the religious awakenings occurred about equally on both sides of the lines, and the average Union soldier was at least as devout as his Confederate counterpart, if not more so.”²⁶ Certainly

18. *Id.* at 16.

19. *Id.* at 17.

20. *Id.* at 18-19.

21. *Id.* at 21.

22. *Id.* at 289-90 (referencing WILLIAM J. BENNETT, NARRATIVE OF THE GREAT REVIVAL IN THE SOUTHERN ARMIES DURING THE LATE CIVIL WAR BETWEEN THE STATES OF THE FEDERAL UNION (1877); JOHN WILLIAM JONES, CHRIST IN THE CAMP: OR RELIGION IN THE CONFEDERATE ARMY (1904)).

23. *Id.* at 291 (citing BELL IRVIN WILEY, THE LIFE OF BILLY YANK: THE COMMON SOLDIER OF THE UNION (1952)).

24. *Id.* at 290.

25. *Id.*

the number of primary sources Woodworth consulted and referenced in his work tend to support his proposition.

Woodworth's book is also balanced in that he realistically understands the limits of Christianity's influence on the soldiers of the Civil War. Though the book's focus is on the religious worldview of soldiers and its impact in their lives, Woodworth doesn't overreach and argue that all who fought were influenced by religion. For example, while Woodworth spends a significant amount of time describing the expansion of the Great Revival and its impact throughout the many armies of both the North and South, he does not assert that everyone was converted or even affected by this spiritual movement. In Chapter 10, "Religion in the Camp and on the Battlefield, 1861-1862," Woodworth clearly states, "The upsurge in religious interest in the armies by no means eradicated the presence of vice and dissipation in the camps."²⁷ Similarly, in Chapter 12, "Religion in the Camp and on the Battlefield, 1864-1865," Woodworth again recognizes: "As always, evil remained present in the armies to a greater or lesser degree, even alongside intense religious interest. The revivals never became so all-pervasive as to produce a decisive effect on all the soldiers."²⁸ Yet, while Woodworth recognizes the limits of Christianity's influence in the lives of soldiers, he still concludes: "Many soldiers came out of the Civil War with their faith strengthened. Others found faith in Christ for the first time during the war. Very few gave signs of becoming embittered or losing their faith."²⁹

V. Conclusion

In his new book, *While God is Marching On: The Religious World of Civil War Soldiers*, Steven E. Woodworth explores an aspect of the Civil War that few historians have previously developed—the pivotal role of religion in the lives of the common Civil War soldier. With his "building block" organization orienting the reader, his compelling use of primary resources and direct quotations focusing on the soldier, and his balanced presentation of the religious views of bitter foes, Woodworth credibly and persuasively makes his case for the vital importance religion had in the camps, battlefields, and lives of the Civil War soldier. An intelligent and

26. *Id.* at 291.

27. *Id.* at 197.

28. *Id.* at 246.

29. *Id.* at 292.

interesting book that engages the reader's mind as well as his heart, Woodworth's work will assist many in better understanding not only the religious world of the Civil War's soldiers, but the Civil War itself.

**CASUAL SLAUGHTERS AND ACCIDENTAL
JUDGMENTS:
CANADIAN WAR CRIMES PROSECUTIONS, 1944-1948¹**

REVIEWED BY LIEUTENANT-COLONEL JOSEPH C. HOLLAND²

Fifteen years ago, poking through the archives at the Office of the Judge Advocate General, I came across an intriguing document. It was a charge sheet documenting the offences, trial, and execution by Canadian firing squad of a German, Robert Holzer, in 1946. I remained curious about the unknown story behind that single sheet of paper. Only upon reading Patrick Brode's *Casual Slaughters and Accidental Judgments* did I learn more about the unfortunate Herr Holzer.

In *Casual Slaughters*, Brode recounts the little known story of Canada's war crimes prosecutions following World War (WW) II. Canadians prosecuted thirteen accuseds in both Europe and the Far East. They cooperated with their wartime partners in many more prosecutions. Canadian military prosecutors tried both enemy military personnel and enemy civilians. Canadian courts-martial sentenced eight of those tried to death. Firing squads and the hangman executed five.

The least obscure and most significant prosecution was that of Major-General Kurt Meyer of the Waffen Schutzstaffeln (SS). The Waffen SS was the military branch of the infamous Nazi SS. By the end of the 1944 Normandy fighting, Meyer commanded the 12th Waffen SS Division (12th SS). The 12th SS was largely composed of fanatical Hitler *Jugend*, that is, sixteen to eighteen year-old soldiers drawn from the Nazi cadet wing, the "Hitler Youth." Meyer himself remains a fascinating character, although it is a fascination tinged with more than a little queasiness.

While not explicit, Brode's apparent thesis is that Canada's first independent prosecutions of war criminals was a generally credible effort, albeit one marred by at least a tinge of hypocrisy, governmental indiffer-

1. PATRICK BRODE, *CASUAL SLAUGHTERS AND ACCIDENTAL JUDGMENTS: CANADIAN WAR CRIMES PROSECUTIONS, 1944-1948* (1997).

2. Office of the Judge Advocate General, Canadian Forces. Written while attending the 50th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

ence, and a few questionable trial results (the “accidental judgments” of the title).

Before dealing with his thesis, Brode’s explores the murder of prisoners of war (PWs) in Normandy and elsewhere. While relatively rare on the Western Front of WW II, such crimes occurred all too frequently in Normandy (the “casual slaughters” of the title). This disturbing occasional phenomenon of war will not surprise anyone even somewhat familiar with military history.³ Eventually, Canadian prosecutors charged Meyer in connection with over one-hundred killings of Canadian PWs.

This danger regarding PWs is perhaps so commonplace as to approach the trite. The few minutes of surrender may be the most dangerous a soldier ever faces. Obvious or not, this is a lesson worth re-learning and remembering. These murders can occur even in armies whose causes are just. Such reminders are particularly useful for militaries, such as Canada’s, whose self-image is overly benign.⁴

In documenting these grisly events, Brode’s account provides excellent lessons for present day military leaders at all levels. Prime among these is the poisonous quality of rumoured enemy misbehavior. Murders by Canadian and German soldiers in Normandy were both sparked by stories common amongst the soldiery that the other side was not taking prisoners.⁵ Leaders must be alert to such rumours and effectively counter them. Another useful lesson is the extreme care needed in use of language by military leaders. The ambiguity of “Take care of the prisoners” is notorious. To this phrase, one can add Meyer’s “I want no prisoners from my regiment.”⁶ Meyer claims he only meant he did not want his soldiers to surrender. Attempts to inoculate soldiers against capitulation by empha-

3. CORNELIUS RYAN, *THE LONGEST DAY JUNE 6, 1944*, at 246-47 (1959) (describing a Royal Navy seaman on Juno Beach coming upon the bodies of six German PWs whose throats had just been slit by Canadian soldiers).

4. John Dermott et al., *Bitter to the End: The Somalia Inquiry Takes its Best Shot—and Ottawa Fires Back*, *MACLEAN’S*, July 14, 1997 (citing a Canadian Government “Somalia Commission” report). Although legally distinct, the psychology and pathology in the killing of a detainee by several members of the Canadian Airborne Regiment in Somalia in 1992 is proof that such dangers have not abated with time.

5. BRODE, *supra* note 1, at 10, 41, 221.

6. Petition of Kurt Meyer Re Trial, Conviction and Sentence to the Governor-General of Canada para. 15 (Dec. 8, 1950) [hereinafter Petition of Kurt Meyer] (being his plea for executive clemency) (copy on file with author).

sizing the enemy's real or imagined barbarity can have the unintended effect of encouraging counter-barbarism.⁷

While too common, such murders were definitely not the rule after D-Day. Brode documents in a balanced fashion the generally correct treatment of Canadian and Allied PWs captured by the Germans, including those taken by the SS. Indeed, SS officers even intervened to prevent the execution of PWs on several documented occasions.⁸ Confirming Brode's assessment of normally correct German treatment of PWs, another author concluded that in Normandy, "the Germans fought the good fight" and the 12th SS's murder of PWs was anomalous.⁹

Inevitably, Brode's book at many points asks whether Canada's post-WW II war crimes prosecutions, and by implication the entire Allied effort to bring war criminals to justice, were merely vengeance dressed in judicial robes. Certainly, Brode finds some evidence to support an affirmative answer. Most of this evidence rests on the contention that Canadian soldiers did the same things of which they accused their former enemies. Regrettably, the book clearly demonstrates that Canadians did murder some PWs and that some senior Canadian commanders were negligent or even complicit in such actions. One can argue timing and scale, but the distressing facts remain.

The second type of evidence offered in support of this cynical categorization of war crimes prosecutions is that the procedures and rules of evidence were one-sided and unfair to the accuseds. The procedures and evidentiary rules were certainly not those applied in Canada to civilians or even to Canadian military personnel charged under military law.

