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MILITARY LAW REVIEW

ARTICLES

BOOK REVIEWS

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CONTENTS

ARTICLES

BOOK REVIEWS

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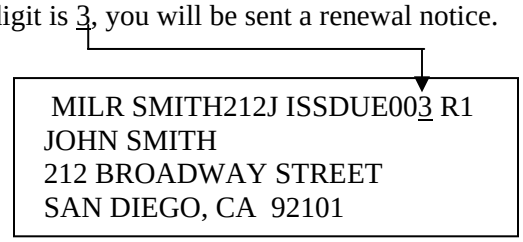

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MILITARY LAW REVIEW

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PEREMPTORY CHALLENGES IN MILITARY CRIMINAL JUSTICE PRACTICE: IT IS TIME TO CHALLENGE THEM OFF

MAJOR ROBERT WM. BEST[1]

[The peremptory challenge] functions as a repository of the unexamined fears, suspicions, and hatreds held by attorneys and their clients.[2]

Peremptory challenges provide opportunities for game playing and the exercise of pseudo-expertise by trial lawyers, but it seems doubtful that they accomplish much more.[3]

I. Introduction

In the crucible of a contested court-martial with members, the facts are elicited in a search for the truth and assessment of criminal liability,

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[2] Judge Raymond J. Broderick, *Why Peremptory Challenges Should Be Abolished*, 65 TEMP. L. REV. 369, 418 (1992).

[3] Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 203 (1989).

if any, of an accused.[4] In that crucible, the most important actors are thefinders of fact,[5] for in their collective judgment lies the fate of the accused—his life, liberty, and property. When the accused chooses trial by a panel, he has no control over which specific persons initially sit as finders of fact. Rather, the convening authority, the same person who decided to send the accused's case to be tried by court-martial in the first place,[6] personally selects persons to sit as court members pursuant to Article 25, Uniform Code of Military Justice (UCMJ)[7] and Rule for Courts-Martial (RCM) 503.[8] The only way an accused can shape a panel after the convening authority has selected it is through the exercise of either challenges for cause[9] or peremptory challenges.[10]

Critics regularly compare the military criminal justice system with the civilian criminal justice system, often times with the military system allegedly coming up short.[11] Nowhere is this more pronounced than with comparisons between the civilian jury system and court-martial panels. For example, unlike a civilian criminal defendant, a servicemember is not entitled to a court-martial panel that is cross-representative of the community.[12] Military personnel are not entitled to a "jury of their peers" composed of a fair cross-section of the community as a matter of Sixth Amendment right.[13] Military personnel are, however, entitled to a panel composed of fair and impartial members,[14] who are, in the mind of

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[4] As in any other criminal trial, the finder of fact must find the accused guilty beyond a reasonable doubt. MANUAL FOR COURTS-MARTIAL, UNITED STATES, RULE FOR COURTS-MARTIAL (R.C.M.) 920(e)(5)(A) (2002) [hereinafter MCM].

[5] The accused may elect to be tried by a panel composed of at least one-third enlisted members pursuant to RCM 903(a)(1) or, in noncapital cases, by military judge alone pursuant to RCM 903(a)(2). In the absence of a timely election, the accused will be tried by a panel of officers pursuant to RCM 903(c)(3). *Id*.

[6] *See id*. R.C.M. 601.

[7] UCMJ art. 25 (2002).

[8] MCM, *supra* note 4, R.C.M. 503.

[9] *See id*. R.C.M. 912(f); *see also* UCMJ art. 41(a)(1) (stating in pertinent part, "The military judge and members of a general or special court-martial may be challenged by the accused or the trial counsel for cause stated to the court").

[10] *See* MCM, *supra* note 4, R.C.M. 912(g); *see also* UCMJ art. 41(b)(1) (stating in pertinent part, "Each accused and trial counsel are entitled to one peremptory challenge of the members of the court").

[11] *See*, *e.g.*, Edward T. Pound et al., *Unequal Justice*, U.S. NEWS & WORLD REP., Dec. 16, 2002, at 19.

[12] *See* United States v. Roland, 50 M.J. 66, 68 (1999) (citing United States v. Lewis, 46 M.J. 338, 341 (1997)).

[13] *See* United States v. Loving, 41 M.J. 213, 285 (1994) (citations omitted).

[14] *See Roland*, 50 M.J. at 68.

the convening authority, "best qualified."[15] This aspect is a key difference from state and federal courts. In the civilian system, the convening authority is unknown and jury selection is entirely different.[16] The criminal civilian jury need not be a "true" cross-section of the community, but it must be fair and impartial.[17] Thus, "[t]he logical, and desirable, way to impanel an impartial and representative jury . . . is to put together a complete list of eligible jurors and select randomly from it, on the assumption that the laws of statistics will produce representative juries most of the time."[18] Such juries "will be impartial in the sense that they will reflect the range of the community's attitudes."[19]

Procedurally, most jurisdictions use random selection in an effort to meet the Sixth Amendment's requirement for an impartial jury.[20] After winnowing the prospective list of jurors because of various excuses or exemptions,[21] the venire is then subjected to questioning by the parties to determine their "impartiality" and fitness to sit as a juror. "The purpose of challenges is to eliminate jurors who may be biased about the

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[15] UCMJ art. 25(d)(2) (2002). In selecting members, the convening authority "shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." *Id*. This particular aspect of military criminal justice practice is one source of great concern to many. *See, e.g.*, Hon. Walter T. Cox III et al., *Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice* (2001) ("There is no aspect of military criminal procedures that diverges further from civilian practice, or creates a greater impression of improper influence, than the antiquated process of panel selection."), *available at* http://www.badc.org/html/militarylaw_cox.html; Major Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for his Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1, 103 (1998) (advocating random selection of panel members); Pound et. al., *supra* note 11, at 19 (noting that convening authority selection is the weakness of the system). An excellent article that discusses the various points of view on this issue is by Major Christopher W. Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV. 190 (2003).

[16] *See* JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS (1977) (offering an extensive survey on jury selection procedures in the fifty states and the federal system).

[17] *See* Stephen A. Saltzburg & Mary Ellen Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 346-48 (1982). A "true" cross-section would require jurors of every group, including consideration of factors such as racial, ethnic, economic, or religious.

[18] VAN DYKE, *supra* note 16, at 20.

[19] *Id*.

[20] *See id*. at 258-62.

[21] *See generally id*. at 111-37 (discussing the various reasons jurors are able to escape jury duty).

defendant, the prosecution, or the case, and who thus might threaten the jury's impartiality."[22] The function of the challenge system, both causal and peremptory challenges, is "to eliminate those who are sympathetic to the other side, hopefully leaving only those biased *for* [the litigant]."[23] A party's ability to impanel a jury it wants is generally limited by two factors: (1) for causal challenges, success in proving a juror's bias to the judge's satisfaction; and (2) the number of peremptory challenges available and how they are exercised.[24]

Military criminal practice also features both challenges for cause and peremptory challenges.[25] Peremptory challenges are, by definition, challenges for which no cause or basis need be stated.[26] Each party is entitled to one peremptory challenge.[27] Challenges for cause, by contrast, are unlimited in number.[28] Given the preselection of a panel by the convening authority, the exercise of for-cause challenges and the peremptory challenge is the only means left to the parties to shape a panel. Some argue that by virtue of being able to select the members *ab initio*, the convening authority has already shaped the composition of the panel and, very likely, the outcome of the trial.[29] Unlike jury selection in

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[22] *Id*. at 139.

[23] Barbara Allen Babcock, "*Voir Dire: Preserving 'Its Wonderful Power*,'" 27 STAN. L. REV. 545, 551 (1975).

[24] VAN DYKE, *supra* note 16, at 140.

[25] MCM, *supra* note 4, R.C.M. 912(f), R.C.M. 912(g).

[26] *See id*. R.C.M. 912(g)(1), discussion.

[27] *See* UCMJ art. 41(b)(1) (2002).

[28] UCMJ art. 41(a)(1) and MCM, *supra* note 4, R.C.M. 912. Because neither of these provisions has an explicit limitation on the number of for-cause challenges, the inference is that there is none. Further, RCM 912(f)(1) makes it clear that "a member shall be excused for cause" when the evidences bias. *Id*. R.C.M. 912(f)(1)(M), (N).

[29] *See* United States v. Carter, 25 M.J. 471, 478 (C.M.A. 1988) (Cox, J., concurring). In *United States v. Carter*, Judge Cox opined that the government "has the functional equivalent of an unlimited number of peremptory challenges" when selecting members in accordance with Article 25, UCMJ. *See id.* Almost ten years after Judge Cox's opinion in *Carter*, Judge Effron opined that given the structural differences between civilian trials and trials by court-martial, "the ability of an accused to shape the composition of a court-martial is relatively insignificant compared to the influence of the convening authority and trial counsel." United States v. Witham, 47 M.J. 297, 304 (1997) (Effron, J., concurring). This argument assumes that the convening authority selects panels with an outcome in mind and does so in a *prosecutorial* function, rather than in a *justice* function; that is, to determine what occurred *beyond a reasonable doubt*, and to assess criminal liability, if any. This opinion also assumes that the outcome is predetermined and that a trial is merely one stop on the railroad of convicting an accused. The convening authority *must* select members in accordance with Article 25, but is further confined by custom and

the civilian sector, with its typically larger number of available peremptory challenges,[30] the process of seating a panel is more akin to member deselection than member selection.[31] Using the tools provided by the *Manual for Courts-Martial* (MCM), the parties attempt to shape the "impartial" fact finders into a panel *partial to their respective cases*.

This article focuses on the exercise of peremptory challenges to answer the question of whether the military peremptory challenge should be abolished. To that end, this article analyzes the genesis of peremptory challenges in civilian practice and how that practice influences the establishment and practice of peremptory challenges in the military court-martial system. Specifically, this article examines the following issues:

1. The historical development of the peremptory challenge, as inherited from the common law,[32] into today's modified peremptory challenge[33] and how that history informs the modern practice in courts-martial practice;

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practicality. *See* FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, 2 COURT-MARTIAL PROCEDURE § 15-55.10 (2d ed. 1999).

[30] *See* VAN DYKE, *supra* note 16, at 282-84 (listing all states' number of peremptory challenges for each party and type of case).

[31] *See id*. Even in the civilian system, as recognized in *Pointer v. United States*, 151 U.S. 396, 412 (1894), "The right of peremptory challenge, this court said in *United States v. Marchant*, and in *Hayes v. Missouri*, is not itself a right to select, but a right to reject jurors" (internal citations omitted). This difference in method was recognized in *United States v. Moore*:

> In reality, "petit jury" selection for trial by court-martial is done by the convening authority. He is provided a "jury venire" by the Army, composed of personnel assigned to this command. He selects the "jury" from his "venire" by a reverse striking, i.e. by selecting a given number rather than striking all over the given number. The single peremptory challenge therefore may be used to finally form the court-martial panel, but, it is not a jury selection method as exists . . . in civilian jurisdictions.

26 M.J. 692, 699 n.7 (A.C.M.R. 1988).

[32] *See generally* 4 WILLIAM BLACKSTONE, THE COMMENTARIES ON THE LAWS OF ENGLAND 352-54 (New York, Harper & Brothers 1852) (discussing the procedure, reasons for, and number of peremptory challenges); Swain v. Alabama, 380 U.S. 202, 212-19 (1965) (discussing the long history of the peremptory challenge at common law and as implemented in the American judicial system).

[33] *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 146 (1994) (holding that peremptory challenge must be gender-neutral); Batson v. Kentucky, 476 U.S. 79, 84 (1986) (holding that peremptory challenge must be race-neutral).

2. The development of the peremptory challenge in the military justice system, paying particular attention to the parameters of the challenge as developed in case law, with further attention focused on the clear distinction between the federal and military practice of peremptory challenges (curative peremptory challenges); and

3. The roles of the jury as an institution[34] and whether those roles are translated into courts-martial practice.

This article concludes that the right to exercise peremptory challenges should be removed from Article 41, UCMJ. The peremptory challenge, once a challenge not requiring *any* explanation as to its exercise, is now a psuedo-causal challenge that must be justified in all but the most limited circumstances. Therefore, the "peremptory" nature of the challenge is no more. Further, as any judge advocate experienced in military justice knows, the use of peremptory challenges has devolved into an unseemly "numbers game," detracting from the solemnity of the process and giving the parties more power than should be permitted.[35] From a practical standpoint, as a result of the impact of *Batson* and its progeny, the challenge has been emasculated and serves no particularly useful function. From an aspirational point of view, the challenge should be abolished to ensure that discrimination, which has no place in a courtroom, does not occur.

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[34] *See* Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1052-1086 (1995) (discussing the roles of the jury in society).

[35] *See* ROBINSON O. EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES (1956); GILLIGAN & LEDERER, *supra* note 29, at § 15-58.00 ("Many counsel have been playing the 'numbers game' for years."). The appendix to this article provides a chart to display graphically the competing interests of the numbers game. *Contra* United States v. Newson, 29 M.J. 17, 21 (C.M.A. 1989) ("We do not subscribe to the myth of the numbers game."). It cannot be gainsaid that such considerations play a role in tactical decisions at trial. Each side attempts to shape a panel it believes will favor its case. As part of that strategy, if the opportunity presents itself (and there is no real need to exercise a peremptory for any other reason), it is very likely that a defense counsel, who routinely decides whether to exercise his right to a peremptory *after* the government does, will make a determination whether it will be statistically easier to have to convince one or two more members of his case to achieve a "not guilty" verdict.

II. Historical Background

A. The Common Law History of Peremptory Challenges

At their origin in English law,[36] juries were "presentment" juries, meaning their function was to investigate and accuse;[37] the concept of impartiality did not have a place. There were only three recognized challenges for cause: being related to the defendant by blood, being related to the defendant by marriage, or having an economic interest.[38] As juries were called upon to make findings of guilt, they evolved into fact-finders; and thus, correspondingly, the need for impartiality also evolved.[39] "By the end of the fifteenth century, the notion that jurors had to be impartial was firmly entrenched in the English common law."[40]

Since their inception and until the English parliament reacted, the King effectively handpicked juries.[41] By virtue of having picked the jurors, the Crown could remove someone deemed unacceptable, thus claiming for itself an unlimited number of peremptory challenges.[42] "In 1305, the English Parliament decided that this type of jury—which was not impartial but rather biased toward the prosecution—was obnoxious to their idea of justice."[43] Parliament, therefore, passed a statute that limited challenges by the Crown to causal challenges, eliminating the Crown's peremptory challenges altogether,[44] and giving criminal

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[36] For a survey of the history of jury trials *see, e.g.*, Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 812-19 (1997).

[37] *See* William T. Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 AM. CRIM. L. REV. 1391, 1407 (2001) (citing LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 14 (2d ed. 1988)).

[38] *See id.* at 1406.

[39] *See id*. at 1407.

[40] *Id*. at 1407-08.

[41] *See id*. 1408.

[42] *See* VAN DYKE, *supra* note 16, at 147. Peremptory challenges appeared in England between 1250 and 1300. *See* Pizzi & Hoffman, s*upra* note 37, at 1412.

[43] VAN DYKE, *supra* note 16, at 147 (footnote omitted).

[44] *See id*. (citing Statute of 33 Edw. I, Stat. 4 (1305)). The language of the statute is of some interest in disclosing the challenge's nature:

> That from henceforth, notwithstanding it be *alleged by them that sue for the King, that the Jurors of those Inquests, or some of them, be not indifferent for the King*, yet such Inquests shall not remain untaken; but if they that sue for the King will challenge any of those jurors, they shall assign of their Challenge a Cause Certain and the

defendants the right to challenge jurors peremptorily.[45] The accused was permitted to exercise thirty-five peremptory challenges; that number was reduced to twenty except in cases of treason in 1530.[46] Some believe that the peremptory challenge was actually a disguised for-cause challenge.[47] In the ancestral home of the peremptory challenge, its use was extremely rare for hundreds of years.[48] Notwithstanding its rare use, William Blackstone, in his *Commentaries on the Laws of England*, called the defendant's right to peremptory challenges "a provision full of that tenderness and humanity to prisoner's [sic] for which our English laws are justly famous."[49] Unlike the causal challenge, the peremptory challenge is "an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all."[50] The challenge exists because:

> As every one must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, that want of which might totally disconcert him, the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike.[51]

> truth of the same Challenge shall be enquired of according to the custom of the court . . . .

Quoted in Hoffman, *supra* note 36, at 846 (emphasis added). Hoffman posits that this language "corroborates the idea that the King's unlimited peremptories were actually unarticulated challenges for cause." *Id*.

[45] *See* VAN DYKE, *supra* note 16, at 147.

[46] *See id*. Hoffman notes the decreasing number of peremptory challenges in England through the years until 1989, peremptory challenges were discarded entirely. *See* Hoffman, *supra* note 36, at 822.

[47] *See infra* note 48 and accompanying text.

[48] *See* Hoffman, *supra* note 36, at 820-21. Hoffman notes that because English communities were so small, the lawyers, judges, and jurors knew each other well, so when a juror was unfit for service, all participants recognized that the juror was disqualified for cause. *See id*. at 846. Most interestingly, Hoffman also believes that when Parliament failed to kill this remnant of royal infallibility, it passed "the defective gene" to the American version of the peremptory challenge—that gene being a corollary to the axiom of royal infallibility. *See id*.

[49] 4 BLACKSTONE, *supra* note 32, at 353.

[50] *Id*. at 352-53.

[51] *Id*. at 353.

Blackstone also assigned a second reason for the challenge: "Because upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases peremptorily to set him aside."[52] As will be shown, these same arguments are advanced to this day to maintain the peremptory challenge.

Although the Crown was not, by statute, permitted to exercise peremptory challenges, the Crown's advocates devised a method, approved by the courts, of "standing aside," a practice whereby courts allowed the Crown's attorneys to ask potential jurors to stand aside without giving reason as to why.[53] In cases where a jury was impaneled from the remaining jurors, those standing aside were permanently dismissed.[54] "Court practice thus allowed the [C]rown to continue a procedure that Parliament had explicitly eliminated."[55]

B. The American Peremptory Challenge Experience

The practice of peremptory challenges by an accused was carried over to the British Colonies in North America as part of the common law.[56] Even the practice of standing aside continued in some states and some others permitted the prosecution to exercise peremptory challenges.[57] As states permitted the prosecution peremptory challenges, the practice of standing aside jurors fell into obsolescence.[58] For federal courts, Congress codified the practice of peremptory challenges in 1790, granting a federal criminal defendant thirty-five peremptories in treason cases and twenty in all capital cases.[59] In the nineteenth century, the government's exercise of the peremptory challenge was the rule rather than the exception.[60] State courts tracked the development of the

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[52] *Id*. This language can be read to support an argument that the challenge is, at least in one of its roots, curative. *See infra* Part IV.C.
[53] *See* VAN DYKE, *supra* note 16, at 148.
[54] *See id*.
[55] *Id*.
[56] *See id*.
[57] *See id*. at 149.
[58] *See id*. at 150.
[59] *See* Hoffman, *supra* note 36, at 825 (citing 1 Stat. 119 (1790)).
[60] *See* VAN DYKE, *supra* note 16, at 150. Hoffman notes that in 1865, Congress gave a federal criminal defendant in non-capital cases ten peremptory challenges and the

challenge along the same lines as in federal court. "By 1790, most states recognized by statute a defendant's right to some peremptory challenges" and most states shared the view of Congress that a government's right to peremptory challenges was founded in common law.[61] By the twentieth century, both the defendant's and the government's right to peremptory challenges were firmly established.[62]

The government's right to peremptory challenge, however, brought with it the specter of discrimination. That discrimination, however, was not immediately in use: "Until Reconstruction, the peremptory challenge does not appear to have been used extensively to exclude disfavored racial or ethnic groups, probably for the simple reason that . . . those groups were excluded quite effectively at the front end by restrictive laws on juror qualification."[63] With the Civil War and Reconstruction, however, the prosecution's use of the peremptory challenge took a more ominous turn and became "an incredibly efficient final racial filter."[64] Justice Goldberg noted in dissent in *Swain v. Alabama*[65] that no African-American had sat on any Talladega County jury, civil or criminal, in living memory.[66] Peremptory challenges thus have a pernicious history of being used discriminatorily, that history rectified only through the pronouncements of the U.S. Supreme Court (Court). The "right" of the peremptory challenge, not founded in the Constitution,[67] was going to get

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prosecution two. The same statute decreased the number of peremptory challenges to a capital defendant from thirty-five to twenty and granted the prosecution five. The numbers varied throughout the next several years until the adoption of the Federal Rules of Criminal Procedure (FRCP). Rule 24(b) equalized the number for each side at twenty in capital cases. *See* Hoffman, *supra* note 36, at 826; *see also* FED. R. CRIM. P. 24(b).

[61] Hoffman, *supra* note 36, at 827.

[62] *See* VAN DYKE, *supra* note 16, at 150.

[63] Hoffman, *supra* note 36, at 827.

[64] *Id*. at 829. For example, "For almost a century after the Civil War, blacks rarely appeared on jury lists at all in the South, and when—after years of litigation—they were finally included on the qualified list, the prosecution frequently used its peremptory challenges to exclude them from the jury box." VAN DYKE, *supra* note 16, at 150 (footnote omitted). Hoffman notes a parallel between the use of the peremptory challenge and the rise of civil rights: "While the English version of the peremptory challenge was withering from disuse, the American version was vigorously and comprehensively being applied in attempts to stem the inevitable tide of civil rights." Hoffman, *supra* note 36, at 827.

[65] 380 U.S. 202 (1965)

[66] *See id.* at 231-32 (Goldberg, J., dissenting).

[67] *See generally* Ross v. Oklahoma, 487 U.S. 81, 89 (1988) (reaffirming that "[b]ecause peremptory challenges are a creature of statute and are not required by the Constitution, it is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise" (citations omitted)).

an overhaul, to the point in the military context, of hardly being recognizable as a peremptory challenge at all.

III. The Rise of the Modified Peremptory Challenge

Because the peremptory challenge was used in a discriminatory fashion in civilian criminal trials, the Court stepped in to rid jury trials of any specter of racial or gender discrimination, because such discrimination violated the Equal Protection Clause of the Fourteenth Amendment and due process under the Fifth Amendment.[68] As a result of the Court's forays into the previously unexplained peremptory challenge, the challenge is a shell of its former self. Before the Court's efforts, the peremptory challenge served as a vehicle for trial lawyers' experience, who, relying on that experience, attempted to discern which jurors were inclined to view their cases unfavorably. Because the peremptory challenge was outside judicial scrutiny, litigants avoided having to express that which was often unexplainable. Equally important, however, is the clear empirical evidence in criminal cases that the peremptory challenge was being used not as a means to serve a lawyer's intuition, but as a means of outright discrimination.[69] The Court has held that group identifiers, by themselves, are not sufficient indicia as to jurors' ability to sit as fair and impartial finders of fact.[70] The first step toward correcting the problem of discriminatory peremptory challenges came in *Swain v. Alabama*[71] in 1965. By the time of *Swain*, "the peremptory challenge was well entrenched as the last line of defense against the increasing pressures for desegregation in the venire."[72] In

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[68] "No state shall deny any person equal protection of the laws nor deny due process of law." U.S. CONST. amend. XIV, § 1. The Fifth Amendment provides in pertinent part that no person shall "be deprived of life, liberty, or property without due process of law." *Id.* amend. V.

[69] As an example of such evidence, Hoffman quotes the Alabama Supreme Court in its opinion in *Swain v. State*, 156 So. 2d 368, 375 (Ala. 1963), *aff'd*, 380 U.S. 202 (1965): "Negroes are commonly on trial venires but are always struck by attorneys in selecting the trial jury." Hoffman, *supra* note 36, at 829; *see also* Miller-El v. Cockrell, 537 U.S. 322, 335 (2003) (noting, for example, that up until 1976, the Dallas County District Attorney's Office used a 1963 manual instructing its attorneys to use peremptory challenges to strike minority members).

[70] *See*, *e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 137 (1994) ("[W]e consider whether peremptory challenges based on gender stereotypes provide substantial aid to a litigant's effort to secure a fair and impartial jury.").

[71] 380 U.S. 202 (1965).

[72] Hoffman, *supra* note 36, at 831.

upholding the lower court's ruling on the case, the Court specified limits–if only theoretical–on the use of the peremptory challenge.[73]

A. *Swain v. Alabama*

The state of Alabama tried Robert Swain, an African-American, for rape; the jury convicted him and sentenced him to death.[74] At the beginning the trial, the petit venire had eight African-Americans.[75] During the process of jury selection, the judge excused two African-American jurors and the prosecution struck the remaining six using peremptory challenges.[76] Alabama asserted "its system of peremptory strikes—challenges without cause, without explanation and without judicial scrutiny—affords a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial."[77]

As a starting point, the majority noted, "Although a Negro defendant is not entitled to a jury containing members of his race, a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause."[78] The Court, however, stated, "purposeful discrimination may not be assumed or merely asserted. It must be proven . . . ."[79] After reviewing the history of the peremptory challenge as exercised both by the prosecution and defendant at both the federal and state levels,[80] the Court concluded that "[t]he persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury."[81] The majority then opined that the function of the peremptory challenge:

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[73] *See* VAN DYKE, *supra* note 16, at 150.
[74] *See Swain*, 380 U.S. at 203.
[75] *See id*. at 205.
[76] *See id*.
[77] *Id.* at 211-12.
[78] *Id.* at 203-04.
[79] *Id.* at 205 (citations omitted).
[80] *See id.* at 212-18.
[81] *Id*. at 219. Such reasoning appears dubious. Merely noting the long practice and pervasiveness of a practice is not persuasive when considering the practice's *necessity*.

> is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. . . . Indeed the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the *voir dire* and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause.[82]

The language of the Court on this point harkens directly back to the thoughts of Blackstone in his analysis of the justification for the practice.[83]

Understanding that the peremptory challenge is "exercised without a reason stated, without inquiry and without being subject to the court's control," the Court acknowledged that peremptory challenges were "frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned."[84] The Court concluded:

> With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. *To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge*. The challenge, *pro tanto*, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards.[85]

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[82] *Id.* at 219-20.
[83] *See supra* text accompanying notes 49-52.
[84] *Swain*, 380 U.S. at 220.
[85] *Id.* at 221-22 (emphasis added).

Thus determining that the peremptory challenge should be exercised without scrutiny, the Court held that the Constitution does not require an examination into the prosecutor's reason for exercising peremptory challenges. Further,

> The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it.[86]

The majority placed a heavy burden on a criminal defendant to show improper discrimination in the use of peremptory challenges. The burden on the defendant was to show a systematic striking of minority members from the venire over a period of time.[87] Any Fourteenth Amendment claim, the Court noted, would take on significance if a defendant could show that no African-Americans ever served on petit juries, even when selected as qualified jurors and who have survived challenges for cause.[88] In these circumstances, the Court conceded that "[s]uch proof might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of a particular case on trial and that the peremptory system is being used to

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[86] *Id*. at 222.

[87] *See id*. at 227. It must be borne in mind that proof that minorities were never selected to sit as members of the venire is distinct from the exercise of peremptory challenges. The majority addressed this distinction noting that

> Total exclusion of Negroes by the state officers responsible for selecting names of jurors gives rise to a fair inference of discrimination on their part, an inference which is determinative absent sufficient rebuttal evidence. But this rule of proof cannot be woodenly applied to cases where the discrimination is said to occur during the process of peremptory challenge of persons called for jury service.

Id. at 226-27.

[88] *See id*. at 223.

deny" African-Americans the right to sit as jurors.[89] It is this use of peremptory challenges that "the peremptory challenge is not designed to facilitate or justify."[90]

The Court, although standing squarely in favor of the unfettered peremptory challenge, perhaps without even realizing it, struck a significant blow against the peremptory challenge. The majority starkly demonstrated the tension between the unfettered exercise of the peremptory challenge and the dictates of the Fourteenth Amendment. Given the right facts, the peremptory challenge, as commonly understood, would have to stand aside. Quite clearly, the peremptory challenge was used as a vehicle for discrimination, depriving African-Americans of "the same right and opportunity to participate in the administration of justice" enjoyed by others.[91] The *Swain* Court, however, was loath to change the challenge on the facts of the case. The majority noted, "[W]e think it is readily apparent that the record in this case is not sufficient to demonstrate that the rule has been violated by the peremptory system as it operates in Talladega County."[92] The Court lacked the courage to modify the long-established tradition of using peremptory challenges. This case was, however, a harbinger of things to come. For discrimination to end, the nature of the challenge had to change.

B. *Batson v. Kentucky*[93]—The End of Racial Discrimination in Jury Selection?

Twenty-one years later, the Court re-examined its holding in *Swain* in the case of *Batson v. Kentucky*. The Court plainly framed the issue as that of examining "the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury."[94] With twenty-one years of history as evidence, the Court determined that *Swain*'s burden of showing repeated striking of blacks over a number of cases on a defendant was "crippling," resulting in the

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[89] *Id.* at 224.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] 476 U.S. 79 (1986).
[94] *Id.* at 82.

prosecutor's peremptory challenges being "immune from constitutional scrutiny."[95] No more.

The state of Kentucky indicted the petitioner, an African-American, on charges of second-degree burglary and receipt of stolen goods.[96] After the judge conducted *voir dire* and challenges for cause were exercised, the prosecutor exercised his four peremptory challenges against the remaining four African-Americans on the venire, resulting in an all white jury.[97] The petitioner's defense counsel moved to discharge the jury.[98] He argued that the prosecutor's exercise of his peremptory challenges against the African-American venire men violated his client's Sixth and Fourteenth Amendment right "to a jury drawn from a cross section of the community."[99] Denying the petitioner's motion, the trial judge ruled that the parties could exercise their peremptory challenges to "strike anybody they want to."[100] The jury convicted petitioner on both counts.[101] Pressing his claim in the Kentucky court, the petitioner argued that the facts showed that the prosecutor engaged in a pattern of discriminatory challenges, violating his Sixth Amendment and state constitutional rights.[102] The Kentucky Court affirmed the conviction.[103]

In deciding the issue before it, the majority made a number of important points regarding peremptory challenges and a defendant's right to a fair and impartial jury. The Court recognized "that the peremptory challenge occupies an important position in our trial procedures,"[104] though the peremptory challenge is confined by the "mandate of equal protection."[105] Just where the balance was between a challenge not subject to judicial scrutiny and the selection of a jury free from

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[95] *Id*. at 92-93.
[96] *See id*. at 82.
[97] *See id*. at 82-83.
[98] *See id*. at 83.
[99] *Id.*
[100] *Id*. (quoting the trial judge).
[101] *Id*.
[102] *See id*. at 83. Batson argued that the prosecutor's conduct violated his rights under the Sixth Amendment and § 11 of the Kentucky Constitution to a jury drawn from a cross-section of the community. *See id.* He also contended that the facts showed that the prosecutor engaged in a patter of discriminatory challenges in violation of equal protection. *See id*. at 83-84. Before the Supreme Court, however, he did not press a claim under the Equal Protection Clause because of the Court's decision in *Swain*. *See id*. at 84-85 n.4.
[103] *See id.* at 84.
[104] *Id*. at 98.
[105] *Id*. at 99.

discrimination was decided in favor of the latter. The *Batson* Court recognized that in prior cases, "[t]he Court sought to accommodate the prosecutor's historical privilege of peremptory challenge free of judicial control, and the constitutional prohibition on exclusion of persons from jury service on account of race."[106] The Court noted that "the Constitution does not confer a right to peremptory challenges, those challenges traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury."[107] Notwithstanding the apparent historical importance of the peremptory challenge to the maintenance of the criminal justice system, the Court struck a decisive blow against the traditional practice of peremptory challenges.

The 7-2 majority expressly overruled *Swain* insofar as it placed a "crippling" burden on the defendant to show purposeful discrimination in the use of peremptory challenges over a period of time.[108] The Court laid out a three-part test. First, a defendant must make a *prima facie* case that a peremptory challenge was based on race.[109] Second, if that showing is made, the burden of proof switches to the prosecution, which must show a race-neutral reason for the exercise of the peremptory challenge.[110] Third, the trial court must then determine "if the defendant has established purposeful discrimination."[111]

The first two parts of the test have their own particular points that merit discussion. Recalling the prior "crippling burden" on the defendant, the Court held that to make a *prima facie* case, the defendant need only show "purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial"[112] rather than the much heavier burden of showing strikes over a period of time. In meeting his burden, the defendant is required to show that he is a member of a cognizable racial group and that the prosecutor exercised a peremptory challenge against a venire member of the defendant's race.[113] The defendant then "is entitled to rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a

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[106] *Id*. at 91 (internal citations omitted).
[107] *Id*. (internal citations omitted).
[108] *See id*. at 100 n.25.
[109] *See id.* at 96.
[110] *See id*. at 97.
[111] *Id*. at 98.
[112] *Id*. at 96.
[113] *See id*.

mind to discriminate.'"[114] The defendant then "must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race."[115] The Court then declared that this combination of facts "raises the necessary inference of purposeful discrimination."[116] With respect to the requirement that the State proffer a neutral explanation for the challenge, the Court recognized that the requirement "imposes a limitation in some cases on the full peremptory character of the historic challenge," but noted that that the explanation "need not rise to the level justifying exercise of a challenge for cause."[117] The Court then noted two points that a prosecutor could not use in support of a neutral explanation: that a juror would be partial because of shared race and an affirmation of his good faith.[118] The bottom line for the Court and for the peremptory challenge was a lightening of the defendant's burden and a large step toward taking the peremptory challenge as an arrow of discrimination out of the state's quiver.

Answering the state's arguments regarding the "vital importance" of the historical peremptory challenge, the Court denied that the change it made to the peremptory challenge practice would "eviscerate the fair trial values served by the peremptory challenge."[119] The Court, in strong terms, reaffirmed the principle from *Swain*: "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors

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[114] *Id*. (citation omitted).
[115] *Id.*
[116] *Id*.
[117] *Id*. at 97.
[118] *See id*. at 97-98.
[119] *Id.* at 98. Chief Justice Burger in dissent, joined by Justice Rehnquist, argued that "the Court sets aside the peremptory challenge, a procedure which has been part of the common law for many centuries and part of our jury system for nearly 200 years." *Id*. at 112 (Burger, C.J., dissenting). It should be noted that the Chief Justice dissented primarily on procedural grounds. In the petitioner's brief and argument, Batson disclaimed any reliance on the Fourteenth Amendment as a basis for reversal, relying instead on a Sixth Amendment argument. *See id*. at 99. Arguing that since the petitioner did not raise an equal protection argument either at the state supreme court level or before the Court, the Chief Justice called the majority's decision in the case on such a basis "truly extraordinary." *Id*. at 112. Drawing a distinction between discrimination in a venire summons and a venire at a particular trial, he also noted, however, that an "unadulterated equal protection analysis is simply inapplicable to peremptory challenges exercised in any particular case. A clause that requires a minimum 'rationality' in government actions has no application to 'an arbitrary and capricious right.'" *Id*. at 123-24.

in the administration of justice violates the Equal Protection Clause."[120] The Court placed the inherent tension between the unfettered peremptory challenge and the Equal Protection Clause before the world to see and came down firmly on the side of removing discrimination from the courtroom. The reality of *Batson* is that the peremptory challenge, which previously needed no explanation, now was subject to judicial scrutiny for evidence of prejudice to protect a juror's right to participate in the administration of justice—and concomitantly the defendant's right to a fair trial—under the Fourteenth Amendment.[121] This case represents a radical overhaul.

C. *Powers v. Ohio*[122] and the Expansion of *Batson*

The boundaries of *Batson*, in which the Court limited its analysis and holding to cases involving the exclusion of members of venire of the same racial group as the defendant,[123] were expanded five years later in *Powers v. Ohio* when the Court addressed whether the exclusion of African-American veniremen by peremptory challenge in the trial of a white man violated the Equal Protection Clause of the Fourteenth Amendment. Powers stood trial for two counts of aggravated murder and one count of attempted aggravated murder.[124] Each time the prosecutor peremptorily challenged an African-American member of the venire the defense objected, each time citing *Batson*.[125] Each time, the trial judge overruled his objections.[126] The jury convicted Powers of murder, aggravated murder, and attempted aggravated murder.[127] Powers appealed his conviction on both Sixth Amendment (Ohio violated his right to a jury composed of a fair cross-section of the community) and Fourteenth Amendment grounds.[128] The state courts affirmed his conviction.[129]

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[120] *Id.* at 84 (quoting Swain v. Alabama, 380 U.S. 202, 203-04 (1965)).
[121] The majority noted that the "Fourteenth Amendment protects an accused throughout the proceedings bringing him to justice." *Id*. at 88.
[122] 499 U.S. 400 (1991).
[123] *See Batson*, 476 U.S. at 96.
[124] *See Powers*, 499 U.S. at 402.
[125] *See id.* at 403.
[126] *See id*. Of interest, the record apparently neither disclosed whether there were any remaining African-Americans on Powers' petit jury, nor whether Powers exercised his peremptory challenges against any African-Americans. *See id*.
[127] *See id*.
[128] *See id*.
[129] *See id*.

The Court held:

> [T]he Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civic life. An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race.[130]

The Court, therefore, took a logical step in determining the extent to which the Fourteenth Amendment prohibits the exclusion of a member of a petit jury on the basis of race. If race is not be considered in the selection of members of petit jury, it should not make any difference if the defendant is a member of the same racial group as the excluded juror. In response to the argument from the government that, as a white man, Powers could not object to the exclusion of prospective African-American jurors, the Court stated, "This limitation on a defendant's right to object conforms neither with our accepted rules of standing to raise a constitutional claim nor with the substantive guarantees of the Equal Protection Clause and the policies underlying federal statutory law."[131] The harm the Court sought to redress was "racial discrimination in the qualification or selection of jurors" that "offends the dignity of persons and the integrity of the courts."[132] As a matter of traditional peremptory challenge practice, Justice Scalia, in dissent, was correct in noting that the Court's decision in *Powers* "[t]o affirm that the Equal Protection Clause applies to strikes of individual jurors is effectively to abolish the peremptory challenge."[133] To date, however, the Court has not gone that far.

D. *J.E.B. v. Alabama* ex rel. *T.B.*[134] and the Further Expansion of *Batson*

In *J.E.B.*, the Court extended the reasoning of *Batson* to the area of gender discrimination in jury selection. This case involved the use of

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[130] *Id.* at 409.
[131] *Id.* at 406.
[132] *Id.* at 402.
[133] *Id.* at 425 (Scalia, J., dissenting).
[134] 511 U.S. 127 (1994).

nine out of ten peremptory challenges by the State of Alabama to exclude male jurors from sitting on a paternity case.[135] The petitioner J.E.B., used all but one of his peremptory challenges to exclude female jurors.[136] Clearly, both sides were engaging in the "trafficking of stereotypes,"[137] with each side using stereotypes to justify its conclusions that women presumably would be more favorable toward the State's case and the men would be more favorably inclined toward the petitioner's case.[138] The majority refused to conclude that "gender alone is an accurate predictor of juror's attitudes,"[139] instead holding that "gender, like race, is an unconstitutional proxy for juror competence and impartiality."[140] Connecting the case to *Batson*, the Court observed, "Failing to provide jurors the same protection against gender discrimination as race discrimination could frustrate the purpose of *Batson* itself" because peremptory challenges were used often against minority women.[141] And as in *Batson*, the Court created a procedure for judicial review of a peremptory challenge based on gender, which is identical in practice to *Batson* challenges.[142]

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[135] *See id.* at 129 (emphasis added). Of interest, and as pointed out by Justice Scalia in his dissenting opinion, the majority spilled much ink regarding the exclusion of *women* from jury duty, although the issue before the Court was the propriety of excluding *men* from the jury based solely on gender. *See id*. at 156-63 (Scalia, J., dissenting).

[136] *See id*. at 129.

[137] Babcock, *supra* note 23, at 553.

[138] *See J.E.B.*, 511 U.S. at 129. The Court made note of the Respondent's argument on this point quoting from his brief:

> Far from proffering an exceptionally persuasive justification for its gender-based peremptory challenges, respondent maintains that its decision to strike virtually all the males from the jury in this case "may reasonably have been based upon the perception, supported by history, that men otherwise totally qualified to serve upon a jury in any case might be more sympathetic and receptive to the arguments of a man alleged in a paternity action to be the father of an out-of-wedlock child, while women equally qualified to serve upon a jury might be more sympathetic and receptive to the arguments of the complaining witness who bore the child."

Id. at 137-38.

[139] *Id*. at 139.

[140] *Id*. at 129.

[141] *Id*. at 145.

[142] *See id*. at 144-45. The party alleging gender-based discrimination in the use of a peremptory challenge must make a *prima facie* case, which once made, requires the challenging party to offer a gender-neutral reason for the peremptory challenge. *Id.*

The Court struck a powerful blow in favor of the jury as an institution designed to promote democratic values writing, "All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination."[143] The majority also addressed the likely effect of the holding on peremptory challenges generally. Concluding that the holding would not "imply the elimination of all peremptory challenges," the majority held that parties could still remove jurors thought to be partial to one side, but parties could not use gender "as a proxy for bias."[144] The Court also noted,

> If conducted properly, *voir dire* can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise. *Voir dire* provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently.[145]

Of interest is Justice O'Connor's concurring opinion. She agreed with the Court that the Equal Protection Clause forbids "the government from excluding a person from jury service on account of that person's gender" but stated that the holding should be limited to the *government's* use of gender-based peremptory challenges.[146] With respect to the reach of the Equal Protection Clause, she wrote that the Clause only prohibits state actors from acting discriminatorily.[147]

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[143] *Id.* at 141-42.
[144] *Id*. at 143.
[145] *Id*. at 143-44.
[146] *Id*. at 147 (O'Connor, J., concurring) (emphasis in original).
[147] *See id*. at 150 (O'Connor, J., concurring). Justice O'Connor also believed that the cases *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (observing that litigants in a civil trial were state actors for purpose of Equal Protection analysis and thus cannot exercise peremptory challenges in a racially discriminatory manner) and *Georgia v. McCollum*, 505 U.S. 42 (1992) (extending *Batson*'s prohibition of racially discriminatory use of peremptory challenges to criminal defendants, who are also state actors for Equal Protection purposes) were wrongly decided. A review of both of these cases cited by Justice O'Connor clearly shows that the Court places a high value on the jury as an institution and the importance of the perception of justice. Indeed, as Justice Thomas noted in his concurrence in *McCollum*, "[W]e have exalted the rights of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death." *Id*. at 62 (Thomas, J., concurring). Promotion of the jury at the expense of a defendant's rights has a tremendous impact on

Justice O'Connor touched on the gender-based peremptory challenge issue as well. She understood the argument that the peremptory challenge's primary purpose is to assist in the selection of an impartial jury.[148] She noted,

> Our belief that experienced lawyers will often correctly intuit which jurors are likely to be the least sympathetic, and our understanding that the lawyer will often be unable to explain the intuition, are the very reason we cherish the peremptory challenge. But, as we add, layer by layer, additional constitutional restraints on the use of the peremptory, we force lawyers to articulate what we know is often inarticulable.[149]

She minced no words in explaining that gender *does* matter:

> Today's decision severely limits a litigant's ability to act on this intuition, for the import of our holding is that any correlation between a juror's gender and attitudes is irrelevant as a matter of constitutional law. But to say that gender makes no difference as a matter of law is not to say that gender makes no difference as a matter of fact.[150]

She concluded that extending *Batson* to gender was to take a step closer to eliminating the peremptory challenge and diminishing "the ability of litigants to act on sometimes accurate gender-based assumptions about juror attitudes."[151] If one remembers how Blackstone used and extolled the challenge,[152] it is hard to square the notion of a peremptory challenge and judicial scrutiny for its use. By definition, a peremptory challenge should be free of such scrutiny. As interpreted by the Court, however, due process and equal protection *vis-à-vis* potential jurors outweigh the peremptory challenge as inherited from the common

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the peremptory challenge. If the value of the jury as an institution takes priority over the rights of an accused to "choose" his jury, the peremptory challenge necessarily suffers.

[148] *See J.E.B.*, 511 U.S. at 148 (O'Connor, J., concurring) ("Because I believe the peremptory remains an important litigator's tool and a fundamental part of the process of selecting impartial juries, our increasing limitation of it gives me pause.").

[149] *Id*.

[150] *Id.* at 149.

[151] *Id*. at 149-50.

[152] *See supra* text accompanying notes 49-52.

law. In practice, the peremptory challenge has become another species of causal challenge, the propriety of which is to be decided by a trial judge and subject to scrutiny by appellate courts. That the peremptory challenge has changed is the price for ensuring that all persons are able to participate as equals in the administration of justice.

E. The Meaning of It All

As a matter of normative judgment, due process and equal protection cannot countenance purposeful discrimination in the selection of juries. The Court balanced the peremptory challenge as practiced since the early days of the common law with the notions of what potential jurors and the parties to a case are entitled to as a matter of right. Underlying *Batson* and its progeny is an assumption that the jury system is fundamentally a public institution whose purpose is to further democratic governance. *Swain*, *Batson*, *Powers*, *McCollum*, and *J.E.B*. all stand, in progression, for the proposition that "[d]iscrimination in jury selection . . . causes harm to the litigants, *the community, and the individual jurors who are wrongfully excluded from participation in the judicial process.*"[153] From the early days of *Strauder v. West Virginia*,[154] the Court took steps to protect individuals coming before juries and, more importantly, those answering a jury summons, to be free from the effects of discrimination. The Court has placed the rights of *potential jurors* against racial or gender discrimination above the rights of an individual accused to shape the jury to his liking.[155] The pressing issue was just how far that juxtaposition went. As can be deduced, the concepts of due process and equal protection with respect to potential jurors have not found their outer limits.

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[153] *J.E.B.*, 511 U.S. at 140 (emphasis added). The Court has gone to great lengths to explain the harm to the potential juror and the system as a whole, but less time on the harm to the litigants.

[154] 100 U.S. 303 (1879). This case involved a former slave tried in West Virginia for murder. *See id.* at 304. Under West Virginia law, no one but a white man could sit on a grand or petit jury; thus, the jury that convicted Strauder was composed of only white men. *See id.* Declaring that the "very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine," the Court reversed the conviction. *Id*. at 308.

[155] *McCollum* is the best example of the subordination of the individual defendant to the interest of a potential juror. *McCollum*, 505 U.S. 42 (1992).

IV. The History and Practice of Peremptory Challenges in Courts-Martial

The foundation for the peremptory challenge in military practice is in Article 41, UCMJ and RCM 912 rather than the Constitution. The military peremptory challenge is a creature of statute, a right afforded the accused as a matter of due process. Unlike its civilian counterpart, the peremptory challenge in courts-martial practice is of relatively recent vintage.

A. The Genesis of the Uniform Code of Military Justice—The Articles of War

Military disciplinary codes generally developed from unwritten codes that trace their lineage back to the Greeks and Romans.[156] Throughout early English history, kings promulgated codes of conduct upon which the British Articles of War were eventually based.[157] An American version of the Articles of War, which appeared on June 30, 1775, was based on the then-effective British Articles of War.[158] The American Articles 32-53 covered many procedural aspects of courts-martial, oaths, and assembly of courts-martial,[159] but contained no provision for challenges, despite their existence in civilian law. The American Articles of War of June 30, 1775,[160] the additional Articles of November 7, 1775,[161] and the American Articles of War of September 20, 1776,[162] as amended by Articles enacted on May 31, 1786,[163] maintained the silence on challenges of any sort. Congress did not grant the right to challenge a member until the American Articles of War of April 10, 1806.[164] Article 71 provided, "[w]hen a member shall be challenged by a prisoner, he must state his cause of challenge, of which

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[156] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 17-19 (2d ed. 1920 reprint).
[157] *See id*. at 18-19.
[158] *See id*. at 22.
[159] 1 Jour. Cong. 90, *reprinted in* WINTHROP, *supra* note 156, at 956-57.
[160] *Id.* at 90, *reprinted in* WINTHROP, *supra* note 156, at 953-59.
[161] *Id.* at 959-60.
[162] *Id.* at 961-71.
[163] 4 Journals 649, *reprinted in* WINTHROP, *supra* note 156, at 972-75. The amendments repealed Section 14 of the September 20, 1776, Articles of War governing the Administration of Justice.
[164] Act of Apr. 10, 1806, 2 Stat. 359 (1806), *reprinted in* WINTHROP, *supra* note 156, at 976-85.

the court shall, after due deliberation, determine the relevancy or validity, and decide accordingly; and no challenge to more than one member at a time shall be received by the court."[165] Article 88 of the Articles of War of June 22, 1874[166] stated, "[m]embers of a court-martial may be challenged by a prisoner, but only for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time."[167] The Article was silent with respect to the government's ability to exercise challenges for cause. Winthrop noted that "[i]t is uniformly held, however, by the authorities that the same right may, and in a proper case should, be exercised by the prosecution . . . [r]esting, as such action really does, on long-continued *usage*, it is now too late to dispute its authority."[168] The system of casual challenges was maintained through the Articles of War of August 29, 1916: "[m]embers of a general or special court-martial may be challenged by the accused, but only for cause stated to the court."[169]

The June 4, 1920 Articles of War[170] evidenced a significant shift in the nature of challenges in military practice. Maintaining the existing language regarding challenges for cause,[171] Article 18 stated, "[e]ach side shall be entitled to one peremptory challenge; but the law member of the court shall not be challenged except for cause."[172] It is noteworthy that the proposed Article 23 gave the accused two peremptory challenges if before a general court-martial and one peremptory challenge if before a special court-martial.[173] The 1928 *MCM* for the Army indicated that the peremptory challenge "does not require any reason or ground therefore to

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[165] *Id*. at 982-83.

[166] Articles of War, 14 Stat. 228 (1874), *reprinted in* WINTHROP, *supra* note 156, at 986-96.

[167] *Id*. at 993.

[168] *Id*. at 206.

[169] Article of War 18, Act of August 29, 1916, Pub. L. No. 64-242, 39 Stat. 653 (1916).

[170] Article of War 18, Act of June 4, 1920, Pub. L. No. 66-242, 41 Stat. 787 (1920).

[171] Article 18 did add language stating that challenges for cause from the trial judge advocate should be "presented and decided before those by the accused are offered." *Id*. That practice continues today. *See* MCM, *supra* note 4, R.C.M. 912(g)(1).

[172] *Id*.

[173] *Establishment of Military Justice*, Hearing on S.64 *Before the Senate Subcommittee of the Committee on Military Affairs*: 66th Cong. First Session 591 (1919) (Brigadier General Walter A. Bethel, USA, who had served as a Judge Advocate for sixteen years when he testified before the Senate Committee on Military Justice, said "I think it is very important that the accused feel that he is getting justice, and there are frequently members of the court against whom no challenge for cause can be made, but whom the accused would like to have removed from the court as not fair-minded.").

exist or to be stated and may be used before, after, or during the challenges for cause, or against a member unsuccessfully challenged for cause, or against a new member, but can not be used against the law member."[174] While the Army took a considerable step toward mirroring challenge practice in the civilian criminal justice system, the Articles Governing the Navy did not contain a similar provision.[175]

The Uniform Code of Military Justice passed in 1950[176] unified military practice by giving the right to one peremptory challenge to the accused and government. Article 41(b) stated, "Each accused and trial counsel shall be entitled to one peremptory challenge, but the law officer shall not be challenged except for cause."[177] The explanation in the 1951 *MCM* regarding the exercise of peremptory challenges tracked the language from the Army 1928 MCM.[178] Paragraph 62*e* of the 1969 *MCM* provided:

> A peremptory challenge does not require any reason or ground therefor to exist or be stated. It may be used before, during, or after challenges for cause, or against a member unsuccessfully challenged for cause, or against a new member if not previously utilized in the trial. It cannot be used against the military judge. A member challenged peremptorily will be excused forthwith. In a joint or common trial each accused is entitled to one peremptory challenge.[179]

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[174] A MANUAL FOR COURTS-MARTIAL, U.S. ARMY ¶ 58d (1928). Of particular interest regarding challenges for cause, the *1928 Manual* notes:

> Courts should be liberal in passing upon challenges, but need not sustain a challenge upon the mere assertion of the challenger. The burden of maintaining a challenge rests on the challenging party. A failure to sustain a challenge where good ground is shown may require a disapproval on jurisdictional grounds or cause a rehearing because of error injuriously affecting the substantial rights of an accused.

