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MILITARY LAW REVIEW

ARTICLES

BOOK REVIEWS

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ARTICLES

BOOK REVIEWS

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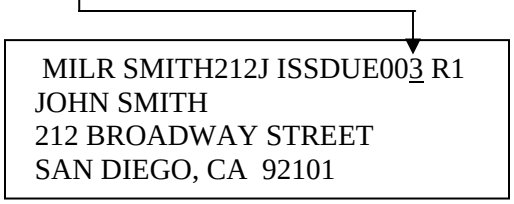

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MILITARY LAW REVIEW

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PLEA-BARGAINING IN THE MILITARY: AN UNINTENDED CONSEQUENCE OF THE UNIFORM CODE OF MILITARY JUSTICE

COLONEL CARLTON L. JACKSON[1]

The impact of the Uniform Code of Military Justice on the Army and on this Corps has been very great. Among its effects have been an over-worked Court of Military Appeals, over-worked boards of review, a pipeline filled with cases at various stages of progress toward final conclusion, and confinement facilities filled with prisoners in a technically "unsentenced" status. All of these must be reduced. One way to do it is to relieve trial and appellate tribunals of the burden of passing upon needless issues of law and fact.[2]

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[1] Chief, Legal Assistance Policy, Office of The Judge Advocate General (OTJAG), U.S. Army. LL.M. *with distinction* (International and Comparative Law), 1995, Georgetown University Law Center; LL.M. (Military Law), 1989, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; J.D., 1981, Emory University School of Law; B.A. *with honors* (Criminal Justice), 1978, Michigan State University. Previous assignments include Staff Judge Advocate, U.S. Army Japan/9th Theater Support Command; Deputy Director, Legislative Reference Service, Defense Legal Services Agency; Staff Judge Advocate, U.S. Army Special Forces Command (Airborne); Deputy Chief, International and Operational Law, OTJAG; Senior Defense Counsel and Regional Defense Counsel, U.S. Army Trial Defense Service, Stuttgart Germany/Saudi Arabia; Appellate Counsel and Branch Chief, Government Appellate Division, U.S. Army Legal Services Agency; and Trial Defense Counsel, 82d Airborne Division/XVIII Airborne Corps. Colonel (COL) Jackson also served in the Persian Gulf War of 1990-1991, and twice with the Multinational Force and Observers, Sinai, Egypt.

[2] Letter from Major General (MG) Franklin P. Shaw, The Assistant Judge Advocate General, U.S. Army, to All Staff Judge Advocates (April 23, 1953) [hereinafter MG Shaw Letter]. A copy of all records pertaining to the "Guilty Plea Program" are on file with The Judge Advocate General's Legal Center and School Library, Charlottesville, Virginia (TJAGLCS Library) under file number JAGJ 1953/1278. *See* discussion *infra* App. A.

I. Introduction

When Congress enacted the Uniform Code of Military Justice (UCMJ) in 1950, neither the President nor Congress realized that the UCMJ would force the military to adopt plea-bargaining.[3] After all, Congress enacted the UCMJ to level the playing field in contested trials and enhance appellate review.[4] The UCMJ did not even mention plea-bargaining in 1950,[5] and the *Manual for Courts-Martial* (*MCM*) did not discuss the practice until 1960.[6] While this may surprise current judge advocates, there was simply no precedent for plea-bargaining in the military in 1950-1951.[7] As the drafters of both documents focused on correcting past abuses in contested cases,[8] they failed to consider the impact of suddenly expanding the due process rights in a military justice system, when the Army alone would try over 100,000 courts-martial in its first year of the UCMJ's implementation.[9]

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[3] Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950).

[4] THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975, at 203-09 (1975) [hereinafter JAGC HISTORY]; *see also* John S. Cooke, *Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition*, 165 MIL. L. REV. 1, 8-10 (2000); George S. Prugh, Jr., *Observations on the Uniform Code of Military Justice: 1954 and 2000*, 165 MIL. L. REV. 21 (2000).

[5] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 705 analysis, at A21-39 (2002) [hereinafter MCM (2002)].

[6] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. XII, ¶ 70b, (1951), *as amended in* MANUAL FOR COURTS-MARTIAL, UNITED STATES 1959, Pocket Part, at 39-40 (1960) [hereinafter MCM (1959)].

[7] *See* Major Michael E. Klein, United States v. Weasler *and the Bargained Waiver of Unlawful Command Influence Motions: Common Sense or Heresy*, ARMY LAW., Feb. 1998, at 3-5 & n.12; William J. Hughes, *Pleas of Guilty-Why So Few?* 13 JUDGE ADVOC. J. 1, 2 (Apr. 1953).

[8] The UCMJ was drafted in response to complaints of unjust treatment raised by large numbers of World War II veterans. Many veterans who had never been in trouble in civilian life, found themselves behind bars or separated from the service with less than honorable discharges because of military offenses. After the war concluded, Congress held hearings on reforming the military justice system—the UCMJ was the result. *See* JAGC HISTORY, *supra* note 4, at 194-200.

[9] The UCMJ became effective on 31 May 1951. *See* Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950); JAGC HISTORY, *supra* note 4, at 203. Its first year of implementation crossed fiscal year (FY) 1950 and 1951. At the end of FY 1950, the active duty strength of the Army was 632,000. *See* COMMITTEE ON THE UNIFORM CODE OF MILITARY JUSTICE, AND GOOD ORDER AND DISCIPLINE IN THE ARMY, REPORT TO THE HONORABLE WILBER M. BRUCKER, SECRETARY OF THE ARMY 252 (1960) [hereinafter AD HOC COMMISSION]. During that FY, the Army tried 6,769 general courts-martial, 5,838 special courts-martial, and 59,961 summary courts-martial for a total of 72,568 courts-martial. *Id.* So in terms of courts-martial per 1000 troops, the Army tried 114.82 Soldiers for every 1000 Soldiers on active duty. *Id.* At the end of FY 1951, the active

During the 175 years that preceded the enactment of the UCMJ, the military used the Articles of War to punish misconduct.[10] Under the Articles, military justice was "command-dominated" and served the commander's will.[11] Courts-martial "had few of the procedures and protections of civilian criminal justice, and protecting the rights of the individual was not a primary purpose of the system."[12] Rather, the system was designed to "secure obedience to the commander," and to swiftly punish those who opposed him.[13]

Judged by these standards, the old system worked extremely well—it obtained convictions in better than ninety percent of contested cases.[14] Punishment was swift because there was little, if any, appellate review.[15] So from the commander's perspective, there was no need for the distasteful practice of plea-bargaining.[16] All this changed, however,

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duty strength of the Army was 859,000. *Id.* During that FY the Army tried 5,206 general courts-martial, 27,404 special courts-martial, and 79,226 summary courts-martial for a total of 111,836 courts-martial; and the rate of courts-martial per 1000 troops was 130.19. *Id.* The average active duty strength of the Army in FY 2002 was 516,599. CODE COMMITTEE ON MILITARY JUSTICE, UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES & THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES, ANN. REP., OCTOBER 1, 2001 TO SEPTEMBER 30, 2002, at 40 (2002) [hereinafter ANN. REP. (2002)]. A copy of each annual report from 1952 through 1977 is on file with United States Court of Appeals for the Armed Forces. Annual reports for 1978 and thereafter are reprinted in the *Military Justice Reporter*, or are available on line (1997-2002) *at* http://www.armfor.uscourts.gov. The average Army active duty strength for FY 2002 includes 486,500 Regular Army and 30,099 mobilized Reserve Component Soldiers. In comparison to the number of courts-martial conducted in FY 1950-1951, the FY 2002 courts-martial rate is extremely light. During FY 2002, the Army tried only 788 general courts-martial, 602 special courts-martial, and 858 summary courts-martial for a total of 2248 courts-martial; and its courts-martial rate per 1000 troops was a mere 4.35. ANN. REP. (2002), *supra* this note at 39-40. The courts-martial rate per 1000 troops was obtained by dividing the total courts-martial by the average Army strength, that is, 2,248/517 = 4.3481625.

[10] Cooke, *supra* note 4, at 2-3.

[11] *Id.* at 3.

[12] *Id.*

[13] *Id.*

[14] Based on the figures cited in AD HOC COMMISSION, *supra* note 9, at 251-52, in FYs 1945 through 1950, the conviction rate for general courts-martial averaged ninety-three percent, and never dropped below ninety percent.

[15] *See* Cooke, *supra* note 4, at 5-6; JAGC HISTORY, *supra* note 4, at 125-30. The Army instituted the first military appellate review system in January 1918. The appeal consisted of a review by the OTJAG in capital and other serious cases. This limited review was a response to the outcry that occurred when thirteen African-American Soldiers were hanged for mutiny the day after their court-martial adjourned.

[16] *Cf.* Hughes, *supra* note 7, at 1 ("In the military system [plea-bargains] are suspect. The archaic shibboleth: 'You cannot bargain with this court' still obtains.").

when the UCMJ was enacted. It broke new ground in the following areas: (1) it contained provisions to prevent commanders from "unduly influencing the justice system";[17] (2) the accused was provided with new pretrial and trial rights;[18] and (3) appellate review was substantially expanded.[19] While civil libertarians applauded these changes, practitioners quickly realized that these new due process rights came with a price tag—an immense backlog of cases at the trial and appellate levels.

In 1953, the Army became the first service to officially encourage plea-bargaining.[20] The adoption of the practice was not an altruistic act, but a pragmatic decision to avoid drowning in a sea of litigation. By the end of the decade, plea-bargaining spread to the Coast Guard and the Navy.[21] The Air Force, however, did not officially endorse the practice until 1975.[22]

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[17] JAGC HISTORY, *supra* note 4, at 205.

[18] *Id.* at 204-06.

[19] *Id.* at 207-08.

[20] *See* MG Shaw Letter, *supra* note 2. This action is viewed as the first step in the development of negotiated guilty plea practice in the military. *See* Gary N. Keveles, *Bargained Justice in the Military: A Study of Practices and Outcomes in the U. S. Army, Europe* 1, 1 (1981) (a dissertation submitted to the School of Criminal Justice, State University of New York at Albany) (on file with University Microfilms International, Ann Arbor, Michigan); Kenneth D. Gray, *Negotiated Pleas in the Military*, 37 FED. B.J. 49 (1978); Charles W. Bethany Jr., The Guilty Plea Program 1 (1959) (unpublished LL.M. thesis, The Judge Advocate General's School, U.S. Army) (on file with TJAGLCS Library); George W. Hickman, Jr., *Pleading Guilty for a Consideration in the Army*, 12 JAG J. 11 (1958).

[21] Hickman, supra note 20, at 11; *see also* United States v. Rinehart, 26 C.M.R. 815, 816 (C.G.B.M.R. 1958). In *Rinehart*, the court refers to a 1956 pretrial agreement. This is the first reference to pretrial agreements in a published case involving the Coast Guard. See also United States v. Villa, 42 C.M.R. 166 (C.M.A. 1970). This case contains one of the earliest substantive discussions of pretrial agreements in the Coast Guard. In 1957, the Navy adopted a guilty plea program in general courts-martial. *See* U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 5811.1, PRETRIAL AGREEMENTS AS TO GUILTY PLEAS IN GENERAL COURTS-MARTIAL (11 Sept. 1957) [hereinafter SECNAVINSTR 5811.1], reprinted in Pretrial Agreements as to Guilty Pleas in General Courts-Martial, 10 JAG J. 3 (1957). This program was extended to special courts-martial by U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 5811.2, PRETRIAL AGREEMENTS AS TO GUILTY PLEAS IN SPECIAL COURTS-MARTIAL (17 Dec. 1957) [hereinafter SECNAVINSTR 5811.2], reprinted in Seagoing Navy's Greatest Opportunity for "TAPECUT" Pretrial Agreements as to Guilty Pleas Extended to Special Courts-Martial, 12 JAG J. 17-18 (1958).

[22] *See* United States v. Avery, 50 C.M.R. 827, 829 (A.F.C.M.R. 1975); *Air Force Pretrial Agreement Restrictions Declared Invalid*, 10 ADVOC. 214-15 (1978).

Between 1952 and 1956, the guilty plea rate in Army general courts-martial rose from less than one percent to sixty percent.[23] This allowed staff judge advocates to substantially reduce general courts-martial processing times,[24] enabling them to process 11,168 general courts-martial in FY 1953, and then catch their breath as the number of such trials dropped to 7,750 in 1956.[25]

By 1958, this combination of increased guilty pleas and decreased general courts-martial reduced the workload of the Army Board of Military Review (ABMR) enough to eliminate three of its seven panels of appellate judges.[26] These numbers, however, do not tell the whole story because the birth of plea-bargaining occurred in the midst of the Korean War, and the dynamics of that conflict significantly impacted the development of the practice of law in the military.[27]

Additionally, the pioneering Army judge advocates, warrant officers, legal noncommissioned officers, and civilians of the 1950s profoundly

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[23] *See* MG Shaw Letter, *supra* note 2, at 3; Jasper L. Searles, *Functioning of the Guilty Plea Program* (1956), *in* REPORT OF PROCEEDINGS, ARMY JUDGE ADVOCATE CONFERENCE 226, 226 (1956) (on file with TJAGLCS Library).

[24] Hickman, *supra* note 20, at 11; *see also* COL Mark W. Harvey, Chief, Criminal Law Division, OTJAG, U.S. Army, *Transforming Military Justice, Timely Post-Trial Processing* 16 (5 Sept. 2002) (Information Paper) (on file with the OTJAG, U.S. Army, Criminal Law Division). In FY 2002, the Army experienced its worst post-trial processing times in thirty years; and in FY 2003 post-trial delay continued to be a problem in the Army. *See* THE JUDGE ADVOCATE GENERAL OF THE ARMY, ANN. REP., OCTOBER 1, 2002 TO SEPTEMBER 30, 2003, at 1-2, 6, & 11 (2003) [hereinafter TJAG REPORT (2003)] (on file with the OTJAG, U.S. Army, Criminal Law Division). To combat the continuing post-trial delay problem the Criminal Law "Division has aggressively monitored Army post-trial courts-martial processing and reevaluated the voice recognition program currently in use by Army court-reporters." *Id.* at 1-2. The U.S. Army Trial Defense Service and Defense Appellate Division "have coordinated to monitor post-trial processing delays to ensure that their clients are receiving the very best representation throughout both the trial and appellate process, with smooth transition of counsel between our organizations." *Id.* at 6. The Judge Advocate General's Legal Center and School has continued instruction to military justice managers with a heavy emphasis on post-trial processing. The 42 students of the 9th Military Justice Managers Course received significant instruction on the practical "how to" of court-martial post-trial processing as well as substantive law instruction. As in the past two courses, justice managers received a number of resources on CD-ROM for use in the field, including examples of case tracking systems.

Id. at 11.

[25] Searles, *supra* note 23, at 226.

[26] Hickman, *supra* note 20, at 11.

[27] *See* Cooke, *supra* note 4, at 8; Prugh, *supra* note 4, at 24-25.

impacted this process. Their collective wisdom, along with astute guidance from the Army Judge Advocate General's Corps (JAGC) leadership, developed and institutionalized the basic tenants of military plea-bargaining that are used in courts-martial today.[28] In fact, the lessons they learned in the 1950s form the basis of Rules for Courts-Martial (RCM) 705, 910, and 1001; and Military Rule of Evidence (MRE) 410.[29]

II. The Implementation of the New UCMJ Brings Sweeping Changes to Courts-Martial Practice

When Congress enacted the UCMJ in 1950, it incorporated some procedures that were not generally accepted in American jurisprudence.[30] For example, Article 31 of the UCMJ provided military suspects the rights to be:

> 1. Advised of the general nature of the accusation against them;
> 2. Advised of their right to remain silent regarding the offense; and
> 3. Admonished that any statement made by them could be used against them in trial by court-martial.[31]

While the historical roots of this procedure date back to 1786, the provision had no civilian counterpart in 1950.[32] Sixteen years later, however, the Supreme Court favorably noted the military practice in its landmark decision of *Miranda v. Arizona*.[33]

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[28] *See e.g.*, *infra* notes 166-69, 175-80, 182, 187, 192-96 and 271-306, and the accompanying text.

[29] *See* MCM (2002), *supra* note 5, R.C.M. 705 (Pretrial Agreements); R.C.M. 910 (Pleas); R.C.M. 1001 (Presentencing procedure); MIL. R. EVID. 410 (Inadmissibility of pleas, plea discussions, and related statements).

[30] *See* Cooke, *supra* note 4, at 9-10.

[31] UCMJ art. 31 (2002).

[32] JAGC HISTORY, *supra* note 4, at 204.

[33] Miranda v. Arizona, 384 U.S. 436, 489-90 nn.62-63 (1966).

> Similarly, in our country the Uniform Code of Military Justice has long provided that no suspect may be interrogated without first being warned of his right not to make a statement and that any statement he makes may be used against him. Denial of the right to consult counsel during interrogation has also been proscribed by military

The UCMJ also provided the right to a formal pretrial investigation in serious cases. During this hearing, the accused could confront the witnesses against him, and present evidence in defense, extenuation, and mitigation.[34] This is in stark contrast to federal grand jury practice which to this day does not afford the accused such adversarial rights.[35]

Trial practice also significantly changed. Before the enactment of the UCMJ, line officers, with no formal legal training could prosecute and defend Soldiers before courts-martial.[36] After the UCMJ took effect, it required all appointed counsel in general courts-martial to be judge advocates in the Army or Air Force, or law specialists in the Navy or Coast Guard.[37] Service members tried by special courts-martial were also entitled to such legally trained defense counsel, if the trial counsel was so qualified.[38]

The UCMJ also changed procedures governing courts-martial. Under the UCMJ, special courts-martial can only adjudge a bad conduct discharge when a verbatim record is kept.[39] The UCMJ as enacted in 1950 also required that an appointed judge advocate serve at each

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> tribunals. There appears to have been no marked detrimental effect on criminal law enforcement in these jurisdictions as a result of these rules. Conditions of law enforcement in our country are sufficiently similar to permit reference to this experience as assurance that lawlessness will not result from warning an individual of his rights or allowing him to exercise them.

Id. (footnotes omitted). Although *Miranda* has been criticized in some circles, the Supreme Court has declined to overrule it. *See* Dickerson v. United States, 530 U.S. 428 (2000).

[34] JAGC HISTORY, *supra* note 4, at 204.

[35] *See, e.g.*, FED. R. CRIM. P. 6(d); Symposium, *If It Ain't Broke, Don't Fix It: Why the Grand Jury's Accusatory Function Should Not Be Changed*, 75 J. CRIM. L. & CRIMINOLOGY 1047 (1984).

[36] *See* United States v. Tomaszewski, 24 C.M.R.76, 80-84 (1957) (Latimer, J., dissenting); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 183, 185, & 196-99 (2d ed. 1920) (discussing the practice of appointing line officers with no formal legal training to prosecute and defend accused in trials by courts-martial under the Articles of War).

[37] UCMJ art. 27(b) (2002); *see also* Cooke, *supra* note 4, at 9 ("A parallel right would not be recognized in civilian criminal trials until the Supreme Court decided *Gideon v. Wainright* [372 U.S. 335 (1963)] some twelve years later.").

[38] UCMJ art. 27(c).

[39] *Id.* art. 19.

general court-martial as a "law officer."[40] This law officer instructed the court on the elements of offenses and court procedures, and ruled on interlocutory questions of law.[41] While not a military judge in the true sense, this requirement was a significant step in the creation of an independent trial judiciary in the military.[42]

Finally, all approved sentences affecting general or flag officers; and those including the death penalty, dismissal from the service, a dishonorable or bad conduct discharge, or confinement for one year or more; were automatically appealed to boards of review (now courts of criminal appeals).[43] These boards were composed of at least three judge advocates or civilian attorneys certified by the Service Judge Advocate General.[44] Their mandate was to review such trials for errors in both law and fact.[45]

To further ensure fairness to military personnel, the UCMJ also provided appointed counsel to represent the convicted Soldiers before the board of review.[46] The Soldiers could also appeal the board's decision to a Court of Military Appeals (COMA) (now Court of Appeals for the Armed Forces (CAAF)).[47] It was composed of three (now five) civilian judges appointed by the President, with the advice and consent of the Senate.[48] The term of these appointed judges was set at and remains at fifteen years.[49]

In many respects, these requirements still exceed the procedural guarantees used in federal criminal appeals. For example, while civilian appellants before federal courts must pay for legal services unless they are indigent, military appellants are afforded free legal counsel at all

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[40] Uniform Code of Military Justice, art. 26, Pub. L. No. 81-506, 64 Stat. 117 (1950); *see also* JAGC HISTORY, *supra* note 4, at 205.
[41] *Id.*
[42] *Id.*
[43] UCMJ art. 66(b).
[44] *Id.* art. 66(a).
[45] *Id.* art. 66(c).
[46] *Id.* art. 70(c); *see also* JAGC HISTORY, *supra* note 4, at 204.
[47] *Id.*
[48] UCMJ art. 67(a)(1), Pub. L. No. 81-506, 64 Stat. 129 (1950), *as amended by* Pub. L. No. 90-340, 82 Stat. 178, 178-79 (1968); Pub. L. No. 101-189, § 1301, 103 Stat. 1352, 1569-76, (1989); Pub. L. No. 103-337, § 924, 108 Stat. 2663, 2831-32 (1994).
[49] UCMJ art. 67(a)(1), Pub. L. No. 81-506, 64 Stat. 129 (1950), *as amended by* Pub. L. No. 90-340, 82 Stat. 178 (1968); Pub. L. No. 96-579, § 12(b), 94 Stat. 3359, 3369 (1980); Pub. L. No. 101-189, §1301(g), 103 Stat. 1352, 1575, (1989).

stages of criminal proceedings without regard to their financial means.[50] Additionally, as a general rule, federal appellate courts are limited to reviewing questions of law, and are bound by the factual determinations of the trial court.[51] Implementing such sweeping changes would have been difficult even under the best of circumstances. The task, however, became formidable in an overburdened military justice system during a time of war.[52]

III. Astronomical Courts-Martial Rates and the Korean War Force the Army to Adopt Plea-Bargaining

When North Korea crossed the 38th parallel on 25 June 1950, with eight divisions and an armored brigade,[53] the U.S. Army had ten divisions—four in the Far East, one in Germany, and five in the United States. [54] Unfortunately, the demobilization following World War II left these units unprepared to fight a major war in the Far East.[55] The occupation force in Japan was undermanned and not combat-ready; U.S. troops in Germany were indispensable to the defense of Western Europe; and most of the divisions in the United States were hollow.[56]

Consequently, as beleaguered South Korean forces fled in disarray, General Douglas MacArthur was forced to deploy an ill-equipped and undermanned force to delay the invaders and evacuate American

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[50] *Compare* FED. R. CRIM. P. 44(a), *with* UCMJ art. 70.

[51] This is a significant departure from federal appellate court practice. Generally, federal appellate courts are bound by the findings of fact at the trial, and review trials only for legal errors. Service Boards of Review, now Courts of Criminal Appeals, however, may grant the accused appellate relief after finding that the evidence supports a different factual conclusion than found by the court below. *Compare* 28 U.S.C.S. § 2254 (d)(2), *with* UCMJ art. 66(c); *see also* Arizona v. Jeffers, 497 U.S. 764, 780-84 (1990); David B. Sweet, Annotation, *Supreme Court's Construction and Application of 28 U.S.C.S. § 2254(D) Which Provides That in Federal Habeas Corpus Proceedings, State Court's Factual Determinations Must Be Presumed to be Correct*, 88 L. ED. 2D. 963 (2004).

[52] Cooke, *supra* note 4, at 8-9 ("[T]he sweeping changes made by the new code would be implemented during the height of the Korean War—a formidable task for the judge advocates of the day.").

[53] The U.S. Army Center of Military History, *An Overview of the U.S. Army in the Korean War, 1950-1953*, *available at* http://korea50.army.mil/history/factsheets/army.shtml (last visited Jan. 10, 2004) [hereinafter *Overview*].

[54] DORIS M. CONDIT, THE TEST OF WAR 1950-1953, 2 HISTORY OF THE OFFICE OF THE SECRETARY OF DEFENSE 58-59 (1988).

[55] *Id.* at 59.

[56] *Id.*

dependents.[57] The results were predictably disastrous. When Task Force Smith (a 540-man force) engaged the enemy, it was quickly outflanked, suffered 200 casualties, lost all its equipment, and broke into a disorganized retreat.[58]

After thirty-seven months of bitter combat, the border between North and South Korea was reestablished along the 38th parallel.[59] The cost, however, was high—over two million combatants on both sides were killed, wounded or taken prisoner, including 27,728 American Soldiers killed in action, and 77,596 wounded.[60] Civilian losses and property damage were also high.[61]

The demobilization after World War II also drastically reduced the size of the "world's largest law firm."[62] Between 1945 and 1950, the number of Army judge advocates on active duty was cut from 2000[63] to 650.[64] As a result, the demobilization left the Army JAGC too small to simultaneously implement the new UCMJ and respond to the spike in courts-martial that occurred at the outbreak of war.[65] In Fiscal Year (FY) 1949, the Army tried 30,651 general and special courts-martial;[66] and while the war raged, the number of such trials rose to 35,449 in FY 1950.[67] Thus, faced with increasing demands and limited resources, the Army justice system teetered on the brink of disaster.

After a year of intense warfare, and little more than a week before the effective date of the UCMJ, U.S. forces stopped the last major Communist offensive of the active phase of the war.[68] The fighting then shifted to a "static war" of patrolling and fighting small clashes along the line of contact between Communist and United Nations forces.[69]

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[57] *Overview*, *supra* note 53, at 1-2; Condit, *supra* note 54, at 59.
[58] *Overview*, *supra* note 53, at 2.
[59] *Id.* at 6.
[60] *Id.*
[61] *Id.*
[62] JAGC HISTORY, *supra* note 4, at 186.
[63] *Id.*
[64] *Id.* at 209.
[65] *Id.*; *see infra* App. E.
[66] AD HOC COMMISSION, *supra* note 9, at 252.
[67] *Id.*
[68] *Compare Overview*, *supra* note 53, at 5 (explaining that I Corps stopped the enemy attack on 20 May 1951), *with* JAGC HISTORY, *supra* note 4, at 203 (noting that the effective date of the UCMJ was 31 May 1951).
[69] *Overview*, *supra* note 53, at 5.

Although armistice talks began on 10 July 1951, the war dragged on for two more years.[70] During this period, the combatants exchanged artillery fire, ambushed each other, and engaged in costly battles along the 38th parallel in which little territory was gained or lost.[71]

During this relative lull in combat, the Army redeployed the 1st Cavalry and 24th Infantry Divisions to Japan and replaced them with the 40th and 45th Infantry Divisions.[72] As the war dragged on, Army commanders consolidated and improved defensive positions near the 38th parallel, while their staff judge advocates processed military justice actions that had been delayed during the heavy fighting.[73]

As the courts-martial rate steadily climbed, so did the requirements for law officers, trial defense counsel, defense appellate counsel, and appellate judges.[74] Consequently, in 1951 the Army began a program to commission 250 law school graduates as Reserve judge advocates and order them to active duty.[75] By May of 1952, the JAGC had grown to 1200 officers, and 750 of these attorneys [sixty-two point five percent] were "engaged full-time in criminal justice activities."[76] The 61,520 general and special courts-martial the Army tried in FY 1952, however, offset this personnel increase.[77]

Administering this huge volume of cases with such a small cadre of attorneys was hard enough, but virtually all of the serious cases were fully contested at the trial level. Army records show that less than ten percent of the 9383 general courts-martial convictions in 1952 were based on guilty pleas.[78] Even when the accused entered a guilty plea, he often plead "not guilty" to some of the charges and specifications, and

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[70] *Id.* at 5-6.
[71] *See id.*; Condit, *supra* note 54, at 124-26.
[72] *Overview*, *supra* note 53, at 5.
[73] *See generally* Condit, *supra* note 54, at 125-26.
[74] *See* AD HOC COMMISSION, *supra* note 9, at 252. The courts-martial rate for general and special courts-martial combined rose from 32,610 trials in FY 1951 to a peak of 76,715 in FY 1953, before falling to 22,663 in FY 1959. By comparison, the total number of general and special courts-martial tried in 2002 was 1390. *See* ANN. REP. (2002), *supra* note 9, at 39. Even adjusting for the size of the Army in 1953 (1,536,000) and 2002 (516,599), the disparity is striking. *See* AD HOC COMMISSION, *supra* note 9, at 252; ANN. REP. (2002), *supra* note 9, at 39.
[75] JAGC HISTORY, *supra* note 4 at 209.
[76] *Id.*
[77] *Id.* at 252.
[78] Hughes, *supra* note 7, at 1.

the government introduced evidence on those charges.[79] As a result, less than one percent of general courts-martial convictions were based solely on the accused's pleas.[80] This grueling procession of contested cases was largely unnecessary given the Army's ninety-five percent conviction rate.[81]

On the appellate front, the Army military justice system was also under siege. From June 1951 through December 1952, the caseload of the Army Board of Review (ABR) increased to 11,289 cases.[82] Defense counsel appealed roughly 181 of every 1000 of these cases to the COMA.[83] The UCMJ's increased access to appellate counsel in part caused this increase of appeals.[84] To clear the growing backlog of appeals, the five existing review boards were augmented with a sixth board in 1951 and a seventh in 1952.[85]

The backlog of special courts-martial cases involving approved bad-conduct discharges was of particular concern. As meritorious appeals of such convictions poured in, the judges of the COMA and Service Judge Advocates General recommended amending the UCMJ to prohibit special courts-martial from adjudging bad conduct discharges.[86] The rationale for this recommendation was threefold. First, there were not enough legally trained personnel in the service to serve as court members or counsel.[87] In FY 1951, the Army tried 27,404 special courts-martial,[88] and the lack of legally trained personnel resulted in a large number of reversible errors.[89] Second, the "paucity of court reporters, particularly in overseas commands," significantly delayed the convening authority's final action while he waited for verbatim records of trial to be prepared.[90]

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[79] MG Shaw Letter, *supra* note 2, at 3.
[80] *Id.*
[81] *See generally* Hughes, *supra* note 7; MG Shaw Letter, *supra* note 2.
[82] JAGC HISTORY, *supra* note 4, at 211.
[83] *Id.*
[84] *Id.* In the first year of appellate practice under the UCMJ, requests for representation by appellate defense counsel before the ABMR rose from sixty-six percent to seventy-six percent. *Id.*
[85] *Id.* at 211.
[86] CODE COMMITTEE ON MILITARY JUSTICE, UNITED STATES COURT OF MILITARY APPEALS & THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES, ANN. REP., MAY 31, 1951 TO MAY 31, 1952, at 4 (1952) [hereinafter ANN. REP. (1952)].
[87] *Id.*
[88] AD HOC COMMISSION, *supra* note 9, at 252.
[89] ANN. REP. (1952), *supra* note 86, at 4.
[90] *Id.* Two major factors, dramatic increases in AWOL and desertion cases during time of war, and a shortage of court reporters at overseas commands, caused significant

Third, the entire appellate process took so long that in most cases the accused served his sentence before the final appellate action was taken.[91] This was a major problem because the Army had to restore these Soldiers to full duty status, rank, and pay, while their appeal was pending, because in the early 1950s, Army regulations made no provision for granting excess leave to Soldiers awaiting punitive discharges.[92]

As one might imagine, these problems undermined good order and discipline in front-line units, and posed major housekeeping problems for their unit commanders and judge advocates alike.[93] As 1952 drew to a close, it was apparent that Army judge advocates were working hard—but were they working smart? After considering this question, Major General (MG) Franklin P. Shaw, The Assistant Judge Advocate, concluded that the JAGC was doing things the hard way, and the time had come for change.[94]

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backlogs of Army post-trial actions in 1952 and 2002. *See* discussion *infra* Part VI and note 172.

In FY 2002, the Army experienced its worst post-trial processing times in thirty years. COL Harvey, *supra* note 24, at 16. The primary causes of this regrettable circumstance is a fifty-seven percent increase in special and general courts-martial from FY 2000 to FY 2002, court reporter shortages, and other factors. *Id.* at 1, 14-35. There is also evidence that the global war on terrorism has sparked increase unauthorized absence and desertion cases. *See* CLERK OF COURT, ANALYSIS OF ARMY AWOL & DESERTION FY 1999 – FY 2003 1 (2003) (on file with the Office of the Clerk of Court, U.S. Army Court of Criminal Appeals). Pure AWOL and desertion cases averaged seventeen cases per year in FY 1999-2001. In FY 2002, however, 109 such cases were referred to courts-martial. The number of referrals climbed to 113 in FY 2003. In FY 2002 the total number of cases with AWOL and/or desertion charges, to include pure AWOL & desertion cases, doubled from 218 in FY 2001 to 463. In FY 2003 the total number of such cases was 471. The vast majority of these cases, however, were disposed of by pleas of guilty or administrative separations. *Id.*

Concern has also been raised that recent changes in the UCMJ and MCM expanding sentencing authority of special courts-martial may result in higher courts-martial rates and further increase post-trial processing delays. COL Harvey, *supra* note 24, at 15.

[91] ANN. REP. (1952), *supra* note 86, at 4-5.

[92] *Compare id.*, *with* U.S. DEP'T. OF ARMY, REG. 600-8-10, LEAVE AND PASSES, paras. 5-19 & 5-21 (31 July 2002).

[93] ANN. REP. (1952); *see also* Prugh, *supra* note 4, at 27-28; Letter from COL Edward H. Young, Second Army Judge Advocate, to Major General Franklin P. Shaw 1-2 (May 28, 1953) (on file with TJAGLCS Library) (expressing the commander's concern regarding the detrimental effect of restoring sentenced prisoners to their full grade and pay and placing them among Soldiers of equal or lower rank).

[94] *See* MG Shaw Letter, *supra* note 2.

IV. The Guilty Plea Plan

In late 1952, or early 1953, MG Shaw began developing a three-step plan for the OTJAG to implement civilian plea-bargaining in Army courts-martial.[95] The plan was as follows: (1) acquire statistics on guilty pleas in federal courts and compare them with guilty plea rates in courts martial;[96] (2) publish an article to "stimulate interest in a decided break from convention and tradition";[97] and (3) implement plea-bargaining in Army courts-martial.[98]

After gathering and analyzing the necessary statistics, on 19 January 1953, the Chief of the Military Justice Division prepared a decision memorandum for MG Shaw's review.[99] The memorandum recommended, among other things, to test civilian plea-bargaining in a busy jurisdiction.[100] If the initial test was successful, the memorandum recommended that the practice be expanded without the Secretary of the Army or subordinate commanders issuing written instructions to Army units.[101] This caution came as a result of the enactment of the UCMJ which had heightened the sensitivity of the JAGC to command influence issues.[102]

After MG Shaw approved the recommendations, Colonel (COL) William J. Hughes, Jr. completed step two of the plan in early to mid-April 1953, when he published an article in *The Judge Advocate Journal*,

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[95] *See generally id.*
[96] *Id.*
[97] Memorandum, COL C. Robert Bard, Chief, Military Justice Division, to Mr. Totten P. Heffelfinger, II, Office of General Counsel, Department of Defense (23 Apr. 1953) [hereinafter COL Bard Memo to OGC] (on file with TJAGLCS Library).
[98] *Id.*
[99] Memorandum, COL C. Robert Bard, Chief, Military Justice Division, to Major General Franklin P. Shaw, The Assistant Judge Advocate General (19 Jan. 1953) [hereinafter COL Bard Memo to TAJAG] (on file with TJAGLCS Library). Colonel Bard's eight-page memorandum with seven multi-page enclosures details a guilty-plea practice remarkably similar to modern procedure. *But see* Memorandum, COL M. W. Ludington, Chief, Defense Appellate Division, to COL C. Robert Bard, Chief, Military Justice Division 1-4 (16 Jan. 1953) (on file with TJAGLCS Library). Colonel Ludington recommended that stipulations of fact be used during guilty-plea proceedings to establish a *prima facie* case during a thorough inquiry into the providence of the accused pleas of guilty, which in many respects was well ahead of his times. *See id.* at 2-3.
[100] COL Bard Memo to TAJAG, *supra* note 99, at 1.
[101] *Id.*
[102] *Id.*

entitled "*Pleas of Guilty - Why So Few?*"[103] The article commented on the gridlock then plaguing the military justice system and contrasted it with the efficiency of the civilian guilty-plea practice. To make his point, COL Hughes noted that pleas of guilty or *nolo contendre* disposed of ninety-four percent of the 33,502 convictions obtained in federal courts in FY 1950; and that in FY 1951, federal prosecutors again disposed of ninety-four percent of their cases with plea-bargaining.[104] Since these statistics proved that plea-bargaining saved the government a great deal of time, effort and money, COL Hughes opined the time had come for the Army to stop tying up its courts with "interminable and utterly senseless trials."[105] Soon after COL Hughes published this article, MG Shaw moved to implement the last step of his plan.[106]

Step three of the plan was completed on 23 April 1953 when MG Shaw sent a letter to all Army staff judge advocates.[107] In the letter, MG Shaw stated that the Army could no longer afford to ignore plea-bargaining[108] because it was the obvious remedy to clear the growing backlog of courts-martial.[109]

The legal gridlock that currently beset the Army, however, was not MG Shaw's only concern. He was also concerned that the military's steadfast refusal to engage in plea-bargaining was, in effect, depriving the accused of zealous representation of counsel.[110] In this regard, MG Shaw used his letter to remind the Corps that defense counsel are

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[103] COL Bard Memo to OGC, *supra* note 97. It is worth noting that COL Hughes was a prominent attorney in Washington, D.C. and one of the Directors of the Judges Advocate's Association that published the article. *See* Hughes, *supra* note 7 (inside cover of Bulletin No. 13). It is also noteworthy that "General Shaw approved the manuscript before publication." COL Bard Memo to OGC, *supra* note 97.

[104] Hughes, *supra* note 9, at 1.

[105] *Id.* at 6.

[106] MG Shaw Letter, *supra* note 2, at 1-3.

[107] *Id.*

[108] *Id.* A copy of MG Shaw's Letter and Hughes' article were provided to the Office of the General Counsel, Department of Defense, The Honorable Frank C. Nash, Assistant to the Secretary of Defense for International Security Affairs, and The Honorable John E. Hannah, Assistant Secretary of Defense for Manpower and Personnel. *See* COL Bard Memo to OGC, *supra* note 97; Letter from The Honorable Frank C. Nash, Assistant to the Secretary of Defense for International Security Affairs, to William J. Hughes, Jr., Attorney at Law (June 26, 1953) (on file with TJAGLCS Library). In his memo, COL Bard advised the Office of General Counsel that the guilty plea plan was "being tested in the Third and Seventh Armies." COL Bard Memo to OGC, *supra* note 97.

[109] MG Shaw Letter, *supra* note 2, at 1.

[110] *Id.* at 2-5.

ethically obligated to advise the accused of the strengths and weaknesses of the government's case, and under appropriate circumstances, to advise the accused of the benefits of seeking a plea-bargain.[111] Thus, by refusing to bargain with accused, the military was in effect, denying them "a 'break' which the guilty defendant has available to him in civilian courts; and forcing defense counsel to put on a "good show" that often resulted in a heavier penalty."[112] Major General Shaw opined that the time had come to emancipate military defense counsel and allow them to seek plea bargains like their civilian counterparts.[113]

Major General Shaw, however, tempered his enthusiasm for military justice practitioners to adopt plea-bargaining with the caveat that they must carry out such agreements "with the utmost good faith."[114] In MG Shaw's view: "It would be better to free an offender completely, however, guilty he might be, than to tolerate anything smacking of bad faith on the part of the Government."[115] Major General Shaw then closed the letter with a direction to all staff judge advocates to raise the issue with their commanders and report back to his office on their experiences.[116] The only restriction he placed on establishing local guilty-plea programs was that "[a]ny action looking to securing advantage to the accused by a plea avoiding contest must emanate from [defense counsel] and the accused."[117]

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[111] *Id.* at 3-5.
[112] *Id.* at 2 & 4.
[113] *Id.* at 7.
[114] *Id.* at 6.
[115] *Id.*
[116] *Id.* at 7. MG Shaw Letter, *supra* note 2, is a remarkable document for three reasons. First, from a historical standpoint it contains the first official encouragement of plea-bargaining in the U.S. armed forces. Second, it records the thought process that led MG Shaw to initiate the guilty plea program. Third, MG Shaw's observations on the ethical duties of counsel in plea-bargain situations, closely parallels the current guidance provided in the Rules of Professional Conduct. *Compare* MG Shaw Letter, *supra* note 2, at 3-7, *with* U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS app. B, R. 1.2(1)(a) (1 May 1992) [hereinafter AR 27-26] (noting lawyers must abide by the client's decision on whether to enter into a pretrial agreement); *id.* app. B, R. 1.4(2) (stating that lawyers negotiating a pretrial agreement shall provide the client with sufficient information so that the client can make intelligent decisions); *id.* app. B, R. 3.2(1) (seeking concessions quickly is often in the client's interest).
[117] MG Shaw Letter, *supra* note 2, at 6. Given the overriding concern of the drafters of the UCMJ to create a system of military justice that would gain public confidence, and distance the system from its "drumhead justice" reputation, it was wise, if not essential, for MG Shaw to impose the limitation that plea-bargaining "must emanate from [defense counsel] and the accused." Prugh, *supra* note 4, at 25. After nearly fifty years of practice, however, the President removed this limitation in Executive Order 12,767, 56

V. The Guilty Plea Program: Initial Reaction

The initial reaction to the initiative was mixed.[118] While some Army commands embraced the program enthusiastically,[119] others had deep reservations.[120] On the positive side, Lieutenant Colonel (LTC) Laurence W. Lougee, the Staff Judge Advocate, U.S. Army, Alaska (USARAL), revealed that his office had started plea-bargaining a year before MG Shaw dispatched his letter.[121] According to LTC Lougee, the judge advocates and commanders at Fort Richardson, Alaska, supported his guilty plea program and universally praised it for expediting courts-martial.[122] The USARAL's leadership in adopting plea-bargaining was later documented in a survey of 359 general courts-martial that was conducted between 5 May 1953 and 6 November 1953.[123] The survey showed that the USARAL, and the Military District of Washington led the Army in guilty plea cases with a rate of eighty percent.[124]

Fed. Reg. 30284 (1991). The change adopts the civilian practice of allowing either party to initiate plea-bargaining. *See* MCM (2002), *supra* note 5, at A21-40 (discussing the 1991 Amendment to R.C.M. 705(d) (Procedure)).

[118] Memorandum for File, COL Stanley W. Jones, Chief, Military Justice Division 1 (5 Jan. 1954) [hereinafter COL Jones Memo for File]; *see infra* app. B; *see also* United States v. Gordon, 10 C.M.R. 130, 132 (C.M.A. 1953) (noting the first pronouncement from the Court of Military Appeals on the subject was noncommittal: "While we express no view relative to the desirability or feasibility of such a practice before courts-martial, we observe that it has the sanction of long usage before the criminal courts of the Federal and state jurisdictions").

[119] COL Jones Memo for File, *supra* note 118, at 1.

[120] *Id.*

[121] Letter from LTC Lawrence W. Lougee, Staff Judge Advocate, U.S. Army, Alaska, to Major General Franklin P. Shaw, The Assistant Judge Advocate General 1 (May 15, 1953) (on file with TJAGLCS).

> I think it would be of interest to you to learn that it has been the practice in this theater for the past year to follow substantially the procedure you have outlined. In the past few months we have had fourteen pleas of guilty in general court-martial cases and also two pleas of guilty to lesser-included offenses. All of these pleas were known in advance to this office and were only approved after prior ascertainment that the rights of the accused were being fully protected.

Id. This modest, but pioneering effort appears to mark the actual beginning of plea-bargaining in the U.S. armed forces.

[122] *Id.*

[123] COL Jones Memo for File, *supra* note 118, at 3, encls.

[124] *Id.* Thirty-four of forty cases in the U.S. Army, Alaska and eight of ten cases in the Military District of Washington were disposed of by guilty pleas. Only one command

On the other hand, this same study showed that many commands around the world had guilty plea rates of less than ten percent.[125] In fact, the Commander, V Corps, rejected the guilty plea initiative.[126] As his staff judge advocate would later write:

> When this program began in the spring of 1953[,] [I] was Staff Judge Advocate of V Corps, in Germany, a pretty good-sized jurisdiction with an average of about 15 general courts per month, mostly on the felony side. Being personally a bit on the conservative side, and having as Corps Commander one Major General Ira P. Swift who refused totally to deal with those "G-D-Crooks," V Corps had no deals during the period from about April 1953 thru May 1954. [127]

In the Far East, the guilty plea program received a mixed reception due to operational concerns. In particular, the unit's proximity to the battle and its tactical situation were the key factors in determining the extent that commands used plea-bargaining. In Japan, the guilty-plea program was well received.[128] Between 5 May 1953 and 6 November 1953, sixty-seven Soldiers in the 1st Cavalry Division were sentenced to confinement, and approximately seventy-three percent of those cases were guilty pleas.[129] During the same period, the 24th Infantry Division sent ninety Soldiers to prison, and seventy percent were based on guilty pleas.[130] Note that both units fought in Korea during the initial stages of

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had a higher percentage of guilty plea cases. One hundred percent of the cases at the Field Command Armed Forces Special Weapons Project were disposed of by guilty pleas. This command, however, had only one trial during this period. *Id.*

[125] *Id.* at 1-3. The guilty plea rates in the following jurisdictions were as follows: (1) Fifth Army- 8%, 11 of 138 cases; (2) 101st Airborne Division-2.6%, 1 of 39 cases; (3) 5th Armored Division -8.3%, 10 of 121 cases; (4) 40th Infantry Division- 0%, 0 of 16 cases; (5) Camp Pickett 5%, 12 of 215 cases; and (6) Fort Leavenworth- 6.5%, 3 of 46 cases. *Id.*

[126] Letter from COL H. F. McDonnell, Staff Judge Advocate, Fort Leonard Wood, Missouri, to COL J. L. Searles, Chief, Government Appellate Division, Washington, D.C. 1 (Aug. 7, 1956) (on file with TJAGLCS Library).

[127] *Id.* It should be noted, however, that the guilty plea study showed that V Corps had a thirty-four percent guilty plea rate (33 of 97 cases) during this same time frame. COL Jones Memo for File, *supra* note 118, at 1, encls. Given COL McDonnell's remarks it would appear that in these cases the accused plead guilty without the benefit of a pretrial agreement.

[128] *Id.*

[129] *Id.* at 1.

[130] *Id.*

the conflict, then redeployed in late 1951, when the 40th and 45th Infantry Divisions replaced them on the front line.[131]

In Korea, however, there was less willingness to engage in plea-bargaining. During the same period, the 40th Infantry Division imprisoned sixteen Soldiers—all of the trials were contested.[132] The 45th Infantry Division, on the other hand, sentenced eighteen Soldiers to confinement and only approximately twenty-two percent were disposed of by guilty pleas.[133] The guilty plea rates for remaining Army units serving in the war zone were also low:

Eighth Army	29.8%
I Corps	25%
IX Corps	42.5%
X Corps	30%
2nd Infantry Division	11.1%
3rd Infantry Division	20%
7th Infantry Division	38.5%
25th Infantry Division	28.6%
U.S. Army Forces Far East	0%
Korean Base Section	26%
Korean Communications Zone	12.5%[134]

While these figures suggest that units in combat have a lower rate of courts-martial and guilty pleas as units outside of the combat zone, they do not tell the whole story.

VI. The Guilty Plea Program: Early Lessons Learned From Desertion Cases

As the guilty plea program was taking form in Washington, D.C., U.S. forces fought a series of bloody battles along the 38th Parallel.[135] In March and April of 1953, North Korean and Chinese forces attacked the 2nd Infantry Division at Little Gibraltar, and the 7th Infantry Division at

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131 *Overview*, *supra* note 53, at 5.
132 COL Jones Memo for File, *supra* note 118, at 2, encls.
133 *Id.* at 2.
134 *Id.* at 1-3.
135 The U.S. Army Center of Military History, *Commemoration of the Korean War "Freedom Is Not Free," available at* http://korea50.army.mil/history/chronology/timeline_1953.shtml (last visited Jan. 10 2004).

the Old Baldy/Pork Chop Hill Complex.[136] As U.S. forces fought to hold these positions, it was vital to engage the enemy with every able-bodied Soldier. Soldiers who deserted their units, or otherwise attempted to avoid combat were understandably *persona non grata* for plea bargains.

Later, in July 1953, the Communists again attacked U.S. positions in significant numbers, this time seeking to gain leverage in the stalemated armistice talks.[137] As the war entered its final phase, on 10 July 1953, the 7th Infantry Division was ordered to abandon its defensive positions on Pork Chop Hill and withdraw after a five-day battle.[138] Ten days later, IX Corps stopped the last major Communist offensive of the war (a six-division attack) in the Battle of Kumsong River Salient.[139] On 27 July 1953, North Korea and China signed the armistice agreement ending the war.[140]

Dealing with Korean War deserters was a vexing problem under the UCMJ. Desertion in time of war is a crime punishable by death, and the death penalty was thought to effectively deter such misconduct.[141] But given the tenor of the times and the huge appellate backlog, the likelihood of swiftly imposing the death penalty was virtually non-existent in 1951-1953.[142] Thus, during the heaviest of the fighting, savvy Soldiers quickly realized that they might stand a better chance of surviving the war if they deserted. This, of course, created a dilemma for commanders and judge advocates.

While it was essential to maintaining good order and discipline to punish deserters swiftly and severely, increasing the number of guilty-pleas had become necessary to clear the huge backlog of cases.[143] To make matters worse, the numbers of cases reversed on appeal due to technical errors was on the rise.[144] As these trends combined to delay the

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[136] *Id.*
[137] *Id.*
[138] *Id.* at 2.
[139] *Id.*
[140] *Id.*
[141] UCMJ art. 85(c).
[142] See Commemoration of the Korean War "Freedom Is Not Free, *supra* note 135; COL Bard Memo to OGC, *supra* note 97.
[143] Bard Memo to OGC, *supra* note 97.
[144] Ann. Rep. (1952), *supra* note 86, at 4.

swift implementation of punishment in desertion cases, commanders and judge advocates became increasingly frustrated with the UCMJ.[145]

An example of this growing frustration was expressed in correspondence between the U.S. Army Pacific headquarters and the Department of the Army in 1953.[146] Shortly before the OTJAG announced the guilty plea program, the Staff Judge Advocate, U.S. Army Pacific was directed to write a memo to the Army Inspector General.[147] The memo asserted the commander's view that the UCMJ was preventing him from swiftly punishing Soldiers for malingering and desertion, and thus hindering him from winning the war.[148] A copy the memo was sent to The Judge Advocate General (TJAG) on 1 May 1953.[149] From the Army Pacific Commander's viewpoint, the UCMJ's lengthy post-trial and appellate process encouraged Soldiers to use the military justice system to avoid combat;[150] and he was right. It was imminently practical for Soldiers seeking to avoid the rigors of combat to choose to languish in pretrial and post-trial confinement, or on limited-duty,[151] while they waited for the appellate courts to reward them by reversing their convictions.[152]

Less than three months later, Lieutenant General (LTG) W. B. Kean, the Commanding General of the Fifth Army raised additional concerns about processing delays in desertion cases while discussing the relative merits of MG Shaw's plea-bargaining initiative.[153] In a letter to TJAG, LTG Kean wrote that he was "most reluctant to embark upon the practice which General Shaw suggest[s]."[154] This reluctance, however, was not predicated on disdain for the practice of plea-bargaining, but on two well

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[145] Memorandum, COL John A. Hall, Staff Judge Advocate, U.S. Army Pacific, to The Inspector General, U.S. Army (21 Apr. 1953) [hereinafter COL Hall Memo]. *See infra* app. C.
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] Letter from COL John A. Hall, Staff Judge Advocate, U.S. Army Pacific, to Major General Franklin P. Shaw, The Assistant Judge Advocate General (May 1, 1953) [hereinafter COL Hall Letter]. *See infra* app. D.
[150] COL Hall Memo, *supra* note 145.
[151] *Id.*
[152] *Id.*
[153] Letter from Lieutenant General W. B. Kean, Commander, Fifth Army, to Major General E. M. Brannon, The Judge Advocate General (July 9, 1953) (on file with TJAGLCS Library).
[154] *Id.* at 1.

founded concerns. First, the given the tenor of the times, LTG Kean feared that plea-bargaining would do more harm than good, because he believed the general public would regard it as a means to coerce Soldiers to plead guilty to offenses they did not commit.[155] Second, he was very uncomfortable about making commitments regarding sentence limitations or post-trial restoration to duty without complete information.[156] Most of the general courts-martial in the Fifth Army, which was then located in Chicago, Illinois, were for desertion in the Far East.[157] Under these circumstances, defense counsel were quick to take advantage of the substantial delay it took to obtain evidence necessary to prove the charge by offering a plea-bargain to the government to move the case along.[158] This placed the commander in the unenviable position of either sacrificing expediency and a guaranteed conviction by waiting for the evidence to arrive, or accepting a plea-bargain before he was certain the Soldier was deserving of it.[159]

To avoid this Hobson's choice, LTG Kean and his staff judge advocate employed the following three-step process:

> 1. Request the evidence of the offense and the accused's service record early;
> 2. Accept the accused's pleas of guilty without any commitment to grant post-trial relief; and
> 3. Review all of the information received in a post-trial clemency submission.[160]

This method of expediting desertion cases was admirable in its even-handed and pragmatic approach to the problem. Yet, it also illustrates why many Soldiers held the perception that the implementation of the UCMJ during the Korean War enabled deserters to manipulate the new due process procedures to avoid combat.[161]

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[155] *Id.*
[156] *Id.* at 2.
[157] *Id.*
[158] *Id.* at 1-2.
[159] *Id.*
[160] *Id.* at 2.
[161] *See generally* CODE COMMITTEE ON MILITARY JUSTICE, UNITED STATES COURT OF MILITARY APPEALS & THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES, ANN. REP., JANUARY 1, 1954 TO DECEMBER 31, 1954, at 21-22 (1954) [hereinafter ANN. REP. (1954)]. Major General Eugene M. Caffey, The Judge Advocate General, U.S. Army, commented on how the appellate delay and the likelihood of avoiding the death penalty encouraged desertion. *Id.* Major General Caffey's remarkable military career spanned

With these operational considerations, it was not surprising that pretrial agreements in the U.S. Army Pacific were rudimentary. The process began with a conference between the staff judge advocate and the defense counsel.[162] During the conference, the staff judge advocate would agree to withdraw one or more charges or specifications in exchange for the accused's agreement to plead guilty to the remaining charges, and in appropriate cases, to enter into stipulations of fact or testimony.[163] In cases that the accused sought a limitation on the convening authority's power to approve portions of the sentence adjudged by the court-martial, the staff judge advocate would discuss the accused's offer with the convening authority.[164] Such arrangements, however, were extremely rare given the commander's predisposition against the UCMJ in general and plea-bargaining, in particular.[165]

Nevertheless, the Army Pacific experience established the emerging tenants of military pretrial agreements. First, the agreement is struck between the accused and the convening authority, with judge advocates acting as negotiators and counselors.[166] Second, the agreement must be voluntary and mutually beneficial.[167] Third, the terms of the agreement must relate to the charges and specifications to be presented to the court-martial, and must not contain terms and conditions that would violate public policy.[168] Fourth, obtaining a pretrial agreement is not a right of an accused, and in a particular case the convening authority may reject a

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from 1918 to 1956. During World War II, he was awarded the Distinguished Service Cross for "extraordinary heroism" while commanding an engineer brigade on Utah Beach during the D-Day invasion. *See* JAGC History, *supra* note 4, at 219-20.

[162] COL Hall Letter, *supra* note 149, at 1.

[163] *Id.* at 1.

[164] *Id.*

[165] *Id.* As previously discussed, the survey showed that from 5 May 1953–5 November 1953, the U.S. Army Pacific had fifty percent guilty-plea rate (two of four convictions resulting in confinement). *See* COL Jones Memo for File, *supra* note 118, at 3, encl. This rate was higher than the 40.6% average of the Army. *Id.* at 1. It is unclear if this statistic is the result of a change of heart or change of command. It is clear, however, that by February 1954, the field commanders in the U.S. Army Pacific were "highly pleased" with the results of plea-bargaining. *See* Letter from COL Allan R. Browne, Army Staff Judge Advocate to Brigadier General Eugene M. Caffey, Acting The Judge Advocate General 2 (Feb. 3, 1954) (stating three of the last five general courts-martial, including a desertion case in which the accused had been absent for fifteen months, were disposed of by negotiated pleas of guilty) (on file with TJAGLCS Library).

[166] *See* MCM (2002), *supra* note 5, R.C M. 705(a) & (d), discussion and analysis.

[167] *Id.* R.C.M. 705(b) & (c), discussion, and analysis.

[168] *Id.*

plea bargain simply because acceptance would undermine good order and discipline.[169]

In the final analysis, the Army never found an effective way to deal with deserters under the UCMJ during the Korean War, and this would lead a future Judge Advocate General to make the following comment in a 1954 report to the Congress:

> It is doubtful whether a system that requires more than a year to complete appellate review in peacetime can be relied upon in time of war to punish offenders promptly. There is little deterrent value in a system of military justice which precludes contemporary punishment of front line deserters. Moreover, a system which permits wartime offenders to languish in stateside detention barracks while faithful soldiers fight and die in far off lands does little for the morale of fighting men, particularly when it is common knowledge within the military that when passions cool and peace descends, the public will demand clemency for those serving sentences for military offenses.[170]

To solve this problem, MG Eugene M. Caffey recommended forward deploying the boards of review in time of war to the combat zone where they could expeditiously review such convictions.[171] His recommendation, however, was not adopted,[172] perhaps because the

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[169] *See id.* R.C.M. 705(d)(3) ("The decision whether to accept or reject an offer is within the sole discretion of the convening authority.").

[170] ANN. REP. (1954), *supra* note 161, at 21-22; *see also* JAGC HISTORY, *supra* note 4, at 194-200; *supra* notes 8 & 15 (noting much of the impetus for enacting the UCMJ came from the public's perception that the administration of military justice under the Articles of War was arbitrary and capricious, and often resulted in more severe punishment than the accused deserved).

[171] ANN. REP. (1954), *supra* note 161, at 22.

[172] In the "Information Age," many of the problems noted above can be remedied. First, courts-martial rates have dropped significantly largely due to an increased use of administrative separations and nonjudicial punishment, so the pressure to move cases has been greatly reduced. *See* MAJ Klein *supra* note 7, at 7 n.45. Second, verbatim records of trial can be prepared and transmitted to the appellate courts expeditiously using modern technology. For example, by using voice recognition court reporting equipment, digital photography, and document scanning to prepare a verbatim digital record of trial, and encrypted email to transmit the record during the post-trial and appellate process, it is possible to expedite the courts-martial process in ways that were unimaginable in the 1950s. *See* COL Harvey, *supra* note 24, at 44; *see* Brigadier General Scott C. Black,

proposed solution would not really solve the problem. Except in cases when the accused was sentenced to death, speeding up the appellate review process would simply expedite the execution of the appellant's period of confinement in a stateside prison or discharge from the service. Ironically, a speedy trial in a non-capital desertion case may actually reward the individual who prefers imprisonment and a punitive discharge to the risks of combat.

VII. Lessons Learned: 1953-54 (The End of the Brannon/Shaw Era)[173]

After the Korean War ended, Army judge advocates continued their effort to increase the percentage of plea-bargains.[174] But as the guilty plea rate climbed, four recurring errors were identified in records of trial. One of the first errors brought to the attention of MG Ernest M. Brannon, TJAG, was the failure of some staff judge advocates to clearly indicate in their post-trial reviews, whether the accuseds' pleas of guilty were based on pretrial agreements.[175] This failure had the unfortunate consequence of complicating the post-trial processing of the case when allegations of a breach of the agreement or other errors were raised on appeal.[176] The second error to catch TJAG's attention was a practice by some staff judge advocates that required the accused "to forego his right to present to the court matters in extenuation or mitigation of the offense charged" in the pretrial agreement.[177] This was done to preclude the defense from

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Assistant Judge Advocate General of Military Law and Operations, Criminal Law Update, *U.S. Army Judge Advocate General's Corps 2002 World Wide Continuing Legal Education Conference* slide 14 (9 Oct. 2002) (on file with the OTJAG). Third, although the likelihood of executing Soldiers in such cases remains remote, confinement for life without eligibility for parole is now an authorized punishment for desertion and other serious cases. *See* UCMJ art. 56a.

[173] By *comparing* the discussion in Part VII *infra* (concerning the lessons learned from Korean War desertion causes), and *supra* note 65 discussion (concerning traditional spikes in courts-martial at the outbreak of major conflicts), *with* discussion *in supra* notes 24, 65, & 90 (concerning current increases in post-trial processing times), one can easily see how the lessons learned during the Korean War are paying dividends in the global war on terrorism.

[174] *See* MG Shaw Letter *supra* note 2; Searles, *supra* note 23.

[175] *See Agreements as to Pleas of Guilty*, 36 JAG CHRON. 183 (1953). Major General Brannon served as The Judge Advocate General from 26 January 1950-26 January 1954. *See* JAGC HISTORY, *supra* note 4, at 200-02.

[176] *Id.*

[177] *Id.*

trying to beat the deal in court.[178] The third error was the reverse of the second. Some staff judge advocates, and the chief, military justice division, took the position that after a plea of guilty is received, the government should be precluded from presenting aggravation evidence, because the plea established the government's prima facie case.[179] Finally, there was the embarrassing and troublesome tendency of some staff judge advocates to make promises regarding sentence limitations that the convening authority was unwilling to implement.[180]

To end these problems, in August 1953, MG Ernest M. Brannon, directed that a notice be published in the *JAG Chronicle*.[181] The notice was published on 4 September 1953 with the following main points:

> 1. Staff Judge Advocates were required to state in the post trial review if any or all of the accused guilty pleas were pursuant to a pretrial agreement;
> 2. Waiving extenuation and mitigation evidence in pretrial agreements was prohibited;
> 3. Trial Counsel were advised to introduce aggravation evidence in appropriate cases; and
> 4. Staff Judge Advocates were advised to ensure that the promises they made regarding sentence limitations, fell within the convening authority's guidelines, or had been personally approved by the convening authority in advance.[182]

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[178] *See, e.g.*, Letter from LTC Marion H. Smoak, Staff Judge Advocate, 82d Airborne Division, to COL J.L. Searles, Chief, Government Appellate Division 2 (Aug. 9, 1956) (on file with TJAGLCS Library) [hereinafter COL Smoak Letter].

[179] COL Bard Memo to TAJAG, *supra* note 99, at 3.

[180] *Agreements as to Pleas of Guilty*, *supra* note 175, at 183.

[181] Letter from COL James E. Goodwin, Acting Chief, Military Justice Division, to COL Charles L. Decker, Commandant, The Judge Advocate General's School (Aug. 25, 1953) (on file with TJAGLCS Library).

[182] *Id*. This advice forms the basis for several rules governing contemporary plea-bargaining in the military. *See* MCM (2002), *supra* note 5, R.C.M. 705(c)(1)(B) (A pretrial agreement may not deprive the accused of complete sentencing proceedings.); *id.* R.C.M. 705(a) & (d), II-70, & A21-40 (stating the convening authority must agree to the terms of the pretrial agreement, although he or she need not sign the agreement); *id.* R.C.M. 1001(a)(1)(A)(iv), (a)(1)(B), (b)(4), (c), II-122, II-123, A21-69 through A21-71 (finding trial counsel may present evidence of aggravation and defense counsel may present evidence in extenuation or mitigation or both.); *id.* R.C.M. 1106 (d)(3)(E), at II-149 (requiring the staff judge advocate's review to contain a statement regarding the convening authority's obligations under the pretrial agreement.).

