Volume 193 **Fall 2007**

MILITARY LAW REVIEW

ARTICLES

BOOK REVIEWS

Department of Army Pamphlet 27-100-193

MILITARY LAW REVIEW

Volume 193 **Fall 2007**

CONTENTS

ARTICLES

BOOK REVIEW

Headquarters, Department of the Army, Washington, D.C.

Pamphlet No. 27-100-193, Fall 2007

MILITARY LAW REVIEW—VOLUME 193

Since 1958, the *Military Law Review* has been published at The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia. The *Military Law Review* provides a forum for those interested in military law to share the products of their experience and research, and it is designed for use by military attorneys in connection with their official duties. Writings offered for publication should be of direct concern and import to military legal scholarship. Preference will be given to those writings having lasting value as reference material for the military lawyer. The *Military Law Review* encourages frank discussion of relevant legislative, administrative, and judicial developments.

The *Military Law Review* (ISSN 0026-4040) is published quarterly by The Judge Advocate General's Legal Center and School, 600 Massie Road, Charlottesville, Virginia, 22903-1781, for use by military attorneys in connection with their official duties.

SUBSCRIPTIONS: Interested parties may purchase private subscriptions from the Superintendent of Documents, United States Government Printing Office, Washington, D.C. 20402, at (202) 512-1800. See Individual Paid Subscriptions form and instructions to the *Military Law Review* on pages vi and vii. Annual subscriptions are $20 each (domestic) and $28 (foreign) per year. Publication exchange subscriptions are available to law schools and other organizations that publish legal periodicals. Editors or publishers of these periodicals should address inquiries to the Technical Editor of the *Military Law Review*. Address inquiries and address changes concerning subscriptions for Army legal offices, ARNG and USAR JAGC officers, and other federal agencies to the Technical Editor of the *Military Law Review*. Judge Advocates of other military services should request distribution

through their publication channels. This periodical's postage is paid at Charlottesville, Virginia, and additional mailing offices.

POSTMASTER: Send address changes to *Military Law Review*, The Judge Advocate General's Legal Center and School, U.S. Army, 600 Massie Road, ATTN: ALCS-ADA-P, Charlottesville, Virginia, 22903-1781.

CITATION: This issue of the *Military Law Review* may be cited as 193 MIL. L. REV. (page number) (Fall 2007). Each issue is a complete, separately-numbered volume.

INDEXING: *Military Law Review* articles are indexed in *A Bibliography of Contents: Political Science and Government; Legal Contents (C.C.L.P.)*; *Index to Legal Periodicals*; *Monthly Catalogue of United States Government Publications*; *Index to United States Government Periodicals*; *Legal Resources Index*; four computerized databases—the JAGCNET, the *Public Affairs Information Service*, *The Social Science Citation Index*, and *LEXIS*—and other indexing services. Issues of the *Military Law Review* are reproduced on microfiche in *Current United States Government Periodicals on Microfiche* by Infordata International Inc., Suite 4602, 175 East Delaware Place, Chicago, Illinois, 60611. The *Military Law Review* is available at http://www.jagcnet.army.mil/MLR.

SUBMISSION OF WRITINGS: Anyone may submit for publication consideration, articles, comments, recent development notes, and book reviews in Microsoft Word format to the Senior Editor, *Military Law Review*, at Ann.Ching@hqda.army.mil. If electronic mail is not available, please forward the submission in duplicate, double-spaced, to the Senior Editor, *Military Law Review*, The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia, 22903-1781. Written submissions must be accompanied by an electronic copy on a 3 1/2 inch computer diskette or CD, preferably in Microsoft Word format.

Footnotes should be typed double-spaced and numbered consecutively from the beginning to the end of the writing, not chapter by chapter. Citations should conform to *The Bluebook, A Uniform System of Citation* (18th ed. 2005), copyrighted by the *Columbia*, *Harvard*, and *University of Pennsylvania Law Reviews* and the *Yale Law Journal*, and to the *Military Citation Guide* (TJAGLCS 12th ed. 2007).

Masculine pronouns appearing in the text refer to both genders unless the context indicates another use.

Typescripts should include biographical data concerning the author or authors. This data should consist of branch of service, duty title, present and prior positions or duty assignments, all degrees (with names of granting schools and years received), and previous publications. If the article is a speech or prepared in partial fulfillment of degree requirements, the author should include the date and place of delivery of the speech or the date and source of the degree.

EDITORIAL REVIEW: The *Military Law Review* does not purport to promulgate Department of the Army policy. The opinions and conclusions reflected in each writing are those of the author and do not necessarily reflect the views of the Department of Defense, The Judge Advocate General, the Judge Advocate General's Corps, or any other governmental or non-governmental agency.

The Editorial Board of the *Military Law Review* includes the Chair, Administrative and Civil Law Department, Lieutenant Colonel Suzanne G. Mitchem; and the Director, Professional Writing Program, Major Daniel J. Sennott. The Editorial Board evaluates all material submitted for publication, the decisions of which are subject to final approval by the Dean, The Judge Advocate General's School, U.S. Army. We accept submissions from military and civilian authors, irrespective of bar passage or law school completion. In determining whether to publish an article, note, or book review, the Editorial Board considers the item's substantive accuracy, comprehensiveness, organization, clarity, timeliness, originality, and value to the military legal community. No minimum or maximum length requirement exists.

When the Editorial Board accepts an author's writing for publication, the Editor of the *Military Law Review* will provide a copy of the edited text to the author for prepublication approval. Minor alterations may be made in subsequent stages of the publication process without the approval of the author.

Reprints of published writings are not available. Authors receive complimentary copies of the issues in which their writings appear. Additional copies usually are available in limited quantities. Authors may request additional copies from the Technical Editor of the *Military Law Review*.

BACK ISSUES: Copies of recent back issues are available to Army legal offices in limited quantities from the Technical Editor of the *Military Law Review* at Charles.Strong@hqda.army.mil. Bound copies

are not available and subscribers should make their own arrangements for binding, if desired.

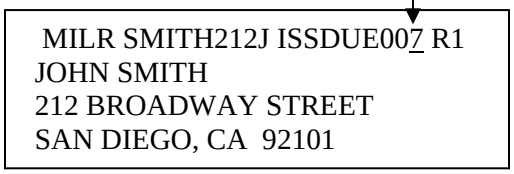
REPRINT PERMISSION: Contact the Technical Editor, *Military Law Review*, The Judge Advocate General's Legal Center and School, U.S. Army, ATTN: ALCS-ADA-P, Charlottesville, Virginia, 22903-1781.

INDIVIDUAL PAID SUBSCRIPTIONS TO THE *MILITARY LAW REVIEW*

The Government Printing Office offers a paid subscription service to the *Military Law Review*. To receive an annual individual paid subscription (4 issues), complete and return the order form on the next page.

RENEWALS OF PAID SUBSCRIPTIONS: You can determine when your subscription will expire by looking at your mailing label. Check the number that follows "ISSDUE" on the top line of the mailing label as shown in this example:

When this digit is 7, you will be sent a renewal notice.



The numbers following ISSDUE indicate how many issues remain in the subscription. For example, ISSDUE001 indicates a subscriber will receive one more issue. When the number reads ISSDUE000, you have received your last issue and you must renew.

To avoid a lapse in your subscription, promptly return the renewal notice with payment to the Superintendent of Documents. If your subscription service is discontinued, simply send your mailing label from any issue to the Superintendent of Documents with the proper remittance and your subscription will be reinstated.

INQUIRIES AND CHANGE OF ADDRESS INFORMATION: The Superintendent of Documents is solely responsible for the individual paid subscription service, not the Editors of the *Military Law Review* in Charlottesville, Virginia.

For inquires and change of address for individual paid subscriptions, fax your mailing label and new address to (202) 512-2250, or send your mailing label and new address to the following address:

United States Government Printing Office
Superintendent of Documents
ATTN: Chief, Mail List Branch
Mail Stop: SSOM
Washington, DC 20402

United States Government
INFORMATION
PUBLICATIONS ★ PERIODICALS ★ ELECTRONIC PRODUCTS

Army Lawyer and Military Review
SUBSCRIPTION ORDER FORM

Order Processing
Code: **5937**

Easy Secure Internet:
bookstore.gpo.gov

Toll Free: 866 512-1800
Phone: 202 512-1800
Fax: 202 512-2104

Mail: Superintendent of Documents
PO Box 371954
Pittsburgh, PA 15250-7954

☐ **YES,** enter my subscription(s) as follows:

_____subscription(s) of the *Army Lawyer* (ARLAW) for $50 each ($70 foreign) per year.

_____subscription(s) of the *Military Law Review* (MILR) for $20 each ($28 foreign) per year. The total cost of my order is $_____.

Prices include first class shipping and handling and is subject to change.

VISA MasterCard DISCOVER/NOVUS

Check method of payment:

Personal name (Please type or print)

Company name

Street address City, State, Zip code

Daytime phone including area code

Purchase Order Number

☐ Check payable to Superintendent of Documents

☐ SOD Deposit Account ☐☐☐☐☐☐ — ☐

☐ VISA ☐ MasterCard ☐ Discover/NOVUS ☐ American Express

☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐☐

☐☐☐☐ (expiration date)

Thank you for your order!