The totality of the evidence Brode assembles, however, supports the contrary thesis; that is, this process was not "victors' justice." The investigations were painstaking. They ranged across Europe, Asia and North America. Investigation teams included a person to represent the absent suspects' interests by way of cross-examining the witnesses. Major-General Meyer was so impressed with the fairness of the investigation that his

7. BRODE, *supra* note 1, at 20.

8. *Id.* at 72.

9. JOHN KEEGAN, *SIX ARMIES IN NORMANDY* 147, 329 (1982).

first request for defense counsel was the investigator-prosecutor, Lieutenant-Colonel (LCol) Macdonald!¹⁰

Prosecutors dropped many cases, not only for an insufficiency of evidence, but in recognition of the pressures faced by the enemy. Prosecutors convinced one victim, a former PW, that they should not proceed against the guard who had bayoneted him as the PW had provoked the guard by punching him.¹¹ The executioners of a Canadian paratrooper were not charged because the paratrooper (in civilian clothes with the French resistance after being separated from his unit) was not wearing the “fixed sign recognizable at a distance” required of resistance fighters to qualify for PW status.¹² Other examples are given.

All the accuseds benefited from a vigorous defense, whether defended by Canadian military personnel or by German and Japanese lawyers. German civilians who witnessed portions of the Meyer trial were impressed with its impartiality, although other accuseds’ German lawyers were less pleased. Post-trial commutations spared the lives of three condemned. Even several of the condemned acknowledged receiving fair trials.

As to the special rules, Brode himself provides a compelling rationale for these extraordinary procedures. Brode’s research and analysis leads him to the well-supported conclusion that war crimes are unique situations occurring in exceptional circumstances.¹³ Not all the usual peacetime civilian rules are applicable because unique difficulties arise. Subpoenas seldom prove effective during a conflict or its chaotic aftermath. The documents one expects in an ordered peacetime society may not exist. Many suspects and witnesses have been killed. Surviving suspects shift blame to dead comrades. The crimes can be of a scale for which no peacetime system is designed. Suspects may have had governmental powers with which to cover up their misdeeds. In such an extraordinary universe, society must use different procedures if it is to avoid a morally abhorrent legal paralysis.

Brode does not advocate abandoning basic fairness and proper judicial behavior. Rather, he recognizes that while the goal of justice remains constant, the route taken in applying the law of war cannot be identical to

10. BRODE, *supra* note 1, at 61.

11. *Id.* at 186.

12. *Id.* at 39.

13. *Id.* at 228.

the peacetime path. He rightfully castigates the Supreme Court of Canada (SCC) for failing to recognize this.¹⁴

Casual Slaughters also illustrates the dilemma of those holding the enemy to account for breaches of the law of war. The time-honoured and legally sanctioned means for doing this has been before a military court composed of the accuseds' captors. Even accepting that this is a fair and effective way of dispensing justice, those trying the accuseds are in a true no-win situation. If they are strict and stern as they must on occasion be, they face unfair accusations of dispensing victors' justice. If they are lenient and understanding as they must on other occasions be, they will be charged with acting to protect fellow members of the "officers' club."¹⁵

Surprisingly, Canada suffered from such a lack of political will to pursue war criminals that the reader may consider it "accidental" that any prosecutions took place at all. That Canada acted is due largely to LCol Macdonald. He took on an initially small investigation and thereafter became the main "engine" for Canada's prosecution efforts. Brode offers ample evidence upon which to consider LCol Macdonald the hero of the book. According to Brode, the main culprits were External Affairs bureaucrats, their legal staff, various politicians, and occasionally senior Army officers. At different times, these hesitant groupings took the position that the crimes did not engage Canada's vital interests, the British or Americans would handle these matters, the likely results were not worth the effort or expense, and the chance of incurring some political damage was too great. That Canadian soldiers and airmen were murdered, even tortured, seemed lost on them. Eventually, Canadians stopped war crimes prosecutions in Europe, not because prosecutors had finished the job, but because the government ordered all Canadian military personnel repatriated. The Canadians turned their remaining dozens of cases over to British authorities for their action. Canada truly merited Brode's description as a "timid dominion."¹⁶

Other countries efforts provide a disturbing comparison. By 1 January 1946, Canadians had tried one war criminal, Meyer, implicated in the

14. *Id.* at 227 (referring to the SCC's decision in *Her Majesty the Queen v. Finta* [1994] 1 S.C.R. 701 (Can.)). Finta was accused of WW II war crimes for his actions as a Hungarian police officer assisting in the deportation of Jews. The SCC majority decision imposed such an onerous burden on the prosecutors of war crimes that it is generally thought to be impractical to ever meet.

15. *Id.* at 110, 214-15.

16. *Id.* at 33.

deaths of about 103 Canadian PWs. By this time, the United Kingdom had tried ninety-four individuals and the United States 100.¹⁷ British¹⁸ and American¹⁹ handling of their major European PW massacres was much more vigorous.

Certainly, *Casual Slaughters* does describe some individually questionable results. There were also unwarranted disparities in sentencing. That these failings are not unknown in today's peacetime civilian justice system provides a context for these criticisms. Disparities became so evident in the Far East that authorities put in place a sentence review mechanism to address that problem. It speaks to the basic good faith of the Allies that they noted such a problem and took corrective action.

Courts-martial rendered many of the decisions in these life and death processes with frightening alacrity. Meyer's panel deliberated only twenty-five minutes before sentencing him to death, surprising even the prosecutor.²⁰ In a legally complex fact pattern, the panel considering the fate of two Germans accused of killing an unidentifiable Royal Canadian Air Force (RCAF) flyer shot down over Germany in 1944 took only twenty minutes to convict.²¹ Finally, the prosecution's case in the Holzer matter, concerning the murder of three RCAF flyers, consisted solely of documentary evidence. After his conviction, a Canadian firing squad executed

17. A. P. V. Rogers, War Crimes Trials Under the Royal Warrant: British Practice 1945-1949, at 14 (n.d.) (copy of unpublished article on file with author).

18. See generally PAUL BRICKHILL, *THE GREAT ESCAPE* (1950). Brickhill describes the 1944 escape of seventy-six Allied PWs from Stalag Luft III. This largest single PW escape of the war so enraged Hitler he ordered all those recaptured executed. Luftwaffe chief Goering convinced Hitler killing all those re-captured would be too obviously murder. Hitler then ordered "over half" shot. Luftwaffe officials settled on fifty. Thus, the Gestapo murdered fifty of the seventy-three recaptured PWs. Six of those executed were Canadian flyers. This heinous crime so incensed British authorities that a specially created Royal Air Force group arrested and charged sixty Germans responsible for various aspects of the killings. Thirty-two of these were executed or killed themselves while in custody. *Id.* chs. 19-21.

19. See generally JAMES J. WEINGARTNER, *CROSSROADS OF DEATH - THE STORY OF THE MALMEDY MASSACRE AND TRIAL* (1979) (detailing the 1944 murder of seventy U.S. PWs captured by the Germans during the Battle of the Bulge and the 1946 trial of seventy-four SS accused, all of whom were convicted and half of whom were condemned to death although none were actually executed).

20. BRODE, *supra* note 1, at 101.

21. *Id.* at 134.

Holzer and one of his co-accused.²² Not surprisingly, Brode considers this particular case a low point in the prosecutions.

Lest these comments paint an unfair picture of Brode's book or the prosecutions in general, in most cases the enemy accused received the benefit of the doubt and their cases were properly determined. For example, the Japanese lawyer for a regimental commander accused of responsibility for killing PWs during Japan's capture of Hong Kong in 1941 won his client's acquittal on a "no evidence" motion.²³ Brode also describes the case against the main subject of *Casual Slaughters*, Meyer, as "compelling."²⁴

Like many good historical accounts, *Casual Slaughters* raises a host of intriguing issues. In Meyer's case the issues were legal,²⁵ political,²⁶ international, and human. Brode's account of the Meyer trial is fascinating. What prosecutor cannot sympathize with LCol Macdonald, whose first witness went AWOL on the eve of trial, whose second witness contradicted his pre-trial statements on the stand, and whose third witness, upon cross-examination, qualified his testimony into meaninglessness? For reasons set out below, however, the tales of other prosecutions are far less gripping.

Casual Slaughters also reveals the extraordinary talents and personality of Major-General Meyer. He was an extremely able and brave officer. In Normandy, he became, at thirty-three years of age, Germany's youngest division commander. He fought in Poland, France, the Balkans and Russia before returning to France to face the Allies in Normandy. His awards and medals seemingly encompassed all those available, some for the second and third time.²⁷ The enemy wounded him on three occasions.