Later that month, the Army Judge Advocate Conference convened at Charlottesville, Virginia,[183] and the timing of the conference was significant. The Korean War had recently ended and the guilty plea program was just getting underway, so both subjects were hot topics. On the first day of the conference, a panel consisting of COL James Garnett, U.S. Army Forces, Far East (AFFE); LTC Waldemar A. Solf, [184] U.S. Army, Europe (USAREUR); and LTC Laurence W. Lougee, U.S. Army, Alaska (USARAL), assembled to discuss the program.[185] Attending this discussion were: MG Brannon, TJAG; MG Shaw, The Assistant Judge Advocate General; and Brigadier General (BG) James L. Harbaugh, Jr., the Assistant Judge Advocate General for Military Justice.[186]

Colonel Garnett (AFFE) began the discussion with a presentation on the seven-step procedure that was used in by IX Corps in Korea for initiating, negotiating, and administering pretrial agreements at the trial level.[187] As the discussion began, there was general agreement that the

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[183] U.S. DEP'T OF ARMY, REPORT OF PROCEEDINGS, ARMY JUDGE ADVOCATE CONFERENCE, 28 SEPT.-2 OCT. 1953 at 1 [hereinafter JAGC CONFERENCE (1953)].

[184] Lieutenant Colonel Solf was a combat Soldier in World War II, and he spent many years as a military justice practitioner. After retirement, LTC Solf lectured at American University and served as the Chief, International Affairs Division, in the OTJAG. He also represented the United States at many international conferences, including those that drafted the 1977 Protocols to the 1949 Geneva Conventions. He served as a Special Assistant to TJAG for Law of War Matters. In 1982, The Judge Advocate General's School established The Waldemar A. Solf Lecture in International Law. *See* Michael J. Matheson, *The Twelfth Waldemar A. Solf Lecture in International Law*, 161 MIL. L. REV. 181, 181-82 & n.1 (1999).

[185] JAGC CONFERENCE (1953), *supra* note 183, at 77-87.

[186] *Id.*

[187] *Id.* at 77-79.

Step 1: The defense counsel consults with the accused. If the evidence indicates that a plea of guilty would be appropriate and the accused indicates that he desires to plead guilty, a conference is then held with the staff judge advocate several days prior to the trial. *Id.* at 77.

Step 2: After an analysis of the case and an examination of the service record, report of investigation, and all facts (including prevalent problems of discipline within the command), a recommendation is made to the convening authority that, upon a plea of guilty made by the accused, the sentence as approved by the convening authority will not exceed a certain period of confinement. *Id.*

Step 3: After the approval by the convening authority, the defense counsel is advised of the maximum sentence which will be approved if a plea of guilty is made to a designated charge or charges. *Id.*

first step in the process was for the defense counsel to approach the government.[188] This was no surprise given the provisions in the UCMJ

Step 4: The law officer is advised of the agreement reached, but the members of the court are not so advised in order that there will be no influence, direct or indirect, exerted upon the court in violation of Article 37. *Id.*

Step 5: The trial counsel has all essential witnesses available, but he is instructed to offer no evidence, and he is not required to establish a prima facie case. However, after the plea of guilty and at the appropriate place in the proceedings, the trial counsel informs the court that the witnesses are available and calls any witnesses desired by the court or the law officer. *Id.*

Step 6: The defense counsel maintains a log showing the time spent conferring with the accused in connection with the case and setting out in detail the procedure followed as to the plea of guilty and the decision of the convening authority as to the maximum sentence which will be approved if such a plea is decided upon by the accused. This log is not made a matter of record but is placed in the office file in the case. This procedure is set out to meet the objection of commanders who feel that an agreement as to sentence based upon a plea of guilty by an accused may, in some cases, result in a later complaint by the accused that he was "railroaded" or forced into a plea and that he otherwise would not have pleaded guilty. In the event of such complaint (congressional or otherwise), reference to this log will permit a staff judge advocate, for the convening authority, to answer any and all complaints relative to the case. *Id.* at 78.

Step 7: There will be included in the review a detailed statement of the agreement reached as to the plea of guilty and the maximum punishment that is to be approved, in compliance with a recent letter from the OTJAG. *Id.*

With the exceptions noted in this article, the procedure outlined in the AFFE procedure closely resembles current practice. *Compare* Step 1, *with* AR 27-26, *supra* note 116, R. 1.2(1)(a) (requiring lawyers to abide by the client's decision on whether to enter into a pretrial agreement.); *id.* R. 1.4(2) (stating that lawyers negotiating a pretrial agreement shall provide the client with sufficient information so that the client can make intelligent decisions.); *id.* R. 3.2(1) (seeking concessions and resolving matters quickly is often in the client's interest.); MCM (2002), *supra* note 5, R.C.M. 705(d)(1) (Procedure for conducting pretrial agreement negotiations). *Compare* Steps 2 & 3, *with id.* R.C.M. 705(b)(1) (stating a pretrial agreement may include a sentence limitation), *and id.* R.C.M. 705 (d)(3) *and* discussion (stating that the convening authority should consult with the staff judge advocate or trial counsel before accepting the pretrial agreement). *Compare* Steps 4 & 5, *with id.* R.C.M. 910(c)-(i) (outlining the procedure for accepting guilty pleas and entering findings of guilty), *and* R.C.M. 1001 (detailing presentencing procedure). *Compare* Step 6, *with* AR 27-26, *supra* note 116, R. 1.6(1)(c), (d) (allowing lawyers to reveal such confidential information as necessary to defend themselves allegations of misconduct or ineffective assistance). *Compare* Step 7, *with* MCM, *supra* note 5, R.C.M. 1106(d)(3)(E) (requiring the staff judge advocate's review to contain a statement regarding the convening authority's obligations under the pretrial agreement.).

[188] JAGC CONFERENCE (1953), *supra* note 183, at 80, 82-83, 85.

regarding unlawful command influence and MG Shaw's direction that pretrial agreements must emanate from the defense.[189]

The second step in the process, however, generated some debate. Some of the staff judge advocates supported the idea that an accused should be allowed to propose a binding sentence limitation in exchange for his guilty plea, and that the final agreement should be based on negotiation.[190] While others argued that once the accused signaled a willingness to plead guilty, the staff judge advocate should dictate the terms of the agreement, based on what he was willing to recommend to the convening authority.[191]

As the discussion progressed, MG Harbaugh made the following observations: (1) it was impermissible for a pretrial agreement to require the accused not to take the stand in mitigation;[192] (2) the critical factor in reaching a pretrial agreement was not who proposed the sentence limitation, but that the staff judge advocate may not negotiate in a vacuum.[193] He must consult with the convening authority, to avoid the

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[189] *See* MG Shaw Letter, *supra* note 2; UCMJ arts. 37 & 98; Pub. L. No. 81-506, 64 Stat. 120, 137 (1950).

[190] For example, LTC Waldemar A. Solf of U.S. Army Europe noted that his command accepted sentence limitations proposed by defense counsel in two serious cases. The first involved a theft of "confidential funds" by an officer in a "sensitive intelligence assignment." In return for his plea of guilty, the government agreed to an eleven-month cap on confinement, to avoid the risk of disclosure of classified information. The second case involved a cold-blooded murder and robbery of a German taxi driver that was committed by a young veteran of the Korean War. Because of his youth, obvious remorse, cooperation with authorities, "credible Korean combat record" and deference to German law, the government agreed to a non-capital referral proposed by the defense, in exchange for the accused's pleas of guilty. JAGC CONFERENCE (1953), *supra* note 183, at 81.

[191] *Id.* at 85. Colonel James Garnett, AFFE, stated the following: "The practice in my particular jurisdiction is that the defense counsel comes to me and says: The accused will plead guilty; what will you recommend? He does not tell me what he wants." *Id.* (internal quotation marks omitted). It should be noted that at the time of this discussion, both the trial counsel and trial defense counsel were subordinates of the staff judge advocate, and members of the convening authority's command. As such, the objectivity and loyalties of the appointed trial defense counsel was often questioned. In 1980, the Army established the U.S. Army Trial Defense Service (TDS) as a separate activity. "To ensure objectivity and fairness, TDS counsel are completely independent of local commands and the post legal advisors. They are supervised and rated by their superiors within TDS." Colonel Leroy C. Bryant, HQ, U.S. Army TDS, Welcome to TDS Website, *at* http://www.jagcnet.army.mil/USATDS (last modified Aug. 5, 2003).

[192] JAGC CONFERENCE (1953), *supra* note 183, at 85.

[193] *Id.* at 85. This sage advice was a precursor to the concurring opinion by Judge Walter T. Cox, III, in *United States v. Jones*, 23 M.J. 305, 308-09 (C.M.A. 1987) (Cox, J.,

"embarrassing situation" of negotiating an agreement that the convening authority would not support.[194]

Later in the conference, a judge advocate noted that his pretrial agreements were reduced to writing and contained an acknowledgement by the accused that he discussed the agreement with his counsel and believed it to be in his best interest.[195] These agreements were also signed by the accused, his counsel, trial counsel, and the staff judge advocate, and were made a part of the record.[196] As this portion of the guilty plea symposium concluded, the following question was asked: Must every offer to plead guilty be brought to the attention of the convening authority?[197] The Judge Advocate General responded that it depended on what the convening authority wants to do.[198] He may want to see every offer or give "*carte blanche*" to the staff judge advocate to act on his behalf.[199] It is interesting to note, however, that there was no discussion as to whether giving the staff judge advocate *carte blanche* to enter such agreements constituted delegating a non-delegable duty.[200]

The attendees also discussed the courtroom procedures to use in guilty plea cases, and how the government established a *prima facie* case before findings were entered.[201] In this regard, although the 1951 *MCM*

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concurring in the result) ("I write to distance myself from any implication in the majority opinion that the point of origin or "sponsorship" of any particular term of a pretrial agreement is outcome determinative.").

[194] JAGC CONFERENCE (1953), *supra* note 183, at 85.

[195] *Id.* at 86.

[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] *Id.* at 87.

[200] Almost twenty years later, however, *United States v. Crawford*, 46 C.M.R. 1007, 1009 (A.C.M.R. 1972) held that these powers may not be delegated. *See also* MCM (2002), *supra* note 5, R.C.M. 705(d)(3), at II-70. This provision states the following:

> The decision whether to accept or reject an offer is within the sole discretion of the convening authority. When the convening authority has accepted a pretrial agreement, the agreement shall be signed by the convening authority or by a person, such as the staff judge advocate or trial counsel, who has been authorized by the convening authority to sign.

Id.; *see also id.* R.C.M. 705(d)(3) analysis, at A21-40 ("In some circumstances, it may not be practicable or even physically possible to present the written agreement to the convening authority for approval. The rule allows flexibility in this regard.").

[201] JAGC CONFERENCE (1953), *supra* note 183, at 85.

did not contemplate plea-bargaining, it did provide rudimentary guidance on courtroom guilty plea procedure.[202] Guilty pleas could only be entered in non-capital cases, or to a non-capital lesser-included offense in a capital case.[203] The *MCM* also required that legally trained counsel represent the accused before a guilty plea could be accepted.[204] Guilty pleas would be taken in a closed session, as an interlocutory matter, [205] and the law officer of a general court-martial, or the president of a special court-martial, was required to ensure that the accused understood the meaning and effect of his pleas.[206]

To accomplish this, the law officer or the president advised the accused that the plea admitted every element of the offense and authorized conviction without further proof.[207] The accused was also advised of the maximum sentence provided by law for the offense.[208] After being advised of these matters, the accused was required to acknowledge this advice before the guilty plea could be accepted.[209] All of these matters were recorded in a verbatim record in general courts-martial and in special courts-martial that were empowered to adjudge a bad conduct discharge.[210] In other cases, the substance of each inquiry and reply would be recorded.[211] Once the guilty plea was accepted, if the accused made a statement inconsistent with the plea, or requested to withdraw the plea, a plea of not guilty was entered, and the burden of proof shifted to the government.[212]

One quirk in the 1951 *MCM*, however, was that it made no provision for the immediate entry of findings as to the charges and specifications to which the accused had pled guilty. Instead, it required the court to reconvene and deliberate on the findings.[213]

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[202] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. XII ¶ 70b (1951) [hereinafter MCM (1951)].
[203] *Id.* ¶ 70a.
[204] *Id.* ¶ 70b(1).
[205] *Id.* ¶ 70b(4); *see also id.* ¶ 53d (stating that interlocutory questions are addressed in closed session).
[206] *Id.* ¶ 70b(2).
[207] *Id.*
[208] *Id.*
[209] *Id.* ¶ 70b(3).
[210] *Id.*
[211] *Id.*
[212] *Id.* ¶ 70b(4).
[213] *See id.* pt. XIII, ¶ 74d, at 117; CODE COMMITTEE ON MILITARY JUSTICE, UNITED STATES COURT OF MILITARY APPEALS & THE JUDGE ADVOCATES GENERAL OF THE ARMED

Under the IX Corps plan, the law officer was advised of the accused's plea and then conducted an inquiry into the providence of the plea outside of the presence of the court members. The government would not present evidence in aggravation after the plea was accepted,[214] but would have the witnesses available for the court to call if desired.[215] Lieutenant Colonel Solf (USAREUR) strongly disagreed with the IX Corps practice and suggested that stipulations of expected testimony be placed in the record before findings.[216] According to LTC Solf, this practice usually appeased the members enough so that they would not insist on the live witnesses being brought into court to testify.[217] Lieutenant Colonel Lougee (USARAL) also rejected the IX Corps procedure of not putting in aggravation evidence unless the members called for it, because it allowed the defense to keep "the sordid details of the crime" from the members, and out of the record of trial.[218] The discussion ended, however, with TJAG endorsing no particular approach.[219] Rule for Courts-Martial 1001 has since made it clear that the presentation of such evidence in oral or written form is permitted, even in guilty plea cases.[220]

The conference also discussed what the law officer must do if the defense puts on evidence inconsistent with the plea during sentencing.[221] Colonel Garnett took the position that the law officer must reject the plea.[222] Lieutenant Colonel Lougee, however, opined that the provisions of the *MCM* should be changed to make the acceptance of the plea final.[223] Again, there was no resolution of this issue.

Before adjourning, the conferees also discussed protecting defense counsel from allegations of ineffective assistance of counsel. Colonel Garnett started the discussion with a proposal that defense counsel keep a

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FORCES, ANN. REP., JUNE 1, 1952 TO DEC. 31, 1953, at 4 (1953) [hereinafter ANN. REP. (1953)]

214 JAGC CONFERENCE (1953), *supra* note 183, at 77.

215 *Id.*; *cf.* United States v. Duncan, 26 C.M.R. 245, 248 (C.M.A. 1958) (holding that a court member could ask questions before and after findings were entered, regarding the accused's guilt or innocence in guilty plea cases.).

216 JAGC CONFERENCE (1953), *supra* note 183, at 81, 85.

217 *Id.* at 81.

218 *Id.* at 84.

219 *Id.* at 87.

220 MCM (2002), *supra* note 5, at II-122.

221 JAGC CONFERENCE (1953), *supra* note 183, at 79, 84.

222 *Id.* at 79.

223 *Id.* at 84.

log regarding their pretrial negotiations that would be filed in an office file.[224] The staff judge advocate could later use this log to defend the defense counsel against claims of ineffective assistance of counsel.[225] This proposal was met with mixed reviews, primarily because of concerns for client confidentiality.[226] Although this discussion did not resolve all of the potential issues regarding client confidentiality, and ineffective assistance of counsel, it clearly shows that the judge advocates of the time were considering a need to build a record to avert allegations of ineffective assistance of counsel and improvident pleas.

A few months after the conference ended, the COMA judges and the service Judge Advocates General issued their annual report to Congress.[227] The first two recommendations of the report, if enacted, would amend the UCMJ to authorize a single officer to sit as a general or special courts-martial in non-capital cases, and authorize him to accept the accused's pleas of guilty, render findings, and impose an appropriate sentence.[228] In the case of general courts-martial, it was recommended that this officer should be a "law officer" certified by the service Judge Advocate General, with the rank of at least lieutenant colonel or commander.[229] Although, these recommendations were not adopted, the proposed procedure was a precursor to trials by military judge alone, which were authorized in the 1968 revision of the UCMJ, and the 1969 revision of the *MCM*.[230]

The report also recommended that the UCMJ be amended to limit appellate review of convictions based on guilty pleas to discretionary appeals raising questions of law to reduce a growing backlog of cases in

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[224] *Id.* at 78.
[225] *Id.*
[226] *Id.* at 85-86.
[227] ANN. REP. (1953), *supra* note 213, at 4.
[228] *Id.* at 4-5. This recommendation was also repeated in subsequent annual reports for 1954, 1955, and 1956. *See* CODE COMMITTEE ON MILITARY JUSTICE, UNITED STATES COURT OF MILITARY APPEALS & THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES, ANN. REP., JAN. 1, 1954 TO DEC. 31, 1954, at 5 (1954) [hereinafter ANN. REP. (1954)]; CODE COMMITTEE ON MILITARY JUSTICE, UNITED STATES COURT OF MILITARY APPEALS & THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES, ANN. REP., JAN. 1, 1955 TO DEC. 31, 1955, at 3 (1955) [hereinafter ANN. REP. (1955)]; CODE COMMITTEE ON MILITARY JUSTICE, UNITED STATES COURT OF MILITARY APPEALS & THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES, ANN. REP., JAN. 1, 1956 TO DEC. 31, 1956, at 3-4 & 8-10 (1956) [hereinafter ANN. REP. (1956)].
[229] ANN. REP. (1953), *supra* note 213, at 4-5.
[230] *See* UCMJ arts. 16(1)(b), 16(2)(c), 26; MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶¶ 4a, 4e, 4g, 39 (1969) [hereinafter MCM (1969)].

the appellate courts.[231] This recommendation, however, was also not adopted. Ultimately, the solution to reducing the appellate backlog was to reduce the number of trials through administrative means,[232] and detailing legal counsel and military judges to conduct special courts-martial.[233]

On 28 July 1954, the first published appellate court decision involving the guilty plea program was issued in *United States v. Smith*.[234] Private Smith was convicted under his pleas, of an eleven-day unauthorized absence from his unit in Korea that occurred after the cessation of hostilities, breach of arrest, and a violation of a lawful general order issued by his company commander.[235] Based on these findings, a general court-martial sentenced Smith to forfeiture of all pay and allowances, confinement for five years, and a dishonorable discharge.[236] The terms of the pretrial agreement between Private Smith and the convening authority were simple: In exchange for Private Smith's guilty pleas to the three offenses, the convening authority agreed to limit the accused's period of confinement to three years.[237] The convening authority complied with the sentence limitation in the pretrial agreement, but in a surprise move, disapproved the breach of arrest finding as "unwarranted."[238]

The ABR affirmed the conviction, but held that additional sentence relief was required because the "agreement was necessarily predicated upon the assumption by both parties that the accused was guilty of all three offenses."[239] Thus, when the convening authority dismissed the breach of arrest conviction, the Board opined that he should also have reduced the approved sentence as well.[240] Thus, the Board reduced the appellant's confinement by an additional six months to ensure that all parties received the benefit of their bargain.[241] In *Smith*, the ABR *sub*

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[231] ANN. REP.(1953), *supra* note 213, at 6. This recommendation was also repeated in the annual reports for 1954, 1955, and 1956. *See* ANN. REP. (1954), *supra* note 228, at 6; ANN. REP. (1955), *supra* note 228, at 3; ANN. REP. (1956), *supra* note 228, at 14-15.
[232] *See* Klein, *supra* note 7, at 7 & n.45.
[233] MCM (1969), *supra* note 230, ¶¶ 4a & 6a.
[234] 16 C.M.R. 344 (A.B.R. 1954).
[235] *Id.* at 345.
[236] *Id.*
[237] *Id.*
[238] *Id.* at 346.
[239] *Id.*
[240] *Id.*
[241] *Id.*

silentio approved of the practice of negotiating pretrial agreements. At the same time it also established reassessment of sentence as a remedy that could be used to ensure that all parties received the benefit of their bargain.[242]

VIII. Putting the Breaks on Plea Bargaining: 1954-56 (The Caffey Era)

On 20 September 1954, the Army Judge Advocate Conference convened again at Charlottesville, Virginia.[243] Although pretrial agreements were once more a topic of discussion, the new Judge Advocate General, MG Eugene M. Caffey, did not attend the discussion.[244] In fact, MG Caffey was not a fan of plea-bargaining, and to make this point clear he told the first speaker of the seminar to advise the conference of his views on the subject:[245]

> 1. He did not like the term "negotiate" because it implied that the Government was approaching the accused asking for favors;
> 2. He did not favor agreements just to move cases along, or those limiting the maximum punishment; and
> 3. He considered plea-bargains in desertion cases or long unauthorized absences "highly inappropriate."[246]

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[242] *Id.*; *cf.* United States v. Emerson, 20 C.M.R. 482, 484 (A.B.R. 1956); United States v. Proctor, 19 C.M.R. 435, 437-38 (A.B.R. 1955). In both cases, the appellate court approved a suspended bad conduct discharge, vice the suspended dishonorable discharge approved by the convening authority, to give effect to provisions of pretrial agreements that called for approving partial forfeitures of pay. The court took these actions because, by operation of law, the approval of confinement at hard labor and a suspended dishonorable discharge, as authorized by the terms of the pretrial agreement, stopped the accrual of all pay and allowances to the accused. Since approval of a suspended bad conduct discharge did not have the same financial impact, the court approved a suspended bad conduct discharge to give effect to the spirit and intent of the accused's original bargain.

[243] U.S. DEP'T OF ARMY, REPORT OF PROCEEDINGS, ARMY JUDGE ADVOCATE CONFERENCE, SEPT. 20-25, 1954, at 1 [hereinafter JAGC CONFERENCE (1954)] (on file with TJAGLCS Library).

[244] *Id.* at 82-93.

[245] Ralph K. Johnson, *The Effect Accepted Pretrial Offers to Plead Guilty Has Had on the Administration of Military Justice* (1954), *in* JAGC CONFERENCE (1954), *supra* note 243, at 82, 84-85.

[246] *Id.*

The conferees were also advised that there would be no all-encompassing directive on the subject coming from Washington.[247] This was done because there was a general feeling in the OTJAG that it was better to allow local staff judge advocates to tailor the program to suit the local command.[248] Other matters were discussed, but given the tone set by TJAG's guidance, the period set aside for questions and answers on the guilty plea program was abbreviated and unenlightening.[249]

During his tenure as TJAG (5 February 1954–31 December 1956),[250] MG Caffey's less than enthusiastic support for the guilty plea program had a significant impact on it. Although guilty plea rates rose from forty-one percent in FY 1954 to sixty percent in FY 1956,[251] there was also a decided trend toward pleading guilty "without the benefit of an agreement."[252] This change from plea-bargaining to naked guilty pleas, however, was not attributed to the remarks made at the 1954 Conference. Rather, the proffered explanation was that "accused persons [were] relying on the fact that the convening authority [would] consider his pleas of guilty as a mitigating factor, and that they [were] acquainted with the fact that certain types of offenses normally bring a certain type of punishment."[253] These shifts in guilty plea practice were praised as "good signs that the program is working very well."[254] But, the resurgence of the JAGC's ambivalence toward plea-bargaining, was not a good sign. In fact, it was a harbinger of appeals concerning *sub rosa* agreements and waivers of fundamental rights that would occupy the courts in the coming years.

Nevertheless, on 2 August 1956, the Chief of the Government Appellate Division sent a letter to all staff judge advocates advising them that the "Functioning of the Guilty Plea Program" would be discussed at the upcoming Judge Advocate Conference. [255] As one might expect, many of the responses voiced the growing sentiment in the JAGC that plea-bargaining in the military had become largely a one-way street,

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[247] *Id.* at 84.
[248] *Id*.
[249] JAGC CONFERENCE (1954), *supra* note 243, at 84-85 & 92-93.
[250] JAGC HISTORY, *supra* note 4, at 220.
[251] *See* Searles, *supra* note 23, at 226.
[252] *Id.* at 227.
[253] *Id.*
[254] *Id.*
[255] Letter from COL J.L. Searles, to All Staff Judge Advocates (Aug. 2, 1956) (on file with TJAGLCS Library).

where the government dictated the terms and defense accepted or rejected the *fait accompli*. For example, one staff judge advocate wrote:

> We have no guilty plea program. In some cases in return for a promise to enter a plea of guilty to some of the charges and specifications, we have agreed to dismiss other charges and specifications. It is contrary to our policy to agree in advance to reduce a court-martial sentence. When we make an agreement of the kind mentioned above, it is contingent upon the plea of guilty being entered in open court. After the plea is entered, the trial counsel is permitted to move for dismissal of other specifications by direction of the convening authority. This policy reflects my natural dislike for any program which involves the arbitrary reduction of sentences by any reviewing or appellate agency.[256]

Another staff judge advocate wrote:

> I personally feel that where the accused pleads guilty upon an agreed sentence, it is improper for the defense counsel to then attempt to have a lesser sentence imposed by the court. I feel that it should be understood between the Staff Judge Advocate and Defense Counsel that nothing in mitigation should be introduced.[257]

When the 1956 Conference convened there was little time spent on the subject.[258] Unlike previous conferences when multiple presenters from distant commands made extensive presentations and entertained questions, the 1956 seminar consisted only of a briefing by COL Searles and no period for questions and answers.[259] During his allotted time, COL Searles, recounted the latest statistics and then discussed the following three problem areas:

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[256] Letter from COL Howard H. Hasting, Staff Judge Advocate, U.S. Army Caribbean, to COL Jasper L. Searles (Aug. 6, 1956) (on file with TJAGLCS Library).
[257] COL Smoak, *supra* note 178, at 2.
[258] *See* Searles, *supra* note 23, at 226-29.
[259] *Compare* JAGC CONFERENCE (1953), *supra* note 183, at 77-87, *and* JAGC CONFERENCE (1954), *supra* note 228, at 82-93, *with* Searles, *supra* note 23, at 226-29.

> 1. The recurring problem of pretrial agreements that required the accused to forego presentation of evidence in extenuation and mitigation;[260]
> 2. A new problem of agreements which provided for early release from service after the appellant's case was affirmed by the Army Board of Review, thereby cutting off appeal to the Court of Military Appeals;[261] and
> 3. An administrative double jeopardy problem arising in officer cases when officers were administratively separated after concluding pretrial agreements providing the convening authority would disapprove or suspend any dismissal adjudged by the court-martial.[262]

In this regard, the conferees were advised that the first two problems could be solved simply by not entering into agreements in which the accused waived fundamental due process rights, and the third by inserting a clause in pretrial agreements that informed the accused that, while the convening authority would disapprove any dismissal, the government was in no way precluded from administratively separating the accused for the same conduct.[263]

Shortly after the conference adjourned, the ABR addressed waiving evidence in extenuation and mitigation as part of a pretrial agreement. In *United States v. Callahan*, the appellant alleged that such a provision in his pretrial agreement prejudiced him.[264] Notwithstanding the 4 September 1953 notice to all judge advocates not to include such provisions in pretrial agreements, sometime before Callahan's 17 May 1956 sentencing at Fort Meade, Maryland, the defense included the clause in the appellant's pretrial agreement.[265] The court agreed that this was error,[266] and reduced the adjudged confinement from one year to nine months.[267]

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[260] Searles, *supra* note 23, at 228.
[261] *Id.*
[262] *Id.* at 229.
[263] *Id.*
[264] 22 C.M.R. 443, 447-48 (A.B.R. 1956).
[265] *Compare id.* at 445 ("Sentence adjudged 17 May 1956."), *with id.* at 447 (discussing 4 Sept. 1953 notice). *See also id.* at 446-48.
[266] *Id.* at 448.
[267] *Id.*

In another case from Fort Meade, *United States v. Banner*, the ABR struck down a provision in a pretrial agreement that required the accused to waive litigation of a jurisdiction motion.[268] Although the court disposed of the case on the government's inability to establish jurisdiction over the accused,[269] the court observed that "neither law nor policy could condone" the clause and that "such an 'agreement' would be void."[270]

IX. The Renaissance of Plea-Bargaining: 1957-59 (The Hickman Era)

On 2 January 1957, MG George W. Hickman, Jr. was confirmed as TJAG.[271] He served in that capacity until 1961.[272] Under MG Hickman's leadership, "pleading guilty for consideration in the Army" was encouraged.[273] In fact, soon after assuming his new duties, MG Hickman sent out a message to the field[274] that contained the first detailed guidance on plea-bargaining since MG Brannon published a notice on the subject in the September 1953 *JAG Chronicle*.[275] This message not only signaled a return to the standards and tone set by MG Shaw, but also made it clear that after over four years of *ad hoc* development, the time had come to institutionalize the lessons learned.

The message contained the following instructions: (1) multiplicious charges will not be used to induce pretrial agreements; (2) offers to plead guilty must originate with the accused; (3) trial counsel will be consulted before any pretrial agreement is approved; (4) pretrial agreements will

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[268] 22 C.M.R. 510, 520 (A.B.R. 1956).
[269] *Id.* at 519.
[270] *Id. But see* United States v. Clark, 53 M.J. 280, 283 (Army Ct. Crim. App. 2000); United States v. McLaughlin, 50 M.J. 217, 218 (Army Ct. Crim. App. 1999). Both cases hold that the appropriate remedy for impermissible terms in a pretrial agreement is not to enforce the impermissible term. Voiding the agreement is not required.
[271] JAGC HISTORY, *supra* note 4, at 225.
[272] *Id.*
[273] *See* Hickman, *supra* note 20, at 11.
[274] Message, 525595Z, 8 May 1957, Headquarters, Dep't of Army. The original of this message may no longer exist, however, a copy is reprinted in Bethany, *supra* note 20, at app. I; and the substance of the message is contained in MCM (1959), *supra* note 6, ¶ 70b. In this regard, it is worthy of note that this message established for the first time common standards for plea-bargaining in the Army, and in particular, required for the first time that all pretrial agreements in the Army, be reduced to writing, and that law officers must not only inquire into the providence of the accused's plea, but also the terms of the agreement, and the parties' understanding of such terms.
[275] *See Agreements as to Pleas of Guilty*, *supra* note 175, at 183.

only be accepted in cases when the evidence of guilt is convincing and the sentence limitation is appropriate; (5) the agreement must be reduced to an unambiguous writing which contains no term limiting the accused's rights; (6) the members should be made aware of the aggravating, extenuating, and mitigating circumstances of the offense; (7) the law officer must conduct an inquiry into the providence of the plea and pretrial agreement; and (8) the government must scrupulously execute the terms of the agreement.[276]

The publication of this message was the first of four major developments in military guilty plea practice that took place in 1957. The second development came in late 1957, when the Navy issued instructions for implementing plea-bargaining in general and special courts-martial.[277] Then around the same time that the Navy instruction was issued, the third major development occurred when the COMA addressed for the first time, issues arising from the Army guilty-plea program.

In *United States v. Hamill*,[278] the COMA had to fashion an appropriate remedy when an honest mistake as to the terms of a pretrial agreement was discovered on appeal.[279] The mistake in *Hamill* centered on a difference between the appellant's understanding of the agreement and the convening authority's understanding of it. The appellant understood the agreement to provide that if his behavior was appropriate in confinement, his discharge would be automatically remitted and he would be restored to duty.[280] The convening authority, however, understood the agreement to allow certain officials to restore the appellant to duty as a matter of clemency, if they determined such action appropriate.[281] The court resolved the doubt in favor of the appellant, and ordered the remission of the discharge and the appellant's return to active duty, provided his behavior had been good.[282]

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[276] *See* JAGC CONFERENCE (1954), *supra* note 228.
[277] *See* SECNAVINSTR 5811.1 and SECNAVINSTR 5811.2, *supra* note 21 and accompanying text.
[278] 24 C.M.R. 274 (C.M.A. 1957).
[279] *Id.* at 275-76.
[280] *Id.* at 276.
[281] *Id.*
[282] *Id.*

The fourth major event was the COMA's decision in *United States v. Allen*.[283] *Allen* involved an allegation of ineffectiveness of counsel, for failing to present matters in extenuation and mitigation of the appellant's desertion offense, following a plea of guilty.[284] While it is clear from the majority opinion that there was a pretrial agreement in the case,[285] it is unclear whether counsel's failure to present evidence on behalf of his client was under that agreement, a *sub rosa* agreement, a tactical decision, incompetence of counsel, or an innocent mistake.[286] One point came through loud and clear—the COMA will not allow pretrial agreements to transform a court-martial "into an empty ritual."[287]

These four developments, taken as a whole, set the tone for the future. The Army now had clear guidelines applicable to all commands. The program was no longer simply an Army initiative but a Navy initiative as well. And the COMA had sent a strong message to the field that it would not allow pretrial agreements to trample the fundamental rights of the accused or the integrity of the military justice system.

The year 1958 brought additional challenges to the Army guilty-plea program in *United States v. Kilgore*,[288] and *United States v. Hood*.[289] Both challenges were based on allegations of misconduct by defense counsel, and both were resolved against the appellant.

In *Kilgore*, the appellant alleged that his counsel had misinformed him of the maximum confinement period that the convening authority would approve.[290] This allegation was quickly and effectively rebutted by an affidavit of the defense counsel, and a true copy of the agreement that contained counsel's correct advice on the maximum punishment, and bore the appellant's signature.[291]

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[283] 25 C.M.R. 8 (C.M.A. 1957).
[284] *Id.* at 10-12.
[285] *Id.* at 10.
[286] *Id.* at 10-12; *see also id.* at 12-17 (Latimer, J., dissenting), *aff'd*, CM393920 (A.B.R. 10 Mar. 1958) (unpublished).
[287] *Id.* at 11; *cf. id.* at 17 (noting counsel's duties do not end at findings) (Latimer, J., dissenting); *see also* United States v. Welker, 25 C.M.R. 151, 153 (C.M.A. 1958). The failure by the defense to present sentencing evidence may signal to members the existence of an agreement. Welker, 25 C.M.R. at 153.
[288] 25 C.M.R. 137 (C.M.A. 1958).
[289] 26 C.M.R. 339 (C.M.A. 1958).
[290] *Kilgore*, 25 C.M.R. at 138.
[291] *Id.* at 138-39.

In *Hood*, the appellant alleged that his counsel and the law officer pressured him into pleading guilty under a pretrial agreement.[292] What is remarkable about this case is that the appellant testified before the COMA on this issue.[293] His testimony, however, was unpersuasive, and in fact was a key point in the defeat of his appeal.[294]

Both cases illustrate an important point for defense counsel—keep good records, because the record of trial may be insufficient to protect them from allegations of ineffective assistance of counsel. Thus, defense counsel should meticulously document actions taken on the behalf of the accused and the rationale for those actions. When possible, counsel would also be well advised to prepare a memorandum for the client's signature so the client acknowledges his or her agreement with the advice and the course of action proposed by the defense counsel.

Two other appeals also merit discussion. In *United States v. Darring*,[295] and *United States v. Harrison*,[296] the COMA came to opposite conclusions as to whether waiver of appellate review was permissible in guilty plea cases. In both cases, waiver of appellate review appeared not to be based on any clause in the pretrial agreement, but on counsel's post-trial advice that the appeal would be useless.[297] In *Darring*, the court reversed the appellant's conviction because he was erroneously informed by counsel that the Army had a policy discouraging appeals in guilty plea cases; and in *Harrison*, the court affirmed the conviction because the counsel's advice was based on his personal belief the appeal would be fruitless.[298] With no major developments in 1959, the decade closed with the guilty plea program firmly entrenched in military practice with many questions answered but some unresolved.

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[292] *Hood*, 26 C.M.R. at 339-42.
[293] *Id.* at 342.
[294] *Id.* at 342-43.
[295] United States v. Darring, 26 C.M.R. 431 (C.M.A. 1958).
[296] United States v. Harrison, 26 C.M.R. 511 (C.M.A. 1958).
[297] *Compare* Darring, 26 C.M.R. at 433-35, *with* Harrison, 26 C.M.R. at 512-13.
[298] *See* Darring, 26 C.M.R. at 435; Harrison, 26 C.M.R. at 513-14 (Ferguson, J., dissenting) (holding counsel's personal advice was based in part on Army Policy).

X. Conclusion

Major General Shaw's plea bargaining initiative was ingeniously devised and flawlessly executed. Between 23 April 1953 and 31 December 1959, Army judge advocates laid the foundation for contemporary plea-bargaining in the military. By introducing negotiated guilty plea practice to courts-martial, these judge advocates broke ranks with the scorched-earth approach to military justice that had dominated military practice for 175 years. Gone were the days when uncontested courts-martial punished virtually all misconduct. In so doing, they developed a military jurisprudence that favors dispensing the vast majority of misconduct with nonjudicial punishment, administrative separation, and guilty pleas. Thus, staff judge advocates may focus their attention on complex contested trials.

The Korean War also shaped the development of the guilty plea practice by demonstrating that operational considerations should be taken into account when negotiating plea-bargains. One of the enduring lessons learned during the Korean War is that convening authorities may properly reject plea agreements proposed by wartime offenders who seek to "languish in stateside detention barracks while faithful Soldiers fight and die in far off lands."[299] And as the global war on terrorism expands, this lesson takes on renewed significance.

As a result of the guilty plea program, it is now axiomatic that pretrial agreements are struck between the accused and the convening authority.[300] The participating judge advocates are merely negotiators and counselors.[301] The agreement must be voluntary and mutually beneficial.[302] The terms of the agreement must relate to the charges and specifications to be presented to the court-martial, and must not contain terms and conditions that would violate public policy.[303] The agreement must be in writing and contained in the record of trial,[304] and clearly indicated in the staff judge advocate's post-trial reviews.[305] Provisions

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[299] ANN. REP. (1954), *supra* note 161, at 21.
[300] *See* MCM (2002), *supra* note 5, R.C.M. 705(a).
[301] *Id.*; *see also* AR 27-26, *supra* note 116, R.s 1.2(1)(a), 2.1.
[302] *See* MCM (2002), *supra* note 5, R.C.M. 705(a), (b), (c)(1)(A), (d)(3).
[303] *See id.* R.C.M. 705(c).
[304] *See id.* R.C.M. 705(d), 910(f), (h)(3) & (i).
[305] *See id.* R.C.M. 1106(d)(3)(E).

waiving the right to present evidence in extenuation or mitigation, or challenge jurisdiction are void.[306]

The creations of an independent trial judiciary and trial defense bar are also largely a result of the need to eliminate errors that arose in Korean War era guilty plea cases. Similarly, the practice of having law officers, and now military judges, conduct an inquiry into the providence of the plea and pretrial agreement began in the 1950s. The lessons learned in the1950s also established the duty of staff judge advocates and appellate courts to ensure that the government scrupulously executes the terms of the agreement. The advances made in guilty plea practice during this period were groundbreaking and paved the way for further important substantive and procedural refinements that would occupy counsel, military judges, and appellate court personnel for the next fifty years.

As we enter the third year of the Global War on Terrorism, the JAGC is poised to conduct the first military tribunals since the close of World War II. Throughout the JAGC, active component, reserve component, and in some cases, retired judge advocates, warrant officers, paralegal noncommissioned officers, and civilians are working diligently to devise and implement the rules that will govern these historic trials. At this point, it is unclear what the road ahead will entail, but it appears that the procedures promulgated for these tribunals,[307] recent Supreme Court decisions concerning the due process rights of enemy combatants,[308] and the ebb and flow of the current conflict will have an impact on the JAGC and the future of military justice that is as significant as that experienced when the UCMJ was implemented during the Korean War.

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[306] *See id.* R.C.M. 705(c)(1)(B).

[307] U.S. DEP'T. OF DEFENSE, MILITARY COMMISSION ORDER NO. 1 (21 MAR. 2002).

[308] *See* Rumsfeld v. Padilla 2004 U.S. LEXIS 4759 (2004); Rasul v. Bush 2004 U.S. LEXIS 4760 (2004); Hamdi v. Rumsfeld 2004 U.S. LEXIS 4761 (2004).

Appendix A

DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON D.C.

JAG 1953/1278 3 April 1953

TO: ALL STAFF JUDGE ADVOCATES

The impact of the UCMJ on the Army and on this Corps has been very great. Among its effects have been an over-worked COMA, over-worked boards of review, a pipeline filled with cases at various stages of progress toward final conclusion, and confinement facilities filled with prisoners in a technically "unsentenced" status. All of these must be reduced. One way to do it is to relieve trial and appellate tribunals of the burden of passing upon needless issues of law and fact.

The ideal accomplishment would be to attain such perfection at the pre-trial and trial level as wholly to eliminate necessity for correction on appellate review. Of course, this can never fully be achieved, but it should be our constant aim. Substantial improvement is possible. This is a statement of self-evident fact, and should not be interpreted as an indication of any lack of appreciation of the high degree of efficiency already attained by the officers of the Judge Advocate General's Corps.

The Code is not perfect. We can never expect to have a perfect one. However, it is our duty, as the group to which the law looks primarily for attaining the high purposes of the Congress in enacting the Code, to do our utmost to make the Code the most effective instrument of justice possible. It is imperative that we adapt our practices and methods in such manner as to eliminate any unnecessarily expensive, time-consuming and nonproductive effort. The Code leaves less room for administrative amendment and adaptation of procedures than was available under the Articles of War; but there is still wide scope for effective action in this field. We owe it to the Army, to the taxpayer, to those directly affected and to ourselves constantly to strive for progressive improvement.

The outstanding trend in legislation affecting military justice since World War I, and this is particularly true of the UCMJ, has been in the direction of applying to military justice, procedures similar to those of

the criminal courts. The adversary system has to a very considerable degree displaced the paternalistic system which has heretofore characterized military procedure, and which has conditioned and continues to condition military thought. Running throughout the post World War II criticism and comment regarding military justice was the demand for adequate defense of the accused; and the Congress legislated with a view to insure that he has it. How nearly are we measuring up in practice?

We must adjust our thinking and practice to the actualities, and never lose sight of the objective. Trial and appellate procedures are means to an end. The end is the vital thing. A voluminous record, impeccable as to legal detail and immune to attack on appeal may not represent justice in the fullest and proper sense. The most skillfully conducted court room battle may not represent a good defense.

We have not availed ourselves of practices, commonly employed in all civilian criminal jurisdictions, the use of which greatly reduces the work of the criminal courts, facilitates finality of decision, reduces the expense to the taxpayer, operates to the advantage of the guilty defendant, and actually benefits the state. Striking a fair and reasonable balance between the individual and the public's interest is of the very essence in penal procedure. For some reason we appear to a considerable extent to be doing our job the hard way, the most expensive way, and in a way which deprives many military accused of a "break" which the guilty defendant has available to him in civilian courts and which his counsel there usually sees that he gets.

There have recently been brought to my attention some statistics which are highly pertinent to the subject matter of this letter. These, compiled by the Director of the Administrative Office of the U. S. Courts, 178 (1950), show that in 1950 of an aggregate of 33,502 convictions in the Federal courts, 31,739, or slightly [end of page two] over 94.4 per cent, were based on pleas of guilty or nolo contendre. Examination of the records of trial by general court-martial on file in this office for the year 1952 shows that of 9,383 convictions, in only 750 cases were there pleas of guilty to all charges and specifications, and a spot check of 73 of these shows that in 65 of them, notwithstanding the plea, evidence was introduced by the prosecution before the findings. Assuming this sample to be representative, the indication is that in only about one per cent of the cases were the

findings based wholly on the pleas. Why this great disparity between the two systems in the numbers of sentences based on contest?

Any enlightened penal system protects the citizen, not only against unjust conviction, but also against being harassed and embarrassed by being forced to defend himself against ill-founded allegations of crime. It also allows considerable scope for the guilty to benefit by means other than an attempt to "beat the case."

Lawyers generally are averse to trying hopeless causes. They adapt their methods to *the interests of their clients*. Good lawyers do not advise their clients to go to trial on the merits if other action reasonably may be expected to produce better results of the defendant. They use their knowledge of things which affect the attitude of the trial judge and prosecutor toward the guilty defendant. If relieved of the work and attendant expense of unnecessary trials those representing the state are often properly willing to make concessions; and a high percentage of the cases are settled on the basis of an agreement with the prosecutor to recommend acceptance of a plea of guilty to a lesser included offense, to dismiss some of the charges, or to recommend a lighter sentence than can reasonably be expected to result after a contested trial and a verdict of guilty. Counsel often rely on the known inclination of the trial judge to be more lenient to the defendant who gives some indication of repentance by pleading guilty and throwing himself on the mercy of the court. One or more of these and like considerations may have to be weighed in deciding how best to serve the client in any case. Such methods are perfectly legitimate. There is little room for doubt that if the courts and attorneys for the defendants in criminal cases were to follow the habitual practices of courts-martial, where contested trial on a plea of not guilty is the norm, criminal dockets in the courts of the United States and of the various states would soon be hopelessly clogged. [end of page three]

The duties of a military person acting as counsel for the accused include those which "usually devolve upon the counsel for a defendant before a civil court in a criminal case." He must guard "*the interests of the accused* by all honorable and legitimate means known to the law" (par. 48c, p. 68, MCM, 1951; underscoring supplied). The *MCM* speaks to a large extent in the terms of contest, and it is the duty of military counsel at all stages of the case to be concerned with the "interest of the accused." However, it is not only the right, but the duty of defense counsel to use "Honorable and legitimate means" for

reducing the impact of the law on the accused, however guilty he may be. He must use the most effective, honest advocacy of which he is capable if the case is contested; but he should never go to trial on the merits without weighing the possibilities of obtaining greater benefit to the accused from other methods. To provide a "good show" for the accused in the form of polished forensics, but to bring upon him a heavier penalty than might have been obtained by other legitimate methods is a poor way to protect his interests. I fear that is just what we are doing in many cases. For a guilty person to admit his offense represents some progress along the road to rehabilitation, even if he bargained for it; and it is only in the rarest and most heinous cases that there is not some legitimate scope for fair compromise with the guilty accused.

I cannot too strongly urge upon you the importance of constant and careful attention to the pre-trial and trial procedure in all cases. Our system of pre-trial practice is probably the fairest and most enlightened of any penal system known to the law. The disclosure of the prosecution's case is much more complete than in criminal jurisdictions generally. The appellate process, while important, is of much less importance than sound pre-trial and trial practice. Trial counsel and defense counsel should be very carefully selected, and if there is any difference in their relative importance that of the latter may be the greater. Defense counsel should be good lawyers and practical men, men who can and will carefully weigh all of the factors involved in each case, and never lose sight of *the interest of the accused* and of their undivided allegiance to him. Defense counsel should never advise an accused to plead guilty if he has [end of page four] reasonable doubt of his guilt. As the *MCM* promulgated by the President of the United States has stated, "It is his duty to undertake the defense regardless of his personal opinion as to the guilt of the accused," but it is also high duty, after consultation with the accused, to "endeavor to obtain full knowledge of the facts of the case," and to give the accused his 'candid opinion of the merits of the case'" (par. 48f, p. 69, MCM, 1951).

Defense of an accused is not restricted to the courtroom. It is much broader in scope, and the best real defense may employ means avoiding contest. Counsel falls short of the full discharge of his duties i[f] his advice to the accused does not extend to a frank and candid opinion as to the probable outcome of a contested trial, and as to the possibilities of effecting something better for the accused by other

legitimate means. Occasionally counsel will encounter, as does the attorney for the defendant in criminal cases, the accused who tries to deceive his counsel, has conceived a plan of action which has no merit and may well tend to aggravate his difficulties, and LB inclined to go to trial in the face of what appears to be hopeless prospects. Counsel must leave the ultimate decision as to the nature of the plea to the accused himself, but he should not allow the accused to make this decision without the benefit of sound advice. That advice should be comprehensive and should include information as to what is embraced by the "honorable and legitimate means known to the law" which he may use in protecting the interests of the accused.

There is reason to believe that among the considerations which operate to produce the resort to trial 'on the merits[']' in many court-martial cases is the desire upon the part of counsel to avoid criticism for alleged failure vigorously to defend. Just as military defense owe to the accused and to their position as officers of justice the courage vigorously and without fear to press the defense of the accused in contested cases, and to contest every case which on careful study and appraisal calls for it, they owe to the law and to the accused himself the courage to advise the guilty accused of possible benefits to him from lawfully pursuing other methods in proper cases. [end of page five]

The civilian criminal practice, with the sentencing power usually vested in the trial judge, renders disposition of a case on a plea of guilty simple. There are some jurisdictions in which the penalty is fixed by the jury, and in these it is customary for the court to recommend to the jury a sentence recommended by opposing counsel and approved by the judge. Juries habitually act accordingly. Similar methods are adaptable to the administration of military justice. Of course, a court-martial has the power, in its discretion, to adjudge a lower sentence.

The coordinated action of all concerned will be necessary to effect improvement along the lines indicated. A good defense counsel, acting for and with the approval of the accused who knows just what he is doing and why, is the key factor. He alone has the benefit of the confidential relation of attorney and client, as well as the disclosure of the prosecution's case through the report of investigation and other means of appraising its strength. Any action looking to securing advantage to the accused by a plea avoiding contest must emanate from him and the accused. Trial counsel also is important, as his attitude

may advance or block any proposal. He should be highly competent, and keep his mind open for consideration of any reasonable suggestion. He in turn must be governed by considerations of sound policy, and not just try to avoid work by encouraging pleas of guilty. The convening authority's responsibility for discipline within his command and for seeing that consideration of justice to the Government as well as to accused persons are given due weight cannot be ignored. He must lean heavily on his staff judge advocate in fixing his policy. Those who deal with the defense must carefully avoid making any commitment or entering into any understanding inconsistent with the policy of the commander. No accused can be expected to plead guilty, and competent counsel will not advise him to do so, unless some benefit to the accused is reasonably certain. And any understanding reached must be carried out with the utmost good faith. Should counsel for the Government blunderingly exceed his authority, the full power of the commander exercising general court-martial jurisdiction must be exercised to preclude any prejudice to the accused. It would be better to free an offender completely, however, guilty he might be, than to tolerate anything smacking of bad faith on the part of the Government. [end of page six]

The personnel of courts-martial must be educated in some of the principles of sound defense. The Congress did not create the Judge Advocate General's Corps and provide for trained lawyers to represent military persons accused of offenses in the expectation that the wide degree of discretion traditionally conceded to counsel for the defense in civilian criminal cases would be denied to them. What the public demanded and the Congress intended was that every accused have a real defense in the broadest and most comprehensive sense, and that cannot be realized if courts-martial deny to counsel for the defense full scope for the discharge of their duties in the interest of the accused as the defense views it. Courts must not assume that they, on the basis of a contested trial, can necessarily arrive at sounder conclusions as to how a case is to be disposed of than can a trained lawyer who has probably lived with the case for some time, and has had the benefit of everything that can be brought out in evidence and normally much more. In other words, defense counsel must be emancipated, recognized for what they are and what the law expects them to be, that is, a vital element in the judicial process whose function is of the utmost importance and must be accorded the deference and respect it requires to fulfill its mission.

Please give this matter your careful consideration. Take it up with your commander and devote your best efforts to securing effective action to the ends indicated. Put some of your best lawyers on the defense and let them defend in the fullest sense. The Lucas case, 1 CMR 19 and subsequent cases following it, indicate that much can be done.

Please inform this office of the action you take and of the results, and let us have such suggestions as your experience indicates.

Sincerely yours,

// Original signed //
FRANKLIN P. SHAW
Major General, USA
Acting The Judge Advocate General

Appendix B

JAGJ 1953/1273 5 January 1954

MEMORANDUM FOR: FILE

SUBJECT: Pleas of Guilty in Trials by Courts-Martial

1. This division has analyzed the effect of the letter of 23 April 1953, which the Acting Judge Advocate General directed to a1l staff judge advocates, encouraging pleas of guilty, when appropriate, in trials by courts-martial.

2. Comments on General Shaw's letter which have been received from staff judge advocates in the field indicate reactions varying from doubt and mild disapproval to enthusiastic comp1iance with the recommended procedure. Cases reaching the Office of The Judge Advocate General during the last seven months reveal a pronounced and steady increase in the proportionate number of p1eas of guilty. Cases received during May 1953 showed that l5% of all accused persons tried by general court-martial had pleaded guilty to all charges and specifications; in June, 18% so pleaded; in July, 26%; August, 29.3%; September, 29.5[%]; October, 34.5%; and in November, 40.6%. It appears that a "1eve1ing off" process is being effected and that this will become even clearer within the next few months. The attached table shows the ratio of pleas of guilty to persons tried in every general court-martial jurisdiction for the period 5 May 1953 to 5 November 1953. A wide disparity may be clearly seen. Obviously, if those jurisdictions which have not adopted the recommended policy would do so, a substantial over-all increase in the number of pleas of guilty would result.

3. A random survey has been completed of 359 general courts-martial (all resulting in sentences to confinement) convened at Fort Campbell, Kentucky, Korean Base Section, 4th Infantry Division, The Engineer Center and First Army, between 5 May 1953 and 6 November 1953. This survey was undertaken to provide a spot check on whether or not there has been a meaningful difference between sentences to confinement when a plea of gui1ty was entered as opposed to when the accused pleaded not guilty. The results are as follows:

a. Fort Campbell, Kentucky, 28 cases, average sentence to confinement when plea of guilty was entered: 9 months, 14 days; when plea of not guilty was entered: 28 months, 4 days.

b. Korean Base Section, 182 cases, average sentence to confinement when plea of guilty was entered: 12 months, 8 days; when plea of not guilty was entered: 16 months. (Not included in these figures are two sentences to confinement for life and one death sentence, all approved by the convening authority and adjudged upon a plea of not guilty.)

c. 4th Infantry Division, 43 cases, average sentence to confinement when plea of guilty was entered: 11 months, 26 days; when plea of not guilty was entered: 25 months, 4 days.

d. The Engineer Center, 66 cases, average sentence to confinement when plea of guilty was entered: 12 months, 10 days; when plea of not guilty was entered: 21 months, 20 days.

e. First Army, 40 cases, average sentence to confinement when plea of guilty was entered: 10 months, 12 days; when plea of not guilty was entered: 12 months, 12 days.

It must be noted that this information does not reveal whether reduced sentences following pleas of guilty resulted from pretrial agreements or were simply the result of consideration by the court of the plea of guilty as matter in mitigation. It also must be remembered that in the cases studied the types of offenses in which the accused pleaded guilty are not necessarily identical to those in which a not guilty plea is entered. Notwithstanding these limitations, it is submitted that this represents a fair sample and that from it the conclusion may be drawn that a plea of guilty, when in fact the accused is clearly guilty, is advantageous to him in terms of time which he will have to spend in confinement.

// Original signed //
STANLEY W. JONES
Colonel, JAGC
Chief, Military Justice Division

PLEAS OF GUILTY

5 May 1953 – 5 November 1953

Jurisdiction:	**Pleas of Guilty:**	**Total Persons:**	**Percentage of Pleas of Guilty:**
First Army	16	41	39
Second Army	2	17	11.9
Third Army	17	114	14.9
Fourth Army	7	33	21.2
Fifth Army	11	138	8
Sixth Army	18	35	51.4
Seventh Army	149	128	38.3
Eighth Army	28	94	29.8
I Corps	7	28	25
III Corps	0	0	0
V Corps	33	97	34
VII Corps	28	103	27.1
IX Corps	17	40	42.5
X Corps	9	30	30
XVI Corps	15	38	39.5
XVIII Airborne Corps	2	16	12.5
11th Airborne Division	19	36	52.8
82d Airborne Division	17	45	37.8
101st Airborne Division	1	39	2.6
1st Armored Division	13	109	11.9
2d Armored Division	31	62	50
3d Armored Division	0	0	0
5th Armored Division	10	121	8.3
6th Armored Division	0	0	0
7th Armored Division	63	174	36.2
1st Cavalry Division	49	67	73.1
1st Infantry Division	21	59	35.6
2d Infantry Division	4	36	11.1
3d Infantry Division	15	75	20
4th Infantry Division	21	62	33.9
5th Infantry Division	3	78	3.8

6th Infantry Division	0	0	0
7th Infantry Division	15	39	38.5
8th Infantry Division	12	28	42.9
9th Infantry Division	3	65	4.6
10th Infantry Division	15	32	46.9
24th Infantry Division	63	90	70
25th Infantry Division	10	35	28.6
28th Infantry Division	9	44	20.5
31st Infantry Division	12	67	17.9
37th Infantry Division	10	35	28.6
40th Infantry Division	0	16	0
43d Infantry Division	13	79	16.5
44th Infantry Division	6	16	37.5
45th Infantry Division	14	18	22.2
47th Infantry Division	0	0	0
Camp Atterbury	3	91	3.3
Camp Breckinridge	0	0	0
Camp Carson	13	37	35.1
Camp Gordon	31	147	66
Came Kilmer	3	129	2.3
Camp Pickett	12	215	5.6
Camp Polk	10	35	28.6
Camp Roberts	0	1	0
Camp Rucker	39	116	33.6
Fort Bragg	0	20	0
Fort Campbell	12	29	41.4
Fort Devens	63	139	45.3
Fort Huachuca	0	4	0
Fort Jackson	0	0	0
Fort Knox	5	30	16.6
Fort Leavenworth	3	46	6.5
Fort Leonard Wood	19	84	22.6
Fort Lewis	15	51	29.4
Fort MacArthur	0	9	0
Fort Meade	8	29	27.6
Fort Ord	29	72	40.2
Fort Riley	7	43	16.3

Bremerhaven POE	0	0	0
New Orleans POE	7	19	36.8
New York POE	0	1	0
San Francisco POE	0	0	0
Seattle POE	0	0	0
AAA & Guided Missile Center	7	61	11.5
The Armored Center	0	0	0
The Artillery Center	19	97	19.6
The Engineer Center	12	78	15.14
The Infantry Center	39	93	41.9
Sig Cps Center & Ft Monmouth	15	23	65.2
3d Army AAA Training Center	3	46	6.5
The Transportation Center	14	22	18.2
Berlin Command	16	30	53.3
Central Command	72	127	56.7
Northern Area Command	10	28	35.7
Ryukyus Command	3	27	11.1
Southern Area Command	58	103	56.3
Southwestern Command	88	153	57.8
Special Weapons Comd 8452d AAU	0	0	0
The Quartermaster Training Cmd	0	5	0
Trieste, U. S. Troops	0	7	0
Western Area Command	14	49	28.6
U.S. Army, Alaska	32	40	80
U.S. Army, Caribbean	1	10	10
U.S. Army, Europe	13	44	29.5
U.S. Army Forces, Far East	0	0	0
U.S. Army Pacific	2	4	50
USAF, Antilles & Mil Dist of P.R.	1	21	14.7
U.S. Forces in Austria	6	51	11.9

Aberdeen Proving Ground	0	15	0
Army Field Forces, Ft Monroe	0	0	0
373d Transp Major Port	1	2	50
Military District of Washington	8	10	80
U. S. Mi1itary Academy	0	0	0
35th AAA Brigade	0	1	0
Branch US Disciplinary Barracks	1	8	12.5
Adv Sec USAREUR Comm Zone	5	17	29.14
Base Sec USAREUR Comm Zone	33	91	36.3
Korean Base Section	64	246	26
Korean Communications Zone	3	24	12.5
U.S. Army Europe, Comm Zone	2	35	5.7
U.S. Mil Adv Grp Rep of Korea	0	9	0
32d AAA Brigade	14	27	51.8
Fld Comd Armd Forces Spec Weap Proj	1	1	100

Appendix C

HEADQUARTERS
UNITED STATES ARMY, PACIFIC
OFFICE OF THE STAFF JUDGE ADVOCATE
APO 968

21 April l953

MEMO FOR: The Inspector General, U. S. Army

1. At the request of COL Richard A. Erickson, I am confirming in writing the views of the Army Commander as expressed orally to him this date by the undersigned.

2. The Army Commander is of the firm opinion that the recent changes in the law controlling the administration of military justice have harmed rather than helped the Army in the performance of its primary function of fighting and winning battles and wars. It is his view that the injection into military justice system of the elaborate appellate reviews existing in civil life has encouraged malingering by materially delaying the swift imposition of just punishment following the commission of a military offense. Too often Soldiers are inclined to choose the comparatively safe course of prolonged confinement pending trial and final action over the immediate hazards of combat.

He further feels that, under the present UCMJ and the case law developing thereunder, the maintenance, of military discipline through the aid of courts-martial is seriously hampered by a plethora of legal technicalities which confront the personnel of a court-martial and often cause appellate reversal of convictions on other than material and substantial grounds.

Having had the opportunity personally to observe the operation and effectiveness of the court-martial systems both in World War II and today, he is convinced that the former is by far superior considering the primary mission of the Army in time of war.

3. The Army Commander desired that I present to you his views in this matter.

// Original signed //
JOHN A. HALL
Colonel, JAGC
Army Staff Judge Advocate

Appendix D

HEADQUARTERS
UNITED STATES ARMY, PACIFIC
OFFICE OF THE STAFF JUDGE ADVOCATE
APO 961

May 1953
Major General Franklin P. Shaw, USA
The Assistant Judge Advocate General
Department of the Army
Washington, D. C.

Dear General Shaw:

I have received your interesting and instructive letter of 23 April 1953 in which you stress the importance of progressive improvement in the administration of military justice at the pre-trial and trial levels to the end that the workload of appellate agencies may be materially reduced. Copies have been circulated among the Judge Advocates of this command for their information and guidance.

It has been my practice both with First Army and here personally to confer with the defense counsel of a general court-martial whenever possible before preparing an advice to the Convening Authority in a given case. Often for the purpose of bringing a case to trial at an early date and/or to reduce the length of the record, I have agreed to strike or amend specifications in exchange for pleas of guilty or stipulations of facts or the testimony of witnesses. At turns, but less frequently and only with the prior express approval of the Convening Authority, I have, for the same reasons extended a promise to counsel with respect to the maximum sentence which would be approved on review by the Convening Authority.

This procedure I am sure has resulted in mutual benefit to the accused and the Government and it is my intention to continue the practice in so far as possible. At present however I am experiencing considerable opposition in following the second course of action, for although the Commanding General is extremely critical of the present Code, he is most reluctant to enter into any pre-trial compromise with an accused with respect to his action on review. Enclosed is a copy of a report which sets forth his views and may eventually reach your office

through The Inspector General. As you can see, while emphatically deploring the results, he has not as yet at least clearly indicated the cure. I would appreciate your holding it confidential unless or until it reaches you officially.

Within the above limitation I shall endeavor to follow your instructions with sincerity. In my opinion much can be accomplished by a Staff Judge Advocate in the pre-advice stage on purely legal and technical grounds without impugning his integrity or loyalty to his Commander.

Sincerely yours,

// Original signed //
JOHN A. HALL
Colonel, JAGC
Army Staff Judge Advocate

1 Encl
Memo dtd 21 Apr 53

Appendix E

Analysis of Judge Advocate Strength and Courts-Martial Statistics

I. Judge Advocate Strength FY 1950-2003

At the outbreak of the Korean War, the ratio of lawyers to troops was 1.03 lawyers per thousand troops (650 lawyers supporting 632,000 troops).[309] This was in line with the conventional wisdom of the times that: "the *Code* requires roughly one lawyer for every one thousand servicemen."[310] As the Army grew to 1,597,000 in FY 1952, the JAGC also grew to 1,200 attorneys.[311] During this same period of time, however, the ratio of lawyers per thousand troops dropped to 0.80. In FY 2003, the average Army end strength was 493,563 Soldiers and they were supported by 1,506 judge advocates; this is a ratio of 3.05 lawyers per one thousand troops.[312] The future size of the JAGC is unclear. News reports indicate that the current Army leadership may eliminate 373 judge advocate and 638 civilian attorney positions and replace them with an indeterminate number of contract attorneys to reduce costs.[313]

II. Courts-Martial Rates following World War I

With the exception of the Persian Gulf War in 1990-1991, courts-martial rates have spiked at the outbreak and close of every major armed-conflict involving U.S. forces from the close of WWI through the start of the global war on terrorism. For example, when World War I ended, the

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[309] JAGC History, *supra* note 4, at 209; AD HOC COMMITTEE, *supra* note 9, at 252.

[310] Prugh, *supra* note 4, at 28.

[311] AD HOC COMMITTEE, *supra* note 9, at 252; JAGC HISTORY, *supra* note 4, at 209.