Id. ¶ 58f.

[175] S. REP. NO. 486, at 2242 (1950).

[176] Pub. L. No. 81-506, 64 Stat. 108.

[177] *Id.* at 123.

[178] MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 62a (1951).

[179] MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 62*e* (1969) [hereinafter 1969 MCM].

The 1984 version of RCM 912(g)(1) provided:

> Each party may challenge one member peremptorily. Any member so challenged shall be excused. No party may be required to exercise a peremptory challenge before the examination of members and determination of any challenges for cause has been completed. Ordinarily the trial counsel shall enter any peremptory challenges before the defense.[180]

The discussion noted that "[n]o reason is necessary for a peremptory challenge."[181] The current *Manual*'s provision regarding the exercise of the challenge in RCM 912(g)(1) maintains the same language.[182] Notwithstanding the unambiguous language regarding the range of the challenge, the discussion notes, "Generally, no reason is necessary for a peremptory challenge," but does cite *Batson* as a limit on the exercise of the peremptory challenge.[183]

B. Early Military Case Law and Exercise of the Peremptory Challenge

Military case law surrounding the peremptory challenge remained stagnant until *Batson*, which injected additional litigation into the field. The early cases were framed in terms of having to use a peremptory challenge to remove a member who was subject to a causal challenge, which the law officer or military judge denied (also known as a curative peremptory challenge). In the case of *United States v. Shaffer*,[184] for example, the law officer ruled on a challenge for cause in violation of then Articles 41(a) and 51(a), UCMJ, which required that the court-martial vote by secret written ballot without the law officer and the challenged member being present.[185] The law officer denied the challenge for cause and the court-martial approved that decision.[186] The accused then exercised his "curative peremptory challenge."[187] The

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[180] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912(g)(1) (1984) [hereinafter 1984 MCM].
[181] *Id*. at discussion.
[182] MCM, *supra* note 4, R.C.M. 912(g)(1).
[183] *Id*. at discussion.
[184] 6 C.M.R. 75 (C.M.A. 1952).
[185] *See id.* at 76-77.
[186] *See id.* at 76.
[187] *See id*. at 77.

Court of Military Appeals (COMA) found error, but the error did not materially prejudice a substantial right of the accused: "In the record of this trial there is no hint of material injury to substantial rights. The officer [whom] defense counsel sought to avoid by challenge for cause was in fact excused through exercise of a peremptory challenge."[188] The defense counsel's apparent error was the failure to note that he would have exercised his peremptory challenge against another member, but for the denial of his challenge for cause: "Defense has not at all contended that its cause was embarrassed or prejudiced by the fact that it was required to exercise its single peremptory challenge."[189]

The issue of preservation of error for appellate review arose in *United States v. Harris*.[190] In *Harris*, the COMA granted review to determine whether the trial judge abused her discretion when she disallowed a challenge for cause "compel[ing] trial defense counsel to use his peremptory challenge" against that same member.[191] Defense counsel sought to challenge the president of the panel because he wrote or endorsed three other members' evaluation reports and he wrote or endorsed the effectiveness reports on two of the victims in the case.[192] The panel president was also a member on the base resources protection committee, which surveyed areas of the base that experienced personal or government property losses, presumptively relevant because the government charged the accused with larceny.[193] The majority of the court was concerned not only with actual bias on the part of the member, but with implied bias as well.[194] The COMA focused on three findings made by the Air Force Court of Military Review: (1) the challenged member, the president of the panel, was in a position to improperly influence other members of the panel because he wrote or endorsed three other members' fitness reports; (2) he had a personal relationship with two of the alleged victims; (3) he had a professional interest in

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188 *Id*.
189 *Id*.
190 13 M.J. 288 (C.M.A. 1982).
191 *See id*. at 289.
192 *See id*.
193 *See id*. at 290.
194 *See id*. at 291. Implied bias is defined in RCM 912(f)(1)(N), which provides that "[a] member shall be excused for cause whenever it appears that the member . . . should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." MCM, *supra* note 4, R.C.M. 912(f)(1)(N). Whether such bias exists is reviewed under an objective standard as viewed through the eyes of the public. *See* United States v. Reynolds, 23 M.J. 292, 294 (C.M.A. 1987).

discouraging the type of larcenies of which the accused was charged.[195] Given these issues, the majority concluded that "[t]he military judge was not free as a matter of military law to ignore these facts . . . in reaching her decisions simply because she found the member's disclaimer sincere."[196] The majority determined that the military judge should have granted the challenge for cause, but found no prejudice.[197] The majority also noted that the challenged member did not sit on the court because he was removed by a peremptory challenge: "In view of this fact, we are convinced that appellant was sentenced by a fair and impartial court-martial."[198] Although the majority believed the right to a peremptory challenge was "an important codal right," it did not find prejudice "because of the lack of any evidence in the record that appellant otherwise desired to exercise this right [against another member]."[199] The court deemed the accused's exercise of his peremptory challenge cured any error *if the record was devoid of any evidence that the accused would have otherwise used his right to a peremptory challenge against another member*.[200] This ruling, along with *Shaffer*, seemingly left an accused without a remedy for the improper denial of a causal challenge. Chief Judge Everett's dissent in *Harris*, however, put the issue squarely before the COMA for future resolution.

While he agreed with the majority's conclusion that the challenge for cause was improperly denied, Chief Judge Everett drew a different conclusion as to its meaning with respect to the peremptory challenge.[201] Chief Judge Everett noted that the "clear lesson" drawn from the principal opinion was that an accused, in order to preserve that challenge on appeal, "should exhaust his peremptory challenge and then 'evidence' in some way that he still would wish to exercise another peremptory challenge if it were available."[202] Thus was introduced the requirement of a "but for" challenge. Such a requirement was written into the governing RCM, amended in 1990.[203] The amended RCM 912(f)(4) states:

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[195] *See Harris*, 13 M.J. at 292.
[196] *Id*.
[197] *See id*.
[198] *Id*.
[199] *Id*.
[200] *See id.*
[201] *See id.* at 293 (Everett, C.J., dissenting).
[202] *Id*. at 294.
[203] GILLIGAN & LEDERER, s*upra* note 29, § 15-57.00.

> [W]hen a challenge for cause is denied, a peremptory challenge by the challenging party against any member shall preserve the issue for later review, provided that when the member who was unsuccessfully challenged for cause is peremptorily challenged by the same party, that party must state that it would have exercised its peremptory challenge against another member if the challenge for cause had been granted.[204]

C. The Curative Peremptory Challenge

Aside from the hot controversies that arise because of *Batson* and its progeny,[205] there is a simmering controversy concerning the apparent difference between civilian courts and military courts in the effect of using a curative peremptory challenge. The Court addressed the issue of a denial of a causal challenge and a subsequent curative peremptory challenge against that same juror in *Ross v. Oklahoma*[206] and more recently in *United States v. Martinez-Salazar*.[207] In general terms, the Court concluded that the exercise of a curative peremptory challenge, whether required by law or not, did not prejudice the defendant.[208]

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[204] 1984 MCM, *supra* note 180, R.C.M. 914(f)(2). The current *Manual* maintains the same language. MCM, *supra* note 4, R.C.M. 912(h)(4). The *1969 Manual* did not contain any similar language. 1969 MCM, *supra* note 179, ¶ 62. Why the language regarding the ability to exercise a peremptory against *any other member* should preserve the issue for appeal is mysterious, given the usual waiver provisions that appellate courts apply to trials. If an accused chooses to permit a member who should have been challenged for cause to remain on the panel, she should not be heard to complain the panel that tried her case was not impartial. Pizzi and Hoffman suggest a defendant, who does not elect to remove a biased juror peremptorily participates in their seating as much as a trial judge who erroneously fails to remove them for cause. *See* Pizzi & Hoffman, *supra* note 37, at 1437.

[205] *See supra* Parts III.B-D.

[206] 487 U.S. 81 (1988).

[207] 528 U.S. 304 (2000).

[208] *See Ross*, 487 U.S. at 88; *Martinez-Salazar*, 528 U.S. at 307. In *Ross*, the Court concluded, "[p]etitioner was undoubtedly required to exercise a peremptory challenge to cure the trial court's error. But we reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury." *Ross*, 487 U.S. at 88. Oklahoma state law required the defendant to exercise his "right" to a peremptory challenge. *See id.* at 89-90. The Court did not address the broader question of whether "in the absence of Oklahoma's limitation on the 'right' to exercise peremptory challenges, 'a denial or impairment' of the exercise of peremptory challenges occurs if the defendant uses one or more challenges to remove jurors who should have been

Against the backdrop of these two cases, the reasoning in the applicable military case law is not persuasive, as it ignores the history of the peremptory challenge.[209]

In *Ross*, the Court first looked at the implication of the Sixth Amendment's guarantee of an impartial jury when a trial judge denied a challenge for cause, whereupon the defendant exercised a peremptory challenge against that potential juror.[210] Oklahoma law required a defendant to exercise his peremptory challenge against a juror who was subject to a denied causal challenge to preserve a claim that the ruling deprived him of a fair trial.[211] With respect to the Oklahoma statute, the Court observed "there is nothing arbitrary or irrational about such a requirement, *which subordinates the absolute freedom to use a peremptory challenge as one wishes to the goal of empaneling an impartial jury*."[212] Thus, the Court found no violation of the Sixth Amendment. The Court then denied a Fourteenth Amendment due process argument. Noting that the peremptory challenge is a creature of statute,[213] the Court concluded, "[a]s required by Oklahoma law, petitioner exercised one of his peremptory challenges to rectify the trial court's error, and consequently he retained only eight peremptory

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excused for cause." *Id*. at 91 n.4. *Martinez-Salazar* extended the reasoning of *Ross*, addressing the question *Ross* left open:

> We hold . . . that if the defendant elects to cure such an error [that is, a trial court's erroneous refusal to grant a challenge for cause] by exercising a peremptory challenge, and is subsequently convicted by a jury on which no biased juror sat, he has not been deprived of any rule-based or constitutional right.

Martinez-Salazar, 528 U.S. at 307. As Justice Souter points out, however, Martinez-Salazar did not indicate he would have used his peremptory challenge against another juror. *See id*. at 318. Thus, this case is distinguishable on the facts from cases that routinely come through the court-martial system. *See, e.g.*, United States v. Wiesen, 56 M.J. 172, 174 (2001) (noting that appellant preserved a denied for-cause challenge for appeal when he stated that but for the military judge's denial of the challenge for cause, he would have exercised his peremptory challenge against another member).

[209] *See infra* text accompanying notes 229-64.

[210] *See Ross*, 487 U.S. at 85.

[211] *See id.* at 89. This statute is much like the implementation of Article 41 by RCM 912(f)(4). MCM, *supra* note 4, R.C.M. 912(f)(4); UCMJ art. 41 (2002).

[212] *Ross*, 487 U.S. at 90 (emphasis added).

[213] *See id.* at 89 ("Because peremptory challenges are a creature of statute and are not required by the Constitution, it is for the State to determine the number of peremptory challenges allowed and to define their purpose and manner of their exercise." (citations omitted)).

challenges to use in his unfettered discretion. But he received all that Oklahoma law allowed him, and therefore his [Fourteenth Amendment] due process challenge fails."[214] *Ross* took place in a state law environment. The next case, *Martinez-Salazar*, took up a similar issue in a federal context.

In *Martinez-Salazar*, during *voir dire*, a juror indicated that he would be more inclined to favor the prosecution.[215] During a discussion with the trial judge he stated, "[a]ll things being equal, I would probably tend to favor the prosecution."[216] Quite understandably, Martinez-Salazar challenged the juror for cause.[217] Quite inexplicably, however, the trial judge *denied* the challenge.[218] The defendant then used a peremptory challenge to remove the juror, giving him, in effect, one less peremptory challenge.[219] The Ninth Circuit Court of Appeals held that automatic reversal was required in these circumstances.[220] Noting that because the jury that heard the case was impartial and there was, therefore, no Sixth Amendment violation, the Court of Appeals determined that the district court improperly denied the challenge for cause.[221] The court observed that the trial judge's abuse of discretion "forced" the petitioner to use a

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[214] *Id*. at 90-91 (footnote omitted).
[215] *See Martinez-Salazar*, 528 U.S. at 308.
[216] *See id*. (internal quotation marks omitted).
[217] *Id*. at 309.
[218] *See id*.
[219] *See id.* at 309-10. Federal Rule of Criminal Procedure 24(b) is the rule that governs the exercise of peremptory challenges in civilian federal criminal cases. The rule states:

> (b) Peremptory Challenges. Each side is entitled to the number of peremptory challenges to prospective jurors specified below. The court may allow additional peremptory challenges to multiple defendants, and may allow the defendants to exercise those challenges separately or jointly.
>
> (1) Capital Case. Each side has 20 peremptory challenges when the government seeks the death penalty.
>
> (2) Other Felony Case. The government has 6 peremptory challenges and the defendant or defendants jointly have 10 peremptory challenges when the defendant is charged with a crime punishable by imprisonment of more than one year.
>
> (3) Misdemeanor Case. Each side has peremptory challenges when the defendant is charged with a crime punishable by fine, imprisonment of one year or less, or both.

FED. R. CRIM. P. 24(b).
[220] *See Martinez-Salazar*, 528 U.S. at 310.
[221] *See id.* at 309.

peremptory challenge to cure the error, which, in turn, impaired his right to the full complement of peremptory challenges.[222]

The Court found that the Ninth Circuit "erred in concluding that the District Court's for-cause mistake compelled Martinez-Salazar to challenge [the juror] peremptorily, thereby reducing his allotment of peremptory challenges by one."[223] The Court rejected the government's contention that Federal Rule of Criminal Procedure 24(b) *required* the petitioner to exercise his peremptory challenge to cure the District Court's error to preserve the claim that the causal challenge ruling impaired his right to a fair trial.[224] The Court did agree with the government, however, that the petitioner received all the peremptories to which he was entitled under the rule.[225] The Court posited that "[a] hard choice is not the same as no choice."[226] Ignoring the usual rules regarding waiver, the Court determined that the petitioner "had the option of letting Gilbert sit on the petit jury and, upon conviction, pursuing a Sixth Amendment challenge on appeal. Instead, Martinez-Salazar elected to use a challenge to remove [the juror] because he did not want [the juror] to sit on his jury. This was Martinez-Salazar's choice."[227] Tying in the purpose behind peremptory challenges, the Court noted, "in choosing to remove [the juror] rather than taking his chances on appeal, Martinez-Salazar *did not* lose a peremptory challenge. Rather, he used the challenge in line with a principal reason for peremptories: to help secure the constitutional guarantee of trial by an impartial jury."[228]

A military case discussing the effect of a curative peremptory challenge is *United States v. Jobson*.[229] The COMA construed RCM 912(f)(4) in the context of an accused who had a challenge for cause denied by the trial judge against a member who was aware that the accused had a pretrial agreement.[230] The accused exercised his one

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[222] *See id*. at 309-10 (citing United States v. Martinez-Salazar, 146 F.3d 653, 659 (9th Cir. 1998)). The Ninth Circuit concluded that the denial of the full complement of peremptory challenges violated the Fifth Amendment's due process clause because Martinez-Salazar did not receive what federal law entitled him. *See id.* at 310.
[223] *Id*. at 315 (citation omitted).
[224] *See id*. at 314-15.
[225] *See id*. at 315.
[226] *Id*.
[227] *Id.* (footnote omitted).
[228] *Id*. at 315-16 (citations omitted).
[229] 31 M.J. 117 (C.M.A. 1990).
[230] *See id.* at 118-19.

peremptory challenge against the member whom the judge denied as a causal challenge, noting that he would have used his peremptory against another member of the panel.[231] Adopting the Army Court of Military Review's (ACMR) position,[232] the COMA concluded that the plain language of RCM 912(f)(4) permitted the accused to preserve for appeal a denied for-cause challenge when he peremptorily challenged that same member.[233] The COMA expressly rejected the approach taken by the Air Force Court of Military Review that if the accused elects to remove the member, any error would be tested for harmlessness.[234] "To so hold," wrote Judge Cox, "would render the language of RCM 912(f)(4) meaningless and, in every case, would require an accused, *at his peril*, to leave the objectionable member on the panel in order to obtain review of the military judge's ruling on his challenge for cause."[235]

The Air Force court did not say that any alleged error in refusing to grant a for-cause challenge could not be preserved in accordance with RCM 912(f)(4). Rather, the Air Force court said that any alleged error is not *per se* harmful to the accused. To make that determination, the trial judge's alleged error must be tested for any prejudicial effect on the substantial rights of the accused. The Air Force court, in accord with *Harris* and *Ross*, argued for a functional analysis of the challenge denial. This argument is similar to the analysis appellate courts routinely undertake in the face of allegations of trial court error.

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[231] *See id.* at 120.

[232] United States v. Moyar, 24 M.J. 635 (A.C.M.R. 1987); United States v. Anderson, 23 M.J. 894 (A.C.M.R. 1987). In *Moyar*, the Army court complained "some trial judges have at best only grudgingly granted challenges for cause and others frustrate the rule with *pro forma* questions to rehabilitate challenged members." *Moyar*, 24 M.J. at 638. In both cases, the challenges for cause were denied (the members were peremptorily removed) and the Army court found an abuse of discretion in both cases. *See id*. at 636; *Anderson*, 23 M.J. at 896.

[233] *See Jobson*, 31 M.J. at 121.

[234] *See id*. The Air Force court, citing *Harris* and other cases, determined that "use of the peremptory challenge, forced or otherwise, purges any resulting error." United States v. Jobson, 28 M.J. 844, 849 (A.F.C.M.R. 1989), *aff'd*, 31 M.J. 117 (C.M.A. 1990). It also took note of the Supreme Court's *Ross* decision for support of its contention that any review must be conducted for harmlessness. *See id.* The Air Force court determined that analyzing these type cases as if the member sat "fails to concentrate on the real issue: Whether there was prejudice to the appellant from the members who did sit." *Id*. Rule for Court-Martial 912(f)(4) did not, in the court's opinion, overturn existing case law, but merely "made clear the procedural requirement for preserving an issue." *Id*.

[235] *Jobson*, 31 M.J. at 121 (citation omitted).

In *United States v. Armstrong*,[236] the Court of Appeals for the Armed Forces (CAAF) examined the effect, if any, of *Martinez-Salazar* on the military justice system. At issue in this case was the trial court's denial of a challenge for cause against a member for actual bias.[237] After the trial court denied the defense's for-cause challenge, the defense peremptorily challenged the same member, thus preserving the issue for review.[238] The court concluded that *Martinez-Salazar* was distinguishable based on the rule at issue—RCM 912(f)(4) establishes a procedure for preserving a for-cause challenge issue while Rule 24(b) of the FRCP does not.[239] Because RCM 912(f)(4) gives greater rights with respect to his right to a peremptory challenge, the military accused is not faced with "the hard choice faced by defendants in federal district courts—to let the challenged juror sit on the case and challenge the ruling on appeal or to use a peremptory challenge to remove the juror and ensure an impartial jury."[240] This ruling functionally places the right to a peremptory challenge on a pedestal. Clearly, RCM 912(f)(4) is a procedural rule that spells out exactly how to preserve an error regarding a for-cause challenge. The rule does not confer a substantive right on the parties at trial—Article 41, UCMJ[241] as promulgated in RCM 912(g)[242] does that. The Court's reading of RCM 912(f)(4) gives the aggrieved party an absolute functional right that cannot be read into Article 41. This decision should have been the end of the matter. A year later, however, the CAAF faced a similar issue yet again.

The Court of Appeals for the Armed Forces tackled the issue of implied bias and peremptory challenges in *United States v. Wiesen*.[243] This case illustrates the interplay between a military judge's ruling on a challenge for cause, the subsequent exercise of a peremptory challenge, and the preservation of error on a for-cause challenge ruling. In this case, the president of the panel maintained some form of supervisory authority over six other panel members.[244] As a result, the president and these six other members were sufficient to form the two-thirds majority

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[236] 54 M.J. 51 (2000).
[237] *See id.* at 52.
[238] *See id.* at 53.
[239] *See id*. at 54-55.
[240] *Id*. at 55 (citation omitted). The federal rule merely governs the number of peremptory challenges each side has. FED. R. CRIM. P. 24(b); *see also supra* note 219 (providing the text of the rule).
[241] UCMJ art. 41 (2002).
[242] MCM, *supra* note 4, R.C.M. 912(g).
[243] 56 M.J. 172 (2001).
[244] *See id.* at 175.

required to convict the appellant.[245] According to the majority, "[w]here a panel member has a supervisory position over six of the other members, and the resulting seven members make up the two-thirds majority sufficient to convict, we are placing an intolerable strain on public perception of the military justice system."[246] As in *Armstrong*, the accused exercised a curative peremptory challenge against the president, who subsequently did not sit at trial.[247] Nonetheless, the CAAF determined that the appellant was prejudiced because he did not have a peremptory challenge against another member *of his choice*.[248] "To say that appellant cured any error by exercising his one peremptory challenge against the offending member is reasoning that, if accepted, would reduce the right to a peremptory challenge from one of substance to one of illusion only."[249] The nonbinding analysis of RCM 912(f)(4) sheds light on the intent behind the rule: "Because the right to peremptory challenge is independent to the right to challenge members for cause, *see* Article 41, that right should not be forfeited when a challenge for cause has been erroneously denied."[250] This reasoning is clearly in favor at the CAAF.

In *United States v. Miles*,[251] the most recent military case involving the exercise of peremptory challenge, the CAAF held that "the right to

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[245] *See id*.
[246] *Id*.
[247] *See id.* at 174.
[248] *See id*. at 177.
[249] *Id*. Pizzi and Hoffman suggest that to cause a defendant to use her peremptory against someone who should have been removed for cause surely is to reduce their peremptory challenge by one. *See* Pizzi & Hoffman, *supra* note 37, at 1430. They go on, however, and suggest that while it is surely error (although not constitutional error because a defendant does not have a constitutional right to peremptory challenges), it is harmless error because there has been no adverse affect on the defendant's right to a impartial jury. *See id*. at 1431. This reasoning is persuasive as an analytical matter because the right of the accused is to a trial by an impartial panel, not an error free trial. *See* United States v. Brooks, 26 M.J. 28, 29 (C.M.A. 1988) (observing that appellant is entitled to a fair trial, not an error-free, perfect trial) (relying on United States v. Owens, 21 M.J. 117, 126 (C.M.A. 1985)). Where is the prejudice to a *substantial right of the accused*? If the allegedly biased member does not sit on a panel, there is no persuasive argument to be made that the accused suffered a constitutional prejudice or other prejudice sufficient to overturn an otherwise proper verdict. Naturally, because the accused only has one peremptory challenge, the deprivation of the only peremptory challenge is not to be regarded lightly. If the primary purpose of a peremptory challenge is to enhance the impartiality of a panel, however, how can an accused complain when he took *the step* to make it so?
[250] MCM, *supra* note 4, R.C.M. 912 analysis, at A21-61.
[251] 58 M.J. 192 (2003).

save his single peremptory challenge for use against a member not subject to challenge for cause . . . was violated . . . when Appellant was forced to use his peremptory challenge" against a member the military judge did not remove for implied bias.[252] During *voir dire*, a member disclosed that his nephew was born with a form of epilepsy resulting from his mother's cocaine use, and that as a result, the nephew died when ten years old.[253] The member indicated that the case would trigger memories of his nephew's death and illness and remind him of an article he authored for the base newspaper about the effects of drug use.[254] The accused, charged with use of cocaine,[255] made a challenge for cause against the member.[256] The military judge denied a causal challenge for implied bias.[257] The CAAF determined that the member's experience coupled with the newspaper article would create serious doubts in the minds of a reasonable observer about the fairness of the trial.[258] The CAAF, therefore, found that the military judge abused his "limited discretion" and "violated the liberal-grant mandate" and set aside the sentence.[259] Chief Judge Crawford, in dissent, found that "[e]ven if the military judge clearly abused his discretion . . . that error was rendered harmless when Appellant used his peremptory challenge to remove [the member]."[260] Picking up the fallen standard from the Air Force Court of Military Review's decision in *United States v. Jobson*,[261] Chief Judge Crawford wrote that she did not "believe that anything in R.C.M. 912(f)(4) precludes a constitutional and statutory harmless error analysis" in this situation.[262] In support of her position, she cited *Ross* and *Martinez-Salazar*, calling these two cases "dispositive" in appellant's case.[263] She rightly concluded that nothing in the language of RCM 912(f)(4) "precludes a harmless error analysis of the denied challenge for cause. When the requirements of RCM 912(f)(4) are met,

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[252] *Id.* at 195.
[253] *See id*. at 193.
[254] *See id*.
[255] *See id*.
[256] *See id*. at 194.
[257] *See id*.
[258] *See id.* at 195.
[259] *See id*.
[260] *Id*. at 195-96 (Crawford, C.J., dissenting).
[261] United States v. Jobson, 28 M.J. 844, 849 (A.F.C.M.R. 1989), *aff'd on other grounds*, 31 M.J. 117 (C.M.A. 1990) (determining that "use of the peremptory challenge, forced or otherwise, purges any resulting error").
[262] *Miles*, 58 M.J. at 196 (Crawford, C.J., dissenting).
[263] *See id*. at 197; *see also supra* text and accompanying notes 206-87.

an accused is guaranteed one thing only: that we will not apply waiver."[264]

Using Chief Judge Crawford's analysis a question arises as to when, if ever, there would be harm to the accused if he exercises his one peremptory challenge against a member against whom the military judge denied a causal challenge. Unless the accused could point to another member who should not have sat because of bias, there would never be error if the one challenged member does not sit and there are no other biased members. Such a result is more in keeping with the dictates of the right to an impartial panel than reversing a case where there were no biased members sitting in judgment. Fundamentally, the CAAF and *Manual* exalt the right to *exercise* the peremptory challenge over the more elemental justification for the challenge—to secure an impartial finder of fact.

With respect to the issue of the curative peremptory challenge, the CAAF and the *Manual* are clear in seeking to protect a party's right to exercise a peremptory challenge against a member of *his choice*.[265] When a trial court improperly denies a challenge for cause, the CAAF will not abide by the notion that an accused suffer the loss of his right to peremptorily challenge a member of his choice.[266] As long as trial judges refuse to grant challenges for cause liberally, it seems that CAAF will do its utmost to give the accused the implied benefit of Article 41—the right to challenge peremptorily a member of his choice. It is also clear that the CAAF is using the preservation of error procedure and the refusal to apply a harmless error analysis as a means of keeping trial courts in line. Without such a reading of RCM 912(f)(4), the appellate courts would find it very difficult to serve as a check on erroneous rulings on for-cause challenges.

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[264] *Miles*, 58 M.J. at 198 (Crawford, C.J., dissenting).

[265] This stance is somewhat curious given that an accused only has a right to trial by members who are fair and impartial, and not a panel of one's choosing. This ordering of rights is also curious when one considers the court's rulings applying *Batson* and its progeny to trials by court-martial. In those cases, as will be seen, the right of the panel member to sit is what is at stake. *See infra* Part IV.D.

[266] Pizzi and Hoffman suggest that if peremptory challenges have little to do with ensuring impartiality of a jury, then error that results in a compromise of an defendant's right to a peremptory challenge "will almost always be harmless." *See* Pizzi & Hoffman, *supra* note 37, at 1428. The CAAF, however, seems to suggest that peremptory challenges have everything to do with ensuring impartiality, thus harmless error analysis does not apply.

Unlike the Court, the CAAF either apparently doubts trial judges' ability to rule properly on for-cause challenges or the court is trying to balance the peremptory challenge against Article 25.[267] If the former is true, the issue then turns not on whether the accused had the opportunity to use his peremptory challenge against a member of his choice, but rather on whether the peremptory challenge, as used, produced a fair and impartial jury. If the emphasis were on the production of a fair and impartial jury, the exercise of the peremptory challenge, by itself, would be a sufficient exercise of the accused's right. Fundamentally, however, "[w]hen a criminal defendant uses a peremptory challenge to remove a prospective juror whom the trial court should have removed for cause, the defendant is using peremptory challenges in precisely the curative manner for which they were intended."[268] An interesting question arises in cases where the accused alleges the military judge erroneously ruled on more than one challenge for cause. In such a case, the accused would "run out" of peremptory challenges sufficient to cure any alleged error, thus inviting an appellate court to overturn the case. Assuming the trial judge abused his discretion in denying at least one of the challenges for cause, the error would be clearly reversible. The appellate court should, however, conduct a harmless error analysis. As a measure of the clear lack of persuasiveness of the CAAF's argument, the Joint Service Committee on Military Justice took action.

On 15 August 2003, the Joint Service Committee on Military Justice proposed a change to RCM 912(f)(4), which would eliminate much of the appellate litigation regarding the use of peremptory challenges to

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[267] UCMJ art. 25(d)(2) (2002) (providing for panel member selection by the convening authority, who is to select members based on "age, education, training, experience, length of service, and judicial temperament").

[268] Pizzi & Hoffman, *supra* note 37, at 1440 (citing Justice Scalia's concurrence in *Martinez-Salazar*). In his concurrence, Justice Scalia wrote,

> The resolution of juror-bias questions is never clear cut, and it may well be regarded as one of the very purposes of peremptory challenges to enable the defendant to correct judicial error on the point. Indeed, that *must* have been one of their primary purposes in earlier years, when there was *no appeal* from a criminal conviction, so that if the defendant did not correct the error by using one of his peremptories, the error would not be corrected at all.

United States v. Martinez-Salazar, 528 U.S. 304, 319 (2000) (Scalia, J., concurring) (internal citation omitted).

cure denied casual challenge.[269] The rule with the proposed amendment is as follows:

> When a challenge for cause is denied, the successful use of a peremptory challenge by either party, excusing the challenged member from further participation in the court-martial, shall preclude further consideration of the challenge of that excused member upon later review. Further, failure by the challenging party to exercise a peremptory challenge against any member shall constitute waiver of further consideration of the challenge upon later review. ~~However, when a challenge for cause is denied, a peremptory challenge by the challenging party against any member shall preserve the issue for later review, provided that when the member who was unsuccessfully challenged for cause is peremptorily challenged by the same party, that party must state that it would have exercised its peremptory challenge against another member if the challenge for cause had been granted.~~[270]

The articulated reason in support of the amendment is "to conform military practice to federal practice and limit appellate litigation when the challenged member could have been peremptorily challenged or actually did not participate in the trial due to a peremptory challenge by either party."[271] Interestingly, the analysis directly references the Court's opinion in *Martinez-Salazar*: "This amendment would result in placing before the accused the hard choice faced by defendants in federal district courts—to let the challenged juror sit on the case and challenge the ruling on appeal or use a peremptory challenge to remove the juror and ensure an impartial jury."[272] The amendment clearly adopts the reasoning of well-established court case law and Chief Judge Crawford's

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[269] Manual for Courts-Martial; Proposed Amendments, 68 Fed. Reg. 48,886, 48,887 (Aug. 15, 2003) (Notice of Proposed Amendments to the Manual for Courts-Martial, United States (2002 ed.) and Notice of Public Meeting). To date, the proposal has not been adopted by the President.

[270] *Id*.

[271] *Id*.

[272] *Id*. For the language in the Supreme Court opinion, *see supra* text accompanying note 226.

points in *Miles*. At least with respect to the Joint Service Committee, the answer to whether the CAAF is getting it right is emphatically no.[273]

If the CAAF is seeking to balance the right of the peremptory challenge against the convening authority's panel selection, which as noted above can be seen as the exercise of an unlimited number of peremptory challenges,[274] the path chosen by the court is appropriate an attempt to equalize the relative disparity in shaping the panel. Assuming that this disparity does in fact exist, it would seem appropriate to either remove the authority of the commander to select panel members or give more peremptory challenges to the defense. The exercise of only one challenge seems a poor compromise.

D. Discriminatory Use of Peremptory Challenges in Military Court-Martial

Like for-cause challenges and trial courts' ruling on them, the area of the discriminatory use of peremptory challenges has proven fertile ground for judicial scrutiny. In the case of *United States v. Santiago-Davila*,[275] the COMA addressed for the first time whether the decision of the Court in *Batson* applied to trials by court-martial. At the time of Santiago-Davila's, who was Hispanic,[276] trial in Germany, the Court had not decided *Batson*. Relying on state court decisions that held that peremptory challenges could not be used in a racially discriminatory way, the accused's defense counsel asked that the trial court to inquire into the reason for the trial counsel's exercise of a peremptory challenge

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[273] After a period of public comment on the proposed amendment, the Joint Service Committee published a summary of comments made. On 24 March 2004, the Committee published the substance of the comments and the Committee's reaction to them in the *Federal Register*. Manual for Courts-Martial; Proposed Amendments, 69 Fed. Reg. 13,816 (Mar. 24, 2004) (Notice of Summary of Public Comment Received Regarding Proposed Amendments to the Manual for Courts-Martial, United States (2002 ed.). The Committee noted that the comments argued that the change would reduce confidence in the military justice system and "are only being made in response to perceived adverse decisions of the various courts." *Id*. at 13,817. The argument was also made that modeling the military justice system after the federal system is "not valid" because the federal system offers more peremptory challenges. *See id*. The Committee "determined that is proposed amendment to the R.C.M. 912 is proper and consistent with the rationale in the amended analysis." *Id*.

[274] *See supra* note 29.

[275] 26 M.J. 380 (C.M.A. 1988).

[276] *See id.* at 385.

against a member of Hispanic origin.[277] The military judge refused to require the trial counsel to articulate a reason for his challenge.[278] The COMA declared that even if it were not bound by *Batson*, decided after appellant's trial but before his appeal,[279] the principle espoused by *Batson* "should be followed in the administration of military justice."[280] Further, the COMA stated, "we are sure that Congress never intended to condone the use of a *government* peremptory challenge for the purpose of excluding a 'cognizable racial group'" and held that "where the accused makes a *prima facie* showing that the Government has used a peremptory challenge to purposefully exclude 'a member of a cognizable racial group,'"[281] the trial counsel "must articulate a neutral explanation related to the particular case to be tried."[282]

The ACMR in *United States v. Moore*[283] offered an analytical framework for implementing the requirements of *Batson*.[284] Premising its framework on the idea that "there is no logic in permitting the prosecutor, through the use of his peremptory challenge, to do what the convening authority, in the selection of panel members, cannot," the Army court declared that the basic principles of *Batson* were fully applicable to trials by court-martial.[285] Believing that the specific procedural application of *Batson* was "neither required nor practicable"

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[277] *See id*.
[278] *See id*. at 386.
[279] *See id*. at 389.
[280] *Id*.
[281] *Id*. at 392 (emphasis added). On this line of reasoning, it would be hard to see that Congress envisioned *either* party using its peremptory challenges in a discriminatory manner.
[282] *Id*. (citation omitted).
[283] 26 M.J. 692 (A.C.M.R. 1988), *rev'd*, 28 M.J. 366 (C.M.A. 1989).
[284] The U.S. Court of Military Appeals (COMA) opinion in *Santiago-Davila* had not been released when the Army court released its opinion. The court released *Santiago-Davila* on 29 August 1988, and released *Moore* on 26 May 1988. *See id.* Because the framework set out in *Moore* was articulated by the Army court, its reasoning did not apply necessarily to the other services.
[285] *Moore*, 26 M.J. at 698. The court, however, did not find that the court-martial system had been victim of purposeful discrimination that gave rise to *Batson* in the first place: "[T]here has been no showing or history of systemic subversion of the system or exclusion of members of minority races from court-martial panels, as has occurred in civilian trials." *Id*. at 699-700. Given this backdrop, one has to wonder, as did Judge Crawford in her dissent in *United States v. Tulloch*, 47 M.J. 283, 290 (1997), why the Army court, and subsequently its superior court, adopted a more *stringent* standard than the civilian system, where discrimination was a historical fact.

to trials by court-martial,[286] the Army court modified accused's *prima facie* burden. Rather than having to articulate specific reasons to raise an inference of the improper exercise of peremptory challenge, the Army court required only that the accused make a timely objection to the trial counsel's peremptory challenge of a member of a cognizable racial group to which the accused also belonged.[287] The Army court created the procedural difference because each party is entitled to one peremptory challenge; therefore, the burden of making the *prima facie* case required in the civilian context, would be "intolerably high."[288] After a timely objection by the accused, the burden of persuasion shifts to the trial counsel to provide a race-neutral reason for the challenge.[289] When evaluating the reason(s) offered by the government, "the military judge must give due deference to the government representative as an officer of the court," without "rubberstamping" the proffered reasons.[290] The military judge must ensure that the reasons are stated for the record, must make specific findings of fact and rule on the issue, and must disallow the peremptory challenge if no race-neutral reason is offered.[291]

When the COMA received the case, it adopted the *per se* rule as articulated by the Army court for all services.[292] The COMA also

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[286] *Moore*, 26 M.J. at 699. Those differences included that courts-martial are not subject to the jury trial requirements of the Constitution, that a military accused is tried by a panel of superiors chosen by the convening authority, military counsel are provided only one peremptory challenge as distinguished from their civilian counterparts who have many, and peremptory challenges are used in the military context not to select jurors as in the civilian context, but to eliminate those already selected by the convening authority. *See id.*

[287] *See id*. at 700. The Army court believed that the peremptory challenge is functionally different in military practice: "In courts-martial, counsel use their single peremptory challenge not to select a jury, but to preserve or to enforce a challenge for cause or to remove a member that counsel suspects, intuitively or otherwise, will be sympathetic to the opponent's case." *Id*. (citations omitted). At bottom, however, is the fundamental purpose of the peremptory challenge, whether in the civilian or military context, i.e., to ensure a fair and impartial fact finder. *See* United States v. Witham, 47 M.J. 297, 302 (1997). Thus the Army court's functional analysis may be seen as a distinction without a difference.

[288] *See Moore*, 26 M.J. at 700.

[289] *See id*. at 700-01.

[290] *Id*. at 701.

[291] *See id*.

[292] United States v. Moore, 28 M.J. 366 (1989). The COMA reasoned that in adopting the rule, they were simplifying the court-martial process and making it fairer to the accused given the difficulty of showing a "pattern" of discrimination that might obtain in a civilian trial where there are more peremptory challenges available to the litigants. *See id*. at 368.

clarified the standard for trial counsel: "Although the reasons [for exercising a peremptory challenge] need not rise to the level justifying a challenge for cause, trial counsel cannot assume or intuit that race makes the member partial to the accused and cannot merely affirm his good faith or deny bad faith in the use of his challenge."[293] The CAAF had an opportunity to clarify the standard for reviewing trial counsel's reason for exercising his peremptory in *United States v. Tulloch*.[294] The CAAF held that once the convening authority has designated members as "best qualified" under Article 25, UCMJ, "trial counsel may not strike that person on the basis of a proffered reason under *Batson* and *Moore*, that is unreasonable, implausible, or that otherwise makes no sense."[295]

In *United States v. Witham*,[296] the CAAF faced the question of the applicability of *J.E.B.* to trials by court-martial. Finding "no military exigency or necessity which requires that a military accused's right to a peremptory challenge be unfettered by . . . equal protection concerns,"[297] the CAAF held "that gender, like race, is an impermissible basis for the exercise of a peremptory challenge by either the prosecution or the military accused."[298] The facts of the case are unusual because the accused attempted to exercise his peremptory against a female member of the panel,[299] but was challenged by the trial counsel, relying on *McCollum*.[300] The military judge inquired into the basis for the defense

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[293] *Id.* at 369.
[294] 47 M.J. 283 (1997).
[295] *Id.* at 298 (declining to apply *Purkett v. Elem*, 514 U.S. 765 (1995) (holding that a prosecutor is not required to offer an explanation that is persuasive or plausible, but only a race-neutral reason for the exercise of peremptory challenge) to the military context). The CAAF premised its decision on the convening authority's assertion by virtue of the members' selection that they are "best qualified." Therefore, the trial counsel must articulate a reason that essentially overcomes the convening authority's imprimatur on the abilities of members to sit.

> Given the select nature of the pool of court-martial members chosen by the convening authority and the presumption that those members are the 'best qualified' to serve on the court-martial, the statement by trial counsel that a member 'seemed uncomfortable' does not, without further explanation, provide a sufficiently articulated reason to sustain a challenge under *Moore*.

Id. at 288.
[296] 47 M.J. 297 (1997).
[297] *Id.* at 302.
[298] *Id*. at 298.
[299] The case involved allegations of rape and kidnapping. *See id.* at 298-99.
[300] *See id.* at 299.

counsel's challenge; the answer was gender.[301] The military judge denied the challenge for cause.[302] Judge Effron noted in a concurring opinion that the procedural requirements *Tulloch* placed on the trial counsel in responding to a *Batson* challenge are not applicable to peremptory challenges made by the defense counsel.[303] He did not, however, elaborate on the difference in these requirements.[304]

As a result *Batson* and its progeny, an opposing party may question the exercise of a peremptory challenge based on race or gender with no requirement that the accused be the same race or gender.[305] Further, the scrutiny of a peremptory challenge whether race- or gender-based will follow the opposing party's timely objection.[306] The CAAF's handling of these cases, however, is not without controversy. Of interest in recent the CAAF cases concerning *Batson* and its progeny is a running dispute between Judges Cox, Gierke, and Effron, on one side, and Judge Crawford and Judge Sullivan on the other.[307] Chief Judge Crawford and Judge Sullivan believed that their brethren refused to follow the

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[301] *See id*.

[302] *See id.*

[303] *See id.* at 304 (Effron, J., concurring).

[304] *See id*. at 303-04 (Effron, J., concurring). As a practical matter, it is hard to see a difference between what would be required of the trial counsel and of the defense counsel in articulating a neutral reason for a challenge. Perhaps, the Army Court of Criminal Appeals in *United States v. Cruse*, 50 M.J. 592 (Army Ct. Crim. App. 1999) sheds light on how the CAAF might address the problem—apply *Purkett v. Elem*, 514 U.S. 765 (1995) to the defense counsel and not to the trial counsel.

[305] *See* United States v. Ruiz, 49 M.J. 340, 343 (1998) ("[U]nder *J.E.B.*, it is irrelevant whether the accused and the person challenged are of the same gender, since not only the accused's right is involved, but also the Fourteenth Amendment right of jury members to 'equal opportunity to participate in the fair administration of justice.'")(citations omitted); *see also* United States v. Norfleet, 53 M.J. 262, 271 (2000) ("The right to challenge discriminatory use of peremptory challenges exists whether or not an accused is of the same race as the challenged juror . . . .").

[306] *Ruiz*, 49 M.J. at 343-44. The Air Force Court of Criminal Appeals in *United States v. Powell*, 55 M.J. 633 (A.F. Ct. Crim. App. 2001) had occasion to question the wisdom of the *per se* rule. Noting that the *per se* rule does not require that counsel show any evidence of discrimination, the Air Force court opined that the rule is subject to abuse. *See id*. at 644. They also concluded that the *per se* rule "is not a weapon to be employed in order to frustrate the legitimate use of the single peremptory challenge guaranteed each side." *Id*. at 645 (citation omitted). The Air Force court stated, "In our opinion, it would be a better practice to allow the judge to decide when an explanation for the challenge is required. After hearing counsel's explanation, opposing counsel must either accept the reason or present evidence of unlawful discrimination." *Id*.

[307] Judges Cox and Sullivan are no longer on the CAAF, having been replaced by Judges Baker and Erdmann. As to where Judges Baker and Erdman would fall on this issue remains to be seen.

procedural aspects of the Court's holding in *Purkett v. Elem*.[308] A short review of some of the cases demonstrates the controversy.

In *Tulloch*,[309] Judge Crawford took exception to the majority's framework for assessing the reasons for the government's peremptory challenge. She did so not only because the CAAF did not follow Court precedent, but also because "[t]he majority advocates holding peremptory challenges valid only when there is objective evidence of a race-neutral reason."[310] Judge Sullivan agreed with Judge Crawford, but also ventured the opinion that "in reality only a total ban on peremptory challenges will eliminate the possibility of racial and gender discrimination in the use of such challenges."[311]

In *United States v. Ruiz*,[312] the CAAF extended *Moore*'s *per se* rule to gender-based peremptory challenges, thus furthering, in the eyes of Judge Crawford, the CAAF's refusal to follow Court precedent. In her dissent, Judge Crawford wrote that "the Court is interested in refining the peremptory challenge to conform with the Equal Protection Clause of the Fourteenth Amendment, while maintaining the challenge as separate from the challenge for cause,"[313] and suggested that the CAAF majority is doing just the opposite. Judge Crawford argued that the CAAF majority expanded the narrow confines of the Court's cases to include occupation.[314] Further, she concluded, "[b]y extending the *Moore per se* rule to cases of potential gender-based discrimination, the majority requires the Government to explain nearly every peremptory challenge. Essentially, the Court's pursuit of a vastly restricted peremptory challenge rule eliminates such challenges for the prosecution

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[308] 514 U.S. 765 (1995) (determining that any race-neutral explanation will be deemed acceptable unless discriminatory intent is inherent in a prosecutor's explanation; focusing on the genuineness, as opposed to the reasonableness, of the explanation).

[309] 47 M.J. 283 (1997). The court decided this case on the same day as *Witham*. *Witham*, 47 M.J. 297 (1997).

[310] *Id*. at 294 (Crawford, J., dissenting). She also notes that "[m]any military trial attorneys will make a decision based on body language, tone of voice, hair style, and dress. Generally, these attorneys are not motivated to eliminate a person from the jury because of race, ethnicity, or gender." *Id*.

[311] *Id*. at 289 n.* (Sullivan, J., dissenting). He ventured the same point of view in the majority opinion in *Witham*. *Witham*, 47 M.J. at 303 n.3.

[312] 49 M.J. 340 (1998).

[313] *Ruiz*, 49 M.J. at 350 (Crawford, J., dissenting).

[314] *See id.* ("The occupation, especially of a court member, does make a difference."); *see also infra* notes 319-25 and accompanying text for a discussion of this issue.

altogether."[315] In Judge Crawford's opinion, "[s]o radical a change to the Code should be enacted by Congress or the President."[316]

In *United States v. Norfleet*,[317] Chief Judge Crawford and Judge Sullivan, both concurring in part and in the result, again voiced their displeasure with the CAAF majority's refusal to analyze the proffered reason for the government's exercise of its peremptory challenge under the more generous auspices of *Purkett*.[318] They concurred in the result, it seems, only because the majority came to the conclusion that the trial counsel's explanation was gender-neutral. In *United States v. Chaney*,[319] the CAAF reviewed an issue with a trial counsel who exercised his peremptory challenge against the only female panel member. When asked by the military judge to offer a gender-neutral reason, the trial counsel stated that he struck her because of her occupation as a nurse.[320] The majority opined that the "occupation of the challenged member may or may not provide an acceptable race or gender neutral reason for a peremptory challenge, depending on the facts of the case."[321] Citing as support the Court's opinion in *J.E.B.*, the CAAF stated,

> [O]ccupation could provide a sufficient basis for a peremptory challenge if the proffered reason is not used as pretext for an improper race or gender based challenge. Absent a showing of such pretext, the Supreme Court suggested that occupation-based peremptory challenges could be appropriate, even in fields that are predominately associated with one gender, such as nursing or military service.[322]

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[315] *Id*. at 351-52 (Crawford, J., dissenting).
[316] *Id*. at 352.
[317] 53 M.J. 262 (2000). This case involved an issue of whether the government advanced valid reasons for a peremptory challenge of the only female members detailed to the court-martial. Those reasons were: (1) that because of the member's prior court-martial experience, the trial counsel was concerned with "the members using that experience to dominate the panel;" and (2) the member was involved with the legal office in a dispute and the trial counsel was concerned about spill-over. *See id*. at 272. The CAAF found both reasons to be nondiscriminatory. *See id*.
[318] *Id*. at 273 (Crawford, C.J., concurring in part and in result) (Sullivan, J., concurring in part and in result).
[319] 53 M.J. 383 (2000).
[320] *See id.* at 384.
[321] *Id*. at 385.
[322] *Id*.

Chief Judge Crawford, again, took issue with the majority's refusal to apply *Purkett*, stating, "[t]he focus should be on the genuineness of the asserted non-racial/non-gender motive, not the reasonableness of the trial advocate's explanation."[323] Judge Sullivan adopted the same reasoning as Chief Judge Crawford, repeating his suggestion that "the military justice system should eliminate the peremptory challenge."[324] Analyzing the challenge in the military justice context, he wrote:

> The peremptory challenge in the military, as it stands in the current of present Supreme Court and our Court's case law, may have outlived its usefulness and benefit. Congress and the President should relook this long established right to strike off a jury, a juror without a judicially sanctioned cause. Real and perceived racial and gender abuses lie beneath the surface of the sea of peremptory challenges.[325]

Finally, the case of *United States v. Hurn*[326] offers an example of second-guessing the exercise of a peremptory challenge. The facts suggest that the challenge was supported by a racial-neutral reason, but the CAAF determined otherwise, inferring a racial motive to the trial counsel's exercise of a peremptory challenge when there was *no evidence* of such a purpose. In this case, a trial counsel struck the only Hispanic on the panel.[327] When questioned by the military judge pursuant to a defense request, the trial counsel indicated he struck the member "to protect the panel for quorum."[328] The military judge deemed that reason to be race-neutral and permitted the challenge.[329] The CAAF held that the reason offered by the trial counsel "does not satisfy the underlying purpose of *Batson*, *Moore*, and *Tulloch*, which protects participants in judicial proceedings from racial discrimination."[330] The CAAF reasoned that if the purpose of the challenge was to protect

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[323] *Id*. at 386 (Crawford, C.J., concurring in the result).
[324] *Id*. (Sullivan, J., concurring in the result).
[325] *Id*.
[326] 55 M.J. 446 (2001), *aff'd per curiam*, 58 M.J. 199, *cert. denied*, 540 U.S. 949 (2003).
[327] *See id.* at 447.
[328] *Hurn*, 55 M.J. at 448. The court noted that "[a]fter challenges for cause, the panel consisted of five officers and three enlisted members. *See Hurn*, 58 M.J. at 200 n.3. If the defense were to exercise a peremptory against an enlisted member, the court would fall below quorum. *See Hurn*, 55 M.J. at 448. The trial counsel, therefore, struck an officer to ensure that quorum would be met. *See id*.
[329] *See id*.
[330] *Id.*

quorum, the trial counsel "could have accomplished that by challenging any other officer member."[331] In the face of the *prima facie* case made by the defense counsel (by timely posing an objection), the trial counsel did not "explain why he challenged the only non-Caucasian officer instead of any of the Caucasian officers."[332] It should be noted that the defense counsel did *not* interpose another objection to the military judge's conclusion that the proffered reason was race-neutral.[333]

Chief Judge Crawford and Judge Sullivan took the majority to task for again failing to follow the controlling Court precedent on the issue of assessing the proffered reason for the challenge. Chief Judge Crawford called the reason given by the trial counsel "legitimate, reasonable," and facially valid.[334] Judge Sullivan again noted his recommendation that the peremptory challenge be eliminated in the military justice system.[335] Most problematic in this particular case is CAAF's substitution of its judgment for that of the military judge and its determination that because the trial counsel had other options, *he, without more, must be presumed to have exercised his peremptory challenge in a discriminatory manner*. There can be little doubt that the reason offered was facially-neutral and, as any trial counsel could say, a valid concern with any enlisted panel. Ultimately, after a fact-finding inquiry to resolve several issues of fact, the CAAF upheld the military judge's determination that the challenge was indeed racially-neutral,[336] noting that "[t]he military judge's determination that the trial counsel's peremptory challenge was race-neutral is entitled to 'great deference' and will not be overturned absent 'clear error.'"[337]

Part of the problem is that by imposing the *per se* rule,[338] the CAAF implies that counsel are not acting as officers of the court, but rather, are

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[331] *Id*. at 449.
[332] *Id*.
[333] *Id.*
[334] *Id*. at 450 (Crawford, C.J., dissenting).
[335] *See id*. (Sullivan, J., dissenting).
[336] United States v. Hurn, 58 M.J. 199, 201 (2003).
[337] *Id.* (quoting United States v. Williams, 44 M.J. 482, 485 (1996)).
[338] It is true that because the parties only have one peremptory challenge, making a *prima facie* case as understood in the civilian context (that is the showing of a pattern of discriminatory use of peremptory challenges) would be extremely difficult. *See* United States v. Moore, 28 M.J. 366, 368 (C.M.A. 1989) (observing that "it would be difficult to show a 'pattern' of discrimination form the use of one peremptory challenge in each court-martial"). According to the COMA, that difficulty is the primary reason for using the *per se* rule in the military. *See id*.

acting to fix panels, although there is *no* evidence that the government or defense has used peremptory challenges to further invidious discrimination. Judge Crawford stated as much in *Ruiz* when she wrote, "I am still bothered by the fact that what began as a presumption in *Swain* that prosecutors act faithfully in fulfilling their duties as officers of the court has become a presumption that military prosecutors act as part of a conspiracy to pack court panels or fix courts-martial."[339] The CAAF's justification for their position, resting as it does on the "differences" between the civilian and military trial, is a thin reed indeed. A vehicle for discrimination, in whichever forum it is used, is still a vehicle for discrimination. A defense counsel's discriminatory use of a peremptory challenge is just as pernicious to justice as that of a trial counsel, because justice cannot tolerate discrimination from either side. A majority at the CAAF is not following reason to its logical conclusion. This question still must be asked and answered: Are peremptory challenges fulfilling their role as part of the larger goal of ensuring that an accused receives a fair trial?