Authorizing signature

11/02

MILITARY LAW REVIEW

Volume 193 **Fall 2007**

PSYCHOLOGICAL POLICE INTERROGATION METHODS: PSEUDOSCIENCE IN THE INTERROGATION ROOM OBSCURES JUSTICE IN THE COURTROOM

MAJOR PETER KAGELEIRY, JR.*

Interrogation . . . takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation room.[1]

[I]nterrogations . . . must be conducted under conditions of privacy . . . . They also frequently require the use of psychological tactics and techniques that could well be classified as "unethical," if evaluated in terms of ordinary, everyday social behavior.[2]

* Judge Advocate, U.S. Army. Presently assigned as Chief of Military Justice, 21st Theater Sustainment Command, Kaiserslautern, Germany. LL.M., 2006, The Judge Advocate General's Legal Center & School, U.S. Army, Charlottesville, Virginia; J.D. 1998, Boston College Law School; B.A., 1991, College of William and Mary. Previous assignments include Senior Defense Counsel, United States Army Trial Defense Service, Fort Gordon Field Office, 2003–2005; Chief of Military Justice, U.S. Army Southern European Task Force, Vicenza, Italy, 2002–2003; Chief of Operational Law, U.S. Army Southern European Task Force, Vicenza, Italy, 2001–2002; Trial Counsel, Headquarters, 82d Airborne Division, Fort Bragg, North Carolina, 2000–2001; Group Judge Advocate, United States Support Group, Port-Au-Prince, Haiti, 1999–2000; Legal Assistance Attorney, Headquarters, 82d Airborne Division, Fort Bragg, North Carolina, 1999; 147th Judge Advocate Officer Basic Course, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; Platoon Leader, 82d Military Police Company (Airborne), 82d Airborne Division, Fort Bragg, North Carolina, 1995; Platoon Leader, 16th Military Police Brigade (Airborne), Fort Bragg, North Carolina, 1992–1995. Member of the state bar of Wisconsin. This article was submitted in partial completion of the Master of Laws requirements of the 54th Judge Advocate Officer Graduate Course.

[1] Miranda v. Arizona, 384 U.S. 436, 448 (1966).

[2] FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, CRIMINAL INTERROGATION AND CONFESSIONS xi–xii (Jones & Bartlett 4th ed. 2004).

I. Introduction

Forty years after *Miranda v. Arizona*, there is still "a gap in our knowledge as to what in fact goes on in the interrogation room."[3] Most people are unaware that police routinely employ unethical and "pseudoscientific"[4] psychological interrogation methods in order to obtain confessions[5] from criminal suspects.[6] Most people, including many judges and lawyers, are also unaware that these interrogation methods obscure the search for justice in the courtroom.[7] This article examines the modern psychological interrogation process that too often produces inaccurate, misleading, and even false admissions and confessions.[8]

---

[3] *See Miranda*, 384 U.S. at 486.

[4] *See* Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U.L. REV. 979, 986 (1997).

[5] This article uses the terms "confession" and "admission" interchangeably. However, these terms have distinct meanings. *Black's Law Dictionary* explains: "A confession is a statement admitting . . . all facts necessary for conviction of the crime. An admission, on the other hand, is an acknowledgement of a fact or facts tending to prove guilt which falls short of an acknowledgement of all essential elements of the crime." BLACK'S LAW DICTIONARY 205 (abr. 6th ed. 1991) [hereinafter BLACK'S]; *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 304(c) (2005) [hereinafter MCM].

[6] *See* Jacqueline McMurtrie, *The Role of the Social Sciences in Preventing Wrongful Convictions*, 42 AM. CRIM. L. REV. 1271, 1282 (2005).

[7] *See* Andrew E. Taslitz, *Convicting the Guilty, Acquitting the Innocent: The ABA Takes a Stand*, 19 CRIM. JUST. 18 (2005).

> Estimates of the extent to which false confessions contribute to wrongful convictions vary, with some estimates attributing close to one-fourth of all convictions of the innocent partly to false confessions. These false confessions take place despite the giving of *Miranda* warnings and despite the modern decline of extreme tactics like those of the "third degree."

Id. (citations omitted); *see* McMurtrie, *supra* note 6, at 1273–74; *see also* REPORT OF THE [ILLINOIS] GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 40, 96, 111 (2002) [hereinafter GOVERNOR'S COMMISSION] (describing the need for increased training on interrogation methods and the causes of false confession), *available at* http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html.

[8] *See generally* Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature & Issues*, 5 PSYCHOL. SCI. IN PUB. INTEREST 33 (2004) (scrutinizing the interrogation process from the pre-interrogation interview through *Miranda* warnings, interrogation tactics, and why people confess); Ofshe & Leo, *supra* note 4, at 986–1001 (providing detailed description of how police elicit true and false confessions). Even though some of the techniques discussed herein may be used during intelligence interrogations, the focus of this article is limited to police interrogation methods used with an eye toward criminal prosecution.

Thanks to the work of such groups as the *Innocence Project*,[9] we now know that false confessions are a leading cause of wrongful convictions.[10] False confessions were a significant contributing factor in more than twenty-five percent of the 208 wrongful convictions thus far uncovered by the *Innocence Project*.[11] Furthermore, these and other proven false confessions represent "the mere tip of a much larger iceberg."[12] Most wrongful convictions and a concomitant number of false confessions are never exposed.[13] Even with growing evidence of the false confession problem, most people continue to believe that a person would never "confess" to a crime he did not commit.[14] Expert assistance and expert testimony is therefore necessary to educate lawyers, judges, and panel members on the interrogation process and to

---

[9] *See* Innocence Project, http://www.innocenceproject.org/ (last visited Nov. 15, 2007).

[10] *See* Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 544 (2005); Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 905 (2004); Thomas P. Sullivan, *Preventing Wrongful Convictions*, 86 JUDICATURE 106, 108 (2002), *available at* http://www.jenner.com/files/tbl_s20Publications/RelatedDocumentsPDFs1252/398/Judicature1102.pdf. The *Innocence Project* provides several examples of proven wrongful convictions resulting from false confessions. *See* Innocence Project, Know the Cases, Search Profiles, http://www.innocenceproject.org/know/Search-Profiles.php# (last visited Nov. 15, 2007). Many more examples of false confessions are available through the news media. For example, in July 2002, eighteen-year-old high school graduate Jorge Hernandez falsely admitted to raping a ninety-four year old woman in Palo Alto, California. *See 60 Minutes: A True Confession?* (CBS television broadcast Feb. 29, 2004), transcript available at http://www.cbsnews.com/stories/2004/02/26/60minutes/main602401.shtml. During his interrogation by the Palo Alto police, Hernandez repeatedly denied involvement in the rape. *Id.* However, police interrogators used false evidence ploys against Hernandez to convince him to confess. *See id.* Interrogators lied to Hernandez telling him that they had found his fingerprints at the crime scene and they "suggested they had surveillance tape of him at the crime scene." *Id.* Next, the police interrogators suggested to Hernandez that he might not remember the incident because he was drunk on the night in question. *Id.* Doubting his own memory of the night in question, Hernandez eventually gave a taped statement in which he admitted, "I'm going to be a man and I want to say I was drunk, maybe. I was drunk, and I was under the influence of alcohol, and I just don't remember doing that. I probably did it and I just don't remember the next day doing it." *Id.* Hernandez spent nearly a month in jail until DNA evidence proved he was not the rapist. *See* Bay City News Service, *Suit Claims 2002 Arrest Was Racially Motivated*, PALO ALTO WKLY. ONLINE, July 18, 2003, http://www.paloaltoonline.com/weekly/morgue/2003/2003_07_18.digest18.html.

[11] Innocence Project, Understand the Causes, False Confessions, http://www.innocenceproject.org/understand/False-Confessions.php (last visited Nov. 15, 2007).

[12] *See* Kassin & Gudjonsson, *supra* note 8, at 34 (citing then-unpublished manuscript which was later published at Gross, *supra* note 10).

[13] *See id.*

[14] *See* Drizin & Leo, *supra* note 10, at 908–09.

explain the counter-intuitive notion that under certain circumstances, people do confess to crimes they did not commit.[15]

The military justice system has traditionally looked upon the use of so-called false confession experts with skepticism.[16] For example, in *United States v. Bresnahan*, a three-to-two majority of the United States Court of Appeals for the Armed Forces (CAAF) upheld a military judge's ruling that there was no necessity[17] for expert assistance in that case.[18] The military judge denied the defense request for expert assistance even after the defense counsel demonstrated that the interrogator had employed psychological interrogation methods against the accused.[19] The majority holding in *Bresnahan* arises from a stubborn skepticism toward the use of false confession experts[20] and is an example of the need to inform judges of the pseudoscience underlying modern

---

[15] *See* McMurtrie, *supra* note 6, at 1273–74.

> Courts traditionally tended to exclude scientific evidence from expert witnesses in [the area of false confessions], primarily on the basis that the testimony addressed matters within the common understanding of jurors, was confusing, or that it invaded the province of the jury to make credibility determinations. . . . However, with the increased awareness of the role that . . . false confessions . . . play in convicting the innocent, a new trend is developing regarding the admissibility of expert testimony. Courts have more recently acknowledged that the research of social scientists in . . . [false confessions] contains findings that are counter-intuitive and therefore expert testimony can assist the trier of fact.

Id. (citations omitted).

[16] *See* United States v. Bresnahan, 62 M.J. 137 (2005); United States v. Griffin, 50 M.J. 278 (1999).

[17] *See Bresnahan*, 62 M.J. at 142. The *Bresnahan* majority reiterated the applicable test:

> We apply a three-part test to determine whether expert assistance is necessary. The defense must show: (1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why the defense counsel were unable to gather and present the evidence that the expert assistance would be able to develop. A military judge's ruling on a request for expert assistance will not be overturned absent an abuse of discretion.

Id. at 143 (citations omitted).

[18] *See id.* at 139.

[19] *See id.* at 148–49 (Erdmann, J., and Effron, J., dissenting).