22. *Id.* at 154.

23. *Id.* at 163-64.

24. *Id.* at 208.

25. *Id.* at 29, 35, 64. The initial rejection and eventual use of the Royal Prerogative as authority for the war crimes trials is a legally fascinating spectacle. *Id.*

26. *Id.* at 210. Canadian politicians were embarrassed when Meyer was found by reporters re-united with his family at home on a pass only days after having been transferred to British-supervised custody to serve the remainder of his life sentence in Germany. Canadian politicians had assured the public that British authorities could not release Meyer without their approval. *Id.*

27. Petition of Kurt Meyer, *supra* note 6, para. 9 (including the Iron Cross Second Class, the Iron Cross First Class, the Knight's Cross, the German Cross in Gold, Oak Leaves to the Iron Cross, that is, a second awarding of that honor, and the Sword to the Oak Leaves, that is, a third awarding of the Iron Cross).

Meyer led by example, apparently fearless. He kept so close to the action that four of his drivers were killed during the war. In one remarkable scene, he arrived to encourage a unit on the verge of retreat. Enemy fire hit his motorcycle, killing the driver and setting Meyer alight. As soon as nearby German troops put out the blaze, Meyer, his jacket still smoldering, led them in an attack, yelling encouragement the entire time.

Meyer also exhibited extraordinary personal powers. His young soldiers worshipped him. After capture and while in a uniform without rank, guards identified him as a senior officer by the deference the other PWs naturally showed him. During his trial, he could transfix witnesses, particularly former subordinates with hypnotic glaring.²⁸ He had an effect even on his guards, who in a surreal moment arranged a birthday party for him in the evening during his trial. His personality was so strong that his minor cult status survives to this day.²⁹

For all his military virtues, Meyer was an early, life-long, and dedicated Nazi. He joined the Nazi party in 1925 at the age of fifteen.³⁰ He became a spokesman for Waffen SS veterans upon his release from prison. His post-war biography and speeches never indicated a doubt as to the rightness of Nazi Germany's cause.

The already mentioned Robert Holzer, in contrast, faced a firing squad for his part in the murder of Canadian airmen shot down over Germany. This would seem to deprive him of any call on our sympathy. Yet, Holzer had spent twenty-one months in a concentration camp, apparently for displaying undue consideration to his Jewish employer. He served on the Eastern Front, being wounded seven times, the last by burial resulting in his medical discharge from the wartime German army. He won seven awards for his actions. At war's end, the Gestapo was pursuing him. None of this saved him from the firing squad.

28. BRODE, *supra* note 1, at 69, 70.

29. An October 2001 Internet search of "Kurt Meyer Panzer SS" turns up about 500 Web sites. Unacknowledged site, *Kurt Meyer's HomePage*, at <http://home.bip.net/glenfidish> (last visited Oct. 18, 2001) (describing him as the "one of the greatest soldier (sic) of all times" in its subtitle); Hot-Metal-35.de (German scale model Web site), *Figuren*, at <http://www.hot-metal-35.de/figuren.htm> (last visited Oct. 18, 2001) (selling Kurt Meyer miniature figures).

30. Petition of Kurt Meyer, *supra* note 6, para. 4. Why his counsel thought this fact would assist his client's plea for mercy is uncertain.

Like any historical work, *Casual Slaughters* aims to provide an accurate, balanced, and engaging account of a significant event or process. In this, Brode is largely successful. His narrative is accurate and well researched, and he uses many primary sources. Brode presents a factual and compelling account of Canada's first foray onto the world stage as an independent nation involved in war crimes prosecutions. The facts support his conclusions, and his conclusions are sensible.

Perspective in matters of war crimes is critical given the strong emotions raised. It certainly is a difficult ideal to achieve when examining such an emotive issue. It is the nature of things that, by virtue of the strong feelings evoked, the relatively few egregious breaches of the law of war will overshadow the hundreds of thousands of un-noted, mundane, proper applications of those same strictures. "Thousands of Prisoners Not Murdered!" is not a headline that will be seen during any war. Brode does a very good job in this regard. He credits the law of war with doing tremendous good in a global sense during WW II. He acknowledges that literally millions benefited from general adherence to these humanitarian norms at least on the Western Fronts. He attacks mainly its non-application and non-enforcement. He further demonstrates a keen sense of perspective in the sympathy he shows for the soldiers who must apply the laws of war in the most trying of circumstances. He rightfully opines, "Combat is a strange country to those who have never visited it . . ."³¹ Displaying admirable objectivity and perspective, Brode even concedes the Kafkaesque pressures on citizens of Nazi Germany in the context of war crimes into which they were sometimes unwillingly drawn.³² Such perspective ameliorates the air of sanctimoniousness that often surrounds academic and legal discussions of war crimes.

Brode also speculates in a brief but informed manner about the effects and workings of the present ad hoc international tribunals and the proposed permanent International Criminal Court (ICC). It is Brode's optimism concerning the good that can be done, or perhaps more accurately the evil prevented, that leads him to argue for a strengthening of the international enforcement of the laws of war through the future ICC. He sees that mechanism as a way out of the one-sided application of such rules and the unfair

31. BRODE, *supra* note 1, at 222.

32. *Id.* at 134-35.

charges of “victors’ justice” which attend traditional attempts by the winners to bring the losers to account.

Brode may be faulted in one regard on this issue. He does not fully acknowledge the Allies’ general enforcement of the laws of war through their own military disciplinary codes. The uninitiated often assume that because military authorities have charged no one with war crimes per se, that they have not enforced the law of war. This is wrong. The culprits’ nations generally enforce most of the laws of war. Military leaders utilize their own internal disciplinary codes to do so. Just because they label these crimes “murder” or “theft” does not mean the charges do not pertain to the internationally proscribed grave breaches of the Geneva Conventions. The labels are legally irrelevant. Such self-generated trials are a quite acceptable and effective domestic enforcement of the international rules.

Casual Slaughters has several weaknesses. Some are within the author’s control; others are not. In the first category is the extremely annoying use of endnotes instead of footnotes. The endnotes force the reader to constantly interrupt his reading to consult the back of the book, search for the appropriate chapter, and then locate the numbered source. In accounts such as this, the origin of information is critical; for example, is the source Canadian or enemy? Much needless flipping and scanning is required. Footnotes at the bottom of the pages would have been much more convenient.

In addition, Brode largely confined his research and sources to those of the Allies. He provides German and Japanese perspectives almost totally from the trial testimony of the accuseds. The one exception was Meyer, whose biography Brode used. Given Canada’s small role in war crimes prosecutions, there may be no specific Axis “take” on Canada’s pursuit of war criminals. Nevertheless, the result is uncomfortably one-sided.

The relative availability of background research and material leads to another problem. Brode’s account of the Meyer case benefits greatly from access to the archival materials supplied by the prosecutor, LCol Macdonald, the papers of the assistant prosecutor, and several surviving witnesses. Further, Brode had Meyer’s own account and even a book by the son of Major-General Foster, the President of Meyer’s court-martial. The abundance of material related to Meyer, however, skews the total result heavily to the Meyer prosecution. Brode devotes fully half the book to the Normandy murders implicating Meyer and their legal fallout. The other

defendants' cases and some tangential episodes share the remainder of the book. While perhaps unavoidable, it leaves the reader with the impression that the treatment of the non-Meyer accuseds was somewhat cursory. In Brode's defense, the Meyer case was probably the most significant in terms of the number of Canadian victims and the important issues involved, such as command responsibility.

Casual Slaughters' many qualities make up for its few flaws. It documents an historical event ignored by others, but meriting wider attention. Patrick Brode convinces us that these prosecutions were a necessary and worthwhile exercise. He motivates us to ensure any future efforts avoid the pitfalls apparent from our WW II experience.

Beyond these lessons, *Casual Slaughters* is a "good read." Brode objectively considers both sides' misdeeds and exhibits a too often missing appreciation of perspective. He weaves the larger issues of justice, morality, and war into his account. In so doing, *Casual Slaughters and Accidental Judgments* provides a good description and intelligent consideration of the Canadian war crimes prosecutions following WWII.

**GHOST SOLDIERS: THE FORGOTTEN EPIC STORY OF
WORLD WAR II'S MOST DRAMATIC MISSION¹**

REVIEWED BY MAJOR GARY P. CORN²

*And still we have the faith—faith in your might
In each bright weapon in the far-flung fight
And in the blood of weary men
Who take the coral beaches back again³*

I. Introduction

Inspired by the spectacular sight of dozens of American Navy Hellcats streaking across the sky, Lieutenant Henry Lee's poem represented a shared sense of hope for liberation growing among the surviving American prisoners in the Cabanatuan prisoner of war (POW) camp in September 1944. The sight of the planes served to confirm rumors that their Japanese captors were in retreat. Having managed to survive three years of unimaginable misery, their growing excitement at the prospect of liberation was understandable. Unfortunately, it was far from assured.