V. Role of the Jury and Court-Martial Panel and Peremptory Challenges

To the extent that the military justice system became more "civilianized" over time with the addition of layers of protection for an accused,[340] a review of the role of civilian juries in the criminal justice system is instructive. Depending on the jury's role, the relative importance of the peremptory challenge follows. As a normative matter, juries and court-martial panels occupy two competing roles. For both, the first role is to act as a public institution furthering the administration of justice.[341] The second role is to protect a party's rights.[342] In both these roles, juries and panels have important value decisions to make, and depending on the prevailing role of the jury and panel, the peremptory challenge furthers or hinders these functions.

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[339] United States v. Ruiz, 49 M.J. 340, 351 (1998).

[340] *See generally* Captain John S. Cooke, *The United States Court of Military Appeals, 1975-1977: Judicializing the Military Justice System*, 76 MIL. L. REV. 43, 45-49 (1977) (reviewing the historical development of the military justice system and noting that "it has gradually been recognized that servicemembers are entitled to a panoply of rights similar, if not identical, to that enjoyed by civilians").

[341] *See* Marder, *supra* note 34, at 1046.

[342] *See id*.

A. The Jury and Court-Martial Panel as a Public Institution

The civilian jury furthers democratic values by: making public value decisions that reflect the community; rendering accurate verdicts; appearing fair; and educating citizens about the justice system.[343] Such a view concludes that peremptory challenges work to undermine these values by excluding a "range of values and perspectives;" by impeding accuracy "by systemically eliminating jurors with a range of perspectives who might have challenged erroneous or mistaken ideas;" by compromising the fairness of the jury because of the suggestion "that jury composition can be manipulated and that discrimination has a place in the judicial process;" and, most importantly, by denying access to a civic duty.[344] Further, "[j]ury service provides citizens with the only opportunity, other than voting, to participate directly in their own governance."[345] Being a public institution, the "jury should be accessible; stereotypical notions about group identity, which often form the basis for peremptory challenges, should not be permitted to bar access to the jury."[346]

The civilian jury and a court-martial panel should embody the values of the community from which they are drawn, and by their verdicts, articulate public values. When either body renders a verdict in a particular case, it is stating a public value, the result of which of which could be trial and imprisonment. In cases of a not guilty finding, the public judgment is that the government failed to prove its case beyond a reasonable doubt; therefore, even if possibly guilty, the accused must go free. In cases of a guilty finding, the panel in very real terms tells the accused and the community that the conduct committed will not be tolerated. Any court-martial panel speaks not only to the service members at any given camp, post, base, or station, but particularly in high-profile cases, speaks to the larger civilian community, articulating its public value of the importance of maintaining good order and discipline. The courts-martial of members of the training cadre at Aberdeen Proving Ground are excellent examples of panels speaking not only to the Army community, but also to the public at large.[347]

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[343] *See id*. at 1045.
[344] *Id*.
[345] *Id*. at 1084.
[346] *Id*.
[347] *See, e.g.*, Warren Richey, *Aberdeen Rape Trial Tests Army's Credibility*, CHRISTIAN SCI. MONITOR, Apr. 11, 1997, at 3 (noting that if Staff Sergeant Delmar Simpson were to receive "a light sentence, the case will send a powerful message that the Army isn't

To the extent that juries and panels are tasked to decide public values, the exclusion of points of view based on group identity is as detrimental to articulating that public value. "[D]eliberate exclusion is detrimental to the jury because, if a range of views is lost to the jury, then the verdict is less likely to reflect public values . . . ."[348] This particular role of the jury is most compelling. As much as a legislature regulates morality, a jury articulates the public's morality on the canvass of the case it decides If a jury or panel does not reflect larger community values, its decisions will be met with derision and unacceptance.

A jury or panel's role as fact finder is one of its most important functions. Fact-finding is the jury and panel's *raison d'etre*. In this role, the jury or panel must determine what happened and reach an accurate verdict based on the facts it finds.[349] The purposeful exclusion of prospective jurors injures this process to the extent that a certain juror might bring a different frame of reference. To the extent that peremptory challenges may exclude diversity, the ability of the group to determine what happened is arguably impaired.[350] An excellent example of embracing differing frames of reference in the court-martial context is the *inclusion* of enlisted members at the request of the accused.[351] When an accused selects an enlisted panel, conventional wisdom is that he does

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serious about protecting female soldiers from sexual harassment and even rape"); Paul Richter, *Drill Sergeant Guilty of 18 Charges of Rape*, L.A. TIMES, Apr. 30, 1997, at A1 (stating that the "verdicts were a sorely needed victory for the Army"); Elaine Sciolino, *Sergeant Convicted of 18 Counts of Raping Female Subordinates*, N.Y. TIMES, Apr. 30, 1997, at A1 (observing that guilty verdict sent "a clear signal throughout the armed forces that sexual misconduct will not be tolerated"); *see also* United States v. Simpson, 55 M.J. 674 (Army Ct. Crim. App. 2001), *aff'd*, 58 M.J. 368 (2003). In *Simpson*, a general court-martial, composed of officer and enlisted members, convicted Staff Sergeant (SSG) Delmar Simpson, a drill sergeant at Aberdeen Proving Ground, Maryland, of maltreatment of subordinates, rape, sodomy, assault, and indecent assault involving trainees, sentencing him to a dishonorable discharge, forfeiture of all pay and allowances, reduction to Private E1, and confinement for twenty-five years. *See id.* at 678. The case began as an investigation into sexual activity between cadre personnel and trainees with the instigating complaint being lodged against SSG Simpson. *See id.* at 680. In the course of the investigation, other allegations involving others cadre members came to light, ultimately involving allegations against twenty cadre members. *See id*. In response to the investigation, the commander of Aberdeen Proving Ground held a press conference announcing the investigation. *See id*. A media blitz ensued, along with strong congressional interest in the case. *See id*. at 682.

[348] Marder, *supra* note 34, at 1064.

[349] *See id*. at 1067 (noting how a jury's function developed and evolved through time).

[350] *See generally id*. at 1070.

[351] MCM, *supra* note 4, R.C.M. 903(a)(1).

so because he wants their viewpoints and collective life-experiences, which may be different from those of officers.

The third public institutional role played by a jury and a panel is to be a fair decision maker. This particular role underlies many of the Court's decisions discussed previously. A jury or panel must appear fair to maintain its elevated standing in our society. Both the accused and the government have an interest in the appearance of jury actions. For the accused, if the jury or panel appears predisposed either for or against him, he was either convicted at a "kangaroo court" or acquitted but still deemed guilty.[352] For the government, if a jury appears to be unfair, the tenability of the justice system would be at risk. Arguably, *Batson* and its progeny are the results of the appearance of unfairness by excluding prospective jurors. The Court stepped in to ensure a semblance of fairness in jury selection by striking down the discriminatory use of peremptory challenges. It did so because it is intolerable for discriminatory peremptory challenges to take place in public with the seeming approval of a court of law.[353]

The problem with peremptory challenges in this context of appearing fair is that "[j]ury selection should not perpetuate stereotypes, but peremptory challenges exercised on the basis of group membership necessarily do."[354] In panel selection, very little information is given to the parties with respect to who is each individual member. Rule for

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[352] A well-known example of a widely-believed-to-be guilty defendant being acquitted is O.J. Simpson. The jury's not guilty verdict was generally met with derision:

> Race-based jury nullification, of course, describes the hypothesis–catapulted to public prominence by the swift acquittal of O.J. Simpson by a mostly black jury at his criminal trial–that jurors sometimes become so affected by a sense of racial solidarity for a defendant, or a sense of racial hostility toward a prosecution witness, that they vote to acquit a defendant notwithstanding their belief that he has been proven guilty beyond a reasonable doubt.

Roger Parloff, *Race And Juries: If It Ain't Broke . . .*, AM. LAW., June 1997, at 5.

[353] *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 140 (1994) ("The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders."); *see also* Marder, *supra* note 34, at 1078 ("Peremptory challenges permit discrimination in a setting that should be free from all discrimination.").

[354] *See id*.

Court-Martial 912(a)(1) permits questionnaires to be given to the members before trial to expedite *voir dire* and to promote the informed exercise of challenges.[355] The typical questionnaire, however, will have little information that may bear on a member's bias.[356] Rule for Courts-Martial 912(d)—in an effort to assist the parties exercise of informed challenges—permits, but does not require, the military judge to allow parties to examine the members.[357] Assuming a party is able to develop information in the questioning of the members that permits him to articulate a challenge for cause, the party may make such a challenge after *voir dire*.[358] Absent a developed ground for challenge, the party is left only with its peremptory challenge. At bottom (assuming no error by the trial judge in refusing to grant a challenge for cause) either party is most likely to exercise its peremptory challenge, not based on any specific information, but on intuition or on group membership because of the paucity of information available. In the case of the defense, the senior panel member is most likely to be challenged peremptorily under the idea that, as a group, senior officers are more likely to be disciplinarians.[359] This group identification makes sense only on the premise that, if the services reward conformity and leadership, those most senior have acceded to the services' values. By seeking to exclude the senior-most member, the challenging party is losing the breadth of experience and wisdom that comes with long experience in a military organization at an unknown cost to the case at bar. As an example, many

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[355] *See* MCM, *supra* note 4, R.C.M. 912 analysis, at A21-60.

[356] Rule for Courts-Martial 912(a)(1) permits the questionnaire to contain a member's date of birth, sex, race, marital status, home of record, educational information, current unit of assignment, past duty assignments, awards and decorations, date of rank, and information concerning whether the member acted as an accuser, counsel, investigating officer, convening authority, legal officer or staff judge advocate for the convening authority that forwarded the charges, or whether the member has forwarded the charges with a recommendation as to disposition. *See* MCM, *supra* note 4, R.C.M. 912(a)(1). In practice, the questionnaire will question a member's experience with nonjudicial punishment under Article 15, experience as a summary court-martial officer, experience with the court-martial system as a witness either for the prosecution or the accused, and any information regarding being victim or related to anyone who has been a victim of a crime. *See, e.g.*, Memorandum, Court-Martial Members, to Commander, Eighth U.S. Army, subject: Court Member Questionnaire (undated) (on file with author).

[357] *See id.* MCM, *supra* note 4, R.C.M. 912(d) discussion.

[358] *See id*. R.C.M. 912(f)(3).

[359] *See* COMPTROLLER GENERAL OF THE UNITED STATES, MILITARY JURY SYSTEM NEEDS SAFEGUARDS FOUND IN CIVILIAN FEDERAL COURTS, REPORT TO THE CONGRESS 41 (1977) (noting that, "[s]everal defense counsels told us that juries drawn from the higher grades may be more severe. This is apparently why in the 244 records of trial for special and general courts we reviewed, the defense used 82 percent of their peremptory challenges . . . to remove higher grade officers.").

senior leaders may, precisely because of their long experience in the military, give an accused the benefit of the doubt and not be persuaded by passion or prejudice. The elimination of such a perspective may, therefore, actually result in more convictions.

The fourth role played by a jury and court-martial panel is to educate the citizens and servicemembers.[360] The Court recognized this principle in *J.E.B.* when Justice Blackmun wrote,

> Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. It not only furthers the goals of the jury system. If reaffirms the promise of equality under the law—that all citizens regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy. When persons are excluded from participation in our democratic processes solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized.[361]

The military justice system teaches some of the same lessons with a difference; namely, that maintaining good order and discipline is paramount. There should be no mistake that the military justice system depends on the maintenance of fairness for its lifeblood. The presumption of innocence is the most important value taught in a justice system routinely derided because it seemingly lacks fairness and seemingly reeks of railroading its members.[362] That service as a member is deemed important and instructive for potential panel members is reflected in memoranda routinely given to new members when selected for court-martial duty.[363] In this role of the panel, the peremptory challenge conveys harmful message about who can and who cannot serve:

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[360] *See* Marder, *supra* note 34, at 1083 ("The jury plays an important role as educator of the citizenry in the lessons of democracy.").

[361] J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 145-46 (1994) (footnote, citation, and parenthetical omitted).

[362] *See*, *e.g.*, Pound et. al., *supra* note 11, at 19 (observing that the military justice system is a system that denies justice).

[363] As one convening authority put it, "I believe that service as a court-martial is a singularly important duty." Memorandum for Lieutenant General Daniel R. Zanini, to panel members, subject: Selection of Courts-Martial Panel Members for Area II (Sept. 15, 2001) (on file with author).

> Those who witness the improper exclusion of prospective jurors based on peremptories are also taught harmful lessons. They learn that exclusion based on stereotype and discrimination, which is unacceptable in other walks of public life, is acceptable in the courtroom. They may also conclude that there is a hierarchy, rather than equality, among citizens, with those who are permitted to serve on juries being more highly valued citizens than those who are denied the opportunity.[364]

If our system of justice is to vindicate the rule of law and equality, courtrooms should not be the examples of legalized discrimination.

B. The Jury and Court-Martial Panel as a Protector of Rights

A competing viewpoint paints the jury as an institution designed to protect a party's rights. "According to this view, the peremptory [challenge] is a valued mechanism because it ensures that parties believe that fair juries have tried their cases."[365] The Court noted in 1948 that the right to peremptory challenge was given "in aid of the party's interest to secure a fair and impartial jury."[366] As noted, Blackstone called the peremptory challenge "a provision full of that tenderness and humanity to prisoner's for which our English laws are justly famous."[367] Given the decisions of the Court in *Batson* and its progeny, the argument can be successfully made that the role of the jury as a protector of rights has been in decline.

The peremptory challenge has, as it was understood for hundreds of years in the common law and for almost two hundred years since this country's founding, been stripped bare and sacrificed on the altar of the equal protection and due process. As a weapon in the arsenal of the litigant, the peremptory challenge gave a party unparalleled ability to shape a jury to its liking without judicial oversight. Given the judicial scrutiny that follows whenever a prospective juror is struck peremptorily, a party is forced to create a neutral reason for something that in many cases cannot be fashioned into words that would pass judicial muster.

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[364] Marder, *supra* note 34, at 1084-85.
[365] *Id*. at 1046.
[366] Frazier v. United States, 335 U.S. 497, 505 (1948).
[367] 4 BLACKSTONE, *supra* note 32, at 353.

This idea is more pronounced in the military justice context because of the CAAF's imposition of the *per se* rule. With this rule in its kitbag, the CAAF is free to second-guess any trial counsel's peremptory challenge (assuming an objection is made), even when facially-neutral.

VI. The Future of the Peremptory Challenge in Courts-Martial

The constant theme regarding the use of peremptory challenges is that the peremptory challenge is one means to secure an impartial finder of fact. In the usual case

> attorneys have less than perfect information about the predispositions and hidden biases of prospective jurors. Thus, they naturally have tended to rely on stereotypes, common sense judgments, and even common prejudice in deciding whether a juror with a given age, race, sex, religion, ethnic background, and occupation will act partially toward a particular defendant.[368]

What does a party's *dislike* of a member have to do with an inference of partiality? In the military context, where the panel members tend to be "blue ribbon" panels,[369] the argument that peremptories assist in the search for impartiality is unpersuasive indeed. Certainly over time, and given that trial and defense counsel have personal and professional relationships with many members,[370] the members of a standing panel become more experienced and become known quantities to the counsel.

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[368] Saltzburg & Powers, *supra* note 17, at 342.

[369] *See* United States v. Rome, 47 M.J. 467, 471 (1998) (Crawford, J., dissenting) (observing that a military panel "has often been called a 'blue ribbon' panel due to the quality of its members").

[370] *See* Colonel (Ret.) Norman G. Cooper & Major Eugene R. Milhizer, *Should Peremptory Challenges Be Retained in the Military Justice System in Light of* Batson v. Kentucky *and Its Progeny?*, ARMY LAW., Oct. 1992, at 14. The Army Court of Military Appeals also supports this idea:

> Military trial attorneys see their court members frequently—both in and outside the courtroom. Undergirding the law of peremptory challenges . . . is the use to which a defense counsel can put the information he has gleaned from, or about, court members in past courts-martial in order to challenge them peremptorily in the case about to be tried.

United States v. Cruse, 50 M.J. 592, 595-96 (1999).

Thus, the need to rely on stereotypes diminishes.[371] At the same time, however, with that knowledge, counsel should be able to articulate a basis for a challenge for cause if that member is known to be partial and thus not fit for continued service. Detractors may argue that because the convening authority selects the panel, there must exist partiality toward the prosecution. In this case, so the could argument run, the peremptory challenge serves as a check. The reality, however, is that the convening authority may likely only know a few, if any, of the members personally. Further, if we believe that convening authorities act with integrity and understanding the gravity of the roles they have to play in the system, the likelihood that the convening authority selects members with a result in mind is very small. Further, at least in the Army, a panel is chosen to sit for a period of time, and not for a particular case.[372] The instant reaction that peremptory challenges further the interest of impaneling an impartial fact-finder has been taken at face value for too long.[373]

Another point in favor of the challenge is that the peremptory challenge protects the parties in cases when, notwithstanding extensive *voir dire*, a member cannot be challenged for cause, but, for whatever reason, should not sit.[374] As Justice Scalia noted in his *J.E.B.* dissent, "there really is no substitute for the peremptory. *Voir dire* cannot fill the gap. The biases that go along with group characteristics tend to be biases that the juror himself does not perceive, so that it is no use asking about

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[371] *But see* Cooper & Milhizer, *supra* note 370, at 14 ("The knowledge and insight an attorney gains from this familiarity sometimes will provide the attorney with a sound reason to exclude a potential member.").

[372] Memorandum, Staff Judge Advocate, to Lieutenant General Daniel R. Zanini, subject: Selection of Courts-Martial Panel Members for Area II (15 Sept. 2001) (on file with author).

[373] *See* Hoffman, *supra* note 36, at 847-48. The peremptory challenge has nothing to do with juror impartiality, which is grounded in two institutional commitments: (1) the commitment to include broad segments of the population as jurors and (2) the commitment to exclude those who simply cannot be fair. As to the first commitment, peremptory challenges do not help. In the military context, this commitment does not transfer well, except insofar as the convening authority seeks to include members of differing ranks, races, genders, duties, and military occupational specialties. As to the second commitment, if the parties cannot ferret out the reason that a member would be unfair, should they have the right to exclude as "unfair" someone whom the convening authority deems to comport with Article 25 with little or no explanation? The answer seems to be no, given that Army cases are, like those in the civilian context, premised on the right of a panel member to sit unless there is good cause to doubt their impartiality.

[374] *See* Saltzburg & Powers, *supra* note 17, at 356 (observing that a peremptory challenge can remove a juror whom a party has alienated through extensive *voir dire* or whom a party believes cannot be neutral).

them."[375] That point coupled with the combination of restrictive *voir dire* and narrow grounds for causal challenges creates a potent argument for maintaining the peremptory challenge as a functional matter.[376]

Justice Scalia's point has great merit in the civilian system, but is less persuasive in the military context, where members are already deemed qualified for court-martial duty by the convening authority. Further, an answer to this issue is to force military judges to liberally grant challenges for cause. How to accomplish this goal, assuming there is no other error, is a difficult issue. Although military judges are already under a mandate to grant causal challenges liberally,[377] the existence of a peremptory challenge may play a subtle role in the judge's inclination to be less liberal in granting causal challenges. The solution to this problem is to have the military judge conduct the entire process of *voir dire* of prospective members, to eliminate potential alienation of the members by the parties. The practice of judge-directed *voir dire* is not without precedent. In federal civilian practice, the FRCP have given judges exclusive control to conduct *voir dire* since 1944.[378] Rule for Courts-Martial 912(d) already gives military judges the authority to control the method and manner of *voir dire*,[379] but the Rule could be amended mandating that military judges conduct the questioning of members, with either party having the right to submit questions it would like asked. The value of *voir dire* is not reduced because the military judge asks the questions when one remembers *voir dire*'s purpose—to

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[375] J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 162 (1994) (Scalia, J., dissenting).

[376] *See* Saltzburg & Powers, *supra* note 17, at 340 (arguing that subconscious biases are difficult to discover and even more difficult to prove with restrictive *voir dire* procedures).

[377] United States v. Miles, 58 M.J. 192, 195 (2003) (noting the trial judge's error by failing to apply a liberal grant mandate for causal challenges).

[378] *See* VAN DYKE, *supra* note 16, at 164 (citing Rule 24(a) of the FRCP). Van Dyke also explores briefly the reasons commonly given in support of attorney conducting *voir dire*, to include building rapport with jurors, their superior knowledge of the cases, and the preservation of the adversarial system. *See id.* at 164. He also looks at the common reasons for shifting responsibility of *voir dire* to the judge. *See id*. at 164-65. Those reasons include that lawyers take too much time, ask inappropriate questions, and "[a]ttorneys frequently attempt to explain elements of their case in a sympathetic manner to the prospective jurors or to influence the jurors on questions of law while they are trying to establish 'rapport' . . . ." *Id*.

[379] *See* MCM, *supra* note 4, R.C.M. 912(d) (providing that the "military judge *may* permit the parties to conduct the examination of members or *may* personally conduct the examination" (emphasis added)).

uncover bias in members.[380] Having the military judge conduct the examination of members means that the trial and defense counsel must forego an opportunity to place their case personally before the panel. There is some merit in the point that counsel should have that right, but it misses the purpose of *voir dire*. Although it has become so, *voir dire* is, by rule, not a free shot at the panel to educate the panel about one's case[381] or to establish "rapport" with the members. *Voir dire*'s purpose is to discover relevant biases that serve as a basis for a causal challenge.[382] Finally, the least persuasive argument in favor of maintaining the challenge is based on tradition. Tradition carries the justice system only so far. When values change, the system must change. Clinging to tradition for tradition's sake does not permit the recognition that times, and needs of justice, change and develop.

Harkening back to the days of Blackstone, an argument for maintaining the peremptory challenge is that an accused should feel good about who is trying his case.[383] In the military context, this argument is less persuasive given the selection of the members by the convening authority. There are probably few military accused who, when looking at the panel, are going to have positive feelings about those members. If an accused, for whatever reason, suspects a member is against him, he should have the right to eliminate that member from sitting in judgment. This argument runs against the rocks of stereotypical thinking. Given the current stance of CAAF, such an argument, at least as it extends to the government, is not likely to find many adherents.

The most persuasive functional argument in favor of eliminating the peremptory challenge from military practice is that its exercise is not aimed at securing an impartial panel. Given *Batson* and its progeny, the

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[380] There are doubtless many advocates who think otherwise, particularly given that the judge does not have the same familiarity with the facts of the case as do the lawyers. The suggestion that parties have the right to submit questions for the judge to ask potential members is sufficient to rebut that argument. The merits of those arguments are outside the scope of this article.

[381] To the extent that a case requires educating the member's about the case to uncover bias, such a practice conforms with the rule. For example, a defense counsel might have to tell the members that the case involves alcohol in order to probe the members' biases about alcohol's use. In most cases, however, the "education" can be accomplished by asking general questions about the issue rather than telling members specific facts about the case.

[382] *See* MCM, *supra* note 4, R.C.M. 912(d) discussion. Rule for Courts-Martial 912(f)(1) lists the specific grounds for challenge against a member. *Id*. R.C.M. 912(f)(1).

[383] 4 BLACKSTONE, *supra* note 32, at 353.

core function of the challenge ("to avoid trafficking in the core of truth in most common stereotypes"[384]) no longer exists—it has become a shell of its former self. The elimination of the peremptory challenge could result in military judges carrying out the CAAF's requirement to liberally grant challenges for cause. If military judges know that the parties no longer have a peremptory challenge, perhaps they may be more willing to grant causal challenges in close cases, rather than deny them. Eliminating the numbers game and acknowledging that the peremptory challenge is no longer what it used to be would enhance the solemnity of the trial process. Further, removing the only vehicle left for discrimination *by the parties*, thus ensuring the elimination of any suspicion of race or gender playing any adverse role in the function of the panel, could only enhance the public's perception of military justice.

VII. Conclusions

The peremptory challenge is under assault. With *Batson*, *Powers*, *J.E.B.*, *McCollum*, *Moore*, and *Tulloch*, the peremptory challenge is no more. It is a shadow of its former self and given the courts' belief that the peremptory challenge is still a vehicle for discrimination,[385] there is only one choice left to the Congress and the President. The value of enforcing the ideal that a court-martial is to be free of discrimination means eliminating the method of discrimination. It is true that if the challenge is eliminated and a military judge makes an erroneous ruling on a challenge for cause, there will be no vehicle to correct the error at the trial level and much time would be lost. The argument has merit at least until proposed amendment to RCM 912(f)(4) is promulgated.[386] On a more basic level, however, why should a trial judge's ruling on a causal challenge be any different than any other ruling he makes? In the usual case, the military judge's ruling is not subject to an "on-the-spot" correction. The decisions made by the military judge are subject to review by appellate courts and, in that arena, such review is appropriate. In a military courtroom without a peremptory challenge, any ruling on a causal challenge would make its way through the usual appellate process.

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[384] Babcock, *supra* note 23, at 553.

[385] *See* Alschuler, *supra* note 3, at 208 ("Preserving the peremptory challenge as a face-saving device in cases close to the line of appropriate exclusion for cause guarantees irrational and invidious discrimination in countless cases far from the line.").

[386] *See supra* text accompanying notes 269-73.

Functionally, the peremptory challenge is only a step below a for-cause challenge. It is subject to being used, not to ensure the impaneling of a fair and impartial fact finder, but to change the numbers to favor one side[387] or remove, without any justification, experience and perspective from the panel's deliberative process. What's more, the challenge, in reality, does not live up to its billing: "Trial lawyers frequently observe that they use their peremptory challenges, not to secure impartial juries, but to secure juries likely to favor their positions. Nevertheless, the available evidence suggests that they fall short of their partisan goals. Their folk wisdom, trial experiences, mystic intuitions, and crude group stereotypes do not in fact enable them to predict which jurors will favor their positions."[388]

As for the argument that peremptory challenges assist the parties to shape the panel, that is marginally true, given that each side has only one challenge. There is some argument to be made that removing the challenge will also remove from the defense's kitbag the ability to reduce a panel below quorum, perhaps the heaviest weapon in its arsenal. The peremptory challenge, however, was never envisioned to give the defense that kind power over a panel and is another species of the numbers game, which detracts from the solemnity of the proceeding.

If, as the CAAF articulated in *Tulloch*, a trial counsel cannot strike a *single* member without a reason tied to the member's ability to execute her duties faithfully (because it will be remembered the convening authority has certified them qualified to serve), why should a defense counsel be able to reduce a panel below quorum without a similar showing? Or why should a defense counsel be able to reduce a panel below quorum arbitrarily at all? Consider also the fundamental issue that must be considered: "If a prospective juror has a right not to be excluded for constitutionally impermissible reasons, does he or she not also have the right not to be excluded for reasons which, by definition, cannot be *rationally* articulated?"[389] Stated another way, "The Equal Protection Clause says in essence, 'When the government treats people differently, it has to have a reason.' The peremptory challenge says in essence, 'No,

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[387] *See infra* Appendix for a table of how the "numbers game" would favor one side or the other.

[388] Alschuler, *supra* note 3, at 203.

[389] Hoffman, *supra* note 36, at 835 (emphasis added). He also posits that it is an "odd constitutional right indeed which cannot be taken away for certain reasons, but which can freely be taken away for a universe of other unstated and unstatable reasons." *Id*. (footnote omitted).

it doesn't.'"[390] That kind of sentiment is intolerable in a system of justice. Peremptory challenges show that we do not trust jurors or members to tell the truth. Members are told that they should be fair and the counsel and military judge conduct *voir dire* to find out if they can be fair. At the same time, however, counsel and judges then suggest that the mechanism is flawed because the parties are still unable to detect hidden biases with their "fancy questions."[391] Peremptories also simply do not advance the goal of securing an impartial fact-finder. Peremptory challenges are simply a vehicle for "insulting stereotypes"[392] with the hope that those stereotypes work in a party's favor. Should those who wear the uniform and brass of legal professionals strive for more? The answer is self-evident.

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[390] Alschuler, *supra* note 3, at 203.
[391] *Id*.
[392] *See id.* at 170.

Appendix

The Numbers Game

Number of Members	Better for	Number needed to convict	TC must persuade	DC must persuade
3	**Gov't**	2	67%	2
4		3	75%	2
5	Acc'd	4	80%	2
6	**Gov't**	4	67%	3
7		5	71%	3
8	Acc'd	6	75%	3
9	**Gov't**	6	67%	4
10		7	70%	4
11	Acc'd	8	73%	4
12	**Gov't**	8	67%	5
13		9	69%	5

KEY DEVELOPMENTS AFFECTING THE SCOPE OF INTERNAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW

ANTHONY CULLEN[1]

I. Introduction

This article's objective is to examine the concept of internal armed conflict,[2] focusing on four stages of its development in international humanitarian law. Specifically, this article analyzes the areas of continuity and divergence between each stage, highlighting changes in the scope of the concept and in the threshold for the application of international humanitarian law.

The first section of this article outlines the concepts of rebellion, insurgency, and belligerency in traditional international law. Here, the doctrine of recognition is examined, focusing on the grounds for acknowledging the existence of internal armed conflict. While the application of international humanitarian law is required in the case of belligerency, situations of insurgency are governed by the laws of war only when explicitly provided for in an act of recognition by either a third state or the *de jure* government. The concept of internal armed conflict in traditional international law signifies a situation governed exclusively by municipal law except in cases in which the recognition of belligerency has occurred.

The second section focuses on the effect of Article 3 common to the four Geneva Conventions of 1949[3] and explains the significance of

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[2] For the purposes of this article, "internal armed conflict" is used synonymously with "non-international armed conflict."

[3] Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field, *opened for signature*, Aug. 12, 1949, art. 3, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea, *opened for signature*, Aug. 12, 1949, art. 3, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature*, Aug. 12, 1949, art. 3, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention

Common Article 3 as the first provision of international humanitarian law relating specifically to situations of non-international armed conflict. As customary international law, it is held to embody a set of standards universally applicable in all situations of armed conflict. Problems surrounding its application, such as the lack of a formula for its implementation, are also discussed.

The third section examines the influence of Additional Protocols I and II on the concept of internal armed conflict in international humanitarian law.[4] Additional Protocol II has effectively created another category of internal armed conflict, similar in certain respects to the concept of civil war in traditional international law. Additional Protocol I is shown to have removed wars of national liberation from the remit of international humanitarian law relating to situations of internal armed conflict.

The fourth section explicates the definition of internal armed conflict provided by the *Tadic* case,[5] reproduced in the Rome Statute of the International Criminal Court.[6] The application of the concept is scrutinized in the case law of the International Criminal Tribunals for Rwanda and the former Yugoslavia. Its adaptation in Article 8(2)(f) of the Rome Statute is then studied. This represents a positive development of international humanitarian law, distinguishing with a greater degree of clarity the applicability of Common Article 3 in situations of low-intensity armed conflict.

The aim of the above approach is to critically appraise a number of key developments in the area of international humanitarian law relating to situations of internal armed conflict. Conditions determining the

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Relative to the Protection of Civilian Persons in Time of War, *opened for signature*, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

[4] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, art. 1, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Additional Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *adopted* 8 June 1977, *entered into force* 7 Dec. 1978, U.N. Doc. A/32/144 Annex II, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

[5] Prosecutor v. Dusko Tadic (a/k/a Dule), No. IT-94-1-AR72, para. 70 (Oct. 2, 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction).

[6] Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, July 18, 1998, as amended through Jan. 16, 2002, *entered into force* July 1, 2002 [hereinafter Rome Statute].

internationalization of internal armed conflicts are not discussed.[7] The issue of distinguishing situations of terrorism from ones constituting *de facto* armed conflict is also not considered.[8] The sole purpose of this work is to examine the development of internal armed conflict as a concept, concentrating on changes in its scope and also changes in the grounds for application of international humanitarian law.

II. The Practice of Recognition and the Application of Humanitarian Norms in Traditional International Law

The relevance of traditional international law to the concept of internal armed conflict is an area that is frequently overlooked.[9] It merits attention to the present discussion as the starting point for the development of internal armed conflict in international humanitarian law. The doctrine of recognition in traditional international law is studied in this section as a means of investigating the application of international

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[7] For reading on the distinction between international and internal armed conflict, *see* Christine Byron, *Armed Conflicts: International or Non-international?* 6 (1), J. CONFLICT & SECURITY L. 63 (2001); Bart De Schutter & Christine De Wyngaert, *Coping with Non-international Armed Conflicts: The Borderline Between National and International War,* 13 GA. J. INT'L & COMP. L. 279 (1983); Tom Farer, *Humanitarian Law and Armed Conflicts: Towards the Definition of "International Armed Conflict,"* 71 COLUM. L. REV. 37 (1971); Hans-Peter Gasser, *Internationalized Non-international Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 33 AM. U. L. REV. 145 (1983).

[8] *See* ELIZABETH CHADWICK, SELF-DETERMINATION, TERRORISM AND INTERNATIONAL HUMANITARIAN LAW OF ARMED CONFLICT (1996); Leslie C. Green, *Terrorism and Armed Conflict: The Plea and the Verdict*, 19 ISRAEL Y.B. HUM. RTS. 131 (1989); John Norton Moore, *A Theoretical Overview of the Laws of War in a Post-Charter World, with Emphasis on the Challenge of Civil Wars, "Wars of National Liberation," Mixed Civil-International Wars, and Terrorism*, 31 AM. U. L. REV. 841 (1982).

[9] This occurs mainly for two reasons. First, international instruments such as the Geneva Conventions of 1949, *supra* note 3; the Additional Protocols I and II of 1977, *supra* note 4; and the Rome Statute, *supra* note 6, have overtaken this body of law in their provisions relating to non-international armed conflict. Second, the doctrine of belligerency, used in traditional international law for the recognition of internal armed conflict, has fallen into disuse and is now considered obsolete. For further reading on the concept of belligerency in traditional international law, *see* James W. Garner, *Recognition of Belligerency*, 32 AM. J. INT'L L. 106 (1938); Lieutenant Colonel Yair M. Lootsteen, *The Concept of Belligerency in International Law*, 166 MIL. L. REV. 109 (2000); P.K. Menon, *Recognition of Belligerency and Insurgency*, *in* P.K. MENON, THE LAW OF RECOGNITION IN INTERNATIONAL LAW: BASIC PRINCIPLES 109 (1994); Vernon A. O'Rourke, *The Recognition of Belligerency in the Spanish Civil War*, 31 AM. J. INT'L L. 398 (1937); Dietrich Schindler, *State of War, Belligerency, Armed Conflict*, *in* THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 3 (Antonio Cassese ed., 1979).

humanitarian norms to situations of non-international armed conflicts prior to the formulation of the Geneva Conventions. The purpose is to indicate the origins of the contemporary concept in traditional international law. Three discernible stages in the development of non-international armed conflict in traditional international law are examined: rebellion, insurgency, and belligerency. Particular attention is paid to the grounds for recognizing the existence of armed conflict in the second and third stages of its development. In doing so, the scope of internal armed conflict in traditional international law is shown to be limited to situations in which the belligerency of insurgents is recognized.

A. The Non-application of the Laws of War to Situations of Rebellion

The concept of rebellion in traditional international law refers to situations of short-lived insurrection against the authority of a state.[10] In part due to their brevity, situations of rebellion are considered to be completely beyond the remit of international humanitarian concern.[11] Rebels challenging the *de jure* government during a rebellion are afforded no protection under traditional international law. According to Professor Richard A. Falk, a situation of rebellion may be distinguished as "a sporadic challenge to the legitimate government, whereas insurgency and belligerency are intended to apply to situations of sustained conflict."[12] He states that situations qualify as rebellion "if the faction seeking to seize the power of the state seems susceptible to rapid suppression by normal procedures of internal security."[13] Lothar Kotzsch supports a similar position, stating that "domestic violence is called rebellion or upheaval so long as there is sufficient evidence that the police force of the parent state will reduce the seditious party to respect the municipal legal order."[14] Hence, provided the situation is quickly suppressed and does not develop into one of insurgency, the

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[10] *See* Richard A. Falk, *Janus Tormented: The International Law of Internal War*, *in* James N. ROSENAU, INTERNATIONAL ASPECTS OF CIVIL STRIFE 197-99 (1964). Heather Wilson defines rebellion as "a sporadic challenge to the legitimate government." HEATHER A. WILSON, INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS 23 (1988).

[11] R.P. Dhokalia, *Civil Wars and International Law*, 11 INDIAN J. INT'L L. 219, 224 (1971).

[12] Falk, *supra* note 10, at 199.

[13] *Id.*

[14] LOTHAR KOTZSCH, THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW 230 (1956).

treatment of rebels by the state authorities is beyond the remit of international law.

In traditional international law, a situation of rebellion may thus be characterized as a short-lived, sporadic threat to the authority of a state. Such situations may manifest as a "violent protest involving a single issue . . . or an uprising that is so rapidly suppressed as to warrant no acknowledgement of its existence on a[n] external level."[15] According to the International Criminal Tribunal for the former Yugoslavia (ICTY), the lack of a provision in traditional international law relating situations of rebellion was due in part to the fact that states preferred to regard it as "coming within the purview of national criminal law and, by the same token, to exclude any possible intrusion by other States into their own domestic jurisdiction."[16] Falk comments that in situations of rebellion,

> external help to the rebels constitutes illegal intervention. Furthermore, the incumbent government can demand that foreign states accept the inconvenience of domestic regulations designed to suppress rebellion, such as the closing of ports or interference with normal commerce. . . . There is also the duty to prevent domestic territory from being used as an organizing base for hostile activities overseas. . . . Thus if an internal war is a "rebellion," foreign states are forbidden to help the rebels and are permitted to help the incumbent, whereas the incumbent is entitled to impose domestic restrictions upon commerce and normal alien activity in order to suppress the rebellion.[17]

As a matter of exclusive concern for the *de jure* government, a situation of rebellion is not considered to be subject to the laws of war.[18] Hence, Heather A. Wilson, states that where a rebellion takes place,

> the rebels have no rights or duties in international law. A third State might recognize that a rebellion exists, but under traditional international law a rebellion within the

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[15] Falk, *supra* note 10, at 197.
[16] Prosecutor v. Dusko Tadic (a/k/a Dule), No. IT-94-1-AR72, para. 96 (Oct. 2, 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction).
[17] Falk, *supra* note 10, at 198.
[18] *Id.* at 194.

> borders of a sovereign State is the exclusive concern of that State. Rebels may be punished under municipal law and there is no obligation to treat them as prisoners of war. . . . Because rebels have no legal rights, and may not legitimately be assisted by outside powers, traditional international law clearly favours the established government in the case of rebellion, regardless of the cause for which the rebels are fighting.[19]

B. The Concept of Insurgency

When a rebellion survives suppression, it duly changes in status to a situation of insurgency.[20] The concept of insurgency in traditional international law is, however, ambiguous in the sense that its broad parameters are ill-defined. Falk describes it as a "catch-all designation" stating, "On a factual level, almost all that can be said about insurgency is that it is supposed to constitute more sustained and substantial intrastate violence than is encountered if the internal war is treated as a 'rebellion.'"[21] Wilson notes that

> there seems to be general agreement that recognition of insurgency is recognition of a "factual relation" or acknowledgement of the fact that an internal war exists. Beyond that, there is little explanation of the characteristics of the "fact." There are no requirements for the degree of intensity of violence, the extent of control over territory, the establishment of a quasi-governmental authority, or the conduct of operations in accordance with any humanitarian principles which would indicate recognition of insurgency is appropriate.

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[19] WILSON, *supra* note 10, at 23-24.

[20] According to Erik Castrén, "Recognition of insurgency means acknowledgement of the existence of an armed revolt of grave character and the incapacity, at least temporarily, of the lawful government to maintain public order and exercise authority over all parts of the national territory." ERIK CASTRÉN, CIVIL WAR 212 (1966). For further reading on the concept of insurgency in traditional international law, *see* Menon, *supra* note 9, at 109; William V. O'Brien, *The Jus in Bello in Revolutionary War and Counter-Insurgency*, 18 VA. J. INT'L L. 193 (1978); George Grafton Wilson, *Insurgency and International Maritime Law*, 1 AM. J. INT'L L. 46 (1907).

[21] Falk, *supra* note 10, at 199.

> Indeed, the only criterion for recognition, if one could call it that, is necessity.[22]

Recognition of insurgency occurs out of necessity when the interests either of the *de jure* government or a third state are affected by the conflict, requiring the establishment of relations with the insurgent party. This vague criterion of necessity referred to by Wilson abbreviates much of the ambiguity surrounding the concept of insurgency in traditional international law. As the conditions for the recognition of insurgency are not clearly defined, the legal situation arising from such acts of recognition differs in each case.[23] In regard to objective grounds for the recognition of insurgency, Professor Hersch Lauterpach states

> any attempt to lay down conditions of recognition leads itself to misunderstanding. Recognition of insurgency creates a factual relation in that legal rights and duties as between insurgents and outside states exist only insofar as they are expressly conceded and agreed upon for reasons of convenience, of humanity and of economic interest.[24]

Although the legal effects of recognition differ according to each situation of insurgency, generally it is "an indication that the recognizing state regards the insurgents as legal contestants, and not as mere lawbreakers."[25] As noted by Lauterpacht, recognition of insurgency occurs due to a "desire to put their relations with the insurgents on a regular, although clearly provisional basis."[26]

The indeterminate scope of insurgency allows for the concept's

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[22] WILSON, *supra* note 10, at 24.

[23] Castrén states,

> [R]ecognition of insurgency includes as one of its principle elements the grant [sic] of certain rights [which vary] according to whether recognition has been received from the lawful Government of from a third State. It is thus impossible to define in advance the legal situation consequent on recognition of insurgency.

CASTRÉN, *supra* note 20, at 212.

[24] HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 276-77 (1947).

[25] Rosalyn Higgins, *Internal War and International Law*, *in* C.E. BLACK & R.A. FALK, THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 88 (Black & Falk eds., 1971).

[26] *See* MENON, *supra* note 9, at 121.

manipulation by states wishing to define their relationship with insurgents. Third states may recognize the existence of insurgency without explicitly declaring an allegiance or adopting a position of neutrality towards the conflict.[27] An act recognizing the existence of belligerency would infer an obligation to refrain from offering assistance to either party.[28] In contrast, the recognition of insurgency may be utilized to tailor the position of the state according to its interests, avoiding the risks involved in explicitly joining the conflict and also the restrictions on behaviour resulting from neutrality. On this point, Falk comments the recognition of insurgency

> serves as a partial internationalisation of the conflict, without bringing the state of belligerency into being. This permits third states to participate in an internal war without finding themselves "at war," which would be the consequence of intervention on either side once the internal war had been identified as a state of belligerency. Interventionary participation in an insurgency may arouse protest and hostile response, but it does not involve the hazards and inconveniences that arise if a state of war is established with one or the other factions.[29]

The concept's indeterminate range of efficacy allows states the greatest measure of flexibility in defining their relationships with insurgents.[30] As an international acknowledgement of the existence of conflict by a third state, the recognition of insurgency leaves it "substantially free to

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[27] Recognition of insurgency was first employed by the government of the United States in relation to the situation in the Cuban Civil War of 1868-1878. *See* CASTRÉN, *supra* note 20, at 46-47.

[28] *See infra* Part II.A (text following note 45).

[29] Falk, *supra* note 10, at 200.

[30] Falk states,

> In general, the status of insurgency is a flexible instrument for the formulation of claims and tolerances by third states. If it is used to protect economic and private interests of nationals and to acknowledge political facts arising from partial successes by insurgents in an internal war, then it can adjust relative rights and duties without amounting to a mode of illegal intervention in internal affairs.

Id. at 200, 202.

control the consequences of this acknowledgment."[31] Possible motives for the recognition of insurgency are illustrated by Lauterpacht who states, "It may prove expedient to enter into contact with insurgent authorities with a view to protecting national interest in the territory occupied by them, to regularizing political and commercial intercourse with them, and to interceding with them in order to ensure a measure of humane conduct of hostilities." It is important to recognize here that the concept of insurgency in traditional international law does not necessitate the application of humanitarian norms. Unless explicitly conceded, the *de jure* government is not obligated to adhere to such norms.[32] Any legal protection available to insurgents comes only from the provisions of municipal law unless the application of humanitarian standards is specifically provided for in the act of recognition.

International law now has evolved to require the application of minimum humanitarian standards in all situations of insurgency.[33] Before the formulation of the Geneva Conventions of 1949, the only form of internal conflict considered to necessitate the application of humanitarian norms was one involving the recognition of belligerency. The section that follows examines the concept of belligerency, enquiring into its range of efficacy and thus also into the conditions necessitating the application of humanitarian norms.

C. The Recognition of Belligerency and the Application of Humanitarian Norms in Civil War

The distinction in traditional international law between insurgency and belligerency is referred to in the *Tadic* case before the International Criminal Tribunal for the former Yugoslavia.[34] It states the "dichotomy was clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands."[35] The distinction marks a line necessitating the application of international humanitarian law in situations of internal conflict. In traditional international law, the

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[31] *Id*. at 199.
[32] CASTRÉN, *supra* note 20, at 207-23.
[33] *See supra* Part II.A.
[34] Prosecutor v. Dusko Tadic (a/k/a Dule), No. IT-94-1-AR72, paras. 96-97 (Oct. 2, 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction).
[35] *Id.* para. 96.

recognition of belligerency demands that in all circumstances the laws of war are adhered to. As mentioned in the previous section, humanitarian norms may be applied to situations of insurgency, but only when specifically provided for in the act of recognition. Thus, Lauterpacht remarks, "The difference between the status of belligerency and that of insurgency in relation to foreign States may best be expressed in the form of the proposition that belligerency is a relation giving rise to definite rights and obligations, while insurgency is not."[36]

Prior to the formulation of the Geneva Conventions of 1949, any legal obligation to ensure a minimum standard of humane treatment for the victims of an internal conflict was essentially a matter of exclusive domestic concern. The International Committee of the Red Cross (ICRC) Commentary on the Additional Protocols states, "Positive law has very largely abstained from laying down rules governing non-international armed conflicts according to traditional doctrine, states were the only sovereign entities considered to be the subjects of international law; thus the laws of war were conceived to govern international relations, were not applicable to internal conflicts."[37] This, of course, has now changed with the codification of international humanitarian law relating to situations of non-international armed conflict.[38] Prior to this codification, traditional international law required that the belligerency of parties to an internal armed conflict be afforded either formal or tacit recognition before humanitarian obligations could be said to exist. According to Lindsay Moir,

> An examination of some major internal conflicts of the nineteenth and early twentieth centuries shows that, in those cases where the laws of war were accepted and applied by opposing forces, some form of recognition of belligerency has invariably taken place. In contrast, where recognition of belligerency was not afforded by the government, the laws of war tended not to be applied, leading to barbaric conduct by both sides.[39]

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[36] LAUTERPACHT, *supra* note 24, at 270.

[37] YVES SANDOZ, CHRISTOPHE SWINARSKI, & BRUNO ZIMMERMAN, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE TO THE GENEVA CONVENTIONS OF 12 AUG. 1949, 1320 (Yves, Swinarski, & Zimmerman eds., 1987).

[38] *See supra* Part III (providing an analysis of Article 3 common to the four Geneva Conventions of 1949).

[39] LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICT 345 (2002).

The recognition of belligerency is the only institution in traditional international law necessitating the application of humanitarian norms to situations of internal conflict. In order for the existence of belligerency to be recognized, certain conditions need to be fulfilled. Lauterpacht lists the following four criteria for the recognition of belligerency:

> first, there must exist within the State an armed conflict of a general (as distinguished from a purely local) character; secondly, the insurgents must occupy and administer a substantial portion of national territory; thirdly, they must conduct the hostilities in accordance with the rules of war and through organized armed forces acting under a responsible authority; fourthly, there must exist circumstances which make it necessary for outside States to define their attitude by means of recognition of belligerency.[40]

The first condition refers to the scale of hostilities and requires that the character of the conflict is similar to that of an international war.[41] The second condition, stating the insurgent force must "occupy and administer a substantial portion of national territory," demands the existence of a quasi-governmental authority controlled by insurgents. The third condition necessitates insurgent adherence to laws governing the conduct of hostilities, ensuring respect for humanitarian norms. The fourth condition listed by Lauterpacht, requiring the act of recognition to be a diplomatic necessity, is included so that it is not "open to abuse for the purpose of a gratuitous manifestation of sympathy with the cause of the insurgents."[42] Without defining its position in relation to the situation, an act of recognition performed by a third state may be deemed "a premature and unfriendly act."[43]

When recognized as belligerents, parties to an internal armed conflict are, in traditional international law, to be treated in essentially the same way as states at war. The obligation to ensure respect for the humanitarian norms is equally binding on both insurgents and the authorities of the *de jure* government.[44] Falk states,

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[40] LAUTERPACHT, *supra* note 24, at 176.
[41] Falk, *supra* note 10, at 203.
[42] L.F.L. OPPENHEIM, 2 INTERNATIONAL LAW 249-50 (1905).
[43] Dhokalia, *supra* note 11, at 227.
[44] Daoud Khairallah, states, "The laws of war then become applicable to both parties in the conflict, not only with regard to the conduct of hostilities, but also for all other war

> International law treats an internal war with the status of belligerency as essentially identical to a war between sovereign states. This also means that an interventionary participation on behalf of either the incumbent or the insurgent is an act of war against the other. That is, as with a truly international war, a state is given the formal option of joining with one of the belligerents against the other or of remaining impartial.[45]

With recognition of belligerency, insurgents acquire the same rights and duties as a party to an international war. If recognition is bestowed by a third state, the government of that state is required to act as a neutral until the conflict's cessation. While neutral states are not permitted to offer assistance to insurgents, the benefits of third state neutrality for the insurgent party are manifold, including the right to obtain credit abroad, the maintenance of blockades, and the use of foreign ports.[46] By recognizing the belligerency of parties to an internal conflict, neutral states also obligate the application of humanitarian norms by both insurgents and the armed forces of the *de jure* government.