[20] *See* McMurtrie, *supra* note 6, at 1273–74.

psychological interrogation methods and the unreliable courtroom evidence those methods produce.[21]

The CAAF should adopt a more enlightened view of police interrogation methods.[22] A more informed justice system would recognize the underlying necessity for expert assistance when law enforcement obtains a confession through the use of psychological interrogation methods.[23] The CAAF majority should adopt a position similar to the "colorable showing" test suggested by the dissent in *Bresnahan*.[24] Once the defense has made a "colorable showing" that police interrogators used psychological interrogation methods against an accused, the court should acknowledge the necessity for expert assistance and direct the Government to appoint the expert.[25]

Section II of this article reviews the growing literature on proven false confessions and identifies an important role for experts in educating judges, lawyers, and panel members. In the past, skeptics have questioned the empirical basis for expert testimony in this area.[26] The skeptics, however, can no longer ignore or dismiss the growing number of proven false confessions and the resulting wrongful convictions.[27] Recent studies of the false confession problem demonstrate that false confession theory is reliable and that expert assistance is often necessary to analyze and explain psychological interrogation methods.[28]

---

[21] *See id.* at 1274 ("First, it is essential that 'obdurate' lawyers and judges address their preconceptions about the social sciences and educate themselves about the findings of applied psychology.").
[22] *See id.*
[23] *See id.* ("By incorporating lessons learned from the research of social science, we can improve the administration of justice and guard against conviction of the innocent.").
[24] *Bresnahan*, 62 M.J. at 148 (Erdmann, J., and Effron, J., dissenting) ("Although Bresnahan's confession was voluntary and therefore admissible at trial, the defense counsel made a colorable showing that there was a reasonable possibility she could raise doubt in the members' minds as to the reliability of that confession.").
[25] *See* UCMJ art. 46 (2005) ("The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence . . . ."); MCM, *supra* note 5, R.C.M. 703(d) ("[T]he military judge . . . shall determine whether the testimony of the expert is relevant and necessary . . . . If the military judge grants a motion for employment of an expert . . . the proceedings shall be abated if the Government fails to comply with the ruling.").
[26] *See, e.g.*, Major James R. Agar, *The Admissibility of False Confession Expert Testimony*, ARMY LAW., Aug. 1999, at 26.
[27] *See* McMurtrie, *supra* note 6, at 1273–74.
[28] *See* Elizabeth F. Loftus, *The Devil in Confessions*, 5 PSYCHOL. SCI. IN PUB. INTEREST i, ii (2004); *see also* Sullivan, *supra* note 10, at 120.

Section III describes the pseudoscientific psychological interrogation methods routinely employed by police interrogators.[29] Fred E. Inbau and John E. Reid were among the earliest and most influential proponents of psychological police interrogation methods.[30] Inbau and Reid's colleagues at the Reid Institute[31] continue to teach these interrogation methods and provide updates to their influential manual *Criminal Interrogation and Confessions*.[32] Military law enforcement interrogators routinely employ the "pseudoscientific" psychological interrogation methods developed and promoted by Inbau and Reid.[33] As explained in detail in Section III, these psychological methods often begin with an interrogator's erroneous prejudgment of guilt and too often result in the production of misleading, inaccurate, and even false admissions and confessions that obscure the search for justice in the courtroom.[34] Section III concludes by explaining how a more rational military justice system would encourage the use of expert consultants and expert witnesses to educate military judges, lawyers, and panel members on the pseudoscience underlying psychological interrogation methods.

II. False Confession: A Counter-intuitive Yet Undeniable Phenomenon

> As psychological methods of interrogation have evolved over the years, they have become increasingly sophisticated, relying on more subtle forms of manipulation, deception, and coercion. As a result, it is no longer as apparent how or why police interrogation techniques might lead the innocent to confess falsely—particularly to crimes that carry the possibility of lengthy

---

[29] *See* Ofshe & Leo, *supra* note 4, at 986.

[30] *See* John T. Philipsborn, *Interrogation Tactics in the Post-Dickerson Era*, 25 CHAMPION 18, 20 (2001); Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 154 (1998). Inbau and Reid first developed their psychological interrogation model in the 1940s. INBAU ET AL., *supra* note 2, at 122.

[31] John E. Reid & Assocs., Inc., http://www.reid.com (last visited Nov. 15, 2007).

[32] *See* INBAU ET AL., *supra* note 2.

[33] *Compare* U.S. DEP'T OF ARMY, FIELD MANUAL 3-19.13, LAW ENFORCEMENT INVESTIGATIONS ch. 4 (Jan. 2005) [hereinafter FM 3-19.13], *with* INBAU ET AL., *supra* note 2.

[34] *See* Ofshe & Leo, *supra* note 4, at 986; *see also* Saul M. Kassin et al., *Behavioral Confirmation in the Interrogation Room: On the Dangers of Presuming Guilt*, 27 L. & HUM. BEHAV. 187, 188 (2003), *available at* http://www.williams.edu/Psychology/Faculty/Kassin/research/confessions.htm ("[P]olice interrogations are persuasive, and at times too persuasive, in part because they are theory-driven social interactions founded upon a presumption of guilt.").

> prison sentences or execution. . . . Indeed, in the era of psychological interrogation, the phenomenon of false confession has become counter-intuitive.[35]

"Intuition" leads most people to believe that a suspect would not confess to a crime he did not commit unless subjected to physical torture.[36] Physical torture, however, is rare in the modern police interrogation room.[37] Police interrogators have replaced "the third degree"[38] with more "sophisticated" psychological interrogation methods.[39] Even after these police reforms, however, false confessions have not disappeared and in fact are still a "leading cause" of wrongful conviction.[40] Expert testimony is needed to bridge the gap between what uninformed "intuition" tells us about false confessions and the reality that psychological interrogation methods can and do cause people to confess falsely.[41]

A. Evidence of False Confessions in the Age of Psychological Interrogation

"Until recent years, false confessions . . . and, more generally, wrongful convictions were widely assumed by the legal profession and general public alike to be only regrettable anomalies in an otherwise well

---

[35] Drizin & Leo, *supra* note 10, at 908–09.
[36] *See id.* at 907.
[37] *See id.* 907–08. In the first half of the twentieth century, increased scrutiny from the courts and the public compelled police departments to reform their interrogation methods. *Id.*
[38] *See id.* at 907 ("Through the nineteenth century and into the first one-third of the twentieth century, American police routinely relied on the infliction of bodily pain and psychological torment—the so-called "third degree"—to extract confessions from custodial suspects."); *see also* BLACK'S, *supra* note 5, at 1029 ("Term used to describe the process of securing a confession or information from a suspect or prisoner by prolonged questioning, the use of threats, or actual violence.").
[39] Drizin & Leo, *supra* note 10, at 906–09.
[40] *See id.*; *see also* INBAU ET AL., *supra* note 2, at 411–12; Saul M. Kassin et al., *"I'd Know a False Confession If I Saw One": A Comparative Study of College Students and Police Investigators*, 29 L. & HUM. BEHAV. 211 (Apr. 2005), *available at* http://www.williams.edu/Psychology/Faculty/ Kassin/research/confessions.htm.
[41] *See* McMurtrie, *supra* note 6, at 1273–74; *see also* Kassin & Gudjonsson, *supra* note 8, at 58–59 ("In this era of DNA exonerations . . . it is now clear that such [expert] testimony is amply supported not only by anecdotes and case studies of wrongful convictions, but also by a long history of basic psychology and an extensive forensic science literature . . . .").

functioning criminal justice system."[42] Recently, however, the false confession phenomenon has garnered much concern in the news media.[43] Undeniable evidence that wrongful convictions occur as a result of false confessions has emerged thanks to the work of such organizations as the *Innocence Project* at the Benjamin N. Cardozo School of Law at Yeshiva University.[44] Since 1992, the *Innocence Project* has exonerated 208 wrongfully convicted people after they had served many years in prison.[45] These wrongful convictions were exposed "[a]s a result of technological advances in forensic DNA typing . . . ."[46] False confessions were a significant contributing factor in more than twenty-five percent of those 208 wrongful convictions.[47] In other words, in more than twenty-five percent of those 208 wrongful convictions, suspects confessed to serious crimes we now know with scientific certainty they did not commit.[48]

In a significant number of cases, false confessions derail the search for justice.[49] In 2004, Professors Steven A. Drizin and Richard A. Leo compiled and analyzed wrongful conviction studies: "These studies report

---

[42] Rob Warden, *The Role of False Confessions in Illinois Wrongful Murder Convictions Since 1970*, Center on Wrongful Convictions, Northwestern University School of Law, http://www.law.northwestern.edu/depts/clinic/wrongful/FalseConfessions2.htm (revised May 12, 2003).

[43] *See, e.g.*, Sharon Begley, *Interrogation Methods Can Elicit Confessions from Innocent People*, WALL ST. J., Apr. 15, 2005, at B1 ("I have written in the past about the lack of a rigorous scientific foundation for fingerprints, eyewitness testimony, standard lineups and other forensic techniques. Add to that list the assumption that only the guilty confess."); Editorial, *New Doubts About Confessions*, CHI. TRIB., Dec. 19, 2001, at N1 ("The mind is a malleable thing, open to suggestion, prone to fatigue. Strength of will and confidence in one's own sense of reality can twist and bend."); April Witt, *Police Tactics Taint Court Rulings, Victims' Lives*, WASH. POST, June 6, 2001, at A1 (explaining that false confessions do not get thrown out by judges because judges most often believe police descriptions of interrogations and disbelieve defendants' claims of coercion and innocence).

[44] *See* Innocence Project, Understand the Causes, False Confessions, http://www.innocenceproject.org/understand/False-Confessions.php (last visited Nov. 15, 2007).

[45] Innocence Project, http://www.innocenceproject.org/ (last visited Nov. 15, 2007).

[46] Kassin & Gudjonsson, *supra* note 8, at 34.