[312] *See* TJAG REPORT (2003), *supra* note 24, at 1 & 12; section 401(1) of the Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, 116 Stat. 2458, 2524 (2002). It should also be noted that an in-depth analysis of the reasons for the dramatic growth in the number of lawyers per one thousand troops that has occurred in the Army since 1951 is beyond the scope of this discussion. For the purposes of this article, however, it suffices to say that the practice of military law is a multidisciplinary practice that requires expertise in administrative, civil, claims, international and operational law, legal assistance, and military justice; and in the author's opinion the current staffing of the JAGC meets the needs of the Army.

[313] Sandra Jontz, *Army Studies Outsourcing; More Than 200,000 Jobs May Be Privatized,* STARS AND STRIPES, (Pacific Ed.) Oct. 12, 2002, *available at* http://www.estripes.com/article.asp?section=104&article=10484&archive=true (last visited Jan. 10, 2004).

total number of general and special courts-martial convened during the fiscal year jumped from 11,679 in FY 1917 to 27,091 in FY 1918.[314] The rate crested at 40,999 in FY 1919, then dropped to 12,607 in FY 1920.[315]

III. Courts-Martial Rates during World War II

When World War II began, the general and special courts-martial rate rose from 13,314 in FY 1941 to 42,143 in FY 1942.[316] The rate then continued to rise to 132,479 in FY 1943, and peaked at 226,938 in FY 1944.[317] The rate then dropped to 201,262 in FY 1945, and to 86,379 in FY 1946.[318] The decrease in the courts-martial rate, however, was due primarily to a dramatic drop in the special courts-martial rate, because from 1943 through 1946 the general courts-martial rate more than doubled from 14,782 to 35,977.[319]

IV. Courts-Martial Rates during the Korean War

At the outbreak of the Korean War, the number of general and special courts-martial tried in the Army went up from 30,651 in FY 1949 to 35,449 in FY 1950; then declined slightly to 32,610 in FY 1951.[320] One explanation for the rate drop from FY 1950 to FY 1951 is that most of the heavy fighting of the war took place in the first year, so there was little time to conduct courts-martial.[321] After the war ended, the rate peaked at 76,715 in FY 1953 then fell to 64,293 in FY 1954; by FY 1959, the general and special courts-martial rate had dropped to 22,663.[322]

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[314] AD HOC COMMITTEE, *supra* note 9, at 251.
[315] *Id.*
[316] *Id.*
[317] *Id.*
[318] *Id.*
[319] *Id.*; *see also* Prugh, *supra* note 4, at 21 (citing THE ADJUTANT GENERAL, U.S. DEP'T OF ARMY, THE ARMY CORRECTIONAL SYSTEM 92 (Jan. 1952) ("At its peak, in October 1945, the Army's prison population counted five men for every one thousand servicemen.").
[320] AD HOC COMMITTEE, *supra* note 9, at 252. The rate then declined slightly to 32,610 in FY 1951, before climbing to 61,520 in FY 1952, and peaking at 76,715 in FY 1953. *Id.*
[321] *Overview*, *supra* note 47, at 6.
[322] AD HOC COMMITTEE, *supra* note 9, at 252.

V. Courts-Martial Rates during the Vietnam War

During the Vietnam War, the Army general and special courts-martial rate remained constant at 20,000 to 30,000 trials per year from FY 1959 through FY 1966, then spiked to 36,337 in FY 1967; peaked at 62,079 in FY 1969: then fell to a low of 12,160 in FY 1975.[323] Establishing the start date for the Vietnam War is somewhat problematic. Although U.S. efforts to stop the spread of Communism in Vietnam began at the end of World War II, the U.S. Army had no presence in Vietnam until a small military assistance advisory group was established 1950; and the JAGC had no presence there until 1959.[324] Major formations of U.S. ground forces did not arrive in Vietnam until 1965, and the bulk of the fighting occurred in 1965 through 1968.[325] For the purposes of this discussion, the start date of the Vietnam War is set in 1959, and the lack of a spike in courts-martial between FY1959 and FY1967 is largely due in part to the slow buildup of U.S. forces in Vietnam.[326] As the numbers of troops increased, the courts-martial rate ebbed and flowed in relation to combat on the ground. In FY 1965, the Army tried 26,597 Soldiers by general or special courts-martial, the rate then dipped to 24,597 in FY 1966.[327] After two years of major combat operations, the spike in courts-martial came in FYs 1967-1969. In FY 1967, the courts-martial rate jumped to 36,637; then rose again to 46,144 in FY 1968; and peaked at 62,079 in FY 1969.[328] One reason for the peak in the courts-martial rate in 1969 is that the withdrawal of U.S. forces had begun, and many departing units were handing off pending cases to the units left behind.[329] As the United States disengaged from the conflict in 1970 to 1975, and shifted the burden of fighting to South Vietnamese forces, the overall Army courts-martial rate fell dramatically as large numbers of troops returned to the United States. In FY 1970, the

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[323] COL Mark W. Harvey, Chief, Criminal Law Division, OTJAG, U.S. Army, *Courts-Martial and Nonjudicial Punishment Trends*, 2-3 (2 June 2000) (Information Paper) (on file with the OTJAG, U.S. Army, Criminal Law Division)[hereinafter, Harvey, *Courts-Martial and Nonjudicial Punishment Trends*].

[324] FREDRIC L. BORCH III, JUDGE ADVOCATES IN VIETNAM: ARMY LAWYERS IN SOUTHEAST ASIA 1959-1975, 1-3 (2003).

[325] *Id.* at 27-30.

[326] *See generally id.* at 10, 51, 60-61, 69, and 70-71. Between 1965 and 1969, the Army tried 25,000 courts-martial in Vietnam. *Id.* at 51.

[327] Harvey, *Courts-Martial and Nonjudicial Punishment Trends, supra* note 323, at 3.

[328] *Id.*; *see also* BORCH *supra* note 324 at 51 (At the peak of the U.S. buildup in 1969, the Army tried 377 general courts-martial, 7,314 special courts-martial and 2,231 summary courts-martial).

[329] BORCH *supra* note 324 at 51.

courts-martial rate was 43,967; it then fell to 30,740 in FY 1971; 18,660 in FY 1972; and 15,472 in FY 1973.[330] In the last year of the war, however, the courts-martial rate jumped to 16,662 then fell to 12,160 in FY 1975 as the war ended.

VI. Courts-Martial Rates during the Persian Gulf War of 1990-1991

In the Gulf War, general and special courts-martial rates actually dropped from 2,619 in FY 1989 to 2,372 in FY 1990.[331] The rate then dropped again to 1,852 in FY 1991, and 1,778 in FY 1992.[332] The general and special courts-martial rates from FY 1993 through FY 1998 continued to drop from 1,287 in FY 1993 to 972 in FY 1998.[333] One explanation for the anomalous drop in courts-martial rates despite the outbreak of the Gulf War is that the United States continued to reduce the size of the Army from 762,000 Soldiers in FY 1989 to 748,000 in FY 1990 and then to 479,000 in FY 1999.[334] Another reason for the lack of increase in the courts-martial rate is the extremely short period it took for the U.S. Army to mobilize, deploy, win the war and redeploy.[335]

VII. Courts-Martial Rates during the Global War on Terrorism

As the global war on terrorism began in FY 2001 the general and special courts-martial rate rose slightly to 1,127.[336] Then as the global war against terrorism shifted to Afghanistan and the Philippines, the general and special courts-martial rate rose in accordance with the model discussed above to 1,390 in FY 2002.[337]

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330 Harvey, *Courts-Martial and Nonjudicial Punishment Trends, supra* note 323 at 2.
331 *Id.* at 1-2.
332 *Id.* at 1.
333 *Id.* at 1 & 2.
334 *Id.*
335 FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI 121-95 (2001) (U.S. operations in connection with the Gulf War of 1990-1991, began on 7 August 1990; ground combat lasted a mere 100 hours; and most U.S. troops redeployed to their pre-war duty station by late April 1991).
336 CODE COMMITTEE ON MILITARY JUSTICE, UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES & THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES, ANN. REP., OCT. 1, 2000 TO SEPT. 30, 2001, at 37 (2001).
337 ANN. REP. (2002), *supra* note 9, at 39.

In FY 2003, U.S. forces were again engaged in major combat operations, this time in Iraq. During FY 2003, the general and special courts-martial rate dropped slightly to 1,354 trials.[338] This temporary drop in trials is, however, consistent with the model discussed above in that courts-martial rates tend to dip during heavy combat, and then rise as units return to garrison duties. In his FY 2003 report to the Congress, The Judge Advocate General of the Army commented on this phenomenon in two parts of his report.

In discussing the activities of the U.S. Army Trial Defense Service (TDS), Major General Thomas J. Romig observed:

> Over the past five years, TDS has seen an overall increase in both the number of courts-martial and their complexity. During FY03, however, the upward trend line halted and the number of courts-martial decreased to the lowest number since FY99. The decrease is largely attributable to the ongoing operations associated with Operations Iraqi Freedom and Enduring Freedom.[339]

Then in a discussion of the first call up of Army Reserve judges to preside over courts-martial in combat zones since 1968, Major General Romig observed:

> In spite of massive troop deployments, the overall caseload decreased only slightly, and actually increased at many locations within the continental United States, Germany, and Korea. Trials of Soldiers in the Iraq and Kuwait areas commenced shortly after the active combat phase ended, and increased in number over the summer and fall.[340]

There is also another explanation for the slight drop in trials, when an increase might be expected. As the table reprinted below indicates, as the global war on terrorism grew in intensity, the number of administrative separation boards conducted by the Army significantly and steadily increased.[341]

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[338] TJAG REPORT (2003), *supra* note 24, app. at 1.
[339] *Id.* at 5.
[340] *Id.* at 4.
[341] *Id.* at 5.

	FY 99	FY 00	FY 01	FY 02	FY 03
Administrative Boards	698	597	826	918	1,215

Accordingly, the current increased use of administrative separations to manage a growing caseload would appear to be the modern equivalent of adopting plea-bargaining during the Korean War.

Finally, to put these numbers into better perspective, the general and special courts-martial rate per thousand troops was 30.2 in FY 1944; 50 in FY 1953; 41.06 in FY 1969; 2.51 in FY 1991; 2.34 in FY 2001, 2.85 in FY 2002, and 2.74 in FY 2003.[342] Most of the variation in these rates, however, is due to fluctuations in the rates of special courts-martial. For example, between FY 1951 and FY 1979, the rate of special courts-martial per 1000 fluctuated from a high of 67.16 in FY 1953 to a low of 5.21 in FY 1970.[343] In contrast, the rate per thousand for general courts-martial has consistently remained below ten per thousand troops since the UCMJ became effective in 1951.[344]

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[342] Harvey, *Courts-Martial and Nonjudicial Punishment Trends, supra* note 323 at 1-4; CODE COMMITTEE ON MILITARY JUSTICE, UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES & THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES, ANN. REP., OCT. 1, 1999 TO SEPT. 30, 2000, at 47-48 (2000) [hereinafter ANN. REP. (2000)], *reprinted in* 54 M.J. at CXXXI-CXXXII; CODE COMMITTEE ON MILITARY JUSTICE, UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES & THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES, ANN. REP., OCT. 1, 2000 TO SEPT. 30, 2001, at 37-38 (2001) [hereinafter ANN. REP. (2001)], *reprinted in* 56 M.J. at CIII-CIV; ANN. REP. (2002), *supra* note 9, at 39-40; TJAG REPORT (2003), *supra* note 24, app. at 1-2.

[343] Harvey, *Courts-Martial and Nonjudicial Punishment Trends, supra* note 323 at 2-3.

[344] *Id.* at 1-3; AD HOC COMMITTEE, *supra* note 9, at 252, fig. 1; ANN. REP. (2002), *supra* note 9, at 39-40 (788/517 = 1.52); TJAG REPORT (2003), *supra* note 24 app. at 1-2 (689/494 = 1.4); *see also* ANN. REP. (2002), *supra* note 9, at 39 (In FY 2002 the total number of special courts-martial empowered to adjudge a bad conduct discharge (BCD) rose 67%, and the number of non BCD special courts-martial by 233.3%. At the same time the number of general courts-martial only went up by 2.3%). In FY 2003, the number of BCD special courts-martial rose by 8.8%, and non-BCD special courts-martial increased by 110%. The number of general courts-martial on the other hand declined by12.6%. *See* TJAG REPORT (2003), *supra* note 24, app. at 1. To obtain the courts-martial rate per thousand for FY 2001–FY 2003, divide the total number of general and special courts-martial at page 1 of the appendix to the Army TJAG report, by the average active duty strength at page 2 of the appendix to the Army TJAG report.

THE CUSTOMARY ORIGINS AND ELEMENTS OF SELECT CONDUCT OF HOSTILITIES CHARGES BEFORE THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA*: A POTENTIAL MODEL FOR USE BY MILITARY COMMISSIONS

FIRST LIEUTENANT MELISSA J. EPSTEIN, USMC[1]
CHIEF WARRANT OFFICER THREE RICHARD BUTLER, U.S. ARMY (RET.)[2]

I. Introduction

On 13 November 2001, in response to continuing military developments regarding the war against terrorism, the President of the United States—in his capacity as Commander in Chief of the Armed Forces—issued a military order concerning the "Detention, Treatment,

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* In accordance with the International Criminal Tribunal for the Former Yugoslavia (ICTY) Administrative Instruction AI/2001/05 (2001), the authors are required to note that the views expressed in this article are those of the authors alone, and do not necessarily reflect the views of the International Tribunal or the United Nations in general.

1 First Lieutenant, U.S. Marine Corps. Currently deployed to Iraq in support of Operation Iraqi Freedom II. Assigned as Trial Counsel, Legal Services Support Team Echo, 1st Force Service Support Group, Camp Pendleton, CA. J.D., 2000, Columbia Law School; B.A., 1995, State University of New York at Binghamton. Previously assigned as a Student, Naval Justice School, Newport, RI; The Basic School, Quantico, VA; Officer Candidate School, Quantico, VA, 2002-2003. Previously served as a lawyer in the Office of the Prosecutor, International Criminal Tribunal for the Former Yugoslavia (ICTY), The Hague, Netherlands, 2001-2002; Law Clerk to the Honorable Andrew S. Effron, U.S. Court of Appeals for the Armed Forces, Washington, DC, 2000-2001. Member of the bar of the state of New York; admitted to practice before the Court of Appeals for the Armed Forces.

2 Chief Warrant Officer Three (Ret.), U.S. Army. Currently employed as an Intelligence Research Specialist with Immigration and Customs Enforcement, Department of Homeland Security, Atlanta, GA. B.S., 1992, University of Maryland (European Division). Previously assigned as a Senior Military Analyst, Office of the Prosecutor, ICTY, The Hague, Netherlands, 1997-2003; All Source Intelligence Technician, 513th Military Intelligence Brigade, attached to the G-2, U.S. Army Central Command and Third Army, Fort McPhearson, Georgia, 1992-1997; All Source Intelligence Technician, G-2, Third Infantry Division, Wuerzburg, Germany, 1989-1992; attached to U.S. VII Corps G-2 for Operation Desert Storm, Saudi Arabia-Kuwait-Iraq, 1991; Intelligence Analyst, J-2, U.S. Central Command, Macdill AFB, Florida, 1986-1989; Intelligence Analyst, 66th Military Intelligence Company (CEWI), Third Armored Cavalry Regiment, Fort Bliss, Texas, 1985-1986; Intelligence Analyst, Headquarters, 66th Military Intelligence Group, Munich, Germany, 1982-1985.

and Trial of Certain Non-Citizens in the War Against Terrorism."[3] This order established the necessary findings, policy basis, and jurisdiction to constitute military commissions, with the mandate of bringing to trial members or supporters of the Al Qaeda organization for "violations of the laws of war and other applicable laws by military tribunals."[4] The President's Military Order did not define the phrase "law of war," nor did it identify such acts that might qualify as "violations."

The ensuing legislative committee hearings and associated discussion immediately following the issuing of this order focused primarily on issues concerning procedure and due process.[5] The hearings elucidated no additional information concerning specific criminal acts subject to trial by military commission. Nor did Military Commission Order Number One (DOD MCI No. 1), issued by the Secretary of Defense, address this point.[6] While the Secretary's orders addressed a number of procedural concerns, the underlying issue of what the United States considered an actual criminal offense within the context of the law of war remained an open question. Over a year later, the Department of Defense published Military Commission Instruction Number Two (MCI No. 2), listing a series of acts that constituted offenses under the law of armed conflict (LOW).[7] Included among these are the specific offenses of "attacking civilians" and "attacking civilian objects".[8]

This article argues that the historical policy and practice of the U.S. government regarding the law of war pertaining to the "conduct of hostilities"—coupled with consistent jurisprudence developed over the past eleven years by the International Criminal Tribunal for the former

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[3] Military Order of 13 November 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 § 7(b)(2) (Nov. 16, 2001) [hereinafter Military Order of 13 November 2001].

[4] *Id.* § 1(e).

[5] *See generally* Open Session Testimony Before the U.S. Senate Armed Services Committee, Military Commissions (Dec. 13, 2001), *available at* http://armed – services.senate.gov/hearings.htm#dec01) and the U.S. Senate Committee on the Judiciary (*Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism*, Nov. 28, Dec. 4, and Dec. 6, 2001, *available at* http:// judiciary.senate.gov/) (providing additional comments by Sen. Leahy on the Senate floor on 14 December 2001 (congressional Record 107-1 at S.13276-S.13280).

[6] U.S. DEP'T OF DEFENSE, MILITARY COMMISSION ORDER NO. 1 (21 Mar. 2002), *available at* http://www.defenselink.mil/news/commissions.html [hereinafter DOD MCI No. 1].

[7] U.S. DEP'T OF DEFENSE, MILITARY COMMISSION INSTRUCTION NO. 2 (30 Apr. 2003), *available at* http://www.defenselink.mil/news/commissions.html [hereinafter MCI No. 2].

[8] *Id.* para. 6A & 6B.

Yugoslavia (ICTY)—establishes a solid legal foundation in customary international law for these offenses to be tried by military commission.

II. Overview

The first part of this article will examine U.S. doctrine on the law of war, including recognition and application of customary law of war under domestic statute, policy, doctrine, and declarative statements. In their totality, these bases form a foundation for what the U.S. government historically acknowledges as customary law with respect to military attacks involving civilians and civilian objects. The second part of this article will detail the chronology of ICTY conduct-of-hostilities cases and the customary basis for such charges under the law of armed conflict. The article examines the customary foundations of ICTY charges dealing with unlawful attacks on civilians and civilian objects in order to explore how these same foundations might form the basis for the similar offenses listed in MCI No. 2.[9] The third part of this article will examine the propriety of using the principles articulated in the 1977 Protocol One Additional (Protocol I) to the 1949 Geneva Conventions as a legal basis for charges before a military commission. Ultimately, the analysis of these three areas should demonstrate that customary international law, to include ICTY jurisprudence, provides the required legal foundation to bring these charges against an accused individual before any U.S. military commission.

III. Part 1: The Law of War as Recognized by the United States

On 30 April 2003, the Department of Defense (DOD) General Counsel addressed the United States' view of the existing law of war in a series of Military Commission Instructions issued for the primary purpose of detailing many of the technical aspects of the conduct of future military commissions. Military Commission Instruction No. 2 enumerates a series of crimes and elements under the heading of "Substantive Offenses."[10] Those identified as war crimes include a number of offenses relating to the means and methods by which parties to a conflict conduct hostilities. These include the offenses of "attacking

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[9] *Id.*
[10] *Id.*

civilians" and "attacking civilian objects,"[11] both of which clearly apply to the attacks of September 11, 2001, in New York City.[12]

Less clear is the technical applicability of these offenses before a military commission. As reflected in MCI No. 2, there are limits to the offenses that may be tried before a constituted military commission:

> No offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question. These crimes and elements derive from the law of armed conflict, a body of law that is sometimes referred to as the law of war. They constitute violations of the law of armed conflict, or offenses that, consistent with that body of law, are triable by military commission. Because this document is declarative of existing law, it does not preclude trial for crimes that occurred prior to its effective date.[13]

This raises a question as to what standards, norms, principles, or instruments the international community generally recognized as declarative of existing law with respect to conduct-of-hostilities issues in general, and specifically to the above-noted offenses. A further question asks how much of this existing law the international community and the United States also recognized, either by treaty ratification or as custom, at the time of the offense. The latter answer is not immediately clear, as the United States declined to ratify a number of modern conduct-of-hostilities treaties proscribing such acts as grave breaches or criminal offenses.[14]

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[11] *Id.* para. 6(A)(2) (Attacking Civilians); para. 6(A)(3) (Attacking Civilian Objects).

[12] *See* discussion *infra* Part III (Section V B) for comments pertaining to offenses that may apply to the attack on the Pentagon.

[13] MCI No. 2, *supra* note 7, para. 3A.

[14] The United States signed Protocol Additional (Protocol I) to the 1949 Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, art. 1, 1125 U.N.T.S. 3 [hereinafter Protocol I]. On 29 January 1987, the President of the United States notified the U.S. Senate that he would not forward Protocol I to the Senate for ratification. *See Letter of Transmittal, President Ronald W. Reagan, to the Senate of the United States*, 23 WKLY. COMP. PRES. DOC. 91 (Jan. 29, 1987) [hereinafter *Letter of Transmittal*]. President Reagan did forward Protocol Additional II to the 1949 Geneva Conventions (pertaining to internal armed conflict) to the U.S. Senate on 29 January 1987 (Treaty Action 100-2) Protocol Additional II to the 1949 Geneva Conventions of 12 Aug. 1949, and Relating to the

A. Conventional (Treaty) Law

The United States has long been a state party to the 1907 Hague Conventions in their entirety, to include Annex IV (Respecting the Laws and Customs of War on Land).[15] The international community broadly considers the Annex governing the protection of civilians from the effects of hostilities between belligerents to be customary international law with respect to land warfare.[16] The 1907 Convention, however, is largely admonitory in nature, and punitive provisions for violations of civilian protections by state belligerents during the conduct of hostilities are developments that are more recent in treaty law. While the 1949 Geneva Conventions contain some punitive terms, notably the grave-breach regime, the relevant provisions prohibiting the extensive destruction or appropriation of property not justified by military necessity, apply only to the actions of an occupying power against a civilian population.[17] The grave-breach provisions of the 1977 Protocol I to the 1949 Geneva Conventions (Protocol I) articulated the first explicitly punitive provisions potentially applicable to the offenses at issue.[18] The United States is not a party to Protocol I, having decided in

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Protection of Victims of International Armed Conflicts, Dec. 12, 1977, art. 1, 1125 U.N.T.S. 3, at 609 [hereinafter Protocol II]. This Protocol II Treaty has not come to a floor vote, and presently remains in the Committee for Foreign Relations. More recently, on 31 December 2001, the United States signed the Rome Treaty establishing the International Criminal Court. Subsequently, on 6 May 2002, the United States stated its intent to withdraw its signature from the treaty. *See* Letter from Under Secretary of State for Arms Control and International Security John R. Bolton, to UN Secretary General Kofi Annan (May 6, 2002). Press Release, U.S. Dep't of State, Int'l Criminal Court: Letter to UN Secretary General Kofi Annan (May 6, 2002), *available at* http://www.state.gov/r/pa/prs/ps/2002/9968.htm [hereinafter Press Release, International Criminal Court].

[15] Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 2, 36 Stat. 2277; T.S. 539 and Annex IV, sec. II, ch. 1 (Means of Injuring the Enemy, Sieges, and Bombardments (arts. 22-28) (ratified by the United States on 27 Nov. 1909, entered into force on 26 Jan. 1910). *See* U.S. Department of State, *A List of Treaties and Other International Agreements of the United in Force on January 1, 2000*, at 455-456, *available at* http://www.state.gov/www/global/legal_affairs/.

[16] MACHTELD BOOT, NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT 545-46 (2002).

[17] *See* ICRC Commentary to Article 147 of the Fourth Geneva Convention 601; *see also* Prosecutor v. Duško Tadic, No IT-94-1, para. 81 (Oct. 2, 1995) (Decision on Defense Motion for Interlocutory Appeal on Jurisdiction).

[18] Protocol I, *supra* note 14. Article 85 covers the grave breaches regime, to include (85)(3)(a), which prohibits making the civilian population or individual civilians the object of attack. *Id.* art. 85.

1987 to forgo ratification.[19] More recently, the United States formally withdrew its signature and support for the Rome Treaty process that established the International Criminal Court (ICC), where such punitive provisions are again organic to the treaty.[20] Thus, although the crimes and elements set forth in MCI No. 2 are virtually identical to those in Article 8 of the ICC Statute, the latter cannot be the legal basis for charges before a U.S. military commission.[21] As the United States is not party to any relevant punitive treaty, a clearly recognized basis in customary law must exist if these offenses are to be tenable before a military commission.

B. Customary Law as Recognized by the United States

1. Domestic Case Law

The courts of the United States have long recognized the binding legal authority of customary international law. In the *Paquette Habana* case, the Supreme Court held that it was bound to follow "an established rule of international law," where that rule was founded on "the general consent of the civilized nations of the world, and independently of any express treaty or other public act."[22]

Civil law contains the few substantive references to U.S. legal doctrine regarding the customary law of armed conflict in domestic jurisprudence, in cases pertaining to the application of the Alien Tort Claims Act and the Torture Victim Protection Act by victims or their representatives against former foreign military officers now residing in the United States.[23] These decisions do not address offenses related to

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[19] *See Letter of Transmittal*, *supra* note 14.

[20] *See* Press Release International Criminal Court, *supra* note 14.

[21] *Assembly of State Parties to the Rome Statute of the International Criminal Court, First Session 03-10, Official Records* (ICC-ASP/1/3) (Sept. 2002) [hereinafter *Assembly of State Parties to the Rome Statute of the International Criminal Court, First Session 03-10, Official Records*]. Article 8(2)(b)(i) (war crime of attacking civilians (in international armed conflict)); art. 8(2)(e)(i) (war crime of attacking civilians (in internal armed conflict)); and art. 8(2)(b)(ii) (war crime of attacking civilian objects).

[22] The Paquette Habana, 175 U.S. 677, at 708 (1900).

[23] Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 (2000), as derived from the Judiciary Act of 1789, and the associated Torture Victim Protection Act (TVPA) of 1991, Pub. L. 102-256, 106 Stat. 73 (as codified in 28 U.S.C. § 1350).

the customary law of armed conflict because the text of the statutes themselves set forth explicitly the relevant offenses.[24]

No established jurisprudence exists within the context of criminal law. Offenses enumerated under the 1997 Expanded War Crimes Act[25] apply strictly on a treaty or convention basis, and no court has ever adjudicated crimes under this provision. The handful of other references and rulings in federal case law relating to this subject pertain exclusively to jurisdiction and other procedural issues.[26] No federal court has addressed the substantive issue of which offenses might constitute customarily recognized violations of the law of armed conflict.

2. Federal Statutes

As noted previously, the 1997 Expanded War Crimes Act offers no utility in this regard, as offenses enumerated therein are restricted to violations of treaties or conventions to which the United States is a party.[27] Another potential source of federal statutory clarification, the Uniform Code of Military Justice (UCMJ),[28] is similarly unhelpful in defining applicable offenses. The UCMJ establishes jurisdiction to try violations of the law of war; however, it neither articulates a definition of the law of war nor specifies the acts or offenses that prosecutors may charge as violations under such law.[29]

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[24] 28 U.S.C. § 1350. There is no requirement under the TVPA for a legal nexus between the commission of the acts and a state of armed conflict; rather, such acts need only have been committed by "an individual under actual or apparent authority, or under the color of law or any foreign nation". *See* Pub. L. No. 102-256, § 2(a), 106 Stat. 73.

[25] 18 U.S.C. § 2441.

[26] *See, e.g.*, U.S. v. Buck, 690 F. Supp. 1291 (S.D.N.Y. 1988) (holding that the Geneva Conventions and Additional Protocol I were not applicable to the defendant's claim of Prisoner of War status).

[27] 18 U.S.C. § 2441. Under this federal statute, *Expanded War Crimes Act of 1997*, Congress enumerates specific treaty-associated violations of the law of war. There are three definitions of a war crime, which could potentially apply: (1) a grave breach of the 1949 Geneva Conventions or of any protocol thereto to which U.S. is a party; (2) a violation of Articles 23, 25, 27, or 28 of the 1907 Hague Convention IV; and (3) a violation of Geneva Convention-Common Article 3. Notably absent from this statute is any clause which at face value could imply an applicability to a broader body of the customarily recognized laws of war. *See* 18 U.S.C. § 2441, (c) (Definitions).

[28] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002) [hereinafter MCM].

[29] 10 U.S. C. § 818 (2000).

3. Federal Executive Actions

Despite the lack of relevant federal jurisprudence or statutes, several declarative statements issued by the Executive Branch provide significant guidance to what concepts the U.S. government considers customary over the past thirty years with respect to conduct-of-hostilities issues. While these statements have no technical legal significance, they are noteworthy to the extent that they represent the *opinio juris* of the Commander-in-Chief of the Armed Forces concerning customary law of armed conflict obligations. Moreover, current military doctrine and practice incorporates a number of these acts and statements, further solidifying their standing as custom recognized by the United States.[30]

C. United States Doctrine Regarding the Customary Law of War

1. Background

The law of armed conflict is generally defined as the part of international humanitarian law that exists in convention or custom to safeguard innocent life, ameliorate suffering, and preserve basic human dignity during a state of armed conflict.[31] The law of armed conflict is further divided into two complimentary sets of laws; one governing the legitimacy of the use of force (*jus ad bellum*),[32] and another intended to regulate the means and methods of warfare[33] and to protect civilians and

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[30] For example, the U.S. Army amended *Field Manual (FM) 27-10* to reflect language from Article 51 of Protocol I one year before the opening for signature of the Additional Protocols. Although the United States has not elected to ratify Protocol I, this language remains operative in *FM 27-10*. U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, LAW OF WAR (18 July 1956) (C1, dated 15 July 1976) [hereinafter FM 27-10].

[31] Unlike the broader protections inherent in international humanitarian law (hereinafter IHL), the safeguards inherent in the law of armed conflict apply only during a recognized state of armed conflict. The protections of most other bodies of international humanitarian law are not dependent upon this requirement—for example, the protections and prohibitions found within the United Nations Convention Against Torture and other Cruel, Degrading or Inhumane Treatment or Punishment (1469 U.N.T.S. 85) apply at all times.

[32] Robert Korb, *Origin of the twin terms jus ad bellum/jus in bello*, 320 INT'L REV. RED CROSS 553-62 (1997).

[33] This body of law is generally referred to as the "law of the Hague" or the "Hague Regulations." *International Law Concerning the Conduct of Hostilities* 8, ICRC PUB. 0467/002 (Aug. 1997).

combatants rendered *hors de combat* (out of combat) (*jus in bello*).[34] Beyond this abstract consensus concerning the existence of conventional and customary practices and prohibitions, however, there is often a significant difference of opinion or practice among states concerning the scope and range of applicability of many such provisions, particularly those associated with customary law.

In large part, this is due to the recognition that customary law is considered binding upon the actions of all states that are parties to an armed conflict, without regard to whether that state is a historical party to the specific treaty or agreement proscribing such practices or conduct.[35] Further, compliance does not hinge on the concept of *jus ad bellum* and may not be set aside by a party based on the changing fortunes of war; rather, customary law of war applies regardless of any perceived military or strategic disadvantage incurred.[36] As such, acts or practices considered contrary to custom may not be lawfully employed by belligerents, regardless of how they may favorably impact specific war aim—even by a State or government that is the victim of aggression or on the brink of military defeat.[37] More pragmatically, the law of armed

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[34] This body of law encompasses the general protections inherent in the Geneva Conventions of 1949. *See Preliminary Remarks to The Geneva Conventions of 1949* 2, ICRC PUB. 0173/002 (Mar. 1995). *Hors de combat* meaning, "out of action and often seriously wounded" (from French, literally, "out of the fight"). MSN Encara, *Dictionary*, *at* http://encarta.msn.com/dictionary_1861618777/hors_de_combat.html.

[35] HOWARD S. LEVIE, THE CODE OF INTERNATIONAL ARMED CONFLICT, Introduction (1986).

[36] Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 615, para. 1927 (ICRC ed. 1987). The commentary states as follows:

> [I]t seems clear that the right of self-defense does not include the use of measures which would be contrary to international humanitarian law, even in a case where aggression has been established and recognized as such by the Security Council. The Geneva Conventions of 1949 and this Protocol must be applied in accordance with their Article 1 in all circumstances; the Preamble of the Protocol reaffirms that their application must be without any adverse distinction based on the nature or origin of the armed conflict or in the causes espoused by or attributed to the Parties of the conflict.

Id.; *see also* LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 15-19 (2d ed. 2000).

[37] In addressing this concept after World War II, one American military tribunal reflected the following:

conflict also reflects a post-World War II practice that achieved customary status: the international community can hold individuals, to include heads of state who commit violations of the law of war, criminally accountable for such transgressions.[38] Predictably, given the potentially grave repercussions that violations of customary law can have on a State and its leadership, declarative statements pertaining to custom are infrequent and tend to vary based upon a multitude of internal or external political, diplomatic, and security factors affecting a State at any given time.

2. Definition of the Law of War

An issue of primary significance is the definition of the law of war as recognized by the United States. The UCMJ, various DOD directives, and U.S. Army *Field Manual 27-10*, provide a framework for the current U.S. understanding of the law of war as defined in legal and military doctrine.

> It is an essence of war that one or the other side must lose and that experienced generals and statesmen knew this when they drafted the rules and customs of land warfare. In short, these rules and customs are designed specifically for all phases of war. They comprise the law for such emergency. To claim that they can be wantonly—and at the sole discretion of any one belligerent—disregarded when he considers his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely.

The Krupp Trial, 10 LRTWC 139 (1949), *as cited in* A.R. Thomas & James C. Duncan (eds.), *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, 73 NAVAL WAR COLL. 293 (1999).

[38] The International Military Tribunal at Nürenberg concluded that the absence of treaty provisions on punishment of breaches does not bar a finding of individual criminal responsibility. *See* THE TRIAL OF MAJOR WAR CRIMINALS: PROCEEDINGS OF THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NÜRENBERG GERMANY pt. 22, at 445-47, 467 (1950). An ICTY appeals chamber's jurisdictional decision further amplifies this rationale concerning the applicability of individual criminal responsibility for violations of the law of war in internal armed conflict. *See* Prosecutor v. Duško Tadic, No IT-94-1, paras. 128-129 (Oct. 2, 1995) (Decision on Defense Motion for Interlocutory Appeal on Jurisdiction).

a. Uniform Code of Military Justice

Article 18 of the UCMJ establishes jurisdiction for violations of the law of war to be prosecuted at general courts-martial.[39] While the UCMJ confers jurisdiction over this class of offenses, however, it neither defines the law of war nor specifically enumerates those offenses that qualify as violations.[40] The Manual for Courts-Martial is similarly devoid of any discussion on the definitional issue.[41]

b. U.S. DOD Directive 5100.77

United States DOD Directive (DOD Dir.) 5100.77 is the foundation for the DOD Law of War Program.[42] This directive outlines existing DOD policy as to the law of war obligations of the United States.[43] The directive defines the law of war as follows:

> Law of War: That part of international law that regulates the conduct of armed hostilities. It is often called the law of armed conflict. The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.[44]

By this definition, the DOD endorses the common view of the international community that the body of the law of armed conflict is comprised of two separate but related components: namely, treaty-based law and customary law.

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[39] 10 U.S.C. § 818 (2000) (stating that a general court-martial has the jurisdiction to "try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war").
[40] *See* 18 U.S.C. § 2441(c) (Definitions).
[41] *See* MCM, *supra* note 28, R.C.M. 201(f)(1)(B)(i)(a), 202(B), and app. 21, at 20-21 (R.C.M. 307(c)) (discussing the jurisdiction and offenses, however, the *MCM* does not provide definitions of specific offenses).
[42] U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (9 Dec. 1998).
[43] *Id.* para. 1.1.
[44] *Id.* para. 3.1.

c U.S. Army Field Manual 27-10*, Law of Land Warfare*

United States Army *FM 27-10* sets forth the U.S. Army's official understanding as to the customary and treaty law applicable to the conduct of warfare on land.[45] The first chapter of the manual details the sources of the law of war, explaining that the following two principle sources compose the law of war: lawmaking treaties or conventions, and custom. In affirming the legitimacy of customary law, *FM 27-10* notes:

> Although some of the law of war has not been incorporated in any treaty or convention to which the United States is a party, this body of unwritten or customary law is firmly established by the custom of nations and well defined by recognized authorities on international law.[46]

Commenting on the broad and varied origins of customary law, *FM 27-10* reflects that such custom "arises from the general consent of States, judicial decisions, diplomatic correspondence, writings of jurists and other documentary material concerning the practice of States."[47] Significantly, the U.S. Army asserts in this publication that its provisions have "evidentiary value" in establishing the custom and practice of the United States with respect to the law of war.[48]

Field Manual 27-10 is also clear as to the binding nature of the body of the customary law of war, providing,

> The unwritten or customary law of war is binding upon all nations. It will be strictly observed by United States forces, subject only to such exceptions

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[45] FM 27-10, *supra* note 30, ch. 1, para. 1.
[46] *Id.* para. 4b.
[47] *Id.* para. 6 (Custom).
[48] *Id.* para. 1, stating,

> This Manual is an official publication of the United States Army. However, those provisions of the Manual which are neither statutes not the text of treaties to which the United States is a party should not be considered binding upon courts and tribunals applying the law of war. However, such provisions are of evidentiary value insofar as they bear upon questions of custom and practice.

Id.

> as shall have been directed by competent authority by way of legitimate reprisals for illegal conduct of the enemy . . . . The customary law of war is part of the law of the United States and, insofar as it is not inconsistent with any treaty to which this country is a party or with a controlling executive or legislative act, is binding upon the United States, citizens of the United States, and other persons serving this country.[49]

Like *DOD Dir. 5100.77*, this Army doctrinal authority clarifies the law of armed conflict with respect to both its basis in convention and custom, and its binding nature. It does not further clarify the term "custom of nations," except to note that such unwritten law is well defined by authorities in international law.[50]

3. Ratified Treaty or Convention as a Basis for Customarily Recognized LOAC: The 1907 Hague Convention (IV) and the 1949 Geneva Conventions

It is well established that the basis for the customary law of armed conflict is in part on treaty and on convention that endures as a broader practice over time.[51] Moreover, the various state parties ultimately bound by such custom do not dispute this theoretical concept. The potential ramifications of customary law of armed conflict, however, on issues pertaining to a state's defense policy or security requirements can be quite broad. Thus, it is often difficult in the practical application sense to achieve a consensus on custom by the broader international community.

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[49] *Id.* para. 7c (Force of Customary Law).

[50] *Id.* para. 4b.

[51] *See* E. KWAKWA, THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSONAL AND MATERIAL FIELDS OF APPLICATION 29-42 (1992) (providing a functional and concise explanation of this subject), citing (among others) such noted commentators on international customary law as Theodor Meron, Professor of International Law at New York University and current President of the International Criminal Tribunal for the Former Yugoslavia and Rwanda; Antonio D'Amato, Professor of International Law at Northwestern University, and author of *International Law* (1987); and Arthur M. Weisburd, Professor of International Law at the University of North Carolina.

Such a consensus is further complicated by the existence of two different standards—one applying to international armed conflicts, and another for armed conflicts of an internal character. The separate standard for internal armed conflicts reflect customary views concerning issues of state sovereignty, non-interference in another states legitimate internal security affairs,[52] and the concern over perceptions of providing international legitimacy to purely internal violence or terrorism that would be considered criminal conduct under the domestic laws of the affected jurisdiction.[53]

Further complicating this issue is the increasingly broad challenge raised by human rights advocates and non-governmental organizations (NGOs) over the lower standard of protection available to civilians affected by non-international armed conflict. These human rights advocates and NGOs enjoy a growing role in the development of the law of armed conflict.[54] As these advocates and organizations are primarily engaged with humanitarian objectives, and operate with an agenda not influenced by traditional state-party concerns of defense, security, and legitimate war objectives, their interpretations of the customary law of armed conflict naturally tend to address the protection of non-combatants vice the rights of belligerent parties to conduct legitimate warfare.[55]

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[52] UN Charter art. 2(4), (7). *See also* Protocol II, *supra* note 14, art. 3, at 610.

[53] A number of nations who are not parties to Protocol I, including the United States, cite the provisions of Article 1, paragraph 4 as a key reason for their rejection of the treaty. *Id.* art. 1, para. 4. This paragraph, in part, extends the privileges normally afforded to state belligerents to individuals or organizations "fighting against colonial domination, alien occupation and against racist regimes in the exercise of their right of self-determination . . . ." *See Letter of Transmittal*, *supra* note 14.

[54] While development of the law of armed conflict remains the province of state parties, several NGOs are exerting a growing influence in the broader realm of IHL and its impact on law of armed conflict issues. These include such organizations as Medecins Sans Frontieres, Human Rights Watch, and Amnesty International. As a reflection of this growing influence, approximately 300 NGOs had observer status at the Rome Treaty preparatory conferences, and many of these actively sought to influence the development of the ICC Statute. *See* M. CHERIF BASSIOUNI, THE STATUTE OF THE ICC, A DOCUMENTARY HISTORY 25-26, 108-109 (1998).

[55] For example, by mid-1998, a growing body of expert opinion asserted that the Fourth Geneva Convention could have a universal applicability for the protection of civilian populations in armed conflicts, to include conflicts of a non-international character and those not involving occupied territories. *See* Chairman's Report, Expert Meeting on the Fourth Geneva Convention, Oct. 27-29, 1998, *as reprinted in* MARCO SASSOLI & ANTOINE A. BOUVIER, HOW DOES LAW PROTECT IN WAR? 861-65 (ICRC 1999).

Still, in spite of often-competing interests among states, there have been occasions since the end of World War II where the international community achieved a considerable degree of consensus on core customary principles, to which nations must adhere, at least with respect to international armed conflict. One of the more significant and recent instances occurred on 22 February 1993, when the U.N. Security Council (UNSC) established the ICTY.[56] As part of the framework of the Tribunal's statute, the UN Secretary General outlined the baseline of customary law of war, recognized as of 1991, and he reaffirmed that individual criminal charges could be raised against individuals who committed serious violations of these customs.[57] As stated in his report to the Security Council:

> The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodies in: the Geneva Conventions of 12 August 1949 for the protection of War Victims; . . . the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; . . . the Convention on the Prevention and Punishment of the Crime of Genocide of 09 December 1948; . . . and the Charter of the International Military Tribunal of 08 August 1945.[58]

Approved and adopted by the UNSC as Resolution 827 (25 May 1993), this resolution provided an authoritative definition with respect to both acknowledged custom and individual criminal liability for violations of the law of armed conflict.[59]

Given the United States' status as a permanent member of the Security Council, as well as its significant role in developing UNSC Resolutions 808 and 827, the adoption of this resolution arguably reflects the view of the United States government on the customary law of armed

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[56] U.N. SCOR 808, 3175th mtg., para. 1, S/RES/808 (1993).

[57] *See Report of the Secretary-General Pursuant to Paragraph 2 of United Nations Security Council Resolution 808 (1993)*, adopted on February 22, 1993 (S/25704) (May 3, 1993) [hereinafter *Report of the Secretary-General Pursuant to Paragraph 2 of United Nations Security Council Resolution 808 (1993)*].

[58] *Id.* para. 35.

[59] U.N. SCOR 827, 3217th mtg., S/RES/827 (1993).

conflict.[60] Beyond this declaratory basis, the United States moved to criminalize violations of certain articles of the 1907 Hague Conventions, the 1949 Geneva Conventions, and the 1949 Genocide Convention under federal statutes.[61]

4. Non-ratified Treaty or Convention as a Basis for Customarily Recognized LOAC: 1977 Protocol I to the 1949 Geneva Conventions

Beyond this baseline, the customary status of other relevant instruments is less clear. This is particularly true with respect to Protocol I, to which the United States is not a state party. Despite some of the more controversial innovations inherent in this treaty,[62] however, over 150 states have now ratified it.[63] Further, the United States and others now recognize much of Protocol I—particularly those Articles pertaining to protection of the civilian population from the conduct of hostilities—as a codification of established customary law principles pertaining to international armed conflict.[64]

Although the United States has not ratified Protocol I and thus is not a state party, it has long recognized a number of Protocol I provisions as customary.[65] A public history developed over the past twenty-five years establishes that the U.S. considers a number of specific provisions of

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[60] For instance, on 17 July 1995, the U.S. government filed a submission before the ICTY in the case of the *Prosecutor v. Duško Tadic*, offering its views on the Statute of the Tribunal on the basis of "its special interest and knowledge as a Permanent Member of the Security Council and its substantial involvement in the adoption of the Statute of the Tribunal." *See* Prosecutor v. Duško Tadic, 94-1-T, at D 4369 (17 July 1995) (containing submission of the Government of the United States of America Concerning Certain Arguments made by Counsel for the Accused in the Case of *Prosecutor v. Duško Tadic* (17 July 1995)).

[61] 18 U.S.C. § 2441 (War Crimes (as amended 1997)); *id.* §§ 1091-93 (1994) (Genocide).

[62] ROBERTS & GUELFF (EDS.), DOCUMENTS ON THE LAWS OF WAR 387-89 (2d ed. rev. 1995).

[63] At the time of writing, 156 States were parties to Protocol I. *See* International Committee for the Red Cross IHL treaties, *available at* http://www.ICRC.org/ihl.nsf (last visited Apr. 26, 2004).

[64] Prosecutor v. Pavle Strugar, Miodrag Jokic, No. IT-01-42, para. 17-19 (Nov. 22, 2002) (Decision on Interlocutory Appeal, ICTY Appeals Chamber). *See* discussion *infra* Part II.

[65] Michael J. Matheson, Remarks, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, *in* 2 AM. UNIV. J. INT'L L. & POL'Y 415 (Fall 1987).

Protocol I to reflect principles of the customary law or war, as a matter of both policy and doctrinal practice.[66] These select provisions include several specific Protocol I articles and general principles related to the protections of the civilian population from the conduct of hostilities.[67] With regard to U.S. doctrinal practice, the U.S. Army incorporated a number of provisions of Protocol I into *FM 27-10* in 1976, and they remain operative, despite U.S. non-ascension to the protocol.[68] Select DOD public reports to Congress noting the customary recognition and practice of these principles by U.S. military forces further address a number of these provisions.

This historical record, examined further below, is of significant value with respect to the referenced MCI No. 2 offenses of "attacking civilians" and "attacking civilian objects," for two reasons. The first deals with the treaty-negotiation process for the Rome Statute of the ICC. Although not a party to this treaty, the United States was significantly involved in the development of the statute.[69] As noted previously, the MCI No. 2 offenses are virtually identical to the offenses enumerated in Article 8 of the Rome Statute.

Second, ICTY jurisprudence relies heavily on these select articles of Protocol I as a "modern reference or re-formulation" to established customary law principles concerning the protection of a civilian population during the conduct of hostilities.[70] As both the ICTY and the proposed U.S. military commissions rely on the customary origins of these offenses, any acknowledgement by the United States of the customary status of the underlying Protocol I Articles is a useful predicate to applying ICTY jurisprudence before a military commission.

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[66] *Id.*

[67] Protocol I, *supra* note 14, at. 48-60.

[68] *See generally* FM 27-10, *supra* note 30.

[69] OTTO TRIFFTERER (ED.), COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT-OBSERVERS' NOTES, ARTICLE BY ARTICLE 186-7 (Nomos, Baden-Baden 1999) (comments by William J. Fenrick). *See also* KNUT DORMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, SOURCES AND COMMENTARY 132-3 (Cambridge Univ. Press 2002).

[70] Prosecutor v. Pavle Strugar, Miodrag Jokic No. IT-01-42-PT (June 7, 2002) (ICTY Trial Chamber Decision on Defense Preliminary Motion Challenging Jurisdiction) (discussed in detail in pt. 2).

5. Declarative Statements Concerning the Conduct-of-Hostilities Articles of Protocol

The U.S. government's recognition of customary status of relevant portions of Protocol I first manifested itself in 1976, one year before the opening of the protocols for signature. In this instance, the U.S. Army revised the text of the 1958 *FM 27-10* to incorporate language from Article 51 of Protocol I. The revised manual stated, "[c]ustomary international law prohibits the launching of attacks (including bombardment) against either the civilian population as such or individual civilians as such."[71] This language derived directly from Article 51(2).[72] The Army also updated *FM 27-10* to reflect, in part, the principles of distinction and proportionality in the engagement of military objects, derived from Article 51(5) b.[73] United States Air Force *Pamphlet 110-31* makes similar restatements of Protocol I Article 51(2) and (5).[74]

> An internal DOD memorandum dated 9 May 1986, provides further clarification as to the official understanding of the United States regarding the customary status of various provisions of Protocols I and II during that time. In pertinent part, this memorandum—signed by several high-ranking DOD officials including W. Hays Parks[75] and then-Lieutenant Commander Michael F. Lohr[76]—affirms the view of the United States that Articles 51(2) and 52(1), (2) (except for the reference to reprisals), and (4), of Protocol I; constitute customary international law.[77]
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> Over a decade after the opening of the Additional Protocols for signature, the President of the United States definitively determined

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[71] FM 27-10, *supra* note 30 (reflecting the specific change in question related to para. 40c).

[72] *See* Protocol I, *supra* note 14, art. 51 (2).

[73] FM 27-10, *supra* note 30 (reflecting the specific change in question related to para. 41).

[74] U.S. AIR FORCE, PAM. 110-31, INTERNATIONAL LAW ch. 14 (19 Nov. 1976).

[75] W Hays Parks is currently the Associate Deputy General Counsel, International Affairs Office of the General Counsel, Department of Defense, *see* Convention on Certain Conventional Weapons, *Statement on Explosive Remnants of War* (Mar. 10, 2003), *at* http://www.ccwtreaty.com/031003Hayes.htm.

[76] Currently Rear Admiral and the Judge Advocate General of the Navy. United States Navy, *Judge Advocate General's Corps*, *at* http://www.jag.navy.mil.

[77] Memorandum, Department of Defense (unclassified), subject: 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications (9 May 1986).

> that notwithstanding the signature by the United States in 1977, ratification of Protocol I in its entirety was not in the U.S. national interest.[78] The executive branch, however, explicitly recognized that despite the decision not to forward Protocol I for Senate ratification, the international community already established a number of provisions of that protocol as principles of the customary law of armed conflict. Specifically, the December 1986 Letter of Submittal from the U.S. State Department stated, "We recognize that certain provisions of Protocol I reflect customary international law, and others appear to be positive new developments."[79] Similarly, the Letter of Transmittal from then-President Ronald W. Reagan in January of 1987, commended portions of Protocol I as "sound" and "meritorious."[80] These letters further pledged that the U.S. government would, in conjunction with its allies, develop appropriate methods to incorporate the positive provisions into the rules that govern "our military operation and as customary international law."[81]

In 1987, senior officials of the U.S. State Department addressed the Sixth Annual American Red Cross–Washington College of Law Conference on International Humanitarian Law detailed the United States' position on the existing state of customary law.[82] With respect to Articles 51 and 52 of Protocol I, the Deputy Legal Advisor of the State Department noted:

> We support the principle that the civilian population as such, as well as individual citizens, not be the object of acts or threats of violence, the primary purpose of which is to spread terror among them, and that attacks not be carried out that would result in collateral civilian casualties disproportionate to the expected military advantage. These fundamental principles can be found in Article 51.
>
> We also support the principle that the civilian population not be used to shield military objectives or operations

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[78] *See* Letter of Submittal, U.S. Department of State, to The President (Dec. 13, 1986) [hereinafter DOS Letter of Submittal]; *see also Letter of Transmittal*, *supra* note 14.
[79] DOS Letter of Submittal, *supra* note 78.
[80] *Letter of Transmittal*, *supra* note 14.
[81] *Id*.
[82] Matheson, *supra* note 65, at 426.

> from attack, and that immunity may not be extended to civilians who are taking part in hostilities. This corresponds to provisions in Articles 51 and 52 of Protocol I. On the other hand, we do not support the prohibition on reprisals in article 51 and subsequent articles . . . and do not consider it a part of customary law.[83]

Five years later, in April 1992, the U.S. DOD reported to Congress on a number of legal issues related to the U.S.-led military operations to liberate Kuwait from Iraqi occupation. In this report, the DOD clarified the U.S. position on the customary status of select articles of Protocol I. The report noted that Articles 48 and 49 of Protocol I were "generally regarded as a customary codification of the practice of nations, and therefore binding on all".[84] It further acknowledged the obligation of coalition forces to "exercise reasonable precautions to minimize collateral injury to the civilian population or damage to civilian objects," despite actions on the part of Iraq to use civilians to shield military objects.[85] Finally, the DOD noted its view that the language of Protocol I Article 52 (3) did not constitute a codification of the customary practice of nations.[86]

In 1999, the U.S. Senate considered the status of customary law of armed conflict concerning the general protection of civilians from the conduct of hostilities, and addressed specific provisions of Article 51 of Protocol I. As part of the Senate ratification of Amended Protocol II of the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons the Senate explored, which may be

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[83] *Id.*

[84] *See* U.S. DEPARTMENT OF DEFENSE, CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS 614 (Apr. 1992) (noting that with respect to Article 49, the DOD's use of the English word "attacks" as reflecting the obligations of both the attacker and defender, as consistent with the other official languages of the Protocol I) [hereinafter DOD REPORT, Apr. 1992].

[85] *Id.* at 614-15.

[86] *Id.* at 616. Protocol I, Art. 52(3), provides that "in case of doubt as to whether or not an object which is normally dedicated to civilian purposes . . . is being used a make an effective contribution to military action, it shall be presumed to not be so used." Additional Protocol I, *supra* note 14, art. 52(3). The DOD argued this shifted the burden from the party with possession or control of the facility, and had the ability to identify it as non-military in nature, to the non-possessing party, which may not have a detailed picture as to the use, or presumed use of the structure in question. *See* DOD REPORT, Apr. 1992, *supra* note 84, at 616.

deemed Excessively Injurious or to have Indiscriminate Effects (CCW Treaty).[87] The analysis of Amended Protocol II (which accompanies both the committee report and the ratification resolution) addresses the customary law of armed conflict governing the protection of civilians in two specific instances, both pertaining to the use of mines, booby-traps and other devices. Referencing Paragraph 7 of Article 3, the report and resolution state as follows:

> Paragraph 7 codifies within [the CCW Treaty] Protocol II a well-established customary principle of the law of war prohibiting the targeting of the civilian population as such, or individual civilians or civilian objects. It also prohibits the use of such weapons [mines, booby traps and other devices] in reprisals against civilians.[88]

Further, with respect to the principle of distinguishing between civilian persons or objects and legitimate military objectives in an attack, the report and resolution note,

> Paragraph 9 [of Article 3] provides that several clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects are not to be treated as a single military objective. This provision is derived from Article 51 (5) (a) of Additional Protocol I to the 1949 Geneva Conventions. However, Article 51 (5)(a) is limited in its application to attacks by bombardment, prohibiting the indiscriminate shelling of as entire city, town or village on the basis of the presence of several distinct military objectives. It states, when so limited, a principle that the United States supports and regards as customary international law.[89]

The U.S. Senate adopted this resolution by unanimous consent, formally ratifying Protocol II of the CCW Treaty on 24 May 1999.[90]

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[87] S. EXEC. REP. NO. 106-2 (to Accompany Treaty Doc. 105-1(A) (May 13, 1999)); SENATE TREATY DOC. 105-1A (adopted on 20 May 1999) (ratified on May 24, 1999) [hereinafter SENATE TREATY DOC. 105-1A].

[88] S. EXEC. REP. NO. 106-2, at 47; SENATE TREATY DOC. 105-1A, *supra* note 87, at 28.

[89] S. EXEC. REP. NO. 106-2, at 43; SENATE TREATY DOC. 105-1A, *supra* note 87, at 29.

[90] SENATE TREATY DOC. 105-1A, *supra* note 87.

With respect to more recent U.S. military operations in the Federal Republic of Yugoslavia (*Operation Allied Force* in 1999), the public DOD after-action report to Congress did not identify any specific issues related to customary law governing conduct of hostilities.[91]

This record of acknowledgement by various agencies of the executive branch that relevant provisions of Articles 48, 49, 51, and 52 of Protocol I constitute customary law provides a framework to support the use of these principles as a customary basis for the offenses of attacking civilians and civilian objects. The Senate similarly supports acknowledging the general customary prohibition on the targeting of civilians or civilian objects as well as the specific customary status of Article 51(5)(a) of Protocol I.[92]

6. International Judicial Tribunals

Beyond the realm of domestic law, policy statements, and doctrine, a number of international courts and tribunals have a mandate to examine war crimes-related issues and offenses. The most active among these institutions is the ICTY, established under Chapter VII of the UN Charter by the UN Security Council in 1993.[93] The resolution created this institution and declared them a component body to prosecute individuals for serious violations of international humanitarian law in the territory of the former Yugoslavia, and to try a variety of criminal offenses based on violations of either conventional law or customary international law.[94]

Although the Tribunal's mandate is geographically limited, the scope of law examined during the course of proceedings is not.[95] Trial and

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[91] U.S. DEPARTMENT OF DEFENSE, REPORT TO CONGRESS, KOSOVO/OPERATION ALLIED FORCE AFTER ACTION REPORT (U) (31 Jan. 2001).

[92] The U.S. government persistently objects to the customary status of the Article 51 (6) prohibition on reprisals against civilians, *see supra* note 65, at 426, and the Article 52 (3) prohibition on attacks against normally dedicated civilian objects if their effective contribution to military action is in doubt, *see supra* note 84. Neither of these declared reservations should influence the MCI No. 2 offenses of "attacking civilians or civilian objects." MCI No. 2, *supra* note 7.

[93] U.N. SCOR 827, 327th mtg., S/RES/827 (1993).

[94] *See Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808*, *supra* note 57, paras. 32-33.

[95] *See Statute of the International Criminal Tribunal for the Former Yugoslavia*, adopted by the UN Security Council on 25 May 1993, 19 May 1993), *available at* http://www.un.org/icty/legaldoc/index.htm) [*Statute of the International Criminal*

appeals chambers regularly explore a variety of questions on the existing customary law of armed conflict, including offenses related to the conduct of hostilities.[96] Before judicial proceedings, the prosecutor frequently reviews customary law of armed conflict norms as a component of the investigative process. For instance, in June 2000, the Prosecutor published a review of select NATO military actions during the 1999 bombing campaign against the Socialist Federal Republic of Yugoslavia (SFRY), following a series of high-visibility incidents resulting in collateral damage to civilians or civilian objects.[97] Given the extensive scope of cases and review undertaken by the ICTY, trial and

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Tribunal for the Former Yugoslavia]. In accordance with Article 8 of the Statute of the ICTY, the ICTY has temporal and territorial jurisdiction over crimes committed in the territory of the former Socialist Federal Republic of Yugoslavia, inclusive of land surface, airspace and territorial waters as of 01 January 1991. *Id*. art. 8. This jurisdiction encompasses offenses that occurred during periods of armed conflict with respect to the succession of the Republic of Slovenia from the Socialist Federal Republic of Yugoslavia (1991) [hereinafter SFRY]; the succession of Republic of Croatia from the SFRY (1991-92); the succession of the Republic of Bosnia and Herzegovina from the SFRY (1992); the resulting conflict in Bosnia thereafter (1992-95); and the liberation of occupied Croatian territory in 1995 (held by the self-declared Autonomous Republika Srpska Krajina). Additionally, subsequent to the Dayton Accords (Nov 1995), the ICTY has exercised jurisdiction over offenses related to armed conflict between the Federal Republic of Yugoslavia (FRY) and Kosovo Liberation Army (KLA) in the Republic of Serbia (1997-1999); the NATO intervention against the FRY (Serbia-Montenegro 1999); and the Macedonian government and Albanian separatist clashes (Macedonia 2000-2001).

[96] *See* Prosecutor v. Zoran Kupreskic, No. IT-95-16-T, paras. 537-42 (Jan. 14, 2000) (ICTY Judgment) (detailing the abstract process by which an ICTY Trial Chamber determines "existing" law).

[97] A 13 May 1999 speech by Justice Louise Arbour (then Prosecutor of the ICTY) noted that by becoming "parties to the conflict" on 24 March 1999, nineteen European and North American countries (read NATO) have "voluntarily submitted themselves to the jurisdiction of a pre-existing International Tribunal, whose mandate applies to the theatre of their chosen military operations." *See* Press Release, ICTY, JL/PIU/401E (May 13, 1999), *available at* http://www.un.org/icty. With respect to the issue of jurisdiction by both the ICTY and the International Court of Justice, NATO spokesperson Jamie Shea addressed the issue directly, noting, NATO "obviously recognizes the jurisdiction of these tribunals, but I can assure you, when these tribunals look at Yugoslavia I think they will find themselves fully occupied with the far more obvious breaches of international law that have been committed by Belgrade than any hypothetical breaches that may have occurred by the NATO countries." *See* Press Conference, NATO Headquarters, NATO's Role in Kosovo (May 17, 1999), *available at* http://www.nato.int/kosovo/press/p990517b.htm. *See also Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* (June 8, 2000), *available at* http://www.un.org/icty/pressreal/nato061300.htm. It does not appear that the issue of ICTY jurisdiction over U.S. military forces was ever publicly refuted, or even addressed, by the DOD or the Department of State.

appellate decisions treating customary law issues generally reflect a broad spectrum of understanding from across the international community. As such, ICTY jurisprudence can serve as a substantial tool in defining what constitutes "existing law" with regard to the law of armed conflict.[98]

The ICTY and the U.S. military commissions are analogous in their mandates to rely, to varying degrees, on the customary origins of the law of armed conflict as a basis for the offenses they are empowered to adjudicate. The ICTY statute, enacted by the U.N. Security Council, specifically provides for the prosecution of offenses under the laws *and customs* of war. Crimes prosecuted by U.S. military commissions pursuant to the 13 November 2001 Military Order will depend almost entirely on the customary law of armed conflict.[99] Due to this similarity, relevant findings by the ICTY as to the scope of customary law will be

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[98] For example, Professor Leslie C. Green—a noted authority on the issue of command responsibility under the law of armed conflict—recently commented as follows with respect to the UN Tribunals for Yugoslavia and Rwanda:

> [I]t is necessary to bear in mind that the two Tribunals are *ad hoc*, intended to deal with specific conflicts. When they have completed the series of trials associated therewith, they become *functus officio* and, strictly speaking, their decisions will only have relevance to the conflicts and trials which they have been seized. Nevertheless, to the extent that they have analyzed general principles relating to command responsibility and have created a *jurisprudence constante*, the overall impact of the *rationes decidendi* should serve as a guide for future tribunals facing similar problems.

Leslie C. Green, Lecture, The Judge Advocate General's School, U.S. Army (6 Mar. 2002), *Fifteenth Waldemar A. Solf Lecture in International Law, Superior Orders and Command Responsibility* (6 Mar. 2002), *in* 175 MIL. L. REV. 309, 380 (Mar. 2003).

In practice, at least one federal appeals court has come to the same conclusion, again with respect to the issue of command responsibility. In ruling on "the allocation of the burden of proof in a civil action involving command responsibility doctrine" raised under the TVPA, the 11th Circuit Court of Appeals cited a number of ICTY trial and appeals judgments referencing the doctrine of command responsibility, specifically the three part test for applicability, that being: (1) the existence of a superior-subordinate relationship between the commander and the perpetrator of the crime; (2) that the commander knew or should have known, owing to the circumstances at the time, that his subordinates had committed, were committing, or planned to commit acts violative of the law of war; and (3) that the commander failed to prevent the commission of the crimes, or failed to punish the subordinates after the commission of the crimes. *See* Ford v. Garcia, 289 F.3d 1283, 1290-91 (2002).