By the end of December, some 1600 prisoners were shipped to Japan for use as slave labor.⁴ For the approximately 500 prisoners that remained, a far more sinister hurdle lay in their path: the very real threat of being murdered *en masse*.⁵ Confronted with the possibility that in the face of his advancing Sixth Army, the Japanese would execute the remaining POWs at Cabanatuan, Commanding General Walter Krueger ordered a daring and

1. HAMPTON SIDES, *GHOST SOLDIERS: THE FORGOTTEN EPIC STORY OF WORLD WAR II'S MOST DRAMATIC MISSION* 202 (2001).

2. United States Army. Written while assigned as a student, 50th Judge Advocate Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. SIDES, *supra* note 1, at 202 (quoting a poem written by Lieutenant Henry Lee, U.S. Army, while imprisoned in the Cabanatuan Prisoner of War Camp in the Philippines on 24 September 1944).

4. Of the 1600, 700 died en route to Japan. Lieutenant Lee was among those who did not survive the journey. *Id.* at 214.

5. This is exactly what happened to nearly all of the 150 prisoners of the Puerto Princesa Prison Camp on Palawan Island in the Philippines on 14 December 1944, when the retreating Japanese burned them alive in air-raid shelters. The Cabanatuan POW camp was located on the Philippine island of Luzon. *Id.* at 23-24.

unprecedented rescue mission thirty miles behind enemy lines to save these fragile, imperiled “ghost soldiers.”

In his book *Ghost Soldiers: The Forgotten Epic Story of World War II's Most Dramatic Mission*, Hampton Sides brings to life with incredible detail and intense drama the fantastic yet nearly forgotten rescue mission carried out by the elite 6th Ranger Battalion in 1945. Through alternating chapters, Sides skillfully intertwines the experiences of the Cabanatuan POWs and the 121 hand-picked Rangers that ultimately liberated them. Their stories progress through the book like two distinct lines grinding forward, destined to intersect in a blaze of glory and redemption. *Ghost Soldiers* is an extraordinary read that is at once a chilling expose on the depths of human cruelty, and an uplifting tribute to the ultimate power of courage and heroism.

Sides is a skilled writer. The 342-page *Ghost Soldiers* reads like a Hollywood thriller, jam-packed with intrigue, spies, danger, and glory. Each page is easily digested and draws the reader deeper into the story, leaving him hungry for what will be revealed around the next corner. At times the story seems so fantastic that it is easy to forget it is non-fiction. Sides' skillful narration coupled with his extensive research allowed him to bring to life the stories of the book's numerous characters, not just the Rangers and the POWs, but also heroic guerilla leaders and self-deputized spies with mysterious code names.⁶

Ghost Soldiers is Sides' first foray into the realm of military history.⁷ As he puts it, the book is a “thoroughgoing collaboration between myself and the men who populate its pages.”⁸ Sides spent countless hours interviewing the remaining survivors of Cabanatuan and their rescuers. He reviewed prisoner memoirs, oral history transcripts, thousands of pages of archival documents, and traveled to the Philippines and Japan to research

6. Claire Philips, a.k.a. High Pockets, was awarded the Medal of Freedom in 1951 for her efforts in the Philippines during the war. *Id.* at 332.

7. A native of Memphis, Tennessee, Sides is a contributing editor for *Outside Magazine*, and his work has appeared in the *New York Times Magazine*, *DoubleTake*, *The New Republic*, the *Washington Post*, and on National Public Radio's *All Things Considered*. His other books include *Why Moths Hate Thomas Edison*, a collection of question and answer columns from *Outside Magazine*, and *Stomping Grounds: A Pilgrim's Progress Through Eight American Subcultures*.

8. SIDES, *supra* note 1, Acknowledgments.

the book. The result is a work that is extremely entertaining and highly informative.

At the same time, Sides employs a narrative approach to the book that makes for an excellent read, but leaves the work nearly devoid of any significant analysis. Nor does *Ghost Soldiers* have any real thesis. This, coupled with Sides' lack of experience as a military historian, caused him to neglect some of the deeper leadership lessons to be learned from the planning and execution of this daring mission.

This book review briefly explores Sides' work. In doing so, it attempts to give the reader a sense of *Ghost Soldiers*' strengths as well as some of the weaknesses in Sides' rendition of this historic rescue mission.

II. The Decision

Sides opens the book with a chilling account of the Japanese massacre at the Puerto Princessa Prison Camp. The Japanese herded all prisoners into makeshift air-raid shelters by feigning an imminent attack by U.S. planes. They then doused the POWs with aviation fuel, ignited it, tossed in hand-grenades, and riddled the shelters with bullets. Despite this, a handful of Americans miraculously survived and later escaped. Their incredible story, along with other intelligence,⁹ reached General Krueger just days after his Sixth Army had landed at Lingayen Beach. By 26 January 1945, the Sixth Army had driven halfway to Manila. The Cabanatuan camp sat squarely in the center of its axis of advance and would be overtaken within days. When General Kreuger was briefed by his G-2 on the

9. For example, by this time, the Allies were probably aware of an order issued by the War Ministry in Tokyo in August 1944, known as the "August 1 Kill-All Order," which read:

When the battle situation becomes urgent the POWs will be concentrated and confined in their location and kept under heavy guard until preparations for the final disposition will be made. Although the basic aim is to act under superior orders, individual disposition may be made in [certain] circumstances. Whether they are destroyed individually or in groups, and whether it is accomplished by means of mass bombing, poisonous smoke, poisons, drowning, or decapitation, dispose of them as the situation dictates. It is the aim not to allow the escape of a single one, to annihilate them all, and not to leave any traces.

Id. at 23-24.

tenuous situation of the remaining POWs, he knew the Sixth Army's advance spelled certain disaster for the prisoners. Kreuger determined that, despite the obvious risks, they had to attempt a rescue mission. He quickly decided to assign the task to Lieutenant Colonel Henry Mucci's 6th Rangers.

In retrospect, this decision may seem obvious; American POWs were in grave danger of massacre—they had to be rescued. Under the circumstances, however, it could not have been an easy decision for Kreuger. Although the tide of war was turning decidedly in favor of the Allies, victory was by no means assured. The Japanese Fourteenth Imperial Army was digging-in, some 250,000 strong, for what the War Ministry in Tokyo called “the decisive battle.”¹⁰ Over 8000 battle-hardened troops were concentrated around Cabanatuan alone. In addition, Kreuger was under intense pressure from MacArthur to drive south and re-take Manila despite his serious concerns about leaving his flanks unprotected.¹¹ The rescue mission offered no significant military objective, and could have threatened to slow the advance. Given the Japanese buildup around the camp, Kreuger had to know that he was sending the Rangers on a possible suicide mission.

Such a decision could not have been taken lightly. Yet Sides addresses Kreuger's deliberation in one short paragraph:

Kreuger needed no further convincing from Horton White [the G-2]. By all means, by any means, a force must be immediately dispatched ahead of the lines to attempt a rescue of Cabanatuan. It was an eleventh-hour mission of mercy that Kreuger knew would be near to General MacArthur's heart. “Sounds risky,” Kreuger said, “but it's a wonderful enterprise.”¹²

By glossing over this critical point in the decision-making process, Sides fails to shed light on a potentially valuable leadership lesson.

10. *Id.* at 18. The Luzon campaign would turn out to be the largest of the Pacific theatre. More U.S. troops were engaged than had been employed in North Africa, Italy, or southern France. RONALD H. SPECTOR, *EAGLE AGAINST THE SUN: THE AMERICAN WAR WITH JAPAN* 518 (1985).

11. SPECTOR, *supra* note 10, at 521.

12. SIDES, *supra* note 1, at 24.

III. The Prisoners

Sides' account of the day-to-day horrors suffered by the Cabanatuan prisoners is powerful. By exploring the lives, and deaths, of a number of individual POWs, Sides paints a vivid picture of the horrid conditions imposed by the Japanese, and the Americans' amazing will to survive. His account of their maltreatment and resistance is a powerful history lesson for judge advocates on why the world promulgated the Geneva Conventions of 1949.¹³

On 9 April 1942, four months after the Japanese attack on Pearl Harbor, Major General Edward King surrendered the 78,000 American and Filipino soldiers under his command to Lieutenant General Masaharu Homma, commander of the 14th Imperial Army. Over the four months of intense combat, the condition of the American soldiers deteriorated steadily due to a combination of battle fatigue, disease, and starvation. By the time they surrendered, these soldiers were ill-prepared, physically and emotionally, for what lay ahead.