[47] Innocence Project, Understand the Causes, False Confessions, http://www.innocenceproject.org/understand/False-Confessions.php (last visited Nov. 15, 2007).

[48] *See id.*

[49] *See, e.g.*, A.B.A. CRIM. JUST. SEC. & N.Y. COUNTY LAW. ASS'N, REPORT ON THE ELECTRONIC RECORDING OF POLICE INTERROGATIONS 1 (2003), *available at* http://www.nycla.org/index.cfm?section=News_AND_Publications&page=Board_Reports_AND_Resolutions&pubyear=2003 ("False confessions by suspects appear to be among the major causes of wrongful convictions within the criminal justice system.").

that the number of false confessions range from 8–25% of the total of miscarriages of justice studied, thus establishing the problem of false confessions as a leading cause of the wrongful convictions of the innocent in America."[50] Drizin and Leo's conclusions are consistent with the conclusions of other experts.[51]

In 2005, in the most comprehensive single study of wrongful convictions thus far published, Professor Samuel R. Gross of the University of Michigan Law School led a group that examined 340 post-conviction exonerations from around the United States.[52] The Gross study included only those cases in which the criminal justice system took official action to declare a person innocent after they had been convicted.[53] In fifty-one, or fifteen percent, of these proven wrongful conviction cases, "the defendants confessed to crimes they had not

---

[50] Drizin & Leo, *supra* note 10, at 905.

[51] *See, e.g.*, Michael J. Saks et al., *Symposium: Serenity Now Or Insanity Later?: The Impact of Post-Conviction DNA Testing on the Criminal Justice System: Panel Three: The Adversary System and DNA Evidence: Past, Present, and Future: Toward a Model Act for the Prevention and Remedy of Erroneous Convictions*, 35 NEW ENG. L. REV. 669, 671 (2001) (concluding that false confessions were a significant cause in nineteen percent (fifteen out of eighty-one) of wrongful convictions studied).

[52] Gross, *supra* note 10, at 523–25 (including 144 that were cleared by DNA evidence).

[53] *Id.* On average, the wrongly convicted in this study had spent more than ten years in prison before the system declared them innocent. *Id.* at 524. The exonerees fell into one of four categories:

> (1) In forty-two cases governors (or other appropriate executive officers) issued pardons based on evidence of the defendants' innocence. (2) In 263 cases criminal charges were dismissed by courts after new evidence of innocence emerged, such as DNA. (3) In thirty-one cases the defendants were acquitted at a retrial on the basis of evidence that they had no role in the crimes for which they were originally convicted. (4) In four cases, states posthumously acknowledged the innocence of defendants who had already died in prison . . . .

Id. (citation omitted). Professor Gross was very conservative in classifying a case as a wrongful conviction. *See id.* at 537–38. For example, in 1978 Curtis McGhee was convicted of murder in Iowa. *Id.* McGhee was convicted as a result of testimony from his alleged accomplice who had confessed to the crime. *Id.* In 2003, the Iowa Supreme Court reversed the conviction. *Id.* Rather than face additional jail time, McGhee entered a plea of "no contest" to a lesser charge and was immediately released from prison. *Id.* McGhee's alleged accomplice, who had recanted his confession, was later acquitted. *Id.* Because McGhee entered a "no contest" plea, he is not counted as exonerated in Professor Gross's study. *Id.* Any defendant who pled guilty in order to be released from prison, is not included in the study regardless of the evidence of the defendant's innocence. *Id.*

committed."[54] The skeptics can no longer deny that the false confession phenomenon is real and that it undermines the search for justice.[55]

B. The Tip of the Iceberg

The proven cases of wrongful conviction are "the mere tip of a much larger iceberg."[56] Thomas P. Sullivan, former U.S. Attorney, explains:

> There is every reason to act. Courts recently have determined that a great many innocent persons have been sentenced to death. But for every case resulting in a death sentence, there are far many more defendants sentenced to prison for life or a term of years. Accordingly, *we must face the likelihood that there are a vast number of persons now in our prisons who are innocent of the crimes for which they were convicted.* The protections against conviction of the innocent adopted for capital cases ought to be implemented as well in all felony cases throughout the country.[57]

The psychological interrogation methods that contribute to the wrongful conviction problem in capital cases are also used in non-capital cases.[58] It follows then that false confessions occur at similar rates in non-capital

---

[54] Gross, *supra* note 10, at 544.

[55] *See, e.g.*, Innocence Project, Know the Cases, Search Profiles, http://www.innocence project.org/know/Search-Profiles.php# (last visited Nov. 15, 2007) (giving dozens of examples of how false confessions led to miscarriages of justice); *see also* Taslitz, *supra* note 7 ("[T]ens of thousands of innocent persons may be under the supervision of the criminal justice system at any given time. Correspondingly, similar numbers of the guilty may escape punishment, sometimes leading to explosive evidence of their continuing commission of serious offenses.") (citations omitted).

[56] *See* Kassin & Gudjonsson, *supra* note 8, at 34 (citing then unpublished manuscript which was later published at Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005)); *see also* Taslitz, *supra* note 7 ("[G]iven the enormous size of our criminal justice system, even a very small error rate means that tens of thousands of innocent persons may be under the supervision of the criminal justice system at any given time.").

[57] Sullivan, *supra* note 10, at 120 (emphasis added). Sullivan served as co-chairman of the Illinois *Governor's Commission on Capital Punishment. Id.*

[58] *See generally* INBAU ET AL., *supra* note 2, at 209–397 (advocating the use of the Reid Nine Steps of Interrogation for a variety of offenses); FM 3-19.13, *supra* note 33, at ch. 4 (describing the general applicability of interrogation techniques for solving all types of crime).

cases as in capital cases.[59] Furthermore, because military law enforcement uses the same pseudoscientific interrogation methods as their civilian counterparts,[60] the lessons learned from the proven false confession cases in civilian jurisdictions apply equally to the military justice system.[61]

1. Underreporting

Because of the time and resources required to win exoneration after wrongful conviction, the rate of wrongful conviction is significantly underreported.[62] The average time from wrongful conviction to exoneration is more than ten years.[63] Thus, many wrongly convicted people complete their sentences before they have an opportunity to win exoneration.[64] The effort to win exoneration is not worthwhile for individuals convicted of a less serious crime; more significantly, the resources required to win exoneration are not made available to those individuals.[65] Professor Gross explains:

> A falsely convicted defendant who has served his time for burglary and been released has little incentive to invest years of his life keeping the case alive in the hope of clearing his name—and if he wanted to, he'd probably have a hard time finding anybody to help. Our data reflect this: nobody, it seems, seriously pursues exonerations for defendants who are falsely convicted of shop lifting, misdemeanor assault, drug possession, or routine felonies—auto thefts or run-of-the-mill

---

[59] *See* Taslitz, *supra* note 7 ("The mistakes made that have drawn the media's attention have mostly been in capital cases. But exploration of the causes of error in these cases has suggested that similar causes are at work in the far larger pool of more run-of-the-mill criminal cases.").

[60] *See, e.g.*, United States v. French, 38 M.J. 420, 434 (C.M.A. 1993) (Wiss, J., dissenting) (explaining that special agents' cutting off of denials is "a common interrogation ploy") (citation omitted); United States v. Schake, 30 M.J. 314, 317 (C.M.A. 1990) ("Behavioral Analysis Interviews of appellant conducted by the military criminal investigators . . . [were] clearly a form of police interrogation.") (citations omitted).

[61] *See* Sullivan, *supra* note 10, at 120.

[62] *See* Gross, *supra* note 10, at 535–36.

[63] *See id.*

[64] *See id*; Taslitz, *supra* note 7.

[65] *See* Gross, *supra* note 10, at 535–36.

> burglaries—and sentenced to probation, a $2000 fine, or even six months in the county jail or eighteen months in state prison.[66]

Ninety-six percent of the 340 proven cases of wrongful conviction in Professor Gross's study involved defendants accused of murder, rape and sexual assault.[67] Because those who are wrongly convicted of lesser offenses are largely ignored, a large number of wrongful convictions and a concomitant number of false confessions go unreported.[68]

2. Collateral Effects of Psychological Interrogation Methods

"False confessions have more impact on false convictions than their numbers suggest, since quite often they implicate other innocent people in addition to the confessor."[69] For example, manipulative psychological interrogation methods are often used against suspects who later testify falsely against other defendants.[70] One study of the DNA exoneration cases revealed that seventeen percent of wrongful convictions resulted from false witness testimony.[71] The military justice system is not immune from the problem of manipulated witness testimony.[72] "All trial lawyers are aware of pliable witnesses, those whose testimony can be shaped by persuasive interviewers, and those whose tentative versions of events can evolve and be made more certain by repetition and suggestion."[73]

---

[66] *Id.* (citations omitted).
[67] *Id.* at 528–29.
[68] *See id.* at 537–38; Taslitz, *supra* note 7.
[69] Gross, *supra* note 10, at 545.
[70] *See, e.g.*, Innocence Project, Know the Cases, Search Profiles, http://www.innocence project.org/Content/79.php (last visited Nov. 15, 2007). The case of Richard Danziger illustrates this point. Danziger was convicted after his roommate, Christopher Ochoa, falsely confessed to raping and murdering a waitress in 1988. *Id.* In his false confession, Ochoa implicated Danziger in the rape. *Id.* As part of a plea bargain, Ochoa agreed to testify against Danziger. Both Ochoa and Danziger were later exonerated by DNA evidence and released from jail in 2002. *Id.*
[71] Saks et al., *supra* note 51, at 671.
[72] *See, e.g.*, United States v. Arnold, 61 M.J. 254, 257 (2005). In the Arnold case, the trial counsel coached a coaccused witness for his trial testimony by having the witness review Arnold's statement to police. *Id.* Police manuals recognize this type of witness "contamination" as a threat to the integrity of the judicial process. *See* FM 3-19.13, *supra* note 33, at 4-2.
[73] Sullivan, *supra* note 10, at 108 (suggesting that "[i]nterviews of significant witnesses whose testimony may be challenged should be recorded electronically . . . in its initial, untutored form.").