As a doctrine necessitating adherence to international humanitarian norms, the recognition of belligerency extends the law governing situations of international war to internal armed conflicts. The application of the humanitarian standards provided for by traditional international law is, however, contingent not only on a conflict meeting the criteria mentioned above but also on the willingness of states to recognize it as such. There appears to be little consensus among scholars as to whether the recognition of belligerency constitutes a duty when certain objective conditions are fulfilled or is fundamentally a matter of discretion for state authorities.[47] According to Falk, if the four conditions provided by Lauterpacht are fulfilled then "it is arguable that it is intervention to refuse recognition of insurgency as belligerency."[48] An alternative view is expressed by David A. Elder, describing the

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activities, such as the care for the sick and wounded, prisoners of war, etc." *See* WILSON, *supra* note 10, at 37 (quoting Daoud L. Khairallah, *Insurrection Under International Law: With Emphasis on the Rights and Duties of Insurgents* (1973)).

[45] Falk, *supra* note 10, at 203.

[46] *Id.* at 205.

[47] *See* CASTRÉN, *supra* note 20, at 173-77.

[48] Falk, *supra* note 10, at 206.

recognition of belligerency is "an act of unfettered political discretion."[49] Other areas of controversy surrounding the recognition of belligerency include the extent of territorial control required, the question of what constitutes a "responsible authority," and the nature of circumstances deemed to necessitate the act of recognition for third states.[50]

Given its high threshold of application, and the many grey areas that exist in the conditions for recognition, traditional international law is clearly inadequate as the legal regime governing situations of internal armed conflict.[51] In practice, the doctrine of recognition has served more to support the interests of states than to prioritise adherence to humanitarian norms.[52] The current total disuse of the belligerency doctrine arguably resulted from states resorting to the more flexible concept of insurgency. For many commentators, the non-recognition of the Spanish Civil War as a situation of belligerency by neighbouring states demonstrated the demise of the concept in traditional international law.[53] By recognizing the situation as one of insurgency, states avoided the restrictions on behaviour incurred by recognition of belligerency, allowing a greater degree of flexibility in defining relations with insurgents.

Irrespective of whether recognition of belligerency is regarded as a duty or as a matter of pure discretion, it is important to acknowledge that the act places obligations on each party to ensure respect for humanitarian norms and thus, despite its inadequacies, represents an important starting point for the development of international laws governing the situations of internal armed conflict.[54] Although the scope of belligerency is narrowed by its high threshold of application, its employment nevertheless represents a seismic shift in state practice, eroding the impermeability of state sovereignty in international law. The following section examines the significance of Common Article 3 as the first codification of international law applicable to all situations of non-international armed conflict.

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[49] David A. Elder, *The Historical Background of Common Article 3 of the Geneva Conventions of 1949*, 11 CASE W. RES. J. INT'L L. 37, 39 (1979).
[50] CASTRÉN, *supra* note 20, at 177-84.
[51] *See* Falk, *supra* note 10, at 191.
[52] *See generally* MENON, *supra* note 9 (regarding the doctrine of recognition).
[53] *See, e.g.*, Robert W. Gomulkiewicz, *International Law Governing Aid to Opposition Groups in Civil War: Resurrecting the Standards of Belligerency*, 63 WASH. L. REV. 43 (1988).
[54] *See* Lootsteen, *supra* note 9, at 114.

III. The Significance of Article 3 Common to the Geneva Conventions of 1949 as a Provision Relating to Situations of Internal Armed Conflict

As illustrated in the previous section, before the formulation of the four Geneva Conventions of 1949, no codification of international law existed specific to internal armed conflicts. Consequently, the application of international humanitarian law to a situation of internal armed conflict depended on it being fundamentally similar to an international armed conflict. This section illustrates the significance of Article 3 common to the four Geneva Conventions as the first codification of international law specific to situations of internal armed conflict. This is achieved first by highlighting why the common Article is to be understood as a point of departure from traditional international law. Next, the status of the common Article as a codification of customary international law is discussed. After doing so, the substance and scope of Common Article 3 is inspected. In this way, the significant import of the common Article as a development of international law relating to situations of non-international armed conflict is demonstrated.

A. Common Article 3 as a Point of Departure from the Position of Traditional International Law

The concept of internal armed conflict resulting from the formulation of Common Article 3 differs very significantly from that assumed by state practice in traditional international law. As illustrated in the previous section, in order for international humanitarian norms to be applied, recognition of belligerency was required by traditional international law. Arguably one of the greatest achievements of the common Article is that it lowers the threshold for the application of international humanitarian norms. It applies to all situations of non-international armed conflict, including situations of insurgency not reaching the threshold of a civil war. The concept of internal armed conflict that results is therefore much broader in scope than that assumed by traditional international law. Another significant development lies in the provisions of Common Article 3, which provide a set of humanitarian norms to be adhered to (as a minimum) in all circumstances. The text of Common Article 3 is as follows:

> In the case of armed conflict not of an international character occurring in the territory of one of the High

> Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
> 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
> (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) Taking of hostages;
> (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
> (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
> 2. The wounded and sick shall be collected and cared for.
> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
> The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
> The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.[55]

A further noteworthy departure from traditional international law is that the implementation of Common Article 3 does not, in principle, require reciprocity since it is binding irrespective of agreements (of lack thereof) between parties to an armed conflict. As customary international law, the common Article forms part of the strongest corpus of international

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[55] RICHARD GUELFF & ADAM ROBERTS, DOCUMENTS ON THE LAWS OF WAR 302 (3d ed. 2000).

law. The section that follows focuses on how this helps to prioritize its implementation in situations of non-international armed conflict.

B. Common Article 3 as Customary International Law

The strength of Common Article 3 as a provision relating to situations of non-international armed conflict is highlighted by its status as customary international law. The International Court of Justice (ICJ) in the *Nicaragua* case states,

> Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflict of a non-international character. There is no doubt that [. . .] these rules also constitute a minimum yardstick [. . .] and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity."[56]

The ICJ's position on the customary status of Common Article 3 is supported by the ICTY's jurisprudence. The Appeals Chamber of the ICTY in the *Tadic* case referred to the common Article as a provision embodying "certain minimum mandatory rules."[57] These rules "reflect 'elementary considerations of humanity' applicable under customary international law to any armed conflict, whether it is of an internal or international character."[58] The Appeals Chamber goes on to state "customary international law imposes criminal responsibility for serious violations of Common Article 3."[59] This view of the common Article as customary international law is upheld in the subsequent case law of the ICTY.[60] It is also supported in the jurisprudence of the ICTY's sister

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[56] Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 4 para. 114 (Judgment of June 27) (Merits).

[57] Prosecutor v. Dusko Tadic (a/k/a Dule), No. IT-94-1-AR72, para. 102 (Oct. 2, 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction).

[58] *Id.*

[59] *Id.* para. 134.

[60] *See* Prosecutor v. Mladen Naletilic, and Vinko Martinovic, No. IT-98-34-T, para. 228, (Mar. 31, 2003) (Trial Chamber Judgment); Prosecutor v. Miroslav Kvocka, Milojica Kos, Mlado Radic, Zoran Zigic, & Dragoljub Prcac, No. IT-98-30/1-T, para 124 (Nov. 2, 2001) (Trial Chamber Judgment); Prosecutor v. Dragoljub Kunarac, Radomir Kovac, & Zoran Vukovic, No. IT-96-23-T & IT-96-23/1-T, para. 406 (Feb. 22, 2001) (Trial Chamber Judgment); Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic, & Esad Landžo, No. IT-96-21-A, paras. 136-139 (Feb. 20, 2001) (Appeals Chamber Judgment); Prosecutor v. Dusko Tadic, No. IT-94-1-AR72, para. 609 (May 7, 1997) (Trial Chamber Judgment).

institution, the International Criminal Tribunal for Rwanda (ICTR). According to the *Akayesu* case before the ICTR, "It is today clear that the norms of Common Article 3 have acquired the status of customary law in that most States, by their domestic penal codes, have criminalized acts which if committed during internal armed conflict, would constitute violations of Common Article 3."[61]

The Commentary of the ICRC on the Geneva Conventions of 1949 highlights the universality of rules enshrined in Common Article 3:

> [Common Article 3] merely demands respect for certain rules, which were already recognised as essential in all civilised countries, and embodied in the municipal law of the states in question, long before the Convention was signed. . . . no government can object to observing, in its dealings with internal enemies, whatever the nature of the conflict between it and them, a few essential rules which it in fact observes daily, under its own laws, even when dealing with common criminals.[62]

Although a consensus exists concerning the customary status of the Common Article 3, the grounds for its application have been fraught with controversy. The Article states that it applies "[i]n the case of armed conflict not of an international character." The Geneva Conventions, however, do not define or explain what an "armed conflict not of an international character" consists of. The absence of a definition has arguably undermined the implementation of the international humanitarian law, allowing states latitude to deny the existence of armed conflict.[63] Some scholars, however, consider this omission to be necessary. As illustrated by Lindsay Moir,

> The "no-definition" school of thought believes that no definition, be it either general or enumerative, can be precise enough to all possible manifestations of a

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[61] Prosecutor v. Akayesu, No. ICTR-96-4, para. 608 (Sept. 2, 1998) (Judgment).

[62] ICRC, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR: COMMENTARY 50 (ICRC 1958) [hereinafter ICRC].

[63] Examples of armed conflicts in which the application of international humanitarian law has been denied include situations in the West Bank, Kuwait, and East Timor. The parties denying applicability in these situations are, respectively, Israel, Iraq, and Indonesia. *See* Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 261 n.119 (2000).

> particular concept. Furthermore, an overly strict definition might in fact result in consequences far removed from the intentions of the framers, the text becoming more restrictive the more complete the definition tries to be.[64]

According to Professor Erik Castrén, the common Article "deliberately avoids [a definition] primarily because this could lead to a restrictive interpretation."[65] At the Diplomatic Conference drafting Additional Protocol II, Jean Pictet remarked that the construction of a definition was "always difficult and could even be dangerous."[66] It was perhaps as a result of similar fears that the negotiators of the 1949 Geneva Conventions "deliberately refrained from defining the non-international armed conflicts which were the subject of Article 3 common to those Conventions."[67]

While allowing greater scope for the evolution of the law, the absence of a formula for the recognition of non-international armed conflict in the Geneva Conventions has effectively weakened the protection provided by Common Article 3. States wishing to avoid the obligations incurred by the common Article have commonly done so by refusing to recognize its applicability. Thus, in the words of Professor Richard R. Baxter, "the first line of defense against international humanitarian law is to deny that it applies at all."[68]

C. The Scope of Common Article 3

Common Article 3's field of application is broadened by the absence of a definition of non-international armed conflict. Indeed, Jean Pictet remarks,

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[64] MOIR, *supra* note 39, at 32.
[65] CASTRÉN, *supra* note 20, at 85.
[66] HOWARD S. LEVIE, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 41 (1987).
[67] JEAN S. PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 47 (1985); *see also* Anthony Cullen, *The Parameters of Internal Armed Conflict in International Humanitarian Law*, 12 U. MIAMI IN'T & COMP L. REV 189 (2004).
[68] Meron, *supra* note 63, at 261; *see also* Richard R. Baxter, *Some Existing Problems of Humanitarian Law in* THE CONCEPT OF INTERNATIONAL ARMED CONFLICT: FURTHER OUTLOOK 2 (Proceedings of the International Symposium on Humanitarian Law, Brussels) (1974).

> [T]he Article should be applied as widely as possible. There can be no reason against this. For, contrary to what may have been thought, the Article in its reduced form does not in any way limit the right of a State to put down rebellion. Nor does it increase in the slightest the authority of the rebel party.[69]

This broad interpretation of the common Article's applicability has been criticized for stretching its scope too far. According to Lindsay Moir,

> The danger with Pictet's viewpoint is that, without sufficient organisation on the part of the insurgents, the net application would be spread too wide, so that Article 3 would include those conflicts which are too limited or small-scale to have been intended. It is, after all, generally accepted that low-intensity internal disturbances and tensions are excluded from the ambit of the provision. . . . In seeking a wide application of Article 3, Pictet seeks to expand its scope further than intended.[70]

Pictet may have recognized his interpretation broadened the scope of the common Article beyond that assumed by its drafters. It is likely, however, that this position was held as a way of avoiding the problem of potential refusals by states unwilling to recognise the existence of armed conflict and thus to avoid the applicability of Common Article 3.[71] Nevertheless, in stretching the scope of Article 3, the problem of defining actions as war crimes is exacerbated.

According to the late Professor Colonel G.I.A.D. Draper, the lack of juridical precision in the formulation of Common Article 3 has left it

> open to much ambiguity of interpretation. As is so often the case with humanitarian law instruments, this is the

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[69] ICRC, *supra* note 62, at 50.

[70] MOIR, *supra* note 39, at 35-36.

[71] The following question by Pictet would appear to indirectly support this assumption: "What Government would dare to claim before the world, in a case of civil disturbances which could justly be described as acts of banditry, that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to inflict torture and mutilations and to take hostages?" ICRC, *supra* note 62, at 36.

> outcome of the desire for maximum width for the play of the humanitarian norms, overriding the desire for that element of certainty which legal norms demand if they are to be effective.[72]

The ambiguity in the scope of Common Article 3 effectively allows states the opportunity to evade the responsibility to adhere to its provisions. States are often reluctant to recognize the applicability of the common Article due to the perception that it increases the authority of the insurgents. According to one Eldon V.C. Greenberg, a response is understandable if the political sensibilities of state authorities are taken into account: "In a revolutionary war . . . status is the prize for which fighting is waged. Thus, in spite of the plea contained in Article 3 of the Geneva Conventions to put aside (at least to some extent) questions of status, this politically is impossible."[73] Nevertheless, it is worth emphasizing that recognition of the existence of armed conflict is not a matter of state discretion. The ICRC stated that "the ascertainment whether there is a non-international armed conflict does not depend on the subjective judgment of the parties to the conflict; it must be determined on the basis of objective criteria."[74] The kind of objective criteria which would provide grounds for the application of international humanitarian law is indicated by the ICRC stating, "the existence of an armed conflict, within the meaning of article 3, cannot be denied if the hostile action, directed against the legal government is of a collective character and consists of a minimum amount of organization."[75] The extent of its collective character and the level of organization required for a situation to be recognized as an armed conflict is not clear, however. As noted by Moir, this presents obvious problems for its implementation:

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[72] G.I.A.D. Draper, *Humanitarian Law and Internal Armed Conflicts*, 13 GA. J. INT'L & COMP. L. 253, 264 (1983).

[73] Eldon van Cleef Greenberg, *Law and the Conduct of the Algerian Revolution*, 11 HARV. INT'L L.J. 37, 70-71 (1970), *as cited in* MOIR, *supra* note 39, at 66.

[74] *See* ICRC, *Working Paper* (29 June 1999), *available at* http://www/occmpw/prg/documents/precom/papersonprepcomissues/ICRCWorkPaperArticle8Para2e.pdf [hereinafter ICRC Working Paper]. This was submitted as a reference document to assist the Preparatory Commission in its work to establish the elements of crimes for the International Criminal Court. *Id*.

[75] ICRC, *Commission of Experts for the Study of the Question of Aid to the Victims of Internal Conflicts*, *as cited in* G. Abi-Saab, *Non-International Armed Conflicts*, *in* INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW 225 (UNESCO 1988).

> Given the political factors which are bound to influence these circumstances, and common Article 3's silence as regards the party who is to determine the existence or otherwise of an armed conflict (and indeed the method by which this determination is to be made), decisions on the issue will inevitably be made by the State itself. Naturally reluctant to bind themselves to rules which could be perceived as favouring political opponents, States can therefore hide behind the lack of a definition to prevent the application of humanitarian law by denying the very existence of armed conflict.[76]

Moir also remarks, "The failure of the drafters to define the term 'armed conflict not of an international character' allowed States reluctant to hinder their ability to deal with insurrection by accepting any international humanitarian obligations simply to deny the existence of armed conflict, and thus the applicability of international regulation."[77] Aside from the absence of a definition, another feature of Common Article 3 making its application problematic is the wording of some provisions. The ICRC Commentary on Additional Protocol II states the concise wording of Common Article 3

> lays down the principles without developing them, which has sometimes given rise to restrictive interpretations. This particularly applies to the scope of judicial guarantees (paragraph 1(1)(d)) which does not go into details. The precarious position in which insurgent combatants find themselves requires that such guarantees should be clarified and reinforced for their benefit, particularly with regard to matters of judicial procedure. In fact, an insurgent combatant does not enjoy immunity when charged with having taken up arms, as do members of the armed forces in a conflict between States; on the contrary, he may be punished for having violated the national law.[78]

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[76] MOIR, *supra* note 39, at 34.
[77] *Id.* at 88.
[78] ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1325 (1987) [hereinafter COMMENTARY ON ADDITIONAL PROTOCOLS].

Although the obligations incurred by Common Article 3 are minimal, it arguably represents one of the most important developments in the history of international humanitarian law. Jean Pictet describes the significance of Common Article 3 as "marking a decisive step in the evolution of modern law and tending to limit the sovereignty of the state for the benefit of the individual."[79] Rosalyn Higgins, comments that despite its shortcomings, Common Article 3 represents "a step in the right direction—its application is not based on reciprocity by the other party, nor does it depend upon the fulfilment of a technical definition of civil war."[80] Indeed, the achievement of the common Article as a universal standard applicable to situations of internal armed conflict ought not to go unrecognized. As noted by another scholar, Keith Suter, at the very least "it was useful in enabling governments to become accustomed to the principle of non-international armed conflicts being regulated by international law."[81] The significance of Common Article 3 as a step forward in ensuring a minimum degree of humanitarian protection is emphasised by Wilson:

> Article 3 of the Geneva Conventions was a milestone in the development of the law of war. Although the Article does not grant any legal status to the rebels, as evidenced by the final paragraph, its adoption affirmed that internal wars are not entirely beyond the scope of international law. Each of the States party to the Conventions has the right to demand that its provisions be respected by a government engaged in a civil war. To this degree at least, humanitarian protection in non-international armed conflicts was effectively internationalised.[82]

The progress embodied in Common Article 3 as a development of international humanitarian law is important to appreciate. As the first codification of international law specific to situations of internal armed conflict, it represents a major advancement into an area that had previously been taken as the remit of state sovereignty. The inclusion of insurgency in non-international armed conflict broadens the scope of international humanitarian law, ensuring the protection it provides covers

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[79] PICTET, *supra* note 67, at 47.
[80] Rosalyn Higgins, *International Law and Civil Conflict*, *in* EVAN LUARD, THE INTERNATIONAL REGULATION OF CIVIL WARS 183 (1972).
[81] KEITH SUTER, AN INTERNATIONAL LAW OF GUERRILLA WARFARE 16 (1984).
[82] WILSON, *supra* note 10, at 44.

all situations of *de facto* armed conflict. Described by David A. Elder as an "initial but very important first step," the codification of Common Article 3 represents a development of tremendous value for the victims of internal armed conflict.[83] Its status as customary international law strengthens the protection it offers, helping to ensure the recognition of humanitarian provisions contained therein.

As there is no formula for the recognition of armed conflict in the Geneva Conventions, the implementation of Common Article 3 is largely dependent on the will of parties engaged in hostilities to acknowledge the applicability of international humanitarian law. This is perhaps the most problematic aspect of the law governing situations of internal armed conflict. Without a formula for the recognition of armed conflict, it is possible for states wishing to avoid the application of international humanitarian law to simply deny its relevance. A definition of non-international armed conflict was included in Additional Protocol II to the Geneva Conventions of 1949 to help avoid this problem. The following section examines how the definition contained in Additional Protocol II affected its scope after first investigating how Additional Protocol I narrowed the concept of internal armed conflict to exclude wars of national liberation.

IV. Changes in the Concept of Internal Armed Conflict Resulting from the Additional Protocols of 1977

After Common Article 3, the next major development in international humanitarian law was the formulation of two Additional Protocols to the Geneva Conventions of 1949.[84] This section, in two parts, examines each Protocol, focusing on consequent changes in the scope of internal armed conflict.[85] The first part studies Additional

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[83] Elder, *supra* note 49, at 68.

[84] Additional Protocol I, *supra* note 4; Additional Protocol II, *supra* note 4.

[85] Unlike the Geneva Conventions of 1949, the Additional Protocols of 1977 have yet to be ratified by all 191 member states of the United Nations. To date, 162 states ratified Additional Protocol I while 157 have ratified Additional Protocol II. The non-ratification of Additional Protocol I and II by states such as India, Pakistan, Indonesia, and the United States does not impact significantly on how the internal armed conflict is conceptualized contemporaneously in international humanitarian law. David J. Scheffer, the former U.S. Ambassador at Large for War Crimes Issues, in an address to I Corps Soldiers and Commanders on 4 May 2000 stated, "[W]e continue to recognize that many of the substantive provisions of both Protocol I and Protocol II, which covers internal armed conflicts, reflect the development of customary international norms." In the same

Protocol I, demonstrating how the concept of non-international armed conflict is narrowed to exclude wars of national liberation. The second part scrutinises Additional Protocol II, paying specific attention to provisions governing its application. The distinctions introduced into the notion of internal armed conflict by the Additional Protocols are held not to be advantageous to the cohesiveness of the concept.

A. Additional Protocol I

The significance of Additional Protocol I to the present discussion concerns its characterization of internal wars of national liberation as situations of international armed conflict. The title of the instrument states it relates to "the Protection of Victims of International Armed Conflicts."[86] Article 1(4) expands on this to include

> armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[87]

Before the formulation of this instrument, wars of resistance against colonial powers were viewed through the lens of international humanitarian law as situations of internal armed conflict. Common Article 3 was thus considered to be the main applicable standard. Article 1(4) expands the laws governing the conduct of hostilities in wars of national liberation. According to Professor Leslie C. Green, "So long as an internal conflict is directed towards self-government, the Protocol provides for its recognition as an international conflict governed by the Conventions and the Protocol, as well as the ordinary law regarding

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speech he stated, "Thirteen years ago, President Reagan asked the Senate for its advice and consent to Additional Protocol II to the 1949 Geneva Convention, which governs internal armed conflicts. President Clinton renewed that request in January 1999." David J. Scheffer, Address to I Corps Soldiers (May 4, 2000) (transcript on file with author).

[86] Additional Protocol I, *supra* note 4.

[87] *Id.* art. 1(4).

international armed conflicts."[88] The drafters of the instrument, however, interpreted Article 1(4) more restrictively: the ICRC Commentary states the three cases recorded therein (colonial domination, alien occupation, and racist regimes), constitute "an exhaustive list" of internal armed conflicts deemed now to be international.[89] According to the Protocol drafters,

> [I]t must be concluded that the list is exhaustive and complete: it certainly covers all cases in which a people, in order to exercise its right of self-determination, must resort to the use of armed force against the interference of another people, or against a racist régime. On the other hand, it does not include cases in which, without one of these elements, a people takes up arms against authorities which it contests, as such a situation is not considered to be international.[90]

It is thus clear the protocol excludes the majority of internal armed conflicts, not fitting into any of the three narrow categories mentioned above. This very much constricts the remit of the instrument's application and is criticized by Professor Antonio Cassese for its narrowness:

> [F]rom a strictly humanitarian standpoint, extending the applicability of Protocol I to a larger category of armed conflicts could not but appear positive. Such an extension would involve the application of a greater number of humanitarian rules to these conflicts, and hence would mean greater safeguard of human life. . . . By considering wars of national liberation, other than those falling under Article 1, para. 4, as simple internal conflicts one merely places fewer restrictions on violence and thus attenuates to a much lesser extent the bitterness and cruelty of armed conflict. It may seem difficult for a State to treat insurgents fighting for self-determination as lawful combatants rather than as criminals; but it must be borne in mind that the

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[88] Leslie C. Green, *Strengthening Legal Protection in Internal Conflicts: Low-intensity Conflict and the Law*, 3 ILSA J. INT'L & COMP. L. 493, 503 (1997).
[89] COMMENTARY ON ADDITIONAL PROTOCOLS, *supra* note 78, at 54.
[90] *Id.* at 55-56.

> counterpart to such treatment is greater protection for the civilian population, a much more extensive restriction on methods and means of warfare and thus much greater humanitarian protection for all those embroiled in the armed conflicts.[91]

Despite the restrictions implicit in Article 1(4), its inclusion in the Additional Protocol represents a major victory for the third world countries participating in the negotiations at the Diplomatic Conference.[92] A side effect of this victory, however, was a lessening of interest in the formulation of Additional Protocol II. As the situations of colonial states were now deemed to be international, little impetus was left for the expansion of international humanitarian law governing the conduct of hostilities in internal armed conflict.[93] Indeed, many of the developing countries that participated in the Diplomatic Conferences were in favor of restricting the scope of Additional Protocol II so their situation would remain under the ambit of Additional Protocol I.[94]

B. Additional Protocol II

At the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict (1974 to 1977), Daniele Louise Bujard of the ICRC remarked upon the need to develop further the law governing situations of internal armed conflict:

> When put to the test . . . the rules of protection in [common] Article 3 had been shown to require elaboration and completion. Government and Red Cross experts consulted by the ICRC since 1971 had confirmed the urgent need to strengthen the protection of victims of non-international armed conflicts by developing international humanitarian law applicable in such situations.[95]

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[91] Antonio Cassese, Wars of National Liberation and Humanitarian Law, in ETUDES ET ESSAYS SUR LE DROIT INTERNATIONAL HUMANITAIRE ET SUR LES PRINCIPES DE LA CROIXROUGE, EN HONNEUR DE JEAN PICTET 319-20 (Christophe Swinarski ed., 1984).
[92] Elder, *supra* note 49, at 69.
[93] *See* MOIR, *supra* note 39, at 91.
[94] Elder, *supra* note 49, at 69.
[95] *See* MOIR, *supra* note 39, at 89.

Having recognized that the rules contained in Common Article 3 "needed to be confirmed and clarified,"[96] the drafters of Additional Protocol II sought to expand on the protection provided to the Geneva Conventions.[97] According to Professor Christopher Greenwood, it "goes a long way to putting flesh on the bare bones of Common Article 3 of the 1949 Geneva Conventions. In particular, Additional Protocol II contains the first attempt to regulate by treaty the methods and means of warfare in internal conflicts."[98] Professor Georges Abi-Saab comments that the Protocol provides a "much greater, and greatly needed, elaboration of the elliptic declarations of principle of common article 3, and through introducing new fundamental rules concerning the protection of civilians against the effects of hostilities, as well as the protection of medical personnel and transports."[99]

The concept of non-international armed conflict contained in Additional Protocol II, however, sets a much higher threshold of application than Common Article 3. While Common Article 3 applies to all situations of non-international armed conflict, Article 1(1) of Additional Protocol II states that it applies only to armed conflicts

> which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.[100]

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[96] COMMENTARY ON ADDITIONAL PROTOCOLS, *supra* note 78, at 1325.

[97] Article 1(1) states the Protocol "develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application." The first paragraph of the Preamble emphasises the importance of Common Article 3 stating, "that the humanitarian principles enshrined in Article 3 common to the Geneva Conventions of 12 August 1949 constitute the foundation of respect for the human person in cases of armed conflict not of an international character." Additional Protocol II, *supra* note 4.

[98] Christopher Greenwood, *A Critique of the Additional Protocols to the Geneva Conventions of 1949*, *in* HELEN DURHAM & TIMOTHY L.H. MCCORMACK, THE CHANGING FACE OF CONFLICT AND THE EFFICACY OF INTERNATIONAL HUMANITARIAN LAW 3, 5 (1999).

[99] Abi-Saab, *supra* note 75, at 236.

[100] Additional Protocol II, *supra* note 4, art. 1(1).

According to Professor Leslie C. Green, this definition of internal armed conflict sets such a high threshold of application that it would "probably not operate in a civil war until the rebels were well established and had set up some form of *de facto* government, as has been the case with the nationalist revolution in Spain."[101] The ICRC Commentary on the Additional Protocols states that Article 1, determining Protocol II's material field of application, constitutes "the keystone of the instrument. It is the result of a delicate compromise, the product of lengthy negotiations, and the fate of the Protocol as a whole depended on it until it was finally adopted in the plenary meetings of the Conference."[102]

The decision to include a definition of non-international armed conflict, enabling the instrument's implementation on the basis of objective criteria, had the result of narrowing its application:

> The ICRC proposed a broad definition based on material criteria: the existence of a confrontation between armed forces or other organized armed groups under responsible command, i.e., with a minimum degree of organization. As its representative submitting the draft article in Committee explained, the intention was "to specify the characteristics of a non-international armed conflict by means of objective criteria so that the Protocol could be applied when those criteria were met and not be made subject to other considerations." Although the basic idea underlying the proposal was approved, it turned out to be very difficult to achieve a consensus as to what criteria should be used in the definition . . . . The three criteria that were finally adopted on the side of the insurgents i.e. - a responsible command, such control over part of the territory as to enable them to carry out sustained and concerted military operations, and the ability to implement the Protocol - restrict the applicability of the Protocol to conflicts of a certain degree of intensity. This means that not all cases of non-international armed conflict are covered, as is the case in common Article 3.[103]

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[101] LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 66-67 (1999).
[102] COMMENTARY ON ADDITIONAL PROTOCOLS, *supra* note 78, at 1348.
[103] *Id.* at 1349.

The creation of a new, distinct threshold of application in international humanitarian law was required not only to ensure agreement at the Diplomatic Conference, but also to safeguard the common Article from any restrictions in its future application.

While Article 1(1) provides a positive definition of non-international armed conflict, Article 1(2) of the Protocol provides a negative definition. This provision states that the protocol "shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."[104]

The clause in Article 1(2) providing for the exclusion of internal disturbances and tensions was retained from the original draft of the Protocol, which assumed the same threshold of application as Common Article 3. According to the ICRC Commentary on the Protocol, the purpose of this provision "was to define the lower threshold of the concept of armed conflict, assuming that the field of application of common Article 3 and the Protocol would be identical. The paragraph was not questioned and was retained and adopted without lengthy debates."[105]

Given the list of objective criteria in Article 1(1), it would appear unnecessary to include a further provision excluding situations of internal disturbance. The inclusion of Article 1(2) is significant, however, as it demarcates the lower threshold of non-international armed conflict and thus the application of Common Article 3. Commenting on the distinction between situations of non-international armed conflict and internal disturbances, Professor Dietrich Schindler lists the following four conditions determining the existence of armed conflict:

> In the first place, the hostilities have to be conducted by force of arms and exhibit such intensity that, as a rule, the government is compelled to employ its armed forces against insurgents instead of mere police forces. Secondly, as to the insurgents, the hostilities are meant to be of a collective character, that is, they have to be carried out not only by single groups. In addition, the insurgents have to exhibit a minimum amount of

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[104] Additional Protocol II, *supra* note 4.

[105] COMMENTARY ON ADDITIONAL PROTOCOLS, *supra* note 78, at 1354.

> organisation. Their armed forces should be under responsible command and be capable of meeting humanitarian requirements. Accordingly, the conflict must show certain similarities to a war without fulfilling all conditions necessary for the recognition of belligerency.[106]

It should be emphasized, however, that the distinction between situations of internal disturbance and internal armed conflict is not always apparent. The conditions outlined by Schindler, above, approximate those contained in Article 1(1) of Additional Protocol II. Situations of low-intensity armed conflict outside the remit of the Protocol, necessitating the application of Common Article 3, are more difficult to differentiate.[107]

The narrowing of the scope of Additional Protocol II according to the objective criteria set out in Article 1(1) may be viewed as a negative development for a number of reasons. First, all situations of armed conflict that do not reach a threshold of intensity similar to that of a civil war are excluded from its application. Second, situations of high intensity armed conflict between organized armed groups, not involving the armed forces of a *de jure* government, are also excluded.[108] Third, the threshold set by Article 1(1) creates a distinction in international humanitarian law between situations of internal armed conflicts covered by Common Article 3 and ones that come under the remit of the common Article and Additional Protocol II. This distinction between situations of high intensity non-international armed conflict covered by Additional Protocol II and all other cases of internal armed conflict has arguably a negative effect on the cohesiveness of the concept in international humanitarian law. Although the provision governing the remit of Additional Protocol II does not effectively weaken the protection offered in situations governed only by Common Article 3, the disparity created by this distinction has the effect of undermining aspirations towards

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[106] DIETRICH SCHINDLER, THE DIFFERENT TYPES OF ARMED CONFLICTS ACCORDING TO THE GENEVA CONVENTIONS AND PROTOCOLS 163 (1979); 163 RECUEIL DES COURS 117, 147.

[107] *See* JAMES E. BOND, THE RULES OF RIOT: INTERNAL CONFLICT AND THE LAW OF WAR 52 (1974).

[108] These points will be revisited in section four when the scope of the definition contained in Additional Protocol II is contrasted with that of the Rome Statute of the International Criminal Court.

universality in the application of humanitarian standards.[109] The restrictive definition of non-international armed conflict contained in Article 1(1) is perhaps the greatest failing of the instrument, imposing a threshold similar in certain respects to that stipulated by the recognition of belligerency in traditional international law. Commentator Medard R. Rwelamira states, "Protocol II has in effect restated the general rule of international law relating to the status of belligerency."[110]

Rwelamira's comment is not, however, entirely accurate. Although there is some similarity, the grounds for the application of Additional Protocol II are not identical to those required by the recognition of belligerency. As Lieutenant Colonel Yair M. Lootsteen has noted, "[T]he criteria established in Protocol II, while establishing a threshold that is considerably higher than mere civil unrest, is lower than state-to-state warfare."[111] Before recognition of belligerency may occur, insurgents must be in command of an administration similar to that of a government. This requirement is not included in Additional Protocol II. According to Lootsteen, the main difference in the conditions required for the recognition of belligerency is in the scale of insurgent organization and control over territory:

> The belligerency requirements are more stringent than those in the Protocol in that they lend themselves to a group of rebels who have more than mere military control over part of the state. The belligerency conditions . . . require that rebels establish some semblance of government or administration in the area under their control. The substantive distinction lies in the fact that upon attaining the objective criteria of belligerency, the insurgents achieve many of the characteristics of an independent state - they become in effect a *de facto* state.[112]

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[109] Many scholars are of the view that one body of law should apply to all situations of armed conflict, irrespective of their characterisation as internal or international. *See, e.g.*, Judge G.K. McDonald, *The Eleventh Annual Waldemar A. Solf Lecture: The Changing Nature of the Laws of War*, 156 MIL. L. REV. 30 (1998); James G. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, 85 INT'L REV. RED CROSS 313 (2003).

[110] Medard R. Rwelamira, *The Significance and Contribution of the Protocols Additional to the Geneva Conventions of August 1949*, *in* Swinarski, *supra* note 91, at 234-35.

[111] Lootsteen, *supra* note 9, at 130.

[112] *Id.*

The threshold determining the application of Additional Protocol II is lower than that required for the recognition of belligerency. The scope of the Protocol, albeit restrictive in comparison with that of Common Article 3, requires a significantly lower threshold for the recognition of armed conflict than that stipulated in traditional international law.

The criteria contained in Article 1(1) of Additional Protocol II do not assist, as originally intended, in determining the existence of armed conflict. Indeed, it is arguable that this provision, far from helping to ensure adherence to standards of humane treatment, has effectively created more loopholes for governments wishing to avoid the implementation of international humanitarian law.[113]

Each of the Additional Protocols created a distinction in international humanitarian law that previously had not existed. Article 1(4) of Additional Protocol I, providing for the internationalization of wars of national liberation, has effectively narrowed the concept of internal armed conflict, and, in doing so, lessened interest in the development of applicable laws.[114] The creation of a new threshold of application by Article 1(1) of Additional Protocol II is, however, a much more regressive development—rather than bolstering the implementation of international humanitarian law, the heightened threshold serves to strengthen the discretionary power of states to deny the existence of armed conflict. As pointed out by Medard R. Rwelamira, "Individual states are . . . left with a *carte blanche* to decide when the Protocol or common Article 3 should be invoked."[115] The following section examines the notion of internal armed conflict propounded by the ICTY, highlighting the conceptual framework provided for in the application of international humanitarian law.

V. The Concept of Internal Armed Conflict Propounded in the Tadic Jurisdiction Decision

This section examines two of the most significant recent developments in the concept of internal armed conflict in international

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[113] Similarly to the way in which the recognition of belligerency could be avoided due to the absence of a required condition, it is also possible to escape the jurisdiction of the Protocol by narrowly interpreting the criteria contained in Article 1(1).

[114] Elder, *supra* note 49, at 69.

[115] Rwelamira, *supra* note 110, at 236.

humanitarian law. The first development concerns the jurisprudence of the International Criminal Tribunals for Rwanda and the former Yugoslavia. The definition of internal armed conflict employed by the tribunals is examined in order to explore its scope. The second development is the inclusion of the formula provided by the *Tadic Jurisdiction Decision* in Article 8(2)(f) of the Rome Statute. The drafting of this provision is examined to illustrate how its current form was agreed upon. In conducting this study, in light of its broad scope and low threshold for application, the concept of internal armed conflict emerging from the Rome Statute represents a positive point of departure from the definition given in Additional Protocol II.

A. *Tadic*: A Formula for the Recognition of Armed Conflict

On 2 October 1995, the appeals chamber of the ICTY issued its decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (the *Tadic* Jurisdiction Decision).[116] This decision concerning the first case before the tribunal considerably influenced the development of international humanitarian law. The decision affected many aspects of international humanitarian law—the discussion here is restricted to the definition of armed conflict provided in that decision:

> [A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[117]

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[116] Prosecutor v. Dusko Tadic (a/k/a Dule), No. IT-94-1-AR72, para. 70 (Oct. 2, 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction).
[117] *Id*. para. 70.

The appeals chamber in the *Tadic* case related the above concept to the situation in the Prijedor region of Bosnia-Herzegovina. In doing so, the chamber clarified grounds for asserting the existence of "a legally cognizable armed conflict,"[118] triggering the application of international humanitarian law:

> Applying the foregoing concept of armed conflicts to this case, we hold that the alleged crimes were committed in the context of an armed conflict. . . . There has been protracted, large-scale violence between the armed forces of different States and between governmental forces and organized insurgent groups. Even if substantial clashes were not occurring in the Prijedor region at the time and place the crimes allegedly were committed - a factual issue on which the Appeals Chamber does not pronounce - international humanitarian law applies. It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.[119]

The existence of armed conflict is interpreted in broad terms by the appeals chamber, which states, "[t]he temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities."[120] This position, which strengthens the reach of international humanitarian law, is also voiced by the trial chamber in the *Delalic* case: "whether or not the conflict is deemed to be international or internal, there does not have to be actual combat activities in a particular location for the norms of international humanitarian law to be applicable."[121] Furthermore, the use of the term "protracted" in the tribunal's definition of non-international armed conflict ("protracted armed violence between governmental authorities

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[118] *Id*. para. 66.
[119] *Id.* para. 70.
[120] *Id.* para. 67.
[121] Prosecutor v. Delalic, Mucic, Delic, & Landzo, No. IT-96-21-T, para. 185 (Nov. 16, 1998) (Trial Chamber Judgment); *see also* Prosecutor v. Blaskic, No. IT-95-14-T, Trial Chamber Judgment, P 100-101 (Mar. 3, 2000). The *Blaskic* case before the ICTY refers to the definition provided by the *Tadic* Appeals Chamber as a criterion applicable "to all conflicts whether international or internal. It is not necessary to establish the existence of an armed conflict within each municipality concerned. It suffices to establish the existence of the conflict within the whole region of which the municipalities are a part." *Blaskic*, No. IT-95-14-T, para. 64.

and organized armed groups or between such groups"), implies that hostilities need not be continuous.[122] As interruptions in fighting do not suspend the obligations of the parties under international humanitarian law, the use of this term allows for a broad, practical interpretation of internal armed conflict.

The *Tadic* Trial Chamber applied the concept of armed conflict introduced by the appeals chamber.[123] In doing so, it posited the following interpretation of the definition provided by the appeals chamber:

> The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.[124]

The two aspects of internal armed conflict stated by the *Tadic* Trial Chamber—the intensity of the conflict and the organization of parties to the conflict—provide grounds for the recognition of *de facto* armed conflict (and thus also for the application of Common Article 3). The trial chamber in the *Delalic* case supports this interpretation of non-international armed conflict, stating that "in order to distinguish from cases of civil unrest or terrorist activities, the emphasis is on the protracted extent of the armed violence and the extent of organisation of the parties involved."[125] The ICTR also employs this approach: In

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[122] *See* Andreas Zimmermann, *War Crimes Committed in an Armed Conflict Not of an International Character*, *in* Otto TRIFFTERER, COMMENTARY ON STATUTE OF THE INTERNATIONAL CRIMINAL COURT 285 (1999).

[123] *See* Prosecutor v. Dusko Tadic, No. IT-94-1-AR72, para. 628 (May 7, 1997). The ICTY has consistently employed this test in determining the existence of armed conflict. *See* Prosecutor v. Kunarac, Kovac & Vukovic, No. IT-96-23, para. 56 (June 12, 2002) (Appeals Chamber Judgement); Prosecutor v. Jelisic, No. IT-95-10-T, paras. 29, 30 (Dec. 14, 1999) (Trial Chamber Judgment); Prosecutor v. Furundzija, No. IT-95-17/1, para. 59 (Dec. 10, 1998) (Trial Chamber Judgment).

[124] *Tadic*, No. IT-94-1-AR72, para. 562.

[125] *Delalic,* No. IT-96-21-T, para. 184.

determining the existence of armed conflict in Rwanda, the tribunal held that it is "necessary to evaluate both the intensity and organization of the parties to the conflict."[126]

Besides being utilized to determine the applicability of international humanitarian law in the former Yugoslavia and Rwanda, the formula propounded in the *Tadic* Jurisdiction Decision has also been applied to a number of other situations. These include the Occupied Palestinian Territories of the Middle East and Somalia. The UN Special Rapporteur on the situation of human rights in the Palestinian territories, John Dugard, has used the *Tadic* formula repeatedly in evaluating the status of the situation in the Palestinian territories under Israeli occupation. In a report issued on 4 October 2001, he stated the situation could be characterized, "on an irregular and sporadic basis," as an armed conflict due to the "frequent exchanges of gunfire between the Israel Defense Forces and Palestinian gunmen."[127] Mona Rishmawi, an independent expert of the Commission on Human Rights, applied the *Tadic* formula to the situation in Somalia to determine the existence of armed conflict and thus the application of international humanitarian law. She held that,

> as long as the faction leaders, the militias and other irregular armed forces continue their conflict in Somalia and until a peaceful settlement is reached, international humanitarian law related to internal armed conflict applies in the whole territory of Somalia irrespective of whether the specific area is engulfed in active fighting.[128]

Providing a basis for determining the existence of armed conflict, the *Tadic* formula now arguably forms part of the conceptual framework for the application of international humanitarian law to situations of internal armed conflict. The section that follows examines how it has been adapted in the Rome Statute of the International Criminal Court,

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[126] Prosecutor v. Akayesu, No. ICTR-96-4, para. 620 (Sept. 2, 1998) (Judgment).

[127] *Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in the Palestinian Territories Occupied by Israel since 1967* para. 13, U.N. Doc. A/56/440 (2001).

[128] *See Report on the Situation of Human Rights in Somalia, Prepared by the Independent Expert of the Commission on Human Rights, Mona Rishmawi, Pursuant to Commission Resolution 1996/57 of 19 April 1996* para. 54 U.N. Doc. E/CN.4/1997/88 (1997).

highlighting the broad scope of non-international armed conflict as a positive development of the law.

B. The Adaptation of the Tadic Formula in Article 8(2)(f) of the Rome Statute

The ICTY's characterization of non-international armed conflict as "protracted armed violence between governmental authorities and organized armed groups or between such groups" has had a significant impact on its contemporary conceptualization in international humanitarian law. Perhaps the strongest evidence of this influence is the adaptation of the formula in the Rome Statute of the International Criminal Court. Although the issue of jurisdiction over non-international armed conflicts was one of the most controversial to be dealt with at the Rome Conference,[129] its inclusion in the statute of the court eventually was agreed upon despite opposition from countries including India, China, Turkey, Sudan, and the Russian Federation.[130]

A question that subsequently arose at the Rome Conference concerned the scope of the Court's jurisdiction over non-international armed conflicts. The wording of Article 1(2) of Additional Protocol II received general approval when proposed as part of a definition of internal armed conflict and is now included in Article 8(2)(f) of the Rome Statute. This clause provides for jurisdiction over war crimes committed in "armed conflicts not of an international character" and thus notes the exclusion of "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature."[131] The second sentence of Article 8(2)(f) (stating that the Statute applies "to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups"),[132]

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[129] Darryl Robinson & Herman von Hebel, *War Crimes in Internal Conflicts: Article 8 of the ICC Statute*, 1999 Y.B. INT'L HUMANITARIAN L. 193, 198 (1999).

[130] *Id*. at 198 n.37.

[131] Rome Statute, *supra* note 6, art. 8(2)(f).

[132] *Id*. The wording of this definition of non-international armed conflict differs slightly from that provided by the *Tadic* Jurisdiction Decision. Instead of "protracted armed violence," the term "protracted armed conflict" is used in the Rome Statute. This, however, is not to be interpreted as either changing the scope of internal armed conflict or creating a threshold of applicability distinct from that of the *Tadic* definition. *See* Meron, *supra* note 63, at 260; THEODOR MERON, WAR CRIMES LAW COMES OF AGE 309 (1998); Clause Kress, *War Crimes Committed in Non-International Armed Conflict and the*

originated in a proposal submitted by the Sierra Leone delegation.[133] This proposal adapted the *Tadic* formula to provide a positive definition of non-international armed conflict.

Sierra Leone's proposal received support as an alternative to the one restricting the Court's jurisdiction according to the text of Article 1(1) of Additional Protocol II. As elucidated in the previous section, this article defines situations of non-international armed conflict as taking place

> in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.[134]

If accepted as a positive definition of non-international armed conflict, this provision would have imposed an excessive restriction on the Court's jurisdiction, effectively excluding situations of internal armed conflict such as those in Liberia and Somalia.[135]

The adaptation of the *Tadic* formula in Article 8(2)(f) of the Rome Statute has had the effect of lowering the threshold of intensity required for the recognition of internal armed conflict. This has been welcomed by a number of commentators. According to Adriaan Bos,

> this threshold lowering is important because it reduces the chances that a situation arises in a state that can be qualified neither as an internal conflict nor as an emergency as provided for in the human rights

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Emerging System of International Criminal Justice, 2001 ISRAEL Y.B. ON HUM. RTS. 103, 117-18; ICRC Working Paper, *supra* note 74.

[133] U.N. Doc. A/CONF.183/C.1/L.62 (on file with author).

[134] Additional Protocol II, *supra* note 4, art. 1(1).

[135] *See* ICRC, *Armed Conflicts Linked to the Disintegration of State Structures: Preparatory Document Drafted by the International Committee of the Red Cross for the First Periodical Meeting on International Humanitarian Law, Geneva* (Jan. 19-23, 1998), *available at* http://www.icrc.org/web/eng/siteeng0.nsf/iwpList74/02CED570ABFDD384C1256B66005C91C6 [hereinafter ICRC, Armed Conflicts Linked to the Disintegration of State Structures].

> conventions. A better protection of human rights may be achieved because of this reduction.[136]

For Professor Theodor Meron, the recognition of *de facto* armed conflict as possibly existing between organized armed groups is "both welcome and realistic."[137]

In contrast to the restrictive standard set by Article 1(1) of Additional Protocol II, the inclusive breadth of Article (8)(2)(f) is highlighted by Andreas Zimmerman, pointing to its coverage of the following three situations: Armed conflicts between governmental authorities and dissident authorities; armed conflicts between governmental authorities and organised armed groups; and armed conflicts between several organised armed groups.[138]

The use of the term "governmental authorities" has further broadened the parameters of the provision. According to Zimmerman, the term "has to be understood as including not only regular armed forces of a State but all different kinds of armed personnel provided they participate in protracted armed violence, including, where applicable, units of national guards, the police forces, border police or other armed authorities of a similar nature."[139] The less restrictive nature of the definition contained in Article 8(2)(f) is further demonstrated by the absence of any requirement for the existence of responsible command, sustained and concerted military operations or effective control over part of the territory of a State. Zimmerman remarks this was due to the "experiences of the last twenty years after the adoption of the Second Add[itional] Prot[ocol]."[140] In contrast to Article 1(1) of Additional Protocol II, it is also worth noting that the concept of internal armed conflict in Article 8(2)(f) does not require organised armed groups to have the ability to implement international humanitarian law.

In order to reassure states with concerns over the broadness of the provision and its low threshold of application, Article 8(3) states that none of the provisions in the Statute relating to non-international armed

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[136] Adriaan Bos, *The Universal Declaration of Human Rights and the Statute of the International Criminal Court*, 22 FORDHAM INT'L L.J. 229, 233 (1998).
[137] Theodor Meron, *Classification of the Conflict in the Former Yugoslavia: Nicaragua's Fallout*, 92 AM. J. INT'L L. 236, 237 (1998).
[138] Zimmermann, *supra* note 122, at 286.
[139] *Id.*
[140] *Id.*

conflicts "shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means."[141] This clause is taken from Article 3(1) of Additional Protocol II and serves to emphasise that the Statute's provisions on internal armed conflict may not be interpreted as intruding on state sovereignty.[142]

The concept of internal armed conflict provided by *Tadic* and its adaptation in Article 8(2)(f) of the Rome Statute arguably represent progressive developments in international humanitarian law. Providing a basis for the application of Common Article 3, the formula distinguishes broadly the terms for determining the existence of armed conflict, showing it to be distinct from situations of internal disturbance. As previously illustrated, prior to the *Tadic* Jurisdiction Decision the only standard provided by international humanitarian law demarcating situations of internal armed conflict was that contained in Article 1(1) of Additional Protocol II. The high threshold of application set by the Protocol had proved problematic, measuring the existence of armed conflict according to a standard similar, in certain respects, to that required in traditional international law for the recognition of belligerency.