[99] DOD MCI No. 2, *supra* note 7.

helpful in supporting the U.S. government's assertion that MCI No. 2 offenses are "declarative of existing law."[100]

IV. Part 2: ICTY Jurisprudence on Conduct-of-Hostilities Offenses

During the past several years, the ICTY has adjudicated a number of cases charging offenses against the customary law governing conduct of hostilities; three have come to judgment, and one of those three has been completely adjudicated through the appeals process.[101] A number of other related proceedings are currently before the Tribunal.[102]. Simultaneously, the body of ICTY jurisprudence developed relevant to the customary status of portions of Protocol I.[103] This ICTY precedent on the mechanics of charging offenses related to the conduct of hostilities and the correlated jurisprudence regarding the customary status of relevant principles of Protocol I, provides an important customary foundation for related MCI No. 2 charges before a U.S. military commission.

In *Prosecutor v. Blaškic* and *Prosecutor v. Kordic and Cerkez*, the prosecutor charged the multiple accused with perpetrating "unlawful attacks against civilians, unlawful attacks against civilian objects and

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[100] *Id.*

[101] Prosecutor v. Tihomir Blaškic, No. IT-95-14 (Mar. 3, 2000) (ICTY Trial Judgment), (July 29, 2004) (ICTY Appeals Chamber Judgment); Prosecutor v. Dario Kordic & Mario Cerkez, No. IT-95-14/2-T (Feb. 26, 2001) (ICTY Trial Judgment) (appeal pending); and Prosecutor v. Stanislav Galic, No. IT-98-29-T, (Dec. 5, 2003) (ICTY Trial Judgment).

[102] With respect to the Yugoslav National Army shelling of civilians in the town of Dubrovnik in 1991, *see* the Prosecutor v. Pavel Strugar, No. IT-01-42, paras. 14-25 (Dec. 10, 2003) (ICTY Third Amended Indictment). In August 2003, co-indictee Miodrag Jokic agreed to plead guilty to Counts 1-6 of the second amended indictment. *See* Prosecutor v. Miodrag Jokic, No IT-01-42/1S (Oct. 17, 2003) (ICTY Second Amended Indictment). Counts Three and Five pertain to unlawful attacks on civilians. The court sentenced Jokic to seven years imprisonment. *See* Prosecutor v. Miodrag Jokic, No. IT-01-42/1S, para. 116 (Mar. 18, 2004) (Sentencing Judgment). Former FRY President Slobodan Milosevic is also charged with liability for these offenses. *See* Prosecutor v. Slobodan Milosevic, No IT-02-54, paras. 73-76 (First Amended Indictment, Croatia) (Counts 21-27 pertain to unlawful attacks on civilians).

[103] *See generally* Judicial Supplement, *The Law Review of the Tribunal*, *available at* http://www.un.org/icty/publications/index.htm (last visited 11 Aug. 2004). Specifics pertaining to Protocol I are discussed *infra* Part V.

wanton destruction not justified by military necessity."[104] These cases represent the initial efforts of the ICTY to apply the 1907 Hague Regulations and the 1949 Geneva Conventions judicially as customary law pertaining to criminal liability for making civilians the object of military attacks. Trial proceedings began in the *Blaškic* case in early 1997, with a judgment rendered in March of 2000.[105] In the cases of *Kordzic and Cerkez*, trial proceedings began in April 1999, with a judgment rendered in February 2001.[106]

As proceedings in these early cases were underway, both the defense and prosecution argued a number of issues before the respective trial chambers concerning the customary nature of various provisions of Protocols I and II.[107] These jurisdictional proceedings arose from legal challenges by a number of accused regarding the construction of charges and elements based on the language of the protocols.[108] One challenge also raised conflict-classification issues questioning the applicability of the customary provisions of 1907 Hague Conventions IV and GC IV to an armed conflict that the international community might not legally adjudicate as international in nature.[109]

These challenges before various trial and appellate chambers resulted in a body of ICTY case law pertaining to the construction of charges and elements based on the language of Protocol I. These rulings specifically

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[104] Prosecutor v. Tihomir Blaškic, No. IT-95-14 (Nov. 10, 1995) (Indictment); Prosecutor v. Dario Kordic and Mario Cerkez, No. IT-95-14 (Nov. 10, 1995) (Indictment).

[105] During the course of the trial, proceedings against the accused were suspended for an eleven-month period while both the prosecution and defense engaged in legal efforts to compel the government of Croatia to release state documents to both parties. These efforts were ultimately unsuccessful. *See* Prosecutor v. Tihomir Blaškic, No. IT-95-14 (Mar. 3, 2000) (ICTY Trial Judgment), para. 42-47.

[106] Prosecutor v. Dario Kordic & Mario Cerkez, No. IT-95-14/2-T (Feb. 26, 2001) (ICTY Trial Judgment).

[107] Prosecutor v. Dario Kordic & Mario Cerkez, No. IT-95-14/2-PT, para. 30 (Mar. 2, 1999) (ICTY Decision on the Joint Defense Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3). *See* discussion *infra* Part IV, Section C(1).

[108] *Blaškic*, No. IT-95-14, para. 167 (ICTY Trial Judgment). *See*discussion *infra* Part IV.A(1)(a).

[109] As previously noted, the ICTY examines potential offenses that occurred during a number of different periods of armed conflict in the former Yugoslavia since 1991. Offenses related to a number of these conflicts have to be examined in the context of either an internal or international armed conflict. *See supra* note 95 (listing the various conflicts under the jurisdiction of the ICTY).

cite and endorse the customarily recognized status of the principles enumerated in Articles 48 through 52 of the Protocol.[110] As this jurisprudence specifically supports the customary basis of the "attacking civilians" and "attacking civilian objects" charges enumerated in MCI No. 2, this article examines these, and other jurisdictional rulings in detail.

Finally, based on these same rulings, the ICTY Prosecutor revised the specific offenses of "unlawful attacks on civilians [or] civilian objects" to directly reflect the language of the 1977 Additional Protocols, and to eliminate references to GC IV.[111] These refined charges and elements reflected in the cases of *Prosecutor v. Galic*[112] and *Prosecutor v. Strugar*,[113] are quite similar to the offenses of "attacking civilians" and "attacking civilian objects" enumerated in MCI No 2.[114] Section IV, Part B, of this article discusses the most recent of the unlawful-attack cases.

A. Origin and Evolution of ICTY Offenses of "Unlawfully Attacking Civilians" and "Unlawfully Attacking Civilian Objects"

Article 3 of the Statute of the Tribunal establishes the competence and jurisdiction of the ICTY to prosecute individuals for violations of the laws and customs of war. The jurisdictional requirements include, but are not limited to, the following:

> (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

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[110] *See generally supra* note 103; *see also* Prosecutor v. Pavle Strugar, Miodrag Jokic, No. IT-01-42-PT, paras.17-22 (June 7, 2002) (ICTY Trial Chamber Decision on Defense Preliminary Motion Challenging Jurisdiction); and *see* Prosecutor v. Pavle Strugar, Miodrag Jokic, No. IT-01-42-PT (Nov. 22, 2002) (ICTY Appeals Chamber Decision on Interlocutory Appeal). *See* discussion *infra* Part IV.C(3).

[111] *See* Prosecutor v. Stanislav Galic, No. IT-98-29 (Mar. 26, 1999) (ICTY Indictment, as amended), and Prosecutor v. Pavel Strugar, No. IT-01-42, paras. 14-25 (Dec. 10, 2003) (ICTY Third Amended Indictment). *See* discussion *infra* Part IV.B.

[112] Prosecutor v. Stanislav Galic, No. IT-98-29 (Oct. 23, 2001) (Pretrial Brief filed by the Prosecution pursuant to Rule 65 *ter*). *See* discussion *infra* Part IV.B, analyzing the adjudication of these charges and elements from the *Galic* Judgment.

[113] Identical charges and elements were offered for consideration to the Trial Chamber in the case of *Prosecutor v. Pavel Strugar*, No. IT-01-42, paras. 14-25 (10 Dec. 2003) (ICTY Third Amended Indictment).

[114] MCI No. 2, *supra* note 7.

> (b) wanton destruction of cities, towns, villages or devastation not justified by military necessity;
> (c) attack, or bombardment by whatever means, of undefended towns, villages, dwellings or buildings;
> (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
> (e) plunder of public or private property.[115]

These statutory provisions were designed to reflect the general protections found in the 1907 Hague Convention IV, as well as select protections encompassed in the 1949 Geneva Conventions but not specifically enumerated as grave breaches.[116] Specifically, they incorporate the protections set forth in Article 3 common to the 1949 Geneva Conventions (Common Article 3) and in GC IV. Article 3 of the ICTY statute does not incorporate language from the 1977 Additional Protocols.[117]

At the same time, violations of these provisions can also be adjudicated under Article 5 of the ICTY Statute, pertaining to crimes against humanity.[118] Under this scenario, the above Article 3 conditions must be in place, as well as evidence that the violations took place in a "widespread or systematic" manner against the relevant population.[119]

1. Judgment Analysis: Prosecutor v. Tihomir Blaškic *and* Prosecutor v. Dario Kordic and Mario Cerkez

The first ICTY judgments adjudicating charges of "unlawful attack on civilians" and "attacks on civilian objects" developed in the cases of

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[115] *Statute of the International Criminal Tribunal for the Former Yugoslavia*, *supra* note 95, art. 3.
[116] Grave breaches of the 1949 Geneva Conventions are specifically enumerated as charges under ICTY Statute Article 2. *Id.*
[117] *See Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808*, *supra* note 57, paras. 33-35.
[118] *Statute of the International Criminal Tribunal for the Former Yugoslavia*, *supra* note 95, art. 5.
[119] *See* Prosecutor v. Tadic, No. IT-94, para. 248 (July 15, 1999) (Appeals Chamber Judgement) para. 248; Prosecutor v. Kunarac No. IT-96-23, para. 85 (June 12, 2002) (Appeals Chamber Judgment).

Prosecutor v. Tihomir Blaškic[120] and *Prosecutor v. Dario Kordic and Mario Cerkez*.[121] All three accused were high-ranking Bosnian-Croat military or civilian commanders in central Bosnia, operating as part of the self-declared Croatian Defense Council (HVO).[122] The prosecutor charged these accused with ordering and participating in a series of military attacks against undefended Bosnian-Muslim villages in central Bosnia during late 1992 and early 1993.[123] These attacks were alleged to be part of a larger campaign designed to drive the Bosnian-Muslim inhabitants from their homes and villages in order to "ethnically cleanse" various regions of central Bosnia then falling under HVO control, thus categorizing them as a crime against humanity.[124] The prosecution charged each accused with having "planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of unlawful attacks on civilians and civilian objects and wanton destruction not justified by military necessity."[125] This conjunctive charge served to address violations relating both to the technical conduct of hostilities and to the residual responsibilities of an occupying power to protect the civilian population within the context of an international armed conflict.

Given the commonality of the alleged crimes and charges in *Blaškic* and *Kordic*, the *Kordic* Trial Chamber adopted most of the legal findings with respect to the law of armed conflict originating in the earlier-decided *Blaškic* judgment.[126] Thus, the analysis in this article focuses primarily on *Blaškic*, and notes the *Kordic* judgment only with respect to the finding concerning the offense.

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[120] Prosecutor v. Tihomir Blaškic, No. IT-95-14 (Mar. 3, 2000) (ICTY Trial Judgment).

[121] Prosecutor v. Dario Kordic & Mario Cerkez, No. IT-95-14/2-T (Feb. 26, 2001) (ICTY Trial Judgment) (appeal pending).

[122] *Blaškic*, No. IT-95-14 (ICTY Trial Judgment); *Kordic & Cerkez*, No. IT-95-14/2-T (ICTY Trial Judgment) (appeal pending); *see also* discussion *infra* Part III, providing historical context for these cases.

[123] *Id.*

[124] *Id.*

[125] Prosecutor v. Tihomir Blaškic, No. IT-95-14 (Nov. 10, 1995) (Indictment).

[126] *See generally* Part I, General Requirements for Application of Articles 2, 3, and 5 of the Statute, where the *Kordic* Trial Chamber takes detailed note of the prior *Blaskic* decision. *See generally Kordic & Cerkez*, No. IT-95-14/2-T (ICTY Trial Judgment) (appeal pending).

a. Prosecutor v. Tihmor Blaškic

The *Blaškic* Trial Chamber applied a two-step process in examining the groundbreaking charges and the purported legal bases for these charges. The first step defined whether the criminal charges forwarded by the Prosecutor were tenable under the customarily recognized LOAC, and thus under the jurisdiction of the ICTY Statute Article 3 and 5.[127] The second step defined the legal elements of the charges based on these laws.[128]

In addressing the first step, the *Blaškic* Trial Chamber examined the broad customary and treaty background of the LOAC with respect to the prohibitions against attacking civilians and civilian objects. The Trial Chamber found "beyond doubt" that both the 1907 Hague Regulations (IV) and the 1949 Geneva Conventions constituted customary international law.[129]

After affirming the customary nature of these treaty instruments in the context of an international armed conflict, the *Blaškic* Trial Chamber proceeded to define how jurisdiction and potential criminal liability can be formulated under ICTY Statute Article 5 (Violations of the Laws and Customs of War), pertaining to both international armed conflict, and also internal armed conflict. This analysis first necessitated an examination of the appropriate balance between the minimum protections offered to civilians under customary law and the right of belligerents to conduct legitimate warfare.[130] The Trial Chamber then

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[127] *Blaškic*, No. IT-95-14, para. 160-173 (ICTY Trial Judgment).

[128] *Id.* paras. 179-187.

[129] *Id.* para. 164. This finding is based upon the *Report of the Secretary-General pursuant to Paragraph 2 of the Security Council Resolution 808*, which formed the basis for U.N. Security Council Resolution 827 establishing the ICTY and outlining the fundamental standards of customary law on which the ICTY Statute is based. *See Report of the Secretary-General pursuant to Paragraph 2 of the Security Council Resolution* 808, *supra* note 57, paras. 34-35.

[130] In making this observation, the Trial Chamber again referred back to the *Report of the UN Secretary-General*, quoting:

> The Hague Regulations cover aspects of international humanitarian law which are also covered by the 1949 Geneva Conventions. However, the Hague Regulations also recognize that the right of belligerents to conduct warfare is not unlimited and that the resort to certain methods of waging war is prohibited under the rules of warfare.

reviewed GC Common Article 3 within the context of the ICTY Statute and the 1907 Hague Regulations, finding first that Common Article 3 applied, as a matter of custom, to both internal and international armed conflicts.[131] It further found, without substantive explanation, that Common Article 3 "satisfactorily covered the prohibition on attacks against civilians as provided for by Protocols I and II."[132] Finally, citing the prior *Tadic* Appeal Decision of the ICTY, the *Blaškic* Trial Chamber reiterated that customary international law imposes criminal liability for serious violations of GC Common Article 3 for crimes against "protected persons."[133] On these bases, the Trial Chamber determined that the

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See Prosecutor v. Tihomir Blaškic, No. IT-95-14, para. 168 (Mar. 3, 2000) (ICTY Trial Judgment) (citing the *Report of the UN Secretary-General*, *supra* note 57, para. 43).

[131] *Id.* (echoing an earlier ICTY Appeals Chamber Decision, the Trial Chamber noted that Common Article 3 reflects "elementary considerations of humanity applicable under customary international law to any armed conflict, whether it is of an internal or international character."); *see also* Prosecutor v. Duško Tadic, No. IT-94-1-AR72, para. 102 (Oct. 2, 1995) (Appeals Chamber Decision on the Defence [sic] Motion for Interlocutory Appeal on Jurisdiction) (cited as the Tadic Interlocutory Appeal Decision) (referencing, in turn, the 1986 International Court of Justice decision that explicitly ruled that GC Common Article 3 reflects customary international law with respect to all conflicts, including international conflicts); *see* Nicaragua v. U.S., 1986 I.C.J. 14, at 218 (27 June 1986) (holding that Common Article 3 serves as a "minimum yardstick of protection" in all conflicts); s*ee generally* CENTER FOR LAW AND MILITARY OPERATIONS, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, LAW OF WAR DESKBOOK (June 2000), 131 (policy)**,** 228 (practice) [hereinafter LAW OF WAR DESKBOOK] (commenting on this development, the *Law of War Deskbook* notes that this position appears to be in accord with U.S. government policy, which extends the applicability of Common Article 3 to include non-conflict operations other than war.)

[132] Accordingly, with GC Common Article 3 as an established foundation for the charges of "unlawful attack," the *Blaškic* Trial Chamber found it unnecessary to decide on whether Protocol I specifically constituted customary international law. In making this circuitous route around the issue of the customary status of Protocol I, however, the Trial Chamber provided no historical support for its conclusion that the relevant portions of Protocol I and II are included within GC Common Article 3. *Blaškic*, No. IT-95-14, para. 168-70 (ICTY Trial Judgment). Reviewing this decision four years after judgment, the *Blaškic Appeals Chamber* broadly avails itself to the customary status of Protocol I. *See* Prosecutor v. Tihomir Blaškic, No. IT-95-14, paras. 110-116 (July 29, 2004) (ICTY Appeals Chamber Judgment). *See* discussion *infra* Part IV.C.

[133] In defining "protected person," the *Blaškic* Trial Chamber reaffirmed the test specified in the *Tadic* decision:

> [W]hether at the time if the alleged offense, the alleged victim of the proscribed acts was directly taking part in hostilities, being those hostilities in the context of which the alleged offenses are said to have been committed. If the answer to that question is negative, the

ICTY had jurisdiction over the charged offenses under its Statute, which confers jurisdiction to charge individual or superior criminal responsibility for violations of the laws and customs of war.[134]

After establishing the basis for jurisdiction over the charged offenses, the *Blaškic* Trial Chamber next reviewed the charges and their supporting legal elements. The Trial Chamber found that the charges were tenable under Article 3 of the ICTY Statute. Since the single charge alleged both "unlawful attacks on civilians and civilian objects" and "wanton destruction not justified by military necessity,"[135] the Trial Chamber did not draw a distinction between the protections offered to civilians in the hands of an occupying power pursuant to GC IV[136] and those civilians who—though not in an occupied status—were subject to the "effects of battlefield combat" within the meaning of Protocol I.[137] Thus, such a conjunctive charge would be appropriate only in cases alleging violations of both GC IV and Protocol I.

In affirming the prosecution's charge of "unlawful attack on civilians and civilian objects and wanton destruction not justified by military necessity," the *Blaškic* Trial Chamber stated as follows:

> The Trial Chamber deems that the attack must have caused deaths or serious bodily injury within the civilian

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> victim will enjoy the protection of the proscriptions contained in [GC] Common Article 3.

Prosecutor v. Duško Tadic, No. IT-94-1-T, para. 615 (May 7, 1997) (ICTY Trial Judgment); *see also Blaškic*, No. IT-95-14 (ICTY Trial Judgment).

[134] *Blaškic*, No. IT-95-14, paras. 175-6 (ICTY Trial Judgment); *see also* Prosecutor v. Tadic, No. IT-94-1-AR72, para. 134 (Oct. 2, 1995) (Interlocutory Appeal Decision). Under the statute of the ICTY, Article 3-based charges pertain to "Violations of the Laws and Customs of War". *Statute of the International Criminal Tribunal for the Former Yugoslavia*, *supra* note 95. Statute Article 7(1) defines direct criminal responsibility, and Article 7(3) defines superior responsibility for criminal acts of subordinates. *Id*.

[135] *Blaškic*, No. IT-95-14, para. 12 (ICTY Trial Judgment).

[136] 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter GC IV]. Article 4 pertains to the general protections of civilians in the hands of an occupying power of which they are not nationals; Article 53 pertains to the concept of wanton destruction not justified by military necessity, and is exclusive to the GC IV. *Id.*

[137] Protocol I, *supra* note 14, pt. IV, sec. I, chs. 1-4 (General Protections of the Civilian Population Against the Effects of Hostilities, Pertaining to Civilians, Civilian Populations and Civilian Objects); *see* GC IV, *supra* note 136, arts. 51-52.

> population or damage to civilian property. The parties of the conflict are obliged to attempt to distinguish between military targets and civilian persons or property. Targeting civilians or civilian property is an offense when not justified by military necessity. Civilians within the meaning of Article 3 [of the Tribunal Statute] are persons who are not, or no longer members of the armed forces. Such an attack must have been conducted intentionally in the knowledge, or when it was impossible not to know, that civilians or civilian property were being targeted not through military necessity.[138] This paragraph may be more simply broken into the following elements:
>
> (1) The attack must have affected civilians within the meaning of Article 3 of the Tribunal Statute, i.e., persons who are not, or are no longer, members of the armed forces.
>
> (2) The attack must have killed or caused severe bodily injury to civilians, or caused damage to civilian property.
>
> (3) The attack can be:
>
> (A) conducted by intentionally targeting civilians or civilian property;
>
> (B) conducted with willful ignorance of the civilian status of the target; or
>
> (C) conducted without distinction between military targets and civilian persons or property.
>
> (4) The attack must not be justified by military necessity.

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[138] *Blaškic*, No. IT-95-14, para. 180 (ICTY Trial Judgment). As discussed *infra*, the *Blaškic* Appeals Chamber specifically refuted some aspects of this paragraph. *See also* Prosecutor v. Tihomir Blaškic, No. IT-95-14, para. 109 (July 29, 2004) (ICTY Appeals Chamber Judgment).

b. Targeting Civilians and the Concept of Military Necessity

One of the most legally problematic conclusions in *Blaškic* is the statement that "targeting civilians or civilian property is an offense *when not justified by military necessity*."[139] While adhering to the principle in GC IV proscribing the gratuitous destruction of civilian property,[140] the wording of this statement implies there may be circumstances under which the intentional targeting of civilians—as distinguished from an attack against a legitimate military target that unavoidably results in civilian casualties as collateral damage—would be legally justified.[141]

Referencing the *Blaškic* findings, the *Kordic* Trial Chamber stated in its subsequent judgment as follows:

> Prohibited attacks are those launched deliberately against civilians or civilian objects in the course of armed conflict and are not justified by military necessity. They must have caused deaths and/or serious bodily injuries with the civilian population or extensive damage to civilian objects. Such attacks are in direct contravention of the prohibitions expressly recognized in international law including the relevant provisions of Protocol I.[142]

The *Kordic* Trial Chamber similarly held open the possibility that the deliberate targeting of civilians could be legally justified under the doctrine of military necessity.

Not surprisingly, these particular findings by the *Blaškic* and *Kordic* Trial Chambers and their inherent contradiction to Protocol I (Arts. 51(2) and 85(3)(a)) have met with some critical discussion.[143] The prohibition against the deliberate targeting of civilians and civilian objects are

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[139] *Blaškic,* No. IT-95-14, paras. 180 (ICTY Trial Judgment) (emphasis added).
[140] GC IV, *supra* note 136, art. 147 (Grave Breaches).
[141] *Blaškic,* No. IT-95-14, para. 180 (ICTY Trial Judgment).
[142] Prosecutor v. Dario Kordic, No. IT-95-14/2-T (Feb. 26, 2001) (ICTY Trial Judgment).
[143] DORMANN, *supra* note 69, at 132-33; *see also* William J. Fenrick, *A First Attempt to Adjudicate Conduct of Hostilities Offences: Comments on Aspects of the ICTY Trial Decision in the* Prosecutor v. Tihomir Blaškic, 13 LEIDEN J. INT'L L. 931, 936-43 (2000).

widely viewed as absolute under customary law.[144] Most recently, the *Blaškic* Appeals Chamber unequivocally weighed on that specific issue as well,[145] stating,

> [T]he Appeals Chamber deems it necessary to rectify the Trial Chamber's statement, contained in paragraph 180 of the Trial Judgment, according to which . . . . [t]argeting civilians or civilian property is an offense when not justified by military necessity." The Appeals Chamber underscores that there is an absolute prohibition on the targeting of civilians in customary international law.[146]

In spite of this absolute prohibition on targeting civilians, one previous ICTY Trial Chamber judgment, the *Prosecutor v. Kupreskic, et al.*, provides some guidance on exceptional circumstances under which civilians or a civilian population may be the object of a lawful attack by a belligerent.[147]

c. Judgment Analysis: Prosecutor v. Kupreskic, et al.[148]

The *Kupreskic* Trial Chamber identified the following three abstract circumstances under which the legal protections of civilian objects could be reduced, suspended, or ceased entirely: "(1) when civilians abuse their rights; (2) when, although the object of a military attack is comprised of military objectives, belligerents cannot avoid causing so-called collateral damage to civilians; and (3) at least to some authorities,

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[144] This customary prohibition is also codified by the Statute of the ICC, Article 8(2)(b)(i). *See Assembly of State Parties to the Rome Statute of the International Criminal Court, First Session 03-10*, *supra* note 21.

[145] *See* Prosecutor v. Blaškic, No. IT-95-14, paras. 108-9 (July 29, 2004) (ICTY Appeals Chamber Judgment).

[146] *Id*. para. 109.

[147] The Prosecutor v. Zoran Kupreskic, No. IT-95-16, para. 515 (Jan. 14, 2000) (ICTY Trial Judgment). While the offense of unlawfully attacking civilians or civilian objects was not charged in the indictment, the Trial Chamber believed that the issue merited review on the theory that the accused were indirectly arguing a defense based on the principle of *Tu Quoque* or reciprocal unlawful conduct. *Id.* On appeal, the ICTY Appeals Chamber overturned a number of convictions because of issues of fact, however, it left intact relevant findings of law pertaining to this issue. *See* the Prosecutor v. Zoran Kupreskic, No. IT-95-16 (Oct. 23, 2001) (ICTY Appeals Chamber Judgment).

[148] *Kupreskic,* No. IT-95-16 (ICTY Trial Judgment).

when civilians may legitimately be the object of reprisals."[149] The Trial Chamber extensively examined the issue of reprisals, ultimately concluding that an absolute prohibition on reprisals should be considered reflective of the modern law of armed conflict.[150] The Trial Chamber also briefly addressed the issue of collateral damage, noting that this was more properly an issue of proportionality and discrimination than of the direct targeting of civilians.[151]

The *Kupreskic* judgment analyzed the remaining issue regarding the abuse by civilians of their rights and obligations as non-belligerents under the customary law of armed conflict as follows:

> In the case of clear abuse of their rights by civilians, international rules operate to lift the protection, which would otherwise be owed to them. Thus, for instance, under Article 19 of the Fourth Geneva Convention, the special protection against attacks granted to civilian hospitals shall cease, subject to certain conditions, if the hospital "[is used] to commit, outside [its] humanitarian duties, acts harmful to the enemy," for example if an artillery post is set up on top of the hospital. Similarly, if a group of civilians takes up arms in an occupied territory and engages in fighting against the enemy belligerent, they may be legitimately attacked by the enemy belligerent whether or not they meet the requirements laid down by Article 4(A)(2) of the Third Geneva Convention of 1949.[152]

Thus, setting aside the argument concerning the customary status of the prohibition on reprisals against civilians and civilian objects, the only circumstance under which a civilian population can lawfully become the object of an attack under the doctrine of military necessity occurs where

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[149] *Id*. para. 522.

[150] *Id*. paras. 515-36. As a matter of treaty law, Articles 50-55 of Protocol I explicitly ban reprisals against civilian and civilian objects under treaty. Protocol I, *supra* note 14, arts. 50-55. A significant number of treaty signatories, however, have lodged reservations or clarifications concerning this issue. *See* Shane Darcy, *The Evolution of the Law of Belligerent Reprisals*, 175 MIL L. REV. 184, 224-29 (2003). The United States, which is not a party to the protocol, has similarly stated (ca. 1987) its understanding that the prohibition against reprisals does not reflect customary law. Matheson, *supra* note 65.

[151] *Kupreskic,* No. IT-95-16, para. 524 (ICTY Trial Judgment).

[152] *Id*. para. 523.

such civilians have purposefully abused such protections by acting against an enemy belligerent.

B. ICTY Conduct-of-Hostilities Offenses Based on 1977 Additional Protocols to the Geneva Conventions of 1949

Most recent in the chronology of ICTY conduct-of-hostilities cases are *Prosecutor v. Stanislav Galic*[153] and *Prosecutor v. Pavle Strugar*.[154] The prosecutor charged individuals in both indictments with unlawful attacks on civilians and civilian objects.[155] These charges, based on Article 3 of the ICTY Statute, incorporate offenses described in Articles 51(2) of Protocol I and Article 13(2) of Protocol II, both of which provide that civilians shall not be the object of attack.[156] The accused in *Galic* was also charged with "unlawfully inflicting terror upon civilians" as a violation of the laws and customs of war.[157] Article 51(2) of Protocol I and Article 13(2) of Protocol II, provides the legal foundation underlying this terror charge, which prohibit "acts or threats of violence, the primary purpose of which is to spread terror among the civilian population."[158]

By design, these charges allege only violations of Article 3 of the ICTY Statute or of relevant articles of the 1977 Additional Protocols; they do not refer to the 1949 Geneva Conventions.[159] In this manner, the breadth of the charged offenses—relating to the general protection of civilians from the effects of hostilities by belligerents—is a departure from the charges in *Blaškic* and *Kordic*, which related specifically to

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[153] Prosecutor v. Stanislav Galic, No. IT-98-29 (Mar. 26, 1999) (ICTY Indictment, as amended).

[154] Prosecutor v. Pavel Strugar, No. IT-01-42, paras. 14-25 (Dec. 10, 2003) (ICTY Third Amended Indictment). In August 2003, co-indictee Miodrag Jokic agreed to plead guilty to Counts 1-6 of the second amended indictment. *See* Prosecutor v. Miodrag Jokic, No. IT-01-42/1S, para. 116 (Mar. 18, 2004) (Sentencing Judgment).

[155] *Strugar*, No. IT-01-42, paras. 14-25 (Dec. 10, 2003) (ICTY Third Amended Indictment) (Counts 4 and 7).

[156] *See Statute of the International Criminal Tribunal for the Former Yugoslavia*, *supra* note 95, art. 3. *See also Galic*, No. IT-98-29 (ICTY Indictment, as amended); *and Galic*, No. IT-98-29, para. 152 (Oct. 23, 2001) (Pretrial Brief filed by the Prosecution pursuant to Rule 65 *ter* (E)(i)).

[157] *Galic*, No. IT-98-29 (Indictment, as amended of the indictment) (Count 1); *see also Galic*, No. IT-98-29, para. 139 (Pre-trial brief).

[158] *Galic*, No. IT-98-29 (ICTY Pre-trial brief).

[159] *See Statute of the International Criminal Tribunal for the Former Yugoslavia*, *supra* note 95, art. 3.

actions against a civilian population by an occupying power in violation of GC IV. This change reflects the evolving concept that the protections afforded to civilians and civilian objects from the effects of combat are not contingent upon the side of the battlefield on which the civilians are located, nor upon the status of the territory, whether occupied or merely defended.[160] Rather, the relevant issue is a determination of whether the civilians and civilian objects in question were entitled to protected status under the customary law of armed conflict at the time of the offense.[161]

1. Judgment Analysis: Prosecutor v. Stanislav Galic[162]

Stanislav Galic was a Colonel who had served in the former Yugoslav Peoples Army (JNA) as an Infantry Division commander before the outbreak of hostilities in Bosnia in April 1992.[163] He remained in Bosnia after the JNA withdrew from Bosnia in May 1992, and the nascent Bosnian-Serb military subsequently appointed him as an officer in their armed forces, which later evolved into the Army of the Republika Srpska.[164] In September 1992, the Bosnian-Serb military authorities appointed him the commander of the Sarajevo-Romanija Corps, then conducting military operations in and around the encircled Bosnian capital city of Sarajevo and[165] subsequently promoted him to the rank of General-Major.[166] From September 1992 through August 1994, he exercised command of the Corps and its approximately 17,000

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[160] This concept is reflected in Protocol I, Article 51(7), which prohibits both parties to a conflict from "direct[ing] the movements of civilians in order to shield military objectives, or render certain areas immune from military operations"; and Protocol I, Article 57(4), which directs all parties to a conflict to "take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects." Protocol I, *supra* note 14, arts. 51(7) & 51(4).

[161] Prosecutor v. Duško Tadic, No. IT-94-1-T, para. 615 (May 7, 1997) (ICTY Trial Judgment); Prosecutor v. Tihomir Blaškic, No. No. IT-95-14-T, para. 177 (Mar. 3, 2000) (Trial Judgment). In this context, "protected" refers to the minimum yardstick of protected status provided by the customarily recognized GC Common Article 3. It can also incorporate, however, the more specific protections within the meaning of the 1949 Geneva Conventions with respect to persons and objects.

[162] Prosecutor v. Stanislav Galic, No. IT-98-29-T (Dec. 5, 2003) (Judgment and Opinion) (J. Nieto-Navia, dissenting).

[163] *Id.* para. 603-604.

[164] *Id.*

[165] *Id.*

[166] *Id.* The rank of General-Major in the former JNA, as well as the current day Army of the Republika Srpska (VRS) is nominally equivalent to that of a U.S. Army Brigadier General. *See* DEFENSE INTELLIGENCE AGENCY, BOSNIA FACTBOOK (unclassified) (1996).

soldiers.[167] Based on the conduct of these operations, which included a prolonged and deliberate campaign of sniping, shelling, and terror against non-combatants in the city, the ICTY Prosecutor charged General-Major Galic with various offenses.[168] Among these charges are the offenses of "unlawful attack against civilians and/or civilian objects" and "unlawfully inflicting terror on civilians" as violations of the laws and customs of war.[169] On 5 December 2003, a majority of the Trial Chamber found General-Major Stanislav Galic guilty of the offenses of "unlawfully attacking civilians" and "unlawfully inflicting terror on civilians."[170]

As reflected in the Prosecutor's pre-trial filings in this case, these unlawful-attack charges have their legal basis in the principle of distinction inherent in the law of armed conflict.[171] This principle obligates military commanders to direct their operations only against military objectives, and prohibits the targeting of civilians and civilian objects as the object of attack.[172] In accordance with this principle, the ICTY Prosecutor opined that the following types of attacks against the civilian population were unlawful:

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[167] Units of the Bosnian Serb Sarajevo-Romanija Corps encircled Sarajevo from mid-May 1992, until the termination of hostilities following the Dayton Agreement in November 1995. *Galic*, No. IT-98-29-T, para. 197-205 (Judgment and Opinion). General-Major Galic was the Corps Commander from September 1992 through August 1994. *Id.* para. 613. The prosecutor has also charged General-Major Dragan Milosevic, who assumed command of the Corps from Galic, for similar violations of the law of armed conflict during his tenure in command. *See* Prosecutor v. Stanislav Galic and Dragomir Milosevic, IT-98-29 (Apr. 24, 1998) (Initial Indictment).

[168] Prosecutor v. Stanislav Galic and Dragomir Milosevic, IT-98-29 (Apr. 24, 1998) (Joint Initial Indictment).

[169] *Id.* para. 17.

[170] An ICTY Trial Chamber consists of three judges. A majority of two judges found General-Major Galic guilty with respect to his individual responsibility in planning, ordering, and directing an unlawful campaign of attacks against the civilian population of Sarajevo. One judge dissented with respect to both his individual responsibility, and the existence of an unlawful campaign. *See generally Galic*, No. IT-98-29-T (Judgment and Opinion). All three judges, however, agreed as to General Galic's criminal responsibility with respect to the issue of "superior or command responsibility," noting his failure to prevent such acts or to punish the perpetrators of such attacks, notwithstanding any legal finding of the existence of a campaign directed against the civilians. *Id.*

[171] Prosecutor v. Stanislav Galic, No. IT-98-29, para. 156. (Oct. 23, 2001) (Pretrial Brief filed by the Prosecution pursuant to Rule 65 *ter* (E)(i)).

[172] Protocol I, *supra* note 14, arts. 48 & 51(1).

> (1) attacks deliberately directed against the civilian population as such, whether directed at particular civilian objectives or at civilian areas generally;
> (2) attacks aimed at military and civilians objectives without distinction; and
> (3) attacks directed at legitimate objectives, which cause civilian losses clearly disproportionate to the military advantage anticipated.[173]

This framework provides the basis for the criminal charges by the ICTY Prosecutor when alleging unlawful attacks against civilians or civilian objects or unlawfully inflicting terror on civilians as violations of the laws and customs of war. In addressing these submissions in the *Galic* Judgment, the Trial Chamber generally agreed with ICTY Prosecutor on these points, and in some cases expanded upon them by defining the elements of the offense:

a. The Crime of Attack on Civilians[174]

As finder of law and fact, the *Galic* Trial Chamber defined the specific elements of the offense of "attack on civilians" as follows:

> (1) Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population, [and]

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[173] *See generally Galic*, No. IT-98-29, para. 157 (Pretrial Brief filed by the Prosecution pursuant to Rule 65 *ter* (E)(i))). With respect to number (3), "attacks directed at legitimate objectives, which cause civilian losses clearly disproportionate to the military advantage *anticipated*" [emphasis added], this language is designed to closely follow Article 51 of Protocol 1. *See* Protocol 1, *supra* note 14. This contradicts earlier language by another ICTY Trial Chamber ruling which noted that . . . "incidental (and unintentional) damage to civilians must not be out of proportion to the direct military advantage *gained* [emphasis added] by the military attack." *See* Prosecutor v. Dragoljub Kunarac, No. IT-96-23, IT-96-23/1, para. 426 (Feb. 22, 2001) (ICTY Trial Judgment). *See also* discussion *infra* Part IV.C.

[174] All three judges agreed with respect to identifying the offense of attacks on civilians as a violation of the laws and customs of war, the elements, and the requisite mental element. *See* Prosecutor v. Stanislav Galic, No. IT-98-29-T, para. 56 (Dec. 5, 2003) (Judgment and Opinion).

> (2) The offender willfully made the civilian population or individual civilians not taking a direct part in hostilities the object of those acts of violence.[175]

In examining the first element, the Trial Chamber noted that previous decisions identified a number of acts that qualify as direct attacks against civilians. These include attacks clearly directed against civilians[176] and indiscriminate attacks (i.e., attacks which strike civilians or civilian objects and military objectives without distinction).[177]

To determine the *mens rea* for the acts of violence against the civilian population or individuals not taking part in hostilities element, the Trial Chamber heavily relied on the grave breach provisions of Article 85 of Protocol I.[178] Article 85, Protocol I defines a "grave breach" in this context as "willfully making the civilian population or individual civilians the object of attack."[179] The ICRC Commentary on Article 85 explains the term willfully as follows:

> [T]he accused must have acted consciously and with intent, i.e., with his mind on the act and its consequences, and willing them ("criminal intent" or "malice aforethought"); this encompasses the concepts of "wrongful intent" or "recklessness", viz., the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or a lack of foresight is not covered, i.e., when a man acts without having his mind on the act or its consequences.[180]

Accepting this definition, the Trial Chamber further noted that willfully attacking civilians must be reckless rather than merely negligent.[181] The prosecutor must prove that the perpetrator was aware, or should have been aware, of the civilian status of the persons attacked.[182] In cases of doubt as to the status of the persons in question,

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[175] *Id.*
[176] *Id*. paras. 49-55.
[177] *Id*. para. 57.
[178] *Id*. para. 54.
[179] *Id*.
[180] *Id*. para. 54 (citing the ICRC Commentary to Protocol I, para. 3474).
[181] *Id*.
[182] *Id.* para. 55.

it must be shown that a reasonable person would not have believed that the individual attacked was a combatant.[183]

The *Galic* Trial Chamber also examined another form of indiscriminate attack, one which violates the "principle of proportionality."[184] On the issue of proportionality, the Trial Chamber provided the following general guidance:

> Once the military character of a target has been ascertained, commanders must consider whether striking this target is expected to cause incidental loss of 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. If such casualties are expected to result, the attack should not be pursued. The basic obligation to spare civilians and civilian objects as much as possible must guide the attacking party when considering the proportionality of an attack. In determining whether an attack was proportionate it is necessary to examine whether a reasonably well informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.[185]

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[183] *Id.*

[184] *Id*. para. 58.

[185] *Id*. The *travaux préparatoires* of Additional Protocol I concerning Article 51(5)(b), indicate that the expression "concrete and direct" was intended to show that the advantage must be "substantial and relatively close," and that "advantages which are hardly perceptible and those which would only appear in the long term should be disregarded." *Galic*, No. IT-98-29-T (Judgment and Opinion) (ICRC Commentary, para. 2209). The Commentary explains, "a military advantage can only consist in ground gained or in annihilating or in weakening the enemy armed forces". *Id.* para. 2218. Australia and New Zealand stated at the time of ratification, in almost identical wording, that "the term "concrete and direct military advantage anticipated," used in Articles 51 and 57 of Additional Protocol I, means *bona fide* expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved." *See Galic*, No. IT-98-29-T, n.106 (Judgment and Opinion) (providing Statements of Understanding made by New Zealand on 8 February 1988 and Australia on 21 June 1991).

The *Galic* Trial Chamber further noted that while the parties to a conflict are under an obligation to remove civilians as much as practicable from the vicinity of military objectives, and to avoid locating military objectives near densely populated areas, the failure of a defending party to abide by these obligations does not relieve the attacking party of a duty to abide by the principles of distinction and proportionality when launching an attack.[186] Thus, in defining the *mens rea* of a disproportionate attack, the Trial Chamber requires proof that such an attack must have been launched "willfully in knowledge of the circumstances giving rise to the expectation of excessive civilian casualties."[187]

b. The Crime of Unlawfully Inflicting Terror upon Civilians[188]

Based on the principles articulated in Article 51 of Protocol I and Article 13 of Protocol II, the Prosecutor of the ICTY charged General-Major Galic with the crime of "unlawfully terror against the civilians" as a violation of the laws a customs of war.[189] The distinguishing feature of this offense was the specific intent reflecting terror as the primary purpose.[190] A majority of the Trial Chamber found this offense to be cognizable under Article 3 of the ICTY statute, and it defined the following elements of the offense:

> (1) Acts of violence directed against the civilian population or individual civilians not taking a direct part in hostilities causing death or serious injury to body or health within the civilian population;
>
> (2) The offender willfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence; [and]

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[186] *Id.* para. 61.
[187] *Id*. para. 59.
[188] With respect to the offense, elements, and requisite mental element, the *Galic* Trial Chamber did not make a unanimous finding on this charge. The Trial Chamber decision discussed here reflects the majority view. *See generally Galic*, No. IT-98-29-T (Judgment and Opinion). *See also* discussion *infra* Part IV.C(4), analyzing the view of the dissenting judge with respect to this offense.
[189] *Galic*, No. IT-98-29 (Mar. 26, 1999) (ICTY Indictment, as amended).
[190] *Galic*, No. IT-98-29-T, para. 72 (Judgment and Opinion).

> (3) The above offense was committed with the primary purpose of spreading terror among the civilian population.[191]

The majority explored in detail a number of relevant issues regarding the elements as follows:

In the first element, the phrase "acts of violence" does not include lawful acts against combatants; rather, it refers only to unlawful acts against civilians.[192] Concerning the first element, the Trial Chamber specifically rejected submissions by both the prosecution and defense that the actual infliction of terror constituted an element of the crime of terror.[193] This legal finding negated a requirement to actually prove a causal connection between the unlawful acts of violence and the production of terror.[194] As such, the mere intent of the accused to commit the unlawful act will suffice to establish acts of violence.

With respect to the third element, the majority of the Trial Chamber noted as follows:

> "Primary purpose" signifies the *mens rea* of the crime of terror. It is to be understood as excluding *dolus eventualis* or recklessness from the intentional state of terror. Thus, the Prosecution is required to prove not only that the Accused accepted the likelihood that terror would result from the illegal acts—or, in other words, that he was aware of the possibility that terror would result—but that that was the result, which he specifically intended. The crime of terror is a specific-intent crime.[195]

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[191] *Id.* para. 133.
[192] *Id.* para. 135.
[193] *Id.* para. 134. As cited in Paragraph 73 of the *Galic* Judgment, the prosecution submitted that there must be an established causal connection between the intent to commit unlawful acts of terror, and that the population actually experienced terror. *Id.* para. 73. The defense submissions also reflect that actual terror had to be achieved, and that it had to result from illegitimate acts, as opposed to being the result of lawful urban warfare. *Id*. para. 82.
[194] The majority of the Trial Chamber noted that the plain wording of Protocol I, *supra* note 14, art. 51(2), as well as the *travaux preparatoires* specifically exclude the actual infliction. *Id.* art. 51(2); *see Galic*, No. IT-98-29-T, para. 134 n.224 (Judgment and Opinion).
[195] *Galic*, No. IT-98-29-T, para. 136 (Judgment and Opinion).

More broadly, the full Trial Chamber held that select portions of Protocol I applied to the Bosnian conflict based on conventional or treaty law.[196] The judgment further held that the offense of "attacking civilians or civilian objects" had a customary basis as well, reflecting prior decisions from the ICTY Appeals Chamber.[197] This customary basis is discussed in greater detail below. Conversely, only a majority found that the offense of "unlawfully inflicting terror upon civilians" had a basis in conventional law (Protocol I), and there was no definitive ruling concerning any potential customary basis.[198] This article also examines this in the next section.

C. ICTY Rulings on Customary Status of Principles Underlying Relevant Articles of the 1977 Additional Protocols

Several defendants have challenged the legitimacy of charges predicated on the language of the 1977 Additional Protocols, on the ground that the prosecutor did not establish the wider customary status of these instruments.[199] The ICTY resolved these issues in an appropriate and judicious manner in various jurisdictional decisions by the respective Trial Chambers.[200] These decisions, as well as several other more recent Appeals Chamber decisions directly address the customary basis behind those articles of the Additional Protocols that prohibit making civilians

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[196] On 22 May 1992, representatives of the Bosnian-Serb, Bosnian-Muslim and Bosnian-Croatian parties to the conflict signed an agreement brokered under the offices of the International Committee for the Red Cross (ICRC). One portion of this agreement specified that Articles 35-42 and 48-58 of Protocol I would apply to all parties during hostilities. Protocol I, *supra* note 14, arts. 35-42, 48-59. As a result, the full Trial Chamber reasoned that the terms of Protocol I could apply to the accused (a Bosnian-Serb) as conventional law, without having to legally classify the conflict as either internal or international in nature. *See Galic*, No. IT-98-29-T, paras. 202-205 (Judgment and Opinion).

[197] *Galic*, No. IT-98-29-T, para. 19 (Judgment and Opinion).

[198] Prosecutor v. Stanislav Galic, No. IT-98-29-T, paras. 108-13 (Dec. 5, 2003) (*Galic* Judgment and Opinion) (J. Nieto-Navia, dissenting) (appended to the *Galic* Judgment).

[199] *See* Prosecutor v. Dario Kordic & Mario Cerkez, No. IT-95-14/2-PT (Mar. 2, 1999) (ICTY Decision on the Joint Defense Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3) *and* Prosecutor v. Pavle Strugar, Miodrag Jokic, No. IT-01-42-PT, paras. 17-22 (June 7, 2002) (ICTY Trial Chamber Decision on Defense Preliminary Motion Challenging Jurisdiction).

[200] *Id.*

the object of military attack.[201] These decisions are of particular interest with respect to their applicability to military commissions, since they articulate how the contemporary technical language of these treaty instruments, which were not ratified by the United States, legally incorporate the broader customarily recognized protections afforded to civilians and non-combatants during hostilities.

1. Prosecutor v. Kordic,[202] *Revisited*

In the previously discussed *Kordic* case, the accused made a pretrial motion challenging the validity of the presumed customary status of the 1977 Additional Protocols (both I and II) at the time of the alleged offenses (circa. 1992-93).[203] Accordingly, the accused argued that charges based on the Additional Protocols were beyond the ICTY's jurisdiction's Statute.[204]

In a March 1999 jurisdictional decision on this motion, the *Kordic* pre-trial chamber held as follows:

> It is sufficient here only to address the provisions of Additional Protocols I and II specifically referred to in the indictment. Counts 3, 4, 5, and 6 of the indictment against Dario Kordic and Mario Cerkez refer specifically to Articles 51(2) and 52(1) of Additional Protocol I, and Article 13(2) of Additional Protocol II. These provisions concern unlawful attacks on civilians or civilian objects and are based on Hague law relating to the conduct of warfare, which is considered as part of customary law. To the extent that these provisions of the Additional Protocols echo the Hague Regulations, they can be considered as reflecting customary law. It is

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[201] *Id. See also* Prosecutor v. Dragoljub Kunarac, No. IT-96-23, IT-96-23/1 (Feb. 22, 2001) (ICTY Trial Judgment). *See* Prosecutor v. Pavle Strugar, Miodrag Jokic, No. IT-01-42-PT (Nov. 22, 2002) (ICTY Appeals Chamber Decision on Interlocutory Appeal) *and* Prosecutor v. Tihomir Blaškic, No. IT-95-14 (July 29, 2004) (ICTY Appeals Chamber Judgment).

[202] *Kordic & Cerkez*, No. IT-95-14/2-PT (ICTY Decision on the Joint Defense Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3).

[203] *Id.* para. 30.

[204] *Id*.

> indisputable that the general prohibition of attacks against the civilian population and the prohibition of indiscriminate attacks or attacks on civilian objects are generally accepted obligations. As a consequence, there is no possible doubt as to the customary status of these specific provisions as they reflect core principles of humanitarian law that can be considered as applying to all armed conflicts, whether intended to apply to international or non-international conflicts.[205]

In February 2001, as a part of the subsequent trial judgment, the *Kordic* Trial Chamber revisited this issue.[206] The Trial Chamber noted that since the Additional Protocols were binding as treaty law on both Croatia and Bosnia-Herzegovina at the time, the question of whether the relevant provisions of Protocol I reflected customary law was not properly at issue.[207] Nonetheless, in response to a defense contention offered at trial that Protocol I did not represent customary law, the Trial Chamber noted that it was not persuaded by defense arguments and "reiterate[d] its conclusion contained in the earlier *Decision on Jurisdiction*."[208] The Trial Chamber further ruled that violations of Additional Protocol I incurred individual criminal liability in the same manner that as did other violations of customary international law.[209]

2. Prosecutor v. Dragoljub Kunarac[210]

Almost simultaneously, a separate ICTY Trial Chamber affirmed the customary nature of the same principles, enumerated in Protocol I, governing the protection of the civilian population from the effects of

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[205] *Id*. para. 31.

[206] Prosecutor v. Dario Kordic and Mario Cerkez, No. IT-95-14/2-T (Feb. 26, 2001) (Trial Judgment).

[207] In this particular case, both the Croatian-backed Croatian Defense Council (HVO) and the Bosnian Muslim political leadership had agreed to abide by the provisions of Protocol I regardless of the nature of the hostilities in question. In this respect, the Trial Chamber ruled that the relevant articles of Protocol I applied based on treaty law. *See Kordic & Cerkez*, No. IT-95-14/2-T, paras. 165-67 (Trial Judgment).

[208] *Kordic & Cerkez*, No. IT-95-14/2-PT (ICTY Decision on the Joint Defense Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3).

[209] *Kordic & Cerkez*, No. IT-95-14/2-T, paras. 168-169 (Feb. 26, 2001) (Trial Judgment).

[210] Prosecutor v. Dragoljub Kunarac, No. IT-96-23, IT-96-23/1, para. 426 (Feb. 22, 2001) (ICTY Trial Judgment).

hostilities.[211] In the case of *Prosecutor v. Dragoljub Kunarac, et al.*, the Trial Chamber made the following general findings with respect to the customary status of principles found in Articles 48, 50, 51, and 57 of Protocol I:

> As a group, the civilian population shall never be attacked as such. Additionally, customary international law obliges parties to the conflict to distinguish at all times between the civilian population and combatants, and obliges them not attack a military objective if the attack is likely to cause civilian casualties or damage which would be excessive in relation to the military advantage *anticipated* [author's italics].[212]

In this particular instance, the *Kunarac* Trial Chamber went beyond the language of Additional Protocol I pertaining to the issue of proportionality as stated in Article 51.[213] This was subsequently addressed in the more recent *Galic* Judgment (December 2003).[214] To this end, the *Galic* judgment noted,

> the rule of proportionality does not refer to the actual damage caused nor to the military advantage achieved by an attack, but instead uses the words "expected" and "anticipated".[215]

At the same time, the *Galic* Trial Chamber also acknowledged that with respect to "expected" or "anticipated," the broad consensus among Protocol I member states was that this interpretation should reflect "the decisions taken on a basis of all information available at the relevant time, and not on the basis of hindsight."[216]

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[211] *Id.*
[212] *Id.* para. 426. These findings were articulated with respect to select offenses related to ICTY Statute Article 5 based "crimes against humanity." *Id.*
[213] *See supra* Protocol I, *supra* note 14, art. 51.
[214] Prosecutor v. Stanislav Galic, No. IT-98-29-T (Dec. 5, 2003) (Judgment and Opinion) (J. Nieto-Navia, dissenting).
[215] *Id.* para. 58 n.109.
[216] *Id.*

3. Prosecutor v. Pavle Strugar, Miodrag Jokic[217]

In early 2002, the customary nature of the relevant articles of the Additional Protocols was again raised during the pre-trial stage of the *Prosecutor v. Pavle Strugar,*[218] *Miodrag Jokic, et al.* In this instance, the defense challenged the Prosecutor's jurisdiction to impose criminal charges based on the customary status of Articles 51 and 52 of Protocol I and Article 13 of Protocol II.[219] The defense alleged a technical defect with respect to the use of the Additional Protocols as charging vehicles because these treaties represented conventional law of a more contractual nature to which neither party to the conflict had specifically agreed, as opposed to applicable custom.[220]

In ruling on the jurisdictional motion, the *Strugar* Trial Chamber affirmed the customary nature of Articles 51 and 52 of Protocol I and Article 13 of Protocol II, as a "reaffirmation and reformulation" of the "norms of customary international law designed to prohibit attacks on civilians and civilian objects."[221] The ruling noted that the articles at issue did not contain new principles, but rather that they codified long-standing principles found in earlier codes predating the 1907 Hague Rules and the 1949 Fourth Geneva Convention.[222] The Trial Chamber further found that these specific principles in the articles were customary before 1991.[223]

The defense appealed this jurisdictional ruling, reading the Trial Chamber's decision to hold that Articles 51 and 52 of Protocol I and Article 13 of Protocol II in their entirety constituted customary

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[217] Prosecutor v. Pavle Strugar, Miodrag Jokic, No. IT-01-42-PT (June 7, 2002) (ICTY Trial Chamber Decision on Defense Preliminary Motion Challenging Jurisdiction).
[218] *Id.*
[219] *Id.* para. 9.
[220] *Id.*
[221] *Strugar, Jokic*, No. IT-01-42-PT, paras. 17-22 (ICTY Trial Chamber Decision on Defense Preliminary Motion Challenging Jurisdiction).
[222] *Id*. paras. 17-19. In the *Strugar* Trial Chamber's analysis, they found that the drafting history of the Additional Protocols clearly indicated the *opinio juris* of multiple states concerning Article 51 of Protocol I. It also determined that Protocol I, art. 52, articulated a long-standing customary principle of international law, namely that civilian objects must not be the target of military attack. Protocol I, *supra* note 14, art. 52. The Trial Chamber further noted that this principle, codified in Article 51 of Protocol I, and is a reaffirmation of a similar provision contained in Geneva Convention IV. *Id.* art. 51.
[223] *Strugar, Miodrag Jokic*, No. IT-01-42-PT, para. 21 (June 7, 2002) (ICTY Trial Chamber Decision on Defense Preliminary Motion Challenging Jurisdiction).

international law.[224] In addressing the defense's jurisdictional appeal, the *Strugar* Appeals Chamber upheld the customary law status of the principles prohibiting attacks on civilians and unlawful attacks on civilian objects articulated in Articles 51 and 52 of Protocol I and Article 13 of Protocol II.[225] The Appeals Chamber, however, left unanswered the broader issue of whether the Articles embodying those underlying principles themselves represented customary international law, simply affirming the Trial Chamber's opinion that these principles constitute a customary basis for charging and jurisdiction.[226] As such, the Appeals Chamber deemed it unnecessary to render a decision on the customary status of Articles themselves.[227]

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[224] The *Strugar* defense challenged Paragraph 22 of the jurisdictional decision on the basis that it improperly permitted the prosecution to use the relevant articles of Protocols I and II as independent charging vehicles regardless of their customary status. Paragraph 22 states as follows:

> The reference to the Additional Protocols by the use in the Indictment of words "as recognized by" is to be understood as a reference to a clear and relatively legal instrument in which the relevant prohibitions under customary international law is reaffirmed. The Defense's objection to the use of the reference to instruments, which are not listed as [a] source of customary law by the Secretary-General Report, is therefore rejected.

Id. para. 22.

[225] Prosecutor v. Pavle Strugar, Miodrag Jokic, No. IT-01-42-PT (Nov. 22, 2002) (ICTY Appeals Chamber Decision on Interlocutory Appeal). As stated in paragraph 9 of the decision:

> [T]he Trial Chamber did not pronounce on the legal status of the whole of the relevant Articles, as, having found that they did not form the basis of the charge against the Appellant, it was not obliged to do so. It rather examined "whether the principles contained in the relevant provisions of the Additional Protocols have attained the status of customary international law," and in particular the principles explicitly stated in the Indictment: the prohibitions of attacks on civilians and of unlawful attacks on civilian objects. It held that they had attained such a status, and in this it was correct.

Id. para. 9.

[226] *Id.* para. 13 (reflecting that "[as] the basis of the relevant counts in the indictment is customary international law, the appellant has no basis for further complaint").

[227] *Id*. para. 11. As noted in the decision, on concurring that there was no error on the part of the trial chamber in "failing to identify the relevant [AP I and II] Articles as treaty law," the Appeals Chamber had no further obligation to comment on the customary status of these articles as charging instruments. *Id.*

The *Strugar* Appeals Chamber also addressed the appellants' contention they were entitled to a ruling as to whether the articles in question represented customary law or treaty law to the extent that these articles appeared to serve as the charging basis.[228] In response, the Appeals Chamber stated that the Trial Chamber did not have to decide this issue because the appellants had incorrectly interpreted the Trial Chamber's decision as reflecting the use of the Additional Protocols themselves as charging instruments, rather than the principles underlying them.[229] Next, citing ICTY precedent regarding jurisdiction and criminal responsibility, the Appeals Chamber held that "[c]ustomary international law establishes that a violation of these principles entails individual criminal responsibility."[230]

In summation, the *Strugar* appellate jurisdictional decision establishes the concept that once the international community recognizes a treaty-based principle as customary law, the principle itself can serve as the charging and jurisdictional basis for individual criminal responsibility.[231] In these circumstances, the actual language of the treaty serves chiefly to specify in both modern and technical terms, the broader customary principles—it does not serve as the basis of the offense.[232] Moreover, *Strugar* holds that the applicability of such a principle as treaty law is both distinct from and subordinate to its customary law status.[233] Thus, in the view of the ICTY, the relevant customary principles

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[228] *Id*. para. 12-13.

[229] *Id.* para. 13.

[230] *Strugar, Jokic*, No. IT-01-42-PT, para. 10 (ICTY Appeals Chamber Decision on Interlocutory Appeal). In affirming the Trial Chamber decision, the Appeals Chamber noted,

> [T]he Trial Chamber made no error in its finding that, as the Appeals Chamber understood it, the principles prohibiting attacks on civilians and unlawful attacks on civilian objects stated in Articles 51 and 52 of Additional Protocol I and Article 13 of Additional Protocol II are principles of customary international law. Customary international law establishes that a violation of these principles entails individual criminal responsibility.

Id. This observation on individual criminal responsibility for violations of customary international law mirrors previously discussed decisions in the *Tadic*, *Kordic*, and *Blaškic* cases.

[231] *Id.*

[232] *Id.* para. 6.

[233] *Id.* paras. 11-13. One the Appeals Chamber affirmed that the customary principles of the relevant Articles of Protocol I were the charging basis, it became unnecessary to examine potential treaty applicability. *Id.*

constitute the actual charging basis, while the treaty instruments themselves merely serve to clarify those principles.[234]

4. Prosecutor v. Stanislav Galic,[235] *Revisited*

Based on the *Strugar* jurisdictional decisions, the *Galic* judgment reflected the Trial Chamber's unanimous view that the customary principles with respect to the protection of civilians articulated in Protocol I (Article 51) form the basis of the ICTY statutory offense of "attacking civilians and/or civilian objects."[236] The same cannot be said, however, for the charge of "unlawfully inflicting terror upon civilians."[237] In this instance, the minority in the judgment contested both a customary, and also a conventional basis of the offense.[238]

In evaluating the terror offense on both a treaty basis and a customary basis, the *Galic* majority opinion does little to definitively support either foundation. Despite having previously affirmed the customary principle in Protocol I (Article 51(2)) that "the civilian population and civilian objects are not to be made the object of attack," the majority was unwilling to definitively adjudge as customary the principle enshrined in the second sentence of the article; namely, that "acts or threats of violence, the primary purpose which is to spread terror among the civilian population, are prohibited."[239]

Instead, the majority opinion seeks merely to buttress a treaty-based jurisdictional argument by applying what is often referred to as the Tadic Jurisdictional Test, derived from the October 1995 *Tadic* Jurisdictional Decision.[240] This test allows the ICTY to adjudicate under Article 3 of the ICTY Statute, offenses alleging the violation of "any treaty which:

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[234] *Id.* para. 6.
[235] Prosecutor v. Stanislav Galic, No. IT-98-29-T (Dec. 5, 2003) (Judgment and Opinion) (J. Nieto-Navia, dissenting).
[236] *Id.* paras. 20-25.
[237] Prosecutor v. Stanislav Galic, No. IT-98-29 (Mar. 26, 1999) (ICTY Indictment, as amended) (Count 1, unlawfully inflicting terror upon civilians, charged as a violation of the laws and customs of war).
[238] *See* Prosecutor v. Stanislav Galic, No. IT-98-29-T, paras. 108-113 (Dec. 5, 2003) (*Galic* Judgment and Opinion) (J. Nieto-Navia, dissenting) (appended to the *Galic* Judgment).
[239] *Id.*
[240] *See* Prosecutor v. Duško Tadic, No. IT-94-1-A (Oct. 2, 1995) (Jurisdictional Decision).

(1) was unquestionably binding on the parties at the time of the alleged offense; and (2) was not in conflict with or derogating from peremptory norms of international law. . . ."[241] In applying this test, the *Galic* judgment notes that Protocol I applied as treaty to the parties on the basis of a 22 May 1992 agreement,[242] and further that "the second part of Article 51 (2) neither conflicts with nor derogates from peremptory norms of international humanitarian law."[243] In affirming that this general treaty principle is in accord with the norms of international law, the majority did not address the issue of customary law with respect to this offense.[244]

In dissent, the minority used a more recent Appeals Chamber decision to argue that the ICTY does not have jurisdiction over this offense precisely because no basis exists to ground this offense either as a violation of the Statute of the ICTY or of customary international law.[245] The dissent further opined that since this is the first time the ICTY adjudicated this offense, the customary nature of both the offense itself and criminal liability for the offense must be established in accord with the principle of *nullum crimen sine lege*.[246] Moreover, the dissent cautioned that the few references cited by the majority opinion would not by themselves suffice to allow a finding that the offense and criminal liability for the offense were indeed customary at the time (1992-1994).[247]

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[241] *Galic*, No. IT-98-29-T, para. 98 (Judgment and Opinion) (J. Nieto-Navia, dissenting) (Judgment) (citing *Tadic*, No. IT-94-1-AR72, para. 143 (Jurisdictional Decision)).

[242] *Galic*, No. IT-98-29-T, paras. 22-25 (Judgment and Opinion) (J. Nieto-Navia, dissenting).

[243] *Id*. paras. 99-105. In this section of the judgment, the majority reviews the observations of a number states with respect to the language of the terror clause of Protocol I, Article 51(2), both during the formulation of the treaty, and the subsequent ratification of Protocol I. *supra* note 14, art. 51(2).

[244] *Galic*, No. IT-98-29-T, para. 138 (Judgment and Opinion) (J. Nieto-Navia, dissenting).

[245] *See id.*, app., paras. 110-112 (providing the separate and partially dissenting opinion of Judge Nieto-Navia citing the *Ojdanic* Interlocutory Appeals Decision (No. IT-99-37AR72, para. 10 (May 21, 2003)).