Psychological "suggestion" and manipulation of witnesses are obstacles to the truth finding function of the judicial process.[74]

As explained later in Section III, one psychological method police interrogators use in order to overcome a suspect's reluctance to confess is to minimize the suspect's criminal culpability and to shift blame to an accomplice.[75] For example, a military interrogator may suggest to a suspect that the suspect was merely following orders when he committed an offense and that his superiors bear the blame for the offense at issue.[76] In October 2005, for example, the Army charged Second Lieutenant Erick J. Anderson with two specifications of unpremeditated murder.[77] The Army alleged that Second Lieutenant Anderson had "authoriz[ed] the murders of two unarmed Iraqis" in Baghdad in 2004.[78] The prosecution's key witnesses were the Soldiers who had actually done the shootings.[79] However, those witnesses proved to be unreliable.[80] During the pretrial hearing,[81] one witness "stated under oath that his previous sworn statement [to the Army's Criminal Investigation Division] was a lie."[82] The witness explained that he lied because "he felt pressured by the CID to implicate Lt. Anderson or he would lose his plea bargain . . . ."[83] The CID interrogator had obviously suggested to this witness that he would get a plea bargain by implicating Lieutenant Anderson.[84] This is just one example of how law enforcement employs psychological interrogation methods against witnesses as well as the suspect who is eventually prosecuted.[85]

---

[74] *See id.*; *see also* GOVERNOR'S COMMISSION, *supra* note 7, at 40, 109, 124 (noting the dangers posed by false informant and false accomplice testimony and recommending expert assistance to educate police, judges, and attorneys on those dangers).
[75] *See* discussion *infra* Section III.D and accompanying notes.
[76] *See id.*; Gina Cavallaro, *All Charges Dropped*, ARMY TIMES, Dec. 19, 2005, at 10.
[77] Cavallaro, *supra* note 76, at 10.
[78] *Id.*
[79] *Id.*
[80] *See id.*
[81] UCMJ art. 32 (2005) ("No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made.").
[82] Cavallaro, *supra* note 76, at 10 (quoting the Investigating Officer's Report).
[83] *Id.* (quoting the Investigating Officer's Report). In his recommendation to dismiss the charges, the Investigating Officer also found that the "[t]he CID ha[d] developed a scenario that does not fit the facts . . . ." *Id.*
[84] *See id.*
[85] *See, e.g.*, Innocence Project, Know the Cases, Search Profiles, Contributing Cause, False Confessions, http://www.innocenceproject.org/know/Search-Profiles.php (last visited Nov. 15, 2007).

C. The Illinois Commission: An Important Role for Experts

In 2000, the State of Illinois created the *Governor's Commission on Capital Punishment* in order to study the problem of wrongful murder convictions in that state.[86] The commission members came from varied backgrounds and included a former federal judge, a former U.S. Senator, a former U.S. Attorney, and several prosecutors and public defenders.[87] The commission made a total of eighty-five recommendations, several of which wrestled with the problem of false confessions.[88] Thomas P. Sullivan, former U.S. Attorney and co-chairman of the commission, noted that "[i]n several of the capital cases that led to [the appointment of the commission] . . . police testified to confessions or admissions by defendants who were later exonerated."[89]

The *Governor's Commission* recommended videotaping certain custodial interrogations as a means to combat the false confession problem.[90] The commission explained that "videotaping the entire interrogation process" has several benefits including protecting against "questionable confessions."[91] Quoting Professor Welsh S. White, the commission noted the need for "courts to make more informed judgments about whether interrogation practices were likely to lead to untrustworthy confessions."[92] According to Professor White, the courts also need to use expert testimony in order to determine whether particular interrogation methods are "likely to lead to a false confession."[93]

---

[86] *See* Sullivan, *supra* note 10, at 107.
[87] *See* GOVERNOR'S COMMISSION, *supra* note 7, at v–vi.
[88] *See id.* Recommendation Three, for example, advocates "[a]uthorizing public defenders to appear in response to a request from a defendant for a lawyer during questioning . . . [in order to] reduce the prospect of false confessions . . . ." *Id.* at 24.
[89] Sullivan, *supra* note 10, at 108.
[90] GOVERNOR'S COMMISSION, *supra* note 7, at 24.
[91] *Id.* at 25.
[92] *Id.* (quoting Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 153–54 (1997)).
[93] *See* White, *supra* note 92, at 154–55 (1997). Professor White explains:

> Videotaping interrogations will also enable courts, possibly with the aid of expert testimony, to make more informed judgments as to whether interrogation methods used in a particular case are likely to lead to false confessions. Even if the police employ only permissible interrogation tactics, the combination of these tactics or their effect on a particular suspect could lead to false confessions in some cases. . . . Indeed, in several of the cases now viewed as involving

Most significantly, the *Governor's Commission* unanimously recommended that, "[i]n capital cases, courts should closely scrutinize any tactic that misleads the suspect as to the strength of the evidence against him/her, or the likelihood of his/her guilt, in order to determine whether this tactic would be likely to induce an involuntary or untrustworthy confession."[94] At the same time the commission recognized the need for courts to more carefully scrutinize interrogation tactics, the commission also recognized that most judges, lawyers, and police officers are not adequately educated on how interrogation tactics can cause false confessions.[95] The commission emphasized an important role for experts in educating judges, lawyers, and police officers on "interrogation methods . . . . [and][t]he risks of false confessions."[96]

D. *Miranda*: No Safeguard Against False Confessions

False confessions are not a new phenomenon.[97] For centuries, there has been a part of the law that has distrusted confessions.[98] Over time the law has attempted to prevent coerced and unreliable confessions by adopting certain safeguards.[99] The *Miranda* warnings are the best known

---

> false confession, tapes of all or part of the interrogations have played a significant part in convincing observers that the confessions were false.

Id.

[94] GOVERNOR'S COMMISSION, *supra* note 7, at 123 (footnote omitted).

[95] *See id.* at 40, 96, 111.

[96] *See id.* ("All judges . . . should receive periodic training . . . and experts on these subjects [should] be retained to conduct training . . . on these topics: . . . interrogation methods . . . [and][t]he risks of false confessions.").

[97] *See* Agar, *supra* note 26, at 26.

[98] *See, e.g.*, Major Russell L. Miller, *Wrestling with MRE 304(g): The Struggle to Apply the Corroboration Rule*, 178 MIL. L. REV. 1 (2003) (tracing the development of the corroboration rule since seventeenth century England).

[99] *See, e.g.*, MCM, *supra* note 5, MIL. R. EVID. 304(g) ("An admission or confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence . . . has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth."). However, only a "very slight" quantum of evidence is required to corroborate an admission or confession. *See* United States v. Arnold, 61 M.J. 254, 257 (2005). The military corroboration rule is similar to its civilian counterparts. *Id.*

example of such safeguards.[100] Even after *Miranda* and other safeguards, however, false confessions continue to occur at unacceptable rates.[101]

Research has demonstrated that the *Miranda* warnings are not effective at protecting the innocent against police coercion.[102] Given the psychologically manipulative nature of modern interrogation tactics, waiving *Miranda* rights is generally not a good idea for an innocent person.[103] However, innocent suspects are more likely to waive their *Miranda* rights than guilty suspects.[104] One study reported: "[The] truly innocent [are] significantly more likely to sign a waiver than those who [are] guilty."[105] In fact, most people "[n]aively believ[e] in the power of their innocence to set them free . . . [even] where the risk of interrogation [is] apparent."[106] Rather than protect the innocent, the *Miranda* warnings protect the guilty and single out the innocent for psychological interrogation.[107]

Professors Kassin and Norwick identified two possible explanations for the relatively high *Miranda* waiver rate among innocent suspects in comparison to guilty suspects:

---

[100] *See* Miranda v. Arizona, 384 U.S. 436 (1966); *see also* United States v. Leiker, 37 M.J. 418, 420 (C.M.A. 1993) ("The Miranda rules were issued to counter-balance the psychological ploys used by police officials to obtain confessions.").

[101] *See* Taslitz, *supra* note 7.

> Nor do the Fifth and Fourteenth Amendment Due Process Clauses, prohibiting admission at trial of "involuntary" confessions obtained by the police, currently offer much protection. Those clauses, as recently understood by most courts, set a low standard of voluntariness turning on a case-by-case weighing of a wide range of circumstances concerning what tactics the police use and how able the individual suspect was to resist those tactics. Moreover, a finding of valid waiver of *Miranda* rights generally automatically renders the confession voluntary in the eyes of most judges.

Id. (citations omitted).

[102] *See id.* ("These false confessions take place despite the giving of *Miranda* warnings . . . ."); Saul M. Kassin & Rebecca J. Norwick, *Why People Waive Their* Miranda *Rights: The Power of Innocence*, 28 L. & HUM. BEHAV. 211, 211–12 (2004).

[103] *See* Kassin & Norwick, *supra* note 102, at 212.

[104] *See id. at* 211–12; *see also* Taslitz, *supra* note 7 (These false confessions take place despite the giving of *Miranda* warnings and despite the modern decline of extreme tactics like those of the "third degree.").

[105] *See* Kassin & Norwick, *supra* note 102, at 211.

[106] *Id.*

[107] *See* Taslitz, *supra* note 7; Kassin & Norwick, *supra* note 102, at 211–12.