What lay immediately ahead was the now-notorious Bataan Death March, a brutal, sixty-five mile forced march of the surrendered troops from southern Bataan to the POW camps in the north. Over 1000 Americans and 5-10,000 Filipinos perished on the march. Another 16,000 died during the first few weeks of internment.¹⁴

As Sides rightly points out, the American and Filipino deaths were due in part to their already deteriorated condition. This was coupled with grossly inadequate logistics and planning by the Japanese who had underestimated the number of prisoners by as much as 60,000 and were unprepared to deal with the evacuation. Exacerbating this problem was Corregidor, the island fortress guarding the harbor at Manila, which had not yet surrendered. Without Corregidor, the Japanese victory at Bataan was hollow. In order to reduce the fortress, the Japanese needed to occupy the lower end of the Bataan peninsula, which was exactly where the sur-

13. See Geneva Convention of 12 August 1949, Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, 75 U.N.T.S. 135.

14. SPECTOR, *supra* note 10, at 396.

rendered Americans were. The result was a top-driven mania to move the prisoners out of the peninsula at breakneck speed.

As the faltering prisoners fell behind schedule, Sides writes, the “Japanese became increasingly irritated at [their] halting progress. Their exhortations grew louder and more shrill. With greater frequency, they punctuated their demands with the flash of steel blades.”¹⁵ In many cases this meant death by bayonet or decapitation by sword. Throughout the course of the march, atrocities abounded. Many were simply the product of deliberate cruelty. Describing a particularly sinister display, Sides writes:

The water was pure and cool and raced from the hillside, as though from a natural spigot. Abie Abraham stared at it lustfully, as did the dozen or so other Americans in his group, who all stood at attention, impaled by the afternoon sun. The Japanese guard had halted the column along the East Road at a spot only a few yards from the spring, but he would not permit them to take a drink. Sergeant Abraham couldn’t tell at first whether the guard’s decision to rest at such a tantalizing place was deliberate or absentminded torture, but it was torture nonetheless The sight of [the water] was unbearable—the *thought* of it, the thought of not having it. Abraham tried to avert his gaze, but he couldn’t. His mouth was cottony, his lips were cracked, his tongue fell thickly over his teeth.¹⁶

One of the POWs in the column lacked Abraham’s strength to resist; he bolted for the water and began drinking wildly. “Abraham watched in dull disbelief as the guard unsheathed his sword, . . . [and] with a ‘quick ugly swish,’ he brought the blade down and cleanly decapitated the American.”¹⁷ This is one of many examples of gratuitous maltreatment committed by the Japanese during the death march and for years afterward.¹⁸

15. SIDES, *supra* note 1, at 83.

16. *Id.* at 81.

Sides provides a sobering account of these heinous acts, as seen through the eyes of the victims. As with most of the book, his writing style draws the reader into the center of the marching, suffering column. At times, however, Sides is, if not apologetic, then overly willing to explain away the Japanese behavior. Sides writes:

Yet for all its horrors, the march was not a premeditated atrocity. For the most part, the brutalities occurred in a piecemeal fashion against a backdrop of escalating confusion and seething racial hatred. Miscues, bad intelligence, cultural misunderstandings, sweltering heat, and a devolution of Imperial Army discipline all conspired to create an environment of tragic drift. The Bataan Death March . . . took place not according to plan, but rather as a result of the chaos that flourished under a plan that was fatally flawed.¹⁹

In particular, Sides paints General Homma as a victim of the intense pressure imposed by his superiors to consolidate his victory by taking Corregidor. Reading *Ghost Soldiers*, one is left with the impression that Homma was dedicated to treating the POWs fairly, but that events overcame him and the rest of the Japanese command establishment.

17. *Id.* at 85. This was not an isolated torture technique. As another survivor of the march recounted:

They'd halt us in front of these big artesian wells. . . . There were hundreds of these wells all over Bataan. They'd halt us intentionally in front of these wells so we could see the water and they wouldn't let us have any. Anyone who would make a break for water would be shot or bayoneted.

SPECTOR, *supra* note 10, at 387 (quoting Private Leon Beck and citing DONALD KNOX, DEATH MARCH: THE SURVIVORS OF BATAAN 133-34 (1981)).

18. For example, in one of the sickest displays of whimsical terror, a Japanese soldier pulled one of the sickly Americans from the column and forced him to lie down in the middle of a cobblestone street about five feet in front of a tank. The tank pulled over him, crushing his body. All ten tanks in the Japanese column then ensured that they ran over the already flattened body. SPECTOR, *supra* note 10, at 397.

19. SIDES, *supra* note 1, at 91. Sides also points to the indoctrination of the Japanese military in the ancient Samurai Bushido code, which demanded that soldiers fight to the death. Those that did not were considered somehow less than human and therefore undeserving of humane treatment.

Such explanations fly in the face of accepted notions of command responsibility.²⁰ Although exceptions existed, the Japanese consistently violated every tenet of humane and lawful treatment of POWs, even by 1940 standards. They claimed to abide by the Geneva Convention of 1939, but seldom followed those rules. The book is riddled with examples of the constant abuses, undercutting Sides' post-hoc rationalizations.²¹ As Sides acknowledges, Homma, "preoccupied with his plans for assaulting Corregidor, apparently remained oblivious to the enormity of the disaster that passed by his Balanga headquarters each day."²² If not intentionally involved in the atrocities, Homma was, at a minimum, criminally negligent in allowing them to occur right under his nose.²³

Through the alternating chapters of the book, Sides documents in chilling detail and with obvious insight into the human condition, the surviving marchers' hellish nightmare in captivity. From their initial stay at the temporary holding station of Camp O'Donnell²⁴ through their deplorable internment at Cabanatuan, Sides skillfully explores the POWs' con-

20. Under the doctrine of command responsibility, a commander is criminally liable if "he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof." U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 501 (18 July 1956).

21. To be fair to the author, he is not alone at attempting to explain the Japanese atrocities. See e.g. SPECTOR, *supra* note 10, at 396-400.

22. SIDES, *supra* note 1, at 93.

23. Homma was tried, convicted and executed for war crimes. *Id.* at 333. See also H. Wayne Elliott, *Open Cities and (Un)defended Places*, ARMY LAW., Apr. 1995, at 45 (citing HOWARD S. LEVIE, *TERRORISM IN WAR, THE LAW OF WAR CRIMES* 165 (1993)). Again in fairness to the author, some claim that the prosecution never proved that Homma had any knowledge of the atrocities being committed by his subordinates.

24. Camp O'Donnell was an incredibly putrid place where one out of every ten prisoners who entered died—some 16,000 in the first few weeks. As one survivor is quoted as saying, "Hell is only a state of mind; O'Donnell was a place." SIDES, *supra* note 1, at 107.

stant struggle to cope with malnutrition, tropical disease, and maltreatment by their captors, and their remarkable ability to somehow cling to hope.

Peppered throughout these dismal accounts of misery are uplifting stories that leave the reader amazed at the resiliency and defiance of the human soul under extreme duress. One such passage reads:

In the middle of the camp, a group of Navy men from Corregidor erected a post from which they hung a rusty metal triangle. It looked something like the traditional dinner chimes found on ranches and farms back home, though larger and cruder. Every half hour the designated timekeeper would go out with a stovepipe in his hand and give the contraption a set number of dings in accordance with an old Navy custom called "sounding the watch." The system was a little intricate until one got used to it. Far from dulcet, the tone of the ring was hard and sharp, a metallic sound punctuating the day with seriousness. The Cabanatuan prisoners came to like it, though, for segmenting the blur of chronology, for the sense of orderliness it brought. To some, it sounded like the proud, clear voice of duty.²⁵

In another example, several of the prison guards contracted gonorrhea from local liaisons. Afraid or uncomfortable approaching their own doctors, they sought assistance in the form of sulfa drugs from the American prisoners. As Sides writes, "Even though the Americans had no sulfa drugs, they were quite willing to oblige their captors, for a price."²⁶ Instantly, a cottage industry sprang up to produce bogus drugs for clandestine sale to the guards. "For the prisoners, steeped in three years of unexpressed rage, such acts of vengefulness were both therapeutic and impossible to resist, even though the penalty for defiance, as the American commander constantly warned them, might be their own death."²⁷ Through these and other examples, Sides pays tribute to the indomitable spirit of the American POWs and provides an important les-

25. *Id.* at 137.

26. *Id.* at 161.

27. *Id.* at 161-62.

son to all service members on the important ideals of continued resistance and keeping faith with fellow POWs embodied in the Code of Conduct.²⁸

By the time Lieutenant Colonel Mucci received his orders, only about 500 prisoners remained at Cabanatuan. The population of the camp had risen to as many as 8000, but had slowly dwindled as many were transferred to satellite camps or simply perished. Of the 2100 or so that occupied the camp in December 1944, the healthiest 1600 were shipped to Japan. By January, Cabanatuan had been reduced to a holding station on the way to death.