[246] *Nullum crimen sine lege*—"no crime before law." *Id*. This principle, articulated in the 1993 Report of the Secretary General, is designed to safeguard individuals from being held criminally liable for acts not codified as violations of customary law at the time they were committed. *See Report of the Secretary-General Pursuant to Paragraph 2 of United Nations Security Council Resolution 808 (1993)*, *supra* note 57, para. 34.

[247] *Galic*, No. IT-98-29-T, app., para. 113 (Judgment and Opinion) (J. Nieto-Navia, dissenting).

V. Part III: Propriety of the Use of Protocol I Principles as a Legal Basis for Charges

The previously examined charges and elements developed in ICTY cases offer significant degrees of support for the customary legal basis of the charges and elements U.S. military commission prosecutors intend to use. The charges and elements articulated in *Galic* and *Strugar* offer particularly promising models for several reasons.

The foundation of charges and elements on recognized principles pertaining to the customary prohibition of targeting civilians and civilian objects as articulated in Protocol I (Arts. 48-52)—rather than on GC Common Article 3—preempts any potential conflict with the current U.S. legal doctrine holding that Common Article 3 applies only to internal armed conflicts.[248] Protocol I governs armed conflicts of an international character.[249]

Although the United States has not ratified Protocol I and is therefore neither bound as a matter of treaty law nor entitled to invoke its provisions as a state party, the international jurisprudence discussed in this article articulates the widely held contemporary view that many of the principles reflected in relevant portions of Articles 51 and 52 of Protocol I constitute customarily established norms of the laws of armed conflict. This understanding of the relevant portions of Articles 51 and 52 as a codification of customary law is ideologically compatible with a historical pattern of consistent policy statements by the U.S. government.[250] It is important to note that the scope of legal principles embodied in Protocol I that the United States recognizes as customary is somewhat more restricted than that recognized by the ICTY, and further that the U.S. view would obviously govern military commissions. Nonetheless, despite these narrow doctrinal differences between the United States and the ICTY, considerable common ground exists with respect to the customary nature of conduct-of-hostilities offenses and charges.

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[248] LAW OF WAR DESKBOOK, *supra* note 131, at 130. Despite the observation that universal application to all conflicts is apparently U.S. policy on the issue as cited in the LAW OF WAR DESKBOOK, this remains unspecified in statute. *Id*. The *Expanded War Crimes Act of 1997* explicitly linked violations of Common Article 3 to "non-international armed conflict." 18 U.S.C. § 2441 (c) (3) (2000).

[249] Protocol I, *supra* note 14, art. 1.

[250] Prosecutor v. Pavle Strugar, Miodrag Jokic, No. IT-01-42 (Nov. 22, 2002) (ICTY Appeals Chamber Decision on Interlocutory Appeal).

At a minimum, the principles set forth in relevant portions of Articles 51 and 52 that the United States consistently recognizes, and affirmed by the international community in various manifestations, can be considered settled tenets of the customary law of war. Since the proposed military commissions will have jurisdiction over violations of the "laws of war," these principles are an appropriate basis for charges irrespective of the United States' status as a non-party to the legal instrument that technically codifies them.

A. Model Charges Apply to Attacks Against Civilians in Non-Occupied Territories

As an additional advantage, the charges and elements discussed previously, [251] properly address the non-occupied status of the civilians and civilian objects unlawfully attacked. Unlike the protections afforded to civilians by GC IV, many of which are treaty restricted to civilians under military occupation, Articles 48 through 52 of Protocol I apply more broadly to safeguard civilians and civilian objects from the effects of "battlefield hostilities" without regard to the status of the territory as occupied or merely defended.[252] This broader protection in the principles embodied in Protocol I renders immaterial the issue of control over the civilian population and civilian objects at the time of the offense.[253] Thus, the only relevant issue is whether the international law entitled protected status to the civilians and civilian objects is in question. Moreover, the applicability of such charges founded on the relevant principles of Protocol I is not related to or dependant upon a determination of an accused's status as a lawful combatant; rather, the only requirement is a nexus between the act and a state of armed conflict.[254]

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[251] *See generally supra* Part IV.(B).

[252] Protocol I, *supra* note 14.

[253] *Id.*

[254] As noted in the *Kunarac* Judgment and reflected in Protocol I, the customary law of war obligates parties to the conflict to distinguish between civilians and combatants, and not attack a military object if it is likely to cause civilian casualties or damage which would be in excess to the military advantage anticipated. *See supra* notes 212-214. In this context, this article's authors believe the key elements are the phrases "party to the conflict" and "military advantage anticipated." Whether or not other parties recognize the attacking party at the time as a lawful or privileged belligerent is not germane. The fact that the opposing party may question the legitimacy of a belligerent party does not relieve the challenged belligerent from the obligations to conduct their military operations within the confines of the law of war. Consequently, the requisite

1. Charges Modeled on Violations of Principles in Protocol I Articles 51 and 52 Can Allege Grave Breaches

Charges based on principles enshrined in Articles 51 and 52 of Protocol I have the flexibility to allege serious offenses against customary law equivalent to grave breaches based on principles articulated in Article 85(3) of Protocol I. Specifically, Article 85(3) enumerates the following prohibitions under the law of armed conflict:

> (a) making the civilian population or individual civilians the object of attack;
> (b) launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects as defined in Article 57, paragraph 2 (a) (iii);
> (c) launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury or damage to civilian objects, as defined in Article 57 paragraph 2 (iii);
> (d) making non-defended localities and demilitarized zones the object of attack;
> (e) making a person the object of attack in the knowledge he *is hors de combat*;[255]

2. Terror Charge Incorporates the Element of Specific Intent

Like the unlawful-attack charges in several of the ICTY cases, the terror charge and elements formulated by the prosecution in *Galic* provides a good potential blueprint for a similar charge of unlawfully inflicting terror on civilians as an offense prosecutable by a U.S. military commission. The *Galic* formulation is particularly commendable for its specific-intent element—alleging that the acts or threats of violence were carried out with the primary purpose of spreading terror among the

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considerations by "parties to the conflict" in planning and executing military attacks will be the same, regardless of whether the "military advantage anticipated" belongs to a recognized privileged belligerent, or an unprivileged one.

[255] Protocol I, *supra* note 14, arts. 85(3) (a-e). Subparagrah f, governing the perfidious use of protected emblems, is not applicable. *Id.* art. 85(3)(f).

civilian population—which elevates the egregious nature of this crime.[256] Further, as reflected in the *Galic* Judgment, the actual "infliction of terror" is not the required as a threshold of the commission of the offense.[257] Simply establishing the intent will suffice in establishing the "act of violence."[258] Despite the absence of a decision concerning the customary basis of this offense in the *Galic* Judgment, it can be credibly argued that by the year 2000, this offense was indeed customary (as noted earlier, the U.S. Government advocated the customary nature of this principle as early as 1987).[259]

B. Other Issues Regarding Use of ICTY-Based Charges and Elements at U.S. Military Commission

The ICTY has not fully adjudicated through appeal, the charges and elements discussed in the *Galic* and *Strugar* cases.[260] The defense, and on occasion, the prosecution can challenge the offenses and elements noted in a decision. Moreover, the ICTY Appeals Chamber has the competence to reject or modify them *sua sponte* as a component of its role as the "final arbitrator of law at the International Tribunal."[261] Nonetheless, ICTY decisions are merely instructive in nature on U.S. institutions with respect to the status of customary law.[262] Any technical modifications to the charges and elements in cases currently under appeal before the ICTY should not affect the United States' ability to model charges and elements for a case before a U.S. military commission after those originally submitted by the ICTY, so long as they continue to reflect principles of existing customary law.[263]

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[256] Prosecutor v. Stanislav Galic, No. IT-98-29-T, para. 133 (Dec. 5, 2003) (*Galic* Judgment and Opinion) (J. Nieto-Navia, dissenting).

[257] *Id.* paras. 82, 134.

[258] *Id.* paras. 134-136.

[259] Matheson, *supra* note 65, at 426. Protocol I, *supra* note 14. *See* International Committee for the Red Cross IHL Treaties, *available at* http://www.ICRC.org/ihl.nsf) (last visited Apr. 26, 2004).

[260] At the time of writing, pre-appeals proceedings are underway in *Galic,* with an anticipated Appeals Judgment in early 2005.

[261] Prosecutor v. Tihomir Blaškic, No. IT-95-14, para. 14 n.28 (July 29, 2004) (ICTY Appeals Chamber Judgment).

[262] *See* Ford v. Garcia, 289 F.3d 1283, 1290-1292 (2002). In the case of *Ford v. Garcia*, the 11th Circuit Court of Appeals noted that recent decisions by the ICTY and ICTR provided modern *insights* into the application of the legal doctrine of command responsibility as articulated by the U.S. Supreme Court in *re Yamishita*, 327 U.S. 1 (1946) [emphasis added].

[263] MCI No. 2, *supra* note 7, para. 3A.

On a similar note, the U.S. government's stated positions with respect to the customary status of the relevant provisions of Protocol I will obviously prevail over the ICTY or other international community views, in crafting charges and elements to be used in a case before a U.S. military commission. Therefore, to the extent that the ICTY examples conflict with U.S. policy or with its status as a persistent objector to the purportedly customary status of any provisions, charges, and elements for a U.S. military commission, the United States would need to alter the ICTY's submissions to reflect the United States' understanding of the current state of customary law.[264]

Another potential issue exists with respect to charges for the 11 September 2001 attacks on the Pentagon. Regardless of the United States' objection to a narrow technical aspect of the definition of "military objective" in Protocol I,[265] legal qualification of the Pentagon as a protected civilian or non-military target would be impossible, particularly in light of the state of armed conflict declared in the President's order on military commissions.[266] Furthermore, it would be very difficult as a legal matter to acknowledge the Pentagon as a legitimate military target but argue that the relatively small number of civilian casualties sustained in the attack against that military target was clearly disproportionate to the military advantage anticipated.[267]

Charges that the attack against the Pentagon constituted a violation of the law of armed conflict would therefore necessarily be founded on a theory that the means and method of the attack—namely the hijacking of civilian aircraft and use of those aircraft as projectiles—against the Pentagon is proscribed under customary law. One possible vehicle for such a charge would be the principles articulated in Article 51(7) of Protocol I, which prohibits the use of civilians to shield military operations.[268] Obviously, with respect to the World Trade Center

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[264] For instance, Article 52(3) of Protocol I is not recognized by the United States as reflective of customary law; similarly, the United States has persistently objected to portions of the definition of "military objective" in Article 52(2). Protocol I, *supra* note 14, art. 52(2), (3); *see* U.S. ARMY CENTER FOR LAW AND MILITARY OPERATIONS, LAW AND MILITARY OPERATIONS IN KOSOVO: 1999-2001 LESSONS LEARNED FOR JUDGE ADVOCATES 51-52 (15 Dec. 2001).

[265] *Id.*

[266] Military Order of 13 November 2001, *supra* note 3.

[267] The noncombatant status of the DOD contractors and other civilian DOD employees further complicates the issue of the determination of civilian casualties.

[268] Additional Protocol I, *supra* note 14, art. 51(7).

attacks, there should be no issue concerning the manifestly civilian status of the population and objects attacked.

VI. Conclusion

The ICTY's jurisprudence concerning war crimes committed in the former Yugoslavia serves as a solid foundation for both the customary nature of specific conduct-of-hostilities offenses and for the charges and elements enumerated in MCI No. 2. The ICTY's resolution that the customary principles underlying Articles 48-52 of Protocol I can be an appropriate legal basis for charges, thereby eliminating the need to rely on the articles themselves, is a particularly significant and applicable development given the United States' status as a non-party to that instrument. The ICTY jurisprudence establishes a critical bridge between the generally broader provisions of the 1907 Hague Rules IV and 1949 Geneva Conventions, and the application of the more recent and technically descriptive Additional Protocol I with respect to the customary law of armed conflict. Moreover, these charges and elements are associated with an existing body of international jurisprudence establishing criminal liability for violations of the law of armed conflict (both as an individual, and under the doctrine of superior responsibility).

At the same time, the international judicial forum responsible for creating this body of jurisprudence over the past eleven years was established by United Nations Security Council in 1993, to address the conflict then occurring in the former Yugoslavia.[269] The ICTY Appeals Chamber further serves as the appellate authority for the International Criminal Tribunal for Rwanda established in November 1994.[270] There is no specific association between ICTY trial and appellate related jurisprudence pertaining to the state of customary law, and the events of 11 September 2001. Consequently, U.S. military commissions relying (in part) on jurisprudence originating from the ICTY should be above reproach in that they may be improperly constituting "customary law" strictly to suit any current U.S. political agenda.

ICTY-formulated criminal charges and related jurisprudence are also independent of the Statute and Rules of the International Criminal Court

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[269] U.N. SCOR 808, 3175th mtg., para. 1, S/RES/808 (1993).

[270] U.N. SCOR 955, 3453rd mtg., para. 1 S/RES/955 (1994). *See also Statute of the International Criminal Tribunal for Rwanda*, R. 12 *bis*, *available* at http://www.ictr.org.

(ICC). As such, the U.S. government's reliance on ICTY jurisprudence supporting the customary legal basis for similar charges would not set a precedent for U.S. acquiescence to the controversial ICC Statute. Rather, the United States' embrace of non-objectionable portions of relevant charging tools independently established and adjudicated by an appropriate international judicial forum could demonstrate the U.S. commitment to the basic principles and standards of international criminal law despite its non-participation in the ICC treaty process.

Overall, the contemporary work of the ICTY with respect to adjudicating offenses that violate the laws and customs of war provides a significant legal foundation with respect to the law of armed conflict. The ICTY has produced a well-reasoned, growing body of relevant jurisprudence, which is entirely compatible with the common-law system. While the ICTY Statute remains the primary basis of jurisdiction, trial and appellate benches extensively rely on customary international law and associated state practice in the course of their opinions and judgments. This is particularly true with respect to conduct-of-hostilities offenses. The work of the ICTY should be the first port of call for those legal professionals who will seek to rely on the customary provisions of the law of armed conflict before a U.S. Military Commission.

PROSECUTING INDECENT CONDUCT IN THE MILITARY:
HONEY, SHOULD WE GET A LEGAL REVIEW FIRST?

MAJOR STEVEN CULLEN[1]

> *[V]ague statutes suffer from at least two fatal constitutional defects. First, by failing to provide fair notice of precisely what acts are forbidden, a vague statute "violates the first essential of due process of law."* Connally v. General Construction Co., 269 U.S. 385, 391. *As the Court put the matter in* Lanzetta v. New Jersey, 306 U.S. 451, 453: *"No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." "Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula."* United States v. Cerdiff, 344 U.S. 174, 176.[2]

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[1] Judge Advocate, U.S. Army. Presently assigned as Advance Operational Law Studies Fellow, Center for Law & Military Operations, The Judge Advocate General's Legal Center & School, U.S. Army, Charlottesville, Virginia. LL.M., 2004, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; J.D. 1997, The Ohio State University College of Law; B.A., 1991 Bowling Green State University. Previous assignments include Chief of Military Justice, 82d Airborne Division, Fort Bragg, North Carolina 2002-2003; Chief of Legal Assistance, 82d Airborne Division, Fort Bragg, North Carolina, 2001-2002; Acting Command Judge Advocate, U.S. Army Special Warfare Center and School, Fort Bragg North Carolina, 2001; Chief of Administrative and Contract Law, U.S. Army Special Operations Command, Fort Bragg, North Carolina, 2000-2001; Trial Counsel, 25th Infantry Division and U.S. Army Hawaii, Schofield Barracks, Hawaii, 1999-2000; Administrative Law Attorney, 25th Infantry Division and U.S. Army Hawaii, Schofield Barracks, Hawaii 1998-1999; Legal Assistance Attorney, 25th Infantry Division and U.S. Army Hawaii, Schofield Barracks, Hawaii 1998; Platoon Leader, Bravo Battery (Bradley Stinger Fighting Vehicle), 1st Battalion 5th Air Defense Artillery, 24th Infantry Division, Fort Stewart Georgia, 1993-1994; Platoon Leader, Delta Battery (Avenger), 1st Battalion 5th Air Defense Artillery, 24th Infantry Division, Fort Stewart, Georgia 1992-1993. Member of the bars of Ohio and Pennsylvania. This article was submitted in partial completion of the Master of Laws requirements of the 52d Judge Advocate Officer Graduate Course.

[2] Parker v. Levy, 417 U.S. 733, 775 (1974) (Stewart, Douglas & Brennan, JJ., dissenting).

I. Introduction

Indecent acts with another[3] and other military crimes involving indecency—indecent acts with a child under sixteen-years old,[4] indecent exposure,[5] indecent language,[6] and sending obscene material in the mails[7]—present an uncertain standard of potentially criminal conduct. They present no clear standard of sexual conduct for Soldiers to adhere to, nor do they present a clear standard of proscribed conduct for military attorneys to prosecute. Further, military cases attempting to define indecency or explain the bounds of proscribed indecent conduct fail to establish either a comprehensible definition of the word indecent, or a consistent framework to apply facts to the elements of these military offenses. Persons subject to the Uniform Code of Military Justice (UCMJ) lack a clear differentiation between permissible adult, consensual, noncommercial, private, sexual conduct, and conduct proscribed by the military indecency offenses. Consequently, they make decisions regarding this kind of sexual conduct uncertain of whether they may later be charged and convicted in a military court of an indecency offense.

For both civilians and the military, the scope of lawfully criminalized sexual conduct changed with the U.S. Supreme Court's landmark decision in *Lawrence v. Texas*.[8] In *Lawrence,* the Court's decision finds what is apparently a fundamental liberty interest in the privacy of adult consensual, noncommercial, private sexual conduct. *Lawrence* calls into question the constitutionality of any criminal code that bans this manner of personal conduct.[9] The *Lawrence* decision likely invalidates the military's criminalization of adult, consensual sodomy[10] on constitutional grounds. Consequentially, indecent-acts convictions that rely on the

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[3] MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 90 (2002) [hereinafter MCM].
[4] *Id.* ¶ 87.
[5] *Id.* ¶ 88.
[6] *Id.* ¶ 89.
[7] *Id.* ¶ 94.
[8] 539 U.S. 558 (2003).
[9] *See generally Id*.
[10] This will apply at least, to cases of adult consensual private *heterosexual* sodomy. One can argue that for purposes of good order and discipline, the military has a special need to regulate *homosexual* sodomy, and that the only effective means of regulating this activity is criminalization; therefore, the military should accordingly receive deference in these determinations. This argument, and the military's regulation of homosexual conduct in general, are both beyond the scope of this article.

illegality of sodomy to meet the elements of indecent acts with another, will also fail. The "separate society" theory articulated in *Parker v. Levy*[11] should not limit *Lawrence's* impact on military cases. It is difficult to conceive of a special military need, or legitimate linkage between adult, consensual, noncommercial, private sexual conduct, and either good order and discipline[12] or service credibility. Accordingly, after *Lawrence,* the military may not impose a different criminal standard for this private sexual conduct than that which applies to other citizens.

Recent cases in the Court of Appeals for the Armed Forces (CAAF) have reduced the scope of conduct proscribed by the indecency offenses[13] and suggest a subtle change in the military law of indecency. These cases demonstrate the CAAF's acceptance that contemporary military standards, and not those of overly strait-laced fact finders must measure the definition of indecency. These CAAF decisions, coupled with the implications of *Lawrence v. Texas*, suggest that the CAAF will exercise even greater scrutiny of indecency cases in the future, and that military prosecutors should exercise caution when charging a minor indecency offense as part of a larger case.

II. Indecency Is Incomprehensively Defined by the Military Courts

A. Do the Array of Terms Used to Define "Indecency" Add Anything to Understanding What Conduct the Indecency Offenses Actually Proscribe?

Perhaps the first problem in prosecuting indecent conduct is establishing a cogent definition of the word "indecent". Military courts attempting to provide clarity to the meaning of the word "indecent" have only a circular definition of indecency that includes few words of common understanding[14] to assist them in their effort. Justice Stewart

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[11] 417 U.S. 733 (1974).

[12] William Sherman, *The Civilianization of Military Law*, 22 MAINE L. REV 3 (1973). The power to court-martial under vague standards tends to encourage an arbitrariness of command, which is undesirable in itself and which can have an adverse effect upon morale. *Id.*

[13] *See generally* States v. Baker, 57 M.J. 330 (2002) (finding the military judge's instructions on indecency inadequate); United States v. Brinson, 49 M.J. 360 (1998) (finding the accused's clearly offensive epithets not indecent under the circumstances).

[14] *See, e.g.*, United States v. Negron, 58 M.J. 834, 841 (N-M. Ct. Crim. App. 2003) (defining "obscene" as synonymous with "indecent," defining "libidinous" as "marked by lustful desires: characterized by lewdness"); United States v. Allison, 56 M.J. 606, 608

may have been correct in describing the task of precisely defining obscenity (a term closely related to indecency) as "trying to define the undefinable."[15] Nevertheless, as the terms indecent and obscene specifically appear in the elements of indecency offenses, the justice system requires cogent definition of these terms.

Military judges define indecent acts as "that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but which tends to excite lust and deprave the morals with respect to sexual relations."[16] Similarly, indecent language is defined as "grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. . . [and] must violate community standards."[17] Military courts have found the test to determine if language is criminally indecent "lies in whether the particular language is calculated to corrupt morals or excite libidinous thoughts."[18] Various court decisions attempting to pin down the meaning of these definitions expose a circularity problem in the list of adjectives used to modify and illuminate the meaning of indecent. One military court, in apparent frustration, found that "[t]he term 'lascivious' is synonymous with 'lewd' or 'indecent' and inclusion of the latter adjectives in addition to the former adds nothing . . . ."[19] The Supreme Court found simply that "[i]ndeed, 'lascivious' has been defined along with obscene and lewd, as signifying that form of immorality which has relation to sexual impurity."[20] From these cases, it is clear that indecency is largely defined not by an explanation, but by a

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(C.G. Ct. Crim. App. 2001) (finding essentially that sodomy is indecent *per se*: "It would indeed be a tortured exercise in semantics to conclude that oral sodomy is not an indecent act" (quoting United States v. Harris 25 M.J. 281, 282 (C.M.A. 1987))); United States v. Gaskin 12 C.M.R. 419, 421 (C.M.A. 1961) (defining "lascivious" as synonymous with "lewd" or "indecent").

[15] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[16] U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK para. 3-90-1 (15 Sept. 2002) [hereinafter BENCHBOOK].

[17] United States v. Negron, 58 M.J. 834, 836-37 (N-M. Ct. Crim. App. 2003), *petition granted*, 59 M.J. 258 (2004).

[18] United States v. French, 31 C.M.R. 57, 60 (C.M.A. 1990) (quoting United States v. Linyear, 3 M.J. 1027, 1030 (N.M.C.M.R. 1977)).

[19] United States v. Gaskin, 12 C.M.R. 419, 421 (C.M.A. 1961) (quoting United States v Hobbs, 23 C.M.R. 157 (C.M.A. 1957)).

[20] Swearingen v. United States, 161 U.S. 446, 448 (1896).

string of synonyms providing little guidance on what specific conduct is meant to be included within the definition.

Military courts have also determined the word "obscene" to be synonymous with indecent.[21] The Supreme Court's test for obscenity is "whether to the average person, applying contemporary community standards, the dominant theme . . . taken as a whole appeals to the prurient interest."[22] The military refines the Court's definition of "obscene" explaining that the "applicable and relevant community standards . . . are those of the military community"[23] and are to be judged "according to the average person in the military community as a whole, rather than the most prudish or tolerant."[24]

Military courts are by no means alone in struggling to provide a cogent definition of the conduct or material actually described by the words "indecent" and "obscene." An Ohio municipal court identified that "[u]nder the statute defining lewdness, as including any indecent or obscene act, the words indecent and obscene add nothing to broaden the concept of lewdness, but are simply modifying adjectives."[25] Struggling with this same concept, a Kentucky court found that "the word indecent includes anything which is lewd or lascivious, obscene or grossly vulgar, unbecoming, unseemly, or unfit to be seen or heard."[26] The opinion generally expressed by courts appears to be that the words indecent, obscene, lewd, lascivious, and prurient, all describe the same thing with no meaningful difference between them.

All of these definitions and tests rely on a series of adjectives that are hardly helpful in actually understanding what the principal terms indecent and obscene describe. None of these words—lewd, lascivious, prurient, etc.—provide any clarity to the bounds of the conduct meant to be criminalized by the words indecent and obscene. In defining these words, courts might just as well, and probably to better effect, resort to

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[21] *Negron*, 58 M.J. at 841; *see also French*, 31 C.M.R. at 59 (defining indecent as synonymous with obscene).

[22] Roth v. United States, 354 U.S. 476, 191-95 (1957). The phrase "prurient interest," not helpfully, is defined as "patently offensive representations or descriptions of normal or perverted sexual acts of the description of masturbation, excretory functions, or lewd exhibition of the genitals." Miller v. California, 413 U.S. 15, 25 (1973).

[23] United States v. Hullet, 40 M.J. 189, 191 (C.M.A. 1994).

[24] *Negron*, 58 M.J. at 841.

[25] State v. Davis, 165 N.E. 2d 504 (1959).

[26] King v. Commonwealth, 233 S.W. 2d 522 (1950).

the adjective "dirty." This effort provides precious little guidance on what conduct is actually proscribed by the indecency offenses. One must seriously question what the average military person considers appealing to the "prurient interest," and even this must assume that the average military person has in mind any definition of the word prurient. A further serious question is whether courts-martial panel members, selected because of their, "education, training, experience, length of service, and judicial temperament";[27] or military judges as fact finders, can ever fairly represent the standards of the average person in the military community.[28]

The best to be gleaned from the numerous judicial efforts to define the words indecent and obscene is that they describe some form of sexual behavior of which courts do not approve. Justice Stewart's famous quote—"I know it when I see it"[29]—is probably the best, albeit entirely subjective, description of the gauge used to determine whether a given action is indecent or obscene. Unfortunately, great disparity undoubtedly exists between different individuals, including military prosecutors and judges in how they apply this gauge to the conduct of others. The remainder of Justice Stewart's famous quotation should also be instructive to fact finders who may be tempted to convict any scurrilous conduct charged as indecent, "and the [movie banned by the state as obscene] is *not* that."[30]

B. How Have Courts Actually Illuminated the Difficult Definition of Indecency?

Military courts, attempting to apply the difficult definition of indecency to charged misconduct must determine when sexually related conduct is sufficiently offensive to warrant the label indecent or obscene and, consequently, be worthy of a court-martial conviction. As a starting point, military courts recognize that "[the UCMJ] is not intended to

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[27] UCMJ art. 25 (2002).

[28] Though beyond the scope of this paper, considering the age of most Soldiers, it is worth pondering whether court-martial panels (typically comprised of commissioned and senior noncommissioned officers), or military judges (typically senior commissioned officers) actually attempt to apply the standards of "the average person in the military" or apply their own standards to define these terms.

[29] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[30] *Id.* (emphasis added).

regulate the wholly private moral conduct of an individual."[31] Accordingly, military courts consistently state, "[p]rivate sexual intercourse between unmarried persons is not punishable."[32] One way the courts find otherwise lawful sexual intercourse to be indecent, and thus criminal, is when the sex act is committed "openly and notoriously."[33] Open and notorious conduct occurs when it is subject to the public view.[34] Courts consider the public nature of such acts an aggravating circumstance that converts an otherwise excusable act into an offense.[35] The issue of whether the act was in fact open and notorious is often litigated. These cases demonstrate the difficulty of determining whether a given sexual act should be defined as a crime.

In *United States v. Berry*, the Court of Military Appeals (COMA) found that the place of occurrence does not always determine the public nature of an act,[36] holding that "[a] private residence in which other persons are gathered may be regarded as a public place for the purpose of [determining whether the act is open and notorious]."[37] In *Berry*, the evidence revealed that Sergeant (SGT) Berry and a co-accused Soldier, engaged in consensual, round-robin sex with two young women in a private hotel room.[38] The court found that despite the privacy of the hotel room, the sexual intercourse took place in a public location and became an indecent act because the participants knew of the "actual presence of a third person."[39] The court found irrelevant the fact that the third persons actually present in this case were unlikely offended as they were themselves participants in the sexual intercourse, holding that "the effect of the act on persons of average sensibilities [not the sensibilities of the actual participants] determines the aggravating circumstances."[40]

Subsequent to *Berry*, military courts continue to revisit the issue of when a sexual act takes on a public nature making it worthy of conviction. In 1989, the Navy-Marine Court of Military Review (NMCMR) overturned the conviction of Lance Corporal Carr for

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[31] United States v. Snyder, 4 C.M.R. 15, 19 (C.M.A. 1952).
[32] United States v. Hickson, 22 M.J. 146 (C.M.A. 1986); *see also* Eisenstadt v. Baird, 405 U.S. 438 (1972).
[33] *Hickson*, 22 M.J. at 149 (quoting United States v. Berry, 6 C.M.R. 609 (C.M.A.1956)).
[34] *Berry*, 6 C.M.R. at 614.
[35] *Id.*
[36] *Id.* at 609.
[37] *Id.* at 614.
[38] *Id.* at 611.
[39] *Id.* at 614.
[40] *Id.*

indecent acts with another by "fornicating on a public beach."[41] In this case, the court found the facts as follows:

> Carr and P, the 16 year old daughter of an Air Force Technical Sergeant . . . strolled down the beach for about ¼ mile, into a camping area that was officially closed at 1900. They sat down together at a thatch-covered picnic table. On the ground next to the table was a large canvas tent . . . at some point after midnight . . . . [t]hey lay down on the side of the tent and engaged in sexual intercourse.[42] The sex act occurred on a military beach campground, within 50 feet of a tent occupied by an apparently sleeping family.[43]

Carr was originally charged with rape for these acts, but was acquitted of rape and found guilty of the lesser included offense of indecent acts with another.[44] On appeal of the conviction, the Navy-Marine court weighed the issue of "whether an unwitnessed act of sexual intercourse on a public beach late at night is a 'public' [and thus indecent] act within the meaning of Article 134 of the UCMJ."[45] Ultimately, the court expanded on the *Berry* definition by determining that "an act is 'open and notorious' when it is performed in such a place and under such circumstances *that it is reasonably likely to be seen* by others."[46] The court then determined that despite the actual presence of third persons, separated only by the canvas of their tent, the act was "not likely to be seen by others."[47] The court also took specific note of the "intent of the parties not to be seen"[48] when overturning Carr's conviction.

In *United States v. Izquierdo*,[49] the CAAF adopted the Navy-Marine court's definition of indecency provided in *Carr*, though not its application. At trial, Airman (Amn) Izquierdo was acquitted of raping

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[41] United States v. Carr, 28 M.J. 661 (N.M.C.M.R. 1989).
[42] *Id.* at 662.
[43] *Id.* at 665.
[44] *Id.* at 662.
[45] *Id.*
[46] *Id.* at 665 (emphasis added).
[47] *Id.* at 666.
[48] *Id.*
[49] 51 M.J. 421 (1999).

two young women in his barracks room, but convicted of the lesser included offense of committing indecent acts with both women.[50] The CAAF affirmed one indecent acts conviction, and reversed the other.[51]

In the indecent act with another affirmed by the CAAF, Amn Izquierdo and a young woman had sexual intercourse on his bed in a barracks room while his two roommates were across the room in their beds.[52] A sheet hanging from the ceiling divided the room and blocked the roommates' view of Izquierdo's activities, but the roommates were "quite suspicious of the activity on the other side of the sheet."[53] Using the legal standard provided in *Jackson v. Virginia*,[54] the CAAF held that despite the fact that no one actually saw the intercourse, the members could find the act open and notorious, as it was reasonably likely to be seen by others.[55] Unlike the *Berry* case, the court did not mention the parties' intent not to be seen.

In the indecent acts with another conviction overturned by the CAAF,[56] Izquierdo had sexual intercourse with another young woman on the same bed. This time, no other person was in the room, but one of his roommates, suspecting the sexual activity, opened the unlocked door and actually saw the sexual activity.[57] Even though the sex act was actually witnessed by others, the court found "there was not sufficient evidence, as a matter of law, of the open and notorious nature of the sexual conduct."[58] In his concurring opinion, Judge Sullivan points out that this decision adopts the "reasonably likely to be seen by others"[59] standard of *Carr*, but points out the difficulty in "explaining the difference between a sheet in a room and a closed but unlocked door which was opened by a roommate suspecting sexual conduct."[60] Without saying so, the CAAF in *Izquierdo,* like *Carr*, apparently uses a definition of open and

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[50] *Id.* at 422.
[51] *Id.* at 423.
[52] *Id.*
[53] *Id.*
[54] 443 U.S. 307, 319 (1979) (stating the standard of review for legal sufficiency as "asking whether, considering the evidence in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt").
[55] *Izquierdo*, 51 M.J. at 423.
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.* (Sullivan, J., concurring).
[60] *Id.*

notorious that looks to the intent of the parties. Apparently, the CAAF was reluctant to sustain a conviction when it believed that despite being actually seen, the parties took reasonable steps (e.g., closing a door) to avoid being seen by others.

Even with the assistance of these cases, it remains difficult to determine when sexual conduct will be considered to occur openly and notoriously. From the decisions in *Izquierdo* and *Carr*, it apears that the dividing line between sexual conduct that is private and sexual conduct that is open and notorious—and thus indecent acts—falls somewhere between the thickness of a cotton sheet and the thickness of a canvas tent wall.

Similar to *Carr* and *Izquierdo*, when the courts considered the couples' intent to keep their sexual acts private,[61] military courts have also considered state of mind to determine if an accused's acts demonstrated indecent intent. An example, *United States v. Proper*[62] is a surprising case in which the Coast Guard Court of Criminal Appeals reversed Chief Petty Officer Proper's conviction for indecent assault.[63] The facts at trial revealed that a female petty officer under Proper's supervision arrived for watch without wearing the required T-shirt under her coveralls, an infraction for which Proper had previously counseled the petty officer. When she appeared on watch a few days later, wearing only a bra beneath the coveralls, Proper hooked a finger in her shirt collar and said "[y]ou're not wearing a T-shirt, if [you're] going to give [me] a free titty shot, then [I'm] going to take it."[64] Reversing the

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[61] United States v. Carr, 28 M.J. 661, 666 (N.M.C.M.R. 1989); *Izquierdo*, 51 M.J. at 421.
[62] 56 M.J. 717 (C.G. Ct. Crim. App. 2002), *petition denied*, 56 M.J. 472 (2002).
[63] *Id.* Chief Petty Officer Proper was convicted of the following: eight specifications of violating a lawful general regulation (six by engaging in sexually intimate behavior with subordinate female crewmembers, one for consuming alcohol in the ship's radio room, and one specification of violating a lawful order of a superior officer), all in violation of Article 92 of the UCMJ; one specification of maltreatment of a female subordinate, in violation of Article 93 of the UCMJ; six specifications of committing sodomy onboard his cutter with a subordinate female member of the ship in violation of Article 125 of the UCMJ; two specifications of assault consummated by a battery upon two female subordinates, in violation of Article 128 of the UCMJ; and seven specifications under the general article of the UCMJ (one for committing an indecent act by engaging in sexual intercourse on a racquetball court in a Navy gymnasium, one for committing an indecent assault on a female subordinate, two for wrongfully impeding an administrative investigation, and three for adultery), all in violation of Article 134 of the UCMJ. Proper was sentenced to a bad conduct discharge, confinement for six months, and reduction to pay grade E-1. *Id*.
[64] *Id.* at 718.

indecent assault conviction, the Coast Guard court essentially relied on the definition of indecent first stated in *United States v. Holland*,[65] that "the word indecently itself is insufficient to show how or in what manner the act charged was indecent . . . [and] excludes any possibility that . . . the conduct charged could reasonably be interpreted as innocent."[66] The court concluded that under the circumstances there was insufficient evidence that Proper's actions were performed with the intent to satisfy his lust, and therefore concluded the assault was not indecent.[67] The court used the intent of the actual parties to determine that despite appearances, and the plain meaning of the spoken words, the act was not sexual, and consequently not indecent.[68]

Very recently, the Navy-Marine court issued an opinion demonstrating the continuing difficulty of pinning down a precise meaning of "obscene" and "indecent," and the humor, if not futility of the various adjectives used to circumscribe them. In *United States v. Negron*, the Navy-Marine court sustained Corporal Negron's conviction of, among other things,[69] depositing obscene materials in the mail.[70] The conviction stemmed from an angry letter Negron mailed to his credit union that closed with the offensive phrase: "[m]aybe when I get back to the states, I'll walk in your bank and apply for a blowjob, a nice dick sucking . . . ."[71] The court's opinion scrupulously parsed the meaning of

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[65] 12 C.M.R. 444 (C.M.A. 1961).

[66] *Id.* at 445.

[67] *Proper*, 56 M.J. at 718.

[68] *Id.* The indecent assault charge was reduced to the lesser included offense of assault consummated by a battery. In accordance with Chief Petty Officer Proper's concession, the court agreed that the sentence adjudged would not have been reduced had the trial court reached the same result. *Id.*

[69] 58 M.J. 834 (N-M. Ct. Crim. App.2003), *petition granted*, 59 M.J. 258 (2004). Negron was also convicted of wrongful appropriation, making and uttering a worthless check. *Id.* at 835.

[70] *Id.* at 836; *see also* MCM, *supra* note 3, pt. IV, ¶ 94 (2002).

[71] *Negron*, 58 M.J. at 836. Negron's letter was in response to the credit union denying his loan request. His complete closing remarks in the letter were the following:

> Oh, yeah, by the way y'all can kiss my ass too!! Worthless bastards! I hope y'all rot in hell you scumbags. Maybe when I get back to the states, I'll walk in your bank and apply for a blowjob, a nice dick sucking, I bet y'all are good at that, right?

Id.

Negron's written words and curiously speculated as to their impact on the reader to uphold Negron's obscenity conviction.[72]

During Negron's providence inquiry, the military judge used the *Benchbook's* definition for indecent acts with another to define "obscene" rather than the *Benchbook's* obscenity definition.[73] The Navy-Marine court found no error in this inconsistency by concluding that the word obscene is synonymous with indecent, and that "[t]he matter must violate community standards of decency or obscenity and must go beyond customary limits of expression."[74] The Navy-Marine court explained that for its own decision, it would use neither the trial court's definition nor the *Benchbook's* obscenity definition, finding the most appropriate definition to be "that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite libidinous thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts."[75]

Having selected this third definition, the Navy-Marine court engaged in a curious analysis of the meaning of the words "morals," "libidinous," and "incite" to determine whether the language written by Negron was actually obscene.[76] The court supplied the definition of libidinous as, "having or marked by lustful desires; characterized by lewdness."[77] It defined morals as "rules or habits of conduct, especially sexual conduct,

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[72] *Id.*

[73] *Id.* at 841. The trial judge used the language from MCM, *supra* note 3, pt. IV, ¶ 90c:

> That form of immorality relating to sexual impurity which is not only grossly vulgar and repugnant to common propriety, but which tends to excite lust and deprave the morals with respect to human relations . . . The matter must violate community standards of decency or obscenity and must go beyond customary limits of expression. The community standards of decency or obscenity are to be judged according to the average person in the military community as a whole rather than the most prudish or tolerant.

Id. (quoting MCM, *supra* note 3, pt. IV ¶ 90c).

[74] *Id.* (quoting United States v. Hullet, 40 M.J. 189, 191 (C.M.A. 1994)).

[75] *Id.* at 836-37 (quoting MCM, *supra* note 3, pt. IV, ¶ 89c).

[76] *Id.* at 841-45.

[77] *Id.* at 837 (citing WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1304 (16th ed. 1971)).

with reference to standards of right and wrong."[78] The court defined incite as to "stir up."[79] Surprisingly, the court relied on two different dictionaries, the most current of which was twenty-seven years old, to provide these three definitions. The court's reliance on two different obsolete dictionaries to supply the definitions to support the conviction is troubling as the accused was unlikely born when either was printed,[80] and because current dictionaries no longer provide a sexual connotation to the definition of morals.[81] It is questionable whether an obsolete dictionary definition can fairly assist in determining the contemporary community standard or supply the basis for a criminal conviction.

Using the antiquated definitions as guidance, the Navy-Marine court found that "for most individuals, the very descriptive nature of [Negron's] operative words and phrases upon reading—even if totally involuntary and only fleetingly—will incite libidinous thoughts, in that the mental image of the described act will flash through one's mind."[82] The court specifically declined to view Negron's conduct as a coarse expression of anger—"cursing like a sailor."[83] Instead, it focused on the sexual content of his words, and the visual impact the court imagined they have on a reader.[84] Unfortunately, the court's analysis provided no

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[78] *Id.* at 844 (citing THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 852 (1976)).

[79] *Id.* at 843 n.19 (citing THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 665 (1976)).

[80] Although Negron's age at the time of conviction is unavailable, considering his rank was Lance Corporal (E-3) at the time of trial, it is unlikely he was twenty-seven or more years old.

[81] *See, e.g.*, RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY (2d ed. 1998) (defining morals as principles or habits with respect to right or wrong conduct).

[82] *Negron*, 58 M.J. at 843.

[83] *Id.* at 853-54.

[84] *Id.* The court found the following:

> As sad and as unwelcome as it may be, as a culture we have become somewhat desensitized to the "F" word, and, regrettably, it seems to be on the fringe of the older, long-established group of recognized and perhaps somewhat more "acceptable" commonly-used expletives, such as "hell," Damn," and "s___". . . applying the appropriate military community standard," we do not find that Appellant's words of choice have reached the same commonly-used-as-an-expletive status as the "F" word. How often, when hitting a thumb with a hammer or upon spilling hot, greasy gravy on a new shirt or skirt, is one heard to blurt" "Oh, [the "B" word]!"? Appellant's explicit and descriptive words invoke the image of the sexual act itself.

explanation to support their assertion that someone who read Negron's insulting words would involuntarily form a mental image of a bank employee performing fellatio on a customer.

In *Negron*, the Navy-Marine court's analysis is nearly the complete opposite of the Coast Guard court's in *Proper*. Faced with a question of intent similar to that in *Proper*, the *Negron* court decided to focus on the appearance of sexuality in the words, and not the likely intent of the party who wrote them.

III. The Elements of Indecency Offenses Are Loosely Applied by Military Courts

A. Does Indecent Acts With *Another* Actually Require Another Person?

The elements of the offense of indecent acts with another are listed in the *Manual for Courts-Martial* (*MCM*) as:

> (1) the accused committed a certain wrongful act with a certain person; (2) the act was indecent; and (3) under the circumstances the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces . . . .[85]

In analyzing indecent acts convictions, military courts demonstrate a surprising willingness to disregard the specificity of these elements. The result of this curious analytical technique tends to affirm convictions of appellants who legitimately challenge the sufficiency of the evidence presented on one or more of the elements.

An opening question regarding the specificity of the elements in indecency crimes is whether the UCMJ with the specified offenses of: indecent acts or liberties with a child;[86] indecent exposure;[87] indecent

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Id. It may say a great deal about the court's perspective and their ability to relate to the contemporary community standard of the military when the example they provide for cursing is "spilling hot greasy gravy on one's shirt or skirt." *Id*.

[85] MCM, *supra* note 3, pt. IV, ¶ 90b (2002) ("Under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.").

[86] *Id.* ¶ 87.

language;[88] indecent acts with another;[89] and depositing obscene matters in the mails[90] specifies all forms of indecent sexual conduct meriting proscription. The COMA, in sustaining the conviction in *United States v. Sanchez*[91] answered the question in the negative. At trial, Private Ricardo Sanchez was convicted of violating Article 134 by "wrongfully and unlawfully commit[ing] an indecent act with a chicken by penetrating the chicken's rectum with his penis with intent to gratify his [Private Sanchez's—not the chicken's] lust."[92] On appeal, the defense argued to overturn the conviction as the facts met neither the elements of sodomy nor of indecent acts with another.[93] The court disagreed, finding that although "[a]rticle 134 did not intend to regulate the wholly private moral conduct of an individual . . . [i]t would be an affront to ordinary decency to hold that an act such as the one here committed was not criminal *per se* and would not dishonor the service . . . ."[94]

Although one expects the incidence of human-chicken copulation to be rare, this case has precedential value as the *Sanchez* court affirmed an Article 134 conviction for conduct that did not meet the elements of any other offense, but that the court found Sanchez's conduct to be indecent *per se*, and service discrediting. The *Sanchez* case remains viable to prosecute sexually related conduct that offends the government, but is not specifically proscribed by the *MCM*.

The case of *United States v. Allison*[95] demonstrates a military court's willingness to sustain a conviction for indecent acts with another when the indecent act was not performed "with" another person. In this case, Allison, a Coast Guard specialist first class,[96] pled guilty to two specifications of consensual heterosexual sodomy, and one specification of indecent acts with another by videotaping his acts of sexual intercourse and sodomy.[97] Allison's co-actor in the sexual activity was

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[87] *Id.* ¶ 88.
[88] *Id.* ¶ 89.
[89] *Id.* ¶ 90.
[90] *Id.* ¶ 94.
[91] 11 C.M.R. 216 (C.M.A. 1960).
[92] *Id.* at 217.
[93] *Id.*
[94] *Id.* at 218 (quoting United States v. Snyder, 4 C.M.R. 15 (C.M.A. 1952)).
[95] 56 M.J. 606 (C.G. Ct. Crim. App. 2001), *petition denied*, 57 M.J. 104 (2002).
[96] *Id.* In the Coast Guard, the rank of specialist first class is a pay grade E-6 service member, equivalent to an Army staff sergeant.
[97] *Id.* Allison also pled guilty to, and was convicted of, two specifications of violating a lawful order, and one specification of attempting to destroy evidence. Allison received a

his future wife.[98] Though the record fails to explain how these acts came to be charged, the facts of the case were undisputed. Allison and his future wife engaged in acts of sexual intercourse and oral sodomy in the privacy of Allison's home. They both participated in videotaping these actions. The tape never left the home, and there was no evidence that the tape was ever shown to anyone.[99]

Beginning its analysis, the Coast Guard court acknowledged that unless otherwise in violation of the law, consensual acts of sexual intercourse between unmarried participants are not indecent if conducted in private.[100] The court determined though, that because sodomy is an offense under Article 125, UCMJ, whether heterosexual, consensual, private or not, videotaping such acts is "a different matter."[101] The court followed this finding with the conclusion that "[i]t would indeed be a tortured exercise in semantics to conclude that oral sodomy is not an indecent act,"[102] and sustained Allison's convictions for both sodomy and indecent acts with another by videotaping the acts.

Whether oral sodomy was itself an indecent act *per se* did not ultimately drive the Coast Guard court's decision regarding the indecent acts with another offense. For engaging in oral sex, Allison was charged and convicted of sodomy.[103] The act of videotaping the sexual activities served as the basis for Allison's indecent acts with another conviction.[104] The court's analysis based the conviction on Allison's acts with a video camera, not his acts with his future wife. After restating the definition of indecency provided in the *MCM*,[105] the court inferred from the facts that either "the making of the tape itself, [Allison's] knowledge that his acts of sodomy were being videotaped, or the anticipation of later viewing,

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sentence that included eighteen months confinement and reduction to the lowest enlisted grade. *Id.*

[98] *Id.* at 607.

[99] *Id.*

[100] *Id.* at 608 (quoting United States v. Carr, 28 M.J. 661 (N.M.C.M.R. 1989)).

[101] *Id.*

[102] *Id.* (quoting United States v. Harris, 25 M.J. 281, 282 (C.M.A. 1987)).

[103] *Id*. at 606.

[104] *Id*.

[105] *Id.* at 608 (citing MCM, *supra* note 3, pt. IV, ¶ 90c (2000)). The court explained that "'indecent' signifies that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations." *Id.*

somehow excited his lust to a greater extent or degree than that engendered by the sexual acts alone."[106]

The "excited lust" reasoning of *Allison* is troubling when carefully scrutinized. The court's reasoning suggests that a sexual act becomes criminal when at the time of the sex act, the presence of some other object excites extra lustfulness in the actor's mind. By this logic, there is no reason to confine offending (extra-lustful thought exciting) objects to video cameras. As precedent, this case predicts the possible successful prosecution of adult, consensual sex performed in a private bedroom occupied only by the couple performing the sex act and an "extra-lustful thought exciting" television playing a pornographic program. By extension of the very same logic, a prosecution could be successful if the extra-lustful thought- exciting object is a bouquet of flowers, a scented candle, or bottle of Viagra.[107]

Perhaps realizing the frailty of the "excited lust" analysis standing alone, the *Allison* court ultimately sustained the indecent acts conviction for a more conventional, but factually unsupported reason, concluding that the sex act performed by the couple alone in a private bedroom was nevertheless performed in public view. To reach this conclusion, the Coast Guard court reasoned that the presence of a video camera created public view, finding:

> By capturing the transient acts of sodomy on tape, a degree of permanence was created which enabled later viewing of these acts at any time by anyone. Appellant argues that these tape images were for private use only, but we know that he kept the tape for over seven months, during which time it was possible that someone else could have viewed the tape, with or without Appellant's permission. In fact the police viewed it after its seizure . . . Thus, despite Appellant's argument that the tape was not for others to see, the private quality of the sexual acts was compromised as a result of the videotape. The potential for viewing by others, that taping affords, prompts us to equate videotaping with placing a third-

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[106] *Id.*

[107] Viagra is a pharmaceutical prescribed and marketed to enhance libido and correct erectile dysfunction. Pfizer Pharmaceuticals Viagra official information web site, *available at* http://www. viagra.com (last visited Mar. 15, 2004).

> person observer in the room, and causes the enterprise to take on a public character.[108]

The fact Allison and his future wife kept the recorded images private indicates that the court, without explicitly saying so, reasoned that activities performed in front of a video camera are in the public view *per se*.[109] In this decision, the Coast Guard court created an entirely new definition of public view, and applied it in a manner inconsistent with both the "actual presence of a third person" standard of *Berry*[110] and the "reasonably likely to be seen by others" expansion of *Berry* established in *Carr*.[111] The *Allison* court accepted as fact that the participants performed the activity in private, intended to keep the tape private, and that the tape never left the home. *Allison* establishes a "potential for viewing by others"[112]—at any time now or in the future—standard. The *Allison* court provided no guidance as to how low the actual potential may be for an act to become criminal.

As precedent, the reasoning in *Allison* potentially criminalizes many more sexual activities than just those performed by Allison and his future wife. Under *Allison,* the intent of the parties to keep sexual activity private is irrelevant. Accordingly, the *Allison* "potential for viewing" standard by logical extension could be applied to criminalize unwitnessed sex acts performed behind closed but unlocked doors, as there is certainly at least the potential for viewing by others. Logically, this could be applied not only to couples in barracks rooms, where the presence of other Soldiers in the building creates at least the potential for viewing, but also to parents in their own bedrooms when their own children are in the house.

Careful scrutiny of either of the Coast Guard court's rationales ("excited lust" or "potential for viewing") for upholding Allison's conviction shows them to be fundamentally flawed. Applying the logic of the *Allison* court to consider whether apparently innocent acts of

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[108] *Allison*, 56 M.J. at 609.

[109] *Id.* Though entirely beyond the scope of this paper, *Allison*'s reasoning that anything videotaped, even in a private bedroom, should be considered in the public view fails when analyzed in any other context. It is unlikely courts would ever accept this reasoning to suggest that a crime victim's videotaped statement to either hospital or law enforcement personnel is in the public view.

[110] United States v. Berry, 6 C.M.R. 609, 614 (C.M.A. 1956).

[111] United States v. Carr, 28 M.J. 661, 665 (N.M.C.M.R. 1989).

[112] *Allison*, 56 M.J. at 609.

sexual intercourse would fall within either of the rationales, demonstrates the flaw. Both rationales encompass, and therefore potentially criminalize far too broad a range of sexual conduct. *Allison* fails to provide a cogent standard to guide either prosecutors or participants in cases of adult consensual sexual activity with the intent to maintain privacy.

B. Does Indecent Acts *With* Another Actually Require That Another Person Participate?

Military courts reviewing court-martial convictions for the offense of indecent acts with another[113] frequently analyze whether the first element of the offense: "[t]hat the accused committed a certain wrongful act with a certain person"[114] is met. One part of this analysis is determining whether presumably indecent conduct was actually performed *with* another person. The results in these cases are often surprising, and demonstrate military courts' willingness to twist the plain language of the elements to avoid overturning a conviction. As the "definitions" cases like *Negron* demonstrate the practice of functionally defining "indecent" as sex-related acts of which the court does not approve, these "elements" cases demonstrate a similar willingness to sustain convictions for sex-related activities of which the court does not approve, regardless of whether the facts meet the actual elements of the offense.

In *United States v. Thomas*,[115] the COMA established a rather straightforward test to determine whether an accused's act fits the elements of the indecent acts with another offense, or whether the act fits into the more generally described offense of indecent exposure.[116] At

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[113] MCM, *supra* note 3, pt. IV, ¶ 90 (2002). The specific elements for this offense are:

> (1) That the accused committed a certain wrongful act with a certain person;
> (2) That the act was indecent; and
> (3) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Id. ¶ 90b.

[114] *Id.*

[115] 25 M.J. 75 (C.M.A. 1987).

[116] MCM, *supra* note 3, pt. IV, ¶ 88 (2002). The elements of indecent exposure are:

trial, Thomas was convicted of indecent acts with another for playing games and dancing with nude children, and persuading the children to let him pose them as nude models.[117] The COMA affirmed the conviction, finding,

> The offense of committing indecent acts with another requires that the acts be done in *conjunction or participation with* another person . . . . It is the *participation* of [the accused] with the children in the performance of the indecent acts which distinguishes it from indecent exposure . . . . It was much more than merely exposing himself to an unwilling nonparticipant.[118]

This straightforward "in conjunction or participation with" requirement was almost immediately contorted by the service courts to support indecent acts convictions when the facts provided no evidence of actual participation by anyone other than the accused. As the examples below demonstrate, the service courts have been willing to eliminate virtually any distinction between a co-actor and an unwilling nonparticipant when finding that a sex act was performed "with" another.

The first sign of the courts' willingness to stretch the concept of participation came in the Army court's decision of *United States v. Murray-Cotto*.[119] At trial, SGT Murray-Cotto was convicted of committing indecent acts with a fifteen-year-old German bicyclist.[120] The facts of this case showed that Murray-Cotto, with his penis exposed, drove his car up from behind the bicyclist, shouted obscenities at her, and forced her off the road.[121] Affirming the conviction, the Army court

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> (1) That the accused exposed a certain part of the accused's body to public view in an indecent manner;
> (2) That the exposure was willful and wrongful; and
> (3) That under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Id.

[117] *Thomas*, 25 M.J. at 76.

[118] *Id.* at 76-77.

[119] 25 M.J. 784 (A.C.M.R. 1987), *petition denied*, 26 M.J. 322 (C.M.A. 1988) (emphasis in original).

[120] *Id.* at 784-85.

[121] *Id.*

found that the bicyclist was more than a mere unwilling participant as mentioned in *Thomas*. The court reasoned that forcing the cyclist off the road and shouting obscenities at her created "participation" between Murry-Cotto and the bicyclist sufficient to affirm the indecent acts with another conviction.[122] The Army court did not explain the distinction between the bicyclist's level of participation in this case and that of the "unwilling nonparticipant" mentioned in *Thomas*.

A series of Air Force cases that tracked this precise issue, and in which the court ultimately reversed its reasoning on the subject of participation, best demonstrate the process by which military courts evaporated the participation of another requirement for the offense of indecent acts with another.

The first of these cases was the 1990 case of *United States v. Jackson*.[123] The trial court convicted Amn Jackson of indecent acts with another for masturbating in the stacks of the base library while keeping a particular young woman in view by following her between rows of bookshelves.[124] The Air Force court reversed the conviction, finding that the young woman was not a participant,[125] and accordingly, that indecent exposure was the proper charge. The court noted straightforwardly "the requirement that an indecent act must be done 'with another.'"[126] The court reasoned that "[t]he appellant hardly masturbated 'with' [the young woman]; she was not his co-actor, principal, or co-conspirator.[127] At best, she became the 'inspiration' for Jackson's self-abuse."[128] Besides applying the element to the most straightforward interpretation of the facts, the *Jackson* court attempted to maintain the distinction between the offenses of indecent acts with another and indecent exposure. The court explained this distinction by noting that they "view[ed] the framers of the [*MCM*] as artful drafters,"[129] pointing out that in the *MCM's* Article 134 offense of indecent acts or liberties with a child, "physical contact is not

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[122] *Id.* at 785.
[123] 30 M.J. 1203 (A.F.C.M.R. 1990), *petition denied*, 32 M.J. 378 (C.M.A. 1991).
[124] *Id.*
[125] *Id.* at 1204.
[126] *Id.* (citing MCM, *supra* note 3, pt. IV, ¶ 90b (1988)).
[127] *Id.*
[128] *Id.*
[129] *Id.* at 1205.

required."[130] Under "the logic of *exclusio unis*, physical contact still must be necessary for the offense of indecent acts with an adult."[131]

In 1992, the Air Force court revisited the participation issue and reached a different conclusion.[132] In *United States v. Hansen*, the trial court convicted Master Sergeant (Msgt) Hansen, among more egregious offenses,[133] of indecent acts with another for having his daughter watch him masturbate.[134] This particular act was only a minor part in the torturous history of Msgt Hansen's sexual abuse of his daughter.[135] The Air Force court considered whether the elements of indecent acts with another were met for this specified act, as there was no physical contact between Msgt Hansen and his daughter. In affirming the conviction, the court narrowed its previous decision in *Jackson*[136] by reconsidering the definition of the phrase "with another."[137] The court found "[t]he elements of indecent acts with another do not require a touching. Accordingly, we hold that an indecent act with another may be committed without touching. To the extent *Jackson* states touching is essential to prove an indecent act with another, that portion should be viewed as dicta."[138] Considering the substantial interaction between Msgt Hansen and his daughter necessary for the other offenses, the duration, and the egregiousness of the abuse, the court's reasoning suggests they believed Msgt Hansen made his daughter a co-actor in his indecent acts even though there was no actual touching.[139]

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[130] MCM, *supra* note 3, pt. IV, ¶ 87c(2) (2002).
[131] *Jackson*, 30 M.J. at 1205.
[132] United States v. Hansen, 36 M.J. 599 (A.F.C.M.R. 1992), *petition denied*, 38 M.J. 229 (C.M.A. 1993).
[133] *Id.* at 602. Master Sergeant Hansen was convicted of rape, forcible sodomy, indecent acts upon the body of a minor female on divers occasions, and committing indecent acts with another, all involving his natural daughter, T. He also was convicted of committing an indecent act upon the body of his other minor daughter, L. His sentence included a dishonorable discharge and twenty-years confinement and reduction to E-3. *Id.*
[134] *Id.*
[135] *Id.* The appellant began a course of sexual conduct with T when she was eight or nine-years old. Besides having T watch him masturbate, Msgt Hansen also attempted to have sexual intercourse with T, but was unsuccessful at first in achieving full penetration due to her small size and age. He even used a vibrator on the outside of her vaginal area to stimulate her, as well as providing her a rubber hot dog to insert into her vagina to also stimulate her and aid in eventual penetration. Master Sergeant Hansen eventually began having sexual intercourse with his daughter. This abusive relationship terminated only when the daughter turned eighteen-years old, left home, and joined the armed forces. *Id.*
[136] *Jackson*, 30 M.J. at 1203.
[137] *Hansen*, 36 M.J. at 608-09.
[138] *Id.* at. 604.
[139] *Id*. at 608-09.

A year later, the Air Force court again addressed the participation issue in *United States v. Daye*.[140] On appeal by the government, the court reversed the trial court's dismissal of a charge and two specifications of indecent acts with another against Technical Sergeant (Tsgt) Daye for videotaping his acts of sexual intercourse without the knowledge or consent of the other participant.[141] The defense argued that the act of videotaping was not, in and of itself, indecent and that the act of videotaping did not occur "with another."[142] The court instead accepted the government's position that the indecent act was neither the sex, nor the videotaping itself, but the videotaping without the female's knowledge.[143]

The court held that a touching is not required to commit an indecent act with another[144] and that "[t]he absence of a touching will not, alone preclude a finding of guilty, regardless of the age of the other party involved with the perpetrator."[145] The court asked and answered the obvious question raised by the reasoning of its decision: "If no physical contact is required for commission of an indecent act with another, then what precludes every indecent exposure from being charged as the greater offense of indecent act? It is the requirement that the act be 'with another.' There must be active participation by another person."[146] The implication of this decision is that the other "active participant" need not perform any indecent act, but must in some way actually participate in the accused's indecent act. The court limited the scope of this decision by explaining that "[a]lthough we do not subscribe to the implication in *Jackson* that the other person essentially must be an accomplice or co-

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[140] 37 M.J. 714 (A.F.C.M.R. 1993), *petition denied*, 39 M.J. 5 (C.M.A. 1993).

[141] *Id.* Tech Sgt. Daye was charged separately of committing indecent acts with another and of adultery, both in violation of Article 134 UCMJ,

> by videotaping and/or knowingly participating in a videotaping of various sexual intercourse positions between himself and Sgt LMG and another unnamed partner on another occasion, and videotaping and/or knowingly participating in a videotaping of the sexual partners performing oral sex on him, both without the knowledge or consent of the partners.

Id.

[142] *Id.*

[143] *Id.* at 715.

[144] *Id.* at 717.

[145] *Id.*

[146] *Id.* at 717 n.3.

actor, neither do we accept the other extreme represented by *Murray-Cotto*, which views involuntary observation as participation."[147]

The *Daye* court specifically challenged the persuasiveness of *Jackson*'s determination that the indecent acts with another offense requires a touching between actors. Referring to *Jackson*'s touching requirement,[148] the *Daye* court found *Jackson*'s rationale of using the elements of indecent acts with a child to explain the elements of indecent acts with another unpersuasive.[149] Not surprisingly, the *Daye* court did not mention whether it also found unpersuasive the *Jackson* court's assertion that the framers of the *MCM* were artful drafters.

To reach its decision, the *Daye* court specifically analyzed the elements of indecent acts with another: "(1) the accused committed a certain wrongful act with a certain person, (2) the act was indecent, and (3) under the circumstances . . . ."[150] The court reasoned that the word "with" "includes situations without actual physical contact as well as those involving contact or touching."[151] The court did not explain how the word "with" relates to the element requiring that the accused perform a certain wrongful act "with" another.[152] One can certainly imagine an indecent wrongful act done with another that does not require touching, (e.g. simulated sex performed between two nude adults on an elementary school playground—during recess) but it is difficult to understand indecent acts "with" another, when only one person performs a wrongful act.

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[147] *Id.*

[148] *Id.* at 716 (quoting United States v. Jackson, 30 M.J. 1203, 1205 (A.F.C.M.R. 1990)).

> We view the framers of the Manual for Courts-Martial as artful drafters. A page or two earlier in the Manual, they addressed the Article 134 offense of indecent acts/liberties with a child. They provided that "physical contact is not required." MCM Part IV, ¶ 87c(2). By the logic of *exclusio unis*, physical contact still must be necessary for the offense of indecent acts with an adult. Had the drafters intended something different, they clearly knew how to say so.

Id.

[149] *Id.*

[150] *Id.* (quoting the MCM, *supra* note 3, pt. IV, ¶ 90b (1984)). This paragraph remains unchanged in the 2002 edition of the *MCM*.

[151] *Id.*

[152] MCM, *supra* note 3, pt. IV, ¶ 90b (2002).

In reaching its decision, the *Daye* court ignored the government's alleged wrongful act. The government alleged that videotaping without knowledge was the indecent act. The government argued specifically that "[i]t's not the sexual intercourse that is the basis of the indecent acts, it's the sexual intercourse that was videotaped without the females' knowledge and consent."[153] The sexual intercourse was performed "with" another person, but the government specified this was not the indecent act, nor was it, in and of itself, wrongful. As the charges specified the videotaping was done without the womens' knowledge, Daye's videotaping was not done "with" anyone. By disregarding the "wrongful act with another"[154] language of the element, the court apparently separates the element into two components, satisfied by two different acts. First, the accused does something sexual with another person, and second, the accused does something indecent. The court left unresolved which of the acts must also be wrongful. The Air Force court's faulty logic in *Daye* is particularly glaring since the court was not acting to affirm a conviction already tried below, but to overturn a judge's ruling on a motion.