The lowering of the threshold requirements posited by Article 1(1) of Additional Protocol II has resulted in the broadening of the concept of internal armed conflict to include situations of insurgency that until now were not recognised as requiring the application of international humanitarian law. Common Article 3 is now a recognized applicable standard in situations of guerrilla warfare where hostilities take place between organized armed groups without the involvement of government authorities. Prior to the *Tadic* Jurisdiction Decision, the characterization of such situations as manifestations of *de facto* armed conflict would have been inappropriate due to non-involvement of *de jure* state authorities. This development of international humanitarian law to include situations where state structures have disintegrated, takes into account the experiences of countries such as Somalia and Liberia.[143]

Implicit in the *Tadic* formula is the fact that situations of insurgency are now included within the concept of internal armed conflict,

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[141] Rome Statute, *supra* note 6, art. 8(3).
[142] Additional Protocol II, *supra* note 4, art. 3(1).
[143] ICRC, *supra* note 136.

necessitating the application of international humanitarian law. The *Tadic* Jurisdiction Decision summarizes succinctly four reasons for the historical extension of international humanitarian law to cover situations of insurgency:

> First, civil wars have become more frequent, not only because technological progress has made it easier for groups of individuals to have access to weaponry but also on account of increasing tension, whether ideological, inter-ethnic or economic; as a consequence the international community can no longer turn a blind eye to the legal regime of such wars. Secondly, internal armed conflicts have become more and more cruel and protracted, involving the whole population of the State where they occur: the all-out resort to armed violence has taken on such a magnitude that the difference with international wars has increasingly dwindled . . . . Thirdly, the large-scale nature of civil strife, coupled with the increasing interdependence of States in the world community, has made it more and more difficult for third States to remain aloof: the economic, political and ideological interests of third States have brought about direct or indirect involvement of third States in this category of conflict, thereby requiring that international law take greater account of their legal regime in order to prevent, as much as possible, adverse spill-over effects. Fourthly, the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach.[144]

The move from a state-sovereignty approach to a human-being-oriented approach is to be welcomed as it allows for and supports a greater degree of humanitarian protection for the victims of non-international armed

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[144] Prosecutor v. Dusko Tadic (a/k/a Dule), No. IT-94-1-AR72, para. 97 (Oct. 2, 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction).

conflicts. The adaptation of the *Tadic* formula in the Rome Statute represents a positive development which strengthens this protection, helping to ensure accountability for crimes committed in situations of internal armed conflict.

VI. Conclusion

The objective of this article has been to examine the development of the concept of internal armed conflict employed in international humanitarian law. It is hoped that by doing so, changes in the scope of the concept, and the nature of some problems surrounding its application, have been illuminated. As the course of its development has not been straightforward, it is useful here to recapitulate its evolution.

Prior to the formulation of the Geneva Conventions of 1949, situations of internal armed conflict were generally viewed as falling outside the remit of international law. Situations analogous to international armed conflict were exceptions only when recognition of belligerency had taken place. In traditional international law, the existence of insurgency was not viewed as necessitating the application of international humanitarian law. It was through the recognition of belligerency, either by the *de jure* government or by a third state, that parties to an internal armed conflict were categorically obligated to comply with the laws of war. Soon after the Spanish Civil War, the doctrine of belligerency was viewed to be redundant because of the absence of acts recognizing the existence of armed conflict in the practice of states.[145] The strict criteria governing the recognition of belligerency, together with its high threshold of application, were undoubtedly considerations for the drafters of Common Article 3.

The formulation of Common Article 3, despite its failings, has come to be recognized as the first major achievement in the codification of a universally acceptable standard specific to situations of internal armed conflict. Now recognized as customary international law, the common Article embodies a set of minimum standards of humane treatment to be adhered to in all circumstances. The cardinal problem with the application of Common Article 3, however, is not with its humanitarian provisions, but with the actual recognition of the existence of armed conflict. As there is no set of criteria indicating conditions manifesting

[145] *See* Lootsteen, *supra* note 9, at 111.

an armed conflict "not of an international character" in the Geneva Conventions, the implementation of the common Article is based on the willingness of parties to recognize its applicability. When a state refuses to recognize the existence of armed conflict, it also avoids the application of the common Article. As discussed earlier, the lack of a formula for determining the existence of armed conflict has in many ways facilitated states wishing to avoid the application of international humanitarian law.

In the process of drafting the Additional Protocols of 1977, it is likely that delegates were mindful of how the absence of a formula weakened the efficacy of Common Article 3. The drafters of Additional Protocol II attempted to strengthen the instrument by including a set of criteria demarcating its field of application. This resulted, however, in the establishment of an excessively high threshold for its implementation and also effectively created another category of internal armed conflict in international humanitarian law. Additional Protocol I, relating to situations of international armed conflict, narrowed the concept of internal armed conflict by internationalizing internal wars of national liberation. As a consequence, situations of internal armed conflict against racist regimes or colonial occupation were now viewed as wars governed by the Geneva Conventions in their entirety and not by Additional Protocol II. Both Protocols had the effect of creating new, and in certain respects, problematic distinctions in the concept of internal armed conflict. The distinction created by Additional Protocol II delineated situations of a particular threshold, excluding completely from its remit internal armed conflicts of low intensity. Additional Protocol I distinguished particular kinds of *prima facie* internal armed conflict as international on the grounds of their cause or intended outcome. These distinctions were included due to the pragmatism of drafters, responding to the political pressure exerted during negotiations. Now accepted features of international humanitarian law, they narrow the notion of internal armed conflict, further exacerbating problems that surround the formulation of a cohesive concept. For this reason, the formula propounded in the *Tadic* Jurisdiction Decision and adapted in Article 8(2)(f) of the Rome Statute of the International Criminal Court is an especially welcome development.

The concept of internal armed conflict as "protracted armed conflict between organized armed groups and government authorities or between such groups" is welcome for a number of reasons. It expands the concept of internal armed conflict beyond that contained in Additional Protocol II and, in doing so, provides a basis for the application of

Common Article 3. The formula is broad enough to include situations of low intensity armed conflict and yet exclude situations of internal disturbance. By realistically defining the concept of internal armed conflict in broad terms, Article 8(2)(f) of the Rome Statute expands the protection offered by international humanitarian law in such situations. The practice of guerrilla warfare may now be included in the concept of armed conflict as a result of the provision's lower threshold of application. The definition provided in Article 8(2)(f) lacks the excessive restrictions imposed by Article 1(1) of Additional Protocol II such as the existence of territorial control, responsible command over troops, and the use of sustained and concerted military operations by insurgents. Furthermore, the definition in Article 8(2)(f) specifically provides for the existence of armed conflict between warring factions without the involvement of a *de jure* governmental authority. Before the *Tadic* Jurisdiction Decision, such situations, irrespective of their scale, were generally not recognised in international humanitarian law as constituting armed conflicts. The broad, inclusive language of the definition is of significant help in ensuring a greater degree of protection to the victims of such situations.

The more recent developments outlined in this article show an expansion of the concept of internal armed conflict in international humanitarian law. This is to be welcomed as it enables a greater degree of humanitarian protection. The progress that has been achieved in the area of international humanitarian law governing situations of internal armed conflict has been slow, attained by progressively pulling against interests of state sovereignty. Although the concept of internal armed conflict codified in Article 8(2)(f) of the Rome Statute is a significant attainment, further development is required for its evolution into a more substantive measure for determining the existence of armed conflict. It is important to recognize, however, that there should not be a quantitative threshold set for either intensity of hostilities or the organization of insurgents, as flexibility in the application of the formula could well be stifled by such an action. The concept being phrased in an abstract manner will allow future case law to develop without being constricted by the kind of restrictive stipulations set out in Additional Protocol II. This is vital. In order for the formula to strengthen the application of international humanitarian law, it must possess an optimum degree of flexibility. The concept is a positive contribution to the body of law governing internal armed conflict and no doubt will be further utilized in the future to ensure a greater degree of humanitarian protection in situations once deemed to be the exclusive concern of state sovereignty.

DISCRETIONARY ACTIVITIES OF FEDERAL AGENTS VIS-À-VIS THE FEDERAL TORT CLAIMS ACT AND THE MILITARY CLAIMS ACT: ARE DISCRETIONARY ACTIVITIES PROTECTED AT THE ADMINISTRATIVE ADJUDICATION LEVEL, AND TO WHAT EXTENT SHOULD THEY BE PROTECTED?

LIEUTENANT COMMANDER CLYDE A. HAIG[1]

A prominent exception to the limited waiver of sovereign immunity contained in the Federal Tort Claims Act (FTCA)[2] is the discretionary function exception (DFE).[3] Although the U.S. Supreme Court repeatedly has emphasized the broad reach of the DFE in shielding the government from liability,[4] the exception has been applied inconsistently at the administrative adjudication level by operation of the Military Claims Act (MCA).[5] Unlike the FTCA, the MCA does not contain the DFE,[6] but still provides for compensation in many of the same situations as the

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[2] 28 U.S.C. §§ 1346(b), 2671-2680 (2000).

[3] *Id.* § 2680(a); Dalehite v. United States, 346 U.S. 15, 32 (1953) (recognizing in this seminal articulation of the DFE, that, so long as a governmental action falls within the purview of the exception, even explicitly negligent conduct is shielded from liability).

[4] *See, e.g.*, United States v. Gaubert, 499 U.S. 315, 319 (1991) (holding certain actions taken by federal banking authorities to be within the purview of the DFE); Berkovitz v. United States, 486 U.S. 531, 547 (1988) (finding that the DFE does not protect all governmental actions, but only those which involve policy discretion); United States v. Varig Airlines, 467 U.S. 797, 815-16 (1984) (determining actions taken by Federal Aviation Administration agents in conducting aircraft safety certification spot-checks held to be within purview of the DFE).

[5] 10 U.S.C. § 2733 (2000).

[6] *See id.*

FTCA.[7] As a result, a claim that is expressly barred under the FTCA (based upon the premise that it stems from a discretionary governmental function) may be compensable under the MCA.[8] Given the reach of the DFE in shielding the government from liability in FTCA practice,[9] whether the exception should apply to the MCA should not be a matter of ad hoc speculation or agency discretion; rather, the MCA itself should contain specific guidance on the issue. This article demonstrates the thematic inconsistency between the MCA and the FTCA with respect to discretionary governmental activities, and offers a proposal for resolving this inconsistency.

The tragic shooting death of a teenager by a U.S. Marine Corps anti-drug patrol in Texas[10] is demonstrative of the need for legislative guidance concerning the applicability of the DFE to claims adjudicated at the agency level under the MCA. While the incident drew international attention to a number of issues, including the question of criminal responsibility for the mishap and the propriety of using military forces to assist the border patrol in drug interdiction operations,[11] it also raised

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[7] Within specific parameters, both the FTCA and MCA allow claims for property damage, personal injury, or death stemming from the negligent conduct of federal agents acting within the scope of their employment. *See, e.g.*, 10 U.S.C. § 2733(a), (b)(4) (2000); 28 U.S.C. § 2672 (2000).

[8] Similarly, this inconsistency is also evident upon examination of the Foreign Claims Act (FCA), 10 U.S.C. § 2734. The FCA is addressed in detail at sections I and IV, *infra*.

[9] *See infra* section II (demonstrating the reach of the DFE).

[10] *See* S.C. Gwynne, *Border Skirmish: A Teen's Death Forces the Military to Question its Role in Fighting Drugs*, TIME, Aug. 25, 1997, at 40. As reported in *Time Magazine*:

> On May 20, Marine Corporal Clemente Banuelos, 22, aimed his M-16 rifle at an 18 year-old goatherd named Esequiel Hernandez, Jr. and shot him to death. Banuelos was part of a military surveillance unit helping control drug traffic in the tiny West Texas border town of Redford. He had apparently mistaken Hernandez – who was carrying a rifle and had fired it in the direction of the Marines – for one of the armed scouts who typically act as advance guards for drug smugglers.

Id.

[11] *See id.*; *see also* Richard J. Newman, *A Timeout in the Military's War on Drugs*, U.S. NEWS & WORLD REP., Aug. 4, 1997, at 40 (examining whether the ground reconnaissance counter-drug strategy involving military interdiction teams is worth the risk it may pose to civilians); Sam Howe Verhovek, *After Marine on Patrol Kills a Teenager, A Texas Border Village Wonders Why*, N.Y. TIMES, June 29, 1997, at 16 (highlighting public outcry in response to the killing of a teenager by a Marine Corps counter-drug interdiction team).

issues concerning the settlement of claims under the MCA at the agency level.[12] The U.S. Navy and the Department of Justice (DOJ) settled claims submitted by the victim's family after the incident.[13] While the specific details of the settlement are protected by federal privacy laws, the government denied any wrongdoing or fault in causing the victim's death:

> Asked why federal officials agreed to a settlement . . . [DOJ] spokeswoman Chris Watney said Tuesday in a telephone interview from Washington, D.C., that federal privacy laws prevented her from commenting. However, Watney said the Military Claims Act allows federal military organizations to "settle claims caused by their activities, without showing the [sic] fault on the part of any person, so long as the injured person, or claimant, was not at fault." In the settlement, the Marine Corps, which is under the Department of the Navy, denied any liability in Hernandez's death.[14]

Addressing the implementation of the DFE at the administrative adjudication level, this paper will assess the putative resolution of the Hernandez claims had they been adjudicated under MCA implementing regulations of the other military departments.[15] Following this

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[12] *See* Richard Estrada, *Death Payoff Won't Fix Border Control Policy*, DALLAS MORNING NEWS, Aug. 14, 1998, at 27A. As reported in the *Dallas Morning News*:

> Nearly $2 million is a lot of money, but it won't bring back Esequiel Hernandez, Jr. . . . [a]ccording to attorneys for the family of the deceased, the United States has agreed to pay the hefty sum of $1.9 million dollars to the survivors of young Mr. Hernandez . . .
>
> Under the Military Claims Act, the military components of the federal government are authorized to settle claims related to U.S. military activities without a showing of fault by U.S. military personnel.

Id.

[13] *See id.*

[14] Rene Romo, *Feds to Pay Family of Goatherder*, ALBUQUERQUE J., Aug. 12, 1998, at C3.

[15] *See infra* part IV (providing an analysis of the MCA implementing regulations for the different armed services and an assessment of how the Hernandez claims might have been resolved had they been adjudicated uner Army, Air Force, or Coast Guard MCA regulations instead of the Navy's MCA regulations); *see also infra* part VI (providing an assessment of how the Hernandez claims might have been resolved had they been

assessment is a proposed resolution that addresses the inconsistent application of the DFE to the MCA at the administrative level.[16]

I. The Statutory Framework of the FTCA and MCA

To fully understand how the DFE has been inconsistently applied at the administrative adjudication level, one must first examine the context of the principal provisions of the FTCA and MCA. The following sections provide a background and statutory framework for this analysis.

A. Basis for Governmental Liability Under the FTCA

The FTCA provides that a party may commence a private cause of action against the United States in district court for claims based on the negligent or wrongful conduct of a government agent acting within the scope and course of his employment.[17] Additionally, the FTCA provides for the administrative adjudication of claims brought against the United States, and requires that a claimant exhaust these administrative remedies before properly filing suit against the government:

> [a]n action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his

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adjudicated under Army, Air Force, or Coast Guard MCA regulations instead of the Navy's MCA regulations).

[16] *See infra* parts V and VI (providing a proposed solution for resolving the inconsistencies engendered by the implementation of the MCA at the administrative adjudication level).

[17] *See* 28 U.S.C. § 1346(b) (2000). Specifically, the FTCA provides:

> . . . providing exclusive jurisdiction for "civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Id.

> office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.[18]

While the FTCA dictates "procedural and substantive differences between a suit against a private party and one against the United States,"[19] it is fundamentally a limited waiver of sovereign immunity providing for a cause of action against the United States sounding in tort:

> [s]ince no suit may be brought against the sovereign without its consent, a statutory waiver of immunity is a *sine qua non* to providing a judicial remedy for tort claims against the Government. The [Federal] Tort Claims Act is such a statutory waiver. "The very purpose of the [Federal] Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability."[20]

FTCA practice is bound by a number of additional requirements and restrictions, some of which are statutory, while others are based upon court decisions. For instance, any claim arising in a foreign country is specifically excluded from the purview of the FTCA.[21] Further, the liability of the United States is determined "in accordance with the law of the place where the act or omission occurred."[22] The status of the claimant is also a factor in FTCA practice. For instance, federal civilian

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[18] *Id.* § 2675(a).

[19] LESTER S. JAYSON, HANDLING FEDERAL TORT CLAIMS: ADMINISTRATIVE AND JUDICIAL REMEDIES § 4, at 2 (1964). Among the procedural requirements, a claim must be presented to the agency within two years of accrual. *See* 28 U.S.C. § 2401(b). The date of accrual is the date on which a reasonable and prudent claimant knew or should have known of the injury and the cause of the injury. *See* United States v. Kubrick, 444 U.S. 111, 122-23 (1979) (holding that a claim accrues when the claimant knew, or should have known, about the injury and its cause).

[20] JAYSON, *supra* note 19, § 3, at 7 (citing Rayonier, Inc. v. United States, 352 U.S. 315, 319 (1957)).

[21] *See* 28 U.S.C. § 2680(k).

[22] *Id.* § 1346(b).

employees are limited to the benefits they receive under the under the Federal Employees' Compensation Act (FECA) for injuries incurred during the course of their employment.[23] Similarly, employees of Non-Appropriated Fund Instrumentalities are limited to the benefits they receive under the Longshore and Harbor Workers' Compensation Act for their employment-related injuries.[24] The most hotly contested liability exclusion in FTCA practice is the so-called *Feres* bar. Under the *Feres* doctrine, claims stemming from the injuries (or death) of service members are not compensable under the FTCA if the injury or death is deemed "incident to service."[25]

The status of a tortfeasor may also act as a bar to recovery under the FTCA. Liability of the government under the FTCA will only lie if the injury at issue is attributable to the tortious conduct of a governmental agent or employee acting within the scope and course of his employment.[26] With limited exception, the United States does not assume liability under the FTCA for the torts of its independent contractors.[27]

While the foregoing requirements and exclusions are the subject of exhaustive exceptions and judicial interpretation,[28] the FTCA is, in its most fundamental sense, a limited waiver of sovereign immunity that is "hedged with protections for the United States."[29]

B. Bases for Compensation under the MCA

Unlike the FTCA, the MCA does not provide for a private cause of action against the United States.[30] Thus, instead of creating federal

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[23] *See* 5 U.S.C. § 8116 (2000).
[24] *See id.* § 8173.
[25] *See* Feres v. United States, 340 U.S. 135, 146 (1950); *see also* JAYSON, *supra* note 19, ch. 5A (providing an in-depth discussion of the *Feres* bar to liability under the FTCA, including a review of the types of factors courts have considered in deeming an injury "incident to service").
[26] *See* 28 U.S.C. § 1346(b) (2000); *id.* § 2671.
[27] *See id.* § 2671.
[28] For a discussion of the exceptions and requirements of the FTCA, and particularly the DFE, *see generally* JAYSON, *supra* note 19, at 12-1 – 12-42.
[29] *See* Carlson v. Green, 446 U.S. 14, 28 (1980) (Powell, J., concurring).
[30] *See* 10 U.S.C. § 2733; *see also* Collins v. United States, 67 F.3d 284, 286 (Fed. Cir. 1995) (finding that court does not have jurisdiction under the MCA to consider claim denied by an agency).

government "liability," the MCA compensates private parties in certain circumstances. Unlike the FTCA, the MCA applies worldwide, with the proviso that claims arising in the United States must first be considered under the FTCA.[31] Further, claims arising in foreign territories are first considered under the Foreign Claims Act (FCA) before they are adjudicated under the MCA.[32]

The most salient facet of the MCA impacting adjudication of claims involving discretionary governmental activities is the MCA's bifurcated compensation scheme. The MCA provides compensation for damages to (or loss of) property, personal injury, or death either (1) caused by an agent of the Army, Navy, Air Force, Marine Corps, or Coast Guard "acting within the scope of his employment," or (2) "incident to noncombat activities" of the U.S. Military Departments or Coast Guard.[33] The MCA thus delineates two distinctly different categories of claims for which the government will provide compensation: those claims stemming from injury or damage caused by a government agent acting within the scope of his employment and those claims stemming from noncombat activities. The ramifications of this bifurcated compensation scheme are significant:

> *If the claim is not incident to the noncombat activities of the military departments, the claimant must show the causative act or omission to be negligent, wrongful, or otherwise to involve fault.* Contrariwise, *if the claim is based upon a noncombat activity,* the claimant need not show negligence, wrong, or fault; a showing of causation and damages suffered is all that is needed…if the claim is based upon a noncombat activity of the armed forces, it is not necessary to establish scope of employment . . .[34]

While the "scope of employment" prong for recovery under the MCA is similar to the basis for recovery set forth in the FTCA,[35] the

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[31] *See* 10 U.S.C. § 2733(b)(2).

[32] *See id.* The Foreign Claims Act is addressed more fully in parts I.C and IV, *infra*.

[33] *See id.* § 2733.

[34] JAYSON, *supra* note 19, § 1, at 19.

[35] Although the respective theories of liability set forth in the FTCA and in the "scope of employment" prong of the MCA are not identical, the "scope of employment" prong of the MCA sets forth a compensation paradigm that is generally similar to the basis of governmental liability in the FTCA (requiring that the damage or injury in question

FTCA contains no basis of recovery similar to the "noncombat activities" prong of the MCA. Though each of the services provides guidance on the meaning of noncombat activities, they all define the term in a consistent fashion. Pursuant to Navy claims regulations, noncombat activities are defined as follows:

> activities essentially military in nature, having little parallel in civilian pursuits, and in which the U.S. Government has historically assumed a broad liability, even if not shown to have been caused by any particular act or omission by DON personnel while acting within the scope of their employment. Examples include practice firing of missiles and weapons, sonic booms, training and field exercises, and maneuvers that include operation of aircraft and vehicles designed especially for military use.[36]

Similarly, Air Force regulations define noncombat activities as those activities that are "particularly military in character" and have "little parallel in the civilian community."[37] Like the Navy, the Army also includes as specific examples of noncombat activities the firing of missiles and weapons, training and field exercises, and maneuvers that include the operation of aircraft and vehicles.[38]

While the MCA differs from the FTCA in several critical areas, such as the MCA's noncombat activities basis of compensation, its worldwide application, and its lack of a judicial remedy, many of the MCA's provisions are similar to the FTCA. As with the FTCA, claims submitted under the MCA must be presented to the agency within two years of accrual.[39] Although the MCA does not preclude service members from

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results from some type of negligent or wrongful act or omission by a government agent acting within the scope of his employment).

[36] GENERAL CLAIMS REGULATIONS—MILITARY CLAIMS ACT, 32 C.F.R. § 750.43(a)(2) (2002); *see also* U.S. DEP'T OF NAVY, JUDGE ADVOCATE GEN. INSTR. 5890.1, ADMINISTRATIVE PROCESSING AND CONSIDERATION OF CLAIMS ON BEHALF OF AND AGAINST THE UNITED STATES encl. 2, at 1-2 (17 Jan. 1991) [hereinafter JAGINST 5890.1].

[37] ADMINISTRATIVE CLAIMS—MILITARY CLAIMS ACT, 32 C.F.R. § 842.41(c) (2002); *see also* U.S. DEP'T OF AIR FORCE, INSTR. 51-501, ADMINISTRATIVE CLAIMS FOR OR AGAINST THE AIR FORCE 45 (9 Aug 2002) [hereinafter AFI 51-501].

[38] CLAIMS AGAINST THE UNITED STATES, 32 C.F.R.§ 536.3 (2002); *see also* U.S. DEP'T OF ARMY, REG. 27-20, CLAIMS 92 (1 July 2003) [hereinafter AR 27-20].

[39] *See* 10 U.S.C. § 2733(b)(1) (2000).

receiving compensation for property damage incurred incident to service, it does have a service-connection limitation that is similar to the FTCA's *Feres* bar: claims stemming from the personal injury or death of a service member are precluded if the injury is deemed incident to service.[40] Finally, while there is no judicial remedy under the MCA, the MCA does give claimants the right to appeal decisions that claimants consider unfavorable to higher levels of adjudication authority within the agency.[41]

C. Contrasting the FTCA and MCA with the FCA

As its name implies, the FCA applies only to claims that arise outside the jurisdiction of the United States.[42] When foreign claims cannot be resolved under the FCA, they are generally adjudicated under the MCA.[43] The purpose of the FCA is to "promote and maintain friendly relations through the prompt settlement of meritorious claims" for property damage or loss, personal injury, or death.[44] FCA claims are properly payable "to any foreign country" or "any political subdivision or inhabitant of a foreign country."[45]

Because the FCA is limited to territories outside of the United States, and the FTCA has application within United States only, there is no jurisdictional overlap between the two statutes. In contrast, because the MCA has worldwide application, its territorial jurisdiction does overlap with that of the FTCA. Given that the DFE is a specific statutory liability exclusion that is intended to apply to FTCA claims, and the FTCA expressly applies to claims arising within the United States,[46] by analogy one could argue that the DFE should also apply to MCA claims arising within the United States. In contrast, given the jurisdictional distinctions between the FCA and the FTCA, the application by analogy of the DFE to the FCA does not hold as it does with the MCA. This

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[40] *See id.* § 2733(b)(3). Note, however, that property damage claims are not similarly barred. *See id.*
[41] *See id.* § 2733(g).
[42] *See id.* § 2734.
[43] *See id.* § 2733(b)(2); § 2734. By operation of these provisions, claims of foreign nationals arising in a foreign country are adjudicated under the FCA, while claims of U.S. nationals arising in foreign countries are normally adjudicated under the MCA.
[44] *Id.* § 2734(a).
[45] *Id.*
[46] *See* 28 U.S.C. § 1346(b) (2000); *id.* § 2680(a).

significant distinction notwithstanding, the FCA is relevant to the present analysis insofar as its bases for compensation are similar to those set forth in the MCA.

The FCA establishes a two-pronged compensation scheme that has been further narrowed by service regulations. Under the FCA, claims for property damage, injury, or death are payable if they (1) stem from "noncombat activities" of the armed forces, or (2) if they are "caused by" a member or civilian employee of one of the services.[47] Thus, on the face of the statute, payment is not predicated upon a negligence-scope of employment analysis. Each service, however, has further clarified this second prong by regulation.[48] These regulations narrow the causality prong of recovery under the FCA by distinguishing between (1) instances where scope of employment and negligence is required for recovery and (2) instances where mere causality is all that is required for recovery. As a general rule, if a U.S. employee causes damage or injury in a foreign country, and that employee was initially brought to the foreign country through his employment with the United States, then it is not necessary for compensation under the FCA that the employee was acting within the scope of his employment at the time of the damage or injury.[49] Conversely, if the DOD civilian employee causing the damage or injury is indigenous to the country at issue, then scope of employment is a prerequisite to FCA recovery.[50]

Unlike the FTCA, the FCA and MCA provide compensation for damage or injuries caused by noncombat activities of the armed forces, without regard to a scope of employment analysis. While the FCA never applies in the same jurisdiction that the FTCA applies, the jurisdiction of the MCA, as stated, may overlap that of the FTCA. This jurisdictional overlap forms the critical backdrop for an analysis of the DFE at the administrative adjudication level.

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[47] 10 U.S.C. § 2734.

[48] *See* ADMINISTRATIVE CLAIMS—FOREIGN CLAIMS, 32 C.F.R. § 842.64 (2002); AFI 51-501, *supra* note 37, pt. 4(c); AR 27-20, *supra* note 38, para. 10-3; U.S. DEP'T OF THE NAVY, MANUAL OF THE JUDGE ADVOCATE GEN. para. 0810(d) (2004) [hereinafter JAGMAN]; FOREIGN CLAIMS, 33 C.F.R. § 25.507 (2002).

[49] *See generally* AR 27-20, *supra* note 38, para. 10-3; AFI 51-501, *supra* note 37, pt. 4(c); JAGMAN, *supra* note 48, para. 0810(d); FOREIGN CLAIMS, 33 C.F.R. § 25.507 (2002).

[50] *See generally* AR 27-20, *supra* note 38, para. 10-3; AFI 51-501, *supra* note 37, pt. 4(c); JAGMAN, *supra* note 48, para. 0810(d); FOREIGN CLAIMS, 33 C.F.R. § 25.507 (2002).

II. The Legislative and Judicial Parameters of the DFE

The DFE is an express exception to governmental liability under the FTCA:

> the provisions of this chapter and section 1346(b) of this title [collectively comprising the FTCA] shall not apply to . . . [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the Government, whether or not the discretion involved be abused.[51]

The DFE thus sets out a two-pronged liability exclusion. The first prong shields the government from liability for the acts or omissions of its agents exercising due care in executing a statute or regulation, irrespective of the statute's or regulation's validity. Indeed, the DFE "bars tests by tort action of the legality of statutes and regulations."[52] Thus, the government exempts itself from liability for injuries and damage that stem from a government employee executing an *invalid* regulation.

The DFE's second prong "excepts acts of discretion in the performance of governmental functions," irrespective of whether this involves an abuse of discretion.[53] This prong shields the government from liability for negligent and wrongful acts involving the performance of discretionary functions: the abuse of discretion alluded to in the DFE "connotes both negligence and wrongful acts in the exercise of the discretion . . . [t]he exercise of discretion could not be abused without negligence or a wrongful act."[54] Accordingly, pursuant to the second prong of the DFE, the government is exempt from liability for the negligent conduct of a government agent acting within the course and scope of his employment, as long as that agent is performing a

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[51] 28 U.S.C. § 2680(a) (2000).
[52] Dalehite v. United States, 346 U.S. 15, 33 (1953).
[53] *Id.*
[54] *Id.*

discretionary function. While the same statutory provision contains both prongs of the DFE,[55] the two prongs have manifestly distinct applications.[56] The legislative history of the FTCA and Supreme Court cases interpreting the Act substantiate the central role that both prongs of the DFE play in assessing federal tort liability.

A. The Legislative History of the DFE

As stated in congressional committee reports from the 77th Congress highlighting key provisions of the FTCA, the legislative rationale for the DFE liability exclusion was as follows:

> This [the DFE] is a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity, such as a flood-control or irrigation project, where no negligence on the part of any Government agent is shown, and the only ground for suit is the contention that

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[55] *See* 28 U.S.C. § 2680(a).

[56] *See* Doe v. Stephens, 851 F.2d 1457 (D.C. Cir. 1988). Illustrating the first prong of the DFE, in *Doe*, the Veterans Administration released the plaintiff's private medical records in response to a grand jury subpoena and pursuant to agency regulations that were later held invalid. *See id.* at 1459-60. The court held that the plaintiff's claim was barred by the first prong of the DFE, which shields the government from attacks on the validity or legitimacy of statutes and regulations. *Id.* at 1461. Demonstrating the second prong, in *Flammia v. United States,* the INS made the decision to admit into the United States (and later release from federal custody) a Cuban refugee with a felony record. 739 F.2d 202, 203-04 (5th Cir. 1984). The plaintiff, a city police officer, was later injured by the refugee during a shoot out at a crime scene. *See id.* at 204. The court held that the decision by the INS to release the refugee was a protected discretionary act that did not violate any affirmative duty owed by the agency. *Id.* Thus, the police officer's claim was barred by the second prong of the DFE, which protects acts of discretion on the part of federal agents so long as the discretionary activity takes place within the parameters of mandatory statutes and directives. *See id.* at 204-05. It should be noted that, as a fundamental premise, the violation of mandatory statutes or directives removes a federal agent's conduct from the ambit of protected discretionary conduct, precluding the United States from successfully exerting a DFE defense to an FTCA action based upon the employees conduct. *See, e.g.*, Berkovitz v. United States, 486 U.S. 531, 536 (1988) (finding the DFE would not apply when a governmental employee's conduct violates a federal statute, regulation, or policy); Greenhalgh v. United States, 82 F.3d 422, 1996 U.S. App. LEXIS 8956, at 9-10 (9th Cir. 1996) (holding that supersonic flight by an Air Force jet below a federally regulated minimum altitude is not protected under the DFE, as it countenances a regulatory violation rather than a protected discretionary act).

> the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid. It is also designed to preclude application of the bill to a claim against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee, whether or not negligence is alleged to have been involved.[57]

As the foregoing language indicates, the second prong of the DFE (that is, the clause protecting discretionary activities, even if negligently performed) initially focused on the conduct of only those federal agencies that are intrinsically regulatory in nature. In *United States v. Varig Airlines*,[58] one of the seminal Supreme Court cases addressing this clause of the DFE, the Court explained this language in reference to the broader legislative history of the FTCA.[59] In *Varig*, the Court noted that during the years of extensive debate and discussion that preceded the passage of the FTCA, "Congress considered a number of tort claims bills including exceptions from the waiver of sovereign immunity for claims based upon the activities of *specific* federal agencies, *notably the Federal Trade Commission and the Securities and Exchange Commission."*[60] The *Varig* Court went on to explain the reasons why Congress did not limit the language of the statute itself, 28 U.S.C. § 2680(a), to regulatory agencies such as the Federal Trade Commission and the Securities and Exchange Commission: "the 77th Congress eliminated the references to these particular agencies and *broadened the exception to cover all claims based upon the execution of a statute or regulation or the performance of a discretionary function."*[61]

B. The Parameters of the DFE as Interpreted by Case Precedent

The first clause of the DFE, which exempts the United States from liability for the execution of statutes or regulations by government

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[57] JAYSON, *supra* note 19, § 12, at 11 (citing S. REP. NO. 77-1196, at 7; H.R. REP. NO. 77-2245, at 10; H.R. REP. NO. 1287, at 5-6; Hearings Before the House Judiciary Committee on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess.).
[58] 467 U.S. 797 (1984).
[59] *See id.* at 809-10.
[60] *Id.* at 808-09 (emphasis added).
[61] *Id.* at 809 (emphasis added).

employees exercising due care, "precludes suits for damages growing out of authorized governmental activity in which no negligence is involved, and bars the use of a FTCA suit to challenge the constitutionality or validity of statutes or regulations."[62] This prong is thus predicated upon a government agent actually following the mandates of a statute or regulation. The Supreme Court highlighted this requirement in *United States v. Gaubert*, noting that "if a regulation mandates particular conduct, and the employee obeys the direction, the government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation."[63] On the other hand, "[i]f the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy."[64] Thus, the ultimate effect of the first clause of the DFE is that it protects the government from liability in tort suits that allege or are premised upon the invalidity of a statute or regulation.[65]

The second prong of the DFE (*i.e.*, the prong that shields the government from liability for the performance or failure to perform a discretionary function) has been subject to a higher degree of judicial scrutiny than the first clause. While "[p]robably no other provision of the Federal Tort Claims Act has been regarded as more difficult to understand or to apply," the Supreme Court decision in *Dalehite v. United States* "unquestionably is the leading case on the subject."[66] The *Dalehite* Court interpreted the "discretion" alluded to in the second prong of the DFE as follows:

> We know that it ["discretion" as used in 28 U.S.C. § 2680(a)] was intended to cover more than the administration of a statute or regulation because it appears disjunctively in the second phrase of the section. The "discretion" protected by the section is not that of the judge – a power to decide within the limits of

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[62] JAYSON, *supra* note 19, § 12, at 12.
[63] 499 U.S. 315, 324 (1991).
[64] *Id.*
[65] *See id.* at 323; *see also* Doe v. Stephens, 851 F.2d 1457, 1462 (D.C. Cir. 1988) (stating DFE acts as bar to claim alleging invalidity of a statute or regulation when claimant fails to allege a violation of statute or regulation); Moody v. United States, 774 F.2d 150, 156-57 (6th Cir. 1985), *cert. denied*, 479 U.S. 814 (1986) (providing federal housing inspection regulations, and the actions of federal agents performing their functions within the parameters of those regulations, cannot form the basis of liability under the FTCA).
[66] JAYSON, *supra* note 19, § 12, at 18 (referencing Dalehite v. United States, 346 U.S. 15 (1953)).

> positive rules of law subject to judicial review. It is the discretion of the executive or the administrator to act *according to one's judgment of the best course.*[67]

An important proviso in assessing this "judgment of the best course"[68] is that the discretion "applies only to conduct that involves the permissible exercise of policy judgment."[69] Further, it is the "nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case."[70] Noting that these concepts may be fraught with vagaries, the Supreme Court in *Varig Airlines* observed that it is "impossible . . . to define with precision every contour of the discretionary function exception."[71] The Court in *Varig Airlines* did, however, establish a baseline for the discretionary function inquiry, noting that "the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a government employee—whatever his or her rank—are of the nature and quality that Congress intended to shield from tort liability."[72] If they are, even negligent conduct of a governmental employee in the performance of the discretionary function is shielded from liability.[73]

The foregoing framework for governmental liability vis-à-vis the exclusions found in the DFE frames an important question for purposes of the present inquiry: to what extent do the activities and functions coming within the purview of the MCA fall within the umbrella of protection created by the DFE? This question is not avoided simply because the MCA does not create a right to sue the United States—payment at the administrative level for conduct that is considered protected is no less errant than payment at the district court level. This conclusion is reinforced by an analysis of the various service regulations implementing the MCA: only one of the armed services does

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[67] *Dalehite*, 346 U.S. at 34 (emphasis added).
[68] *Id.*
[69] Berkovitz v. United States, 486 U.S. 531, 539 (1988).
[70] United States v. Varig Airlines, 467 U.S. 797, 813 (1984).
[71] *Id.*
[72] *Id.*
[73] *See Dalehite,* 346 U.S. at 33; *see also* Allen v. United States, 816 F.2d 1417, 1421-22 (1987), *cert. denied*, 484 U.S. 1004 (1988) (applying the DFE to the actions of atomic energy officials, even if such actions were negligent, so long as they were carried out within the parameters of applicable agency regulations).

not directly incorporate the full protections of the DFE into its regulations implementing the MCA.[74]

III. The Interface between the MCA and Protected Discretionary Functions

The MCA does not authorize claims which are "covered by section 2734 of this title [the Foreign Claims Act] or section 2672 of title 28 [the Federal Tort Claims Act]."[75] Insofar as the first prong of the MCA provides compensation for the negligent or wrongful conduct of government agents acting within the scope of their employment, the grounds for providing compensation under the MCA directly intersect with the basis for payment under the FTCA. Moreover, the "noncombat activities" prong of recovery under the MCA, which does not hinge upon a showing of negligence or scope of employment, may also intersect with the FTCA *if* those noncombat activities happened to be conducted negligently by a government agent acting within the scope of his employment. Thus, certain claims cognizable under the MCA may also be cognizable under the FTCA, and vice-versa. As has been observed, for claims presented under the FTCA, "it should be remembered that if representatives of the military department deny that negligence was involved (as presumably they would in all but the clearest of cases), the claim would, in many instances, be eligible for processing under the Military Claims Act, if submitted."[76] For a full understanding of the implications of this interplay, one must examine the legislative history of the MCA, as well as case law dealing with the types of activities envisioned by the MCA.

A. Legislative History of the MCA

A review of the legislative history of the MCA reveals that, during the MCA's formulation, Congress never considered discretionary functions and their impact on governmental liability as it did during

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[74] Each of the service regulations is analyzed in detail in section IV, *infra*. As demonstrated later, only the Navy does not make direct reference to the DFE liability exclusion in its regulation implementing the MCA. *See* 32 C.F.R. § 750.44 (2002); JAGINST 5890.1, *supra* note 36, encl. 2, at 3-4.

[75] 10 U.S.C. § 2733(b)(2) (2000).

[76] JAYSON, *supra* note 19, § 1, at 23.

formulation of the FTCA. First approved in 1943,[77] the MCA preceded the FTCA by several years.[78] While this is not, ipso facto, dispositive of whether Congress considered discretionary function issues when drafting the MCA, an examination of the Senate Report from the 79th Congress entitled "Military Claims Act Made Permanent" discloses that the MCA was drafted without reference to discretionary functions and their potential impact on governmental liability.[79] That report contains the following guidance as to the rationale behind the MCA:

> The purpose of the proposed legislation [amending the original MCA of July 3, 1943] is to authorize the War Department to settle and pay claims for property damage and for medical, hospital, and burial expenses, in amounts not exceeding $1,000 in time of peace, as it is now authorized to do in time of war. The act of July 3, 1943 (57 Stat. 372; 31 U.S.C. 223(b), authorizes the War Department to . . .settle . . . in an amount not in excess of $500, or in time of war not in excess of $1,000 . . . any claim…for damage to or loss or destruction of property, real or personal, or for personal injury or death, caused by military personnel or civilian employees of the War Department . . .while acting in the scope of their employment or otherwise incident to noncombat activities of the War Department…it is the view of the committee that a continuance in time of peace of the wartime authority . . . to settle and pay claims under the Act of July 3, 1943, in amounts not exceeding $1,000, will result in a more expeditious settlement of such claims and will relieve Congress of the necessity of considering a very large number of claims and private relief bills where the amount involved does not exceed $1,000.[80]

This language indicates that Congress intended the MCA to be a small claims act, and that claims exceeding $1,000 were to be referred to Congress from the military departments. The initial objective of the

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[77] *See* 31 U.S.C. § 223(b) (1943).
[78] The FTCA became law in 1946 as Public Law 79-601. Pub. L. No. 79-601, § 401-24, 60 Stat. 812, 842-47 (1946).
[79] S. REP. NO. 1410, at 1-2, 79th Cong., 2d Sess. (1943).
[80] *Id*.

MCA was to facilitate the settlement "in a uniform manner of all *small claims* and to remove certain of the inequities which had sprung from the disconnected passage of prior measures."[81] Thus, at its core, the MCA was conceived with an entirely different emphasis than the FTCA. The complex issues relating to discretionary functions and governmental liability were not the focus of the MCA as it was initially promulgated (that is, as a small claims statute whose emphasis was on handling a large number of claims quickly and efficiently). Since the MCA no longer contains a monetary limitation on the value of claim settlements, it cannot now be considered a small claims act. Given that the MCA is no longer a small claims act,[82] an analysis of the statute's impact on the operation of the DFE at the administrative level is long overdue.

B. The Interface Between the MCA and Discretionary Functions in Case Law

The MCA provides compensation for property damage or loss and personal injury or death (1) caused by agents of the armed services acting within the scope of employment or (2) incident to noncombat activities of the armed services.[83] The FTCA, on the other hand, is a waiver of sovereign immunity that provides for a private cause of action against the federal government for property damage or loss and personal injury or death resulting from the negligent or wrongful conduct of a government agent acting within the scope of his employment.[84] The DFE expressly exempts the government from liability under the FTCA for any claim based on (1) an act or omission of a federal employee or agent exercising due care in the execution of a statute or regulation or (2) the performance of a discretionary function by a federal employee or agent, regardless of whether that performance was carried out in a negligent fashion.[85]

Service regulations specifically include the following activities as falling within the meaning of "noncombat activities" pursuant to the MCA: (1) sonic booms, (2) practice firing of missiles and weapons, (3) training and field exercises, (4) maneuvers that include operation of aircraft and vehicles, (5) use and occupancy of real estate, and (6)

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[81] JAYSON, *supra* note 19, § 2, at 42 (emphasis added).
[82] 10 U.S.C. § 2733(d) (2000).
[83] *See id.* § 2733(a).
[84] *See* 28 U.S.C. § 1346(b); *id.* §§ 2671-72.
[85] *Id.* § 2680(a).

movement of combat or other vehicles designed especially for military use.[86] Some case law addressing the nature of noncombat activities in relation to discretionary governmental functions is inconsistent with the stated purpose of the MCA. The following cases deal with two of the specific regulatory examples of noncombat activities (sonic booms and test firing of weapons) within the context of actions brought against the United States under the FTCA. When viewed in conjunction with the MCA (and the service regulations implementing the MCA), they reveal some of the problems inherent with the operation of the DFE at the administrative adjudication level.

1. Sonic Boom Cases

To differing degrees, many cases hold that military supersonic flight falls within the category of a protected governmental activity under the DFE. Before exploring these cases, however, it is necessary to provide further background on some of the factors that courts have historically considered when applying the DFE to a given set of facts. As these factors have changed over time, a brief overview of the law in this area provides a more complete understanding of the legal context within which the cases were decided.

The second clause of the DFE protects the government from liability for discretionary acts, whether or not that discretion is abused.[87] Accordingly, if supersonic flight falls within this category of the DFE, then negligence would not affect the government's immunity. While this underlying principle is codified in the provisions of the FTCA itself,[88] it can easily be confused (when reading the following cases) with the operation of two different tests formulated by the Supreme Court to determine whether an act involves an element of judgment or choice sufficient to bring it within the purview of a discretionary function in the

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[86] These examples are taken from the Navy regulation implementing the MCA. *See* 32 C.F.R. § 750.43(a)(2) (2002); JAGINST 5890.1, *supra* note 36, encl. 2, at 1-2. The Army definition of noncombat activities (*see* 32 C.F.R. § 536.3 (2002); AR 27-20, *supra* note 38, at 92) is almost identical to the Navy's definition. The Air Force defines noncombat activity more broadly than the Army and the Navy as "[a]ctivity, other than combat, war or armed conflict that is particularly military in character and has little parallel in the civilian community." 32 C.F.R. § 842.41 (2002); *see also* AFI 51-501, *supra* note 37, at 45.

[87] 28 U.S.C. § 2680(a).

[88] *Id.*

first place. In 1953, the Supreme Court established the first such test in *Dalehite v. United States.*[89] Under *Dalehite*, activities at the operational level did not fall within the ambit of discretionary functions, while those at the planning level did:

> [T]he "discretionary function or duty" that cannot form a basis for suit under the [Federal] Tort Claims Act includes more than the initiation of programs or activities. It also includes determinations made by executives or administrators in establishing plans, specifications, or schedules of operations. Where there is room for policy judgment and decision there is discretion.[90]

In 1991, the Supreme Court in *United States v. Gaubert*[91] discarded this "operational vs. planning level" distinction, noting that "the distinction in *Dalehite* was merely [a] description of the level at which the challenged conduct occurred. *There was no suggestion that decisions made at an operational level could not also be based on public policy.*"[92] In discarding this distinction, the *Gaubert* Court drew on its earlier decision in *Varig Airlines*, noting that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case."[93] As one post-*Gaubert* decision noted:

> The plaintiffs' efforts to distinguish between "operational" decisions and "planning" decisions are also not useful to them because the Supreme Court has rejected making a distinction on this basis. In *Gaubert,* the Court explained that "a discretionary act is one that involves choice or judgment; there is nothing in that description that refers exclusively to policy-making or planning functions. *Gaubert,* 499 U.S. at 325. Rather, decisions that take place in the administration of a policy decision are also protected – even if an abuse of

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[89] 346 U.S. 15 (1953).
[90] *Id.* at 35-36.
[91] 499 U.S. 315 (1991).
[92] *Id.* at 326 (emphasis added).
[93] *Id.* at 322 (citing United States v. Varig Airlines, 467 U.S. 797, 813 (1984)).

> discretion – so long as they are judgments based on policy considerations.[94]

The decisions in this section analyzing military supersonic flight in the context of a discretionary function activity were decided under both the operational vs. planning context of *Dalehite,* as well as under the new standard established by *Gaubert.* While many of the cases discussed below were decided under the old *Dalehite* standard and deemed military supersonic flight to fall within the purview of the discretionary function, those that did not (that is, the cases that relied on a sharp division between planning negligence at the command level and operational negligence of the pilot in the field) might have been decided differently post-*Gaubert.* After *Gaubert,* these later cases could well have found that negligence on part of the pilot (as a government agent acting within the scope of his employment and not violating mandatory directives) is protected under the DFE. This line of inquiry notwithstanding, the most important fact, for purposes of the present analysis, is that many of the following cases hold that damage caused by sonic booms generated by military supersonic flight is not actionable under the FTCA due to the operation of the DFE. One can argue that those pre-*Gaubert* cases that did not find the DFE applicable may have yielded an entirely different result post-*Gaubert*.

Another important principle, for the purpose of providing a background for the sonic boom cases, is that availability of the DFE is predicated upon the government agent following all mandatory statutes and directives:

> [i]f a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation . . . If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy. On the other hand, if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation

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[94] *Id.* at 326 (citing Minns v. United States, 155 F.3d 445, 452 (4th Cir. 1998)).

> involves consideration of the same policies which led to the promulgation of the regulations.[95]

Accordingly, if a government agent violates mandatory directives in the performance of his duties, the DFE will not apply. If the government agent does abide by the applicable directives, the DFE will apply even if the agent's conduct was negligent.[96]

In *Huslander v. United States*,[97] the plaintiff, through an FTCA action, sought damages for personal injuries she sustained when a sonic boom from an Air Force jet shattered a nearby windowpane.[98] The plaintiff initially filed a claim under the MCA, which the agency denied.[99] The court held that the plaintiff was barred from recovering under the FTCA because her claim was based upon a discretionary function, that is, the authorization of supersonic flight.[100] In deciding the issue of whether supersonic flight should be a protected activity with respect to the DFE, the court stated:

> With respect to the application of this section [the second prong of the DFE], the following excerpts from the Supreme Court's opinion in *Dalehite v. United States,* should be noted: "one need only read 2680 in its entirety to conclude that Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions,". . . [I]t is clear that the just-quoted clause ["whether or not the discretion involved be abused" per 28 U.S.C. § 2680(a)] as to abuse connotes both negligence and wrongful acts in the exercise of discretion . . . [and] authorization of supersonic flights over the Continental United States was the exercise of a discretionary function.[101]

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[95] *Id.* at 324; *see also* Berkovitz v. United States, 486 U.S. 501 (1988).
[96] 28 U.S.C. § 2680(a) (2000); *see also* Allen v. United States, 816 F.2d 1417 (1987), *cert. denied*, 484 U.S. 1004 (1988).
[97] 234 F. Supp. 1004 (W.D.N.Y. 1964).
[98] *See id*.
[99] *See id.* at 1005.
[100] *See id.* at 1006.
[101] *Id.* at 1005-06 (internal citations omitted).

Focusing on the "authorization" of supersonic flight at the operational level, the *Huslander* court held that the government is not liable under the FTCA for these types of activities because of operation of the DFE. The result of this case is inconsistent with comparable claims brought under the MCA. Indeed, sonic booms generated by supersonic flights are specifically included by service regulations in the lists of noncombat activities compensable under the MCA. Accordingly, the same type of activity that is specifically listed as compensable under MCA is deemed noncompensable by judicial interpretation of the DFE under the FTCA.

Eight years after *Huslander*, the Fifth Circuit faced the same issue in *Abraham v. United States.*[102] In *Abraham*, the plaintiffs commenced a wrongful death action against the United States under the FTCA alleging that an Air Force jet caused a sonic boom, which, in turn, caused a fire that killed plaintiff's husband.[103] The Fifth Circuit held that "military supersonic flights constitute a discretionary function exception," and accordingly, the United States was protected by operation of the DFE.[104] In so holding, the court noted the distinction between planning level negligence and operational level negligence, in keeping with the old test set forth in *Dalehite.*[105] The court found that the evidence presented eliminated the possibility of operational negligence.[106] The *Abraham* result was the same as the *Huslander* result: the same activity falling under the regulatory definition of a noncombat activity compensable under the MCA was deemed noncompensable under the FTCA due to the operation of the DFE.

In yet another sonic boom FTCA case, the plaintiff claimed property damage caused over a three-month period by supersonic Air Force flights over her property.[107] Again, the court held that the flights fall within the purview of the DFE, and thus, plaintiff was not entitled to compensation under the FTCA: "Because it is found that the authorization of supersonic flights was a discretionary function, the exemption of section 2680(a) is applicable here to bar recovery for sonic boom damage claims . . ."[108] Similarly, in *Maynard v. United States*,[109] a Ninth Circuit case,

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[102] 465 F.2d 881 (5th Cir. 1972).
[103] *See id.* at 882.
[104] *Id.* at 883.
[105] *Id.*; Dalehite v. United States, 346 U.S. 15 (1953).
[106] Abraham v. United States, 465 F.2d 881 (5th Cir. 1972).
[107] McMurray v. United States, 286 F. Supp. 701, 701 (W.D. Mo. 1968).
[108] *Id.* at 702.
[109] 430 F.2d 1264 (9th Cir. 1970).

plaintiff sustained severe injuries when a horse she was riding threw her to the ground when it was startled by a sonic boom from an Air Force jet.[110] The court held that the supersonic flight was within the purview of the DFE, despite evidence that the flight path was negligently selected at the planning level.[111] Because mandatory directives were followed (the fact that the pilot "followed directives from superiors was not disputed"),[112] plaintiff's allegations of negligence were insufficient to overcome the government's assertion of immunity pursuant to the DFE.