> One possible reason for the high waiver rate [among innocent suspects] is that police employ techniques designed to obtain waivers just as they do confessions. . . . [P]olice investigators often overcome the warning and waiver requirement by strategically establishing rapport with the suspect, offering sympathy and an ally, and minimizing the process as a mere formality, thus increasing perceived benefits relative to costs. . . . A second possibility is suggested by individual differences among actual suspects. . . . [P]eople who have no prior felony record are far more likely to waive their rights than are those with criminal justice "experience."[108]

The relatively high rate of *Miranda* waiver among the innocent magnifies the problem of investigator bias discussed in Section III.C, below.[109]

E. Lingering Skepticism in the Military Justice System

"'[O]bdurate' lawyers and judges . . . [with] preconceptions about the social sciences" and about the import of the false confession phenomenon slow the pace of reform and obstruct the search for justice.[110] In the past, prosecutors and judges have resisted efforts to use new DNA technology to exonerate the wrongly convicted.[111] The wrongly convicted were forced to engage in costly and time consuming litigation in order to gain access to the evidence that would eventually set them free.[112] Reluctance to believe that psychological interrogation methods pose a problem for the administration of justice is understandable given that only in the last few years has the magnitude of

---

[108] Kassin & Norwick, *supra* note 102, at 212 (citations omitted).
[109] *See infra* Section III.C.
[110] *See* McMurtrie, *supra* note 6, at 1274.
[111] *See* Innocence Project, Fix the System, Priority Issues, http://www.innocenceproject.org/fix/DNA-Testing-Access.php (last visited Nov. 15, 2007); *see also* Hilary S. Ritter, *It's the Prosecution's Story, But They're Not Sticking to It: Applying Harmless Error and Judicial Estoppel to Exculpatory Post-Conviction DNA Testing Cases*, 74 FORDHAM L. REV. 825, 827 (2005).
[112] *See* Innocence Project, Fix the System, Priority Issues, http://www.innocenceproject.org/fix/DNA-Testing-Access.php (last visited Nov. 15, 2007); *see also* Ritter, *supra* note 111, at 827.

the false confession problem become apparent.[113] However, justice demands that prosecutors and judges educate themselves on the growing body of evidence suggesting that psychological interrogation methods produce misleading and false confessions at unacceptable rates.[114]

1. The Skeptics Have Been Proven Wrong

In the past, some skeptics have argued that false confession theory lacks an "empirical lynchpin."[115] The skeptics, however, provided little if any critical analysis of police interrogation methods.[116] Instead, the skeptics concentrated on the difficulty associated with reproducing the criminal interrogation in an experimental setting and the difficulty of producing precise measurements of the false confession problem.[117] Such skeptics concluded that the "psychology of false confessions" was unreliable, but that further study of the problem was warranted.[118] However, as explained in Sections II.A and II.B, evidence of the false confession problem continues to mount and this evidence represents just the "tip of the iceberg" in terms of numbers of false confessions.[119] The growing number of proven false confessions is clear evidence of the

---

[113] Warden, *supra* note 42.
[114] *See* McMurtrie, *supra* note 6, at 1274.
[115] *See, e.g.*, Agar, *supra* note 26, at 30 (quoting Paul G. Cassell, *Balanced Approaches to the False Confession Problem: A Brief Comment on Ofshe, Leo, and Alshuler*, 74 DENV. U. L. REV. 1123, 1125 (1997)). This article points out that the skeptics have failed to acknowledge the significance of the false confession problem. The false confession skeptics have it backwards: they should be skeptical of the validity of the evidence produced by pseudoscientific interrogation methods, not the attempt to analyze and explain those methods. *See* McMurtrie, *supra* note 6, at 1274.
[116] *See id.*
[117] *See id.*; Paul G. Cassell, *The Guilty and the "Innocent": An Examination of Alleged Cases of Wrongful Conviction from False Confessions*, 22 HARV. J.L. & PUB. POL'Y 523 (1999) (criticizing Leo and Ofshe's reliance on the news media for accounts of false confessions and concluding that false confessions do not occur at significant rates). These skeptics, however, wrote before the more recent proven false confessions were discovered. *See, e.g.*, Innocence Project, http://www.innocenceproject.org/ (last visited Nov. 15, 2007). The study led by Professor Gross, for example, included only those cases in which the criminal justice system took official action to declare a person innocent after they had been convicted. *See supra* notes 58–61 and accompanying text. Neither the *Innocence Project* nor Professor Gross's study relied upon media accounts to declare a person innocent. *Id.*
[118] *See, e.g.*, Agar, *supra* note 26, at 42 ("The false confession theory needs further study and refinement.").
[119] *See* Gross, *supra* note 10, at 523.

reality that psychological police interrogation methods produce unreliable results at unacceptable rates.[120]

In recent years, even the proponents of psychological interrogation methods have been compelled to acknowledge that false confessions are real.[121] The most recent edition of *Criminal Interrogation and Confessions* acknowledges that "[t]here is no question that interrogations have resulted in false confessions from innocent suspects."[122] The proponents of psychological interrogation, however, minimize or even deny the significance of the problem.[123] For example, Army Field Manual (FM) 3-19.13, *Law Enforcement Investigations*, states: "Although false confessions are rare, there have been several instances where people who confessed to a crime and were subsequently convicted were later proven to be innocent through forensic evidence."[124] Published in January 2005, FM 3-19.13 grudgingly admits that "several people . . . were later proven to be innocent through forensic evidence . . . ." This statement ignores several key points: (1) well over half of the exonerations studied thus far have been as a result of non-forensic evidence,[125] (2) between eight percent and twenty-five percent of wrongful convictions involve false confessions,[126] (3) because of the time and resources required to win exoneration after wrongful conviction, the rate of wrongful conviction is significantly underreported,[127] and (4) the problem of false confessions by accomplices contributes to underreporting of the false confession problem.[128] Field Manual 3-19.13's obvious understatement of the false confession problem reveals the unbending skepticism among law enforcement as to the significance of the false confession problem.[129]

---

[120] *See* Loftus, *supra* note 28, at i–ii.
[121] *See* INBAU ET AL., *supra* note 2, at 411–12; FM 3-19.13, *supra* note 33, at 4-31 to -32.
[122] INBAU ET AL., *supra* note 2, at 411.
[123] *See id.* at 411–12; FM 3-19.13, *supra* note 33, at 4-31 to 4-32.
[124] FM 3-19.13, *supra* note 33, at 4-31.
[125] Gross, *supra* note 10, at 523–25.
[126] Drizin & Leo, *supra* note 10, at 905.
[127] *See* Gross, *supra* note 10, at 535–36.
[128] *See id.* at 537–38.
[129] *See* McMurtrie, *supra* note 6, at 1274.

2. False Confession Theory Is Reliable

The courts should acknowledge recently completed research and analysis by social scientists and find that false confession theory is reliable. In *United States v. Griffin*, the military judge excluded expert testimony because he found that the testimony would confuse the members and that it lacked "the necessary reliability to be of help to the trier of fact."[130] The CAAF held that the trial court did not abuse its discretion in excluding false confession evidence and emphasized that the false confession testimony proffered in that case lacked the reliability required by *United States v. Houser*[131] and *Daubert v. Merrell Dow Pharmaceuticals, Inc*.[132] When *Griffin* was decided, the courts had neither the full benefit of the lessons learned from the DNA exoneration

---

[130] United States v. Griffin, 50 M.J. 278, 283 (1999).

[131] *See id.* at 284–85. In *Griffin*, the court applied the six factors first announced in *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993). The proponent of expert testimony must establish:

> (1) "the qualifications of the expert"; (2) "the subject matter of the expert testimony"; (3) "the basis for the expert testimony"; (4) "the legal relevance of the evidence"; (5) "the reliability of the evidence"; and (6) probative value outweighing the other considerations outlined in Mil. R. Evid. 403.

Griffin, 50 M.J. at 283.

[132] Daubert v. Merrell Dow Pharms. Inc., 509 U.S. 579 (1993). The *Griffin* court explained that "[t]he Supreme Court focused on the issues of reliability . . . and relevance . . . holding that Fed. R. Evid. 702 assigns to the trial judge the duty to act as a gatekeeper, i.e., 'the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand.'" *Griffin*, 50 M.J. at 283–84 (citations omitted). The *Daubert* factors are:

> (1) Whether the theory or technique "can be (and has been) tested"; (2) Whether "the theory or technique has been subjected to peer review and publication"; (3) The "known or potential" error rate; (4) The "existence and maintenance of standards controlling the technique's operation"; (5) The degree of acceptance within the "relevant scientific community'; and (6) Whether the "probative value" of the evidence "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."