The Air Force court made another attempt to clarify the meaning of "with another" in the 1995 case of *United States v. Eberle*.[155] The relevant facts in this case were that on two occasions Airman First Class (A1C) Eberle entered a public women's restroom and masturbated in the presence of different women.[156] In his providence inquiry, Eberle admitted trying to block the women's exit from the restroom until he finished abusing himself.[157] On appeal of his indecent acts conviction, the court once again confronted how much participation "with another" is necessary to support a conviction for indecent acts with another, rather than mere indecent exposure.[158]

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[153] *Daye*, 37 M.J. at 715.
[154] MCM, *supra* note 3, pt. IV, ¶ 90b (2002).
[155] 41 M.J. 862 (A.F. Ct. Crim. App. 1995), *reh'g granted*, 43 M.J. 231 (1995), *aff'd*, 44 M.J. 374 (1996).
[156] *Id.*
[157] *Id.*
[158] *Id.* At trial, A1C Eberle plead guilty to two specifications of indecent acts and one specification of disorderly conduct. The panel sentenced him to a bad-conduct discharge, confinement for two years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. Although the court found these facts unnecessary to reach their decision, Eberle not only tried to block the women's exit from the restroom, but grabbed the breast of one, and struggled with another who broke her finger trying to exit. *Id.*

In affirming Eberle's conviction, the court discussed the rationale behind the decisions in *Jackson*, *Hansen*, and *Daye*.[159] Considering the *Daye* decision, the *Eberle* court expressed approvingly that "we put to rest any lingering notions about the continued vitality of *Jackson*'s analysis and expressly harmonized the law of indecent acts with another with that for indecent acts with a child."[160] This also put to rest the Air Force court's previous supposition that the *MCM* had careful drafters and that the logic of *exclusio unis*[161] should control military courts when interpreting the *MCM*.

The *Eberle* court held that "to be an indecent act 'with' another person, regardless of age, there must be active participation by that other person. Such active participation need not involve physical touching, but it must be more than just involuntary observation."[162] With this interpretation, the court then applied the elements to the facts, and found that "[Eberle's] attempt to obstruct his victim's exit until he finished his performance satisfied the requirement for 'active participation.'"[163] The logic of this finding is nearly incomprehensible. After stating the indecent act with another offense requires the other person to actively participate in a manner that need not amount to touching,[164] the Air Force court considered only Eberle's conduct (blocking the exit) to find active participation. The court found active participation when the women attempted to leave, and thus remain non-participants. Applying *Eberle's* reasoning, an indecent exposure remains a mere exposure so long as the "victim" continues to look, but becomes an indecent act when the victim "actively participates" by averting their eyes.

Any respect for the elements of indecent acts with another and any distinction between it and indecent exposure the Air Force court hoped to maintain in *Jackson* was completely rubbed out in the very recent decision of *United States v. Proctor*.[165] The facts at trial showed that A1C Proctor walked into the dorm room of a female Airman, and while her back was turned, he removed his penis from his pants and began rubbing it.[166] When the female Airman turned around, Proctor asked her

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[159] *Id.* at 864.
[160] *Id.*
[161] United States v. Jackson, 30 M.J. 1203, 1205 (A.F.C.M.R. 1990).
[162] *Eberle*, 41 M.J. at 865.
[163] *Id.*
[164] *Id.*
[165] 58 M.J. 792 (A.F. Ct. Crim. App. 2003).
[166] *Id.*

to rub his penis.[167] The female Airman demanded that Proctor leave, and she threatened to scream if he did not depart immediately.[168] Proctor pulled his pants up and left the room, later to plead guilty to the offense of indecent acts with another for these actions.[169] To sustain Proctor's indecent acts with another conviction, the Air Force court's analysis reversed the meaning of "with another." The court acknowledged the previous statement of the law that "[t]he offense of committing indecent acts with another requires that the acts be done in conjunction or participation with another person . . . . However, there is no requirement that an indecent act involve a physical touching."[170] The court then disposed of any requirement to find "active participation" on the part of anyone other than the accused by finding, "[i]t is the affirmative interaction of *an accused* with another person, voluntarily or involuntarily that makes what would otherwise be an indecent exposure an indecent act."[171] The court's holding apparently disregards the element of the offense that states, "the accused committed a certain wrongful act with a certain person."[172] Now the offense of indecent exposure becomes indecent acts with another solely based on the conduct of the accused.

Here, the accused's actions transformed an indecent exposure to indecent acts with another when he "singled out [the female Airman] and specifically targeted her as an involuntary participant in his deviant act . . . ."[173] Of course, the female's only participation was demanding that the accused leave. From this analysis, a charging official may use the offense of indecent acts with another rather than indecent exposure whenever the accused knows someone will see their exposed parts. Only rare circumstances will present a case when indecent acts with another cannot supplant an indecent exposure charge. This case has serious implications for the military accused, as the maximum punishment for indecent acts with another includes a dishonorable discharge and confinement for five years,[174] while the maximum punishment for

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[167] *Id*.
[168] *Id*.
[169] *Id*.
[170] *Id*. at 795.
[171] *Id*. (emphasis added).
[172] MCM, *supra* note 3, pt. IV, ¶ 90b(1) (2002).
[173] *Proctor*, 58 M.J. at 795.
[174] MCM, *supra* note 3, pt. IV, ¶ 90e (2002).

indecent exposure includes only a bad conduct discharge and confinement for six months.[175]

IV. *Lawrence v. Texas* Significantly Undermines the Support of Many Indecent Acts Convictions

A. *Lawrence v. Texas* Essentially Finds a Fundamental Right in the Privacy of Noncommercial, Adult Consensual Sexual Activity

In 2003, the Supreme Court announced its decision in *Lawrence v. Texas*.[176] In this decision, the Court invalidated a Texas statute that criminalized sodomy[177] on the grounds that such statutes violate individuals' exercise of liberty under the Due Process Clause of the Fourteenth Amendment.[178] The holding in *Lawrence* came in complete contradiction to, and explicitly reversed the Court's 1986 decision in *Bowers v. Hardwick*.[179] The *Lawrence* Court found that an individual's fundamental right to privacy includes protection from government interference with acts of adult consensual, noncommercial, private sexual activity.[180]

The outcome of *Lawrence,* though perhaps surprising to many, was the latest in a series of Supreme Court cases recognizing a protected liberty interest in matters of sexual intimacy.[181] The Court drew on its decision in *Griswold*, in which it overturned a Connecticut law prohibiting the use of drugs or devices of contraception, and counseling

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[175] *Id.* ¶ 88e.
[176] 539 U.S. 558 (2003).
[177] TEX. PENAL CODE ANN. § 21.06(a) (2003). This code section stated as follows:

> A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex. Deviate sexual intercourse was defined in the statute as any contact between any part of the genitals of one person and the mouth or anus of another person; or the penetration of the genitals or the anus of another person with an object.

Id.
[178] *Lawrence*, 539 U.S. at 561.
[179] 478 U.S. 186 (1986).
[180] *Lawrence*, 539 U.S. at 567.
[181] *See generally* Maggie Kaminer, *How Broad Is the Fundamental Right to Privacy and Personal Autonomy?*, 9 AM. U.J. GENDER SOC. POL'Y & L. 395 (2001).

or aiding and abetting the use of contraceptives.[182] This law applied to all use of contraceptives, including those used by married couples.[183] In *Griswold*, the Court found the Due Process Clause protected individuals' right to privacy in the marital bedroom.[184] Later, when the Court overturned a Massachusetts statute designed to comply with *Griswold* by prohibiting only the distribution of contraceptives to unmarried persons, the Court extended this privacy protection to cover the activities of unmarried persons.[185] The Court extended this same protection farther still, when it invalidated a New York statute that prohibited distributing contraceptives to persons under the age of sixteen.[186] The explicit proposition of these three cases is best summed-up in the *Griswold* opinion in which the court found "[i]f the right of privacy means anything, it is the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether or not to beget a child."[187] As each of these cases invalidated state statutes intended to prevent the use of contraceptives, the Court's language striking them down expanded the privacy right from married persons to all people, but always described the protected interest as one related to decisions regarding procreation, not decisions regarding sexual relations. Resolution of whether this protection extended to other sex-related decisions remained undetermined.

In the 1986 case of *Bowers v. Hardwick*,[188] the Court declined to invalidate a Georgia statute criminalizing sodomy.[189] The Georgia statute was similar to the Texas statute later struck down in *Lawrence*.[190] Unlike the Texas statute in *Lawrence*, the Georgia statute prohibited both heterosexual and homosexual sodomy regardless of the relationship between the partners.[191] Sustaining the validity of the Georgia statute, the Court read the rulings in *Griswold*, *Eisenstadt*, and *Carey* as dealing

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[182] Griswold v. Connecticut, 381 U.S. 479, 485 (1965).
[183] *Id*.
[184] *Id*.
[185] Eisenstadt v. Baird, 405 U.S. 438 (1972).
[186] Carey v. Population Servs. Int'l, 431 U.S. 678, 688-89 (1977).
[187] Lawrence v. Texas, 539 U.S. 558, 565 (2003) (quoting *Griswold*, 381 U.S. at 453) (emphasis in original).
[188] 478 U.S. 186 (1986).
[189] *Id*. at 188; GA. CODE ANN. § 16-6-2 (1984). The sodomy statute stated that, "[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . ." *Id.*
[190] *Compare id.*, *with* TEX. PENAL CODE ANN. § 21.06A (2003).
[191] GA. CODE ANN. § 16-6-2.

only with the right to decide whether to have children.[192] The Court found it "evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case."[193] Interestingly, despite the broad language of the Georgia statute, the Court limited its analysis of the statute only as applied to acts of homosexual sodomy, specifically stating "[w]e express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy."[194] Thus, to reach its conclusion, the Court narrowed both the related precedent to that protecting the privacy of decisions regarding procreation, and the facts at issue to acts of homosexual sodomy. Accordingly, the majority in *Bowers* found it "obvious" that no fundamental right protected a homosexual's decision to engage in consensual sodomy.[195]

Rejecting both the *Bowers* Court's analysis, and narrow construction of the issue, the *Lawrence* Court held that *Bowers* was "not correct when it was decided, and it is not correct today."[196] Instead of framing the issue as one specifically limited to homosexual sodomy, the *Lawrence* Court found the issue to be "[w]hether Petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment[.]"[197] The Court specifically found the case did not involve "minors, . . . persons who might be injured or coerced or who are situated in relationships where consent might not be refused, [or] public conduct, or prostitution."[198] The Court held that the Texas law "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."[199] The *Lawrence* Court drew its rationale directly from Justice Stevens' dissent in *Bowers*, in which he concluded,

> (1) the fact a State's governing majority has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice, and (2) individual decisions concerning the

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[192] 478 U.S. 186, 190-91 (1986).
[193] *Id.*
[194] *Id.* at 188 n.2.
[195] *Id.* at 192.
[196] Lawrence v. Texas, 539 U.S. 558, 578 (2003).
[197] *Id.* at 564.
[198] *Id.* at 578.
[199] *Id.*

> intimacies of physical relationships, even when not intended to produce offspring, are a form of liberty protected by due process.[200]

That *Lawrence* invalidates laws banning conduct traditionally thought of as immoral is consistent with the Court's interpretation of the Fourteenth Amendment that "[t]he zone of privacy found in the due process clause . . . cannot be determined by any formula or code; instead it is something that changes over time in response to changes in values and mores."[201] Further, the analysis of *Lawrence v. Texas*, indicates that the Court may strike down any law proscribing adult, consensual, noncommercial, private sexual activity as unconstitutionally violating the individual's protected zone of privacy.

B. *Lawrence v. Texas* Holds That Traditional Views of Morality Are Insufficient Grounds to Criminalize Certain Sexual Activity.

By way of explaining the explicit reversal of *Bowers v. Hardwick*,[202] the *Lawrence* Court asserted that simply because a governing majority has traditionally viewed a particular practice as immoral does not create a sufficient reason to uphold a law prohibiting the practice.[203] The Court specifically found no legitimate state interest justifying this form of intrusion into the private lives of individuals.[204]

At least one military case reached a similar conclusion regarding the criminalization of private, adult, consensual, noncommercial, sexual activity, though not on constitutional grounds. In *United States v. Stocks*,[205] the COMA reviewed the appellant's convictions of adultery and of committing indecent acts with another by performing oral sex on the vaginal area of a female Soldier before engaging in intercourse.[206]

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[200] *Id.* at 561 (quoting Bowers v. Hardwick, 478 U.S. at 217-18 (Stevens, J., dissenting)).
[201] Poe v. Ullman, 367 U.S. 497 (1961).
[202] 478 U.S. 186 (1986).
[203] *Lawrence*, 539 U.S. at 561.
[204] *Id*. at 578.
[205] 35 M.J. 366 (C.M.A. 1992).
[206] *Id.* Stocks and the female Soldier were in the rocky ending of a six-to-nine month adulterous relationship. On the night in question, they engaged in sex, followed by a physical altercation. Stocks was originally charged with, and pleaded not guilty to: assault consummated by a battery, forcible sodomy, rape and adultery. The members convicted him of committing an indecent act with another, assault consummated by a battery, and adultery. *Id.*

The court affirmed the adultery conviction, but reversed the conviction for indecent acts with another.[207] The issue decided was "whether private, heterosexual, oral foreplay not amounting to sodomy between two consenting adults is an 'indecent act' and whether such a sexual act under the circumstances is within the constitutionally protected zone of privacy and, thus, not criminally punishable."[208] Instead of reaching the constitutional issue, the COMA accepted Stocks's assertion that during the oral sex, his tongue did not actually penetrate the woman's vagina, and therefore did not amount to the separate offense of sodomy.[209]

As the court determined, the oral sex was "consensual sexual touching that amount[s] to mere foreplay"[210] to the adulterous sexual intercourse, and not sodomy,[211] the "*sine qua non* of . . . this case, if it was any crime at all, was the adulterous behavior, not its indecency."[212] The court asserted its decision was "logically and legally distinguishable from a situation in which two independent offenses are completed and in which one was not a mere prelude to the other, e.g., sodomy and adultery."[213] The *Stocks* court rationale relies on a fine distinction indeed. To reach its decision that "mere foreplay" could not justify a separate conviction, the court essentially found the specific act performed by Stocks was not "unnatural carnal copulation"[214] and consequentially, that whatever it was, it could not be criminally indecent.

After *Lawrence v. Texas*, the outcome of *Stocks* is possible without the CAAF splitting hairs as to whether Stocks' "mere foreplay" amounted to sodomy, as a conviction for that act falls within *Lawrence's*

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[207] *Id*. at 367.
[208] *Id.* at 366.
[209] *Id.* at 367.
[210] *Id.*
[211] MCM, *supra* note 3, pt. IV, ¶ 51b (2002). The sole element for the offense of sodomy is that the accused engaged in unnatural carnal copulation with a certain other person or an animal. Unnatural carnal copulation is explained as the following:

> a person taking into that person's mouth or anus the sexual organ of another person or of an animal; or to place that person's sexual organ in the mouth or anus of another person or of an animal; or to have carnal copulation in any opening of the body, except the sexual parts, with another person; or to have carnal copulation with an animal.

Id.
[212] *Stocks*, 35 M.J. at 367.
[213] *Id.*
[214] MCM, *supra* note 3, pt. IV, ¶ 51b (2002).

zone of protected privacy. The court could focus entirely on the *sine qua non* of Stocks' misconduct[215]—the adultery—and not the acts leading up to it.

V. The Military Is Not a Separate Indecent Society

Although *Lawrence v. Texas* was a civilian case, its holding will apply to military cases as well. Many activities formerly criminalized by the UCMJ as indecent are now protected as a liberty interest under the Due Process Clause of the Fourteenth Amendment.[216] The Supreme Court does not always apply constitutional protections to members of the military in the same manner as civilians, leading some commentators to state that the military is a "different constitutional animal, an institution that, by necessity, requires a generous deference to discretionary choice."[217] This deference to military decisions should not be applied to the protections described in *Lawrence v. Texas* as the military has no unique need to regulate the kinds of adult, consensual, noncommercial, private sexual activity conducted by its members.

In the past, the Court has granted constitutional deference to discretionary military decisions when the military seeks to punish its members for otherwise constitutionally protected conduct.[218] The Court justifies this deference stating "the military is, by necessity, a specialized society separate from civilian society,"[219] and that "[it] depend[s] on a command structure that . . . must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself."[220] The cases granting deference to military decisions never contemplated a general military necessity of regulating "individual decisions concerning the intimacies of physical relationships."[221] Considering the rationale applied in cases granting this deference, it is unlikely the Court will find that national security requires the military to

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[215] *Stocks*, 35 M.J. at 367.
[216] *See generally* Lawrence v. Texas, 539 U.S. 558 (2003).
[217] Diane Mazur, *Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L.J. 701, 702 (2002).
[218] *See, e.g.*, Parker v. Levy, 417 U.S. 733 (1974), Goldman v. Weinberger, 475 U.S. 503 (1986).
[219] United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955).
[220] *Parker*, 417 U.S. at 759 (quoting United States v Gray, 20 C.M.R. 63, 67 (C.M.A. 1957)).
[221] *Lawrence*, 539 U.S. at 561.

impose its definition of decency on the adult, consensual, noncommercial, private sexual activities of its members.

The Court's rationale for deferring to military decisions punishing service members for otherwise constitutionally protected acts is best demonstrated in the case of *Parker v. Levy*.[222] In this case, Captain Howard Levy, an Army doctor, was convicted of conduct unbecoming an officer and a gentleman, and conduct prejudicial to good order and discipline in the armed forces.[223] He was charged for making repeated derogatory comments to enlisted subordinates regarding the then-ongoing Viet Nam war with the purpose of discouraging them from participating in the war effort.[224] Levy challenged his conviction on the grounds that the relevant punitive articles were constitutionally overbroad, and that his conviction violated the free speech protections of the First Amendment.[225] The Court agreed that Levy's comments would ordinarily be protected by the First Amendment, but found that "[w]hile members of the military community enjoy many of the same rights and bear many of the same burdens as do members of the civilian community, within the military community there is simply not the same autonomy as there is in the larger civilian community."[226] The Court affirmed Levy's convictions, expressing that:

> In the armed forces, some restrictions exist for reasons that have no counterpart in the civilian community. Disrespectful and contemptuous speech, even advocacy of violent change, is tolerable in the civilian community, for it does not directly affect the capacity of the Government to discharge its responsibilities unless it both is directed to inciting imminent lawless action and is likely to produce such action. In military life, however, other considerations must be weighed. The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness

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[222] 417 U.S. 733 (1974).
[223] UCMJ arts. 133, 134 (2002).
[224] *Parker*, 417 U.S. at 739 nn.5-6.
[225] *Id.* at 752.
[226] *Id.* at 751.

> of response to command. If it does, it is constitutionally unprotected.[227]

In granting deference to the military's decision to punish Levy's speech as unbecoming and prejudicial to good order and discipline, the Court endorsed the reasoning that the military's need to criminalize this conduct was "beyond the bounds of ordinary judicial judgment, for [it is] not measurable by our innate sense of right and wrong, of honor and dishonor, but must be gauged by an actual knowledge and experience of military life, its usages and duties."[228] Even in upholding Levy's conviction, the Court acknowledged that entering military service does not equate to the surrender of all constitutional protections. The Court stated, "While military personnel are not excluded from First Amendment protection, the fundamental necessity for obedience, and the consequent necessity for discipline may render permissible within the military that which would be constitutionally impermissible outside it."[229]

The Court's rationale for granting deference to the military in *Parker v. Levy* is limited to the First Amendment protections of service members.[230] The Court permits the military to prohibit otherwise protected speech because of the military's unique need to regulate the speech activities of its members to preserve good order and discipline, including preserving respect for the chain of command. The facts of the *Levy* case—a commissioned officer encouraging enlisted Soldiers to resist participating in an ongoing war effort, brought this military need into stark relief. The Court will unlikely extend its deference to defining criminal indecency. Though the court is reluctant to interfere in certain types of military decisions, it is unlikely to find "beyond the bounds of ordinary judicial judgment . . . [and] not measurable by our innate sense of right and wrong"[231] the "individual decisions concerning the intimacies of physical relationships" [232] implicated in many military indecency offenses. Justice Stewart's dissent in *Parker v. Levy* underscores this point by making the textualist argument that "the only express exemption of a person in the Armed Services from the protection

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[227] *Id.* (citing Brandenburg v. Ohio, 359 U.S. 444 (1969); United States v Priest, 45 C.M.R. 338 (C.M.A. 1972); United States v. Gray, 20 C.M.R. 331 (C.M.A. 1956)).
[228] *Id*. at 748-49 (citing Swaim v. United States, 28 S. Ct. 172, 228 (1893)).
[229] *Id.* at 758.
[230] *Id*. at 772.
[231] *Id.* at 748-49 (citing *Swaim*, 28 S. Ct. at 228).
[232] Lawrence v. Texas, 539 U.S. 558, 561 (2003).

of the Bill of Rights is that contained in the Fifth Amendment which dispenses with the need for 'a presentment or indictment of a grand jury' in cases arising in the land or naval forces . . . .'"[233]

It is difficult to form a convincing argument that like the military's need to regulate speech activities to fill its role in the defense of the Nation, the military, as a specialized society, has a particular need to regulate the adult, consensual, noncommercial, private sex-related decisions of its members. Absent a specialized necessity to regulate these kinds of decisions, the Court has stated the Due Process Clause of the Fourteenth Amendment prevents the government from invading a fundamental interest unless the interest is narrowly tailored to serve a compelling state interest.[234]

VI. The CAAF Has Identified That Times and Mores Do Change

A trend in recent CAAF decisions involving indecency finds the court carefully scrutinizing whether the underlying conduct was actually indecent.[235] This trend shows a renewed interest at the CAAF in actually testing indecency convictions to determine whether the conduct charged met the military definition of indecency.[236] These cases signal the court's acceptance that contemporary community standards, even in the military, change over time—and that sustaining any conviction for sexually related activity of which the fact finder simply did not approve, creates no judicial standard at all.

United States v. Brinson is an indecent language case demonstrating the scrutiny with which the CAAF will review cases in which the military criminalizes activity that would otherwise protected by the Constitution.[237] Sergeant Brinson was convicted, among other things, of communicating indecent language[238] for repeatedly calling an Air Force

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[233] *Parker*, 417 U.S. at 766 (Stewart, J., dissenting).
[234] Reno v. Flores, 507 U.S. 292, 302 (1993).
[235] *See* U.S. v. Baker, 57 M.J. 330 (2002); U.S. v. Brinson, 49 M.J. 360 (1998).
[236] BENCHBOOK, *supra* note 16, at 3-90-1 (defining indecency in indecent acts, as "that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations").
[237] United States v. Brinson, 49 M.J. 360 (1998).
[238] *Id.* at 361. At trial, SGT Brinson was convicted of assault upon a security police officer (two specifications), communicating a threat (two specifications), communicating indecent language, and failure to go to his appointed place of duty, in violation of

security policeman a "son of a bitch" and a "white mother-fucker"[239] while he arrested Brinson. As the charged misconduct was speech otherwise protected by the First Amendment, the CAAF observed, "When the Government makes speech a crime, the judges on appeal must use an exacting ruler."[240] Here, the court recognized Brinson's scurrilous behavior and the offensive nature of the epithets.[241] The court analyzed the *MCM*'s explanation of the offense[242] and the test that indecent language must be "calculated to corrupt morals or excite libidinous thoughts."[243] Reviewing the facts, and despite the court-martial's findings, the CAAF determined that Brinson's clear intention was "calculated to express his rage, not any sexual desire or moral dissolution."[244]

Unlike the Navy-Marine court's later decision in *Negron*,[245] the CAAF in *Brinson* did not find that Brinson's words "white mother-fucker"[246] "even if totally involuntary and only fleetingly . . . incite[d] libidinous thoughts, in that the mental image of the described act will flash through [the court's] mind."[247] In *Brinson*, the court clearly recognized Brinson's inartful use of language for what it was—an angry rant.[248] This decision presaged the CAAF's later articulation that both contemporary standards and the surrounding circumstances must be considered when examining service members' speech activities:

Articles 128, 134, and 86, respectively, of the UCMJ. *Id.*; *see* UCMJ arts. 86, 128, 134 (2002).

239 *Brinson*, 49 M.J. at 362.

240 *Id.* at 361.

241 *Id*. at 364. The court ultimately concluded that "a conviction for the lesser-included offense of disorderly conduct was not only authorized but required." *Id.*

242 *Id.* (citing the MCM, *supra* note 3, pt. IV, ¶ 89b (2002)). The *MCM* defines indecent language as the following:

> that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards.

MCM, *supra* note 3, pt. IV, ¶ 89b (2002).

243 *Brinson*, 49 M.J. at 364 (quoting United States v. French, 31 M.J. 57, 60 (C.M.A. 1990)).

244 *Id.*

245 United States v. Negron, 58 M.J. 834 (N-M. Ct. Crim. App. 2003).

246 *Brinson*, 49 M.J. at 362.

247 *Negron*, 58 M.J. at 834.

248 *Brinson*, 49 M.J. at 362.

> What is condoned in a professional athletes' locker room may well be highly offensive in a house of worship. A certain amount of banter and even profanity in a military office is normally acceptable and, even when done in poor taste, will only rarely rise to the level of criminal misconduct.[249]

Along the line of applying contemporary community standards, the CAAF issued a perhaps more surprising reversal in *United States v. Baker*.[250] At trial, Amn Baker was convicted, among other things, of committing indecent acts with a female under the age of sixteen.[251] The facts showed that one day short of turning eighteen-years old, Amn Baker dated the then, not quite sixteen-year old daughter of an Air Force noncommissioned officer.[252] During the young couple's romantic encounters, "[Baker] touched the girl's bare breasts and kissed them. He also gave her hickies on her stomach, upper chest, and back. There was no evidence that any activity, beyond mere hugging and kissing, took place in public."[253]

During deliberations at trial, the panel asked the military judge whether they should consider the victim's "age, education, experience, prior contact with [Baker] . . . or proximity of age to seventeen years 364 days when determining whether the acts with [Baker] were indecent."[254] The judge provided only the general advice that the panel should consider all the evidence, and the *Benchbook* definition[255] to determine whether the acts were indecent.[256] The CAAF found this instruction "clearly inadequate guidance for the members to decide the issue of the indecency of appellant's conduct."[257] The court held "that the military judge committed plain error when she failed to provide adequately

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[249] United States v. Carson, 57 M.J. 410, 413 (2002).
[250] 57 M.J. 330 (2002).
[251] *Id.* Airman Baker was convicted at trial of two specifications of failing to obey the order of a superior officer, larceny from the base exchange, sodomy, and committing indecent acts with a female under age of sixteen. *Id.*
[252] *Id.*
[253] *Id.*
[254] *Id.*
[255] *Id.* (citing the BENCHBOOK, *supra* note 16, at 3-90-1, defining indecency in indecent acts, "as that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations").
[256] *Id.*
[257] *Id.*

tailored instructions on the issue of indecency."[258] Reversing Baker's conviction, the CAAF focused on the fact the victim testified that "she did not find the activity offensive *because it comported with her ideas of normal activities* within a boyfriend/girlfriend dating relationship."[259] The CAAF's reliance on the opinion of a sixteen-year-old girl to help determine what actions amount to indecent acts in a dating relationship is an abundantly clear sign of an attempt to use actual contemporary community standards of the relevant population to decide cases involving actions charged as indecent.

VII. Conclusion—The Present State of Prosecuting Indecent Conduct in the Military

A. The Definitions In Indecency Offenses Remain Uncertain

Despite many cases attempting to pin down a precise legal explanation of indecency, a cogent definition remains elusive. Military personnel can hardly rely on the various adjectives used to describe the word indecent such as lewd, lascivious, obscene, and prurient, or various phrases such as, patently offensive, or grossly offensive to modesty, decency, or propriety, to provide any guidance, as each of these words and phrases is at least as amorphous as the basic word indecent. It appears true that this amounts to "trying to define the undefinable."[260]

Even though a comprehensible definition of indecency is unavailable, military personnel cannot simply make decisions regarding indecency crimes relying on Justice Stewart's often quoted definition of obscenity, that "I know it when I see it, and the motion picture involved in this case is not that."[261] If nothing else, this quote demonstrates that courts of appellate jurisdiction can and do apply their own definitions of words, like obscene and indecent, and are willing to disagree with the prosecutor's application of the definition to the facts. This lesson suggests caution in charging indecency offenses when the indecency offense makes up only a minor portion of the overall prosecution. *United States v. Negron*[262] is a prime example of this sort of case.

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[258] *Id*.
[259] *Id*. (emphasis added).
[260] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).
[261] *Id.*
[262] 58 M.J. 834 (N-M. Ct. Crim. App. 2003).

Negron was convicted of wrongful appropriation, and making and uttering a worthless check without controversy.[263] Charging the additional offense of depositing obscene materials in the mails because of the angry words in Negron's letter to his bank, likely added little to the success of the prosecution, but complicated the case considerably when the Navy-Marine court reviewed it. More importantly, the Navy-Marine court's *Negron* decision appears inconsistent with the CAAF's 2002 decision in *Brinson*,[264] leading to the possibility the CAAF could overturn *Negron*'s mails conviction and remand the case for still more proceedings.

Prosecutions for open and notorious indecency will continue to create challenges for military personnel when the alleged misconduct does not fit easily into ordinary definitions of the relevant phrases open and notorious and public view.[265] The *Allison*[266] decision demonstrates the military courts' struggle to comport their understanding of public view to the capabilities of modern technology (video cameras).[267] This struggle to redefine public view may continue as video technology continues to advance (e.g., cell phones with digital camera capability) and become more prevalent in daily life. Despite the Coast Guard court's holding in *Allison*, it is unlikely that the mere potential for viewing by others[268] will be reliable authority to convert otherwise private sexual activity into an offense that requires public view as an element.

B. Meeting the Elements of Indecency Offenses Creates Challenges in Charging Decisions

In charging public view indecency offenses, a troubling problem is determining the definition is that of "with another," as this determines whether clearly indecent conduct is properly charged as indecent exposure,[269] or indecent acts with another.[270] An issue of frequent appellate litigation is whether the facts presented at trial for indecent acts

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[263] *Id.* at 835.
[264] United States v. Brinson, 49 M.J. 360 (1998).
[265] United States v. Berry, 6 C.M.R. 609, 614 (A.C.M.R. 1956).
[266] United States v. Allison, 56 M.J. 606 (C.G. Ct. Crim. App. 2001).
[267] *Id.* at 608.
[268] *Id.* at 609.
[269] MCM, *supra* note 3, pt. IV, ¶ 88 (2002).
[270] *Id.* ¶ 90.

with another meet the element that the wrongful act was performed "with another person."[271] The pertinent question is how much actual interaction with another person is required to convert an indecent exposure to the more serious offense of indecent acts with another.[272] In this area, the service courts appear willing to sustain indecent acts with another convictions when only the slightest interaction between the offender and another creates sufficient participation for the courts to find the accused performed a wrongful act with another.[273] The service courts' apparent willingness to consider virtually any witnessed indecent exposure an indecent act with another necessitates consideration of fairness to the accused when deciding which charge to allege.

The AF court's very recent decision in *United States v. Proctor* apparently goes so far as to hold that if a totally unwilling "victim" of indecent exposure demands the offender depart or "get-out," this creates enough participation to convert the offense to indecent acts with another.[274] It is unlikely that this case will serve as a reliable authority for determining the level of participation required for the offense of indecent acts with another. In light of the CAAFs willingness to overturn both the trial and AF courts' explanation of the term indecent in *United States v. Baker*,[275] the definition supplied in *Proctor* may be unreliable for future indecency decisions. The potential for future litigation on this issue suggests charging the offense of indecent exposure when there is an issue of actual participation. This is particularly true if the facts suggest the appropriate sentence will fall within the authorized maximum punishment for indecent exposure.

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[271] *Id.* ¶ 90b. The element for this offense are the following:

> (1) That the accused committed a certain wrongful act with a certain person;
> (2) That the act was indecent; and
> (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Id.

[272] *Id.* app. 12. The maximum punishment for indecent acts with another includes a dishonorable discharge and five years confinement, while the maximum punishment for indecent exposure includes only a bad conduct discharge and six months confinement. *Id.*

[273] *See* United States v. Murray-Cotto, 25 M.J. 784 (Army Ct. Crim. App. 1998); United States v. Eberle, 41 M.J. 862 (A.F. Ct. Crim. App. 1995).

[274] 58 M.J. 792, 795 (A.F. Ct. Crim. App. 2003).

[275] 57 M.J. 330 (2002).

C. Some Formerly Successful Indecent Acts Prosecutions Are Now Legally Invalidated

Military prosecutors will have to consider the impact of *Lawrence v. Texas*[276] when charging service members for indecent conduct. Although the facts of *Lawrence* were limited to acts of homosexual sodomy, the Court's holding deliberately reached a far wider application. The court held that by interfering with "matters of adult consensual sexual intimacy in the home,"[277] Texas law violated individuals' "vital interests in liberty and privacy protected by the Due Process Clause."[278] Following this holding, any prosecution for adult, consensual, noncommercial, private, sexual activity is likely to face intense scrutiny by the courts.

Some of the military convictions discussed in this paper would likely be reversed if tried after *Lawrence v. Texas*. In *United States v. Allision*,[279] the conviction for indecent acts with another rested on the fact that Allison and his fiancée privately video taped themselves engaged in an act of sodomy,[280] which the court found to be indecent.[281] Both the act of sodomy and the videotaping (as the tape was never shown to anyone)[282] are matters of adult consensual sexual intimacy in the home, and now apparently outside the reach of the criminal law.

The trial conviction in *United States v. Stocks*[283] would also run afoul of *Lawrence v. Texas* as the acts of private adult sexual foreplay could not be criminalized, regardless of whether the court believed the oral sex performed by Stocks amounted to sodomy.[284] The *Stocks* case demonstrates a virtue in the *Lawrence v. Texas* decision. Without *Lawrence*, *Stocks* stands for the proposition that a service member may legally perform oral sex on a woman so long as his tongue does not actually enter her vaginal tunnel, and he follows up this foreplay with more conventional intercourse.[285] Regardless of the moral implications of decriminalizing noncommercial, adult, private, consensual oral sex

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[276] 539 U.S. 558 (2003).
[277] *Id*. at 564.
[278] *Id*.
[279] 56 M.J. 606 (C.G. Ct. Crim. App. 2001).
[280] *Id.* at 606 n.1.
[281] *Id.* at 608.
[282] *Id.*
[283] 35 M.J. 366 (C.M.A. 1992).
[284] *Id.* at 367.
[285] *Id.*

altogether, *Lawrence v. Texas* at least obviates the need for opposing counsel to interrogate adult witnesses on the precise techniques and anatomical geography of their consensual sexual encounters.

D. The CAAF Has Recently Demonstrated a Willingness to Review Indecency Convictions

The CAAF's decisions in *Brinson*[286]and *Baker*[287] demonstrate the court's willingness to reverse decisions of trial and appellate judges on matters of indecency. Both of these cases arguably represent aggressive prosecution of scurrilous behavior of only minor criminal importance.[288] More importantly, these cases demonstrate the CAAF reviews indecency convictions in light of *contemporary* community standards of behavior in the military, not permitting the imposition of a higher standard. The CAAF appears to agree that "[s]uch words as these [indecency, obscenity] do not embalm the precise morals of an age or place . . . the vague subject-matter is left to the gradual development of general notions about what is decent . . . ."[289] These cases show an interest at the CAAF to protect service members from unjust criminal convictions for indecency offenses predating the arguably sweeping Court decision in *Lawrence v. Texas*. Military justice practitioners can expect the CAAF's willingness to examine and reverse convictions for scurrilous but not clearly indecent conduct to increase in the future.

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[286] United States v. Brinson, 49 M.J. 360 (1998).
[287] United States v. Baker, 57 M.J. 330 (2002).
[288] Brinson was prosecuted for calling an arresting military police officer names. Baker was prosecuted for touching and kissing (never amounting to sex or involving the sex organs) his nearly sixteen-year-old girlfriend in ways she considered normal for a dating relationship. *See supra* section VI, for a full discussion.
[289] U.S. v. Kennerley, 209 F. 119, 121 (D.C.S.D.N.Y. 1913) (containing Judge Learned Hand's explanation of the changing notion of contemporary community standards).

THE FIRST FEMALE COLONEL OF THE U.S. ARMY JUDGE ADVOCATE GENERAL'S CORPS: A SUMMARY AND ANALYSIS OF THE "ORAL HISTORY OF COLONEL ELIZABETH R. SMITH, JR. (USA RETIRED) (1951-1978)"[1]

MAJOR GEORGE R. SMAWLEY[2]

> *People think that at the top there isn't much room. They tend to think of it as an Everest. My message is that there is* ***tons*** *of room at the top.*
>
> Lady Margaret Thatcher[3]

I. Introduction

Herman Melville once wrote that pioneers "are the advance-guard, sent on through the wilderness of untried things, to break a new path in the New World that is [theirs]."[4] Like frontier Americans, with one foot

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[1] Oral History of Colonel (COL) Elizabeth R. Smith, Jr., United States Army (Retired) (1951-1978) (January 1989) [hereinafter Smith Oral History] (unpublished manuscript, author unknown, on file with The Judge Advocate General's Legal Center and School (TJAGLCS) Library, U. S. Army, Charlottesville, Virginia). The manuscript was prepared as part of the Oral History Program of the Legal Research and Communications Department at TJAGLCS, Charlottesville, Virginia. The oral history of COL Smith is one of approximately two-dozen personal histories on file with the TJAGLCS Library. They are available for viewing through coordination with the School Librarian and offer a fascinating perspective on key leaders whose indelible influence continues to this day.

[2] Judge Advocate General's Corps, United States Army. Presently assigned as the Deputy Staff Judge Advocate, 10th Mountain Division, Fort Drum, New York. LL.M., 2001, The Judge Advocate General's School, United States Army; J.D., 1991, The Beasley School of Law, Temple University; B.A., 1988, Dickinson College. Previous assignments include Plans Officer, Personnel, Plans, and Training Office, Office of The Judge Advocate General (OTJAG), Washington, DC, 2001-2003; Legal Advisor, Chief, Administrative and Civil Law, and Chief, International Law, United States Army Special Operations Command, Fort Bragg, North Carolina, 1998-2000; Senior Trial Counsel, Special Assistant United States Attorney (Felony Prosecutor), Chief, Claims Division, Fort Benning, Georgia, 1995-1998; Trial Counsel, Special Assistant United States Attorney (Magistrate Court Prosecutor), Operational Law Attorney, Chief, Claims Branch, 6th Infantry Division (Light), Fort Wainwright, Alaska, 1992-1995. Member of the bars of Pennsylvania, the United States Court of Appeals for the Armed Forces, and the United States Supreme Court.

[3] Greatest-Quotations.com, *at* http://www.greatest-quotations.com/search.asp?bedenker=Thatcher,+Margaret (last visited 5 Aug. 2004).

[4] HERMAN MELVILLE, WHITE JACKET (1850) (New York: Oxford Univ. Press, 1991).

set in the experience of the past and the other in hope and ambition for the future, Melville aptly described the women who served in the military in the aftermath of WWII. Unburdened by conscription, they volunteered for military service and commissions with an unbridled desire to serve their nation despite a cultural and institutional environment often unprepared to receive them.[5] Yet, receive them they did; building a history of significant contributions to the Army and its various branches, including the Army's Judge Advocate General's Corps (JAG Corps).

These remarkable officers served the JAG Corps knowing that law, military organization, and culture limited their opportunities. They were volunteers for their country; patriots for an Army which was hesitant of their potential. Their ambition to serve and soldier helped quell such doubts and facilitated their ultimate integration into the Army. These officers overcame barriers to advanced education, institutional biases in the military, and the various statutory and policy prohibitions relating to marriage and pregnancy,[6] many in effect as late as the mid-1970s. The pre-1970s Army was a frontier that few women cared to explore which makes those who did all the more remarkable.

These pioneers include: Colonel (COL) Phyllis Propp Fowle, the first Women's Army Corps (WAC) officer to serve with the JAG

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[5] *See generally* BETTIE J. MORDEN, THE WOMEN'S ARMY CORPS, 1945-1978 (U.S. Army Center of Military History (CMH) 1990), *available at* http://www.army.mil/cmh-pg/books/wac/index.htm (last visited February 2004).

[6] *Id*. The author specifically notes:

> WACs who became pregnant could be legally [involuntarily] discharged. If a woman became pregnant overseas, she was evacuated by air to the United States. If birth occurred before a woman could be discharged for medical disability, she was discharged on the grounds of dependency of a minor child. If the child were stillborn, the woman was discharged for "the convenience of the government." An illegal abortion, however, resulted in a dishonorable discharge for bad conduct. From 1942 through 1945, the WAAC/WAC pregnancy rate was 7 per 1,000 per month; the rate for civilian women in similar age groups for the same period was 117 per 1,000.

Id. at 16. *See also* MATTIE E. TREADWELL, THE WOMEN'S ARMY CORPS, UNITED STATES ARMY IN WORLD WAR II (Government Printing Office 1954). The *Treadwell* and *Morden* works are superb sources of information and authoritative histories of the WAAC and later the Women's Army Corps.

Corps, the first female staff judge advocate, and the only woman to serve with the JAG Corps overseas during WWII;[7] Lieutenant Colonel (LTC) Nora G. Springfield, the first WAC granted permanent detail to the JAG Corps;[8] and COL Elizabeth R. Smith, Jr., the first active duty female judge advocate promoted to the rank of colonel.[9]

Colonel Smith served in both the WAC and the JAG Corps from 1951-1978, a period spanning the Korean War to the end of the WAC as a separate branch within the Army.[10] She is one of only a handful of WAC officers who served in Army legal offices before the Army's 1961 decision granting them permanent status in the JAG Corps and one of a very few who became career officers.[11] Most notably, she is forever part of the Army JAG Corps history as the first active duty female judge advocate to achieve the rank of colonel, on 10 July 1972. For nearly eighteen years she remained the only active duty female judge advocate to serve in that rank, until COL Joyce E. Peters' promotion in 1990.[12]

This article discusses the historical context of the integration of women into the JAG Corps, including the WAC, and provides a summary and analysis of interviews conducted with COL Smith on 13

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[7] U.S. Army Women's Museum, Fort Lee, Virginia (AWM). Colonel Propp graduated from law school at University of Iowa law 1933, where she was the only female student in her class. She was one of the first female officers to join the WAAC in the early 1940s, when she was denied entry to the JAG Corps because of her gender. In 1945, she was the only woman serving with the JAG Corps to deploy to Europe during the Second World War, where she served as a temporary detail in the Office of The Judge Advocate, European Theater Army Headquarters until 1947. After a break in service, she went on to become the staff judge advocate at the WAC Center and School at Fort Des Moines, Iowa, and remained in the U.S. Army Reserves until the early 1970s. A suite at the U.S. Army Judge Advocate General's Legal Center and School is dedicated in her memory. For further information on the AWM, *see*: http://www.awm.lee.army.mil. She died in June 2000 at the age of ninety-two.

[8] MORDEN, *supra* note 5, at 127, 128; Smith Oral History, *supra* note 1, at 46.

[9] Smith Oral History, *supra* note 1, at 77-78.

[10] This article contains additional collateral facts COL Smith provided during the review and editing process of this article, including telephone interviews on 29 September 2003, and written correspondence dated 14 November 2003 [hereinafter Smith Interviews] (on file with the author).

[11] *Id.*

[12] *See* Major Gene Martin & Major Carissa Gregg, An Oral History of COL Joyce E. Peters, United States Army (Retired) (1972-1994) (Mar. 2000) [hereinafter Peters Oral History] (unpublished manuscript, on file with The Judge Advocate General's School Library, United States Army, Charlottesville, Virginia). The manuscript was prepared as part of the Oral History Program of the Legal Research and Communications Department at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia.

and 14 January 1989. The purpose of this article is to present an overview of the personal and professional experience of COL Smith, emphasizing her unique perspective and pivotal place in the history of gender integration in the JAG Corps.

II. Background: The Women's Army Corps

Opportunities for female judge advocates began in 1943 with the creation of the WAC, and the selective temporary detail of a small number of WAC officers with law degrees to the JAG Corps.[13] In 1961, The Judge Advocate General (TJAG) agreed to detail permanently WAC officers to the JAG Corps, effectively granting them the same status as male JAG officers.[14] The remaining doors finally swung open in 1978, with the demise of the WAC and the introduction of regular appointments for qualified female officers in the various branches of the U.S. Army.[15]

The government established the WAC under federal law in July 1943 as a separate military auxiliary within the Department of the Army, to cultivate, manage, advocate, and protect women service members.[16] Effective in September 1943, the WAC succeeded the Women's Army Auxiliary Corps (WAAC) created two years earlier.[17] These

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[13] TREADWELL, *supra* note 6, at 559; Smith Interview, *supra* note 10.

[14] MORDEN, *supra* note 5, at 127.

[15] Department Of Defense Appropriation Authorization Act for Fiscal Year 1979, Pub. L. No. 95-485, 92 Stat. 1611 (1978) [hereinafter DOD Authorization Act, 1979] (disestablishing the WAC as a separate corps within the Army).

[16] Women's Army Corps (W.A.C.) Act, Pub. L. No. 78-110, 57 Stat. 371 (1943). This act established the Women's Army Corps in the Army of the United States on 1 July 1943. The Act provided as follows:

> There is hereby established in the Army of the United States, for the period of the present war and for six months thereafter or for such shorter period as the Congress by concurrent resolution of the President by proclamation shall proscribe, a component to be known as the "Women's Army Corps."

Id. The Women's Armed Services Integration Act of 1948, 62 Stat. 356 (1948), later established the WAC on a permanent basis.

[17] Women's Army Auxiliary Corps (W.A.A.C.) Act, Pub. L. No. 77-554, 56 Stat. 278 (1942) (establishing a Women's Army Auxiliary Corps for Service with the Army of the United States on May 15, 1942).

organizations are distinguished from the long-standing Army Nurse Corps, which included a narrow range of professional services generally reflecting their civilian counterparts.[18] By 1944, WAC personnel were eligible to work in 274 varied Army military occupational specialties (MOS).[19] Commissioned WAC officers with specific skills or educational background could apply to other branches, including the JAG Corps, where they would work and serve although they remained WAC officers for most purposes, including promotion.

Finally, in June 1961, Major General (MG) Charles L. Decker, TJAG of the Army at the time, formally accepted qualified WAC officers for permanent detail in the JAG Corps.[20] Before this, WAC officers with law degrees were eligible for selective temporary detail to the JAG Corps for a period of three years, during which their records, promotions, and career management remained with the WAC.[21] According to Bettie J. Morden's research,

> Lt. Col. Nora G. Springfield was the first [woman] to be approved for [permanent] duty as an Army lawyer. In a few years, the Army approved a program under which civilian lawyers and senior law students could apply for appointment in the WAC with permanent detail to the Judge Advocate General's Corps. Their careers would be managed by [the JAG Corps] rather than by the WAC Career Management Branch. On 21 July 1966, 1st LT Adrienne M. McOmber became the first lawyer permanently detailed in the Judge Advocate General's Corps directly from civilian life.[22]

Still, by December 1963, there appeared to be just two active component women permanently detailed and serving in the JAG Corps,[23]

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[18] TREADWELL, *supra* note 6, at 20-21.
[19] *Id.* at 559.
[20] MORDEN, *supra* note 5, at 127.
[21] *Id.* at 123-128.
[22] *Id.* at 127-128 (citing Chronological Record, June 1961, July 1966, ODWAC Ref File, CMH; U.S. DEP'T OF ARMY, REG. 140-100, RESERVE COMPONENTS, APPOINTMENT OF COMMISSIONED AND WARRANT OFFICERS OF THE ARMY (6 Apr. 1961), superceded by U.S. DEP'T OF ARMY, REG. AR 135-100, RESERVE COMPONENTS, APPOINTMENT OF COMMISSIONED AND WARRANT OFFICERS OF THE ARMY (5 Feb. 1972).
[23] MORDEN, *supra* note 5, at 418 (citing ODCSPER Study, Tab N, WAC Requirements, 1964, ODWAC Reference File, Studies, CMH Library).

a branch made up of over 1,000 officers.[24] By June 1970, the number of female JAG officers tripled to only six.[25] Women remained in the WAC and segregated within the Army until late 1978, when the gates to Army service formally and finally opened through legislation, eliminating the WAC as a separate branch and integrating WAC officers into the various branches of the Army.[26]

In 1972, Assistant Secretary of Defense for Manpower and Reserve Affairs, Roger T. Kelly, wrote in an action memorandum, "separate organizations and restricted assignments do not provide adequate career opportunity for women."[27] It is worth noting that, despite the restrictions for female officers, female lawyers had been playing a role in military justice since as early as 1944.[28] In that year civilian attorney, Laura Miller Derry, became the first women to represent a Soldier in an Army court-martial;[29] she was also the first women to secure a verdict of not guilty in a capital case.[30]

By 1973, the Army began fielding policy reversals and initiatives advancing the role and opportunities for female service members.[31] Foremost among the changes was an end to the involuntary separation for reasons of marriage and pregnancy.[32] These changes responded, in part, to progressive changes in civilian and military culture, and to manpower requirements in the aftermath of the draft. The world and the military had changed significantly since 1948 when congressional hearings resulted in integration of women in the military through establishment of a separate corps.[33] By the mid-1970s, Congress passed

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[24] Personnel, Plans & Training Office (PP&TO), Office of The Judge Advocate General, U.S. Army (July 2003).

[25] MORDEN, *supra* note 5, 129 (citing Strength of the Army Report (STM-30, DCSPER-46) for 30 June 1970).

[26] *See* DOD Authorization Act, 1979, *supra* note 15.

[27] MORDEN, *supra* note 5, at 311 (citing Memorandum, Assist. Sec'y of Defense (Manpower & Reserve Affairs (M&RA) to Asst. Sec'ys M&RA of the Military Departments, 6 Apr. 1972, sub: Equal Treatment of Service Women, ODWAC Ref File, Discontinuance of the WAC, CMH).

[28] LAURA MILLER DERRY, DIGEST OF WOMEN LAWYERS AND JUDGES 8 (Dunne Press 1949). *See also The Laura Miller Derry Papers*, Women's Manuscript Collection, University of Louisville Archives and Records Center.

[29] *Id.*

[30] *Id.*

[31] Smith Interviews, *supra* note 10.

[32] The Army first reversed involuntary separation for marriage, followed later by an end to involuntary separation for pregnancy. *See* MORDEN, *supra* note 5, at 301-311.

[33] *Id.* at 318.

legislation to dissolve the separate corps and fully integrate women into the military.[34]

President Jimmy Carter formally rescinded the legislation authorizing the establishment of the WAC on 20 October 1978.[35] With it, went most remnants of institutional disparity between men and women in the Army, the combat service exclusion notwithstanding. A key sponsor of the legislation was Senator William Proxmire, whose determined and articulate advocacy of full integration of women in the Army was vital to its success. During Senate hearings, he noted:

> Imagine a separate personnel system for Blacks or Catholics or Chicanos. The country would not stand for such a thing . . . . The Women's Army Corps is the last vestige of a segregated military establishment . . . . Women will continue to serve our country in the military—but in the mainstream of the Services, without restrictions on their service, without special privileges, or special obstacles to their advancement.[36]

III. Women in the JAGC

Despite the increased access and opportunity for service in the JAG Corps during the 1970s and 1980s, women remained the exception rather than the rule in an otherwise male-dominated Army legal community.[37] This is currently no longer the case.

In July 2001, Brigadier General (BG) Coral C. Pietsch became the first female judge advocate to achieve flag officer status.[38] General Pietsch, a Reserve Component officer, currently serves as the Chief Judge (Individual Military Augmentee) of the U.S. Army Court of

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[34] *Id.* at 395-397.

[35] *See* DOD Authorization Act, 1979, *supra* note 15.

[36] MORDEN, *supra* note 5, at 396 (citing the Congressional Record, 95th Cong, 2nd Session, 26 Sept. 78, pp. 31516-17).

[37] *See* JA PUB 1-1 (1970-1978), JAGC PERSONNEL AND ACTIVITY DIRECTORY AND PERSONNEL POLICIES (copies are on file with the PP&TO, OTJAG, U.S. Army (1970-1978)). Brigadier General Pietsch has the additional distinction of being the first Asian-Pacific American female general in the history of the U.S. Army. Randy Pullen, *Army Reservist Achieves Two Notable Firsts*, THE OFFICER, Sep 2001, vol. 77, no. 8, at 48.

[38] Personnel, Plans & Training Office (PP&TO), OTJAG, U.S. Army (July 2003) [hereinafter PP&TO, July 2003].

Criminal Appeals.[39] In 2003, the approximately 375 active duty female judge advocates represented slightly more than a quarter of all active duty Army attorneys.[40] Women currently serve with honor and distinction at nearly every level of the JAG Corps.

For example, in 2003, women actively served as staff judge advocates (SJA) or similar senior positions at or in the trial judiciary, the Army litigation divisions, the criminal appeals divisions, corps headquarters, the personnel and policy division, joint combatant commands, major army commands, training installations, and the combat divisions.[41] In the Army, where leaders are traditionally "grown" and developed over time, integrating women in the JAG Corps has proven nothing short of an unqualified success. Their leadership, influence, and contribution have been profound.

This success, however, makes it easy to forget the remarkable experience of those WAC officers who forged the trail ahead of them; the hardy few who served in Army legal offices in advance of the 1961 change in Army policy helping establish the credibility of female judge advocates in the Army legal community as well as among Soldiers and commanders. They were patriots who dedicated their personal and professional lives to the military, which *expressly*[42] limited their opportunities for advancement based on gender and told them they could never serve at the top no matter their talents. It is a tale of dedication, determination, and deserved success. It is, indeed, a story worth telling.

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[39] JA PUB 1-1, (2003-2004), JAGC PERSONNEL AND ACTIVITY DIRECTORY AND PERSONNEL POLICIES (2003-2004) [hereinafter JA PUB. 1-1 (2003-2004)].

[40] PP&TO, *supra* note 38.

[41] *See* JA PUB 1-1 (2003-2004), *supra* note 39. A non-exclusive list includes: COL Denise K. Vowell, Chief Trial Judge, U.S. Army Legal Services Agency; COL Stephanie D. Willson, Chief, Litigation Division, U.S. Army Legal Services Agency; COL Melinda E. Dunn, SJA, XVIII Airborne Corps and Fort Bragg, North Carolina; COL Michele M. Miller, Chief, Personnel, Plans & Training Office, Office of The Judge Advocate General; COL Kathryn Stone, SJA, U.S. Southern Command; COL Janet W. Charvat, SJA, Military District of Washington; COL Edith E. Robb, SJA, U.S. Army Recruiting Command; COL Lauren B. Leeker, Chief, Government Appellate Division, U.S. Army Legal Services Agency; Lieutenant COL Robin Swope, SJA, Fort Eustis, VA; LTC Sharon E. Riley, SJA, 1st Armor Division; LTC Tara A. Osborn, SJA, 2nd Infantry Division. *Id.*

[42] MORDEN, *supra* note 5, at 124. WACs with Regular Army status were ineligible for promotion beyond lieutenant colonel; could not remain on active duty with dependent children under the age of 18; and were ineligible for attendance at the senior service colleges. *Id.*

IV. Colonel Elizabeth R. Smith, Jr. (Retired) (1951-1978)

A. Early Years, Kentucky, and the Desire to Serve

Colonel Smith was born in December 1926, and raised in the modest town of Irvine, Kentucky.[43] From the very beginning, she was fortunate to have a family that encouraged her to do whatever she wanted and to follow her own path regardless of prevailing social conventions. Reinforcing this idea was her mother, who worked and served as the local postmaster under appointment by President Roosevelt.

> It never occurred to me that it was unusual for a woman to have that position, or to do anything. In fact, all the time I was growing up it never occurred to me that women did not do everything. No issue of it was ever made. I never heard any talk about it. So I just assumed women did whatever they wanted to do, wherever they wanted to, whenever they wanted to. I was used to my family being lawyers or ministers, and I certainly wasn't inclined toward the ministry. So, I aimed toward the law. It never occurred to me to do anything else.[44]

In 1944, she entered the University of Kentucky in a six-year combined Bachelor of Arts and Juris Doctorate degree program.[45] It was in college that she first encountered negative bias against women in the law, including "one particular professor who really went out of his way to ridicule women in his class or permit them to fall into a situation where he could make light of them."[46] While she was not the only woman in her law school class, COL Smith readily admits, "they were unique."[47]

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[43] Smith Oral History, *supra* note 1, at 1.
[44] *Id.*
[45] *Id.* at 2.
[46] *Id.*
[47] *Id.* Despite the relative novelty of being a female law student and attorney, she discovered considerable acceptance in her own community.

> It surprised me. Being a woman lawyer in my hometown, up in the hills of Kentucky, people don't "cotton" necessarily to women doctors and lawyers. But we had a woman doctor in our town . . . . Everybody loved Dr. Virginia. So maybe she [helped] pave the way for me . . . .

Upon graduation in 1950, amidst the fighting on the Korean peninsula, COL Smith "was very concerned about the war and felt she ought to do something about it."[48] A friend, and WWII veteran, led her to consider joining the military.[49] She applied to the WAC, "scared stiff at the prospect of entering anything that big."[50] Her motivation was part patriotism, part adventure, and part desire to get away from her small Kentucky home.[51] Although uncertain what she would be doing in the WAC, she felt assured that the Army would put her legal background to good use. "[I]t just did not make sense to me that the Army, being a somewhat sensible organization, would not at some point use my talents, my ability, my training, and education."[52]

Her small town neighbors were surprisingly supportive of her decision to apply to the military.[53] Her father, however, a local elected official and established presence in Democratic political circles, was less enamored with the idea.[54] "I think my father was disappointed that I was not going to return to Irvine, Kentucky, and practice law and be in politics."[55] Even so, he never expressed it.[56] While her mother was concerned about the perception of young women who joined the military as having questionable morals, neither of her parents did anything to stop her from entering military service.[57] Colonel Smith was excited at the

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Id. at 5.

[48] *Id.* at 3.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.* at 5.

[53] *Id.* at 4.

> All the older people in my little home of 3,500 were thrilled at the thought of me entering the Army, particularly the older women. The older the women were, the more excited they were at this great opportunity to leave home and be in the Army and become a woman Soldier. I was simply amazed at these eighty-year-old ladies who were thrilled at the prospect of me entering the Army.

Id.

[54] *Id.* at 6.

[55] *Id.*

[56] *Id.*

[57] *Id.* Smith was also concerned about the reputation of female Soldiers.

> They just sort of had the reputation of having loose morals. All these men all over, they must have loose morals. Surely, when you put a

prospect of serving, and looked forward with understandable hesitation to the commitment she was about to make. In 1951, she entered active duty.[58]

B. Entry into the Women's Army Corps

Colonel Smith reported for military service and entry to the WAC at Fort Lee, Virginia.[59] She entered at the rank of second lieutenant (2LT).[60] Any concerns she had regarding the Army, or the nature and quality of women in the military were quickly abated. She was not the only woman intimidated by the prospect of becoming a Soldier. As she explained,

> I was immediately reassured because none of us knew what we were into. It was interesting. All of these women were professional women. They were teachers, airline stewardesses, businesswomen, college graduates. We were all college graduates, about 100 of us. And we had all entered because of the war, because of patriotism, really. There were blacks in our midst and this was a new experience for many of us . . . . The fact that I was a lawyer was irrelevant. Intellectually, socially, in every way, we were all equals and we were all in it together.[61]

A female cadre administered the officers' basic course training and emphasized traditional military skills in drill, ceremony, critical tasks, and physical fitness. The experience was entirely alien to this group of young, professional women.[62] Like generations of new inductees, most

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> hand full of women amidst a lot of men, they are liable to go "hog wild"—sex rampant in the barracks and all that, I suppose, drinking, and swearing. Women would pick that up from the men and do that, too.

Id. at 6-7.

[58] *Id.*

[59] *Id*.

[60] *Id.*

[61] *Id*. at 7.

[62] *Id*. at 9. Being a group of women did not shield the young WAC trainees from duties typically associated with Army basic training. Colonel Smith commented that,

of these new officers found basic military training a surprisingly rewarding experience.[63] "I guess we got through it [Basic Training] so well because we all went through it together. When you share a common challenge, it is exhilarating, particularly when you [succeed]."[64] Unfortunately, some did not succeed. By the end of the introductory training, the Army dropped roughly twenty-five percent of the women from the program.[65]

After completing the WAC basic course in February 1952, COL Smith received orders for her first duty station to Fort Eustis, Virginia.[66] While enroute to Fort Eustis, she was required, as were all WAC officers, to participate in a two-week hometown recruiting effort. "They thought having us all flood back into our communities in uniform would be helpful to the recruiting effort."[67] Colonel Smith found it ironic that a country so hesitant to embrace the idea of women in uniform in peace was so eager to recruit them in time of war. Colonel Smith found,

> [i]t is interesting in wartime, how the country does not worry about having women do all sorts of things. In wartime, you can fly planes, drive trucks and repair trucks, and fly helicopters and repair them, and they don't ask any questions. It is only in peacetime that you have the luxury of putting women back in offices, perhaps. But in wartime they don't ask questions. If you can walk and breathe and you happen to be a woman, that is irrelevant. You can do the job. In

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> It was also interesting running around policing the post. We always ran around having to pick up cigarette butts and paper and all of that, and of course, scrubbing, waxing, mopping, dusting and cleaning out latrines. Doing all of that was, I felt, good training because we were going to have to require other people to do the same. It was useful that we had to go through exactly what we would have to require others to do someday. If it wasn't too demeaning for us, it would not be too demeaning for anyone else, I suppose.

Id.

[63] *Id.* at 8.

[64] *Id.*

[65] *Id.*

[66] *Id.* at 9.

[67] *Id.* at 10. In June 1952 there were 11,456 women assigned to the WAC, down dramatically from its high in World War II of 95,957. Still, there was general agreement that it played a critical support role during the Korean conflict. MORDEN, *supra* note 5, at 407, app. A (citing Strength of the Army Reports (STM-30) June 1942-1959).

> wartime, they didn't worry about having a lot of women in the service. They wanted the women because the men were in Korea fighting.[68]

Following her recruiting detail, COL Smith assumed responsibilities as the Executive Officer (XO) of the WAC Detachment at Fort Eustis.[69] Although she was an attorney, COL Smith served as a WAC officer without any relationship to the Army legal community. As the XO, she was essentially second in command to the WAC commander, with oversight responsibility for local WAC personnel assigned throughout the installation.[70] This included "training classes, barracks inspections, assisting in the supply office, and preparation of elimination board proceedings for unfitness or unsuitability [for military service]."[71]

Colonel Smith's time at Fort Eustis was uneventful. She and the other two or three female officers were generally well treated and respected by the male officer cohort at the installation, including the various commanders.[72] She enjoyed the social life, which centered on the officer's club.[73] The experience was sufficiently positive that she applied for and received Regular Army (RA) status.[74]

In March 1954, COL Smith left Fort Eustis for Europe, where the Army assigned her to the Headquarters, United States Army Europe, in Heidelberg, Germany.[75] The WAC staff advisor in Europe at the time, COL Mary Milligan, was also in Heidelberg. Colonel Milligan was one of only two authorized female colonel billets in the Army, the other

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[68] Smith Oral History, *supra* note 1, at 10.
[69] *Id.*
[70] *Id.*
[71] *Id*. at 11. The Army broadly interpreted release for unsuitability to include ineptitude, poor job performance, insubordination, or "a routine pattern of being unable to adapt." *Id.*
[72] *Id*. at 12.
[73] *Id*. at 13, 14.
[74] *Id.* at 21. A worthy footnote to the Army of 1952, was the monthly health and welfare formations attended by all personnel, male and female.