In *Ward v. United States*,[113] the Third Circuit, following the lead of the Fifth Circuit in *Abraham* and the Ninth Circuit in *Maynard*, held that military supersonic flights fall within the DFE: "in view of the interpretation given § 2680(a) in *Dalehite* . . . and the legislative history therein discussed, we conclude that the uncontradicted affidavits . . . were sufficient to establish that the flights . . .fell within the discretionary function exception."[114] In *Schwartz v. United States*,[115] the plaintiff alleged that Air Force pilots flew aircraft in such a negligent manner as to cause a sonic boom which, in turn, damaged her property.[116] Noting that the pilots "operated in conformity with all existing regulations," the Court held that activity at issue in the case fell within the governmental liability exclusion of the DFE.[117]

While a number of cases, such as the foregoing ones, analyzed supersonic flight in the context of a discretionary function, courts have found reasons apart from the DFE for governmental immunity in sonic boom cases. In *Laird v. Nelms*,[118] for example, the Supreme Court held that damage from a supersonic overflight is not compensable under the

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[110] *See id.*
[111] *See id.*
[112] *Id.* at 1266.
[113] 471 F.2d 667 (3d Cir. 1973).
[114] *Id*. at 669. Although the court in this case found that the flights were a discretionary function, it concluded that the affidavits submitted were insufficient to rule out the possibility of operational negligence. As highlighted above, at the time that this case was decided, negligence at the operational level was not considered to be within the purview of a protected discretionary function—only negligence at the planning level was protected under the DFE. *See* Dalehite v. United States, 346 U.S. 15, 35-36 (1953).
[115] 38 F.R.D. 164 (N.W.N.D. 1965).
[116] *Id*. at 164.
[117] *Id.* at 166-67. The court in *Schwarz* focused on "conformity with all existing regulations" because this, as opposed to negligence, is the sine qua non for governmental protection under the DFE. *See id.*
[118] 406 U.S. 797 (1972).

FTCA because the FTCA does not authorize actions against the government on theories of strict or absolute liability for ultra hazardous activities.[119] The Court found no evidence of negligence or wrongful conduct involving the overflight.[120] Although this rationale for governmental immunity differs from the DFE rationale, the result of no liability remains inconsistent with the results of similar claims brought under the MCA. Since sonic booms are specifically included in the regulatory definition of noncombat activities, damages caused thereby are compensable under the MCA even without a showing of negligence or scope of employment determination. In the FTCA context, however the *Laird* Court held that, without a showing of negligence, the FTCA does not authorize compensation for these types of claims.[121] Noteworthy is the fact that the *Laird* Court declined to analyze the sonic boom issue under the DFE: as the cases in the preceding paragraphs demonstrate, supersonic flights fall within the purview discretionary activity and thus a showing of negligence, at least at the planning level, does not create liability under the second clause of the DFE.[122]

As stated, a violation of a mandatory statute or directive will take an employee's conduct out of the ambit of discretionary activity, and, accordingly, the DFE will not operate to shield the United States from liability from an FTCA action based upon the employee's conduct.[123] Thus, the Ninth Circuit in *Greenhalgh v. United States*,[124] a post-*Gaubert* case, held the United States liable under the FTCA for damages caused by a supersonic overflight conducted in violation of mandatory minimum altitude restrictions.[125]

As discussed above, prior to the Court in *Gaubert* discarding the operational versus planning level distinction, courts concentrated more on the separation between planning level activities, which were protected under the DFE, and operational activities, which were not protected

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[119] *See id*. at 798-99.

[120] *See id.* (citing *Dalehite* in support of its holding that the FTCA does not provide a cause of action based upon strict liability in those instances where there is no evidence of negligence).

[121] *Id*. at 798-99.

[122] 28 U.S.C. § 2680(a) (2000); *see also Dalehite,* 346 U.S. at 15.

[123] *See, e.g.*, Berkovitz v. United States, 486 U.S. 531, 547 (1988) (stating petitioners' claim that federal health agency officials violated agency policy is not subject to a motion to dismiss based upon the DFE).

[124] 82 F.3d 422 (9th Cir. 1996).

[125] *Id*.

under the DFE. Thus, in *Peterson v. United States*,[126] the Eighth Circuit drew a "bright line" between the planning level, during which flight paths were determined, and the operational level of flying the aircraft: activities at the planning level fell within the protection of the DFE, while negligence at the operational level did not.[127] Although case law on this point had been limited since *Gaubert*, arguably in the post-*Gaubert* context the protections of the DFE relating to supersonic flight are greater than pre-*Gaubert*—the protection of the DFE is not limited to the flight planning level, but may also extend to the operational level, as the planning-operational dichotomy has been discarded.

While the focus for assessing immunity under the DFE has changed (that is, the operational versus planning distinction has given way to a focus on the nature of the conduct), the foregoing cases nevertheless establish that the DFE often works to preclude recovery under the FTCA for damage caused by military supersonic flights. Although these cases were decided on differing facts and considerations, they reveal one important truism: federal courts frequently ascribe complete governmental FTCA immunity under the DFE to the same sort of conduct that service regulations classify as noncombat activities, damages for which are compensable under the MCA. This contradiction is also evident in cases involving practice firing of weapons.

2. Practice Firing of Weapons Cases

The plaintiff in *Barroll v. United States*[128] claimed that the test firing of cannons at Aberdeen Proving Ground damaged his residence.[129] The court held that the operations at Aberdeen that caused the alleged damage fell within the purview of activities protected under the DFE:

> The selection of a place where a proving ground should be located is clearly within the exceptions set out in [the DFE]. So are such matters as the size of the cannon, the amount and character of explosives to be included in the charge, conditions under which the tests should be made, and the location of the firing positions. These were all

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126 673 F.2d 237 (8th Cir. 1982).
127 *See id*.
128 135 F. Supp. 441 (D. Md. 1955).
129 *See id*.

> fixed by groups of specialists, in the exercise of their discretion . . . The decisions of the staff at Aberdeen . . . as well as the decisions of the staff in the Office of the Chief of Ordnance, under the Assistant Chief of Ordnance for Development and Research, come clearly within the discretionary exception . . .[130]

The outcome of *Barroll* was the same result as many of the foregoing sonic boom cases: similar claims are compensable under the MCA and not compensable under the FTCA by operation of the DFE. This result is not only inconsistent in theory, it is expressly inconsistent with most service regulations implementing the MCA.[131]

IV. The Effect of Implementing Regulations at the Administrative Adjudication Level

The confusion and lack of consistency engendered by the interface between the MCA and FTCA with respect to discretionary governmental activity is nowhere more evident than in the various service regulations implementing the MCA. In their respective regulations, the services treat activities otherwise protected by the DFE in an FTCA claim differently under the MCA.

A. Air Force Regulations Implementing the MCA

Under its regulatory guidance pertaining to claims payable under the MCA, Air Force regulations specifically include "[c]laims arising from the noncombat activities of the United States, whether or not such injuries [or] damages arose out of the negligent or wrongful acts or omissions by United States military or civilian employees acting within the scope of their employment."[132] Air Force MCA regulations do not, however, provide payment for scope of employment-related personal injury claims arising in the United States:

> The MCA allows the military services to settle claims . . . arising from the negligent or wrongful acts by members

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[130] *Id.* at 449.
[131] *See infra* section IV.
[132] 32 C.F.R. § 842.49(b) (2002).

> or employees of the armed forces acting within the scope of employment, and for losses sustained as a result of the noncombat activities of the military services. The MCA applies worldwide. However, for claims arising in the United States, the MCA only applies to noncombat activities and incident to service property damage claims of military members.[133]

The Air Force regulations apply the DFE exclusion to scope of employment claims, and expressly eliminate the DFE exclusion from noncombat activities claims.[134] Given the extent to which noncombat activities[135] have been linked to discretionary functions by numerous federal courts, the Air Force regulations would provide recourse for such noncombat activities claims outside the parameters of FTCA practice. The overall impact of the Air Force regulation is problematic, however: a scope of employment claim could easily be recast as a noncombat activities claim in instances where the noncombat activity was conducted by a government agent acting within the scope of his employment. The converse is also true (that is, a noncombat activities claims could likewise be cast as a scope of employment claim by the agency and summarily denied). The fact that the MCA does *not* require proof of scope of employment for claims to be payable under the noncombat activities prong[136] suggests that the purpose of the statute was to make the recovery of damages caused by noncombat activities subject to a *less stringent* standard. This is consistent with the *original* intent of the MCA as a functional small claims act.[137]

The MCA claims stemming from the Texas border-shooting incident[138] would likely have been settled had they been adjudicated by the Air Force. As indicated by the DOJ, the tragedy was not attributed to any wrongdoing or fault on the part of the government.[139] The claims were thus deemed appropriately settled under the MCA.[140] With no

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[133] AFI 51-501, *supra* note 37, at 20.
[134] AFI 51-501, *supra* note 37, at 23.
[135] *See supra* part III.
[136] *See* 10 U.S.C. § 2733 (2000).
[137] *See* JAYSON, *supra* note 19, § 2, at 42.
[138] *See supra* notes 10-14 and accompanying text (providing the details of the Texas border-shooting case).
[139] *See* Romo, *supra* note 14, at C3.
[140] *See id.*; *see also supra* text accompanying note 14 (providing the statement of the DOJ spokesperson).

showing of fault, the claims could only be settled under the noncombat activities prong of the MCA.[141] Even assuming a valid DFE defense,[142] Air Force regulations would likely have allowed settlement of the Hernandez MCA claims, so long as they were not cast as scope of employment claims.[143]

B. Navy Regulations Implementing the MCA

Unlike the Air Force regulation, the Navy regulation implementing the MCA does not include a specific DFE reference.[144] The Navy regulation merely lists that claims payable under the FTCA are among those that are not compensable under the MCA.[145] While claims submitted under the first prong of the MCA (requiring proof of scope of employment) may be cognizable under the FTCA within United States jurisdictions, claims under the second prong are theoretically not cognizable under the FTCA (under the MCA, claims stemming from noncombat activities are assessed without regard to scope of employment,[146] while scope of employment is the fulcrum upon which liability is predicated under the FTCA).[147] Thus, with respect to noncombat activities and the DFE, the Navy and Air Force regulations would appear to allow for adjudication of such claims apart from a DFE

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[141] *See supra* part I.B (providing a detailed discussion of the two prongs of recovery under the MCA). Only the noncombat activities prong of the MCA permits settlement of claims without proof of scope of employment and tortious conduct on the part of a government agent. *See* 10 U.S.C. § 2733.

[142] *See supra* parts II, III (providing an in-depth analysis of the DFE). As the Hernandez claims were not litigated under the FTCA, the applicability of the DFE to this matter can only be a matter of legal speculation based upon the facts of the case. The facts, however, lend themselves to an almost "picture perfect" example of the DFE in action: all available facts indicate that the government agents were doing exactly what they were directed to do, *supra* note 122, and exercised discretion within the parameters of their directed mission. *See* United States v. Gaubert, 499 U.S. 315, 324 (1991); Berkovitz v. United States, 486 U.S. 531 (1988).

[143] AFI 51-501, *supra* note 37, at 23

[144] 32 C.F.R. § 750.44; JAGINST 5890.1, *supra* note 36, encl. 2, at 3-4.

[145] "Claims not payable . . .[a]ny claim cognizable under…[the] Federal Tort Claims Act, 28 U.S.C. 2671, 2672, and 2674-2680." 32 C.F.R. § 750.44(d); *see also* JAGINST 5890.1, *supra* note 36, encl. 2, at 3.

[146] 10 U.S.C. § 2733(a)(3).

[147] 28 U.S.C. § 1346(b) (2000).

analysis.[148] The Hernandez matter was settled under Navy claims regulations implementing the MCA.[149]

C. Coast Guard Regulations Implementing the MCA

While the Coast Guard regulations implementing the MCA do not expressly mention the DFE, they incorporate the DFE by reference. A claim is not payable under Coast Guard regulations if it falls within "one of the following exceptions to the Federal Tort Claims Act," including, by reference, the DFE.[150] Thus, this regulation would bar claims submitted under the MCA if they are susceptible to falling within the purview of the DFE. Again, there is an inconsistent result at the agency level: the same types of claims that are paid by one agency would be denied by another,[151] as the DFE exclusion would likely bar recovery in the Hernandez matter if it was adjudicated under Coast Guard regulations.

D. Army Regulations Implementing the MCA

Army regulations implementing the MCA would appear to have the identical effect as the Coast Guard regulations in applying the DFE to the MCA: claims not payable by the Army under the MCA include "[t]he types of claims not payable under the FTCA," including, by reference, claims which would be subject to the DFE.[152] However, *Army Regulation 27-20*, effective 1 July 2003, provides the following guidance on MCA claims: "the exclusions in paragraphs 2-39*d (1), (2)* [these listed exclusions incorporate, by reference, both prongs of the DFE] . . . *do not apply to a claim arising incident to noncombat activities."*[153] Thus, like the Air Force, the Army does not apply the DFE to MCA claims stemming from noncombat activities. The Hernandez claims

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[148] In addition to the above referenced regulation (*supra* notes 136 and 137) at subpart 32 C.F.R. § §750.41-750.46, general Navy regulatory guidance on handling MCA claims is also found at JAGINST 5890.1, *supra* note 36, at encl. 2.

[149] *See* Romo, *supra* note 14, at C3 ("The Navy and the Department of Justice have reached a $1 million settlement with the family of Esequiel Hernandez…").

[150] CLAIMS—MILITARY CLAIMS, 33 C.F.R. § 25.405(g) (2002).

[151] This would specifically include claims stemming from noncombat activities involving protected discretionary functions, such as the claims submitted in wake of the Hernandez matter.

[152] 32 C.F.R. § 536.24(k).

[153] AR 27-20, *supra* note 38, para. 3-4 (a)(9) (emphasis added).

would therefore be payable if adjudicated under the Army's regulations implementing the MCA.

E. Comparison of Service Regulations Implementing the MCA

The Army and Air Force guidance on MCA claims strikes a middle ground between the Coast Guard, on one hand, and the Navy on the other. Appreciating the tendency that noncombat activities have to fall within the purview of the DFE, the Army and Air Force specifically exempt MCA claims stemming from noncombat activities from the reach of the DFE.[154] It might be argued that the Coast Guard regulations paint with too broad a brush in applying the DFE to all MCA claims, including claims based both upon the scope of employment prong as well as those based upon the noncombat activities prong. On the other hand, it might be argued that the Navy regulations err in the opposite direction by applying the DFE to neither prong, irrespective of whether the MCA claim at issue is based upon scope of employment or the noncombat activities. The Army and Air Force appear to predicate their regulations on the rationale that, since the first prong of recovery under the MCA (the scope of employment prong) mimics the basis of recovery set forth in the FTCA (that is, the negligent or wrongful conduct of a government agent acting within the scope of his employment), then the DFE should apply. Because the noncombat activities prong is not based upon a scope of employment analysis evocative of FTCA practice, then the DFE, pursuant to their regulations, would be inapplicable to such claims. This approach, like that of the other services, is subject to legal criticism.

While the Army and Air Force regulations appear to be predicated upon an understanding of the difficulties in applying the DFE at the administrative adjudication level, the underlying premise is faulty. At first blush, it appears logical to apply the DFE to MCA claims arising under the scope of employment prong of recovery, and not the noncombat activities prong of recovery. This approach seeks, on one hand, to apply the DFE to those types of claims based upon a theory of recovery similar to that set forth under the FTCA (that is, scope of employment and negligence), and, on the other, to exclude application of

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[154] *Id.*; AFI 51-501, *supra* note 37, at 23. The Air Force regulation goes one step further than the Army by eliminating personal injury-based scope of employment claims arising in the Unites States from the purview of the MCA. This is likely based upon the rationale that such claims are more properly brought under the FTCA.

the DFE to those claims arising from noncombat activities (that is, those claims that do not require proof of scope of employment and negligence).

This intellectual construct collapses, however, when applied to claims arising from noncombat activities performed by government agents acting negligently within the scope of their employment. Which principle should control in these instances? Should the nature of the manner in which the activities were performed control such that the claim should be evaluated under the scope of employment prong of recovery under the MCA? If so, the DFE would apply and the claims often would be noncompensable. On the other hand, should the intrinsic nature of the activity (that is, noncombat activity) control to make such claims immune from the DFE and thus compensable under the MCA? As demonstrated, existing case law further compounds the quandary. The cases underscore the fact that noncombat activities often involve government agents acting within the scope of their employment (and, often negligently). Courts frequently have construed noncombat activities as falling within the purview of the DFE—a fact that presents a conundrum for the application of the DFE to the MCA, regardless of which service regulation is applied to a given set of facts. Indeed, none of the service regulations sufficiently resolve the problems associated with the application of the DFE to claims submitted under the MCA. The fact that the different services, by their respective regulations, apply the DFE differently to the same or similar MCA claims underscores the need for clear legislative guidance as to the applicability of the DFE to claims adjudicated at the administrative level under the MCA.[155]

F. Service Regulations Implementing the FCA

There is no jurisdictional overlap between the FTCA and the FCA, because the FCA only applies to claims arising outside of U.S. jurisdiction.[156] The stated purpose of the FCA is to "promote and

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[155] The Hernandez matter is just one example of how the same claim, based upon identical facts and adjudicated under the MCA, could be resolved differently depending upon which agency adjudicated.

[156] 10 U.S.C. § 2734 (2000). The FTCA is inapplicable to "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k) (2000). While the FTCA is limited to the jurisdiction of the United States, claims based upon damages and/or injuries occurring in a foreign country or territory may be actionable under the FTCA if the negligent or wrongful act or omission occurred within the jurisdiction of the United States. *See*, *e.g.*, Alvarez-Machain v. United States, 266 F.3d 1045, 1054 (9th Cir. 2001) (stating the mere

maintain friendly relations" between the United States and other countries.[157] Similar to the MCA, the FCA provides compensation for damage or injury caused by noncombat activities.[158] While the MCA provides compensation for damage or injury caused by an agent only if the agent was "acting within the scope of his employment,"[159] the FCA provides compensation more broadly to any damage or injury caused by an agent, regardless of scope of employment (the "casualty prong").[160] Service implementing regulations require proof of scope of employment only in those FCA cases where the agent is indigenous to the country where the damage or injury occurred; no proof of scope of employment is required where the damage or injury is caused by an agent who was brought to the country by the United States.[161]

Neither Navy regulations,[162] Air Force regulations,[163] nor Coast Guard regulations[164] implementing the FCA contain any direct reference to the DFE. The respective Army regulation, however, incorporates the DFE in the same fashion as the portion of the regulation that implements the MCA: "[a] claim is not payable if it . . .[i]s listed in paragraph 2-39(d) [includes the DFE exclusion] . . . the exclusions set forth in paragraphs 2-39*d*(1) and (2) [specifically referencing both prongs of the DFE exclusion] do not apply to a claim arising incident to noncombat activities."[165] Thus, the Army regulation provides that claims arising under the causality prong of the FCA are subject to all of the limitations

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fact that the operative effect of governmental negligence takes place in a foreign country does not remove a claim from the ambit of the FTCA so long as the negligent act itself took place in the United States); Couzado v. United States, 105 F.3d 1389, 1395-96 (11th Cir. 1997) (holding negligent actions of federal agents in Florida are actionable under the FTCA when injuries from negligence are sustained outside of the United States); Leaf v. United States, 588 F.2d 733, 736 (9th Cir. 1978) (providing an FTCA claim would not be subject to dismissal on jurisdictional grounds if claimant could show that negligent acts in the United States led to injuries occurring in Mexico).

157 10 U.S.C. § 2734.

158 *See id.*

159 *Id.* § 2733(a).

160 *Id.* § 2734(a)(3).

161 ADMINISTRATIVE CLAIMS—FOREIGN CLAIMS, 32 C.F.R. § 842.64 (2002) (Air Force); Air Force guidance on the FCA may also be found at AFI 51-501, *supra* note 37, at 27-31; CLAIMS—FOREIGN CLAIMS, 33 C.F.R. § 25.507 (2002) (Coast Guard); AR 27-20, *supra* note 38, para. 10-3 (Army); JAGMAN, *supra* note 48, para. 0810(d) (Navy).

162 JAGMAN, *supra* note 48, para. 0811.

163 32 C.F.R. § 842.65 (2002); AFI 51-501, *supra* note 37, para. 4.16.

164 33 C.F.R. § 25.509.

165 AR 27-20, *supra* note 38, para. 10-4(k).

of the DFE, while those claims arising incident to noncombat activities are not.

G. Comparing Agency Treatment of Discretionary Activities under the FCA and MCA

Of the respective service regulations, the Army and Navy regulations are the most consistent in their treatment of discretionary activities with respect to the MCA and FCA. The Navy implementing regulations contain no provisions specifically applying the DFE to either the MCA or FCA, while Army regulations consistently apply the DFE to the causality prongs of both the MCA and the FCA and exclude it from the noncombat activities prongs of both statutes. Air Force and Coast Guard regulations, on the other hand, apply the DFE to the MCA but not to the FCA. Given that the FCA does not provide a private cause of action and is jurisdictionally exclusive with the FTCA, the Army regulations appear to be premised on the rationale that certain categories of discretionary activities intrinsically merit protection at all times and in all places (irrespective of their actionability in court). In contrast, Air Force and Coast Guard regulations focus more on the territorial overlap of the MCA and FTCA, and, accordingly, relax the DFE limitations with respect to the FCA. Another rationale for the Air Force and Coast Guard including the DFE in the MCA and not the FCA may be found in the stated purpose of the FCA: "to promote and maintain friendly relations" with other nations.[166] Regardless of reasons why the service regulations differ so significantly in their treatment of the DFE, when viewed together these regulations highlight the inconsistent and uneven application of the DFE at the administrative adjudication level.

V. The Issue in Context: Assessing Governmental Equities

Although the DFE is applied within a certain set of legislative and judicially-created parameters, it often has been difficult for the courts to define these parameters with precision.[167] As one court noted: "Congress has not defined the vague phrase 'discretionary function or

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[166] 10 U.S.C. § 2734(a) (2000). The equities countenanced in the FCA (the promotion of "friendly relations" with other nations) are concededly different from the MCA and the FTCA.

[167] *See supra* parts III.A, II.B.

duty' in the [Federal Tort Claims] Act. Legislative history is of little assistance. *Judicial inconsistency and confusion pervade this area of federal tort liability.*"[168] Similarly, another court observed, "where no identical precedent exists, the vague and situational guidelines in this area have been of minimal help to courts faced with a deliberation over 'discretionary' function."[169] This sentiment has been echoed in a Tenth Circuit opinion: "a tension exists in our cases and . . . the confusion in this area of the law needs to be acknowledged and confronted."[170] Conceptually complicated, the DFE has been the subject of exhaustive argumentation and interpretation in federal case law. It therefore is logical to presume that importing this complex and multifaceted legal concept into the MCA will engender difficulties and inconsistencies.

A. Governmental Equities and the DFE

At its core, the DFE is a powerful and effective statutory provision that has repeatedly been interpreted to shield the United States from liability. As the Supreme Court observed, "[o]ne need only read § 2680 in its entirety to conclude that Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions."[171] The DFE must not, however, be viewed in a vacuum: the DFE exists within the FTCA, a statute that provides for a private cause of action against the United States. Thus, while Congress inserted the DFE within the FTCA to protect important governmental equities, it was done so with the understanding that any agency decision denying an administrative FTCA claim under the auspices of the DFE would be subject to a possible court challenge.[172] While an agency may deny a claim on the basis of the DFE, the claimant has the right under the FTCA to challenge that denial in a U.S. district court. In contrast, there is no private cause of action under the MCA against the United States.[173]

Claims denied under the MCA, irrespective of the basis of the denial, are not per se actionable in U.S. district court. There is one caveat: if a claim is cognizable under the FTCA based upon scope of employment and negligence, it does not matter whether the agency labels that claim

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[168] Hernandez v. United States, 112 F. Supp. 369, 370 (D. Haw. 1953) (emphasis added).
[169] Jackson v. Wise, 385 F. Supp. 1159, 1166 (D. Utah 1974).
[170] Domme v. United States, 61 F.3d 787, 793 (10th Cir. 1995) (Henry, J., concurring).
[171] Dalehite v. United State, 346 U.S. 15, 32 (1953).
[172] 28 U.S.C. § 1346(b) (2000).
[173] 10 U.S.C. § 2733 (2000).

an FTCA claim or an MCA claim. In such a case, a claimant is not precluded from filing suit in U.S. district court upon agency denial of the claim simply because the agency labeled it an MCA claim.[174]

B. The MCA Viewed Against Judicial Safeguards and the DFE

As conceived, the DFE was included within a statute that provides the right to judicial recourse in a legislative effort to protect important governmental equities. As stated, when an agency denies a claim under the FTCA based upon the DFE, the claimant has the right to challenge that decision in federal district court regardless of the merits of the agency's denial decision. Further, as also stated, even if an agency adjudicates a claim arising within the United States under the MCA, the claimant is still entitled to judicial review of an agency denial so long as the claim is also cognizable under the FTCA. The statutory label that the agency places on a claim is immaterial in such an instance. This calculus changes, however, for claims arising outside the jurisdiction of the United States, where the FTCA does not apply. Irrespective of whether a claim is filed under the MCA or FCA, a denial of the claim is not actionable. Accordingly, agency decisions with respect to the DFE on claims arising outside the jurisdiction of the United States are not subject to judicial review.

As enacted, the provisions of the MCA are silent with respect to discretionary functions,[175] keeping within the original purpose of the MCA as a "small claims" statute.[176] In contrast, Congress addressed discretionary functions within the provisions of the FTCA, a statute that creates a limited waiver of sovereign immunity.[177] Any resolution to the discrepancy between the statutes must begin with the understanding that while the DFE was not considered by Congress when it enacted the MCA, the DFE was central to the enactment of the FTCA.

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[174] *See*, *e.g.*, Huslander v. United States, 234 F. Supp. 1004, 1005 (W.D.N.Y. 1964); *supra* notes 97-101 and accompanying text.
[175] 10 U.S.C. § 2733.
[176] JAYSON, *supra* note 19, § 2, at 42.
[177] 28 U.S.C. § 2674.

VI. Striking the Balance: A Proposed Solution

Each of the services, respectively, attempts to resolve the problems associated with the implementation of the DFE outside the parameters of an FTCA claim. The Air Force[178] applies the DFE to overseas MCA scope of employment claims, while the Coast Guard[179] appears to apply the DFE to the full scope of the MCA. Similar to the Air Force, the Army specifically exempts claims arising from noncombat activities from the purview of the DFE, but without creating a dichotomy between overseas MCA claims and MCA claims arising in the U.S.[180] The Army and Air Force approach is premised on the assumption that noncombat activities claims cannot be cast as scope of employment claims.[181] In contrast to the Air Force, Coast Guard and Army approaches, the Navy is silent on the DFE in its MCA regulation.[182] Thus, under the Navy regulations, true MCA claims are adjudicated without reference to the DFE. In addressing FCA claims, the only service that preserves the DFE is the Army, which specifically exempts claims stemming from noncombat activities from the DFE analysis.[183]

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[178] *See* 32 C.F.R. § 842.50 (2002); AFI 51-501, *supra* note 37, at 20, 23. The Air Force MCA statute presents a number of questions which are beyond the scope of this article. For instance, a plain reading of AFI 51-501, *supra* note 37, at 20, 23 appears to indicate that incident to service property damage claims of military members arising in the U.S. are a distinct subcategory of MCA claims (para 3.1) and that the such claims could still be subject to a DFE exclusion (para 3.7.17-.18) if they are not capable of being classified as noncombat activities claims. Further, the Air Force regulation expressly limits the MCA's applicability in the U.S. to noncombat activities claims and incident to service property damage claims of military members. This would appear to create a bright line dichotomy between FTCA and MCA practice with respect to the DFE's applicability in the U.S. and foreign countries. The construct collapses, however, when faced with a noncombat claim arising in the U.S. that stems from the allegedly negligent conduct of a government agent acting within the scope of his employment. Are such claims nevertheless handled under the noncombat activities prong of the MCA? Are they recast as FTCA claims and subject to a DFE exclusion? What about incident to service property damage claims of military members arising in the U.S.? If they are not capable of being classified as noncombat activities claims, are they subject to a DFE exclusion? The regulation does not appear to offer a definitive answer to these difficult questions.

[179] *See* 33 C.F.R. § 25.405.

[180] *See* AR 27-20, *supra* note 38, para. 3-4(9), at 26.

[181] *See supra* section IV.

[182] *See* 32 C.F.R. § 750.44; JAGINST 5890.1, *supra* note 36, encl. 2, at 3-4.

[183] AR 27-20, *supra* note 38, para. 10-4(k). As discussed in Part IV, *supra*, adjudications under the FCA highlight some of the inconsistencies at the administrative adjudication level with respect to discretionary functions. The purpose of the FCA to promote "friendly relations," 10 U.S.C. § 2734(a) (2000), between the United States and other nations, however, removes the FCA from the immediate focus of this analysis.

The considerations involved in implementing the DFE at the administrative level within the parameters of the MCA can be viewed against competing equities. On one hand, whether or not an MCA claim is paid should not depend on which branch of service adjudicates the claim, as the situation currently stands. On the other hand, the critical role the DFE plays as a liability exclusion in FTCA practice may be eroded if claims that would otherwise be barred by the DFE if considered under the FTCA are paid under the MCA. This is especially true in the case of claims arising from noncombat activities: while two services expressly exempt MCA claims stemming from noncombat activities from a DFE analysis, many of these claims involve the negligent acts or omissions of government employees acting within the scope of employment, and are thus susceptible of a DFE exclusion under an FTCA analysis. A comprehensive review of these competing interests, especially in light of divergent agency implementing regulations, points to the need for a revision of the MCA.

As stated, the ultimate effect of the DFE is to shield the United States from *liability* arising from the performance of discretionary functions. To this extent, the problems engendered by importing the DFE into the MCA only materialize at the point where the FTCA and MCA intersect. The solution, therefore, does not merit drawing an artificial DFE dichotomy between the MCA's scope of employment prong and noncombat activities prong. Rather, the first dichotomy should be between claims arising within United States and those arising outside of the United States[184]. Given that there are no jurisdictional precedents that would countenance inconsistent outcomes at the administrative adjudication level for claims arising outside the United States, such claims should not be subject to the DFE. As demonstrated *supra* at Section IV, none of the services, with the exception of the Army, include the DFE in their regulations implementing the FCA. Considering that the factors for compensation set forth in the MCA and FCA are similar, this further supports the conclusion that the DFE is only relevant to the MCA insofar as the MCA intersects the jurisdiction of the FTCA.

Having established the jurisdictional area of application of the DFE to the MCA, the remaining issue is determining the types of MCA claims

[184] *See supra* note 178. As already explained, the Air Force bifurcation between MCA claims arising in the United States and MCA claims arising overseas does not create an adequate dichotomy.

that should be subject to a DFE analysis. Claims adjudicated under the MCA should be isolated from those that are actionable in district court under the FTCA. While this approach focuses on protecting important governmental interests with respect to discretionary functions, it also provides agencies with clear direction on the types of claims that should be subject to a DFE analysis. Simply drawing a dichotomy, however, between claims stemming from noncombat activities and those arising under the scope of employment prong of the MCA does not accomplish this goal. Irrespective of whether a claim may be associated with noncombat activities, the test should consider whether or not the claim arises from the negligent or wrongful conduct of a government agent acting within the scope of his employment. The following language, if added to the MCA, would accomplish this objective:

> *The limitations set forth in 28 U.S.C. § 2680(a) shall apply to claims adjudicated under this section, but only to those claims which (1) arise in United States jurisdiction and (2) are determined by the agency to result from the negligent or wrongful act or omission of an employee of the United States while acting in the scope of his employment. To the extent that claims arising from noncombat activities are determined by the agency to be attributable to a negligent or wrongful act or omission of an employee of the United States while acting in the scope of his employment, such claims shall also be subject to the limitations set forth at 28 U.S.C. § 2680(a).*

This proposed addition balances competing equities.[185] On the one hand, the proposal protects important governmental interests by safeguarding the critical role that the DFE plays as a liability exclusion in FTCA practice. It carefully preserves the legal force of the DFE as an important defense in areas subject to FTCA jurisdiction by ensuring that claims arising within United States, which would otherwise be barred by the DFE, would likewise not be compensable under the MCA. Should such claims be denied under the FTCA, plaintiffs would have the corresponding ability to litigate them. On the other hand, the proposed addition to the MCA would also protect societal equities: whether an MCA claim is paid will no longer depend upon which service happens to

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[185] The question of whether DOJ concurrence should be required before an agency denies an MCA claims based upon the DFE is beyond the scope of this article.

adjudicate the claim. Rather, the statute will define clearly the scope and extent to which the DFE applies to MCA claims. The proposed language would eliminate the arbitrary and inconsistent application of the DFE to MCA claims since the services will no longer be left to resolve the inherent difficulties engendered in implementing the DFE outside the parameters of an FTCA claim.

The claims stemming from the Texas border-shooting incident[186] exemplify how the proposed addition to the MCA would operate in practice. The legislative proposal requires a two-step analysis for determining whether to apply the DFE to claims adjudicated under the MCA. The first step of the analysis determines whether the MCA claim arose in a geographical jurisdiction that is subject to the FTCA. With respect to the Hernandez matter, which arose in Texas, FTCA jurisdiction applies.[187] Accordingly, the first step of the DFE analysis is met. The second step of the analysis determines whether the MCA claim stems from the negligent or wrongful act or omission of a U.S. employee acting in the scope of his employment. Under the proposed MCA amendment, the DFE analysis is not truncated simply because the claim arises under the noncombat activities prong of the MCA. For instance, irrespective of the fact that the Hernandez claim arose under the noncombat activities prong of the statute,[188] a negligence and scope of employment analysis is still required. The government's conclusion that the Hernandez incident was not attributable to the negligent or wrongful conduct of a U.S. employee acting in the scope of his employment[189] resolves the second step of the proposed analysis. Since the MCA claims submitted in the wake of the Hernandez matter stemmed from a noncombat activity, and because it was determined that the incident was not attributable to the tortious conduct of government employees, the proposed legislation would permit adjudication of the claims without application of the DFE.

The proposed addition to the MCA preserves the integrity of the DFE at the administrative adjudication level by requiring the application of the DFE to any claim that might be actionable in district court under

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[186] *See supra* part I (providing an account of the Texas border-shooting incident, including a description of the claims that were filed by the family of the decedent).

[187] *See supra* part I.A (stressing that the FTCA is limited to claims arising within the United States); *see also* 28 U.S.C. § 1346(b) (2000).

[188] *See supra* part IV (providing a discussion of why these claims could only have been settled under the noncombat activities prong of the MCA).

[189] *See* Romo, *supra* note 14, at C3.

the FTCA. At the same time, those MCA claims stemming from noncombat activities with no indication of governmental negligence would not require a DFE analysis. With the sphere of the DFE thus brightly defined and safeguarded, claims will not be denied on the basis of the DFE unless judicial recourse is available in the form of an FTCA action. Fundamentally, a claim should not be denied on the basis of a legal construct as complex and multifaceted as the DFE absent the right to litigate that denial. The fact that the services imported the DFE from the FTCA into MCA implementing regulations in asymmetrical and divergent fashions serves only to underscore this premise.[190]

VII. Conclusion

The MCA is silent with respect to the DFE, one of the most prominent exceptions to the limited waiver of sovereign immunity found in the FTCA. In the face of this silence, numerous courts have been forced to interpret the contours and parameters of the DFE. Against this backdrop, the four agencies which apply the MCA have promulgated their own regulations for its implementation. Given the lack of congressional guidance and the inherent complexity of the DFE, these four agencies have each applied the DFE to MCA claims in different ways. The result is that an MCA claim submitted to one agency may well be resolved differently if submitted to another. The proposed change to the MCA resolves these inconsistencies by providing clear guidance to the agencies on the types of MCA claims that require application of the DFE. The proposal protects the important governmental equities associated with the performance of discretionary activities, while at the same time providing a less arbitrary mechanism for the administrative adjudication of claims.

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[190] *See supra* part IV (providing a detailed comparison of the agency regulations implementing the MCA). The concerns engendered by these divergent regulations are heightened by the fact that the MCA provides no judicial recourse and makes no mention of the DFE. *See* 10 U.S.C. § 2733 (2000).

THE THIRTY-SECOND KENNETH J. HODSON LECTURE ON CRIMINAL LAW*

WHERE MOUSSAOUI MEETS HAMDI[1]

FRANK W. DUNHAM, JR.[2]

Martin Niemoeller, a World War I German U-Boat captain and then a Lutheran pastor and philosopher, when asked by a student referring to the Holocaust, "How could it happen?" responded:

> First they came for the Communists, but I was not a Communist so I did not speak out. Then they came for the Socialists and the trade unionists, but I was neither, so I did not speak out. Then they came for the Jews, but I was not a Jew so I did not speak out. And when they came for me, there was no one left to speak out for me.[3]

Niemoeller forcefully points out our human inclination, no matter our sense of justice in ordinary times, to rationalize injustice to others situated differently from us as beyond our control, or worse, deserved, and to sit silently in the face of it only to later have it visit our own

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* Established at The Judge Advocate General's School on 24 June 1971, the Kenneth J. Hodson Chair of Criminal Law was named after Major General Hodson who served as The Judge Advocate General, U.S. Army, from 1967 to 1971. General Hodson retired in 1971, but immediately was recalled to active duty to serve as the Chief Judge of the Army Court of Military Review. He served in that position until March 1974. General Hodson served over thirty years on active duty, and he was a member of the original staff and faculty of The Judge Advocate General's School in Charlottesville, Virginia. When the Judge Advocate General's Corps was activated as a regiment in 1986, General Hodson was selected as the Honorary Colonel of the Regiment.

[1] This lecture is a reconstruction from rough notes used in remarks made on 19 May 2004, by Frank W. Dunham, Jr., to members of the staff and faculty, distinguished guests, and officers attending the 52d Graduate Course at the Army's Judge Advocate General's Legal Center and School, Charlottesville, Virginia. Assistant Federal Public Defender Geremy C. Kamens is acknowledged for his significant contributions to the content of the original notes and their narrative presentation here. Citations to authorities have been added, and the paper has been updated to include recent developments.

[2] Mr. Dunham is the Federal Public Defender for the Eastern District of Virginia. He was appointed in March 2001 after twenty-three years in private practice and seven years as an Assistant United States Attorney.

[3] The Jewish Virtual Library, Martin Niemoller, *at* http://www.jewishvirtuallibrary.org/jsource/Holocaust/Niemoller_quote.html (last visited Mar. 28, 2005).

doorstep. The phenomenon of rationalization is more prevalent in times of stress. Humankind, often prompted to act selflessly and with great courage on such occasions, such as the New York City fire and police personnel following 9/11, have also been known to act selfishly and hysterically when personal security is threatened.

This combination of human tendencies, rationalizing injustice and acting hysterically when personal security is threatened, is, not surprisingly, manifested when we act as a group through government. After all, our democratic government is nothing other than a reflection and extension of the will and mood of the people. Throughout our history, reacting to the stress from fear for our national security and personal safety, our government has taken actions which are unjust and irrational—actions the majority may have accepted at the time, but which we came later to decry in retrospect when the exigency had passed. For those concerned about incursions upon our civil liberties by governmental actions in the wake of 9/11, they should understand that the current reaction to the perceived crisis is nothing novel. They should be encouraged by the fact that historically there has been a self-corrective process when the crises passed. They should also be cautioned by the fact that the current crisis may never end and that things could get a lot worse instead of being self-corrected.

Very early in our history, and closely following the passage of the Bill of Rights, our second President, John Adams, sided with the English in a war against France. It is important to note that at that time, there were no immigration laws, and therefore no such things as "illegal aliens." We had living among us many folks who still considered themselves citizens of France.

Fearing pro-French sentiment in the Republican northeast where the population consisted of many French nationals, the federalists in Congress enacted the Alien and Sedition Acts of 1798.[4] The Alien Friends Act allowed the detention and deportation of any alien deemed dangerous to the country without due process of law, that is, without notice of charges, presentation of evidence, a right to be heard, or

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[4] *See An Act Concerning Aliens*, ANNALS OF CONGRESS, 5th Cong., 2d Sess., *in* THE PUBLIC STATUTES AT LARGE OF THE UNITED STATES OF AMERICA 570-72 (Boston: Little Brown, 1845); *An Act for the Punishment of Certain Crimes Against the United States*, 5th Cong., 2d Sess., *id.* at 596-97.

judicial review.[5] Congress did this notwithstanding the Fifth Amendment to our Constitution, which states that "[n]o person shall . . . be deprived of . . . liberty . . . without due process of law."[6]

The Sedition Acts prohibited criticism of the President and the government, notwithstanding the First Amendment to our Constitution which states, "Congress shall make no law . . . abridging the freedom of speech."[7] The Acts were vigorously enforced against the Republican opposition and vocal critics of the Adams administration. These Acts expired by their own terms on the last day of Adams administration and were not renewed.[8]

Self-correction arrived when the new president, Thomas Jefferson, recognizing the insanity of it all and the conflict with American core principles, pardoned all those convicted under the Acts, and Congress later repaid all the fines imposed.[9] The Alien and Sedition Acts were never reviewed by a court, but the Supreme Court has said several times that these Acts have been deemed unconstitutional in the court of history.

But Jefferson was by no means perfect when it came to civil liberties. In this nation's most famous treason case brought by the Jefferson administration against Aaron Burr, Chief Justice John Marshall rejected President Jefferson's claims of national security.[10] The government accused Burr of conspiring to start a war and sought the death penalty.[11] In Burr's defense, he sought letters in Jefferson's possession.[12] Jefferson refused a Court order to produce the letter, claiming "state secrets" privilege.[13] Marshall would not allow Jefferson

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[5] Act of July 6, 1798, 1 Stat. 577, R.S. 4067 (as amended 40 Stat. 531, 50 U.S.C. § 21).
[6] U.S. CONST. amend V.
[7] *Id.* amend. I.
[8] *See* New York Times v. Sullivan, 376 U.S. 254, 276 n.16 (1964); *see also* PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 298 (1999) (noting that the Acts expired in 1801).
[9] *See Sullivan*, 376 U.S. at 276; *see also* WILLARD STERNE RANDALL, THOMAS JEFFERSON: A LIFE 532-33 (1993).
[10] United States v. Burr, 25 F. Cas. 30 (C.C.D.Va. 1807) (No. 14692D) (Burr I); United States v. Burr, 25 F. Cas. 187 (C.C.D.Va. 1807) (No. 14694) (Burr II).
[11] *See* RANDALL, *supra* note 9, at 576.
[12] *See Burr II*, 25 F. Cas. at 190; *see also* RANDALL, *supra* note 9, at 577.
[13] *See* JOSEPH J. ELLIS, AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON 284 (1996) (noting that Jefferson "was so eager to see Burr convicted of treason that he was willing to violate basic constitutional principles").

to hang Burr while withholding information material to his defense, stating that "[i]f the President refuses to disclose [information material to the defense], the courts have no choice but to halt the prosecution."[14]

During the Civil War, President Abraham Lincoln engaged in probably the greatest civil liberty infringements in our history. He suspended the writ of habeas corpus eight times in various locations within the United States and twice throughout the whole country. The privilege to petition a court for a writ of habeas corpus to seek relief from illegal executive detention is at the heart of a case I will be discussing with you and is perhaps our most important freedom.

The modern writ of habeas corpus is traced back to England and a case arising in 1627, called Darnell's Case, or the case of the five knights.[15] The King of England at the time, Charles I, had detained five noblemen, throwing them into the castle's dungeon deep, for failing to support England's war against France and Spain. The men filed suit, asking to be brought to court for an explanation from the King for the detentions. The King refused, saying that the men were detained by the King's command—national security, so to speak, in jolly old England. The court denied relief, stating that it had no power to require the King to explain the basis for the detention.[16] It must have been good to be King. The decision provoked widespread outrage, and the following year the Parliament responded by enacting the petition of right, often referred to as "the Great Writ," basically prohibiting imprisonment without formal charges.

The Great Writ was codified in the first Habeas Corpus Act of 1641, which required an explanation from the king for detentions.[17] These rights were expanded by the Habeas Corpus Act of 1679, which required charges to be brought within a specific time period for anyone detained

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[14] Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 98 (1974) (citing *Burr II*, 25 F. Cas. at 191-92); *see also* RANDALL, *supra* note 9, at 577 (describing how, after twenty-five minutes, the jury found Burr "not proved to be guilty under this indictment by any evidence submitted to us" (internal citation omitted)).

[15] *See* Darnell's Case, 3 Cobbett's St. Tr. 1 (1627), 9 Holdsworth 114.

[16] *See Developments in the Law—Federal Habeas Corpus*, HARV. L. REV. 1 nn.11-13 (Mar. 1970) [hereinafter *Developments in the Law*].

[17] *Id.* at 1 n.14; *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451, 460 (Jan. 1966).

for criminal acts.[18] This tradition was incorporated into the U.S. Constitution, in Article I, Section 9, often referred to as the suspension clause, because it permits suspension of the right to petition for a writ of habeas corpus only in times of invasion or rebellion.[19]

Alexander Hamilton viewed the right to petition for a writ of habeas corpus as the bulwark of all freedoms because it required that all detentions be supported by law.[20] Indeed, many felt that there was no need for a Bill of Rights, because the right to the Great Writ would protect all other rights from any tyrant who would seek to violate them.

So it was this most fundamental of all rights that Lincoln took it upon himself to suspend. Among the approximately 38,000 civilians who were arrested and held by the military without trial and without judicial review during the war were newspaper editors critical of Lincoln.[21]

That is not to say that there was no opposition to Lincoln's detentions. He acknowledged this criticism in his famous address to Congress on July 4, 1861,[22] when, referring to his suspension of habeas corpus, he argued, "are all the laws *but one* to go unexecuted, and the Government itself to go to pieces, lest that one be violated?"[23] Lincoln's case in point was *Ex Parte Merryman.*[24] In that 1861 case, Chief Justice Roger Taney, sitting as a circuit court judge, questioned the President's assertion of executive power to suspend the writ of habeas corpus.[25] A southern sympathizer, Merryman was, however, also a civilian, a citizen,

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[18] *Developments in the Law*, *supra* note 17, at 1 n.19.

[19] U.S. CONST. art. I, § 9, cl. 2.

[20] *See* RON CHERNOW, ALEXANDER HAMILTON 260 (2004) (noting that Hamilton felt the Constitution guaranteed the right to habeas corpus).

[21] *See* DANIEL FARBER, LINCOLN'S CONSTITUTION 170 (2003); MARK G. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 104 (1991); Steven R. Shapiro, *Defending Civil Liberty in the War on Terror, The Role of the Courts in the War Against Terrorism*, *in* 29 FLETCHER FORUM OF WORLD AFFAIRS 103 (Winter 2005).

[22] ABRAHAM LINCOLN, ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 594 (Roy P. Basler ed., Da Capo Press 1990) (1946).

[23] *Id.* at 601; *see also* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 38 (2000). Chief Justice Rehnquist chronicles many of the events set forth in this article, making the point that courts, during wartime, have historically tightened their approach to civil liberties, only to loosen the reigns when the war concluded.

[24] 17 F. Cas. 144 (1861).

[25] *Id.* at 148.

and a resident of Maryland which had not seceded.[26] The courts were open. Lincoln suspected Merryman of plotting to blow up the rail line between Baltimore and Washington, D.C. at a time when it was the only means of moving troops from the north to defend Washington.[27] Situated in Virginia, just across the Potomac River, the Army of the Potomac threatened the capitol city. Lincoln had the military arrest and detain Merryman.[28] He maintained that the suspension clause, which allows suspension only "when in Cases of Rebellion or Invasion the public Safety require it,"[29] permitted him to suspend the writ, which Merryman attempted to use to gain his freedom. Certainly, a rebellion was at hand. But Chief Justice Taney held that since the suspension clause rests in Article I, the President's Article II powers did not include the power to suspend the writ.[30] Taney concluded that only Congress, whose powers are enumerated in Article I, had that power.[31]

Rather than adhere to the ruling, Lincoln appealed it to the full Supreme Court. Before the Court could consider the matter, the issue became moot when Congress ratified Lincoln's action by authorizing suspension of the writ.[32] Thus, debate over whether the President has the power to suspend the writ without the support of the Congress has never been answered by the Court. It is noteworthy that immediately after the Civil War, when that great conflict was still fresh in the national mind, but when its exigencies had passed, Congress passed the current habeas statute which sets forth the procedures for habeas proceedings that we still follow, or are supposed to follow, today.[33] Because the habeas statute does not contain the Constitution's caveat for suspension of the privilege in times of rebellion or invasion, many believe its passage settled the issue of whether the President, on his own, can suspend the writ and that suspension can only occur by act of Congress.

Also, just as President Jefferson acted to reverse actions taken by the Adams administration when the war between Britain and France

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[26] *Id.* at 147.
[27] REHNQUIST, *supra* note 23, at 26.
[28] DAVID HERBERT DONALD, LINCOLN 299 (1995).
[29] U.S. CONST. art. I, § 9, cl. 2.
[30] *Merryman*, 17 F. Cas. at 148-49.
[31] *Id.*
[32] Act of Mar. 3, 1863, 12 Stat. 755.
[33] *See* 18 U.S.C. § 2241 (2000) (providing the circumstances under which the writ of habeas corpus shall extend to those in custody).

concluded and tensions from threats to our interests relaxed, the Supreme Court waited until after the Civil War to issue its only serious rebuke to assertions of executive power over citizens during that conflict. In *Ex Parte Milligan*,[34] the petitioner, like Merryman, was a civilian.[35] Milligan was a citizen of Indiana, a northern state where the courts were open.[36] Just before the end of the war, the government arrested and detained Milligan as a prisoner of war.[37] The government accused Milligan of violating the laws of war by plotting the escape of confederate soldiers held prisoner in Indiana.[38] A military tribunal convicted Milligan and sentenced him to death.[39]

Lincoln had not suspended the writ of habeas corpus in Indiana. The Supreme Court, in ruling on Milligan's habeas petition, handed down a decision, which Chief Justice Rehnquist has said "is justly celebrated for its rejection of the government's position that the Bill of Rights has no application in wartime."[40] The Supreme Court contradicted the military's judgment that Milligan was a prisoner of war. Further, it held that there could be no military trial of a civilian when the courts were open and operating.[41] It is important to note that this landmark decision reinforcing our basic rights came after the war was over.

Moving out of sequence for a moment, *Milligan* is tough to square with the Court's later decision in *Ex Parte Quirin*.[42] *Quirin* involved German saboteurs who entered this country from a submarine offshore during World War II.[43] Some of them were U.S. citizens.[44] Captured during this nefarious mission by the FBI, they were later turned over to the military for trial.[45] In *Quirin*, the Supreme Court ratified their trial and pending execution by the military at a time when civilian courts were

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[34] 71 U.S. 2 (1866).
[35] *Id.* at 4.
[36] *Id.*
[37] *Id.*
[38] *Id.* at 4-5.
[39] *Id.* at 5.
[40] REHNQUIST, *supra* note 23, at 137.
[41] *Milligan*, 71 U.S. at 3.
[42] 317 U.S. 1 (1942).
[43] *Id.* at 20-21.
[44] *Id.* at 20 (noting that at least one of the alleged saboteurs was a naturalized U.S. citizen).
[45] *Id.* at 21-23.

open.[46] Indeed, the Court ratified the action of the military tribunals without an opinion, stating that an opinion would follow. The saboteurs were executed before the opinion was written.