IV. The Rangers

At the time General King surrendered at Bataan, the U.S. Army Rangers as we know them today did not exist. It was not until 19 June 1942 that the 1st Ranger Battalion was activated, followed by five more over the course of the war. While training for the 1st Battalion was conducted at the British Army's Commando Training Center in Scotland,²⁹ the U.S. Army in the Pacific had to come up with its own plan for its new Rangers. The task fell to Lieutenant Colonel Mucci. Sides describes how in less than a year, this West Point graduate and former Provost Marshall of Honolulu during the attack on Pearl Harbor, took a battalion of field artillerymen into the jungles of New Guinea and converted them into a force of elite light infantry—the 6th Ranger Battalion.

Sides' treatment of Mucci's role in both the creation of the battalion and the rescue operation itself demonstrates insight into the attributes of successful leadership. In this regard *Ghost Soldiers* is a valuable lesson for Army leaders. In many ways Mucci personified the Ranger creed before it existed. He led from the front, never asking his men to do anything he was not doing right alongside them. Despite his age of thirty-three, he was probably the most physically fit man in the battalion. His 1936 West Point yearbook noted that he did "not choose to be a classroom expert, but rather

28. Exec. Order 10631, Code of Conduct for Members of the Armed Forces of the United States (Aug. 17, 1955) as amended by Exec. Order 12017 (Nov. 3, 1977), reproduced at U.S. DEP'T OF ARMY, REG. 350-30, TRAINING: CODE OF CONDUCT, SURVIVAL, EVASION, RESISTANCE AND ESCAPE (SERE) TRAINING app. B (10 Dec. 1985). In addition, the examples in the book provide very effective training vignettes. See *id.* para. 2-4 (Use of Historical Examples).

29. See About U.S. Military, *History of the U.S. Army Rangers: Rangers Lead the Way*, at http://www.grunts.net/army/rangers.html#_ww2 (last visited Oct. 1, 2001).

the field leader he was: the man who thinks on his feet, who inspires others beyond the powers of persuasion.”³⁰ As Sides demonstrates numerous times throughout the book, it was Mucci’s leadership that propelled his Rangers forward through extremely difficult mission conditions. Mucci’s men loved him. “We would have followed him to hell that night,” said Ranger Thomas Grace. “And when we got there, he would’ve opened up the goddam gates.”³¹

For reasons that Sides fails to adequately explain, Mucci could not bring all 800 men of the battalion on the mission.³² He assigned the mission to C Company, under the command of a quiet young Stanford graduate named Robert Prince, the only other Ranger about whom Sides provides any significant detail. As the mission developed, it fell principally upon Prince to come up with the plan of attack. Unfortunately, few details emerge on exactly how Prince and Mucci developed the plan that the Rangers executed. This failure to shed light onto how these leaders analyzed the mission and applied the principals of war in developing their plan leaves an unfortunate gap in the lessons to be gained from the book.

On 27 January Mucci addressed his men and outlined the mission in broad terms. It would be extremely dangerous but they would “bring out every last man, even if [they had] to carry them on [their] backs.” He wanted every man to be a volunteer, giving them the chance to back-out. None did. Before leaving them he turned and added: “One other thing. There’ll be no atheists on this trip.” He ordered them all to meet with the unit chaplains. “I want you to swear an oath before God. Swear that you’ll die fighting rather than let any harm come to those prisoners.”³³ Such were the men that would set off to liberate the Cabanatuan POWs.

V. The Raid

Amazingly, the raid on the Cabanatuan camp was planned on the fly; there was simply no time to gather the necessary intelligence and refine a plan before stepping off. Their mission was to march thirty miles behind

30. SIDES, *supra* note 1, at 70.

31. *Id.* at 286.

32. This is another area that Sides glosses over. It is especially strange in light of the fact that several hundred Filipino guerillas accompanied the Rangers on the mission and played a crucial role. It is part of a general failure on the part of the author to delve deeply into the planning process of the mission.

33. SIDES, *supra* note 1, at 28-29.

enemy lines, across roads patrolled by Japanese tanks, across Japanese-held bridges, across the open country of the Central Plain of Nueva Ecija infested with Japanese soldiers and pillboxes; and that was the easy part. Once they reached their objective, the Rangers had to assault the camp, liberate 500 walking corpses, and literally carry them back along the same thirty mile path they had just cut, evading pursuing Japanese the whole way. Their success, with only minimal casualties, borders on the amazing. It is a testament either to incredible luck or to good training, leadership, and planning. While one can assume that it was the latter, Sides fails to provide enough insight to fairly draw such a conclusion.

At the same time that Sides walks the reader through the years of suffering in the POW camp, he alternately places him in the middle of the Rangers' column as it slinks steadily forward. The tension grows palpable with each step as the Rangers brush ever closer with the enemy. Sides provides several gripping accounts of the Rangers' evasive tactics and near misses, to include literally slipping under the noses of the Japanese when the Rangers crossed under a major roadway clogged with enemy troops.

In addition to the constant threat of detection, a nearly complete lack of intelligence on the camp itself weighed heavily on Mucci's mind. Not until the last possible minute did Lieutenant Nellist, an Alamo Scout, produce the information that Mucci needed so desperately. With Captain Prince he set about feverishly finalizing the plan for the assault on the camp. What emerged was a complex plan to assault the camp from both ends, a plan that depended on stealth, timing, surprise, and a great deal of luck. As with the stories of the prisoners, Sides does an excellent job of recreating the raid down to the smallest details. For example, he writes:

[Lieutenant Murphy] was supposed to fire the inaugural shot, and the gravity of that assignment was beginning to weigh on him. He glanced at his watch—7:40, ten minutes past the scheduled starting time [He] knew that every Ranger ear was tuned to receive and instantaneously react to a single sound. He braced himself for the thunderous ferocity of a hundred American weapons replying at once to his cue He brought his M-1 rifle to his shoulder and switched off the safety. He drew a deep breath and settled his sights on a Japanese soldier inside the barracks, resting his index finger on the cool crescent of metal.³⁴

34. *Id.* at 256.

What followed was an overwhelming fusillade of gunfire. “The surprise was so complete, the firepower so massive and omnidirectional that the enemy was left paralyzed.”³⁵ The Rangers ripped through the camp with deadly, discriminating efficiency. Within minutes, they had all but eliminated the Japanese guards, and turned to the task of herding the prisoners out. Sides describes one typical encounter between rescuer and rescued:

John Cook, wearing only a G-string and leather high-top shoes, practically interrogated his liberator. “I said. ‘Hey, who in the hell are you?’ The guy had the funniest uniform on, with a funny-looking cap, and he was carrying something that looked like a grease gun, like he was going to grease up a car. He said, ‘We’re Yanks. Get your ass out the main gate.’ This guy is trying to save my life, and I’m sitting there carrying on an argument with him. I said, ‘No Yank ever wore a uniform like that.’ He said, ‘The hell we don’t!’”³⁶

Sides’ narrative draws the reader into the pulse-quickening excitement of the raid, creating a sense of hovering over the Rangers as the battle and rescue unfold below.

In the final chapter of the book, Sides completes the circle that began three years earlier with the Bataan Death March, describing the thirty-mile march back to friendly lines. As Sides writes, the prisoners “observed that the long hike to safety felt like the direct opposite of their trek out of Bataan, a kind of reverse image in which all the emotional valences had been flipped.”³⁷ Sides captures the special nature of what one POW described as “a life march, a march of freedom,”³⁸ the incredible compassion shown by the Rangers for the POWs, and the growing sense of euphoria as the column edged ever closer to the American lines.

35. *Id.* at 271.

36. *Id.* at 280.

37. *Id.* at 303.

38. The words of POW John McCarty. *Id.*

It is at these expressive moments of the book when Sides is at his best. His final paragraph wonderfully portrays the emotion of the moment when the survivors finally entered the haven of the advancing U.S. forces.

Along the way they saw an American flag set in the turret of a tank. It wasn't much of a flag, writhing in a weak breeze, but for the men of Cabanatuan, the sight was galvanizing. Ralph Hibbs said his heart stopped, for he realized that it was the first Stars and Stripes he'd seen since the surrender. All the men in the trucks stood at attention and saluted. Then came the tears. "We wept openly," said Abie Abraham, "and we wept without shame."³⁹

VI. Conclusion

Calling the rescue of the Cabanatuan POWs "World War II's Most Dramatic Mission" may overstate the case a bit. Certainly, it was one of the war's boldest POW rescues. More significantly, it was an extreme example of self-sacrifice. A relatively small group of light infantry literally walked into the teeth of a well-armed, well-trained enemy with no direct tactical objective to be gained. But fellow Americans were in need, and that was all that mattered. *Ghost Soldiers* competently fills a void in the historical record of the Second World War. It offers an inspiring lesson to all service members on the importance of leadership, courage, and the ideals embodied in the Code of Conduct. For judge advocates, it is a treatise on why we must work tirelessly to understand and apply the law of war to all our operations. Despite the book's gaps, Hampton Sides has produced an excellent account of American soldiers at their best.