> We used to march up to the parade ground on payday to get talks on VD and [absences without leave]. Male company guidons would carry streamers for however long they had been without VD, or who had the lowest VD rate. It was interesting.

Id. at 13.
[75] *Id.* at 14.

being the Director of the WAC.[76] As COL Smith recalls, "There were about thirteen female LTCs in the Army, and more majors and lots of captains and lieutenants. Frankly, LTCs were like gods. When you talk about a full colonel, that is . . . beyond a god."[77]

The original plan called for COL Smith to serve as a supply officer in a Quartermaster unit, a duty she had at Fort Eustis.[78] When COL Milligan learned that COL Smith was an attorney, she intervened on her behalf to assign her to a legal office instead.[79] Colonel Milligan's fortuitous intervention changed COL Smith's career. She contacted SJA offices all over Europe looking for an office that needed a lawyer and one willing to accept a female officer. She finally found one in the Northern Area Command, located in Frankfurt.[80] The JAG office there was

> desperate for a lawyer. Their civilian lawyer was returning to the United States. He was the legal assistance officer for the command and they had a booming business in that regard. They were desperate to get a lawyer, male, female, JAG or non-JAG.[81]

Colonel Smith recalls that there were only a handful of active duty WAC officers serving in Army legal offices. "I think there were about three of us; perhaps . . . Mary Attaya was in the Army somewhere at the time and maybe Nora Springfield."[82] Colonel Smith and the others were WAC officers serving with, rather than as a part of the JAG Corps. They remained members of the Army's WAC.[83] Colonel Smith was neither detailed nor formally assigned to the Army JAG Corps.[84]

As a legal assistance officer, COL Smith advised Soldiers on matters ranging from adoption and finances, to command issues and divorce. Despite her unique stature among military attorneys, clients rarely

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[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.* at 15.
[81] *Id.*
[82] *Id.*
[83] *Id.* at 16.
[84] *Id.* "They were short lawyers and were just happy to have me working. I wasn't detailed to the JAG Corps, and no one seemed to mind." Smith Interviews, *supra* note 10.

seemed concerned that she was a woman. "When these young men would come in to me, they might be startled for a minute that I was a woman, but they had too much to worry about to be concerned [by it]."[85] Colonel Smith's supervisor ensured her experience was multi-disciplinary. She rotated through positions in legal assistance, administrative law,[86] and military justice, where she prosecuted two general courts-martial cases.[87]

She found a welcome and professional environment among her peers and others in the legal office in Frankfurt. One of these peers, Lieutenant John O'Connor, was the husband of future Supreme Court Justice Sandra Day O'Connor.[88] Being a woman was neither an obvious advantage nor a handicap, although it did make for interesting moments. In what might seem a cause for concern today, one of the civilian attorneys COL Smith worked with offered open personal advances and "literally chased me around the office from time to time."[89] Doubtless, such conduct by a male co-worker would be wholly unacceptable in the today's Army.[90]

Colonel Smith extended her tour in Germany for a total of three years.[91] Having found her experience working in an SJA office personally and professionally rewarding, in 1957, she applied to attend what is now the Judge Advocate Officer Basic Course, located at The Judge Advocate General's Legal Center and School (TJAGLCS) in Charlottesville, Virginia. She and Mary Attaya were the only women in the class.[92] Colonel Smith loved every minute of it. "I enjoyed it more,

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[85] Smith Oral History, *supra* note 1, at 15.
[86] *Id.* at 19.
[87] Smith Interviews, *supra* note 10.
[88] Smith Oral History, *supra* note 1, at 19.
[89] *Id.* Colonel Smith specifically recounts,

> [w]e had a civilian lawyer, Mr. Loeb, who twirled his red moustache frequently and chased me . . . . He was a very bright, very smart, probably smarter than all of us, but he did have this little thing about women. He did enjoy women. He never really seriously expected to catch me, but he did enjoy the chase.

Id.
[90] *See generally*, U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY Chapter 7 (13 May 2002) (defining sexual harassment and detailing that within the Army, such conduct is unacceptable, not tolerated, and punishable under the Uniform Code of Military Justice); *see also* UCMJ art. 92 (2002).
[91] Smith Oral History, *supra* note 1, at 20, 21.
[92] *Id.*

I think, than my male counterparts did because their first experience in the Army was with the [basic course], while I already knew a great deal about the Army and about JAG work."[93] In particular, she enjoyed the challenge of applying her experience and developing practical solutions to instructional problems.[94]

Importantly, it was in Charlottesville that COL Smith formulated one of her core leadership principles, which is that, "Just because something is legal doesn't make it a good idea, does not make it wise." [95] This sprang from her practical experiences, and served her well in later years as a legal advisor and staff judge advocate. Her common-sense approach and dedicated work ethic, led her to finish first in her basic course class,[96] where she found her gender a non-issue. What mattered more than gender to COL Smith was competence. As she recalls,

> I never thought of myself as different. It is interesting. I was always treated very well. My observation really, in those early days, is that if you could do the job you were accepted. I think you really had to demonstrate you could do the job, whereas a fellow might be able to goof off a little . . . . As a woman I felt that I must do my very best at all times, maybe not to let [other females] down, or let my folks down, or let anybody down really . . . . So I tried to do my best, but I found acceptance wherever I went, really. *If you were competent, people didn't worry about what gender you were*."[97]

The completion of the basic course, while important professionally and personally, did not automatically characterize COL Smith as an Army judge advocate, nor did it guarantee her future assignments in the mainstream JAG Corps. Despite completion of the Judge Advocate Basic Course, COL Smith was neither detailed to the JAG Corps nor assigned to a traditional legal services billet. Rather, she was assigned to

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[93] *Id*. at 22. It is worth noting that at this point in her career, COL Smith was a first lieutenant, having worked her way up from Second Lieutenant in the WAC. Male officers attending the basic course, however, were commissioned into the Army as first lieutenants directly from law school. *Id.* at 25.
[94] *Id*. at 22.
[95] *Id.*
[96] *Id*. at 24.
[97] *Id*. at 23 (emphasis added).

the Fort McClellan Staff Judge Advocate's office[98] and remained a WAC officer. Nevertheless, early on she became the de facto legal advisor to the WAC Center Commander (WACC) during a tumultuous period of investigations into accusations of homosexuality at the center. The investigations often put the Fort McClellan commander and the post Criminal Investigation Division (CID) at odds with the WAC Center.[99] Colonel Smith's concern for suspects' rights, led her to use her status as the only female attorney to assist the WAC Commander.[100]

Despite the seriousness of the controversies and pursuant investigations,[101] Colonel Smith enjoyed her role as legal advisor to senior officers and the opportunity to practice law in a practical, significant way.[102] She assisted the WAC Commander with the investigations, the "adversarial relationship" with the installation, and the heavy-handed approach by CID.[103] Following her efforts in the investigations, she finished her tour at Fort McClellan as an instructor at a WAC basic training battalion where she reveled in the instructional art, trying new and unconventional teaching techniques.[104]

By 1958, at Fort McClellan, Alabama, COL Smith was selected for promotion to captain and was assigned as the commanding officer of a WAC training company, an opportunity she thoroughly enjoyed.[105]

> I loved it. I think, other than being a JAG officer in the Army, being a commander is the next best job because you are responsible for everything. You are responsible

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[98] *Id.* at 25.
[99] *Id.* at 26.
[100] *Id.*
[101] *Id.* at 27.

> During this time, I felt that I would be followed and that anything I had would be searched and read, so I locked things in the trunk of my car. I slept with papers under my pillow. I carried my briefcase with me at all times. I never let it out of my hands . . . . It was that bad at that post at that time.

Id.
[102] *Id.*
[103] *Id.* at 28.
[104] *Id.* at 29-31. Colonel Smith's teaching techniques included the "use [of] physical demonstrations of offenses and do it in a dramatic fashion . . . doing things that would startle them and get them thinking . . . ." *Id.* at 30-31.
[105] *Id.*

> for all your troops, your cadre, your training, your sergeant and your second and first lieutenants, as well as responsible for the training of the WAC basic trainees. It was a daunting, frightening job . . . .[106]

It was also enormously rewarding.[107] Colonel Smith found the challenge of command and the proprietary ownership of the outcomes of her efforts highly satisfying. In particular, she enjoyed taking part in the growth of young women from the moment they arrived for basic training through their graduation.[108]

As a commander, COL Smith benefited from her experience and understanding of the law, especially concerning military justice.[109] Other leaders recognized this and sought her counsel, her sound judgment, and broad experience. "I had a battalion commander who used my legal

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[106] *Id.* at 31.

[107] Colonel Smith, like most commanders, also experienced her share of memorial moments while in command, some of them quite amusing. In one case, during a training exercise she literally fell over from the weight of her military equipment:

> We all had these huge heavy packs, helmets and stuff, and we got almost to the company when retreat sounded. We had to stop. I was on a little hillside and the troops were facing me to get orders. I guess after retreat was over or something, I fell over backwards with all my gear on. From a prone position, I said, "about face." My cadre and officers were laughing out loud . . . . The troops kept themselves quiet. My cadre and officers did not. We made it back to the company and I just laid into my cadre and officers about breaking attention in front of the troops. Then, when it was all over with, we all had a good laugh. They never forgot that and neither did I. It just became the story of the old lady that fell backwards, while in gear, and had to have help getting up . . . . I am sure that the trainees all giggled themselves sick that night about the "old lady" falling down in formation.

Id. at 41-42.

[108] *Id.* at 37.

> The parents would be so proud. They would come in and thank me so much for doing this for little Susie or little Nancy and it was really heartwarming to see the transformation. Maybe you don't think about it, but there is a transformation, not only physical, but inside, as they are able to meet the challenges that you provide them.

Id.

[109] *Id.* at 34-35.

expertise, too, just as advice. Throughout my tour of service, people frequently came to me, rather than to the IG or the chaplain."[110] This was important, because although she was not a judge advocate it gave her the satisfaction of making a meaningful difference for people and organizations. As COL Smith notes,

> I did not have legal status as a lawyer. I felt that I had an opportunity to effect changes frequently, and I did effect some changes when I could because of the fact that everyone knew I had the confidence of the WAC Center Commander. It is very helpful to have the confidence of the commander. You can work miracles through persuasion.[111]

Colonel Smith's next assignment was to the Office of the Staff Judge Advocate, Fort Leavenworth, Kansas, where she was assigned to and served as the office's only female officer.[112] Her WAC status remained the same, although she was now temporarily detailed to the JAG Corps. Unless extended, a temporary detail was for a period of three years.[113] Colonel Smith believes she received the legal office assignment because of her attendance at the basic course and the people she had met there, among them, the chief of the JAG Corps personnel office, COL William Hodson.[114]

At Fort Leavenworth, she served as the claims officer.[115] In that capacity she worked closely with service members and their families to resolve various personnel claims, including damage to property arising from Army moves. Colonel Smith notes that, "[T]he thrust of my time there was in trying to streamline the procedures for the men; they were all men at that time I think, who came to the Command and General Staff College."[116] Her clients also included the prisoners incarcerated at the U.S. Disciplinary Barracks. "I felt I was maybe adding to the morale of the prisoners or something by doing well. You always had to find your motivation for doing whatever job you were doing and mine was helping

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[110] *Id*. at 35.
[111] *Id*.
[112] *Id*. at 43.
[113] Smith Interviews, *supra* note 10.
[114] Smith Oral History, *supra* note 1, at 42.
[115] *Id*. at 42, 43.
[116] *Id*. at 43.

folks."[117] While her Fort Leavenworth assignment would not be the last time she used her talents to help others, it would be the last spent in temporary detail to the JAG Corps.

C. Permanent Detail to the Judge Advocate General's Corps

The gates for women in the JAG Corps opened dramatically in 1961, when TJAG formally granted qualified WAC officers permanent detail in the JAG Corps.[118] In July 1961, COL Smith, along with Nora Springfield and Mary Attaya, were among the very first women to apply for the new status.[119] Although still part of the WAC, officers with permanent detail received their career-development from the JAG Corps.[120]

Colonel Smith's next assignment was to The Judge Advocate General's School (now TJAGLCS), where she served as the Deputy Director of the Academic Department working for COL Russell Fairbanks.[121] She found COL Fairbanks to be "a brilliant man, very demanding of the people who worked for him . . . ."[122] Colonel Smith, the only female judge advocate on the staff or faculty, personally managed the school's academic schedule, guest speakers, coordinated support to the academic departments, and otherwise assisted in the administration of the academic program.[123] During this period, a WAC selection board chose her for promotion to the rank of major.[124]

She remained in Charlottesville the following year to attend the ten-month Judge Advocate Career Course, currently known as the Judge Advocate Officer Graduate Course, where she was the only woman in her class.[125] Upon graduation, COL Smith was assigned to the Pentagon in the Military Affairs Division, Administrative Law Division (ALD), of the Office of the Judge Advocate General.[126] This was a sought-after

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[117] *Id*. at 44.
[118] MORDEN, *supra* note 5, at 127, 128; Smith Oral History, *supra* note 1, at 46.
[119] MORDEN, *supra* note 5, at 127, 128.
[120] Smith Oral History, *supra* note 1, at 46, 47.
[121] *Id.* at 47.
[122] *Id*.
[123] *Id*.
[124] *Id*. at 50-51.
[125] *Id*. at 54.
[126] *Id*. at 53.

assignment, and she was excited for the opportunity. Colonel Smith believed that,

> [c]areer-wise, I think, it was one of the best assignments you could have. It was far better than the Military Justice Division, International Law, or anything else because a commander's "meat and potatoes" is running his post, camp, or station, and he is going to be in the area of administrative law far more than the courts-martial. Anybody can do courts-martial. I think it takes real talent and ability to do Administrative Law . . . .[127]

Indeed, COL Smith found the experience in the Pentagon extremely rewarding, although she missed the contact with clients. Colonel Smith noted, "we would roll our opinions. Where they went, you didn't know; who got them, you really didn't know; you didn't see faces."[128] During this period, she adopted the common practice of limiting legal opinions solely to issues of the law, with minimal commentary on the logic or wisdom of proposed actions. The desire to demonstrate a more consular approach with legal reviews became a key professional trait she later employed as a staff judge advocate.

> We would write back [to the client] "no legal objection" to something. Then, to our little note for ourselves on our retained copies, we would say, "boy, what a lousy idea this is, for all these reasons." But, we would not tell our client this. I guess we thought we would be meddling if we said more. From my experience there, from then on, I never stopped telling people, "no legal objection to this; however, for the following reasons this is an unwise idea. It is fraught with policy problems, political problems, congressional problems, public relations problems," and then would tell them what they were.[129]

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[127] *Id.*
[128] *Id.* at 56.
[129] *Id.* at 56-57.

D. Staff Judge Advocate, U.S. Army Recruiting Command

In October 1966, COL Smith left Washington when TJAG selected her for an assignment as the first staff judge advocate for the U.S. Army Recruiting Command (USAREC), in Hampton, Virginia.[130] Until this time, the command used the legal services of the Continental Army Command (CONARC), located at Fort Monroe, Virginia.[131] She was as excited and unsure, as any officer would be, at the prospect of advising a commanding general and associated staff.[132]

The issues she faced at USAREC, located "in an old missile site way out in the boondocks of Hampton where cows and horses grazed,"[133] ran the full spectrum of administrative, acquisition, and command related concerns.[134] USAREC was not a general courts-martial convening authority, and therefore, CONARC dealt with serious justice issues.[135] The most serious and immediate work dealt with the draft induction of men into the Army during the height of the anti-Vietnam movement. The issues included moral-waivers to escape service, demonstrations at Armed Forces Examining and Entrance Stations (AFEES), and responses to private habeas corpus actions used to impede the induction process.[136]

Moral waivers were required whenever a prospective enlistment applicant had a criminal or juvenile record.[137] Eligibility for a waiver depended on the nature of the conviction or criminal offense. USAREC applied specific standards against these criminal records, which required a close analysis of individual state law to see whether the elements and conditions of the conviction permitted accession into the military.[138]

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[130] *Id*. at 60-61.

[131] *Id*. at 61. At that time, the Continental Army Command was responsible for both training and force management. Those responsibilities were later bifurcated between what is now the U.S. Training and Doctrine Command (TRADOC) and the U.S. Forces Command (FORSCOM). *Id.*

[132] Despite her apprehension at being an SJA, the JAG Corps leadership felt she was ready for the job. "I thought I needed more time in the Administrative Law Division, that I needed time somewhere . . . . But [The Judge Advocate General] felt I could do the job and [Colonel] John Folawn said, 'you are ready, Liz.'" *Id*. at 60.

[133] *Id*. at 61.

[134] *Id*. at 62-97.

[135] Smith Interviews, *supra* note 10.

[136] Smith Oral History, *supra* note 1, at 63-69.

[137] *Id*. at 62.

[138] *Id*. at 63.

Colonel Smith obtained and used extracts of every state's criminal code for this purpose to adjudicate the waivers.[139]

The most dramatic events concerning USAREC during this period involved the often-violent anti-war demonstrations at various recruiting stations and AFEES.[140] Colonel Smith recalls that

> [w]e had incidents of hurling blood; throwing blood on our files and throwing artificial blood on our employees . . . .[141] We had an AFEES bombed. People in their right mind don't go around bombing things just because [they believed] their goal is just. Their goal may be to stop an illegal war, but you don't have the right to kill people, or to destroy government or private property, or to hurt people. There were many zealots who were doing that sort of thing.[142]

Important in all of this was COL Smith's bound determination to address violence without involving military personnel.[143] "We had to protect ourselves, but with civilian law enforcement, not Soldiers."[144] This required coordinated security support operations between federal, state, local, and contract personnel to protect USAREC assets (human and physical) from radical anti-war activists.

> That was my goal: no military person was going to act like a policeman. We were not going to have pictures in the papers of military people, great big sergeants, picking up little civilians and throwing them down, taking them out, or kicking them out the door. We would [instead] have pictures of sheriffs doing that, marshals and [General Service Administration] guards, but not us.[145]

Finally, draft inductees, who were technically under military control, commonly took legal action to stop or delay further administrative

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[139] *Id*. at 67.
[140] *Id*. at 69.
[141] *Id*. at 65.
[142] *Id*. at 69.
[143] *Id*.
[144] *Id*.
[145] *Id*. at 68.

processing. These writs of habeas corpus frustrated the induction process and movement of the individual to military reception stations.[146] The writs were served on the respective commanders of the seventy-three AFEES, who in turn received support and guidance from USAREC.[147]

While the Department of Justice handled the actual litigation, COL Smith actively assisted her AFEES commanders by educating them on the pertinent law and their legal obligations.[148] She developed a uniform command regulation for them to follow.[149] Other routes for avoiding or delaying induction into the Army included filing congressional appeals and claims of conscientious objection, homosexuality, and various medical and psychiatric conditions.[150] The USAREC command ultimately considered all of these at one level or another.

In 1973, the draft ended and inductions ceased.[151] The USAREC began transforming itself and refocused the recruiting mission in response to the all-volunteer Army. This transformation brought its own set of new challenges, among them recruiter misconduct that, "effected the enlistment of male or female applicants who were not qualified."[152] Colonel Smith recalls cases of "tinkering with mental examinations, concealing physical defects, and concealing criminal records."[153]

Introducing advertising and marketing to attract a volunteer force created its own challenges, including intrinsic ethical concerns, conflicts of interest between civilian agencies and military personnel, [154] and the

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[146] *Id*. at 64.
[147] *Id*. at 63.
[148] *Id.* at 65.
[149] *Id*.
[150] *Id*. at 63-64.
[151] *Id*. at 83-84.
[152] *Id*.
[153] *Id*.
[154] *Id*. at 84-85. One of the key problems related to advertising for Army recruits, were the ethical constraints on the relationship between government employees and advertising agency representatives. Colonel Smith remembers that

> [i]t really became necessary to remind these people of ours of the things they should not be accepting from the agency people—gifts, mementoes, free dinners, free drinks, and what have you. They must remember that they are representing the Army; they are not employees of the agency.

Id. at 85.

development of a marketing approach that was entirely new to the Army.[155] The opportunities for women in the Army expanded greatly during the early to mid-seventies, and recruiters took notice. Colonel Smith recounted that "Where women would serve and where women would hold command positions in the Army over men began to develop during this period of time. It was a big change in [the Army's] outlook toward women."[156] The progressive evolution of the Army allowed recruiters to broaden their appeal to women.

Remarkably, COL Smith used her position at USAREC to help facilitate the institutional changes that would help open the gates even wider for women in the Army. As one of the early pioneers, she actively participated in the transformation from induction to inducement, leading to a quality volunteer force more dependent than ever on its female cohort.[157] As COL Smith said,

> If we were going to bring in all these women, they had to figure out how to cope with them. There was concern about the prejudice against women on the part of the commanders within the Army and the sergeants in the Army; so there had to be some schooling or training in dealing with women, watching out for women being mistreated by their male superiors. It was changing. The men were changing grudgingly, but it was changing because of the volunteer Army.[158]

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[155] *Id*. at 102-103.

> In meeting the Army's [recruiting targets] it helped to get lots of women in because the overall number included women . . . . We had all sorts of market studies. It became like a business selling a product. We had market studies and we would break it down. Demographics became very important so you would know where to put your recruiting stations, how many recruiters you needed and what kind of recruiters you needed . . . . The regulations began to change in the area of women having children, women having illegitimate children, entering with children, and having children after they go in service. Of course, the latter did not become our problem, but the whole area of the female began to change.

Id. at 103.

[156] *Id*.

[157] *Id.* at 114.

[158] *Id*.

Colonel Smith reviewed the language for all proposed enlistment contracts and participated in writing Army regulations and policies regarding "enlistment contracts, commitments, and promises."[159] She combined the professional expertise of a lawyer with USAREC's practical experience in recruiting, and assisted the Department of the Army's transition from a conscriptive force to a voluntary one,[160] stating, "[I]t was important to open up and broaden the Army's regulations and the Army's treatment of women in order to help us attract the quality women [we were seeking]."[161] These efforts were remarkably successful. In the post-Vietnam era, the Army had no real difficulty recruiting women.[162] According to COL Smith,

> We had more equality for women in the Army as far as jobs were concerned. They had opportunity to earn the same as a man in the Army. You didn't get paid less because you were a woman. They had the opportunity to get an education while being in the service.[163]

Colonel Smith also used this transitional period to expand the role of judge advocates throughout the recruiting command by securing authorizations for Army lawyers in each of the five recruiting regions.[164] Colonel Smith found that "A big thrust of their work was reviewing the reports of investigation into recruiting malpractice. They were, I felt, invaluable."[165]

Colonel Smith took genuine pride and satisfaction in her USAREC experience. She found the unique civil, administrative, and political

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[159] *Id*. at 110.
[160] *Id*.
[161] *Id.* at 104. Some of the regulatory changes, according to COL Smith, included,

> A waiver for women who had children if they were illegitimate. I don't recall what the significance was of having the child legitimately or illegitimately but women with a child, one or two children, could get waivers to join the Army. We tried to equalize the policy for men and women, still recognizing that the women usually were the primary care-giver for the children. We were trying to equalize the rules for women and men who had spouses and children.

Id. at 112.
[162] *Id*. at 109.
[163] *Id*.
[164] *Id*. at 91.
[165] *Id*.

challenges of the assignment enormously memorable. She recalls, "Things were exciting, literally exciting and exploding, during that draft era and we were right in the middle of it. It was the best job in the Army, at that time, for really reeling out the legal advice to people who were going to act on it right that minute."[166] Equally important, she recognized and took full advantage of the opportunities for leveraging legal counsel into the high visibility operations of induction and recruiting during this volatile period.[167]

Even after the Vietnam era, during her tenure at USAREC, COL Smith proved adept at identifying the issues that mattered to her commanders. Her ability to identify key issues, whether legal or otherwise, and her loyalty and desire to share her views for the best interest of the commanding general, integrated her into the very fabric of the command.[168] It never mattered that she was a woman; she had clearly earned her place at the top as a trusted member of the staff.

> I had the confidence of every one of the staff, their respect, and their wholehearted support. They were in a job that had the "eye of Congress," because of their constituents; the "eye of the press" because of our activities in inducting people like Muhammad Ali; and the "eye of the public," because we had their kids coming in. Everybody was looking at us . . . I briefed every new Commanding General . . . to let them know what to expect. I made it crystal clear to each one that I was their legal advisor, that they were my number one client, and that there would be nobody under them who would ever lead them deliberately into trouble or let them get into trouble if I knew about it. *I would tell them it would never, ever happen because I would stop it. I made it crystal clear to everybody that I briefed that I was absolutely ruthless in protecting the Commanding General*. . . .[169] Everybody's job is to keep the

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[166] *Id*. at 71.
[167] *Id*.
[168] *Id*. at 72.
[169] *Id*. (emphasis added). Colonel Smith readily admits that her commanders did not always follow her advice, but at least they listened. As she remembered,

> The main thing is that [the commander] had the benefit of my views. Other people often would not tell him what he didn't want to

> commander out of trouble and to help him do his job and make decisions. They should not only be legal decisions. They should be wise decisions that will not impact on future decisions, that will not impede him in making future decisions, that will not cause him to lose something for his troops, or for his post, or for the Army as a whole . . . . The Army is people. Through the commander, the Army is the client. If the commander makes legal, wise decisions, the Army is well served.[170]

There were, of course, those occasional few that resented the unique relationship COL Smith crafted with her commanders. Colonel Smith remembered, "There were always one or two officers who resented this bitterly, and I felt it was because I was a woman."[171] Still, she never let it bother her. As COL Smith noted, "because I had the confidence of the one who mattered, the Commanding General, a Division Chief might as well get along with me because his [actions] weren't going to sail through if I didn't concur."[172]

Colonel Smith's legal acumen and instructive candor repeatedly earned her enormous equities with commanders and staff alike. As noted earlier, her experience at the ALD led her to believe that the judge advocate's role is to provide more than simply a read on the law, but also on reason. Her willingness and ability to expand her role from legal advisor to command counselor convincingly, led a succession of general officers to trust her judgment and her commitment to the success of the command.

> If it was an unwise policy, I would point out the political aspects of it, the congressional aspects, or how it could look on the front pages of the *Washington Post* or the *New York Times*. Is this something we want to do? Is

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> hear . . . . I might be the only one around free to tell him what he didn't want to hear, either orally or in writing . . . . Of course, he knew he would go to jail alone. It was sort of a joke. He said, "Well, I guess I will go to jail alone on that one. Liz didn't agree with me, but I did it."

Id. at 76.

[170] *Id.* at 158.

[171] *Id.* at 74.

[172] *Id.*

> this something we have to do? It was legal, but how about such and such? If I could think of an alternative or some other idea, I would suggest it. I frequently would not concur, although there was no legal objection, because it was such a bad idea. We were just inviting a congressional inquiry into it. We were inviting the press to get into it. We were inviting the parents of the nation to rise up in arms. The rest of the Army would take a dim view of something we wanted to do and we could not work in isolation.[173]

Colonel Smith's experience at USAREC was so positive, so rewarding, and so uniformly successful that she managed to do something few military officers can—she never left. Nor did the JAG Corps try to make her go elsewhere.[174] She remained the staff judge advocate at the Recruiting Command for an extraordinary twelve consecutive years from 1966 until her retirement in 1978. Colonel Smith fondly remembers that

> [I]t was wonderful. I resisted efforts to reassign me. I did not want to go anywhere else. Where else could I go and do all this . . . ? I don't know of any other place where I would want to go . . . .[175] [I] felt I was in an enviable position and that [I] had the best job in the Army because I was so in the middle of everything. I was literally affecting Army policy on recruiting as well as on inductions. How many chances do you get to go beyond your post, camp, or station . . . .[176]

Colonel Smith retained her commanders' respect and confidence throughout her tenure at USAREC. During those twelve years, she served five successive commanding generals, fiercely pursuing the interests of each as she worked to help modernize the way the Army identifies and recruits its men and women.[177] After over twenty-six years of dedicated service, she retired on 31 May 1978.[178] The decision was for family; her mother, who had been an active part of the command

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[173] *Id.* at 75.
[174] *Id.* at 97.
[175] *Id.* at 78.
[176] *Id.* at 77-131.
[177] *Id.*
[178] *Id.* at 115.

community but gradually endured declining health, simply needed her more.[179]

Colonel Smith's mother and namesake, Elizabeth R. Smith, (Sr.), had lived with COL Smith for over a decade, and COL Smith "included [her mother] in absolutely every function as though she were a spouse."[180] It has long been part lore of the JAG Corps that COL Smith added the "Jr." to her name, in conjunction with her first and middle initial, to lead audiences of her legal actions to believe she was a man. As COL Smith recalls, nothing could be further from the truth,

> I am a junior, named after my mother. It says so right on my birth certificate; it's perfectly legal. I never abbreviated my name or added "Jr." to mislead anyone into thinking I was a man. It never bothered me at all to be a woman. In fact, it was something I *wanted* people to know.[181]

Her mother's importance cannot be overstated. She provided that fundamental element of a home, so vital to most service members.[182] Even the command understood and appreciated Elizabeth Smith, "Sr".

> Everybody knew her the day I retired from the Army. At my retirement ceremony, General Forrester presented her with a gold medallion on a chain that said, "USAREC Mom." It was really something. I never could have made it the eleven years she was with me without it . . . .[183]

Colonel Smith and her mother settled into quiet retirement in Newport News, Virginia, where COL Smith resides to this day.[184] When she left the Army, she left the law and never turned back.[185] Her memories of the Army and the JAG Corps remain fond, even enthusiastic.

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[179] *Id*.
[180] *Id*.
[181] Smith Interviews, *supra* note 10 [emphasis added].
[182] Smith Oral History, *supra* note 1, at 116.
[183] *Id*. at 115.

[184] Smith Interviews, *supra* note 10.
[185] Smith Oral History, *supra* note 1, at 117-118.

V. The First Female Colonel of the JAG Corps

A seminal moment for COL Elizabeth Smith, the Army, and the JAG Corps, occurred on 10 July 1972, when she became the first permanently detailed WAC judge advocate promoted to the rank of full colonel.[186] The media widely covered this high profile event, and elicited considerable response from women all over the country.[187] Her accomplishment was indeed remarkable. At the time of her promotion, there were only approximately 901 commissioned WAC officers in the Army,[188] and COL Smith believes only thirteen of those were full colonels.[189] It would be another long eighteen years before the active duty Army would promote another female judge advocate to this senior rank.[190]

Her promotion was a credit to all she accomplished. It was recognition of years of hard work, demonstrated professional excellence in both the WAC and JAG Corps', fierce loyalty to her clients, and the proven ability to adapt and excel in the Army of her day. By her own admission, at no time had she focused on anything other than the work at hand, and never worried about efficiency reports or promotions; she let her service speak for her.[191]

Colonel Smith readily admits she did not have the background expected for promotion to colonel.[192] She neither had attended resident

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[186] *Id.* at 78-79.
[187] *Id.*
[188] MORDEN, *supra* note 5, at 410 (citing Strength of the Army Report (STM-30, DCSPER-46) for 30 June 1960-1984).
[189] Smith Oral History, *supra* note 1, at 79. "When I entered the Army becoming a major seemed like a far off goal, and being a lieutenant colonel was almost out of the world, and to be a full colonel, was something." *Id.*
[190] *See generally* Peters Oral History, *supra* note 12.
[191] Smith Oral History, *supra* note 1, at 97. In COL Smith's words,

> [L]et me tell you, anybody who has to work with fear and trembling about an [Officer Efficiency Report] is not going to be able to do a good job. I never worried about that. I never thought about it. I always felt that if I had to leave the Army suddenly for some reason, I could always work. I could always make a living. I did not have to be in the Army to do it. I was not going to operate my life worried about [Officer Efficiency Reports].

Id.
[192] *Id.* at 162-163.

Command and General Staff College nor deployed to a combat zone. Her career path was unconventional, but nonetheless rewarding.[193] She sought out and retained positions where she felt she could make a difference, without compromising herself or what, in her mind, were her responsibilities.

Colonel Smith never had to compromise herself or her responsibilities. Her service secured her place in Army and JAG Corps' history as the first active duty female judge advocate promoted to full colonel. The promotion, a tremendous accomplishment by any standard, was more remarkable given the environment in which it occurred. From college to law school, to the move from the WAC to the JAG Corps, COL Smith was one of only a handful of women forging the trail on which so many have since traveled.

VI. Notes on the Experience of Women and JAG Corps Leadership

Much has been written about the experiences of Army Nurses and WAC officers in the period following the Second World War.[194] Little, unfortunately, has been written of the lawyers, although some experiences are no doubt similar. Colonel Smith's story demonstrates some of the challenges women faced as the Army transitioned from the WAC to full integration. It is also an interesting look at the Army's ongoing institutional transformation.

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[193] *Id.*

> In a way, I probably was not in step with the party line of the JAG Corps or the Army. I have gone my own way and done things that I felt were right. I think if you feel things are right and honest and true, yourself, then do it. You have got to do what you think is right and not what somebody else thinks is right.

Id.

[194] *See generally* EDITH A. ANYNES, FROM NIGHTINGALE TO EAGLE: AN ARMY NURSE'S HISTORY (Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1973); MARY SARNECKY, A HISTORY OF THE U.S. ARMY NURSE CORPS (Philadelphia: University of Pennsylvania Press, 1999); and ELIZABETH A. SHIELDS, HIGHLIGHTS IN THE HISTORY OF THE ARMY NURSE CORPS (CMH 1981).

A. Initial Challenges

Despite the expanded opportunities in the JAG Corps and the military, many female judge advocates had experiences different from their male counterparts. A good and strikingly obvious example is the relationship between women leaders and their female subordinates.

Colonel Smith experienced this first hand as a WAC company commander. She showed little patience for the thinly veiled efforts of some women to leverage their gender when dealing with male officers, and of male officers unsure of exactly how to deal with female Soldiers.[195] Her determined approach often led her male counterparts to say, "Liz, you are too hard-hearted."[196] She remained unapologetic;

> [D]uring my experience, [male officers] were always so hesitant to yell at a women. That was bad, because the women could get lazy and could get away with murder. That could create dissension in the office, particularly within a unit, if the men got different treatment from the women. It always annoyed me that men would let women off easier than men because they couldn't stand to see a woman cry . . . . I would talk to men about this practice of theirs and tell them not to fall for it. A woman could cry buckets with me at the company and, of course, they would, and I would just hand them a little box of Kleenex and tell them to blow. Let them cry their eyes out and then get along with the business. It is an act and a woman can use it. [W]omen cannot want to get ahead in the world and then, when the going gets tough, rely on this female ability to get sympathy from a man. A man knows when he is being played for a sucker. He can't help it and he is going to resent it later when he thinks about it . . . .[197]

Another issue facing COL Smith was the unavoidable consequences of being the only female field grade officer; or, indeed, the only female commissioned officer. The one place where this became an issue was during her short tour in the ALD. The important dynamic involved

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[195] *Id.* at 39.
[196] *Id.*
[197] *Id.* at 38-39.

social relationships within the office and the sense of separation and indifference resulting from an environment that never fully integrated.[198] One example was the casual ostracizing by other field grade officers in the small things that make up a day, like going for coffee. "The field grade officers never, ever, not once, asked me to go with them. Ever. I guess I may have stayed and covered the office. That is the first time I felt there was a distinction being made because I was a woman."[199]

Fortunately, COL Smith rarely encountered any meaningful gender-related issues as a supervisor.[200] Most of her subordinates were, at least outwardly, unaffected by it. There were exceptions, of course. One male junior officer took a dim view of the professional counseling he received from her and became "a disruptive influence" as a result.[201] Colonel Smith stated, "He had a very strong wife at home. Maybe he did not want a strong wife at home and a strong boss at the office . . . . He could not do anything about the wife, so maybe I was the target."[202]

Throughout her career, COL Smith was aware of her unique position as one of only a handful of female judge advocates and, later, as one of its senior officers. Her concern throughout her career was basic enough; she wanted to avoid letting people down. Colonel Smith stated,

> I wanted to do well because I knew that I had a unique position as the legal counsel for a large command and being a full colonel—but my main concern as a woman: never letting down women. I wanted to do well for myself, my family, my hometown, my State of

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[198] *Id.* at 58.

[199] *Id.* Still, COL Smith never let being a woman interfere with what she was doing, recalling,

> I had too much pride to assert myself. I have never ever pushed myself where I thought I might not be wanted . . . . That was the one place where I felt that, I would have to say, being a woman made a difference . . . . It did not impede my progress. I did not stop me from doing my work or interrupt my work at all. I thought, myself, it was, at least, rude and impolite; aside from professionalism, I thought it was wrong.

Id.

[200] Smith Interviews, *supra* note 10.

[201] Smith Oral History, *supra* note 1, at 100.

[202] *Id.* at 100-101.

> Kentucky, and friends, but also just not wanting to do badly because if I did badly, it would perhaps hold back other women, in some way, in the eyes of men who would question whether a woman could do the job.[203]

B. Later Experiences

Whether a woman could do the job became an increasingly moot point during the late 1980s and early 1990s. As time passed, the questions regarding female judge advocates changed profoundly and no longer dealt with the matter of how and whether women could do the job, but at what level. The second generation of female judge advocates, who came of age and rank a decade or more after COL Smith and her peers, would ask questions about advancement, actively participate in promotion and selection boards, and do more. Foremost among them may have been COL Joyce E. Peters.[204]

Colonel Peters joined the Army as a WAC officer in 1972, the same year as COL Smith's groundbreaking promotion to the rank of full colonel; COL Peters would later become the second.[205] Unlike COL Smith, COL Peters entered the Army as a WAC officer permanently detailed to the JAG Corps and served her entire career as a judge advocate.[206]

Like COL Smith, COL Peters also sensed the burden and importance of succeeding on behalf of other women.[207] Separated by a generation, each was keenly aware of their visibility within the JAG Corps, if not the Army, and of the promise and peril that entailed. Colonel Peters echoed

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[203] *Id*. at 118-119.

[204] Peters Oral History, *supra* note 12, at i-iii. Colonel Peters was the Distinguished Graduate of her Officer Advanced Course class where she was the only woman in attendance (May, 1978), and in May,1992, she became the first female judge advocate to attend a Senior Service College, the National War College, where she graduated with honors. She is believed to be the first female officer to serve as a staff judge advocate for a general courts-martial convening authority, at the U.S. Army Quartermaster Center and School, Fort Lee, Virginia (1986-1989). In 1992, she also became the first woman to serve as the staff judge advocate of an Army Corps (I Corps, 1992-1994). Before retiring, COL Peters also served as the first Judge Advocate selected as the Senior Military Assistant to the Secretary of the Army (June-September, 1994). *Id*.

[205] *Id*.

[206] *Id*.

[207] *Id*. at 264.

the sentiments of COL Smith when she [COL Peters] reflected that "the general overall success that [she] had in [senior leadership positions] was a big factor in allowing the JAG Corps to expand as rapidly as it did with the least amount of friction in integrating women in the Army."[208]

As late as the mid-1970s, one of the unmistakable issues for women in the JAG Corps, and the Army generally, was the lack of opportunity for upward mobility.[209] Limited promotion opportunities were a function of law as much as Army culture, which capped the highest rank in the WAC (to which all women technically belonged) to colonel with the exception of the Director of the WAC, who was by this time a brigadier general.

Earlier generations seemed less troubled by the fact that they were ineligible for promotion to general officer in the JAG Corps. As COL Smith noted, "We just never thought of it. There were no female generals, and we considered promotion to colonel a distant hope, at best. We were just happy serving; becoming a general simply never occurred to us."[210] The generation that followed was not so accepting of this obvious inequity. As COL Peters recalls,

> General Persons[211] was the [United State Army Europe] Judge Advocate when I was at V Corps, and I used to see him at social events and that kind of thing. And, I used to tell him, "You know, it's really unfair. This is really unfair." I said, "Where do the women in the JAG Corps go? What is their career aspiration? Am I supposed to be aspiring to be a colonel because I'm a WAC and I can't go above colonel?" I said, "Can I become a two-star general? Could I become The Judge Advocate General?" And he said, "Well, no, I don't think you can." I said, "Well, there's something wrong about that. You need to fix that, General Persons." And, in about [1976] was when they integrated the service academies and [later when] they abolished the WAC… and when Major General Persons was The Judge Advocate General, he wrote me and said, "Okay,

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[208] *Id.*
[209] Smith Interviews, *supra* note 10.
[210] *Id.*
[211] Brigadier General Wilton B. Persons (later promoted to major general).

> we've done it. Go for it." . . . [I]t's interesting because career opportunities for women really changed, and it evolved over the time that I was in the JAG Corps, and earlier . . . . Up until that time, the women, although there were increasing numbers of women coming in the JAG Corps, they didn't have any opportunity to go beyond a certain level. That was bound to be a negative factor, in terms of how they would view what they were doing, and their opportunities should have been the same for everybody . . . .[212]

As one of the very few senior women in the JAG Corps at the time, TJAG often nominated COL Peters to serve as a JAG Corps representative on various Army promotion and selection boards.[213] Part of the reason for this was to ensure the JAG Corps had visibility and a vote on the competitive selection of women for promotion as a means of ensuring women received fair and unbiased consideration for further advancement.[214]

Implicit in this was the notion of affirmative action and evidence of past discrimination. While the Army did not have an express policy of promotion quotas for women, selection boards were advised to look for the possibility that women or minorities were somehow disadvantaged in

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[212] Peters Oral History, *supra* note 12, at 72-73. This echoes the experience of the WAC from its inception:

> By the last phase of their career pattern, the twenty-first to thirtieth year of service, most WAC officers had achieved their last promotion to major or lieutenant colonel and were assigned to WAC Center or WAC School or a major headquarters somewhere in the Army. Their male peers, meanwhile, were attending a senior service college, commanding a battalion or brigade, or managing a large staff division in a major headquarters. Men could look forward to promotion to colonel or even general officer rank and to assignment to positions such as division, corps, or army commander or even chief of staff of the Army.

MORDEN, *supra* note 5, at 125 (citing U.S. DEP'T OF ARMY, TECHNICAL MANUAL 20-206, CAREER MANAGEMENT FOR ARMY OFFICERS (29 June 1948), superceded by U.S. DEP'T OF ARMY, PAM 600-3, CAREER PLANNING FOR ARMY OFFICERS (15 Oct. 1956)).

[213] Peters Oral History, *supra* note 12, at 248.

[214] [Major General William K. Suter] once said to me, "You're on all these boards because you're supposed to keep an eye on what's going on with the women and see what's happening with the women." *Id.* at 248-249.

a way that had a material affect upon their career opportunities.[215] If so, a selection board member could consider this as they evaluated respective personnel files. Colonel Peters' experience was that these protected groups gained little undeserved advantage from such policies.[216] She observed that promotion boards selected individuals for promotion based on patterns of merit and demonstrated ability.[217] As COL Peters recalls,

> I used to sit on these boards, and I would look at all these [personnel] files. There were always files that floated to the top and always files that floated to the bottom, and the hard part was the middle. My own personal view is that I'm not sure that affirmative action ever helped anybody . . . . I never saw anybody advance for that reason.[218]

The example of COL Smith, COL Peters, and others, has made room at the top for women at nearly every level of Army leadership. Their contribution as role models and mentors within the JAG Corps echoes to this day. Within the Army, Soldiers and commanders are no longer surprised to find female judge advocates in courtrooms, claims offices, or combat headquarters.

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[215] *Id.* at 249.
[216] *Id.*
[217] *Id.*
[218] Peters Oral History, *supra* note 12, at 248-249.

> I don't know that you can find past discrimination. The only way you can see discrimination would be if you could read it between the lines in the words of the OER. And, sometimes, you can see images coming up. They did away with a lot of it. It used to be that you'd have these OERs that said his spouse is very active in such-and-such, and I was always suspicious when they said…things that were clearly gender-specific. But usually, I could sort of sense how the person was doing just by what the chain of assignments was and what the texture of the comments were that the person was writing. You could see [discrimination] to some extent in some of that, but nothing that you could put your hand on and say, "that is it."

Id. at 249-250.

VII. Conclusion

For nearly its first 165 years, the commissioned officer corps of the Army JAG Corps contained no women. Not one. While the JAG Corps takes justifiable pride in over 225 years of history, for female judge advocates that period is remarkably short, albeit no less laudatory. Colonel Elizabeth R. Smith, Jr., was among the vanguard of female contributors to the JAG Corps and the Army—the first female JAG officer to achieve senior status with her promotion to colonel in 1972, the second to accept permanent detail to the JAG Corps, and one of the early few career officers. It would be eighteen years before the Army would promote another female judge advocate to colonel, namely, COL Joyce Peters in 1990. In 2000, there were six female colonels in the JAG Corps; by 2004, there were twenty-five.[219]

Colonel Smith's contributions and success helped lead the way for those who followed by validating the notion of senior female leadership, and thereby influencing the culture of not only the JAG Corps, but also the Army itself. She is a model for what a woman born during the interwar period could accomplish. Her experience gives voice to a generation that lacked role models and mentors; one that looked inward for the confidence, the optimism, and the vision to succeed in a landscape often unwelcome and unfamiliar. The pioneer spirit of officers like Colonel Smith, fused to talent and tenacity, provides the current generation of judge advocates with valuable perspective and appreciation for the individuals who cleared the trail for the current day.

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[219] Personnel, Plans & Training Office (PP&TO), Office of The Judge Advocate General, U.S. Army (July 2004).

THE HUNT FOR BIN LADEN—TASK FORCE DAGGER—ON THE GROUND WITH THE SPECIAL FORCES IN AFGHANISTAN

REVIEWED BY LIEUTENANT COLONEL KEVIN H. GOVERN[1]

> *As far as the Green Berets sergeants were concerned, this war was going to be anything but conventional. The ultimate goal was still Osama bin Laden. Taking Afghanistan was just a stop along the way. The Green Berets knew they must control bin Laden's sanctuary in order to destroy his terrorist apparatus. In spite of the broad mission to liberate Afghanistan, one personal mission remained at the forefront of every Green Beret's consciousness: they had to kill the senior leaders of al-Qaida,[2] and they had to kill bin Laden.*[3]

Few, if any, authors can match Robin Moore's subject matter immersion in writing a book. Long after his World War II service,[4] Moore went through Basic Airborne School at Fort Benning, Georgia; and then, in 1964, became the only civilian to complete the Special Forces (SF) Qualification Course at Fort Bragg, North Carolina.[5] His

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[1] U.S. Army. Written while assigned to the U.S. Army Student Detachment, attending the University of Notre Dame Law School, London England, as a Master of Laws candidate in International and Comparative Law.

[2] Variously spelled Al-Qaeda or Al-Qaida. *See, e.g.*, U.S. Dep't of Just., *Al Qaeda Training Manual*, *available at* www.usdoj.gov/ag/trainingmanual.htm (last visited May 24, 2004) (spelling the term Al-Qaeda); *see* Worldtribune.com, *Parents Demand Return of Teens Lured by Al Qaida for "Vacation"*, May 23, 2004, *available at* www.worldtribune.com/worldtribune/breaking_5.html (spelling the term Al-Qaida).

[3] MOORE, *supra* note 1, at 45.

[4] Born in Boston on Halloween night of 1925 and educated in New England Schools, a combat tour in the U.S. Army 8th Air Force in WWII, followed by Harvard College class of 1949, Robert Lowell (Robin) Moore Jr. is the author of over twenty-five published books. *See, e.g.*, Robin Moore, *The Hunt For Bin Laden Group*, *at* www.thehuntforbinladen.com/bio.htm (last visited May 24, 2004) [hereinafter, Promotional Website] (listing Robin Moore's other books and biographical information).

[5] ROBIN MOORE, THE GREEN BERETS 12-18 (1965). In 1968, Hollywood made this book into a popular movie by the same name, but with a slightly altered story line. THE GREEN BERETS (Warner Bros. 1968).

reason: to gain access to the troops, locations, and materials that became the heart of his highly popular 1965 book, *The Green Berets*.[6]

Thirty-five years later, after the cataclysmic events of 11 September 2001, Moore traveled back to Fort Bragg then forward to Central Asia to be in the midst of Special Operations Forces (SOF) operations and chronicle the efforts of U.S. and Coalition SOF during Operation Enduring Freedom (OEF). He intended this book to "show . . . how only a few hundred men, operating from a secret SF base, changed the course of history in Central Asia and destroyed a hundred-thousand man terrorist army in less than ninety days."[7]

This review comments on Moore's study of American, Afghan, and coalition members' operations as part of the Combined Joint Special Operations Force, titled Task Force Dagger, under then-Colonel (promotable) (COL(P)) John F. Mulholland, Jr. It examines the flow of ideas and key themes, and "completes the record" where Moore's book is otherwise silent or inaccurate with respect to applicable law and policy

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[6] MOORE, *supra* note 1, at 11-18. Moore noted that it would have been impossible for him to write *The Green Berets* if he had not had Special Forces training and the media clearance ("accreditation") from the Department of Defense. Moore wrote his story on Special Forces operations in Vietnam as a fictional account:

> [I determined that I] could present the truth better and more accurately in the form of fiction . . . . I changed details and names, but I did not change the basic truth . . . because [events] reported in isolation would fail to give full meaning and background of the war in Vietnam . . . . Also . . . Special Forces Operations are, at times, highly unconventional. To report such occurrences factually, giving names, dates, and locations, could only embarrass U.S. planners in Vietnam and might even jeopardize the careers of invaluable officers.

Id. at 12-13. Notably, while heading to Vietnam as a journalist, Moore co-wrote *The Ballad of the Green Berets* with Staff Sergeant Barry Sadler. ROBIN MOORE & STAFF SERGEANT BARRY SADLER, THE BALLAD OF THE GREEN BERETS (RCA Records) (1966).

[7] MOORE, *supra* note 1, at inside cover. According to the U.S. Central Command (USCENTCOM), the U.S. began building the coalition on 12 September 2001, and at the time of this review, seventy nations were supporting the Global War on Terrorism (GWOT). Some twenty-one nations have deployed more than 16,000 troops to the USCENTCOM Area of Responsibility (AOR). In Afghanistan alone, non-US coalition partners contributed nearly 8,000 troops to OEF and to the International Security Assistance Force in Kabul, making up over half of the 15,000 non-Afghan forces in Afghanistan. U.S. Central Command, *International Contribution to the War on Terrorism*, *at* http://www.centcom.mil/Operations/Coalition/joint.htm (last visited May 24, 2004).

regarding the most notable comments and vignettes in his book. Moore's work contains equal parts romantic adventure novel and historical analysis of recent SOF operations. The book progresses in twenty-four chapters from the earliest reactions to the World Trade Center and Pentagon disasters,[8] through Operation Anaconda[9] in which SOF and conventional forces crushed Taliban and al-Qaida strongholds dug deep into the Shah-i-Kot Mountains of eastern Afghanistan, to an epilogue on Moore's SOF protagonist friends and admired colleagues-in-arms.[10] He carefully details the appearance, actions, and attitudes of the subjects he discusses in his book, using dramatic emphasis and colorful language to paint a picture of the fast-paced, life-and-death decisions that faced Task Force Dagger troops daily. He also shows his pro-SOF or anti-"conventional force" bias throughout the book,[11] and glosses over or misstates some key legal considerations bearing upon the conduct of SOF and coalition forces.

Moore takes many opportunities to revel in Task Force Dagger's use of high tech personal weapons, communications equipment, close air support, horse-borne equipment, motorized ground vehicles, and aircraft, with deadly result against Taliban and al-Qaida forces.[12] While Moore concedes that these SOF hardware items were essential to the success of operations in Afghanistan, the abiding requirements for SOF must be consistent with the so-called "SOF Truths."[13]

General Charles R. Holland, the Commander of U.S. Special Operations Command (USSOCOM), has said that a large part of the reason that U.S. SOF can quickly carry out operations overseas is that

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[8] MOORE, *supra* note 1, at 16.

[9] *Id.* at 271-95.

[10] *Id.* at 303-34; *e.g.*, COL(P) John Mulholland is a hero in Moore'e eyes.

[11] Moore's work largely ignores the role of conventional forces—traditional non-Special Operations U.S. Army units—and devotes only a miniscule fraction of its total pages to the conventional force operations in Afghanistan. Mention of the predominant conventional land force on the ground in Afghanistan, the 10th Mountain Division (Light Infantry), only rates sparse comments on twenty-five of the 370 pages. *Id*. at 112, 171, 175, 176, 223, 253, 262, 273, 276-78, 281-94. Moore refers to Lieutenant General Mikolashek, the Combined Task Force Commander, on only four pages. *Id*. at 58, 221, 272, 275.

[12] *See generally id.* (detailing this equipment and its effects throughout the book.)

[13] *See, e.g.*, William P. Tangney, *Threats to Armed Forces Readiness: Testimony to the House Committee on Government Reform on the Critical Challenges Confronting National Security, May 16, 2002*, *available at* http://www.westlaw.com (last visited May 24, 2004).

several "SOF Truths" are embedded in USSOCOM's philosophy of maintaining high training and deployment readiness.[14] These truths reflect the lessons learned from the history of American SOF employment, and the operations in Afghanistan revalidated them.[15] The SOF Truths are: (1) "Humans are more important than hardware;" (2) "Quality is better than quantity;" (3) "SOF cannot be mass-produced;" and (4) "SOF cannot be created after a crisis occurs."[16] Moore enumerates these truths in this book, but advocates the need for a fifth SOF truth: "Given that SOF Truth #1 is true, humans deserve the requisite personal hardware to fight and survive."[17] Moore's rationale for this novel fifth SOF truth was that many in the Department of Defense caught on to the "humans are more important than hardware" philosophy, and directed the acquisition of many pieces of "SOF-developed" equipment because of its desirability and ability to better protect human life.[18] Moore bemoans, but fails to substantiate, a perceived lack of missions and resources going to Special Forces.[19] Based on that misperception, Moore asserts, with little extra support, that the fifth SOF truth should become reality. Beyond better equipping them, Moore believes the SOF should carry on as the primary force in Afghanistan with conventional force support.[20] Moore's justification is that since "SF ha[s] now shown what they alone [can] do and are now in the hands of the ultimate commander in chief, George W. Bush, and Donald Rumsfeld . . . let them continue to do it, and give them the gear to do it."[21]

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[14] General Charles R. Holland, *Quiet Professionals: U.S. Special Operations Forces Maintain High Training and Deployment Readiness*, ARMED FORCES J. INT'L 1 (Feb. 2002), *available at* http://www.afji.com/AFJI/Mags/2002/February/specops.html.

[15] *Id.*

[16] *Id.*

[17] MOORE, *supra* note 1, at 330-34.

[18] *Id*. at 330-34. Of what Moore might term "conventionally-developed" hardware, Moore wrote that the conventional forces' research and development efforts "go toward developing the wherewithal to fight huge battles, as they should." By implication, he means that such equipment may be inadequate for "less than huge battles," whatever and whenever those may be. *Id.*

[19] *Id.* at 330-34. The USSOCOM experienced an unprecedented expansion of missions, in addition to increased resources with which to accomplish those missions during the GWOT. The Fiscal Year (FY) 2004 estimated budget increases for USSOCOM is forty-seven percent over FY 2003, including an additional $391 million for operations and related expenses, and about $1.1 billion in procurement of critical equipment. U.S. ARMY, U.S. SPECIAL OPERATIONS FORCES, POSTURE STATEMENT 2003-2004, 89-99 (2003).

[20] MOORE, *supra* note 1, at 330-34.

[21] *Id.*

At its core, this book remains a story of innovative and heroic men, rather than military machines. Moore emphasizes the SOF operators' long years of training,[22] the sage SOF commanders whose experience guided training and preparation,[23] and the SOF operators' interpersonal skills and key relationships they built with Afghan resistance commanders and their forces.[24] Those relationships were built on "drinking chai,"[25] leading by example in combat rather than training in classroom settings,[26] and maximizing the resources of cash and equipment to work and fight together.[27] Readers quickly discover that not all the vignettes of Afghan or Northern Alliance leadership were of noble warriors with pure purposes. The seamier side included strained support alliances with Pakistan and Uzbekistan;[28] General Franks' purported alienation from Afghan commanders due to intercultural misunderstandings;[29] conflicting loyalties of Afghan commanders like Ismail Khan and others with ties to Iran;[30] repugnant practices, such as General Naderi's "right of the lord" deflowering of newlywed wives in his tribe;[31] and the flamboyant and aggressive homosexual advances of some Afghans towards SOF operators.[32]

Moore recounts incidents of unintended consequences, such as several purported fratricides resulting from transposed target coordinates, confusion in target identification, and "danger close" proximity to fires.[33] He also outlines how integrated, timely, coalition efforts routed Taliban

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[22] *Id.* at 38-50.
[23] *Id.* at 40.
[24] *Id.* at 51.
[25] *Id.* at 24, 66, 129, 133 ("Drinking chai" literally means drinking tea, but more importantly, the term refers to listening and maintaining personal contact.).
[26] *Id.* at 41.
[27] *Id.*
[28] *Id*. at 24-25.
[29] *Id.* at 24-25, 53.
[30] *Id.* at 164-65.
[31] *Id*. at 24-25.
[32] *Id.* at 189, 261-62.
[33] *Id*. at 170-81 (casualties at Qala-I-Jangi prison), 218-23 (SOF and coalitional personnel casualties, to include the current president of Afghanistan, Hamid Karzai, who was lightly wounded), and 278-79 (purported SOF and coalitional fratricide casualties). Moore correctly describes, but confusingly juxtaposes five types of engagement incidents within the span of four pages at 311-14: "blue on blue" (U.S. fires on U.S. and coalition forces), "green on green" (warlords using fires of their own or of the United States against each other), "blue on green" (U.S. fires on Afghan allies or "innocents"), "blue on red" (U.S. and coalitional fires on opposing forces), and "blue on white" (inadvertent killing of innocent civilians by U.S. forces).

and al-Qaida forces with unprecedented speed and force of effect in spite of interagency disputes over information flow and conflicting "conventional versus SOF" points of view.[34] On that latter point, Moore contradicts his earlier assertion of "conventional versus SOF" points of view.[35] In an early pre-deployment vignette, Moore describes how Major General C. Lambert, the then-Commanding General of U.S. Army SF Command purportedly briefed 5th SF Group Soldiers that "once [they] were on the ground, [they would be] engaged in World War II-type combat. It's good old fashioned conventional war."[36] Moore then implies some derision on the part of the briefed Soldiers: "The Green Berets chuckled at the naïveté of conventional thinking . . . and they were about to show American Generals exactly how futile conventional warfare initiatives were against well-trained, highly experienced unconventional killing machines."[37] According to Moore, the real culprit for SF's lack of missions and resources, paradoxically, is USSOCOM rather than the conventional force leadership.[38]

From a legal perspective, there are no rousing discussions of "rules of engagement, right or wrong," nor any mention whatsoever of legal support to operations.[39] Nonetheless, Moore raises some controversial legal and policy matters with respect to the conduct of U.S and coalition forces in combat operations. While in Afghanistan, Moore flaunted the longstanding prohibitions on troops consuming alcohol in the Central Command (CENTCOM) area of responsibility by offering up liquor he secreted in his walking cane to SF Soldiers, and then thanked an officer in theater by name for "refills for the cane."[40] Moore mentioned the

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[34] *Id.* at 16-25, 294-95, 314-15.

[35] *See supra* note 12 and accompanying text.

[36] *Id.* at 44-45.

[37] *See supra* note 12 and accompanying text.

[38] *Id*. at 330-34; *but see supra* note 20 discussing the expansion of the USSOCOM missions, budget, and resources.

[39] In my oversight role as Deputy Staff Judge Advocate of U.S. Army Special Operations Command (USASOC) from 2001-2003, I observed that in addition to organic SOF Judge Advocates and Paralegal Specialists, Active and Reserve Component legal professionals from all armed services involved themselves in Coalition SOF mission preparation, rehearsals, and support during operations in Afghanistan in a variety of locations and means. The value of legal professionals to the commanders and troops they served was not necessarily measured by the proximity to the "battlefield."

[40] MOORE, *supra* note 1, at xii-iii. Moore states:

> The simple fact was that the Green Berets would fight hard and party hard, no matter where they were, and one hundred General Orders would not get in the way of either endeavor . . . the sergeants knew

motivation for fighting, and also discusses the capture and treatment of U.S. citizen-turned-Taliban soldier John Walker Lindh. [41] Moore does not, however, discuss Lindh's legal status or ultimate disposition.[42] Another controversial discussion in Moore's book involved Colonel General Jurabek,[43] the Northern Alliance Qala-I-Jangi prison commander. [44] Moore alleges Jurabek flooded a prison basement where revolting al-Qaida detainees were hiding, and then poured diesel fuel into the basements to try and burn the detainees out.[45] This maltreatment of detainees, Moore opined—without legal analysis or justification—meant

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> this was a moment for those who had been bathed in fire and blood. They realized I knew that getting a drink was virtually impossible, and if there was one thing I wanted to do, it was to have a private drink with these twenty-first century heroes. We each took a sip of bourbon, which glistened gold in the dim light.

Id. For the restrictions on alcohol consumption then in effect in Afghanistan, *see* Memorandum, Combined Forces Land Component Command (CFLCC), to subordinate commands, subject: Prohibited Activities for U.S. Department of Defense Personnel Present Within the USCENTCOM AOR (19 Dec. 2000) (not titled as, but commonly referred to as General Order #1A); *see also* Memorandum, Combined Forces Land Component Command (CFLCC), to subordinate commands, subject: Partial Waiver of USCENTCOM General Order Number 1A (11 Apr. 2001).

41 MOORE, *supra* note 1, at 168, 176-81, and 266.

42 *Id*. John Walker Lindh pled guilty 15 July 2002, and the court sentenced him on 4 October 2002. Attorney Andrew Cohen, *Sentencing Day For John Walker Lindh*, CBSNews.com (Oct. 4, 2002), *at* http://www.cbsnews.com/stories/2002/08/15/news/opinion/courtwatch/main518767.shtml. While the final publication of Moore's book took place in early 2003, Moore's acknowledgements, and presumably his final manuscript, are dated 11 September 2002, before Lindh's sentencing. *See supra* note 1, at 168, 176-81, 266; *see also* Interview with Margaret Warner & James Brosnahan, Lindh's attorney, *News Hour with Jim Lehrer* (PBS television transcript, July 15, 2002), *available at* http://www.pbs.org/newshour/bb/law/july-dec02/plea2_7-15.html (indicating that in 2002, after his lawyers negotiated an agreement with government prosecutors, John Walker Lindh pled guilty to providing services to the Taliban under 50 U.S.C. § 1705(b) (2000); 18 U.S.C. § 2; 31 C.F.R. §§ 545.204-206(a) (2004), a felony charge with a maximum sentence of ten years. Since Lindh, as a Taliban soldier, carried grenades and an assault rifle (18 U.S.C. § 924(c), he agreed to an additional ten years for using a firearm in the commission of a felony. Based on his plea, the court sentenced Lindh to the maximum twenty years in prison, with credit for the seven months already spent in custody. Under the mandatory fifteen percent credit for "good time," Lindh cannot remain incarcerated more than seventeen years).

43 Under various authorities of the Soviet-influenced rank-structure for Northern Alliance and other forces in Afghanistan, the rank of Colonel General existed. *See* USSR MINISTRY OF DEFENCE, REGULATIONS ON WEARING MILITARY UNIFORMS (Military Publishing House 1989).