Griffin, 50 M.J. at 284 (citations omitted); *see also* United States v. Billings, 61 M.J. 163, 166 (2005) (explaining that even though *Houser* predates *Daubert* and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), the court continues to use the *Houser* factors to analyze the admissibility of expert testimony).

cases nor the results of the more recent studies discussed earlier in this article.[133]

Griffin is not an outright ban on "psychological testimony regarding false confessions."[134] However, false confession skeptics use *Griffin* to attack the general reliability of social science research into psychological interrogation methods and false confessions.[135] In *Griffin*, the defense proffered expert testimony from a psychologist, Dr. Frank, who would have testified that Griffin's confession was "consistent with a coerced compliant type of confession."[136] In upholding the trial court's denial of expert testimony, the CAAF emphasized Dr. Frank's statement that "he had reservations about the normative standards base on which he based his conclusions."[137] Dr. Frank testified that there was a problem with the study upon which he based his conclusions because that study "did not differentiate between the issue of coercion and the issue of torture in the police interviews that resulted in a confession."[138] Dr. Frank also explained that research into false confessions was "'relatively new,' dating back to the 1980s."[139] Since the *Griffin* decision in 1999, however, much additional research and analysis has been completed.[140]

The cumulative weight of research in this area has caused some experts to reevaluate their previous skepticism. In the late 1990s, proponents of false confession theory such as Professor Kassin "believe[d] that additional research in this area is needed, especially if false confession testimony becomes admissible in court."[141] Since 1999, additional research has been conducted and experts such as Professor Kassin have changed their view of the problem. In 2004, Professor Kassin explained:

---

[133] *See supra* Sections II.A through II.C and accompanying notes.
[134] Major Joshua E. Kastenberg, *A Three-Dimensional Model for the Use of Expert Psychiatric and Psychological Evidence in False Confession Defenses Before the Trier of Fact*, 26 SEATTLE U. L. REV. 783, 829–30 (2003).
[135] *See id.* (suggesting that courts should allow "psychiatric-based" false confession evidence but should use the *Griffin* "framework" to exclude "psychology-based" false confession evidence).
[136] *Griffin*, 50 M.J. at 282.
[137] *See id.* at 285.
[138] *Id.* at 281.
[139] *Id.*
[140] *See, e.g.*, *supra* Sections II.A through II.C and accompanying notes.
[141] *See* Agar, *supra* note 26, at 28.

> In this new era of DNA exonerations . . . it is now clear that such [expert] testimony is amply supported not only by anecdotes and case studies of wrongful convictions, but also by a long history of basic psychology and an extensive forensic science literature, as summarized not only in this monograph but also in several recently published books . . . .[142]

Professor Kassin's earlier skepticism as to the reliability of psychology-based false confession evidence has been replaced by a clear conviction that expert testimony in this area is reliable.[143]

Most significantly, the recent false confession studies have made significant strides since the late 1990s in achieving objective standards. Skeptics criticized a 1998 study by Professors Leo and Ofshe as "unscientific and highly subjective."[144] In the 1998 study, Leo and Ofshe relied upon the highly subjective method of reading post-admission narrative statements and then searching for corroborating evidence in the case to determine whether the confession was true or false.[145] Today, on the other hand, thanks to the growing number of DNA exoneration cases as well as more conservative research methods, objective studies of false confessions have been completed.[146] As explained in Section II.A, for example, the Gross study included only those cases in which the criminal justice system took official action to declare a person innocent after they had been convicted.[147]

In the past, false confession skeptics have successfully argued that false confession theory lacked an "empirical lynchpin."[148] Today, on the other hand, the DNA exoneration cases and the recent false confession studies have given false confession theory the level of reliability required

---

[142] Kassin & Gudjonsson, *supra* note 8, at 59. The books to which Kassin and Gudjonsson refer are G.D. LASSITER, INTERROGATIONS, CONFESSIONS, AND ENTRAPMENT (2004); GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK (2003); and A. MEMON ET AL., PSYCHOLOGY AND LAW: TRUTHFULNESS, ACCURACY AND CREDIBILITY (2003). *Id.* For an exhaustive list of resources see *id.* at 61–67.

[143] *See id.* at 58–59.

[144] *See* Agar, *supra* note 26, at 29.

[145] *Id.*

[146] *See supra* Section II.A and accompanying notes.

[147] *See supra* note 53 and accompanying text.

[148] *See* Agar, *supra* note 26, at 30; *see also supra* Section II.E.1 and accompanying notes.

by MRE 702.[149] The courts must now recognize this progress, acknowledge the reality of the false confession problem, and allow expert assistance and expert testimony in this area.

3. An Obdurate Military Justice System

An uninformed skepticism underlies the majority opinion in *United States v. Bresnahan*.[150] In *Bresnahan*, the CAAF majority accepted the military judge's "circuitous" rationale for denying assistance.[151] The military judge reasoned that, "defense counsel is searching for evidence that would assist her defense of the accused, but with little evidence to indicate such evidence exists."[152] By accepting this "circuitous" reasoning, the CAAF "sets the bar unreasonably high."[153] Rather than engage in a well informed analysis of the psychological interrogation methods used against the accused, the military judge and the CAAF took an intellectual shortcut to the preordained conclusion that expert assistance was not necessary.[154] By creating this unreasonable standard, the court reveals its inflexible skepticism concerning the validity of the social sciences that describe psychological interrogation methods.[155] Ironically, the expert assistance that the court denied to the defense is the same expert assistance that could have educated the court and helped the court craft a more reasoned analysis of the interrogation methods used against the accused.[156]

---

[149] *See* MCM, *supra* note 5, MIL. R. EVID. 702; *see also supra* Section II.A through II.C and accompanying notes.
[150] *See* McMurtrie, *supra* note 6, at 1274.
[151] United States v. Bresnahan, 62 M.J. 137, 147 (2005) (Erdmann, J., and Effron, J., dissenting).
[152] *Id.* at 142 (majority opinion).
[153] *Id.* at 147 (Erdmann, J., and Effron, J., dissenting).
[154] *See id.* at 148 ("If Bresnahan were able to develop evidence that his confession was false prior to receiving expert assistance, then he would not need the assistance at all. Requiring 'evidence that such evidence exists' as the military judge did here is circuitous reasoning.").
[155] *See id.* at 148–49; *see also* McMurtrie, *supra* note 6, at 1271 ("The legal profession's reluctance to acknowledge the findings of social scientists, while accepting other 'sciences' on little other than blind faith has contributed to the phenomena of erroneous convictions.").
[156] *See* McMurtrie, *supra* note 6, at 1271, 1273–74; Kassin & Gudjonsson, *supra* note 10, at 58–59.

The CAAF should adopt a standard similar to the "colorable showing" test suggested by the *Bresnahan* dissent.[157] "Although Bresnahan's confession was voluntary and therefore admissible at trial, the defense counsel made a colorable showing that there was a reasonable possibility she could raise doubt in the members' minds as to the reliability of that confession."[158] As the *Bresnahan* dissent points out, the defense counsel did in fact identify "several factors" indicating that Bresnahan's interrogator employed psychological interrogation methods in order to obtain his confession.[159] The court should have granted the request for expert assistance after the defense showed that the interrogator used psychological interrogation methods against the accused.[160]

An accused's "own confession is probably the most probative and damaging evidence that can be admitted against him."[161] Military law enforcement greatly emphasizes getting a suspect to provide incriminating evidence even though this evidence is often unreliable.[162] For the court to admit doubt about a fundamental part of the military justice system would require an enlightened view of the psychological interrogation methods that regularly bring powerful, but often inaccurate, evidence into the courtroom.[163] The CAAF's refusal to craft a reasonable standard for demonstrating the necessity for expert assistance in this area demonstrates the court's continuing lack of comprehension as to the nature of the pseudoscientific psychological interrogation methods used

---

[157] *See Bresnahan*, 62 M.J. at 148 (Erdmann, J., and Effron, J., dissenting).
[158] *Id.*
[159] *See id. at* 148–49.

> [Defense Counsel] identified for the military judge several factors based on her own research that might suggest that Bresnahan gave a false confession including: (a) the sophistication of the interrogators; (b) the fact that Bresnahan was not able to speak to doctors about the condition of his son; and (c) the fact that the interrogator told Bresnahan that he needed to tell her what he did to his son so that the doctors could save his son's life.

Id.
[160] *See id.*
[161] United States v. Datz, 61 M.J. 37, 44 (2005) (citing Arizona v. Fulminante, 499 U.S. 279, 296 (1991) (quoting Bruton v. United States, 391 U.S. 123, 139–40(1968)).
[162] *See* FM 3-19.13, *supra* note 33, at 4-2 ("Although testimonial evidence can be the most beneficial evidence in many investigations, it is also the least reliable form of evidence.").
[163] *See* McMurtrie, *supra* note 6, at 1271–74.

by military law enforcement.[164] Those psychological interrogation methods are the subject of Section III.

III. Psychological Interrogation: Pseudoscience in the Interrogation Room

This section examines the psychological interrogation process that begins with an interrogator's prejudgment of guilt and all too often ends with a false confession.[165] As explained in Section II, the false confession phenomenon is a significant problem in the criminal justice system.[166] Judges, lawyers, and panel members are not well educated on the "pseudoscience" behind psychological interrogation methods and how these methods can cause a person to confess falsely.[167] This section of the article is intended to highlight the pseudoscience behind these psychological interrogation methods and thereby overcome uninformed preconceptions concerning the necessity for expert assistance in this area.[168] Once the pseudoscientific nature of these psychological interrogation methods is exposed, the necessity for expert assistance becomes clear.[169]

---

[164] *See id.*

[165] *See generally* Kassin & Gudjonsson, *supra* note 8 (scrutinizing the interrogation process from the pre-interrogation interview through *Miranda* warnings, interrogation tactics, and finally to why people confess both truthfully and falsely); Ofshe & Leo, *supra* note 4, at 986–1001 (providing detailed description of how police elicit true and false confessions). The Supreme Court has described the use of psychological interrogation methods as being used to "unbend th[e] reluctance" of criminal suspects to confess. *See* Columbe v. Connecticut, 367 U.S. 568, 571–73 (1961). The *Miranda* Court quoted Inbau and Reid to describe the manipulative use of psychological interrogation methods by police: "To obtain a confession, the interrogator must 'patiently maneuver himself or his quarry into a position from which the desired objective may be attained.'" Miranda v. Arizona, 384 U.S. 436, 455 (1966) (quoting INBAU & REID, LIE DETECTION AND CRIMINAL INTERROGATION 185 (3d ed. 1953)).

[166] *See, e.g.*, Taslitz, *supra* note 7.

[167] *See* McMurtrie, *supra* note 6, at 1273–74; GOVERNOR'S COMMISSION, *supra* note 8, at 8, 96, 111.