39. *Id.* at 317.

**RESOURCE WARS: THE NEW LANDSCAPE FOR
GLOBAL CONFLICT¹**

REVIEWED BY MAJOR MICHAEL D. TOMATZ²

*The next war in our region will be over the waters of the Nile,
not politics.*

—Boutros-Boutros-Ghali, then Egypt's
Minister of State for Foreign Affairs, 1988³

Resource Wars presents a compelling, if not daunting, message for diplomats, political leaders, and war planners. Author Michael Klare argues that competition over diminishing natural resources will form the basis for tension and violence in many regions of the world. Klare asserts that the burgeoning effort to exploit essential resources helps explain much of present-day international relations.⁴ If he is correct, the world should prepare itself for another century of bloody conflict.⁵

The end of the Cold War diminished the importance of expansive global alliances and massive arsenals.⁶ Since then American policymakers have increasingly focused on global competitiveness and the importance of economic strength as vital components of national security.⁷ Similarly, other countries have shifted military assets and developed weapons programs designed specifically to protect access to resources considered essential to national survival.⁸ Klare argues that “the relentless expansion in worldwide [resource] demand, the emergence of significant resource

1. MICHAEL T. KLARE, *RESOURCE WARS: THE NEW LANDSCAPE FOR GLOBAL CONFLICT* (2001).

2. United States Air Force. Written while assigned as a student, 50th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. KLARE, *supra* note 1, at 12 (quoted in Peter Gleick, *Water and Conflict*, INT'L SECURITY, Summer 1993, at 86).

4. *Id.* at 14.

5. Michael T. Klare is the director of the Five College Program in Peace and World Security Studies based at Hampshire College in Amherst, Massachusetts, and the author of a number of books regarding the changing nature of warfare. *Id.* at cover leaf.

6. *Id.* at 5-7.

7. *Id.* at 6-8.

8. *Id.* at 11-13.

shortages, and the proliferation of ownership contests” will cause mounting global division, friction and eventual conflict.⁹

Resource Wars paints a picture in grand strokes of a world facing looming shortages, sweeping boldly from region to region, pressing readers to come to grips with the magnitude of the problem. Yet Klare provides sufficient detail and depth in his analysis that even the circumspect reader will agree that responsible leaders and military planners must consider resource issues as a critical component in global strategic planning. The first chapter of the book provides a detailed overview of the global resource environment. Then Klare spends four chapters, roughly half the book, discussing oil and its global significance as a potential flashpoint for war, as well as its regional importance not only in the Persian Gulf, but also in the Caspian Sea Basin and the South China Sea. Chapters six and seven focus on the critical issue of water in the Nile and Indus Basins, and along the Jordan and Tigris-Euphrates rivers. Chapter eight examines internal wars waged over mineral and timber wealth.¹⁰ In the final chapter, Klare synthesizes his observations and defends his thesis that resource wars will become “the most distinctive feature of the global security environment.”¹¹ He concludes by offering alternatives to war.

While Klare’s flare for the dramatic makes this an interesting read, his zeal to place resource considerations on a pedestal above other sources of potential instability diminishes his analysis. Klare challenges other prominent writers who have attempted to define the central feature of the post-Cold War strategic environment. Notably, he disputes Samuel Huntington’s claim that a “clash of civilizations” will dominate world affairs.¹² He finds neither Robert Kaplan’s view that overpopulation and anarchy predominate, nor Thomas Friedman’s assertion that economic “globalization” is key, sufficient to explain prospects for the future global environment.¹³

After arguing that these authors fail to explain present global circumstances through one overarching theme, Klare spends most of his analysis making a similar argument. In lieu of clashing civilizations, anarchy, or

9. *Id.* at 23.

10. *Id.* contents.

11. *Id.* at 213.

12. *Id.* at 13; Samuel P. Huntington, *The Clash of Civilizations?*, FOREIGN AFFAIRS, Summer 1993, at 22.

13. KLARE, *supra* note 1, at 13; Robert D. Kaplan, *The Coming Anarchy*, ATLANTIC MONTHLY, Feb. 1994, at 44-75; Thomas L. Friedman, *THE LEXUS AND THE OLIVE TREE* (1999).

economic globalization, he places diminishing resources as his centerpiece. As a result, he spends his time defending this main thesis, often pushing other explanations for geopolitical instability and tension aside. His absolute focus on resources ignores the possibility of multiple sources of conflict, any one of which lacks sufficient explanatory force by itself, but together provide a more compelling predictor of future regional or global instability.

Mr. Klare is at his persuasive best when he examines specific regions of the world. Here, Klare lays out how resource depletion creates instability that could lead to armed conflict. He predicts that of all resources likely to spark conflict, oil tops the list.¹⁴ To defend this theory, Klare presents a rather gloomy picture of both the demand and supply side of the oil equation. On the supply side, the world's proven reserves of 1,033 billion barrels is sufficient for approximately the next forty years at present rates of consumption.¹⁵ Energy consumption will likely increase substantially, however, particularly in the developing world.¹⁶ While somewhat reminiscent of the doomsday predictions that abound when oil prices rise, Klare defends his numbers with U.S. Department of Energy figures. Whether the world will run out of oil on a preordained timetable is certainly subject to intense debate, but that aside, the beauty of Klare's analysis is its focus on how various nation-states protect resource-based interests in key global regions.

Resource Wars first discusses the Persian Gulf, the region most likely to experience conflict according to Klare.¹⁷ He argues that several factors support this conclusion. Oil wealth enables countries within the region to procure weapons on the global market. Internal conflicts arise due to the inequitable distribution of oil wealth and concerns over western involvement. The great powers, including the United States, have steadily expanded their presence and have indicated a willingness to use force to protect the flow of oil.¹⁸ And in the pursuit of national interests, countries like China and France have attempted to form particular alliances. All this

14. KLARE, *supra* note 1, at 27.

15. *Id.* at 19, 40-41.

16. *Id.* at 38-40.

17. *Id.* at 51.

18. *Id.* at 51-54.

adds up to a recipe for major regional conflict, including a possible spill-over conflict between the external backers of the regional Gulf States.¹⁹

Resource Wars provides useful insight into how resource considerations could cause instability in the Persian Gulf, but as with later sections of the book, the analysis tends toward the dramatic. Could a dispute over oil cause a conflict to break out between the United States and another non-Persian Gulf power? Yes, but one generally would not place such a concern at the top of the threat list. Klare dedicates twenty pages to discussing U.S. strategy in the region, the provision of arms to various Gulf powers, and the U.S. three-war scenario.²⁰ At every turn, he finds potential violence exploding from a resource-based spark. Yet the recent terrorist attacks on the Pentagon and World Trade Centers suggest the spark may be religious fanaticism or a generalized hatred of the United States and the West, not necessarily the contest over oil resources. Moreover, U.S. policymakers would argue that a strategy of dynamic regional engagement and a robust military presence diminishes the chance for war.²¹

Klare next discusses the Caspian Sea Basin, a developing energy region comprised of Russia, Iran, Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, and Uzbekistan.²² With predicted reserves of oil and natural gas second only to the Persian Gulf region, the Caspian Sea Basin is a key development area for the major world energy concerns.²³ Klare points to a number of unresolved issues, including the lack of a legal regime for oil drilling and distribution rights in the Caspian Sea proper, ongoing border disputes, and the challenge of moving oil from this landlocked region to other parts of the world.²⁴ Further, he argues, “the most significant factor in the regional conflict equation is the emergence of a new power struggle between the United States and Russia.”²⁵

19. *Id.* at 57.

20. *Id.* at 58-78. Mr. Klare references a number of government records and policy statements to support this section. Specifically, he describes a three-war scenario involving U.S. planning for three possible sources of violent conflict in the region: another Iraqi thrust into Kuwait and Saudi Arabia, an effort by Iran to close the Strait of Hormuz or effect shipping, and finally an internal revolt against the Saudi royal family. *Id.* at 58.

21. *Id.* at 53.

22. *Id.* at 81.

23. *Id.* at 84-87.

24. *Id.* at 87-88.

25. *Id.* at 88.

Resource Wars begins with an examination of the United States' participation in CENTRAZBAT, a major military exercise involving the United States, Kazakhstan, Kyrgyzstan, and Uzbekistan.²⁶ Just as the United States has increased foreign aid and supported military development within the region, Russia has maintained and expanded its influence through military contacts, arms transfers, and regional troop presence.²⁷ For Klare, these developments do not suggest an immediate, direct confrontation between the United States and Russia, but he clearly envisions proxy wars and long-term regional instability that could entangle outside powers, including these two.