44 MOORE, *supra* note 1, at 176-81.

45 *Id.*

that "[o]ne thing was for sure—the enemy had given up their POW status voluntarily and taken up arms, and if they didn't surrender now they were going to die, every last one of them."[46]

Moore also said—without substantiating fact—that "if caught, bin Laden would not survive . . . they (US SOF) would most assuredly kill him even if the command said no."[47] Finally, Moore touched ever so lightly on the contentious issue of SOF operating in "nonstandard" uniforms. Moore called a black and white scarf given by Northern Alliance forces to COL(P) Mulholland an "unauthorized scarf . . . not part of any U.S. military uniform."[48] Moore asserted that the wearing of that scarf while in an official capacity at a military-civilian ceremony with international media present "surely would be questioned by some in the continental United States."[49] Moore said SOF "adopt[ed] the scarf as a symbol of their solidarity with the "mujahadeen"[50] warriors and their absolute dedication and willingness to give all to achieve victory."[51] Nonstandard uniforms, purportedly or actually worn during OEF, were, and are, a matter of some continuing operational and legal controversy. On 7 April 2003, W. Hays Parks, Special Assistant to The Judge Advocate General, U.S. Army, and Pierre-Richard Prosper, U.S. Ambassador-at-Large for War Crimes Issues, addressed this uniform

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[46] *Id.* at 176. For legal analysis of the status of conflict and treatment of detainees during combat operations, *see* John Embry Parkerson, Jr., *United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause*, 133 MIL. L. REV. 31, 41-42 (1991) (applying analysis to determine whether U.S. invasion of Panama on behalf of Endara government made conflict "international" for the purposes of the Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, U.S.T. 3316, 75 U.N.T.S. 135; *see also* Major Geoffrey S. Corn & Major Michael Smidt, *"To Be or Not to Be, That is the Question"*: *Contemporary Military Operations and the Status of Captured Personnel*, ARMY LAW., June 1999, at 1 (citing an interview with DOD law of war expert Hays Parks, who advocates a purely de facto standard of detainee treatment without regard to political factors); INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC), COMMENTARY ON THE GENEVA CONVENTIONS 61 (J. Pictet ed., 1960) (continuing to act as a "custodian" of international humanitarian law, the ICRC was instrumental in drafting the Geneva Conventions.).

[47] MOORE, *supra* note 1, at 236-37. Moore also said that if bin Laden surfaces, "the Green Berets will execute him." *Id.* at 310-11.

[48] *Id.* at 88, 253-54.

[49] *Id.*

[50] The term "mujahadeen," also sometimes spelled "mujahideen," "mujahedeen," "mujahedin," "mujahidin," and "mujaheddin," refers to a military force of Muslim guerrilla fighters engaged in a "holy war" or "jihad." *See*, *e.g.*, http://www.thefreedictionary .com/mujahadeen (last visited June 22, 2004).

[51] MOORE, *supra* note 1, at 88, 253-54.

matter.[52] Mr. Parks noted that in international armed conflict, all conventional forces and most SOF missions are executed in "full" uniform, with extremely limited exceptions.[53] Dependent upon mission and unit, "indigenous" clothing may be a military uniform worn in conjunction with some distinctive device—for example, part of the Desert Camouflage Uniform (DCU)—with a tribal hat or scarf.[54]

At the end of the day, both in the book[55] and in present-day reality,[56] Osama bin Laden's whereabouts remain unknown, and the Global War on Terrorism continues unabated. Nevertheless, Moore's work demonstrates great admiration for the heroes of Task Force Dagger and their victory over the forces of terror and evil they encountered.

Just as Moore achieved great popular success with *The French Connection*,[57] *The Happy Hooker*,[58] and *The Green Berets*,[59] among other works,[60] this book may be a matter of journalistic history (and accompanying socio-political controversy) repeating itself. The Johnson administration was furious over sensitive information included in Moore's *The Green Berets*.[61] Moore wrote in his acknowledgements for

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[52] *See* Transcript, U.S. Dep't. of Defense, Briefing on Geneva Convention, EPWs and War Crimes, presented by Mr. Bryan Whitman, Deputy Assistant Secretary of Defense (Public Affairs), with W. Hays Parks, Special Assistant to the U.S. Army Judge Advocate General and Pierre-Richard Prosper, U.S. Ambassador-at-Large for War Crimes Issues (Apr. 7, 2003), *available at* http://www.defenselink.mil/news/Apr2003/t04072003_t407genv.html.

[53] *Id.*

[54] *Id.*

[55] MOORE, *supra* note 1, at 310-11.

[56] Current as of June 2004.

[57] ROBIN MOORE & EDWARD KEYES, THE FRENCH CONNECTION (1969). As Moore integrated himself into SOF operations in Afghanistan, he has similarly delved deep into his subject matter for past works. *See* Promotional Website, *supra* note 5 (noting that Moore joined the New York Police Department in one of their most spectacular drug busts as research for his book, which later turned into the popular 1971 movie by the same name).

[58] XAVIERA HOLLANDER & ROBIN MOORE, THE HAPPY HOOKER (1972).

[59] *See* MOORE, *supra* note 1.

[60] *See* Promotional Website, *supra* note 5 (discussing his other fiction and nonfiction novels involving world travel, politics, and adventure).

[61] MOORE, *supra* note 1, at 8-9; *see also* Letter from Robin Moore, to Lieutenant General (Ret.) William P. Yarborough, former Commander, U.S. Army Special Warfare Center and School (May 16, 2000), *available at* http://www.sfalx.com/h_letter_to_gen_yarborough_on_88.htm. In this letter, Moore writes:

The Hunt for bin Laden, of the need to change "a few minor facts and names to protect confidential sources and secret material and to maintain certain aspects of the Green Berets' OPSEC—operational security."[62] In addition to previous comments on journalistic license with facts, Moore wrote in *The Hunt for bin Laden* about purportedly "top secret meetings,"[63] "super secret" commands,[64] and "classified" locations.[65] If this information was true, and Moore had access to classified information for which he was not cleared, then such access and reference to classified matters would justifiably cause consternation in military and political circles alike.[66] Moore's work generally achieved his stated and implied purposes,[67] but future historical works may offer a less romanticized and more balanced history of conventional and SOF operations—and their legal implications—in Afghanistan. Given the popularity of Moore's other works and ongoing operations in Afghanistan, military members and civilians alike will read *The Hunt for Bin Laden* for years to come for entertainment, if not for education.

> About that time General Bud Underwood called me into the Pentagon and let me know that (Sec. of Defense) Bud McNamera was planning to prosecute me under the Secrecy Act (sic). Bud showed me a copy of the book with a bunch of red tabs sticking out. "Each of those eighteen tabs marks a top secret piece of information." I couldn't believe it and reached for the marked book. He snatched the book away. "This book is classified," he growled. Fortunatly Jerry Ford, minority leader in the [H]ouse, heard about my problem. I had addressed his House Armed Services Committee my first week back from Vietnam. Jerry read all the classified sections of the book into the Congressional Record, automatically declassifying them and disposing of that problem for me.

Id.

[62] MOORE, *supra* note 1, at xiii.

[63] *Id.* at jacket cover.

[64] *Id.* at 52.

[65] *Id*. and at jacket cover.

[66] Only time will tell whether authors coming after Moore will gain the fullest trust, confidence, and access to information when so attached or embedded with combat units, or whether they can create such a colorful account of their subjects' exploits.

[67] *Supra* note 8 and accompanying text.

PEARL HARBOR: FINAL JUDGMENT[1]

REVIEWED BY LIEUTENANT COLONEL JOHN J. SIEMIETKOWSKI[2]

> *You are directed to give Major Clausen access to all records, documents and information in your possession or under your control, and to afford him the fullest possible cooperation and assistance.*[3]

I. Introduction

With these words, Secretary of War Henry Stimson created a fascinating, yet largely unknown, place in history for an Army judge advocate during World War II. In *Pearl Harbor: Final Judgment*, Henry Clausen recounts his wild ride from civilian practice in San Francisco to conducting the War Department's investigation into the Japanese attack on Pearl Harbor. Although not widely reviewed in the several years since its publication,[4] this book is a must-read for any judge advocate, or for that matter, anyone interested in World War II history. Despite some shortcomings in the book, it has great historic value, reads like a great legal novel, and contains several important lessons in military leadership. This review analyzes *Pearl Harbor* as a historical text and legal novel, discusses the book's shortcomings, and concludes with valuable lessons from Clausen's work that are helpful to today's leaders.

II. A Historical Text

Pearl Harbor is foremost a history book. Clausen provides detailed chronologies of the communication failures leading up to the surprise attack on Pearl Harbor and his own involvement in conducting the War Department's investigation of those failures.

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[1] HENRY C. CLAUSEN & BRUCE LEE, PEARL HARBOR: FINAL JUDGMENT (1992).

[2] Drilling Individual Mobilization Augmentee, Criminal Law Department, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia.

[3] Memorandum, the Secretary of War, to Army Personnel Concerned (6 Feb. 1945), *reproduced in* CLAUSEN & LEE, *supra* note 1, at back cover.

[4] *See* Jack McKillop, *Pearl Harbor Final Judgment*, *at* http://www.amgot.org/phclausn.htm (last visited Nov. 25, 2003); Paul M. Bessel, *Pearl Harbor—Masonic Connections* (Jan. 11, 2002), *at* http://bessel.org/pearlhar.htm.

In his foreword, Clausen poses several questions that he sets out to answer in his book. He emphasizes, however, that "what occurred during the attack on Pearl Harbor is not as important as *why* it happened."[5] Readers looking for a chronology of events during the attack will instead find a chronology of communication failures that led to the attack. For example, Clausen discusses a 24 January 1941 letter from Secretary of War Henry Stimson to Secretary of the Navy Frank Knox (with copies to the Army and Navy commanders in Hawaii), which warned, "'[I]t is believed easily possible that hostilities would be initiated by a surprise attack upon the fleet or the naval base at Pearl Harbor . . . . The dangers envisaged, in their order of importance and probability, are . . . 1) air bombing attack; 2) air torpedo-plane attack . . . . '"[6] Clausen also discusses and even reproduces two cables from Washington to Hawaii, dated 27 November 1941, that emphasized, "This dispatch is to be considered a war warning" and that "hostile action [is] possible at any moment."[7] Sadly, according to Clausen, neither Admiral (Adm.) Husband E. Kimmel nor Lieutenant General (LTG) Walter C. Short, the Navy and Army commanders in Hawaii, sufficiently communicated these warnings to prepare their commands against attack. In fact, Clausen describes LTG Short's Hawaiian command as "a perpetual happy hour."[8]

Readers will be equally appalled by Clausen's chronology of what happened in Washington late on the night of 6 December 1941. Here, Clausen describes how two Army officers received intercepted messages from Tokyo to its embassy in Washington discussing Japan's imminent severing of diplomatic relations with the United States.[9] Despite reading the last part of the intercepted messages around midnight or 0100—directing their diplomats in Washington to sever relations with the United States on the afternoon of 7 December—the officer responsible for delivery of these intercepts to the senior military leadership went to bed instead of delivering them.[10]

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[5] CLAUSEN & LEE, *supra* note 1, at 8.
[6] *Id.* at 75.
[7] *Id.* at 85-86, 262 (photographs).
[8] *Id.* at 188. Clausen also notes that General Short, while sailing to Hawaii to assume command in early 1941, read a novel rather than the briefing book his predecessor prepared for him. *Id.* at 186.
[9] *Id.* at 82.
[10] *Id.* (quoting interview statement of Colonel C.C. Dusenberry, "I did not wish to disturb the usual recipients who were probably at home asleep, as I did not see the implications of immediate hostilities [in the messages]").

Along with chronicling the communication failures leading up to the Pearl Harbor attack, Clausen also provides a captivating narrative of his whirlwind military career, culminating in his testimony before Congress regarding the findings of his Pearl Harbor investigation.

Soon after hearing the news about the attack on Pearl Harbor while working in his San Francisco law office, Clausen decided to write all three of the existing military services to offer them his legal services.[11] He was thirty-six years old and had four small children. Clausen's descriptions of his early JAG experiences provide a small but fascinating window into JAG life at the beginning of World War II. Clausen describes taking a week-long train ride to Washington, reporting for duty, and promptly shaking the Judge Advocate General's (TJAG) hand rather than saluting him. The Judge Advocate General interviewed Clausen personally and assigned him to review court-martial sentences. Clausen describes being promoted from captain to major quickly and working with other volunteer officers like Leon Jaworski. Clausen's descriptions of his assignments at Salt Lake City, the new JAG School at the University of Michigan,[12] and at the Litigation Division in Washington, will also interest modern judge advocates. While at the Litigation Division, Clausen prosecuted a procurement fraud case against a defense contractor, apparently earning him nicknames like "Bull Dog" and the "Methodical Major" in the press.[13] Through his work on this case, Clausen came to know Senator Harry Truman, who later wrote a letter to TJAG commending Clausen. From this high-visibility assignment, Clausen next sat on a "Presidential Appellate Court" reviewing the trials of captured German spies, hearing the Attorney General argue, and deciding, along with fellow court members, which German spies would be executed.[14] While reading Clausen and Lee's book, young judge advocates, toiling through early assignments in claims and legal assistance, may find themselves wishing they had entered the JAG Corps at a different time in our nation's history.

Although this early part of Clausen's JAG career is interesting, his description of his involvement in the Pearl Harbor investigations is even more fascinating. Clausen describes Congress's appointment of

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[11] *Id.* at 55-57.

[12] ("[T]he schoolwork was interesting, but not taxing, and it was easy to get good grades."). *Id.* at 55.

[13] *Id.* at 56-57.

[14] *Id.* at 58.

Army and Navy boards to investigate what led to our defeat at Pearl Harbor and who should be court-martialed as a result.[15] The War Department appointed Clausen as the Recorder to sit on the Army's board, along with three general officers. After the board concluded its deliberations in October 1944, Secretary Stimson, Clausen, and TJAG suspected that the board's conclusions were faulty because it had heard false testimony and because it had not had access to all of the relevant classified documents. Clausen relates Stimson's seemingly implausible proposal to rectify the board's erroneous conclusions: "'Major, I want you to go back over the operations of the Army Board with a fine-toothed comb. Retake every bit of evidence that needs to be clarified . . . . You are to follow any unexplored leads you find necessary. Leave no stone unturned.'"[16] In a brief moment, Stimson had guaranteed Clausen's place, not only in military legal history, but also more generally in the history of World War II.

Any military counsel bemoaning frequent temporary duty travel will find no solace in Clausen's description of what his investigation required of him. During seven months in 1944 and 1945, Clausen traveled more than 55,000 air miles, interviewed ninety-two witnesses, and took forty-three affidavits.[17] He took statements from Europe to the South Pacific, and interviewed witnesses in recent and still-active combat zones. Those currently deployed might relate to Clausen's description of "the sharp crack of ammunition 'cooking off' in the flames . . . ."[18] Today's judge advocates might also have a difficult time, however, relating to a field-grade lawyer taking statements from such famous individuals as Douglas MacArthur and George Marshall. A judge advocate today is even less likely to carry evidence in a bomb satchel attached to his chest, with orders to detonate the bomb and himself if captured by the enemy.[19]

Today's military lawyers will also have difficulty imagining themselves testifying before Congress as Clausen did in early 1946. Having submitted his lengthy report to Secretary Stimson and leaving the Army as a lieutenant colonel, Congress asked Clausen to testify regarding his findings.[20] Clausen concluded his testimony before

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[15] *Id.* at 30.
[16] *Id.*
[17] *Id.* at 6.
[18] *Id.* at 140.
[19] *Id.* at 33-35.
[20] *Id.* at 255.

Congress on 14 February 1946.[21] Interestingly, but not surprisingly, Clausen faced criticism before he even arrived on Capitol Hill. Some members of Congress accused him of coercing a witness to change his testimony, and one newspaper asked why the Army would "send a lowly Major all over the world to get this testimony . . . ."[22] If nothing else, Clausen's description of his testimony before Congress illustrates for today's judge advocates how involvement with important matters can quickly thrust one into the spotlight.

Finally, for the historical purist not satisfied with reading Clausen's summary of intelligence failures and his role in investigating them, Clausen also supplies a 157-page appendix containing raw intelligence data and some of Clausen's more detailed findings.

III. A Legal Novel

Pearl Harbor: Final Judgment is more than just an excellent history of the communication failures that preceded Pearl Harbor and the author's role in investigating them. It is an intriguing narrative that reads like a legal novel. Clausen once worked as an Assistant U.S. Attorney, and consciously wrote his book from the perspective of a prosecutor.

Clausen calls himself the "independent prosecutor appointed by [the] Secretary of War"[23] and crafts his story as a novelist would craft a book, but from the perspective of a courtroom lawyer. Clausen assembles the evidence surrounding the Pearl Harbor debacle as a trial attorney would assemble it before trial and then relates it as a story, presenting his case to the readers as if they were a jury. "Facts are the nails that the prosecutor uses to seal his case for the jury. So my investigation focused on what happened, how it happened and if it happened. From these facts, the reader can determine *why* Pearl Harbor happened."[24]

Like any good legal novelist, Clausen walks the reader through the evidence, including examples of his questioning—"What about

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[21] *Id.* at 285.
[22] *Id.* at 257.
[23] *Id.* at 4.
[24] *Id.* at 5.

General Short? Did Layton have any contact with him?"[25]—as well as offering insights into the mind of the trial lawyer—"Fine and dandy, I thought. Listen to what the man isn't saying. Sometimes that's more important than what he's talking about."[26]

Clausen devotes an entire chapter[27] to his "jury summation," arguing that Adm. Kimmel and LTG Short were guilty of neglecting their command duties at Pearl Harbor. He begins his argument by stating, "[I]f a case were to be made against Kimmel and Short, this is how I would have presented it."[28] Clausen proceeds to explain the basic duties of Kimmel and Short, and then provides eleven specific instances of how each commander breached those duties. The chapter reads like a good trial notebook. Clausen does not stop there, however, stating that, "this can be translated into guilt that can be charged against individuals."[29] The author names the guilty parties and assigns culpability to each them on a scale of one to ten.[30]

Unlike most legal novelists, Clausen seems to direct his book toward an audience of lawyers. Clausen uses legal analogies common in civilian practice (the duty to exercise due care while driving), and examples unique to military practice (the duty of sentries to maintain a lookout). He also discusses "the proximate cause . . . for the disaster at Pearl Harbor,"[31] which helps lawyers understand his arguments but which may be a bit much for non-lawyers to understand.

Clausen also does something else that most legal novelists do not do—he provides a historical analysis of his narrative. The foreword to the book makes it apparent that Clausen wrote this book to counter many of the conspiracy theories[32] and other myths that he saw clouding the truth about Pearl Harbor. In attempting to dispel these clouds of untruth, Clausen not only relates interesting facts through telling his story, he also analyzes those facts and draws conclusions from them. This is most noticeable in his discussions of Pearl Harbor's "proximate causes," and

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[25] *Id.* at 129.
[26] *Id.*
[27] *Id.* ch. 13.
[28] *Id.* at 229.
[29] *Id.* at 300.
[30] *Id.* at 300-09. Admiral Kimmel and Lieutenant General Short are at the top of the list with ratings of ten; the author gives President Roosevelt a five. *Id.*
[31] *Id.* at 300.
[32] *Id.* at 1.

who was responsible for them. Ultimately, Clausen wrote this book because he did not and could not write a conclusion to the 1945 report he provided to Secretary Stimson.[33] In this sense, then, Clausen's "Final Judgment" becomes the conclusion he never wrote in his report, merging the storytelling talents of a legal novelist with the analytical abilities of a historian.

IV. The Book's Limitations

One of the few drawbacks of *Pearl Harbor: Final Judgment* is the prominence of the author's ego. The influence of the co-author, Bruce Lee, is insufficient to conceal Clausen's affinity for embellishing his story and accomplishments. He begins Chapter 1 by saying, "I was born to survive calamitous events."[34] Although he makes this statement in the context of surviving the 1906 San Francisco earthquake as a baby, Clausen clearly also means this statement as a prelude to his story as the Pearl Harbor investigator. The reader could do without such melodrama. For the same reasons, listening to Clausen's cocky description of his congressional testimony grates on the reader during passages like, "[Senator] Ferguson became incensed. He realized I had him cold;"[35] "[Representative Keefe and I] went around the mulberry bush for some time on the matter, and I finally let him have it."[36] Clausen's condescension borders on disrespect.

Judge advocates are likely to tire of Clausen's frequent statements of his preference for civilian practice. "[I] was a civilian at heart. I didn't give two hoots in hell for a military career . . . . The Army could have my body as long as the war lasted, but it could never have my heart. That belonged to the law."[37] While perhaps refreshing to hear that Clausen had a successful JAG career without beating the "soldier first, lawyer always" drum, his disdain for his military career will irritate most judge advocates. Clausen also gives short shrift to the Soldier skills he fails to mention but necessarily employed during his travels throughout various theaters of operation.

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[33] *Id*. at 4. Clausen states that he did not have the authority to "speak for the Secretary of War." *Id*.
[34] *Id.* at 21.
[35] *Id.* at 269.
[36] *Id.* at 274.
[37] *Id.* at 30-31.

Finally, although Clausen persuasively musters the evidence to support his conclusions, he never stops to seal any of the holes in his investigation. For instance, Clausen never interviewed Short and Kimmel and never explains why. Clausen mentions that the Navy appointed an admiral to conduct a parallel investigation, but never discusses that officer's findings or the investigation's impact on his own. Clausen never discusses, much less admits, any weaknesses in his report or in his congressional testimony. For example, although Clausen harshly criticizes those who missed war warnings in intercepted Japanese messages, he never allows for the overwhelming amount of raw data that the intelligence analysts had to sift through to find something worthwhile.

V. Lessons Learned

Despite these drawbacks, Clausen's book contains numerous lessons for military leaders. Clausen rails against the "codependence" of the Army and Navy commanders, for example, and argues that a unity of command could have helped to prevent the surprise attack.[38] More importantly, Clausen notes the disastrous effects of interservice rivalries, especially regarding the sharing of intelligence.[39] Finally, Clausen cautions against the dangers of arrogance and hubris in anyone who leads.[40] All of these lessons apply to both civilian and military leaders. They are especially important for military leaders because of the military's high stakes, as at Pearl Harbor.

VI. Conclusion

Pearl Harbor: Final Judgment is more than just fascinating reading. It is a treasure trove of valuable historical analysis and leadership lessons. Despite its shortcomings, it should be on the bookshelf of any judge advocate with an interest in the "lore of the corps." The book provides a window into the brief yet captivating career of one World War II Army lawyer.

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[38] *Id.* at 131, 293.
[39] *Id.* at 221, 273, 293.
[40] *Id.* at 244-245.

THE LAWYER'S MYTH: REVIVING IDEALS IN THE LEGAL PROFESSION[1]

REVIEWED BY MAJOR GRETCHEN A. JACKSON[2]

> *The incapacitation for moral growth . . . begins in law school. It is replicated in the profession and is the primary reason many lawyers are ailing in their personal and professional lives.*[3]

The popular perception of lawyers today is of devious insiders who manipulate the system for their personal benefit by feeding off of the misfortune of others. This perception is perpetuated in books, television, and movies, and in reality, by multi-million dollar verdicts and sleazy law firm advertisements. Walter Bennett issues a challenge to fellow lawyers to join him on his quest to revive ideals in the legal profession by seeking moral purpose, "If the legal profession is going to save itself, we are the people who must do it."[4]

The author began his own search for professional ideals when he left thirteen years of trial practice to go back to school for his LL.M. He hoped to escape his "self-made rut" of long hours and intense preoccupation with cases.[5] He observed that there were accomplished lawyers living balanced lives, but could not see how to emulate them. After completing his LL.M., Bennett took a job as a clinical professor of law at the University of North Carolina Law School.[6] Although his task was to teach the skills of lawyering, he felt he owed his students something more.

> I knew by that point in my life that there was much more to living a lawyer's life than graduating from law school and being minimally competent at practical skills. I knew, or at least suspected, that in order to do it well and

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[1] WALTER BENNETT, THE LAWYER'S MYTH: REVIVING IDEALS IN THE LEGAL PROFESSION (2001).

[2] U.S. Army. Written while assigned as a student, 52d Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, United States Army, Charlottesville, Virginia.

[3] BENNETT, *supra* note 1, at 27.

[4] *Id.* at 12.

[5] *Id.* at 1.

[6] *Id.* at 2.

> to avoid the descent that so many lawyers take into the narrow tunnel of one-mindedness—of thinking like a lawyer and doing or being little else—a reorientation of the soul was required, a reopening of the intellectual and emotional gates that so many people begin to shut in law school.[7]

In the process of teaching legal ethics, Bennett discovered two fundamental attitudinal problems in his students; compulsion to moral minimalism and feelings of impotency and loneliness.[8] Moral minimalism derives from a law school focus on repressing morality in order to keep it from complicating legal analysis.[9] Moral impotency comes from law students' realization that, burdened with enormous educational debt, they will not have the luxury to control their own moral decisions and will have to play by the moral rules fashioned in the real world.[10] Loneliness is a function of an adversary system where young lawyers are consumed with winning as the measure of success.[11]

In an attempt to insert a moral dimension back into legal training, Bennett sought to expose his students to "morally meaningful narrative."[12] This narrative came from the stories of fellow lawyers guided by a moral purpose and a commitment to professionalism. Bennett accomplished this by developing a course on oral histories of lawyers and judges in North Carolina. By having his students interview prominent members of the legal community, he gave the students the opportunity to exercise those moral predilections set aside in the remainder of their law studies. Through their reports on fellow lawyers and judges, the students gained insight into how lawyers can achieve balance in their personal and professional lives. Bennett offers excerpts of these narratives throughout the book, which provide vivid accounts of North Carolina lawyers incorporating their beliefs and values into their practice of law.

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[7] *Id.*
[8] *Id.* at 5.
[9] *Id.* at 3. The author provides an example of this removal of morality from legal studies experienced during his first year of law school in the 1970s. At the end of a particularly frustrating round of Socratic dialog in a torts class, one first year student suggested that the ultimate goal of the case at hand was to achieve justice. The professor shouted at the student, "Don't speak to me of justice! I do not wish to hear about justice. I wish to hear about the rule of law." *Id.* at 14.
[10] *Id.* at 3-4.
[11] *Id.* at 5.
[12] *Id.* at 23.

Central to the author's analysis of the legal profession is his reliance on the importance of myths in any society. "Myths are narratives, but they are narratives of a special and powerful kind . . . . Myths help us define ourselves in relation to our communities and to our greater society and help explain our and our society's eternal significance."[13] In addition to providing this orienting function, myths serve a community on a primal level, which C.G. Jung called "the dark realm of the collective unconsciousness."[14] The tools for myth formation are already present in this collective unconsciousness, "[b]ut the shape of the myths which evolve and manifest themselves, and how we use those myths and what they teach us, depend upon real-world experience and the conscious act of valuing myths and their teaching power."[15]

The author relies heavily on the myth of the Fisher King and Parcival's search for the Holy Grail as an analogy to the myth of the legal profession.[16] As the story goes, the Fisher King reigned over a great and prosperous land until he was wounded. As the king suffered, so did his land and his people. This suffering would not stop until a knight seeking the Holy Grail asked the question, "Whom does the grail serve?"[17] Parcival, an uneducated young man, endeavored to become a knight and ultimately to attempt to save the kingdom.[18] Bennett equates Parcival's quest to that required of lawyers:

> [Parcival] must first learn that his soul is out of balance, that he has an exaggerated view of his own importance and a deficient understanding of his duty toward other people. Only then can he begin to grow socially and spiritually so that he eventually gains sufficient consciousness to ask the question that will heal the king and save the community.[19]

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[13] *Id.* at 51.

[14] *Id.* at 52. Carl Jung (1875-1961), a colleague of Sigmund Freud, was especially knowledgeable in symbolism of complex mystical traditions of various beliefs. Jung's theory divided the psyche into three parts, the ego, personal unconscious, and the collective unconscious. Jung referred to the contents of the collective unconscious as archetypes; an unlearned tendency to experience things in a certain way. Dr. C. Geroge Boeree, *Personality Theories* (1997), *at* www.ship.edu/~cgboeree/jung.html (last visited July 7, 2004).

[15] BENNETT, *supra* note 1, at 59.

[16] *Id.* at 9-12.

[17] *Id.*

[18] *Id.* at 12.

[19] *Id.*

Although Bennett at times strays too far into the weeds of mythology (e.g., detailed discussions of "the keys to the transcendent, precognitive truths of our existence"),[20] his basic premise is sound; a profession should be a community built upon the experiences of professionals dedicated to something greater than itself. Stories of the experiences become the professional mythology, and professional ideals provide the perspective or proper relationship between the profession and the greater community.[21]

As the legal profession developed in America, the stories of the profession helped define who lawyers were and their role in society. "The favorable stories about lawyers crystallized into ideals of professionalism and the good lawyer. The unfavorable ones crystallized into archetypal stories of the bully, shyster, and trickster."[22] Bennett notes that professional ideals are particularly important for lawyers.

> The lawyer's role as advocate is fraught with moral ambivalence, and the lawyer's morality exists in a constant tension between the actuality of what he is doing and a vision of higher ideals which must be implicit in his work. Added to the burden of moral ambivalence is the public's limited understanding of lawyers' work, which breeds a cynical view of lawyers and what they do. The public often sees only the shadowy, trickster side, which is that part of themselves that they most readily identify in lawyers. Thus there are powerful messages both from the public's limited perception of lawyers' work and from the reality of the work itself that push us toward the caricature of the trickster. A powerful vision of higher ideals is an essential counterweight to these messages in order for lawyers to maintain a life of moral purpose.[23]

The goal of the legal profession should be to learn from the shyster image and to strengthen professional ideals.[24]

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[20] *Id.* at 53.
[21] *Id.* at 54-55.
[22] *Id.* at 28.
[23] *Id.* at 71.
[24] *Id.* at 69.

A professional mythology may only be perpetuated by a community passing its ideals from one generation to the next. As Bennett sees it, "[T]he true, comprehensive problem facing the legal profession [is that] we no longer exist as and do not perceive ourselves as a community."[25] He provides several explanations for the disintegration of professional myths and community among lawyers. There have been major demographic changes in the legal profession. Lawyers are no longer of one race, one gender, or one social class.[26] The stories of great lawyers of the past have lost much of their metaphorical power for women and minorities in the profession.[27] The role of narrative in the legal profession has been devalued, and lawyers no longer have the time or space for storytelling.[28]

Bennett insists that lawyers must understand the true meaning of profession in order to rebuild their community and to develop ideals worth passing on to the next generation of lawyers. A profession is "a community of people similarly trained and with shared ideals, which is consciously in service to that which is greater than itself."[29] The primary purpose of the legal profession is not simply service to one's clients, but service to the public and to the greater community. Bennett suggests that

> [W]hile service to clients is itself a form of public service and is a basic moral obligation society has conferred upon lawyers, service to clients must be weighed in the greater context of service to the whole. Does work for a client, in its totality, provide more service than harm to other people?[30]

This idea implies that a lawyer must sacrifice a particular client's interests for those of the public. This would often be contrary, however, to the very nature of the lawyer's work for the client, whose interests may directly conflict with those of the community.[31]

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[25] *Id.* at 72.
[26] *Id.* at 74.
[27] *Id.* at 77.
[28] *Id.* at 78-80.
[29] *Id.* at 93.
[30] *Id.* at 128.
[31] *See* MODEL RULES OF PROF. CONDUCT R. 1.7 (imposing duties of loyalty and independent judgment on a lawyer representing a client, and proscribing conflicts of interest between the interests of a client and those of the lawyer or a third party).

Although at first it appears that the author wants lawyers to allow public interests to trump client interests, he goes on to explain that the key is for lawyers to reinstate their own morality and to assert the moral prerogative into their relationship with their clients.[32] This might be accomplished simply by raising the moral perspective with the client and encouraging the client to consider it. Although clients may still choose to ignore the moral ramifications, such ramifications would at least be considered along with the experience and expertise of the lawyer. Bennett correctly observes that it would be difficult for many lawyers to shift their focus from total commitment to their client's cause to consideration of the interests of the greater public. Lawyers, however, are equipped with the training to handle moral dilemmas and as professionals they are expected by the society they serve to exercise this training responsibly. "In order for lawyers to undertake such a task with competence and humility, they must be part of a professional community that promotes the ideal of public service and articulates the public good which is served."[33]

There exists today, a community of lawyers devoted to public service and committed to ideals; namely, military lawyers in the Judge Advocate General's (JAG) Corps. Lawyers in America willing to take Bennett's challenge should take their lead from military lawyers. Military lawyers are dual-hatted professionals, both Soldiers and lawyers. They recognize that participation in a profession, whether of arms or of law, is a privilege that is accompanied by responsibility to the greater good. Military lawyers have answered a higher calling to use their legal expertise to serve their country. They constitute a community with common ideals and support an organization that prides itself on maintaining honor, loyalty, integrity, dignity, and respect through selfless service. [34] For most military lawyers, service is a source of personal and professional pride. Money or power does not drive their lawyering in the military. Instead, service to society and commitment to the good of the service by providing legal advice to command leadership and to individual Soldiers, drives the military lawyer. [35] As a result, military

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[32] BENNETT *supra* note 1, at 137.

[33] *Id.*

[34] These values are central to the military leadership doctrine. *See e.g.,* U.S. DEP'T OF ARMY, FIELD MANUAL 22-100, ARMY LEADERSHIP: BE, KNOW, DO (31 Aug. 1999).

[35] The military services also impose duties of professional responsibility on military lawyers through service regulations. These military rules largely mirror the ABA Model Rules regarding individual client responsibilities, but they also reflect the unique responsibilities of military lawyers to their respective services as clients, *i.e.*, Army, Air

lawyers do not fit the "shyster" image many people associate with the legal profession.[36]

Although military lawyers strive for success like any other lawyer, the "win-at-all-costs" attitude that Bennett cautions against, is tempered by the nature of their assignments.[37] Military lawyers rotate duty positions every one to three years. Therefore, a military lawyer may spend two years advising commanders about regulations, followed by a year assisting individual Soldiers with legal issues, followed by two years as a prosecutor or trial defense counsel. Frequent assignment changes have several effects on these professionals. First, they are reminded of the greater good that they serve through exposure to many aspects of the military community. Second, they are able to maintain a balanced perspective with regard to individual and community interests by representing different sides of legal issues. Finally, they are invested in the relationships with fellow military lawyers through the small size of their legal community and the frequent position changes. Military lawyers rely heavily on their predecessors to help prepare them for their new assignments.

The Army community, like the other branches of the armed forces, recognizes the value of its long tradition and history. Through publications like *Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti*,[38] Army lawyers have attempted to perpetuate their own professional mythology through the stories of fellow lawyers. The need for such narrative history has prompted the U.S. Army Judge Advocate General's Legal Center and School to create LL.M. course credit for projects to interview and report on famous lawyers within the Department of Defense.[39] The current leadership of the Army JAG Corps plans to establish a JAG Corps regimental historian position and develop plans for a JAG Corps museum.[40] These efforts to

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Force, Navy, Marine Corps. *See e.g.*, U.S. DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS R. 1.13 (1 May 1992) (Army as Client).

[36] BENNETT *supra* note 1, at 28.

[37] *Id.* at 82.

[38] FREDERIC L. BORCH, JUDGE ADVOCATES IN COMBAT: ARMY LAWYERS IN MILITARY OPERATIONS FROM VIETNAM TO HAITI (2001).

[39] Major Eugene Baime, Address to the 52d Graduate Course, The Judge Advocate General's Legal Center and School (Sept. 17, 2003).

[40] Major General Thomas J. Romig, Address to the 52d Graduate Course, The Judge Advocate General's Legal Center and School (Sept. 10, 2003).

maintain the history of the JAG Corps are consistent with Bennett's charge to perpetuate a professional mythology.

Although military lawyers belong to a community dedicated to professional ideals, they must join in Bennett's quest to revive ideals in the legal profession at large. As members of a profession, lawyers are responsible not only to society but to each other. They must join together to show America that the popular perception of lawyers is flawed. Military lawyers are only a small subset of the American legal profession. It is not necessary for all lawyers to risk deployment to a combat zone in an effort to show their commitment to the greater good. Every day lawyers make choices that reflect their commitment to something greater than themselves. *The Lawyer's Myth* is a rally cry for lawyers throughout the profession to come together to restore professional ideals and a moral purpose. Some hear that cry loud and clear, while others must be trained to listen for it.

Bennett's book pushes hard for reform in the law school curricula, teaching style, and grading, in an attempt to reorient the legal profession toward a moral purpose.[41] Although law schools would be wise to include moral discourse in their training of law students, the better approach to revive professional ideals is his proposal for mentoring lawyers both young and old.[42] The goal should not be to create a new breed of lawyers who are taught commitment to professional ideals. Instead it should be to reacquaint all lawyers with those values and ideals that motivated them to pursue a legal career in the first place. Lawyers must prove to themselves, and ultimately to society, that they have rediscovered their capacity for moral growth and their willingness to exercise their moral consciousness—not to manipulate society, but to serve it. Those lawyers who answer the call of *The Lawyer's Myth* will ensure their place in a professional heritage worth saving.

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[41] BENNETT *supra* note 1, at 169-178.
[42] *See id*. at 195-202.

THE LAWYER'S MYTH: REVIVING IDEALS IN THE LEGAL PROFESSION[1]

REVIEWED BY MAJOR PETER H. TRAN[2]

> *[T]he true danger in practicing law as an amoral technician is that, when that course is rigorously followed in the hyper-competitive world of legal practice, it becomes more than a professional role. It becomes a way of life. The blocking out of moral compunction soon changes from a temporarily induced state by which lawyers avoid moral qualms about their clients and their work, to a permanent mind-set that colors almost everything they do.*[3]

I. Introduction

Like many lawyers in America, Walter Bennett has observed a growing trend of incivility and outlandish, aggressive behavior within the legal profession. In his book, *The Lawyer's Myth*, Bennett analyzes the alarming development he believes is clearly reflected in the growing public perception of lawyers as aggressive, manipulative, and unscrupulous people doing whatever it takes to win. Bennett describes this "moral malaise"[4] as profound, because it grows primarily out of a self-inflicted wound.[5] Believing that the dominant modern professional archetype is the "go-for-the jugular" trial lawyer, he explains that "[i]n essence, the warrior-like, super-masculine part of our professional psyche has at least temporarily prevailed in the internal struggle for the soul of the profession . . . . The dominance of this type, this negative

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[1] WALTER BENNETT, THE LAWYER'S MYTH: REVIVING IDEALS IN THE LEGAL PROFESSION (2001).

[2] U.S. Army. Written while assigned as a student, 52d Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, United States Army, Charlottesville, Virginia.

[3] BENNETT, *supra* note 1, at 147.

[4] Although Walter Bennett never actually uses the term "moral malaise," he uses several similar terms such as "moral minimalism," "moral impotency," "malaise," and "wound" to describe varying problems with the legal profession. The term "moral malaise" is this reviewer's attempt at shorthand for a complex series of concepts Bennett uses throughout the book to describe his ideas.

[5] BENNETT, *supra* note 1, at 11.

ideal . . . has deeply affected the professional psyche."[6] When winning and the resulting financial rewards become the overriding measure of professional success, "moral doubt and civility towards others"[7] simply become obstacles to success.[8] He believes that in order to treat this wound to the profession, one has to look at the source of the malaise. In describing why the modern dominant archetype is so anathematic to our profession, Bennett presents his fundamental thesis:

> Basically [this dominant archetype] has destroyed our professional mythology and, more importantly, our capacity to create professional myths that allow us to grow and to understand ourselves and the social and moral significance of our profession. This is the true nature of our self-inflicted wound—a wound that will not heal until we begin to ask ourselves the essential mythmaking questions about who we are and whom we serve.[9]

II. Background

Some background may be helpful in understanding the context of Bennett's analysis. Bennett graduated from the University of Virginia School of Law in 1972. He spent sixteen years practicing in Charlotte, North Carolina, first as a trial attorney and then as a trial court judge, before returning to his alma mater to pursue an LL.M. Upon completion of this graduate program, he began work as a clinical law professor at the University of North Carolina Law School. While on the faculty, he was asked to teach a course on professional responsibility at the law school.[10] Trying to convince his students about the importance of legal ethics, Bennett observed an inclination within many modern law students towards what he described as two fundamental problems; "the compulsion to moral minimalism" and "the feelings of impotency and loneliness."[11] As used by Bennett, the term "moral minimalism" described the idea that "moral predilections should be repressed lest they

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[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.* at 1-21.
[11] *Id.* at 5.

complicate legal analysis and inhibit decisive winning action."[12] In trying to address these systemic problems, he developed the idea of teaching a seminar on the oral histories of great lawyers and judges. After gathering and listening to the stories presented by their classmates, the students, Bennett hoped, would not only benefit from some wisdom and legal insight, but also be able to personally witness "a life dedicated to moral purpose and know that even in the legal profession, there is help for the lonely."[13] The oral histories, Bennett observed, not only had a noticeable effect on the students in the seminar, but also had a surprisingly profound and lasting effect on him. From these stories, he began a journey of self-exploration, which ultimately lead him to develop a path for a balanced life as a lawyer.

The Lawyer's Myth is the culmination of his personal search and the truths learned during that quest.[14] Consequently, it reads very much like someone's recognition of a personal epiphany and the resultant soul-searching. Epiphanies, however, are like any other aspect of our lives; they are necessarily shaped by our experiences and our environment. The challenge is to present the theory extrapolated from the personal journey into a compelling and supported argument for a course of action. From that perspective, Bennett makes a good effort, but ultimately cannot capture or persuade the reader to accept his personal ideology as a reasoned analysis on the ills of the legal profession.

There is no denying Bennett's breadth of legal experience. His experiences, however, are still limited to the one jurisdiction; North Carolina.[15] Bennett's personal experience is limited by the constraints of practicing in one defined geographical and sociological region. Often the limitations of personal experience can be tempered with careful research and analysis beyond one's own borders. It becomes painfully clear in the course of the text, however, that even if Bennett conducted thorough research in other jurisdictions, he failed to integrate his

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[12] *Id.* at 3. Bennett felt that this moral minimalism was a natural by-product of the modern law school education wherein law students are taught to view laws critically and skeptically and are asked to find the extreme boundaries, interpretations, and exceptions in aggressively advocating a client's interest. *Id.*

[13] *Id.* at 6.

[14] *Id.* at 1.

[15] Although the North Carolina Bar is an august body, it is still an establishment comprised solely of attorneys from North Carolina or members of the bar wishing to practice in North Carolina. Regardless of the level of diversity present in North Carolina, North Carolina is still only one state out of fifty.

research into the examples and anecdotes used to support his thesis. Except for a few notable national figures,[16] the lack of supporting role models outside of the North Carolina Bar is a glaring omission readily identifiable by lawyers practicing in other states or practicing in multiple jurisdictions.[17]

Although, in some cases, one can draw parallels and generalities to a profession from the experiences of one jurisdiction, Bennett never once acknowledges the limits of his observations or research.[18] Fairly or not, this absence of outside authority and provincial approach diminishes the credibility of the work as an authoritative study encompassing the legal profession in America.

III. Analysis

Myths, narratives, and Jungian[19] archetypes are imperative to Bennett's critical paradigm. Understanding these interrelated concepts is crucial to his thesis on the "revitalization of the legal profession."[20] Myths, explains Bennett, are really just special, powerful narratives.[21] Evolving through numerous retellings, these special narratives are "distilled to a purer and deeper form which connects to the timeless forces in our own natures—forces in the individual and collective

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[16] Abraham Lincoln and John W. Davis (the prominent U.S. Solicitor General) are two of the handful of people that comprise the tiny pool of non-North Carolinians Bennett used as examples of ideals and models for the legal community.

[17] This is especially true in the case of military attorneys who frequently practice in a number of different states, and possibly different countries, as a result of the transitory and deployable nature of the Armed Forces.

[18] For example, Bennett presents a study conducted by the North Carolina Bar Association on the quality of lawyers' lives, without even a passing comment to what relationship the study had to the broader legal community. The reader is left to simply assume, as Bennett seems to, that the study is sufficiently reflexive of the legal profession in America to draw the analogy. A reasonable assumption would be that there were no national studies available at the time; however, if this were the case, Bennett could have easily noted this and explained that the observations came from the North Carolina study and his own experience or research with lawyers from other states.

[19] Carl Jung (1875-1961), a colleague of Sigmund Freud, was especially knowledgeable in symbolism of complex mystical traditions of various beliefs. Jung's theory divided the psyche into three parts, the ego, personal unconscious, and the collective unconscious. Jung referred to the contents of the collective unconscious as archetypes; an unlearned tendency to experience things in a certain way. Dr. C. Geroge Boeree, *Personality Theories* (1997), *at* www.ship.edu/~cgboeree/jung.html (last visited July 7, 2004).

[20] BENNETT, *supra* note 1, at 54.

[21] *Id.* at 51.

subconscious which teach us eternal lessons."[22] In describing how this relates to lawyers, Bennett explains that the myths give "transcendent meaning"[23] to our professional lives. He sees this happening on two basic levels.

The first is on a Jungian primal level revealed only in the form of universal archetypes. He believes that this primal connection is essential "for a healthy, vibrant, and unstagnated society."[24] The second and more important level, is an orienting function in which myths help us "define ourselves in relation to our communities and to our greater society and help explain our and our society's eternal significance."[25] According to Bennett, lawyer myths orient us by providing us a "purpose for lawyers' work that is community based and spiritually transcendent."[26] Spirituality, at least by the Western transcendental definition, is crucial to his paradigm. Although never explicitly stated, it becomes clear to any student of philosophy and theology that Bennett bases his analysis of the universality of myths and archetypes and their significance to a lawyer's spiritual transcendence within the profession, purely on a Western Christian point of view. This, in itself, should not discount his critical analysis but for two reasons. First, it would have been much more effective to use his concept of spiritual transcendence simply as a tool to help the reader understand the steps through his syllogism rather than using a specific cultural-religious view as the foundation in building his critical paradigm. Second, Bennett's essential reliance on this concept as a key element in his paradigm could still give credibility to his analysis had he only acknowledged its use as such. Unfortunately, Bennett's lack of this acknowledgement either reveals his own deficient understanding of the limited nature of his universal analysis or is indicative of either a conscious or a subconscious decision to conceal a religious bias within a critical paradigm.

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[22] *Id.*

[23] *Id.*

[24] *Id.* at 53. For Bennett, this primal level also "connects us to an eternal dimension, to the timeless, the incomprehensible, and, for some the great mystery of creation—for some, to God."

[25] *Id.* Deriving this theory of myths, Bennett cites to the works of the noted mythologist, Joseph Campbell and existential psychologist, Rollo May. Summarizing Joseph Campbell, Bennett describes the four essentially orienting functions that myths have (1) the mystical function; (2) the cosmological function; (3) the sociological function; and (4) the pedagogical function. *Id.* at 52.

[26] *Id.*

To underscore the importance of myths, narratives, and archetypes as "transcendental links"[27] to his critical paradigm, Bennett provides us with the myth of the Fisher King as an introduction to his understanding of the "moral malaise" in the profession. Although there are countless versions and variations of this tale, Bennett recounts the story in the context of the Grail motif in the Arthurian legends.[28] In his version, the Fisher King is a mythic king that is wounded in the groin after a battle with a powerful warrior. [29] The wound is septic, continuously runs poison, and will not heal. The king can only find solace in fishing the lakes and streams of his kingdom where he is temporarily distracted from the constant pain. The wound is a magical one, and the kingdom also begins to be affected by the poison running through the king's wounds. The king's wound and the poison it weeps, causes the conditions of the kingdom to deteriorate.[30] Bennett likens the Fisher King's wound—specifically, the injury to the kingdom—to the malaise and suffering of the legal profession. The wound is self-inflicted because in battling the knight that wounded him, the Fisher King was metaphorically fighting his own "ego and self-pride."[31] Bennett notes that the wound is to the Fisher King's groin, symbolically damaging the "creative and procreative powers"[32] of the legal community that allow us to create and maintain our professional mythology. More critical than the loss of the myths themselves, Bennett believes, is the loss of our ability to create new professional myths that "allow us to grow and to

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[27] *Id.* at 54.

[28] Erin Ogden-Korus, Univ. of Idaho, *The Fisher King*, *at* http://www.uidaho.edu/student_orgs/Arthurian_legend/grail/fisher (last modified Sept. 1998). Ogden-Korus describes the literally hundreds of possible sources that have contributed to the dozens of amalgamated Fisher King myths, and by implication, the Parcival myths. She notes that some scholars argue the Fisher King is derived from pagan fertility rituals, and that "beneath the surface of the numerous legends can be discerned the rites of primitive cults." *Id.* While others believe that because of his status as keeper of the Holy Grail, the Fisher King is primarily a Christian archetype. There are also those who believe that the tale, appearing at the end of the Third Crusade, "developed as a means for fusing the colliding Occidental and Oriental cultures." *Id.* What most scholars can agree about the Fisher King is that it is probably one of the "most abstract and enigmatic symbols" within the Grail motif and Arthurian stories. *Id.*

[29] Bennett uses a number of different sources in molding his particular narration of the Parcival myth, which appropriately enough, also reflects the numerous possible spellings of the mythic hero (e.g., Parsifal, Perceval, Parzival, etc.). The primary source that Bennett relied upon was a twelfth century French writer, Cretien de Troyes. BENNETT, *supra* note 1, at 214 n.3.

[30] BENNETT, *supra* note 1, at 9-11.

[31] *Id.* at 10.

[32] *Id.*

understand ourselves and the social and moral significance of our profession."[33] This loss of our creative process, Bennett observes, corresponds with the rise of the *logos* (the masculine, reasoned analysis approach to problem solving) and the decline of the *mythos* (valuing narrative and teaching power over abstract logic) in the profession.[34]

The story of the Fisher King, as Bennett notes, is sometimes a prologue to a more important allegory.[35] For Bennett, the true significance of the Fisher King legend is in the story's relation to the Parcival myth.[36] He utilizes the Parcival myth to describe the hero's journey and the choices faced by the questing hero, the lawyer. This, in itself, would be a very effective tool to lead the reader through his critical paradigm. His extensive reliance, however, on this one particular parable to analogize every philosophical or sociological aspect of an individual (lawyer) in relation to his community (profession), significantly dilutes the effectiveness of the myth with each subsequent use. For readers accustomed to critical analysis, the intellectual gymnastics Bennett employs in order to manipulate the allegory to suit his multitude of diverse concepts are readily transparent, and the story's sustained use becomes distracting at best, ridiculous at worst,[37] and sometimes simply disingenuous.

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[33] *Id.* at 11.
[34] *Id.* at 59.
[35] *Id.* at 11.
[36] This is readily apparent when Bennett refers back to the Parcival myth fourteen separate times throughout the book to describe and illustrate the crisis the legal profession finds itself facing. Naturally, as we see later, Bennett also looks to the allegory in formulating possible solutions for this professional malaise.
[37] An example of Bennett's exaggerated reliance on the Parcival myth as a tool for his critical analysis lies in the following metaphor for overcoming the dominant masculine archetype in the legal profession:

> In Jungian terms, by defeating the Red Knight, Parcival has conquered the primitive, ruthless, masculine side of himself. He has taken the requisite first step toward controlling the negative aspect of his youthful masculinity—his masculine shadow—in order to make room for the emergence of his feminine side, which will allow him to begin the process of individualization and movement toward psychic balance. On the mythological level, he has demonstrated himself to be worthy of knighthood and membership in the masculine fraternity of knights. In effect, he has proved the quality of his character, achieved a measure of social respectability, and been accepted into the firm. Now he is ready to be a professional.

BENNETT, *supra* note 1, at 96-98.

To his credit, Bennett does not lay blame on any particular group of lawyers but rather on the dominance of a particular trait found to some extent, he believes, in all lawyers.[38] It would be easy to blame the rabid, selfish lawyers as the source of the problem, but under Bennett's analysis, those lawyers are just symptoms of the poison from the professional wound. His argument is that the institution of old law school pedagogy and the harsh realities of the legal practice foster and perpetuate the negative ideals to such a degree that many in the community cannot help but fall victim to the mentality that winning and financial rewards are the only definitions of success in our profession.[39]

While laudable and progressive in thinking, there are numerous weaknesses to this theory. First, Bennett discounts any concept of personal responsibility in his examination of the professional malaise. He postulates that all lawyers are generally shaped by the same experiences in law school and the realities of practice.[40] Why, then, have there been so many in the profession who successfully avoided the negative mentality? Bennett answers that question later by describing those people as having found the right balance in their professional, and personal, and spiritual life.[41] The fact remains that those great lawyers made conscious decisions and choices in their lives. Whether it was simply to act in a civil manner toward fellow attorneys or to make no assertions to the jury that they knew to be false, they made deliberate choices. Bennett fails to consider the view that no community or profession can hope to heal itself from a self-inflicted wound without at least recognizing that the part of our community causing the harm must be willing to accept a different standard of behavior. They must accept

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[38] *Id.* at 11. The Red Knight personifies this aggressive, ruthless, masculine trait in the Parcival myth. Once the young Parcival challenges and defeats the Red Knight, he takes the Red Knight's armor and weapons for himself. Bennett believes, at some point, the armor of the Red Knight begins to "shape the soul of its new owner, and the questing knight becomes only a warrior, challenging and defeating all who cross his path." *Id.* at 97. He believes that something similar has happened to the masculine archetypes of the legal profession, observing that "lawyers have become locked in the masculine archetype, and masculine ideals have become entrenched and all-controlling." *Id.* at 98.

[39] *Id.* at 20-27.

[40] *Id.* at 20-27, 82-85, 114-116.

[41] *Id.* at 6-8, 109-117, 156-168. In particular, Bennett believes that lawyers must find the right balance, individually and as a profession, between our *anima* ("feminine" side of men) and *animus* ("masculine" side of women) Jungian archetypes. From Bennett's paradigm, when the masculine and feminine parts of the personality are "integrated and harmonious," there is "opportunity for moral growth, increased consciousness, and perception of an ideal." *Id.* at 117.

the old standard as wrong and counterproductive. Allowing those lawyers to continue to use the crutch of "I'm just a product of the system," will never bring them to the process of self-discovery that Bennett argues is necessary in order to start this mending of the professional wound.[42]

Another weakness in Bennett's argument is that he looks at the legal profession almost exclusively in terms of private practice. He talks of observing the disillusionment of students as they entered law school perpetuating the cycle of moral minimalism and professional loneliness as they went on to face the harsh realities of billable hours and aggressive litigators.[43] Almost exclusively, the examples Bennett uses to support his generalities, pertain to idiosyncrasies of private practice. These may well be valid observations for that sector, but they alone cannot be used to form a hypothesis on the condition of the entire legal community. He makes little or no mention of the lawyers who serve in the public sector. Furthermore, what about the lawyers who already have different definitions of professional success? In trying to apply Bennett's theory on the professional wound, it certainly becomes inconvenient when a large part of that community does not fit the model he uses to support his initial hypothesis. The response may be that the public sector attorneys are a relatively small part of the profession. That assertion cannot stand in the face of the sheer number of attorneys working throughout the country in legal aid offices, public defenders offices, military service, and in ideal based groups such as the American Civil Liberties Union.[44] Lawyers practicing in those areas are clearly not

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[42] *Id.* at 184-185 ("As long as the Red Knight is in the saddle, the legal profession will not recover from its current malaise.").

[43] *Id.* at 20-27.

[44] The National Association of Law Placement (NALP) has documented the employment experiences of Juris Doctor (J.D.) graduates for the past three decades. As of 15 February 2004, the Class of 2003, reveal the following statistics:

- 15.8% were working in public interest jobs, other government positions, or the military.
- 1.6% were working in the academic field.
- 11.1% were in judicial clerkships.
- 11.5% were in business or corporate fields.
- 2.1% were in unknown or other fields.
- 57.8% were in private practice.

If you add the academic and judicial clerkships into the public interest sector, there would have been 28.5% of the recent law graduates working in non-financially motivated areas.

looking for financial rewards nor are they looking to win at all costs. Military practitioners alone, who number in the thousands,[45] provide a variety of services like legal assistance, claims adjudication, and support to troops on international law. These areas of practice call for service to others as the goal of the representation, not solely winning or the attendant rewards with that success.

Bennett's sweeping generalities make it apparent that he became disenchanted with the practice of law as *he* experienced it. Personal experience is certainly a valid starting point for analytical study, but it cannot be the sole basis for a critical look into the professional wound. Arguably, Bennett is not wrong when he observes that the public has a negative perception of lawyers. Bennett's observation that the public's derogatory view is reflected on the profession as a whole and not just directed at the "aggressive" lawyers is probably supported by evidence in popular culture.[46] Before diagnosing an infirmity in the profession, however, some empirical evidence should at least be used to lay the foundation.

Ultimately, Bennett concludes that we must all look into ourselves to find our own "grail." We must find balance in our lives as individuals and as lawyers. Only then can we rehabilitate the community. The legal profession can survive as a profession only if we understand that the answer to the question, "who does the grail serve?" is in the asking of the question itself. Bennett, himself, holds that service beyond oneself is the heart of a profession. In asking the question, one understands and undertakes to serve others. The observation is elegant in thought certainly, but hardly new in insight.[47] In order to attain this holistic

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National Association of Law Placement, *Employment of New Law Graduates Just Shy of 89%* (Feb. 15, 2004), *available at* http://www.nalp.org/nalpresearch/ersini03.pdf.

[45] As of June 2002, there were over 9,700 military attorneys in the active and reserve components of the armed services. Memorandum, David S. Chu, Undersecretary of Defense, to Donald H. Rumsfeld, Secretary of Defense (7 June 2002) (responding to Secretary Rumsfeld's request for a study of how many attorneys there are in Department of Defense and where they were located).

[46] Although it can also be disputed that popular culture has always had a fondness for or desire to see the earnest and honorable attorney in the pursuit of justice. *See, e.g.,* ERIN BROCKOVICH (Universal Studios 2000), A FEW GOOD MEN (Columbia Pictures 1992), and A CIVIL ACTION (Touchstone Pictures 1999).

[47] Even at the height of the garish and materialistic world of lawyers in the 1980s, John T. Noonan Jr., a professor at the U.C. Berkley Law School was already instructing his students that the rules of law cannot be separated from the persons who make them or

approach to the profession, Bennett believes lawyers have to develop a new professional morality. The service he describes is to the greater community, not to the specific needs of individual clients. Bennett's view is that this ideal morality goes beyond the rules of professional responsibility; it is doing what is right rather than what is ethical under our present rules.[48] This assumption that we should follow a higher morality is dangerous in that it assumes we will all come to perceive the same universal good.[49] Bennett advocates that when faced with a client wanting to pursue an immoral course, whether it be a criminal defense client or an insurance company refusing to pay a legitimate claim, lawyers should engage their clients in a "moral conversation" in which the lawyer raises moral issues and helps a client understand them.[50] Bennett acknowledges that clients may or may not change their minds as a result of this conversation, but at least the lawyer has not completely abdicated his moral autonomy.[51] Bennett believes that if the client will

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from the values of the society they are meant to serve. Kenneth L. Woodward, *Noonan's Life of the Law*, NEWSWEEK, Apr. 1, 1985, at 82.

[48] Again, Bennett displays his limited provincial background. Doing what is "right" is dependent on a variety of factors; religion, often, being a strong factor. Throughout the book, Bennett describes what is a uniquely Western version of the epiphany and the inner quest. Bennett makes no pretense of hiding the fact that he believes the true journey can only be fully completed by reaching inner spirituality and God, specifically, by the Christian definition. The overuse of the Parcival myth and its distinctly religious implication, only serves to underscore a weakness of Bennett's analysis; that it is based, at its heart, on Bennett's own religious ideology.

[49] That is precisely why all state bar associations have some form of Professional Conduct Rules that apply to all its members. Many of the states have fashioned their rules after the ABA's Model Rules of Professional Conduct. Leaving it up to individual attorneys to decide what they believe to be moral or ethical conduct is courting chaos at best or abuse at worst. Would the Muslim, Hindu, or Buddhist attorney practicing law in America define what constitutes the greater good in the same manner as the Christian attorney from North Carolina? If lawyers are to be allowed to police themselves, they must create a set of standards that apply to all members, regardless of the individual morality. Military lawyers such as those in the Army, are subject not only to their own state bar standards, but are also required to abide by Army regulations that control the conduct of lawyers. *See generally* U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992).

[50] BENNETT, *supra* note 1, at 148.

[51] *See generally* MODEL RULES OF PROF'L CONDUCT R. 1 and 2. Although the lawyer may not have abdicated his "moral autonomy," he has probably violated several provisions of the American Bar association's (ABA) Model Rules of Professional Conduct. Rule 1.2, Scope of Representation and Allocation of Authority Between Client and Lawyer, and Rule 1.3, Diligence in Representation of the Client, are just some of the rules that may have been broken by the lawyer. *Id.* at R. 1.2 and 1.3. It should also be noted that within the confines of the ABA Rules of Professional Conduct, the rules allow many of the ideals that Bennett advocates. Rule 1.2(d), for example, prohibits a lawyer from

not see the light and does not have a moral conversion, the lawyer should still continue his representation of the client.[52] Only in rare cases, does he advocate withdrawing from the case.[53] Conspicuously absent, however, is Bennett's answer to the question of what the lawyer should do if the client wants the lawyer to pursue the client's immoral interest and the lawyer refuses to suppress his moral convictions? Is the criminal client required to wait until he can find an attorney whose moral standards allow the attorney to pursue the client's stated defense? Clearly, the inherent weaknesses to Bennett's argument are abundantly present and well beyond the scope of this review.

IV. Conclusion

Often eloquent and sometimes insightful, Bennett provides a thorough, if not excruciating look into the mythological, philosophical, and sociological aspects of the legal profession. Unfortunately, the prose frequently follows Bennett's own indecision. He is unsure whether he is writing scholarly research or simply authoring an exposition on an introspective journey. The end result is sometimes a difficult philosophical discussion that breaks the book's flow and requires the reader to re-read certain passages in order to grasp the concepts. Although moments of brilliance materialize, they are usually hidden between deep layers of abstraction. The reader, unfortunately, must laboriously ponder through the lengthy saunters on this road of abstraction in order to follow the author's analysis. This journey of discovery would ultimately be worthwhile if the conclusion brought the reader some appreciable methods of addressing this posited wound to the profession. Bennett, however, leaves us with neither revolutionary nor particularly innovative suggestions in addressing these problems. This

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counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. *Id.* at R. 1.2(d). Rule 1.4(a)(4) requires a lawyer to consult with a client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Model Rules or other law. *Id.* at R. 1.4(a)(4). Rule 1.16(a)(1) requires the lawyer to withdraw from representing a client when it would result in violating the Model Rules or other laws. *Id.* at R. 1.16(a)(1). Finally, Rule 2.1 states that a lawyer shall exercise independent judgment and render candid advice. In rendering advice, "a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." *Id.* at R. 2.1.

[52] BENNETT, *supra* note 1, at 148.

[53] *Id.*

provides a particularly bad taste after being force-fed such a tedious and loquacious[54] journey through his personal paradigm.

Bennett does present, however, some thoughtful ideas and initiatives in an effort to heal the profession. His proposal to expand and change law school education to give law students more direct attorney mentors is practical and productive. The attorney-mentors would hopefully not only provide practical experience, but also serve as professional role models of attorneys successful in their professional and personal lives without resorting to the base instincts the adversarial system can so often produce. Obtaining more oral histories—myth making narratives as Bennett calls them—of distinguished judges and lawyers is another good suggestion. As stated earlier, however, none of these ideas are particularly new or unique. Many law schools have already decided to change their teaching methods and curriculums to reflect the trend in teaching students a more rounded approach to the profession,[55] not just the basic skills of learning to "think like a lawyer." Oral history programs are already a part of many institutions, not just the legal academy. Bennett is correct in his observation of the importance of narratives and the myth creating process. We, as individuals and as a community, learn about ourselves through the stories that are told to us by our elders. *The Lawyer's Myth*'s best attribute is that it is a good reminder of this fact. As a book looking critically into the problems of the legal profession and proposing new ideas and solutions, however, it is both lacking and ultimately disappointing.

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[54] The adjective is meant to describe both Bennett's writing and his occasional predilection for the ostentatious use of words to convey basic ideas.

[55] In 1987, Tulane University Law School adopted the first mandatory pro bono program in the country. Since that time, the nation's top law schools such as Harvard University, Columbia University, the University of Pennsylvania, and dozens of other law schools have followed suit. Francesco R. Barbera, *Yard Work: Harvard Law Revives Mandatory Pro Bono Debate*, ABA J. May 2000, at 26.