Some say that *Milligan* and *Quirin* can only be distinguished by the fact that the national crisis was perceived to have passed when the Court decided *Milligan*, but that it was going full bore when *Quirin* was decided.[47] Others say *Milligan* and *Quirin* can be distinguished, because at the time of the civil war, Congress had not authorized military proceedings against civilian citizens such as Milligan,[48] whereas by the time of *Quirin*, it had done so.[49] Still others say the cases can be reconciled only because Milligan disputed the military's classification of him as a prisoner of war,[50] while the saboteurs in *Quirin* purportedly "conceded" that they were a part of the armed forces of Nazi Germany.[51]

The government again attempted to crack down on civil liberties during World War I. There was widespread opposition to the war, and President Woodrow Wilson moved aggressively to stifle criticism. Shortly after America's entry into the war, Congress passed the Espionage Act of 1917, which was used to prohibit what was perceived as seditious speech by criminalizing any speech which might disrupt the government's efforts at conscription.[52] The government interpreted and enforced the statute broadly and prosecuted more than 2,000 dissenters for expressing opposition to the war. Many received sentences of ten to twenty years in prison. Then, in 1918, Congress passed the Sedition Act, which made it unlawful to publish language intended to cause contempt or scorn for our form of government, the constitution, or the flag.[53]

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[46] *Id.*

[47] *See, e.g.*, John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1125 (2002) (asserting that "the formal declaration of war by President Roosevelt on the Axis powers, mak[es *Quirin*] distinguishable from" *Milligan*).

[48] *Milligan*, 71 U.S. at 12.

[49] *Quirin*, 317 U.S. at 8.

[50] *Milligan*, 71 U.S. at 51.

[51] *Quirin*, 317 U.S. at 15.

[52] Espionage Act, ch. 30, § 3, 40 Stat. 217, 219 (1917), *amended by* Act of May 16, 1918, ch. 75, 40 Stat. 553 (1918).

[53] Sedition Act of 1918, ch. 75, 40 Stat. 553 (1918), *repealed by* Act of 1921, ch. 136, 41 Stat. 1359, 1360 (1921).

In a series of decisions, the Supreme Court upheld convictions of people who had opposed the war.[54] In one such case, Charles Schenck, a socialist, was convicted of violating the espionage act by passing out antiwar leaflets and encouraging resistance to the draft.[55] Justice Holmes wrote: "[W]hen a nation is at war, many things that might be said in time of peace are such hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right."[56]

Self-correction soon followed. By December 1920, Congress had repealed the Sedition Act, and between 1919 and 1923, all who had been convicted were released. During the 1930s, President Franklin Roosevelt granted amnesty and restored the rights of all who had been convicted.[57] Finally, the Supreme Court later overruled all of its precedent from that era.[58] This enlightenment following the end of World War I did not, however, prevent massive arrests in the wake of the Russian Revolution. From November 1919 to January 1920, a police unit called the General Intelligence Division, created by Attorney General A. Mitchell Palmer and led by J. Edgar Hoover, arrested 5,000 people suspected of communist sympathies.[59] More than 1,000 were summarily deported to Russia without due process.[60] This ended by 1924 when Attorney General Harlan Fisk Stone called Palmer's General Intelligence Division a secret police that was a menace to free government and free institutions.[61]

In World War II, non-criminal executive detentions re-appeared in the form of the shameful internment of Japanese Americans. Pearl Harbor was attacked in December 1941. By February 1942, President Roosevelt had authorized the military to designate military areas from

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[54] *See* Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Schenck v. United States, 249 U.S. 47 (1919).
[55] *See Schenck*, 249 U.S. at 48-49.
[56] *Id.* at 51.
[57] GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME, FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 232 (2004).
[58] Brandenberg v. Ohio, 395 U.S. 444 (1969) (repudiating the "clear and present danger" test used by the Court in *Schenck*, *Debs*, and *Abrams*).
[59] CURT GENTRY, J. EDGAR HOOVER: THE MAN AND THE SECRETS 73, 75-84 (1991).
[60] *See id.* at 85-86 (providing details of the deportations of some citizens to Russia).
[61] *See id.* at 123 (listing Mitchell as a lead critic of the "Palmer Raids").

which anyone could be excluded.[62] This measure was plainly aimed at Japanese Americans. John L. DeWitt, commander of the U.S. Army on the west coast, called the Japanese "an enemy race," stating that the country could not trust "[e]ven second and third-generation Japanese Americans," because, he said, "the racial strains were undiluted."[63] He issued an order excluding them from the entire west coast.[64] Then-California Attorney General Earl Warren, later confirmed as Chief Justice of the Supreme Court, supported DeWitt.[65] Warren said that anyone who didn't expect "a wave of sabotage is simply to live in a fool's paradise."[66] The Supreme Court ratified the exclusion of Fred Korematsu, a young Japanese American who was convicted for failing to leave his west coast home when ordered.[67] Korematsu was among over 100,000 people of Japanese descent who were forced to leave their west coast homes for confinement in desert camps for the duration of the war as a result of DeWitt's order.[68]

The overreaction to the fear of disloyalty by Japanese citizens followed a familiar corrective pattern, this time decades after the perceived threat had passed. In 1976, President Ford stated that the internment of Japanese Americans was wrong.[69] In 1983, a congressional commission stated that there had been no threat and that prejudice, war hysteria, and a failure of leadership contributed to create the policy of internment.[70] In 1988, President Reagan made a formal apology, and offered reparations.[71] Finally, the Supreme Court's decision in *Korematsu* is roundly considered one of the worst decisions

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[62] *See* Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942); *see also* Geoffrey R. Stone, *Civil Liberties at Risk Again: A U.S. Tradition*, CHI. TRIB., Feb. 16, 2003, at C1.

[63] Alan Brinkley, *A Familiar Story: Lessons from Past Assaults on Freedoms*, *in* THE CENTURY FOUNDATION, THE WAR ON OUR FREEDOMS: CIVIL LIBERTIES IN AN AGE OF TERRORISM 40 (Richard C. Leone & Greg Anrig, Jr. eds., 2003).

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] Korematsu v. United States, 323 U.S. 214 (1944).

[68] *See* Stone, *supra* note 62, at C1.

[69] LAST WITNESS: REFLECTIONS ON THE WARTIME INTERNMENT OF JAPANESE AMERICANS 5 (Erica Harth ed., 2001).

[70] REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 5, 8 (1983).

[71] *See* Civil Liberties Act of 1988, 50 U.S.C. app. 1989b-4 (1988); *see also* Stone, *supra* note 62, at C1.

of all time, in a league with *Dred Scott*[72] and *Plessy v. Ferguson*.[73] The Court has never cited *Korematsu* with approval.

The late Justice Brennan, reviewing this history at the Law School of Hebrew University in Jerusalem, warned of exaggerated claims of national security, stating that "[t]he perceived threats to national security [that] have motivated the sacrifice of civil liberties during times of crisis are often overblown and factually unfounded."[74] Summarizing many of the events at issue, he stated:

> The rumors of French Intrigue during the late 1790s, the claims that civilian courts were unable to adjudicate the allegedly treasonous actions of Northerners during the Civil War, the hysterical belief that criticism of conscription and the war effort might lead droves of soldiers to desert the Army or resist the draft during World War I, the wild assertions of sabotage and espionage by Japanese Americans during World War II . . . were all so baseless that they would be comical were it not for the serious hardship that they caused during times of crisis.[75]

Then, during the Cold War, the country faced another time of great national hysteria. Senator Joe McCarthy alleged that communists had infiltrated every vestige of American society with the goal of taking over our government from within through subversion. He used the bully pulpit of televised congressional hearings to publicly accuse citizens of disloyalty, a forum in which the accused citizen could really offer no defense.[76] Congress also passed the Emergency Detention Act of 1950.[77] As a part of that Act, Congress authorized the creation of detention camps modeled after those used to intern Fred Korematsu during World

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[72] Scott v. Sanford, 60 U.S. 393 (1857).
[73] Plessy v. Ferguson, 163 U.S. 537 (1896).
[74] Anthony Lewis, *Security and Liberty: Preserving the Values of Freedom*, *in* WAR ON OUR FREEDOMS, *supra* note 63, at 71.
[75] *Id.*
[76] *See* ARTHUR HERMAN, JOSEPH MCCARTHY: REEXAMINING THE LIFE AND LEGACY OF AMERICA'S MOST HATED SENATOR 160 (2000).
[77] Pub. L. No. 81-831, ch. 1024, 64 Stat. 987, 1019-31 (1950) (codified as amended in 50 U.S.C. §§ 811-826) (repealed).

War II.[78] These camps were intended for detention by the executive of persons he deemed subversive, but the power was never exercised.

There was also an assault on free speech. In *Dennis v. United States*,[79] the Supreme Court held that communist party leaders could be punished for their speech under the "clear and present danger" standard, even though their speech presented neither.[80] Later, when the threat of a takeover of our government from within by a communist conspiracy was no longer feared, the Court reversed *Dennis*.[81] However, the Emergency Detention Act was not repealed until 1971.[82] At that time, we were in the midst of a widely unpopular war, and there was no doubt that Congress feared use of executive detentions to stifle dissent. As a part of the legislation repealing the Emergency Detention Act, Congress passed 18 U.S.C. § 4001(a), which prohibits detention of citizens unless authorized by an act of Congress.[83]

Of course, the Vietnam War era was not without its own civil liberties abuses. However, due to the huge unpopularity of that war, civil rights abuses during that time never enjoyed popular support, occurred largely in secret, and were subsequently punished. The White House created its own "plumbers' unit" to spy on dissenters critical of the war in the name of plugging governmental leaks.[84] This ultimately led to the downfall of Richard Nixon's presidency. The CIA and the FBI conducted illegal break-ins and spied on domestic political dissenters. When these civil liberties abuses came to light, they led to, among other reforms, the creation of an informational sharing wall between and within those organizations. This "wall," which was recently criticized by the 9/11 Commission,[85] was essentially torn down as a so-called "reform" after 9/11 to more effectively combat terrorism.[86] Government

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[78] *Id.*
[79] 341 U.S. 494 (1951).
[80] *See id.* at 503-04.
[81] Brandenberg v. Ohio, 395 U.S. 444 (1969); Yates v. United States, 354 U.S. 298 (1957).
[82] Sept. 25, 1971, Pub. L. No. 92-128, §§ 1(a), (b), 85 Stat. 347.
[83] 18 U.S.C. § 4001(a) (2000).
[84] ANTHONY SUMMERS, THE ARROGANCE OF POWER: THE SECRET WORLD OF RICHARD NIXON 389 (2000) (providing the origin of the term as those individuals who were "to plug the leaks that infuriated the president").
[85] THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 78-80 (2004).
[86] *Id.* at 328.

spying on its citizens is again in vogue and as a result of the attacks on 9/11. We are once again confronted with actions by our government in the name of protecting us that infringe on civil liberties.

We read of allegations of detainees being tortured during interrogations, some rendered to other countries for that purpose,[87] misuse of material witness warrants to detain for lengthy periods hundreds of citizens accused of nothing other than being Muslim, secret deportation proceedings in the name of national security,[88] and what some refer to as kangaroo courts dressed up as military tribunals to try detainees for alleged war crimes.[89] Special kudos are due to JAG Corps' defense counsel for denouncing these tribunals as unfair and taking every legal step, even some outside the military tribunal regime, to defend them.[90]

It is against this history that I discuss the two cases in which I have been involved. For the most part, lawyers who undertake causes for unpopular defendants litigate the cases vigorously. They do this not out of any sense of agreement with the cause or actions of the client but, as Niemoeller so poignantly makes clear, out of recognition that when you defend the rights of the least among us, you are actually defending the rights of all. The two cases in which I have been involved are *United States v. Zacarias Moussaoui*, pending in the U.S. District Court for the Eastern District of Virginia in its Alexandria Division[91] and *Yaser Hamdi v. Donald Rumsfeld*,[92] which was pending in the Norfolk division of that same court, but which has now concluded. Both involve positions taken by the government, which to me are as frightening as any of the

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87 *See, e.g.*, Christopher Bollyn, *The Pentagon's Ghost Planes and Enforced Disappearances*, Jan. 17, 2005 (on file with author); Neil Lewis, *Fresh Details Emerge on Harsh Methods at Guantánamo*, Jan. 1, 2005 (on file with author).

88 Barry Tarlow, *RICO Report; Terrorism Prosecution Implodes: The Detroit 'Sleeper Cell' Case*, CHAMPION 61, Jan./Feb. 2005.

89 Swift as Next Friend for Salim Hamdan v. Rumsfeld, CV04-0777L (W.D. Wash. 2004), *Petition for Writ of Mandamus or in the Alternative, Writ of Habeas Corpus*, at 20 n.4.

90 Neil A. Lewis, *Military's Lawyers for Detainees Put Tribunals on Trial*, N.Y. TIMES, May 4, 2004, at A1.

91 United States v. Zacarias Moussaoui, Cr. No. 01-455-A, E.D. Va. While many of the proceedings and related pleadings in the district court are either under seal or are classified, many are *available at* http://notablecases.vaed.uscourts.gov/notablecases/Index.html.

92 Hamdi v. Rumsfeld, 124 S. Ct. 2633, *on remand at* 378 F.3d 426 (4th Cir. 2004).

historical abuses I have already discussed. In the first of these cases, the government contends that it can put a man to death based on a trial in which he is denied the right to call witnesses to testify in his favor. The second involved a government contention that it could hold a citizen indefinitely, *incommunicado*, without counsel, in solitary confinement, without any charge, trial, or proceeding in which the citizen could challenge the basis for his detention.

Moussaoui is accused of being a participant in the 9/11 plot. Hamdi was alleged to be an "enemy combatant," because he was captured on a battlefield in Afghanistan. On the surface, the two cases seem entirely different. The government made no claim that Hamdi was a terrorist. Accused of no crime, Hamdi's case was civil in nature, a petition for a writ of habeas corpus challenging his detention by the military. Moussaoui's case, on the other hand, not only is a criminal case, it is a death penalty case. He is an alleged terrorist charged with being a participant in what many consider the worst crime in U.S. history, the attacks on 9/11. Yet, there are similarities.

The inability of counsel to communicate with either client was the first of these similarities. Because the government would not allow access to him for almost two years, Hamdi could not talk to us. The government did not relent on this until his case reached the Supreme Court and this restriction became an embarrassment. Similarly, although the government imposed no barrier, after initial meetings with Moussaoui, there came a point where he would not talk to us. So, Hamdi couldn't, Moussaoui wouldn't; the effect was the same. We had to proceed almost as if the cases were hypothetical because we had no clients with whom we could consult. Second, both clients were Muslims. Although Hamdi was born in the United States, neither was raised here. Thus, the detainees had distinct cultural differences from counsel and the courts hearing their respective cases. These did not turn out to be a problem in dealing with Hamdi, but they are a continuing problem in the defense of Moussaoui which exacerbate other problems in that case. Finally, and perhaps most significantly from a legal standpoint, there was the government's invocation of separation of powers in an effort to limit the power of Article III courts to enforce constitutional rights. While there are many other significant legal issues in both cases, I limit my focus here to this one.

In *Moussaoui*, the government contends that, because of separation of powers, the Sixth Amendment's compulsory process clause does not

apply. This is because, it says, to permit Moussaoui to exercise this right would interfere with the President's Article II war powers.[93] Accordingly, the government has refused to comply with court orders to produce persons it has designated as enemy combatants,[94] but who are also favorable defense witnesses "with material testimony that is essential to Moussaoui's defense"[95] and within the reach of the district court's compulsory process power.[96]

In *Hamdi*, the government contends that separation of powers precludes affording Hamdi his Fifth Amendment due process rights in the adjudication of his petition for a writ of habeas corpus. To do so, said the government, would necessarily empower Article III courts to second-guess battlefield judgments made in the exercise of Article II war powers.[97]

Since the *Hamdi* case is now concluded, we address it first. The most often asked question is how does a federal public defender, whose responsibility is to represent indigent criminal defendants in federal court, end up representing a habeas petitioner neither accused nor convicted of a crime? The fact of the matter is that when we began the representation we assumed it would be a criminal case like that of John Walker Lindh.[98] The U.S. military apprehended Lindh in Afghanistan for allegedly fighting for the Taliban.[99] As a U.S. citizen, federal agents brought him back to the United States, indeed to the Eastern District of Virginia, my district, to stand trial on various charges arising from the notion that he had taken up arms against his own countrymen.[100] Lindh retained private counsel,[101] but I was familiar with his case, and it was built almost exclusively on statements Lindh made while in U.S. government custody. When we learned that another U.S. citizen, Yaser

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[93] United States v. Moussaoui, 382 F.3d 453, 466 (4th Cir. 2004).
[94] *Id.* at 459, 464.
[95] *Id.* at 476.
[96] *Id.* at 463-66.
[97] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2645-50 (2004) (noting that the government's position turns separation of powers "on its head").
[98] *See* United States v. Lindh, 227 F. Supp. 2d 565 (E.D. Va. 2002); United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002).
[99] *See* Brooke A. Masters & Patricia Davis, *Walker's Long Trip Ends at Alexandria Jail; Federal Court Hearing Today for American Accused of Fighting with Taliban*, WASH. POST, Jan. 24, 2002, at A13.
[100] *See id.*
[101] *See id.*

Hamdi, had been apprehended in Afghanistan under those same alleged circumstances, and had been returned to the Eastern District of Virginia as well, we assumed another prosecution was soon to follow.

In order to advise Hamdi of his rights, particularly of his right to remain silent, we attempted to meet with him by endeavoring to contact the commanding officer of the Navy Brig in Norfolk, Virginia, where the government was holding Hamdi.[102] When we received no response to our inquiries, we filed a petition for writ of habeas corpus in the U.S. District Court in Norfolk. Federal Magistrate Judge Thomas Miller appointed the federal public defender's office to represent Hamdi.[103] At the time we were appointed to undertake the representation of Hamdi, not only did we still believe a criminal case against him was right around the corner, but we believed that Judge Miller thought so, too.

It was not until after the magistrate judge ordered a response to the habeas petition that we began to wonder what was going on. First, we could not get a clear answer from the U.S. Attorney, Paul McNulty, as to whether Hamdi would be prosecuted. We did not believe McNulty was playing games; he has never been one to do that. Instead, the picture perceived was that the Department of Justice honestly did not know whether or not there would be a prosecution. The only thing that was clear was that there were no plans to release Hamdi any time soon. The question, then, was if he was not to be charged criminally, on what theory could the government continue to indefinitely detain a citizen? The answer to that question came soon enough. We learned that the government contended it could hold Hamdi indefinitely, in solitary confinement, *incommunicado*, without access to counsel and without charge or hearing of any kind as an "enemy combatant."[104]

Both the federal magistrate judge and U.S. district court judge disagreed with the government's notion that Hamdi could have a habeas petition pending before the court and yet be denied access to his counsel. Both ordered the government to make arrangements for counsel's

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[102] Cato Institute, News Release, *Supreme Court to Hear 'Enemy Combatant' Cases Tomorrow* (Apr. 27, 2004), *available at* www.cato.org/new/04-04/04-27-04r.html [hereinafter Cato Institute News Release].

[103] Hamdi v. Rumsfeld, Order of May 14, 2002, No. 2:02CV-348 (Dkt. No. 5) (E.D. Va. 2002).

[104] *Id.*, Tr. of May 20, 2002 Hr'g, at 6.

access.[105] But before that could happen, the government moved to dismiss the case on grounds that the federal public defender was not a proper "next friend." You see, a federal habeas petitioner must ordinarily sign his own petition.[106] But because we could not get to Hamdi, we had signed for him as the statute allows a person acting for the petitioner to do.[107] This process is referred to as acting as the petitioner's "next friend." After the district court ruled that the Federal Public Defender acted properly by signing the petition in a next friend capacity,[108] but before we were allowed to see Hamdi, the government appealed. This was the first in a series of three appeals in this case to the U.S. Court of Appeals for the Fourth Circuit.

The three judge panel of the Fourth Circuit that heard this first appeal made it obvious that they did not believe a federal public defender, acknowledging he had never met the client, could act as a "next friend." Our argument that the concept was "next friend," not "best friend" fell on deaf ears. The panel's opinion directing that the petition be dismissed made that clear.[109] However, before the mandate of the court of appeals directing the district court to dismiss Hamdi's petition reached that court, we located Hamdi's father in Saudi Arabia. We had him sign a new habeas petition as "next friend." Judge Doumar consolidated the original petition with the new petition signed by Hamdi's father and again ordered that the government grant the Federal Public Defender access to his client.[110]

The government again appealed, essentially arguing that the district court's order that a lawyer should be able to see his client about a pending case was unprecedented and that the republic would fall were that to occur. The court of appeals again agreed with the government. It held that Judge Doumar's order that the petitioner be allowed to meet with his counsel was premature and that the district court judge should proceed more cautiously and with a view towards seeing if the case could

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[105] *Id.*, Order of May 20, 2002 (Dkt. No. 11); Order of May 29, 2002 (Dkt. No. 19).
[106] 28 U.S.C. § 2242 (2000).
[107] *Id.*
[108] Hamdi v. Rumsfeld, Order of May 29, 2002, No. 2:02CV-348 (Dkt. No. 19) (E.D. Va. 2002).
[109] Hamdi v. Rumsfeld, 294 F.3d 598 (4th Cir. 2002).
[110] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2636 (2004).

be resolved before taking the drastic step of actually ordering the government to let the detainee see his lawyer.[111]

This led to the third and final appeal. Directed to proceed cautiously and to exhaust all other avenues before taking the drastic step of allowing petitioner to see his counsel, the district court judge examined a declaration from a Pentagon bureaucrat by the name of Michael Mobbs. The government argued that the declaration, which was based on Mobbs' review of the file (Mobbs had no firsthand knowledge of anything), was factually dispositive as to whether Hamdi had been properly classified as an enemy combatant. We argued that nothing was dispositive factually until there was an opportunity for Hamdi to present his side of the story. The district judge, trying to remain faithful to the direction of the court of appeals to open up access to the petitioner only as a last resort, but also concluding that the Mobbs Declaration raised more factual questions about Hamdi's status then it answered, ordered discovery of the documents on which the Mobbs Declaration was based. The government again appealed, arguing that the Mobbs Declaration was more than adequate to dispose of the petition on the merits and that the case should be dismissed.

The court of appeals again reversed the district court and directed that Hamdi's petition be dismissed.[112] It did so over our arguments that due process generally, and the habeas statute specifically, gave Hamdi the right to respond,[113] with the assistance of counsel, to the government's factual justification for holding him set forth in the Mobbs Declaration and to have a district court resolve any factual disputes.[114] We also argued that the anti-detention act[115] precluded executive detention of Hamdi because Congress had not authorized the detention of citizens without charge or trial.

The Fourth Circuit held that separation of powers precluded a proceeding in accordance with the habeas statute where Hamdi would

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[111] Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002); *Hamdi*, Order of June 11, 2002, No. 2:02CV-439 (Dkt. No. 2) (E.D. Va. 2002).

[112] Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004).

[113] 28 U.S.C. § 2243 (2000).

[114] *Id.*

[115] 18 U.S.C. § 4001(a) (2000).

have an opportunity to present his side of the case.[116] The court of appeals reasoned that to grant him that opportunity would necessarily put Article III courts in the position of second guessing quintessential military judgments made as part of Article II commander-in-chief powers, such as deciding who to hold as prisoner on the battlefield.[117] Moreover, the court of appeals, while doubtful that § 4001(a) applied in this circumstance, concluded that congressional authorization for Hamdi's detention was found in the very general language of the Authorization for Use of Military Force (AUMF) passed by Congress shortly after 9/11.[118]

Significantly, at the time that Hamdi's case was pending before the Fourth Circuit for the third time, the government arrested another citizen, Jose Padilla, holding him without charge and detaining him at the same facility to which it had by then moved Hamdi.[119] Unlike Hamdi, who had been captured abroad, FBI agents took Padilla into custody at O'Hare International Airport on a material witness warrant.[120] Agents transported Padilla to New York and held him in the Metropolitan Detention Center (MDC), ostensibly waiting to testify before a grand jury.[121] Counsel was appointed. Before any further proceedings, and without advising the district court or Padilla's counsel, the military took Padilla from the MDC to a Navy brig in Charleston, South Carolina, to detain him there as an enemy combatant.[122] Appointed counsel, Donna Newman, was told that she could not have access to him.[123] The material witness warrant was dismissed.[124]

Padilla's counsel then filed a habeas petition in the U.S. District Court in New York. The issues raised were almost identical to those we

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116 *Hamdi*, 316 F.3d at 474-76.
117 *Id.* at 465-66.
118 *Id.* at 467.
119 Cato Institute News Release, *supra* note 102.
120 *See* Paula Span, *Enemy Combatant Vanishes Into a 'Legal Black Hole,'* WASH. POST, July 30, 2003, at A1.
121 *See id.*
122 *See* Michael Kilian & Lisa Anderson, *U.S. to Let Padilla See Lawyer; Held 20 Months in 'Dirty Bomb' Case*, CHI. TRIB., Feb. 12, 2004, at C1.
123 *See id.*
124 *See generally* John Riley, *Held Without* Charge*; Material Witness Law Puts Detainees in Legal Limbo*, NEWSDAY (N.Y.), Sept. 18, 2002, at A6 (listing Padilla among numerous individuals the government detained on material witness warrants in the months after the 9/11 attacks).

had been raising on Hamdi's behalf with one significant difference. The government claimed that the military captured Hamdi on a foreign battlefield after engaging in combat against U.S. allies, whereas the military snatched Padilla on U.S. soil from a U.S. civilian jail.

In denying Hamdi's petition for rehearing and ordering that his habeas petition be dismissed, the Fourth Circuit noted that Hamdi's case, a battlefield detention, was "apples and oranges" when compared to Padilla's, who was on U.S. soil and was nowhere near a battlefield when detained.[125] Similarly, in ordering that Padilla's petition be granted, the Second Circuit in discussing the holding of the Fourth Circuit in *Hamdi*, suggested there was no circuit conflict, because the *Padilla* and *Hamdi* cases were, given where the individuals were when initially detained by the military, like "apples and oranges."[126] It seemed clear that both circuits would approve the military detention of Hamdi, but not of Padilla.

Ultimately, the Supreme Court granted certiorari in a trilogy of enemy combatant cases, *Hamdi*, *Padilla*, and a third case, *Rasul v. Bush*.[127] *Rasul* was a habeas corpus case filed in the District of Columbia on behalf of alien enemy combatant detainees held at Guantanamo.[128] What all three of these cases had in common was an executive assertion that the petitioners could be held indefinitely, in solitary confinement, *incommunicado*, without access to counsel, and without any recourse to the courts for the aliens held at Guantanamo, and only limited access for the citizens, Hamdi and Padilla, who were by then both held in a Navy brig in Charleston, South Carolina. With regard to the latter two, the government contended that it needed to do no more than state why they were being held and that the detainee could not contest the factual basis for that status determination. The Supreme Court, by granting *cert* in all three cases, apparently concluded that it might need to address all of them to clarify the law.

During the briefing process after *cert* was granted, we were finally allowed access to Hamdi. The government said it relented and granted

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[125] Hamdi v. Rumsfeld, 337 F.3d 335, 344 (4th Cir. 2003).
[126] Padilla v. Rumsfeld, 352 F.3d 695, 721 n.29 (2d Cir. 2003), *cert. granted*, 540 U.S. 1173 (2004).
[127] Rasul v. Bush, 321 F.3d 1134 (D.C. Cir.), *cert. granted*, 540 U.S. 1003 (2003).
[128] *See id.* at 1135.

access, because its interrogation of Hamdi had concluded and his value as a source of intelligence exhausted. We concluded that the real reason was the embarrassment it wanted to avoid trying to defend its denial of access to counsel to the Court. Whatever the reason, being able to put a face on the client provided significant inspiration as we continued with the case. We will never forget the moment when we met Hamdi for the first time and said, "Hi. We are your lawyers and you have a case in the United States Supreme Court." Unlike some we represent in our role as federal public defenders, Hamdi was actually a very likable young man who was very appreciative of everything we did for him.

We argued the case before the Supreme Court on April 28, 2004. Padilla's case was argued that same day. During the arguments, questions were asked in both cases about whether there were any limits on the Executive's power over enemy combatants, including whether they could be tortured.[129] Paul Clement, the Deputy Solicitor General, assured the Court that the United States does not engage in torture.[130] That night, the events at Abu Ghraib prison hit the news for the first time.[131] One can only guess at the impact this breaking news might have had on justices who had just been told that separation of powers precluded Article III courts from having any role in connection with the detention of enemy combatants and not to worry, just "trust us," about torture.

On June 30, the Court released its opinions. In *Hamdi*, there was a split opinion, 4 – 2, 2 – 1. Overall, and for various reasons and in varying degrees, the Court ruled 8-1 that indefinitely detaining Hamdi while denying him judicial review and due process was a violation of his rights. A plurality of the Court, Justices O'Connor, Breyer, Kennedy, and Rehnquist, found that Congress, in the AUMF, had authorized the detention of enemy combatants, both citizens and non-citizens alike, when authorizing the use of military force against the perpetrators of 9/11. Therefore, the military was authorized to deal with enemy belligerents according to the treaties and customs known as the laws of war. But this plurality also held that this authorization was not a "blank

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[129] Oral Argument, Rumsfeld v. Padilla, No. 03-1027, Tr. at 22-24, Apr. 28, 2004; Oral Argument, Hamdi v. Rumsfeld, No. 03-6696, Tr. at 49-50, Apr. 28, 2004.

[130] *Id.*

[131] *See* James Risen, *G.I.'s Are Accused of Abusing Iraqi Captives*, N.Y. TIMES, Apr. 29, 2004, at A1.

check" and was subject to judicial review and procedural due process. As Justice O'Connor explained in quite stirring language:

> Striking the proper constitutional balance here is of great importance to the nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.[132]

Justice O'Connor rejected the Fourth Circuit's holding that separation of powers precluded an Article III court from giving Hamdi due process in adjudicating his habeas petition:

> [T]he position that the Courts must forego any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers . . . . [I]t would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to his detention . . . .[133]

Justices Souter and Ginsburg went even farther, concluding that Congress did not authorize the detention of citizens at all by the very general language of the AUMF, especially in light of the very specific prohibition in § 4001(a), the non-detention act passed in 1971.[134] Justices Scalia and Stevens went still further, concluding that the Constitution precludes detention of citizens as enemy combatants in the absence of suspension of the writ of habeas corpus.[135] They said the government's only option, if it wanted to detain Hamdi, was to proceed by grand jury indictment and provide him all of the protections the

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[132] 124 S. Ct. 2633, 2648 (2004).
[133] *Id.* at 2650.
[134] *Id.* at 2652-660.
[135] *Id.* at 2660-674.

Constitution guarantees an accused before liberty may be deprived. Finally, Justice Thomas agreed with the government that federal courts are ill-equipped to review the executive's enemy combatant determinations, and agreed with the plurality that Congress had authorized such detentions with the AUMF.[136]

The Guantanamo detainees, whose cases had been argued a week before Padilla's and Hamdi's, also gained access to the courts to have their habeas petitions heard. While the procedures that would govern such proceedings, since they were aliens and not citizens, were not spelled out in the Court's opinion, many believe the *Hamdi* opinion's plurality will be instructive to the lower courts. On the surface, it appears Padilla was the loser in this round. Even though the circuit courts seemed to recognize that he had a much stronger claim for due process protection than either Hamdi or the petitioners from Guantanamo, he remains locked up in a Navy Brig in Charleston at this writing, because the Supreme Court ruled that his habeas petition had been filed in the wrong venue and therefore ordered it dismissed without prejudice.[137] However, when you read the opinion in *Hamdi* together with Justice Stevens' dissent in *Padilla*, and then count the noses, it seems clear that Padilla has five votes for the proposition that he must be charged with a crime in an Article III court or released.[138] So far, the government has ignored the fact that a clear majority of the Court has disapproved of Padilla's continued detention as an enemy combatant not charged with any crime.

Following the Court's opinion in *Hamdi*, the government chose to negotiate Hamdi's release and return him to his home in Saudi Arabia rather than face the due process hearing in front of Judge Doumar to which the Court said he was entitled. We do not know whether the government's decision was dictated by the weakness of its case or its ultimate assessment that Hamdi indeed posed no threat to this country, but I suspect it was a little bit of both.

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[136] *Id.* at 2674.

[137] *Id.* at 2735 n.8.

[138] When you add the four dissenters in *Hamdi* (Justices Souter, Ginsburg, Scalia and Stevens) to Justice Breyer's joining Justice Stevens' dissent which supported Padilla's release unless he was charged with a crime (*see* 124 S. Ct. at 2735 n.8), it is clear that there are five votes on the Court for Padilla's position that unless a grand jury indicts him, he must be freed.

Let me switch gears now and move to where Moussaoui meets Hamdi. Of course, because it is still an ongoing case wrapped in national security information and under seal proceedings, we are necessarily constrained in what we can say.

In *Hamdi*, our client was the one detained as an enemy combatant. In *Moussaoui*, it is the defense witnesses who are detained as such. However, the government's argument is not swayed by this difference. It maintains that separation of powers precludes an Article III court from exercising any jurisdiction over enemy combatants, be they the petitioner in a habeas proceeding or material witnesses in a capital case. Thus it maintains that such favorable defense witnesses are not reachable by the Sixth Amendment's compulsory process clause.

Moussaoui demonstrated, in accordance with balancing procedures set forth in *Valenzuela-Bernal*,[139] that there is substantial likelihood that the enemy combatant witnesses would provide testimony in his favor.[140] One circuit court judge believes the testimony from these witnesses could help him escape a sentence of death.[141] *Moussaoui* also has established that the witnesses are within reach of the court's process[142] and that neither the separation of powers nor national security concerns can justify denying him access to the witnesses.[143] However, the U.S. Court of Appeals for the Fourth Circuit concluded that despite all of this, Moussaoui's case could proceed in the face of refusal by the government to produce the witnesses for testimony because Moussaoui would not be "materially disadvantaged" by "substitutes."[144] The substitutes are to be based upon "summaries of classified documents containing information from unnamed, unsworn government agents purporting to report unsworn, incomplete, non-verbatim accounts of what government agents say the defense witnesses have said."[145] Counsel will never talk to these witnesses, and the jury will never hear from them.

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[139] United States v. Valenzuela-Bernal, 458 U.S. 858 (1982).
[140] United States v. Moussaoui, 382 F.3d 453, 469-76 (4th Cir. 2004).
[141] *Id.* at 483-89.
[142] *Id.* at 463-66.
[143] *Id.* at 466-69, 474-76.
[144] *Id.* at 477.
[145] Moussaoui v. United States, No. 04-8385, *petition for cert. filed, available at* http://www.nacdl.org/public.nsf/newsissues/ffefba52d750149885256f73005e2c94/$FILE/Moussaoui_cert.pdf (last visited Mar. 31, 2005).

The Fourth Circuit's opinion circuitously denies embracing the very result that it decrees. In essence, by requiring Moussaoui to proceed to trial without the right the Sixth Amendment guarantees, that is, "in *all* criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . .,"[146] the Fourth Circuit has held that the right to compulsory process need not be enforced when a court determines in advance of trial that the accused will not be materially disadvantaged by a denial of that right.

Because, among other things, we disagree with the notions that the explicit language of the Sixth Amendment has room for exception, that a court in advance of trial and without any access to what witnesses have actually said can conclude there will be no material disadvantage to proceeding without them, and that there is no material disadvantage to Moussaoui from having to proceed on the basis of the substitutes proposed here, we have petitioned the Supreme Court for a writ of certiorari.[147] In opposition to our petition, the government continues to argue that separation of powers places the enemy combatant witnesses outside the reach of an Article III court's compulsory process power, an argument it lost in the Fourth Circuit.[148] We say the ultimate answer to that question lies in the plurality opinion of Justice O'Connor in *Hamdi*.

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[146] U.S. CONST. amend. VI (emphasis added).

[147] *Moussaoui*, No. 04-8385, Petition for Writ of Certiorari; *see* Brief for the United States in Opposition, at 26-30.

[148] *Moussaoui*, 382 F.3d at 471-76.

THE TWENTY-THIRD CHARLES L. DECKER LECTURE IN ADMINISTRATIVE AND CIVIL LAW*

ADRIAN CRONAUER[1]

How many of you have seen the movie "Good Morning, Vietnam?" Well, that certainly does wonders for my ego—probably doesn't hurt my bank balance either! It's been an interesting experience having a film based ever-so-loosely upon my experiences in Vietnam. Possibly because a lot of people know my name, but very few people know my face, which leads to some interesting things happening. For example, not

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* This article is an edited transcript of a lecture delivered on 2 April 2004 by Mr. Adrian Cronauer to members of the staff and faculty, distinguished guests, and officers attending the 52d Graduate Course at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia. The lecture is named in honor of Major General Charles L. Decker, the founder and first Commandant of The Judge Advocate General's School, U.S. Army, in Charlottesville, and the twenty-fifth Judge Advocate General of the Army. Every year, The Judge Advocate General invites a distinguished speaker to present the Charles L. Decker Lecture in Administrative and Civil Law.

[1] Adrian Cronauer is the Special Assistant to the Deputy Assistant Secretary of Defense for POW/Missing Personnel Affairs and Director of the POW/Missing Personnel Office where he helps direct the U.S. Government efforts to achieve the fullest possible accounting of all service members missing in action—in all wars. The Defense POW/Missing Personnel Office (DPMO) exercises policy, control and oversight of the entire process for investigation and recovery related to missing persons. The DPMO develops, implements, and maintains a joint system for live recovery of isolated personnel, rapid post-hostility accounting, and remains identification.

Mr. Cronauer served for four years in the U.S. Air Force. Between 1965-1966, his "Dawn Buster" radio program aired in Vietnam entertaining thousands of soldiers, sailors, marines and airmen. Based on his experiences, Mr. Cronauer co-authored the original story for the major motion picture, "*Good Morning, Vietnam!*" In that film, Mr. Cronauer was portrayed—loosely—by Robin Williams whose performance was subsequently nominated for an Academy Award. In addition to "*Good Morning, Vietnam!*" Mr. Cronauer has authored a textbook which is widely used in universities throughout the United States.

After leaving the Air Force, Mr. Cronauer worked in broadcasting for several years. He then returned to school and obtained his Doctor of Laws degree from the University of Pennsylvania, where he was Special Projects Editor of the University of Pennsylvania Law Review. He also holds a masters degree in Media Studies from the New School for Social Research in New York City; his undergraduate studies were at the University of Pittsburgh and the American University in Washington, D.C. He clerked at the Federal Communications Commission and was honored with the FCC's Special Service Award. Mr. Cronauer's law practice concentrated in information and communications law. He was a member of the Editorial Advisory Board of the Federal Communications Law Journal and has published numerous scholarly articles.

too long ago, I was at a reception in Washington and whenever you go to these receptions, they give you a little sticky tag with your name on it to wear. My wife calls them "nerd" tags. As I passed a group of people, someone noticed the name; I heard him say, "That's the guy they made that movie about, 'Good Morning,Vietnam!'" Another person said, "No, that can't be him, that guy doesn't look a bit like Robin Williams!" If that weren't bad enough, another person said, "Of course not, that's Judge Bork!"

But because of the ubiquity of the film on late night cable, my fifteen minutes of fame have stretched into fifteen years now, and over this period, I've learned that there are certain things people always want to know. So before I get into the substance of my talk, I might as well answer the number one question which is: "How much of that movie is real?" Well, you're in the military. You know that if I did half the stuff he did in that movie, I'd still be in Leavenworth instead of in Charlottesville this morning. There's a lot of Hollywood exaggeration and outright imagination in that film. I'll go through a very, very quick, abbreviated list.

Let's see, yes, I was a disc jockey in Vietnam. Let's see, anything else? Yes, I did teach English during my off-duty time; no, I did not teach my class how to swear and use New York street slang; and no, I was not teaching because I was trying to meet this particular, beautiful Vietnamese girl. At least not one particular, beautiful Vietnamese girl. None of the characters in the film are based on actual people for legal reasons like invasion of privacy and slander; they're all stereotypes. As is true of any good stereotype, though, you could name any character in the film, and I'd probably be able to think of at least a half-dozen people I knew during my four years in the Air Force who fit that stereotype.

The film was never intended to be a point-by-point accurate biography; it was intended to be a piece of entertainment. And it certainly was that. Robin was nominated for an Academy Award.

I take a lot of pride in "Good Morning, Vietnam!" because of the number of people who have told me it was the first film that began to show Americans as they really were in Vietnam rather than murderers and rapists and baby killers and dope addicts and psychotics. Of course, personally, the film has been a boon to me; it's opened a lot of doors. It also paid for law school—and *you* know how important that is!

It also has allowed me to use my name recognition to do things I believe in. I spent two terms as a trustee of the Virginia War Memorial and I'm still on the board, as I have been for about a dozen years now, of an organization called the Citizens Flag Alliance which is a coalition of about 120 different groups—civic, fraternal, veterans, religious, patriotic—all trying to pass a constitutional amendment to protect the American flag from being burned, spit upon, or otherwise physically desecrated.

Because of Robin Williams' portrayal of me, a lot of people are surprised to learn that I'm a life-long, card-carrying Republican; I have long worked on behalf of Republican candidates and was very active in the Bush/Cheney campaign. I was a National Vice Chairman of Veterans for Bush so, when the new administration came in, they asked if I would like to join them. We had some discussions about what I could do for the administration. One of the suggestions was working at the Prisoner of War and Missing Persons office.

My first reaction was a little lukewarm, but on the evening of 9/11, I was talking with my wife, and I said, "You know, if I were about thirty years younger, I might go back into the military." She said, "Adrian, did it ever occur to you that if you took that job that they're telling you about at the Pentagon, you might be able to make more of a contribution than you ever could in uniform." I thought about it and said, "Yes, she's right." So that's what I've been doing for the past two and a half years. I have a position description that goes for three or four pages. I've read it a dozen times, but still don't know what it says. Down at the bottom, though, it says, "other duties as assigned." So that's what I've been doing, other duties as assigned. In the past two and a half years, I've been to Hanoi, Danang, Saigon, Phnom Penh, Laos. I've been to Hawaii twice, Bangkok twice, Geneva six times, and also to Moscow, Kuwait, Baghdad, and several dozen U.S. cities, working on the issue of accounting for America's missing.

Our office is called the Defense Prisoner of War and Missing Personnel Office. Actually, that's a misnomer, because under United States law, there is no designation of "Prisoner of War." There are categories of missing. You could be "Missing," you could be "Missing Beleaguered," "Missing Besieged," "Missing Detained," "Missing Interned," "Missing in Action," and finally, "Missing Captured." If you are designated as "Missing Captured" then, by operation of international law, under the third Geneva Convention, that is called "Prisoner of War."

But that is only in international law. In United States law, there is no such designation, and that is probably the closest to any legal subject I'm going to discuss today. Instead, for the rest of this talk, I want to give you a broad view of the business of accounting for missing Americans.

I am surprised how little most people know about our government's efforts to account for all of the missing Americans, and we have a lot of them. There are approximately 88,000 missing Americans. About 78,000 of those are from World War II; about 8,000 from the Korean conflict. Around 1,800 are still missing from the Vietnam War, thirty missing from incidents occurring during the Cold War, and one person is still missing from the first Gulf War in 1991—Captain Scott Speicher, you've probably heard of him.

Back in 1789, Benjamin Franklin made an oft-quoted comment. He said, "Nothing is certain in life except death and taxes." Well, I respect and admire Dr. Franklin, but I have to take issue with him. There's at least one other certainty: as long as there are evil people in this world who want to use force to impose their will on others, there will be armed conflicts. As long as there are armed conflicts, war has its own certainties. There will be casualties, and there will be missing people. Some people will be taken prisoner, and it's our job to try and recover them.

We know, of course, we'll never account for everybody, but at our office, we want to achieve the fullest possible accounting. We know we'll never close all our cases, yet we keep trying. Why? Because the U.S. government considers this to be a moral obligation.

A lot of other countries don't understand what they see as our "obsession with dead bones." But it's not with dead bones, it's with people who are missing. We strive to identify their remains and return them to their loved ones. No other country in the history of the world has ever devoted anywhere near the amount of time, effort, money, resources, and personnel as we do to achieve this goal. A lot of countries are highly suspicious of our motives. Many North Koreans, for example, are convinced it's all a sham so we can get in there and spy on them.

My boss, Deputy Assistant Secretary of Defense Jerry Jennings, was in the Middle East about a year ago. At a news conference about the people still missing from 1991's Operation Desert Storm, the Kuwaitis said they have more than 600 persons unaccounted for, the Saudis

reported about thirty still missing. A reporter asked Mr. Jennings, "How many Americans are missing?" He answered, "Just one." The reporter was astonished. "What?" he said. "You're going to all this trouble, coming all the way over here, devoting all these resources, just to account for one person?" Mr. Jennings said, "Yes. And what does that tell you about America?"

We have a number of different offices, both in the United States and abroad, over which we have policy oversight and which we supervise. First, each service has a casualty office which is the unit that deals directly with family members of those who are missing. There used to be something that was called "Joint Task Force for Full Accounting." Established in 1992, it is the organization that sends out the teams to excavate crash locations and burial sites to find American remains. They bring the remains back to Hawaii where they're turned over to the Army's Central Identification Laboratory, the acronym is "CILHI." Last October, the Joint Task Force and the Central Identification Laboratory merged and became JPAC, the Joint POW-MIA Accounting Command.

There's also a unit called the Armed Forces DNA Identification Laboratory which is located in Rockville, Maryland. Whenever someone enters the military now, part of the in-processing involves taking a piece of blotting paper about the size of a post-card and putting two drops of the subject's blood on it. Identification information is written on the card, it's vacuum-sealed in foil and kept in a gigantic three-story refrigerator at about thirty degrees below zero. By now, they have more than 4,000,000 samples. You may have read about how, in 1991, through circumstantial evidence, it became suspected who the Vietnam Unknown Soldier might be. So they exhumed his remains, and through DNA testing, they were able to identify him. I suspect we will not have any more unknown soldiers because of the work of the DNA Lab. Back on 9/11, when the plane crashed into the Pentagon, the DNA Lab was able to identify almost every single set of remains. There were only five that they could not identify, because the remains were so thoroughly burned they were unable to get any usable DNA.

There's an organization down at San Antonio, at Brooks City Base, called the Life Sciences Equipment Laboratory. These people are experts at identifying things like flight suits and parachutes and ejection seats. You can go in, hand them what looks like a dirt-encrusted, rusty, hunk of metal and one of their analysts will look at it and say, "Oh yes, that is a buckle from such and such model parachute, that was used in

southeast Asia from 1968-1971. Oh, and here's what it looks like, new." You look at it, and son-of-a-gun, they are absolutely correct!

There's an organization called Stony Beach which is part of the Defense Intelligence Agency (DIA). They go throughout, mostly, the Southeast Asian area collecting oral histories, and following up on reports of last sightings. The oral histories are important, because we talk to people who had fought on the other side and now we're saying, "you were in such and such a place at such and such a time, and you shot down a plane. Where was that? Was there anybody rescued from the wreckage? Did somebody die? Did you bury them? Where did you bury them? Can you show us where?" These oral histories give us a lot of information and incidentally, we do this among American veterans as well. We go to veterans reunions and take oral histories.

We also do that in Russia at an organization called the U.S.-Russian Joint Commission on POW/MIAs. Back in 1991, Boris Yeltsin and the first President Bush, made an agreement that they would set up a joint commission between the United States and Russia designed to account for our missing and theirs, or as many as we can. The support directorate for that commission on the U.S. side is part of our office. We have a team in Moscow, consisting of two full-time American civilian employees, three Russian employees, and two long term military TDY. They go through documents in the Russian archives that have been declassified, looking for hints of what might have happened to Americans from World War II, Korea, and Vietnam. They also travel throughout Russia and many of the other Balkan states looking for veterans to give us their oral histories.

We have about 600 people throughout the world who are employed by these units and who devote all their time and effort simply to account for missing Americans. Since July 12, 1993, we at DPMO have been the designated authority under the office of the Secretary of Defense to supervise all U.S. accounting policy. We have over 120 people in our Arlington, Virginia, office to coordinate all these activities throughout the world, and to set a single harmonized policy. We engage in research and analysis, we develop policy and we develop and maintain both paper and electronic databases, which include information such as names, geographic areas of the loss, branch of service, and so forth. Right now, we are working on the database for World War II losses.

I must tell you, that in the two and a half years I've been working at DPMO, I have been thoroughly impressed with the people I work with. About a little less than half are active duty military, and the rest are either retired military, veterans, or someone who has some other connection to the military. These are highly-educated, highly-intelligent people, who certainly could be making a lot more money doing something else. But they do what they do because they *believe* in it. They believe it's important to do this work and, I suspect, at least some are thinking, "there but for the grace of God, go I."

The DPMO takes a three-pronged approach to our policy formation. First, we want to prepare American forces before they go into combat. Second, we're involved with recovering isolated Americans, hopefully before they're captured and, finally, we want to retrieve and identify the remains of those who were killed in hostile action.

The advanced preparation—we develop policies concerning Code of Conduct training and we ensure that our personnel receive adequate escape and evasion training. Next, we want to make sure that everybody has the best possible survival and evasion equipment. For example, we've recently approved some new radio equipment for people who find themselves behind enemy lines, so that they can be more easily located.

Then there's the subject of live sightings: these we take very, very seriously. Since the fall of Saigon in 1975, the U.S. government has received nearly 22,000 reports that relate to live Americans in Southeast Asia alone. We have alleged first-hand live sightings, we have hearsay reports of sightings, we have reports on possible crashes or gravesites, and we have dog tags that people find. Here are some figures, and, when I give you figures, they are approximations because they're constantly changing. We'll find out new things about people who weren't originally missing or might now be considered missing. We have all sorts of reasons why the figures are less than totally precise. But for purposes of today's discussion, let's say we have 1,911 different reports received since 1975. Ninety-nine percent of those have been resolved. If you break them down, sixty-nine percent proved to be Americans already accounted for, about two percent were sightings made of military before 1975, twenty-eight percent turned out to be outright fabrications. We have fourteen cases remaining, thirteen prior to 1976, and one remaining in the 1976 through 1980 period that hasn't been resolved yet. All live sighting reports after 1980 have been resolved.

The dog tags are a big problem, because when we left Vietnam, we left a lot of equipment there, including machines to make dog tags and a lot of blanks. Also, when people were making dog tags, if they made a typo, they'd just throw the bad one away and make a new one. Vietnamese people have found some of these dog tags that were erroneous and turned it into a minor industry—mostly of trying to sell these tags to Americans, tourists and other people in Vietnam. But the search for missing Americans does continue, and will always continue until all of the cases have been resolved.

Now to North Korea: we've had several reports of American POWs. We know of four defectors from the 1960's—not during the Korean War itself, but later. These four made propaganda films for North Korea, so we know who they are, we've seen the films. Every person who is able to escape or otherwise leaves North Korea is interviewed.

The bottom line, so far, is that there is absolutely no credible evidence of any American serviceperson being held against their will, anywhere. Nonetheless, we still continue to investigate every single report of a live sighting anywhere in the world.

To give you an idea of what we're able to accomplish, it's slow work, it's tedious work, and the work is enormous in volume. Many times it's a situation you could analogize to having to do a jigsaw puzzle. But there's no picture on the box. Furthermore, you don't know for sure that all of the pieces in that box are from the same puzzle. So it takes a long time, but we do make progress.