Klare's examination of the Caspian Sea Basin more completely acknowledges that factors unrelated to oil, including ethnic and religious divisions, border disputes, and authoritarian regimes, contribute to the potential for violence.²⁸ But his prediction of a possible resource-based conflagration between the major powers remains undiminished. While oil is doubtless a key issue in the Caspian Sea Basin, U.S. foreign policy objectives in the former Soviet Union are not primarily resource-driven as Klare suggests. United States efforts to expand NATO and to engage non-resource rich states once part of the Soviet Union reveal broader goals. It appears the United States seeks stability throughout the region, not merely a guarantee of oil development opportunities. Arguably, U.S. engagement in oil and non-oil states creates greater regional stability and will not lead to inevitable conflict. Similar considerations apply to the South China Sea, the final oil region discussed in the book.

Chapter 5 of *Resource Wars* is a must read for anyone interested in global strategy in the Pacific Rim. The Pacific Rim is one of the truly dynamic regions in the world. Predictably, energy consumption in its ten leading economic centers—China, Hong Kong, Indonesia, Japan, Malaysia, the Philippines, Singapore, South Korea, Taiwan, and Thailand—has grown substantially.²⁹ Through his resource-based analysis, Klare reveals the connection between territorial claims to the South China Sea and access to vital oil supplies, and he offers a compelling explanation of why nations have focused military and government efforts in this key strategic

26. *Id.* at 1-2.

27. *Id.* at 92-97.

28. *Id.* at 107-08.

29. *Id.* at 110. For most of the 1990s, consumption grew at a rate of 5.5 percent per year, ten times the rate as compared to the rest of the world. While the rate of increase likely will decline in response to regional economic slowdown, by 2020 Asia will consume approximately thirty-four percent of total world energy. *Id.* at 110.

center. To satisfy their energy needs, states bordering the South China Sea seek greater control of its oil resources, and others nations like the United States and Japan want to ensure the flow of energy resources through its waters.³⁰

Klare argues that control of valuable energy reserves provides the real motive behind disputes over territorial waters and land areas within the South China Sea. For example, the ongoing controversy over ownership of the Spratly Archipelago appears to be a dispute about the control of territory. Klare convincingly demonstrates that the real motive is control of the South China Sea's energy resources.³¹ For Klare, the connection between resources and conflict is clearly evident. China's claim to the entire island chain and its assertive expansion efforts sparked armed conflict between China and Vietnam in 1988,³² and in early 1995 near Mischief Reef between China and the Philippines.³³ While his ultimate prediction of possible large-scale warfare seems overly glum and speculative, Klare's analysis provides a useful frame of reference for foreign policy decision-makers within the region. Certainly the United States, Japan and other interested states must consider underlying resource interests when fashioning policy toward China and other states that share interest in the South China Sea.

Shifting from oil to water, *Resource Wars* details precisely the increase in competition over fresh water from the Nile, Tigris-Euphrates, Jordan, and Indus rivers. Nations from Egypt and Sudan in Africa, and Israel, Syria and Turkey in the Middle East, to India and Pakistan in central Asia regard stable access to water as a pressing national security interest.³⁴ Klare carefully defends his thesis that water competition will rise during the next several decades by pointing to population increases in regions most dependent on limited water resources.³⁵ Offering a staggering statistic, he reveals that approximately one-fifth of the world's population

30. *Id.* at 111.

31. *Id.* at 112-22.

32. *Id.* at 123.

33. *Id.* at 123-26.

34. *Id.* at 138-89.

35. *Id.* at 142-45, 155-58.

receives only two percent of global runoff, and in many areas of the Middle East and Northern Africa runoff levels barely sustain basic human needs.³⁶

In the context of competition for water, Klare effectively links resource defense to the exercise of military power, and his use of historical examples and comments by top government officials illustrates this connection. He points to Egyptian President Hosni Mubarek's retort when Sudan recently suggested amending the 1959 Nile Waters Agreement: "Any step taken to this end will force us into a confrontation to defend our rights and life. Our response will be beyond anything they can imagine."³⁷

With similar clarity, Klare points to clashes between Israel and its Arab neighbors between 1964-1966 near the Dan Spring and the diversion works on the Baniyas-Yarmuk canal.³⁸ Similarly, Syria and Iraq nearly came to blows in 1975 when Syria's construction of the Tabqa Dam on the Euphrates River threatened Iraq's access to water. Last-minute diplomatic intervention by Saudi Crown Prince Fahd narrowly averted war.³⁹ Those nations only resolved their differences when an even greater, mutual threat emerged in 1990, when Turkey cut off the flow of the Euphrates after construction of the Ataturk Dam.⁴⁰ While conflicts between Israel and its Arab neighbors come as little surprise and surely have many dimensions beyond resource differences, the other instances Klare discusses provide a clear causal link between water and war. His analysis of timber and mineral resources contains equally powerful examples.

Klare asserts that internal wars like those in Angola, the Congo, and Sierra Leone quickly degenerate into conflicts over resources. The pursuit of diamonds, copper, gold, or timber wealth becomes both the means and the end of conflict. He drives this argument home with a stunning revelation, originally disclosed by the *New York Times*, from the recent internal conflict in Sierra Leone. The July 1999 United Nations (UN) supported peace agreement signed between the Kabbah government and the Revolutionary United Front (RUF) gave the rebel leader Foday Sankoh effective control over the country's diamonds and others minerals. With this wealth, Sankoh acquired new arms and then renewed his attacks on the government. Internal RUF documents later revealed Sankoh smuggled diamonds and "ordered his forces to go on the offensive against U.N. peacekeeping

36. *Id.* at 145.

37. *Id.* at 158; GREG SHAPLAND, *RIVERS OF DISCORD* 101 (1997).

38. KLARE, *supra* note 1, at 168-69.

39. *Id.* at 177.

40. *Id.* at 173-79.

forces when he learned that the peacekeepers' leader, General Vijay Kumar Jetly, was preparing to send his troops into the Kono diamond region."⁴¹

In an equally tragic example, Klare describes the rampant deforestation and the elites' pursuit of vast timber wealth in Borneo. In 1987, the native Penan people issued an ultimatum to stop destroying their forests, and ultimately attempted a desperate defense of their native territory with blowpipes. This resulted in mass arrests, killings, ongoing clashes between government forces and natives, as well as a steady incursion by timber interests into the forests.⁴² Pursuit of resources not only provides a financial means to wage war, but the wealth generated from the resources becomes the ultimate object of conflict.

The book concludes with a four-page commentary on "alternatives to war" that unfortunately diminishes the book. After describing meticulously the problem of resource-driven conflicts, Klare offers a solution that amounts to the geopolitical equivalent of joining hands and singing *kumbaya*. He proposes an equitable distribution of the world's existing resource stockpiles in times of scarcity, all governed by yet-to-be-created international institutions.⁴³ There is absolutely nothing wrong with the United Nations aggressively pursuing cooperative agreements over fossil fuels, water, and mineral resources, but it is fantasy to believe that national and private interests will subordinate themselves to U.N. distribution bodies.

In a society that believes in free markets, one does not find comfort in the control of the world's resources by government at the international level. Who determines when a resource becomes scarce? Will Egypt accept U.N. control of the Nile? Pursuing oil is a complex, multi-corporate, multi-government venture, with profit as a substantial motivation. Will Texaco, British Petroleum or the Saudi Royal Family agree to global sharing? When will these new international bodies step in? How will equitable distribution be achieved? None of these issues are addressed or defended. *Resource Wars* contains valuable insights into potential sources

41. *Id.* at 201-02; Barbara Crossette, *Sierra Leone Rebel Leader Reportedly Smuggled Gems*, N.Y. TIMES, May 14, 2000.

42. KLARE, *supra* note 1, at 205-06.

43. *Id.* at 223.

of conflict in the new century, but Klare's final commentary on alternatives to war simply pales in comparison to the rest of the book's analysis.

Resources Wars establishes a vital causal link in the conflict equation, and the salience of Klare's work is that it demonstrates how this resource connection cuts across regional boundaries and influences both internal and international conflicts. Regrettably, Klare's focus on resource wars as "the most distinctive feature of the global security environment"⁴⁴ underestimates other powerful causes of conflict, including ethnic and religious strife, territorial differences, and terrorism. Despite this weakness, *Resource Wars* offers military thinkers worthwhile insight into how regional and global instability may arise from the pursuit of resources. From oil, to water, to minerals, Klare's careful analysis of specific regions and resources justifies a careful reading of *Resource Wars: The New Landscape for Global Conflict*.

44. *Id.* at 213.

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