In Southeast Asia, the communists took over all of Vietnam in 1975. At that point, there were 2,585 persons unaccounted for. By now that number has been whittled down to 1,865. That means, since 1973, a total of 718 individuals have been found, repatriated, identified, returned to their families, and buried with full military honors. Recently—just this past February—remains were returned from both Cambodia and Laos. Back in January, we had remains returned from three locations in Vietnam. Last November, we got three sets of remains from Laos.

In Korea, we have about 8,100 Americans still unaccounted for, most of them in the north. The U.S.-North Korean Joint Recovery Operations began in 1996, and it took a lot of work because the North Koreans weren't being very cooperative. It took a long time to set this up as a humanitarian effort—plus the fact that the weather limits our time to

about a half a year that we can get in there; the rest of the time the ground is so frozen, you can't even dig. And we have to, every year, negotiate with the North Koreans about the terms and conditions under which we will go into their country, because in their perspective, we are still at war. And, I've got to tell you about negotiating with these people. They are frustrating, infuriating, illogical, irrational, and those are their good points. It is terribly frustrating to do the job of negotiating with them, but we do it because the job is that important. We will not let them draw us into discussions of other issues. We say, "No, this is a humanitarian effort and this and only this is what we will talk about." And already, we've had twenty-seven different searches and retrieved 186 sets of remains. Of those, so far, we've only been able to positively identify fourteen, and return them to the families. But many more are still in the final stages of being identified. The first Joint Recovery Operation for this year, 2004, is scheduled to begin on 24 April, and we'll be searching in the Chosin reservoir area. There were nearly 1,000 Americans lost just in that area alone; and last October 8th, we had eight sets of remains returned from our last Joint Recovery Operation of 2003.

We are still retrieving remains of people from World War II. Approximately 290 have been identified so far. Just so far this year, we have retrieved one set of remains from Burma, two from China, one from Europe, and two from the Pacific Islands. Last fall, seven sets of remains were discovered in Burma and, just a week ago, were finally retrieved and returned to the Central Identification Lab in Hawaii. Last year, thirteen of nineteen World War II Marine Raiders, killed in action in the Makin Atoll, were laid to rest in Arlington Cemetery, to include the first Medal of Honor recipient in World War II. And this coming Memorial Day, the World War II Memorial will be dedicated in Washington, and our goal is to have our complete database, electronic database, with all 78,000 names of the missing entered into it by then. All of those statistics, I think give you the flavor of the enormity of the job we are doing.

And this job is not without risk to us either. Back in 1973, we had an American die in an accident in Vietnam. On 7 April 2001, seven Americans died in a helicopter crash in Vietnam, and also in that chopper were nine Vietnamese as well. We had one Australian die just last year on a recovery operation.

In Russia, we've had nineteen sets of remains returned from Russia, eleven from a C-130 in Armenia, one Cold War loss in the Yuri Islands.

In the summer of 2000, the Russians located a Navy aircraft crash on the Kamchatka peninsula, which is in far Eastern Russia. And that's tough work because the summer there only lasts for five weeks.

We're taking our oral histories in the Ukraine, Czech Republic, Hungary, and Belarus. From those oral histories, we've been able to have one person make ten trips in less than three years which resulted in the retrieval of about 150 American remains, almost all from the Korean War. In Saint Petersburg, we've just arranged for access to their military hospital archives, and we're hoping to get a lot of good information from transfer records, death certificates, and burial locations. We've already, in Russia, determined the fate of 263 missing Americans. All of this is very important work, yet some of it is dry and plodding.

The most rewarding part of my job is what we call Family Updates. About eight or nine times a year, on a Saturday, we will go to a major urban area in the United States and rent a hotel ballroom. Anyone who lives within 300 miles of that city who is related to someone still missing is invited to come in, and we spend the morning giving them a briefing on our office and all of the other units around the world and what they do. We bring people in from Hawaii, from the DNA laboratory, and from Texas. They do a PowerPoint presentation so that the family members know what we are doing in our accounting efforts. We let the family members ask questions, and we give them a printout of whatever information we might have on their particular loved one. Then we let them talk to an area expert. If their loved one is missing from Vietnam, they can talk to a Vietnam analyst, if from Korea, a Korean analyst. For some of these people, this is the first thing they've heard in decades so even if you're only able to give them just a small amount of information, if it can help them move just a little ways toward closure, they are so grateful, and it means so much to them, and therefore, it means a lot to us to see that reaction; to know why we are doing what we are doing; because we are trying to help these families.

When I went into the Air Force, I went through basic training, and in one of the classes in basic training they said to us, "You are now a member of the United States Air Force. The military takes care of its own. If you happen to find yourself caught behind enemy lines, we will do everything we can to retrieve you before the enemy gets there. If you are taken captive, we will do everything humanly possible to get you released and returned to us. And if, God forbid, you are captured and die in enemy hands, we will not cease in our efforts to retrieve your remains

and bring them back home to your loved ones for an honorable, hero's burial in American soil. That is your government's promise to you." Two and a half years ago when I first went into DPMO, I looked at the door, and thereon was a copy of our logo with a picture of a torch and beneath it, a ribbon. On the ribbon is our motto, "Keeping the Promise." So that's what we do, we are keeping the promise. That's the message I bring you today. Thank you.

IMPERIAL HUBRIS: WHY THE WEST IS LOSING THE WAR ON TERROR[1]

REVIEWED BY MAJOR JEREMY A. BALL[2]

Instead of facing reality, hubris-soaked U.S. leaders, elites, and media, locked behind an impenetrable wall of political correctness and moral cowardice, act as naive and arrogant cheerleaders for the universal applicability of Western values and feckless overseas military operations . . . .[3]

Using provocative language that is both shocking and inflammatory,[4] "Anonymous"[5] presents a tightly reasoned argument that the West, and more specifically the United States, is engaged in a protracted, and likely unsuccessful, global war. Improperly characterized by the trite political slogan, "War on Terror," this war is more accurately understood as a "worldwide Islamist insurgency."[6] The figurative head of this

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[1] ANONYMOUS, IMPERIAL HUBRIS: WHY THE WEST IS LOSING THE WAR ON TERROR (2004).

[2] U.S. Army. Written while assigned as a student, 53d Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[3] ANONYMOUS, *supra* note 1, at xv-xvi.

[4] The author acknowledges that his "comments are at times angry and accusatory," but explains this approach as being reflective of his "profound belief that the lives of my children and grandchildren are at risk because most of my generation has willfully failed to understand and confront the threat America faces from bin Laden and his Islamist allies." *Id.* at xx.

[5] The author, identified by the publisher only as "Anonymous," is widely known to be former Central Intelligence Agency (CIA) officer Michael Scheuer. The publisher originally withheld Mr. Scheuer's true name in compliance with internal CIA regulations. *See* Jason Vest, *The Secret History of Anonymous*, BOSTON PHOENIX, July 2-8, 2004, at 7, *available at* http://www.bostonphoenix.com/boston/news_features/other_stories/multipage/documents/03949394.asp. Although Mr. Scheuer gave numerous media interviews following the book's publication, senior officials within the CIA subsequently ordered Mr. Scheuer to stop granting interviews without written approval. *See* James Risen, *Agency Curbs War Critic Author*, N.Y. TIMES, Aug. 5, 2004, at A12, *available at* http://www.nytimes.com/2004/08/05/politics/05author.html. On 12 November 2004, Mr. Scheuer resigned from the CIA. *See Bin Laden Expert Steps Forward*, CBS NEWS.COM, Nov. 14, 2004, *at* http://www.cbsnews.com/stories/2004/11/12/60minutes/main65407.shtml.

[6] ANONYMOUS, *supra* note 1, at 241. The 9/11 Commission acknowledged that the words "terrorism" or "terrorist" fails to identify adequately the enemy. Ultimately, the commission concluded that "[o]ur enemy is twofold: al Qaeda, a stateless network of terrorists that struck us on 9/11; and a radical ideological movement in the Islamic world,

insurgency is Osama bin Laden, whose most significant threat "lies in the coherence and consistency of his ideas, their precise articulation, and the acts of war he takes to implement them."[7] Applying these conclusions regarding the nature of the conflict, Anonymous makes a compelling argument that the United States has, since September 11th, "waged two failed half-wars and, in doing so, left Afghanistan and Iraq seething with anti-U.S. sentiment, fertile grounds for the expansion of al Qaeda and kindred groups."[8]

The underlying cause of the West's failure is "imperial hubris," a term Anonymous uses to describe the phenomena that causes Americans to "see and interpret people and events outside North America" in a way that "is heavily clouded by arrogance and self-centeredness."[9] It is this imperial hubris that has caused the United States to see and define bin Laden and al Qaeda as what American's imagine them to be, rather than what they are. Perhaps the best example of imperial hubris is the assumption that both the Afghani and Iraqi peoples either want, or are able, to be governed by a constitutional democracy.[10] While such may be the case, Anonymous argues strongly that two of the fundamental democratic principles cherished by the West, freedom of religion and the rule of law, are contrary to, or at least conflicting with, mainstream Muslim belief.[11] To make this point, Anonymous states that, "For Muslims, God's word—as He revealed it in the Koran—and the Prophet's sayings and traditions (the Sunnah) are meant to guide all aspects of life: personal, familial, societal, political, and international. God makes laws, man does not."[12] From this conflict, Anonymous draws the conclusion that, "as Americans today confront bin Laden and

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inspired in part by al Qaeda, which has spawned terrorist groups and violence across the globe." THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 362-63 (2004) [hereinafter 9/11 COMMISSION REPORT]. This definition, unlike the broader articulation by Anonymous, fails to include many of those individuals and groups involved in the now widespread Iraqi insurgency. *See* Jonathan S. Landay & Warren P. Stroebel, *Outlook: The Growing Insurgency Could Doom U.S. Plans for Iraq, Analysts Say*, PHILA. INQUIRER, Sept. 15, 2004, at 1.

[7] ANONYMOUS, *supra* note 1, at xvii.

[8] *Id.* at 252.

[9] *Id.* at 165.

[10] *See, e.g.*, President George W. Bush, Remarks at the Library of Congress, Washington, D.C., on Winston Churchill and the War on Terror (Feb. 4, 2004), *at* http://www.whitehouse.gov/news/releases/2004/02/20040204-4.html [hereinafter President Bush Remarks at the Library of Congress].

[11] ANONYMOUS, *supra* note 1, at 2.

[12] *Id.*

militant Islam, they must recognize that the solution to this conflict can never be a painless, quick transformation of the Muslim world to a Western-style democratic system."[13]

The larger significance of *Imperial Hubris*, however, is that it makes clear that the United States has failed to develop a viable national political strategy. Although Anonymous does not cast his criticism in these terms, his ultimate conclusion is that America must choose "between keeping current policies, which will produce an escalating expenditure of American treasure and blood, or devising new policies, which may, over time, reduce the expenditure of both."[14] The process of arriving at this choice is the essence of developing national strategy. Two of the nation's leading scholars on national strategy, Gordon A. Craig and Felix Gilbert, have described the concept in the following terms:

> Strategy is not merely the art of preparing for the armed conflicts in which a nation may become involved and planning the use of its resources and the deployment of its forces in such a way as to bring a successful issue. It [strategy] is the *rational determination of a nation's vital interests*, the *things that are essential to its security*, its *fundamental purposes in its relations with other nations*, and its *priorities with respect to goals*. This broader form of strategy should animate and guide the narrower strategy of war planning and war fighting . . . .[15]

The contribution of *Imperial Hubris*, and what makes it essential reading for any American serious about understanding the War on Terror, is that it provides a starting point for fully understanding the enemy in the War on Terror. Armed with this knowledge, which has been largely lacking since September 11th, all Americans, but especially policy makers, are in a much better position to formulate a viable national strategy.

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[13] *Id.* at 205.
[14] *Id.* at 253.
[15] Gordon A. Craig & Felix Gilbert, *Reflections on Strategy in the Present and Future*, *in* MAKERS OF MODERN STRATEGY FROM MACHIAVELLI TO THE NUCLEAR AGE 863, 869 (Peter Paret ed., 1986) (emphasis added).

Identifying the Enemy

Anonymous's most powerful arguments are found in his identification and analysis of the enemy. In this regard, Anonymous builds upon his previous work, *Through Our Enemies' Eyes*.[16] In contrast to the amorphous concept of waging a war against terrorists, as articulated by President George W. Bush,[17] Anonymous concludes:

> The threat facing America is the defensive jihad, an Islamic military reaction triggered by an attack by non-Muslims on the Islamic faith, on Muslims, on Muslim territory, or on all three. In this scenario, it is doctrinally incumbent on each Muslim—as an unavoidable personal

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[16] ANONYMOUS, THROUGH OUR ENEMIES' EYES (2002)); *see also* Benjamin Schwarz, *Imperial Hubris: Why the West Is Losing the War on Terror*, ATLANTIC MONTHLY, Aug. 10, 2004, at 123.

[17] On numerous occasions, President Bush has offered various descriptions of the enemy in the War on Terror. For example,

> Any person involved in committing or planning terrorist attacks against the American people becomes an enemy of this country, and a target of American justice. Any person, organization, or government that supports, protects, or harbors terrorists is complicit in the murder of the innocent, and equally guilty of terrorist crimes. Any outlaw regime that has ties to terrorist groups and seeks or possesses weapons of mass destruction is a grave danger to the civilized world -- and will be confronted.

President George W. Bush, Remarks from the USS Abraham Lincoln at Sea off the Coast of San Diego, California (May 1, 2003), *at* http://www.whitehouse.gov/news/releases/2003/05/iraq/20030501-15.html. Additionally, President Bush has remarked,

> Events during the past two years have set before us the clearest of divides: between those who seek order, and those who spread chaos; between those who work for peaceful change, and those who adopt the methods of gangsters; between those who honor the rights of man, and those who deliberately take the lives of men and women and children without mercy or shame.

President George W. Bush, Address to the United Nations General Assembly (Sept. 23, 2003), *at* http://www.whitehouse.gov/news/releases/2003/09/20030923-4.html. Further, "[t]oday, we are engaged in a different struggle. Instead of an armed empire, we face stateless networks. Instead of massed armies, we face deadly technologies that must be kept out of the hands of terrorists and outlaw regimes." President Bush Remarks at the Library of Congress, *supra* note 10.

> responsibility—to contribute to the fight against the attacker [the United States] to the best of his ability.[18]

At the forefront of this defensive jihad is Osama bin Laden, whose "genius," according to Anonymous, has been his ability to "construct[] and articulat[e] a consistent, convincing case that an attack on Islam is under way and is being led and directed by America."[19] The enemy, therefore, is not a discrete group of radical ideologues; rather, they are a politically diverse group motivated by a common religious calling to resist the effects of U.S. foreign policy in the Middle East.

Anonymous convincingly argues that al Qaeda is not a band of religious zealots who perform acts of terror for their own sake. To the contrary, bin Laden has repeatedly articulated six policy goals of al Qaeda that resonate throughout the Muslim world: (1) "the end of all U.S. aid to Israel, the elimination of the Jewish state, and . . . the creation of an Islamic Palestinian state;" (2) "the withdrawal of all U.S. and Western military forces from the Arabian Peninsula;" (3) "the end of all of U.S. involvement in Afghanistan and Iraq;" (4) "the end of U.S. support for, and acquiescence in, the oppression of Muslims by the Chinese, Russian, Indian, and other governments;" (5) the "restoration of full Muslim control over the Islamic world's energy resources;" and (6) "the replacement of U.S.-protected Muslim regimes that do not govern according to Islam by regimes that do."[20] Just as the ubiquitous phrase War on Terror fails to identify the enemy, it necessarily fails to identify the enemy's political objectives. By expressly identifying al Qaeda's objectives, Anonymous takes us one step closer to being able to properly debate national strategy.

Within this debate, the importance of identifying the enemy cannot be overstated. Perhaps the most well known axiom about knowing one's enemy comes from *The Art of War*, by Sun Tzu:

> Know the enemy and know yourself; in a hundred battles you will never be in peril. When you are ignorant of the enemy but know yourself, your chances of winning or losing are equal. If ignorant both of your

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[18] ANONYMOUS, *supra* note 1, at 7.
[19] *Id.* at 7-8.
[20] *Id.* at 210.

> enemy and yourself, you are certain in every battle to be in peril.[21]

In the words of Anonymous, "[w]e face a foe more dangerous than a traditional nation-state because it has a nation-state's goals and resources, draws manpower from a 1.3 billion-person pool, has no fixed address to attack, and fights for a cause in which death while killing enemies earns paradise."[22] Applying the principal stated by Sun Tzu to the facts about al Qaeda supplied by Anonymous, one might logically conclude that the United States, having failed to define, much less "know," the enemy before invading Afghanistan and Iraq, may be in peril of losing both conflicts.

Losing the War on Terror?

Arguing that the West is losing the war necessarily requires some common understanding of what it means to either win or lose. Unfortunately, Anonymous fails to provide a working definition by which to assess either the West or al Qaeda. His failure, however, does not warrant much criticism. As demonstrated so tragically by the Vietnam War,[23] assessing victory requires a clear articulation of the objectives of the conflict. In the case of the War on Terror, there is no such clarity, at least with regard to the objectives of the West. Although one might conclude, as did the 9/11 Commission, that the goal of the War on Terror is the "elimination of terrorism as a threat to our way of life,"[24] that assumption is belied by statements of the Bush administration that would seem to extend the goals of the war to spreading democracy throughout the Middle East.[25] Anonymous, lacking any defined standard

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[21] SUN TZU, THE ART OF WAR 84 (Samuel B. Griffith trans., Oxford Univ. Press 1971) (1963).

[22] ANONYMOUS, *supra* note 1, at 246.

[23] *See generally* GEORGE C. HERRING, AMERICA'S LONGEST WAR: THE UNITED STATES AND VIETNAM, 1950-1975, at 280 (2d ed. 1986) (concluding that the U.S. failure in Vietnam derived from a policy [global containment] "flawed in it's premises" and demonstrated "the limits of national power in an age of international diversity and nuclear weaponry").

[24] 9/11 COMMISSION REPORT, *supra* note 6, at 334.

[25] President Bush Remarks at the Library of Congress, *supra* note 10. The President said:

> The tradition of liberty has advocates in every culture and in every religion. Our great challenges support the momentum of freedom in

for assessing victory, and lacking the information necessary to engage in a holistic assessment of the war, resorts to a blow-by-blow chronology of every significant event between 2001 and the time of the book's conclusion.[26] While impressive in its thoroughness, this chronology sheds little light on the question of which side may be winning or losing. Anonymous eventually concludes that "the war on terrorism has failed to defeat the main enemy, lost focus on national interests in favor of a Quixotic attempt to democratize and secularize Islam, and is generating enemies and animosities faster than we can kill or quell them."[27] This conclusion, while probably premature, serves the larger purpose of

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> the greater Middle East. . . . We seek the advance of democracy for the most practical of reasons: because democracies do not support terrorists or threaten the world with weapons of mass murder. America is pursuing a forward strategy of freedom in the Middle East.

Id. As demonstrated by the following quote from Anonymous, his opinion on the exportation of American Democracy is fundamentally different from that of the Bush administration; a difference that likely explains why his criticism of official policy decisions is so sharp:

> As a people, Americans have a heritage to be proud of and one that is worth defending with their children's lives. It is not, however, a heritage whose experiences, heroes, wars, scandals, sacrifices, victories, mistakes, and villains can be condensed, loaded on a CD-ROM, and given to non-Americans with an expectation that they will quickly, and at little expense, become just like us. This is a debilitating fantasy of how the rest of the world and its peoples live and work. Far worse, it shows a profound ignorance of America, one that mocks those who fought and died resisting tyrannical monarchies and churches, secession, foreign rule, slavery, segregation, discrimination, the union of church and state, and a thousand other issues for which blood was shed to fuel the incremental but still incomplete perfecting of American democracy.

ANONYMOUS, *supra* note 1, at 205.

[26] *See* ANONYMOUS, *supra* note 1, at 86-102.

[27] *Id.* at 215. The managing editor of *Strategic Insights*, a publication of the Center for Contemporary Conflict at the Naval Postgraduate School, criticizes Anonymous for glossing over the fact that al Qaeda has failed to achieve its own political objectives. James H. Joyner, Jr., *Book Review: Anonymous, Imperial Hubris: Why the West is Losing the War on Terror*, STRATEGIC INSIGHTS, Sept. 2004, *at* http://www.ccc.nps.navy.mil/si/2004/sep/joynerSept04.asp. This criticism, however, is largely misplaced. Because each party to a military conflict must define its own political objectives, it is possible that war may result in no winner. The fact that al Qaeda may also be losing in terms of its own political objectives is of little solace if the United States fails to achieve its own goals.

shocking the reader into the dire need for debating national policy, something Anonymous recommends at the conclusion of the book.[28]

Specifically addressing the conflict in Afghanistan, Anonymous argues that the United States is losing because of a widespread failure to take account of those facts that should have been readily apparent to policy makers and military leaders alike.[29] He refers to these facts as "checkables." In his view, "the list of 'checkables' was immense, the cadre of qualified checkers was large, and yet tragically—for Americans as well as Afghans—almost no checking seems to have been done."[30] Examining in detail the many "checkables," Anonymous arrives at seven propositions, which he dubs the "Seven Pillars of Truth about Afghanistan."[31] Explained in detail in the text, the seven pillars are entitled: (1) Minorities Can Rule in Kabul, but Not for Long; (2) the Afghans Who Matter are Muslim Tribal Xenophobes; (3) Afghans Cannot Be Bought; (4) Strong Governments in Kabul Cause War; (5) An International Cockpit Not Insular Backwater; (6) Pakistan Must Have an Islamist, Pashtun-dominated Afghan Regime; and (7) There Will Be an Islamist Regime in Kabul.[32] Each of these "Pillars of Truth" contains a factual proposition that policy makers should have understood before invading Afghanistan. Looking back at the invasion of Afghanistan, Anonymous concludes that U.S. leaders ignored all seven, thereby ensuring disaster, if not total failure.[33]

Anonymous's criticism of the war in Afghanistan pales in comparison to the criticism he levies at the war in Iraq, which he describes as "an avaricious, premeditated, unprovoked war against a foe who posed no immediate threat but whose defeat did offer economic advantages."[34] Anonymous asserts that nothing could have been more beneficial to the cause of Al Qaeda and to bin Laden, who detested the secularized, corrupt, tyranny of Saddam Hussein, than the U.S. led-invasion of Iraq. By invading Iraq, the United States validated bin Laden's most compelling grievances against the West.[35] Through the use

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[28] *See* ANONYMOUS, *supra* note 1, at 252.
[29] *See id.* at 29.
[30] *Id.*
[31] *Id.* at 47-58.
[32] *See id.*
[33] *See id.*
[34] *Id.* at xvii.
[35] *See infra* note 20 and accompanying text (listing Bin Laden's grievances against the United States as reflected in al Qaeda's political objectives). In Anonymous's opinion,

of clear, logical, fact-based analysis, Anonymous demonstrates that there could not have been a more misguided and counterproductive step in the War on Terror.[36] In his view, "[t]he invasion of Iraq and the subsequent insurgency there is icing on the cake for al Qaeda."[37]

Analysis

For all the intelligence and insight that Anonymous brings to the table, his harshly critical tone and seemingly universal contempt for senior leaders and policy makers, both political and military, dampens the credibility of his arguments.[38] Absent this unnecessary approach, which will likely offend many readers who possess an unconditional trust in the good faith and competence of government leaders, *Imperial Hubris* would be a shining example of fact-based critical analysis, at least with regard to his assessment of the enemy. Anonymous, likely knowing that his conclusions would create controversy, carefully documents nearly every factual assertion. Unfortunately, he extends his factual analysis into the realm of policy, opening himself to meritorious criticism in areas in which he lacks expertise.

Anonymous's most significant policy-based error lies in his failure to see the link between national strategy and foreign policy—U.S. national strategy must be consistent with the goals of our allies and supported by the international community. This point, although partially acknowledged by the 9/11 Commission,[39] has been largely lost in the

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the consequence of the invasion of Iraq was that "All Muslims would see each day on television that the United States was occupying a Muslim country, insisting that man-made laws replace God's revealed word, stealing Iraqi oil, and paving the way for the creation of a 'Greater Israel.'" *Id.* at 213.

[36] *See id.* at 212-14.

[37] *Id.* at 134.

[38] One example of this criticism regards the senior leaders of the military, whom Anonymous criticizes in the following language, "Beyond lieutenant colonel, however, things look iffy, and at the rank of brigadier general and above we find a disaster manned by senior officers, mostly men, who tack as needed to protect their careers and their institutions insiders' club . . . ." *Id.* at 177. As to both political and military leaders, Anonymous says, "only a dunce or a man ready to be silent to protect his career could have failed to know the U.S.-led occupation of Iraq would create a 'mujahideen magnet' more powerful than Moscow created in Afghanistan." *Id.* at 182.

[39] *See* 9/11 COMMISSION REPORT, *supra* note 6, at 379. ("The United States should engage other nations in developing a comprehensive coalition strategy against Islamist terrorism.").

Bush administration's reliance upon unilateralism.[40] The result has been a failure to understand the threat to our national security, not only that posed by terrorist attacks, but perhaps more significantly, the reaction of Muslims to the lengthening U.S. occupation of Iraq. In spite of the obvious international character of al Qaeda's policy goals, Anonymous mistakenly downplays the importance of international politics, claiming that "coalition-building delays action, ties our policy and goals to those of tyrants, and limits options, all of which undercut the optimal protection of our national security."[41]

Although not stated explicitly, one might conclude that Anonymous's purpose in presenting such a blistering critique of the United States' political and military actions is to incite Americans into a debate about the merits of the War on Terror.[42] He seeks not a debate like the one that has been ongoing since September 11th, characterized primarily by a cacophony of rhetoric; rather, he encourages an honest debate about U.S. foreign policy, the national strategy necessary to achieve that policy, and the continuing use of military force around the globe.[43] Underlying this debate must rest the facts that Anonymous establishes so persuasively throughout the book, namely that: "[w]e are at war with an al Qaeda-led worldwide Islamist insurgency because of and to defend [U.S.] policies, and not, as President Bush mistakenly has said, 'to defend freedom and all that is good and just in the world;'"[44] that the Islamist insurgency is engaged in a defensive jihad, both required by and rewarded by Allah; and that adherence to our current foreign policy will make large scale global military action the only option.[45]

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[40] *See* Walter Cronkite, *The Unilateral President*, DENV. POST, Nov. 23, 2003, *available at* http://www.independent-media.tv/itemprint.cfm?f,edoa_od=3955&fcategory_desc=Under%20Reported ("For almost three years now, the world has . . . seen global leadership abandoned and replaced with what now is known as American unilateralism - the Bush administration's disdain for international agreements and sometimes for diplomacy itself.").

[41] ANONYMOUS, *supra* note 1, at 223.

[42] *See* Michael Scheuer, *Imperial Hubris: An Author Reviews the Reviews of His Book* (Feb. 7, 2005), *at* http://www.lewrockwell.com/orig6/scheuer1.html ("So far, I have failed in terms of what I intended to do. I have failed to stir any sort of substantive debate, and the nationalist, America first – not America alone – content of my argument has gone virtually unnoticed.").

[43] *See id.* at 252.

[44] *Id.* at 240-41.

[45] *See id.* at 242.

Perhaps most importantly, the United States must stop characterizing the enemy, including Osama bin Laden, as mere terrorists.[46]

Anonymous attempts to tackle the debate on his own by proposing a number of guidelines for discussion.[47] Although he is, by his own admission, inexperienced and unqualified in the art of developing foreign policy,[48] Anonymous nonetheless offers his own policy suggestions within the context of these guidelines. As he sees it, "[w]e can either reaffirm current policies, thereby denying their role in creating the hatred bin Laden personifies, or we can examine and debate the reality we face, the threat we must defeat, and then—if deemed necessary—devise policies that better serve U.S. interests."[49] Whether or not one agrees with Anonymous's specific policy suggestions, the value of this portion of his work lies in the message itself—if the United States is to be successful in the War on Terror, a debate over the critical issues that will drive our national strategy must occur.

In the article, *Reflections on Strategy in the Present and Future*, authors Gordon Craig and Felix Gilbert identify the following common elements in a successful national strategy:

> complete rationality in formulation and, in their implementation, a realistic appraisal of the international context in which they were to be pursued, an accurate view of the capabilities and proclivities of potential opponents, . . . and a determination that the use of force should end with the attainment of the political objective.[50]

Imperial Hubris highlights not only the U.S.'s failure to satisfy the elements provided by Craig and Gilbert, but provides an invaluable understanding of our enemy that is essential to putting the United States back on the right track.

In a speech before the United Nations Security Council, a speaker once put forth the following appeal to the nations of the world:

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[46] *See id.* at 246.
[47] *See id.* at 238-59.
[48] *See id.* at 239.
[49] *Id.* at 253.
[50] Craig & Gilbert, *supra* note 15, at 871.

> We call on this body to declare war on international terror, to outlaw it and eradicate it wherever it may be. We call on this body, and above all we call on the Member States and countries of the world, to unite in a common effort to place these criminals outside the pale of human society, and with them to place any country which co-operates in any way in their nefarious activities . . . .[51]

These words were not spoken by President Bush in the days following September 11, 2001. They were spoken by Chaim Herzog, then-Israeli Ambassador to the United Nations, following the dramatic rescue of Israeli hostages from terrorists in Entebbe, Uganda, in 1976. Just as Israel has done for the past twenty-eight years, it is now time for America to engage in an honest debate over our own national interests and how best to combat terrorism within the context of those interests. This debate must occur if the United States is ever to develop a successful national strategy that will truly make the world safe from terrorism.

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[51] CHAIM HERZOG, THE ARAB-ISRAELI WARS: WAR AND PEACE IN THE MIDDLE EAST 336 (1984) (internal quotations omitted).

WASHINGTON'S CROSSING[1]

REVIEWED BY MAJOR JONATHAN E. CHENEY[2]

> *These are the times that try men's souls: The summer soldier and the sunshine patriot will, in this crisis, shrink from the service of his country; but he that stands it NOW, deserves the love and thanks of man and woman.*
> *— Thomas Paine, December 19, 1776*[3]
>
> *Victory or Death.*
> *— General George Washington*
> *December 24, 1776*[4]

In *Washington's Crossing*, history professor David Hackett Fischer[5] details in a scholarly yet riveting fashion the military victories General George Washington and the American army forged from crisis in the New Jersey campaign of 1776-77. In doing so, Fischer shows how Washington adapted to his circumstance to go from a defeated general at New York to a general admired worldwide within a few months.[6] Fischer provides the reader interested in military affairs a depth of detail that readily facilitates analysis of lessons learned. Moreover, the United States has successfully incorporated many of these lessons learned into a military doctrine instrumental to a legacy of victory in battle. In addition to unearthing rich military history, judge advocates, in particular, can mine *Washington's Crossing* for insights into the importance law plays in the military. This review provides an overview of *Washington's*

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[1] DAVID HACKETT FISCHER, WASHINGTON'S CROSSING (2004).

[2] U.S. Army. Written while assigned as a student, 53d Judge Advocate Officer Graduate Course, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia.

[3] Thomas Paine, *The* American *Crisis, No. 1*, PA. J., Dec. 19, 1776, *reprinted in* FISCHER, *supra* note 1, at 141 (reprinting only the first page of Paine's 1776 document).

[4] FISCHER, *supra* note 1, at 220. General Washington wrote this password on slips of paper for American forces in their impending attack on Trenton. *See id.*

[5] University Professor and Warren Professor of History, Brandeis University. Directory entry, *David Hackett Fischer*, *at* http://www.brandeis.edu/departments/history/faculty/fischer.html (last visited Mar. 14, 2005). Other titles authored by Mr. Fischer include: *Liberty and Freedom: American Visions* (2004), *The Great Wave: Price Revolutions and the Rhythm of History* (1996), *Paul Revere's Ride* (1994), and *Albion's Seed: Four British Folkways in America* (1989).

[6] *See* FISCHER, *supra* note 1, at 360-61.

Crossing, examines some of its strengths and weaknesses, discusses its value to military leaders, and points out some nuggets of special interest to military lawyers.

Fischer introduces this military history not on the battlefield, but with the renowned 1850 painting by Emanuel Leutze, *Washington Crossing the Delaware*.[7] As Fischer tells the story of the painting's production, he exposes threads he will weave throughout his narrative. As in the painting, the book's central figure is General Washington.[8] However, even as Fischer carefully describes the diverse American Soldiers struggling to cross the ice-choked river in Leutze's painting, he fleshes out numerous people on both sides of the conflict throughout the book and shows their impact on the outcome.[9] Fischer alerts the reader that he will examine this "watershed in American history"[10] as a collision of ideas, describing it as a conflict between "the forces of order" and "an army of free men."[11]

Fischer begins the body of his text by introducing Washington; the American, British, and Hessian armies; and the brothers Admiral Lord Richard Howe and General William Howe, commanders of the British and Hessian coalition in America in 1776-77.[12] Fischer then moves into the preparations and battles for New York City.[13] The disastrous defeat at New York in the fall of 1776 leads to the American retreat across New Jersey and the British conquest and occupation of New Jersey.[14] The heart of the book begins with what Fischer calls the rising of New Jersey, a guerrilla war initiated by bands of New Jersey citizens acting independently of Washington and his American army.[15] Fischer then

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[7] *See id.* at 1-2.

[8] "The critical difference, however, is that Leutze's goal was to sustain the myth of Washington as hero, while Fischer's enterprise is to contextualize Washington's actions and reflect on their significance." Fred Anderson, *A Pivotal Moment for America*, L.A. TIMES, Feb. 29, 2004, at 8.

[9] *See, e.g.*, FISCHER, *supra* note 1, at 58, 235-37, 243, 259 (detailing some of the experiences of Hessian Lieutenant Andreas Wiederholdt).

[10] Anderson, *supra* note 8, at 8 (describing the importance of the days surrounding the battles of Trenton and Princeton and praising Fischer's ability to portray these events as such).

[11] FISCHER, *supra* note 1, at 6.

[12] *See id.* at 7-19 (Washington), 19-30 (Americans), 31-50 (British), 51-65 (Hessians), 66-78 (Howes).

[13] *See id.* at 81-114.

[14] *See id.* at 115-81.

[15] *See id.* at 193-205.

details the crossing of the Delaware on Christmas night, 1776, the ensuing battle of Trenton, the lesser-known second battle of Trenton on 2 January 1777, the battle of Princeton on 3 January 1777, and the relatively unknown forage war in New Jersey fought from January to March, 1777.[16] The author concludes by summarizing some of his key teaching points.[17]

But Fischer is not done. While the casual reader may be tempted to skip the twenty-four appendices covering topics ranging from troop strengths and casualty lists to ice conditions and ferries on the Delaware River, curiosity will demand that he examine at least some of this mostly trivial matter. The historiography, however, falls in a different category—it is a must read. A fascinating history in itself, the historiography chronicles a variety of interpretations of the New Jersey campaign that have been presented over the years from both home and abroad.[18] A twenty-eight-page bibliography indicates that Fischer has left no stone untouched in his search through both primary and secondary sources.[19] Over one thousand endnotes contain more than just citations to authority; they add many fascinating details of Fischer's research and discoveries.[20] Finally, a comprehensive index properly declares that the book should be taken seriously as a reference work.[21]

Strengths of *Washington's Crossing* can be found by examining its great balance—between storytelling and scholarship, between American

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[16] *See id.* at 206-20 (Delaware), 221-59 (Trenton I), 277-307 (Trenton II), 308-43 (Princeton), 346-60 (forage war).

[17] Fischer's main teaching points are that history occurs in a web of contingency, that American leaders invented a new way of waging war as a result of the circumstances surrounding the New Jersey campaign, that American culture underlay America's new way of war-fighting, and that American war-fighting was consistent with a policy of humanity. *See id.* at 363-79.

[18] Another reviewer states that the historiography "alone is worth most of the price of the book." Tom Blackburn, *Book Review: "Washington's Crossing,"* PALM BEACH POST (Fla.), Apr. 18, 2004, at 5J.

[19] *See* FISCHER, *supra* note 1, at 459-86.

[20] *See, e.g.*, *id.* at 496 n.3 (showing new evidence that British negotiated for Hessian mercenaries before Lexington and Concord).

[21] *See* Donald Higginbotham, *A Vivid Look at a Key Campaign of the Revolutionary War*, CHI. TRIB., Mar. 21, 2004, at C3 ("Thanks to Fischer, the Trenton-Princeton story will not need to be retold for a long time."); *see also* Blackburn, *supra* note 18, at 5J ("[*Washington's Crossing*] ought to stand as the authoritative study of the battles that saved the Revolution at least until the tercentennial.").

and British coalition perspectives,[22] and between detail and overview. First of all, *Washington's Crossing* is a good read; it is a scholarly tome that is pleasurable reading for the general public. Fischer refers to his narrative style as "braided narrative"—"the art of 'telling complicated stories without trying to simplify them, but giving them narrative coherence' and analytical ballast."[23] He bases his authoritative writing style on prodigious research, enabling him to build upon the knowledge of past historians. For the casual reader, this sizeable book's early chapters on the various armies and the other background information may appear daunting, but provide information required to understand the storyline, such as the difference between a grenadier and a dragoon.[24] More importantly, Fischer puts a face to the different ideologies preparing to collide in the conflict between old world and new. Throughout, Fischer vividly describes the players and painstakingly describes locations important to the story.[25] The pace accelerates during the battle for New York, and once the reader gets to the crossing of the Delaware, the narrative becomes a fast-paced page-turner.

The book's features beyond the post-text materials previously described are well done. The text and the historiography have many black-and-white reproductions of portraits, paintings, and drawings to aid the reader. Additionally, the book lacks only a map for the battle of White Plains to provide maps sufficient to follow the battles described; the reader familiar with the depicted locations will find additional interest in the overlay of a few of today's roads on the battle maps.

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[22] *See* Robert Ruth, *History Washington's Crossing: Resilience Lies at Heart of Victory*, COLUMBUS DISPATCH (Ohio), Apr. 4, 2004, at 7D ("Unlike many Revolutionary War historians, [Fischer] doesn't slight the British and their allies.").

[23] Alexander Rose, *History in the Making*, Nationalreviewonline, *at* http://www.nationalreview.com, July 1, 2004 (quoting Fischer in a telephone interview). Fischer accomplishes this by the "selecting, compressing, and positioning [of his] materials." *Id.* Rose credits Fischer's braided narrative as one reason *Washington's Crossing* reads like fiction and has been so popular. *See id.* Indeed, *Washington's Crossing* was marketed for mass appeal, enabling this scholarly work to debut at number twelve on the *New York Times* nonfiction best seller list. *See Best Sellers*, N.Y. TIMES, Mar. 7, 2004, at Book Review 18.

[24] The grenadiers were the "storm troops of the [British] army," selected for size and strength; the dragoons were the "highly mobile and heavily armed" cavalry. FISCHER, *supra* note 1, at 34, 36.

[25] *See, e.g.*, *id.* at 227 (Jacob's Creek crossing).

One of the book's strengths is its analysis. Fischer views this pivotal moment in American history[26] as occurring "not in a single event, or even a chain of events, but in a great web of contingency."[27] This perspective allows Fischer to delve into many of the intricacies of individual accounts and still paint the big picture, doing both masterfully.[28]

Fischer is unafraid to present competing explanations with his appended historiography, even explanations of those historians who have accused him of triumphalism—*i.e.*, of viewing American achievement as superior to that of others.[29] Though Fischer credits only man for the achievements he records because he writes from his web of contingency, he does not seem to fear including the viewpoints of those participants who looked to Divine explanations.[30] However, he may have hesitated in doing the same for Washington, perhaps attempting to maintain credibility among his peers while objectively describing this exemplary hero. While Fischer credits Washington for success in the winter of 1776-77, he insufficiently allows Washington to credit God, as he undoubtedly did—Washington had previously credited Providence for his survival in the 1755 Battle of the Monongahela and subsequently credited Providence for the nation's success.[31] The closest Fischer

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[26] *Washington's Crossing* is aptly included in Oxford University Press's "Pivotal Moments in American History" series. *See* FISCHER, *supra* note 1, at ix (as explained in the Editor's Note by James M. McPherson).

[27] FISCHER, *supra* note 1, at 364. "This book is mainly about contingency, in the sense of people making choices, and choices making a difference in the world." *Id.*

[28] *See* Jean Dubail, *Delving Deep into a Legendary Moment in History*, PLAIN DEALER (Cleveland, Ohio), Feb. 15, 2004, at J10 ("[W]here [Fischer] really excels [in Washington's Crossing] is at painting the big picture."); Joseph J. Ellis, *Sit Down, You're Rocking the Boat*, N.Y. TIMES, Feb. 15, 2004, at Book Review 13 ("Fischer . . . provid[es] an overarching picture of the way armies move, with a genuine sense of what it looks and feels like to face a bayonet charge or to witness the man abreast of you disemboweled by a cannonball."); Michael Kenney, *"Crossing" Superbly Takes Readers Back to 1776*, BOSTON GLOBE, Feb. 16, 2004, at C4 ("'Washington's Crossing' is history at its best, fascinating in its details, magisterial in its sweep.").

[29] *See* FISCHER, *supra* note 1, at 454; David Mehegan, *A Revolutionary View; Author Revisits, Retells Key Part of US History with an Eye on the Present*, BOSTON GLOBE, Feb. 16, 2004, at C1 (interview with Fischer).

[30] The capitalization is intentional. *See, e.g.*, FISCHER, *supra* note 1, at 259 ("[Many Americans] deeply believed that the battle of Trenton was a Sign of God's Redeeming Providence.").

[31] *See* Margaret Sitte, *Washington, Humble Champion, in His Words*, BISMARCK TRIB. (N.D.), Feb. 20, 1998, at 4A (quoting Washington in 1755 and 1783); *see also* Ellis, *supra* note 28, at 13 ("Washington went to his grave convinced that the eventual American triumph over Britain was, as he put it, a 'standing miracle'"); Letter from

comes to showing Washington's reliance on God is an innocuous reference in a letter to "the smiles of providence"[32] and Washington's belief "that victory would come only if they deserved to win."[33] If nowhere else, this aspect of the book's central figure should have received a closer look in Fischer's introduction of Washington, where Fischer tells the reader merely that Washington regularly attended church.[34] Otherwise, Fischer's presentation of Washington is full and complete.

Of minor consequence is Fischer's failure to define key political terms. Fischer often refers to American Whigs, British Whigs, Loyalists, and Tories without satisfactorily defining or describing their distinctive views. After three chapters dedicated to the various armies, Fischer could spare a page or two—or at least an endnote—distinguishing between these various categories. Nevertheless, considering its strengths, criticism of *Washington's Crossing* starts to become "mere quibble."[35]

George Washington to John Augustus Washington (July 18, 1755), *at* Series 2, Letterbook 1, Image 90, http://memory.loc.gov/ammem/gwhtml/gwhome.html (last visited Mar. 14, 2005) ("But, by the All-powerfull [sic] Dispensations of Providence, I have been protected beyond all human probability or expectation for I had four Bullets through my Coat, and two Horses shot under me, yet escaped unhurt although Death was leveling my Companions on every side of me!").

[32] FISCHER, *supra* note 1, at 190. Washington wrote to General Horatio Gates on 14 December 1776, "If we can draw our Forces together I trust under the smiles of providence, we may yet effect an important stroke, or at least prevent General Howe from executing his Plan." *Id.*

[33] *Id.* at 276. This is a consideration not usually presented in law of war and Rules of Engagement training.

[34] *See id.* at 9.

[35] Ellis, *supra* note 28, at 13. Compared to the "larger achievement of Fischer's riveting narrative," Ellis considers as "mere quibble" his complaints of Fischer "get[ting] somewhat carried away" and misusing the term, "an American way of war." *Id.* Another reviewer quibbles over "Fischer's unfortunate use of the TV weathercasters' 'nor'easter.'" Kenney, *supra* note 28, at C4. Yet another quibbles that Fischer falters in his "brisk style . . . only when he, like too many other historians of war, loses himself and the reader in lists of regiments and their commanders." Dubail, *supra* note 28, at J10. Although list tables appear only in appendices, this criticism has some merit. Notwithstanding, providing the names of the various actors, supports Fischer's web of contingency paradigm—that different people making choices influenced the outcome.

One history professor complains that the American army that emerged from the winter of 1776-77 "was more like a European 'army of order' than Fischer seems prepared to admit." Pauline Maier, *Watershed Moment; A Historian's Blow-by-Blow Account of the Military Saga Behind a Famous Painting*, WASH. POST, Feb. 15, 2004, at T6. The focus of this professor, however, is more on the force's activity; Fischer focuses more on its formation and composition.

Washington's leadership is a relevant study for today's military leaders, who face many of the same challenges. Washington commanded an all-volunteer army comprised of people of diverse cultures and values.[36] His average Soldier was literate and of moderate means by the day's standards,[37] but lacked the experience and discipline of the British and Hessian troops.[38] Enlistment was a recurring concern.[39] In showing how Washington met his various challenges, Fischer effectively contrasts Washington's leadership style to that of many of the British and Hessian commanders.[40] Furthermore, Fischer develops Washington's character and leadership style, showing adaptation[41] and growth as a leader to transform his ill-matched troops into an armed force able to defeat the greatest military power of his day.

For the military historian, Fischer provides, in his conclusion, ready frameworks for analyzing his book both for types of engagement and principles of warfare.[42] He writes,

> In the New Jersey campaign, American troops repeatedly defeated larger and better trained regular forces in many different types of warfare: special operations, a night river crossing, a bold assault on an urban garrison, a fighting retreat, a defensive battle in fixed positions, a night march into the enemy's rear, a meeting engagement, and a prolonged *petite guerre*.[43]

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[36] *See* FISCHER, *supra* note 1, at 11-12, 19-21.

[37] *See id.* at 21, 368. *But see* Maier, *supra* note 35, at T6 (claiming the poor comprised a disproportionately high number of the enlistments after 1776).

[38] *See* FISCHER, *supra* note 1, at 33, 55, 101; *see also id.* at 87 (concerning discipline in field sanitation).

[39] *See* FISCHER, *supra* note 1, at 129, 270 (addressing expiring enlistments).

[40] *See, e.g.*, FISCHER, *supra* note 1, at 310-16.

[41] *See* Higginbotham, *supra* note 21, at C3 ("Although Washington learned valuable lessons from the Trenton-Princeton campaign and its aftermath, it is doubtful that British generals did. The same Cornwallis who had witnessed the foolishness of leaving detached bodies in remote posts in New Jersey in 1776-77 repeated the error as commander in the South in 1780.").

[42] The topics discussed in the conclusion do not exhaust the principles raised in the book. *See, e.g.*, *id.* at 134 (comparing the naval superiority of the British at New York to that of the Americans on the Delaware).

[43] FISCHER, *supra* note 1, at 367. Fischer adds: "Professional observers judged that entire performance to be one of the most brilliant in military history." *Id. Petite guerre* is a term for what modern strategists call guerilla warfare. *See id.* at 348.

Concerning principles of warfare, Fischer notes that, in the New Jersey campaign, the colonists developed an "American way of fighting" calculated to be quick and decisive while also remaining consistent with their unique culture. They accomplished this by using the principles of "boldness and prudence, flexibility and opportunism, initiative and tempo, speed and concentration, force multipliers, and intelligence."[44] *Washington's Crossing* anecdotally supports each of these types and principles throughout the narrative.[45] Considering the broad range of American military principles it discusses, *Washington's Crossing* has vast potential for discussion in present-day situations.[46]

Points of special interest to the judge advocate are not generally so nicely packaged, but are sufficiently apparent to serve as illustrations or lessons learned today. Military lawyers can gain appreciation from the exception that is neatly packaged—the well-developed material on the ad hoc development of America's system of congressional oversight of the military that remains a part of the U.S. system.[47] Military practitioners will readily notice similarities between the British Articles of War[48] and the Uniform Code of Military Justice (UCMJ). Trial counsel who have known a command's interest for quick justice, but reluctance to commit unit resources for courts-martial can gain perspective from the August 1776 court-martial of Lieutenant Colonel Herman Zedwitz, a court requiring participation of two regimental commanders with attack imminent.[49] Operational attorneys can muse over which ideas are preferable between the Americans or the Europeans concerning civilians taking up arms.[50]

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[44] *Id.* at 375. The term "force multipliers" here refers essentially to massed artillery. *See id.* at 374.

[45] *See, e.g.*, *id.* at 195-96 (Ewing's raids), 206-20 (night river crossing of the Delaware), 221-59 (attach on an urban garrison, Trenton I), 281-301 (a fighting retreat, Trenton II), 301-07 (a defensive battle in fixed positions, Trenton II), 308-23 (a night march into the enemy's rear, Princeton), 324-43 (a meeting engagement, Princeton), 346-60 (a prolonged *petite guerre* and forage war), 370-75 (principles).

[46] One commentator has used *Washington's Crossing* to compare and contrast al Qaeda's situation in Iraq to that of the Americans in New Jersey, finding similarity in the superiority in power of the enemy and hope in bleeding the enemy and finding one key difference in which side favors freedom. *See* Thomas Bray, *Fruitless Blame Game*, N.Y. SUN, Mar. 31, 2004, at Book Review 11.

[47] *See* FISCHER, *supra* note 1, at 145.

[48] *See id.* at 45.

[49] *See id.* at 91-92. Both American regiments suffered heavy battle losses the day following the court-martial. *See id.* at 95.

[50] *See id.* at 180.

Washington's Crossing provides many illustrations for law of war discussions. While today's laws of war differ markedly from those of 1776, *Washington's Crossing* illustrates the desirability of law of war compliance insofar as universal principles underlie modern-day laws of war. For instance, European laws of war in 1776 allowed a Soldier to not give quarter, an idea repugnant to American ideals[51] and today's laws of war. Similarly, British standards of treatment for enemy prisoners of war were less humane than American standards.[52] As natural consequences of these discrepancies, British and Hessian maltreatment of American Soldiers attempting to surrender enraged Americans and was a factor in Congress immediately rejecting an offer to negotiate following New York.[53] Similarly, adverse natural consequences from violating present-day laws of war concerning civilians plagued the British in New Jersey. Numerous acts of plunder, pillage, and rape motivated civilians and militia to rise up against British forces, straining the resources allotted to the Hessian outposts.[54] Washington took advantage at Trenton. Judge advocates can debate whether carefully crafted rules of engagement trained to disciplined British coalition troops could have affected the outcome of the New Jersey campaign.

Professor Fischer has spun a superb narrative in *Washington's Crossing* describing how Washington and the American army emerged from crisis to victory in the nation's first winter. Judge advocates and other military leaders will benefit in a study of its timeless lessons.

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[51] *See id.* at 377.

[52] *See id.* at 377-78. Editorialists have contrasted the treatment Washington demanded for prisoners of war and the notorious treatment American Soldiers inflicted on the prisoners at Abu Ghraib. *See, e.g.*, Michael J. Bailey, *Soldiers, Follow Gen. Washington's Lead*, COLUMBUS DISPATCH (Ohio), May 22, 2004, at 11A (in letters to the editor); William A. Lindsay, *The Buck Should Stop with President Bush*, ROANOKE TIMES & WORLD NEWS (Va.), July 4, 2004, at 2 (in letters to the editor).

[53] *See* FISCHER, *supra* note 1, at 99, 377-78. Conversely, the American principle of humanity won the hearts of many of its prisoners with a large percentage of Hessian prisoners of war electing to remain in or return to the United States following the war. *See id.* at 379.

[54] *See id.* at 204-05.