[168] *See* McMurtrie, *supra* note 6, at 1273–74.

[169] *See id.*; *see also* MCM, *supra* note 5, MIL. R. EVID. 102 ("These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.").

The analysis in this section relies heavily upon the influential manual *Criminal Interrogation and Confessions*, first written by Fred E. Inbau and John E. Reid.[170] Both the Supreme Court[171] and the military appellate courts[172] have repeatedly cited versions of this manual. Most significantly, military law enforcement has adopted the psychological interrogation methods outlined in *Criminal Interrogation and Confessions*.[173] Inbau and Reid's colleagues at the *Reid Institute* continue to offer numerous courses on their psychological interrogation methods.[174] Inbau and Reid's impressive influence over police interrogation methods continues today.[175] A better understanding of this influential interrogation model can assist judges, lawyers, and panel members to overcome their preconceptions concerning false confessions, police interrogation methods, and the necessity for expert assistance in this area.[176]

A. The Suspect Interview: Prejudging Guilt

In the context of a law enforcement investigation, the terms "interview" and "interrogate"[177] have very specific and very distinct

---

[170] Weisselberg, *supra* note 30, at 154 ("[Inbau and Reid] . . . developed the most influential model and . . . published the leading interrogation manual for law enforcement officers."); *see also* Philipsborn, *supra* note 30, at 20.

[171] Missouri v. Seibert, 542 U.S. 600, 611 (2004); Stansbury v. California, 511 U.S. 318, 324(1994); United States v. Davis, 512 U.S. 452, 470 (1994); Moran v. Burbine, 475 U.S. 412, 459 (1986); Oregon v. Elstad, 470 U.S. 298, 328–29 (1985); James v. Arizona, 469 U.S. 990, 996 (1984); Rhode Island v. Innis, 446 U.S. 291, 306 and 317 (1980); Miranda v. Arizona, 384 U.S. 436, 449–55 (1966).

[172] *See* United States v. French, 38 M.J. 420, 434 (C.M.A. 1993); United States v. Leiker, 37 M.J. 418, 420 (C.M.A. 1993); United States v. Schake, 30 M.J. 314, 317–19 (C.M.A. 1990); United States v. Gibson, 14 C.M.R. 164, 174 (C.M.A. 1954); United States v. Josey, 14 C.M.R. 185, 193 (C.M.A. 1954); United States v. Whitehead, 26 M.J. 613, 618–19 (A.C.M.R. 1988); United States v. Helton, 10 M.J. 820, 823 (A.F.C.M.R. 1979); United States v. Reynolds, 36 C.M.R. 913, 917 (A.F.B.R. 1966).

[173] *Compare* FM 3-19.13, *supra* note 33, at ch. 4, *with* INBAU ET AL., *supra* note 2 (describing the same interrogation methods).

[174] *See* John E. Reid & Assocs., Inc., Training Programs, http://www.reid.com/training_programs/r_training.htm (last visited Nov 15, 2007). The author attended The Reid Technique of Interviewing and Interrogation Course, 10–13 May 2005, in Phoenix, Arizona.

[175] Philipsborn, *supra* note 30, at 20.

[176] *See* McMurtrie, *supra* note 6, at 1273–74.

[177] Note also that "interrogate" has a distinct yet related meaning in the context of *United States v. Miranda*. The Supreme Court explained that "the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its

meanings.[178] A suspect interview normally precedes the interrogation.[179] During the suspect interview, the investigator asks open ended questions and takes notes while the suspect does much or most of the talking.[180] An interview is non-accusatory.[181] Most importantly, the investigator uses the suspect interview to evaluate the suspect's veracity.[182]

Once the investigator determines that the suspect's denials of wrongdoing are untruthful, then the investigator transitions from the interview to the accusatory interrogation.[183] "The investigator must be reasonably certain of the suspect's guilt before initiating an interrogation."[184] The purpose of an interrogation is to "elicit an admission against interest."[185] An interrogation is confrontational and accusatory.[186]

---

functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980); *see also* United States v. Young, 49 M.J. 265, 267 (1998).

[178] *See* INBAU ET AL., *supra* note 2, at 5–10.

> The first thing that must be addressed in determining whether to interview or interrogate a suspect is to recognize the difference between an interview and an interrogation. An interview is generally unstructured and takes place in a variety of locations, such as a residence, workplace, or police station. It is conducted in a dialogue format where investigators are seeking answers to typically open-ended questions, and the guilt or innocence of the person being interviewed is generally unknown. An interrogation is planned and structured. It is generally conducted in a controlled environment free from interruption or distraction and is monologue-based.

FM 3-19.13, *supra* note 33, at 4-7.

[179] INBAU ET AL., *supra* note 2, at 9–10.

[180] *See id.* at 5–7; FM 3-19.13, *supra* note 33, at 4-7.

[181] INBAU ET AL., *supra* note 2, at 6.

[182] *Id.* at 5–7.

[183] Christian A. Meissner & Saul M. Kassin, *"He's guilty!": Investigator Bias in Judgments of Truth or Deception*, 26 LAW & HUM. BEHAV. 469, 477 (2002), *available at* http://www.williams.edu/Psychology/Faculty/Kassin/ research/confessions.htm.

[184] FM 3-19.13, *supra* note 33, at 4-7.

[185] Frank Horvath, Brian Jayne, & Joseph Buckley, *Differentiation of Truthful and Deceptive Criminal Suspects in Behavior Analysis Interviews*, 39 FORENSIC J. SCI. 793, 794 (May 1994), *available at* http://www.reid.com/reid_institute/Library/index.html (access restricted to Reid Institute Members).

[186] FM 3-19.13, *supra* note 33, at 4-7 to 4-8.

> An interrogation is confrontational in nature, which means the suspect will be directly confronted with his involvement in the offense . . . . An interrogation is not an open two-way communication. If the suspect is allowed to interrupt and provide false denials, he will be entrenched into his lie, making it progressively more difficult to obtain the truth during the interrogation.[187]

An interrogation is a monologue in which the investigator does almost all of the talking and dominates the suspect through the use of interrogation tactics.[188]

B. The Behavior Analysis Interview: Targeting the Innocent

"An interrogation is conducted only when the investigator is reasonably certain of the suspect's guilt."[189] In many cases, however, investigators initiate an interrogation with little or no actual evidence of guilt.[190] Instead, investigators make initial judgments about a suspect's guilt or innocence based upon the suspect's behavioral responses during the behavior analysis interview (BAI).[191] During the BAI, the investigator applies his understanding of behavior symptom analysis (BSA).[192] "Through observation of the suspect's verbal and nonverbal responses [during the interview], the investigator can assess if any indications of deception are present, which may cause the investigator to transition to an interrogational setting."[193]

---

[187] *Id.*

[188] *See* INBAU ET AL., *supra* note 2, at 8; *see also infra* Sections III.D and III.E and accompanying text for examples of interrogation tactics.

[189] INBAU ET AL., *supra* note 2, at 8.

[190] *See* Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 275 (1996) (reporting that in thirty-three percent of 182 observed cases, pre-interrogation evidence was weak, meaning highly unlikely to lead to charging).

[191] *See* INBAU ET AL., *supra* note 2, at 190 ("In the majority of interviews . . . the investigator will generally be able to classify the overall responses . . . as either fitting the description of an innocent or guilty suspect."); s*ee also* FM 3-19.13, *supra* note 33, at 4-7.

[192] *See infra* Section III.B.1 for a definition of BSA; *see generally* INBAU ET AL., *supra* note 2, at 121–91 (describing the development and use of behavior symptom analysis).

[193] *See* FM 3-19.13, *supra* note 33, at 4-7.

The police routinely initiate an interrogation even when there is little or even no evidence of guilt against a suspect.[194] Brian C. Jayne and Joseph P. Buckley, coauthors of the third and fourth editions of *Criminal Interrogations and Confessions*, explained the critical importance of securing a confession in the absence of evidence:

> Unfortunately, most investigations do not come gift wrapped in . . . a neat package. All too often a confession is needed to develop the evidence necessary for a conviction and frequently, absent a confession, there is little admissible evidence to support the suspect's guilt. Through factual analysis and a Behavior Analysis Interview the investigator may have little doubt regarding a suspect's involvement. But when it comes to producing evidence admissible in court, the confession oftentimes makes or breaks a case.[195]

The BSA is often the investigator's only tool for determining whether or not to transition from interview to interrogation.[196] Once the investigator believes a suspect is guilty based upon the investigator's application of BSA during the interview, then the investigator makes the critically important transition from interview to accusatory interrogation.[197]

The less evidence an investigator has against a suspect, the more likely he is to employ psychological interrogation tactics in order to get a confession.[198] Rather than acknowledge a lack of evidence prior to interrogation, Jayne and Buckley recommend that investigators "portray increased confidence in the suspect's guilt" and confront the suspect with the existence of fictitious evidence during the interrogation.[199] One study revealed that detectives are prone to use more interrogation tactics during an interrogation when the pre-interrogation evidence is weak or moderate.[200] Thus, investigators routinely rely upon BSA to make two critical judgments: (1) whether or not to transition from interview to

---

[194] *See* BRIAN C. JAYNE & JOSEPH P. BUCKLEY, THE INVESTIGATOR ANTHOLOGY 224 (1999).
[195] *Id.*
[196] *See id.*
[197] *See* Meissner & Kassin, *supra* note 183, at 477.
[198] *See* Ofshe & Leo, *supra* note 4, at 986–87.
[199] *See* JAYNE & BUCKLEY, *supra* note 194, at 227–30.
[200] *See* Leo, *supra* note 190, at 298.

interrogation, and then (2) whether or not to increase the amount of psychological pressure and manipulation applied against the suspect.[201]

During the interrogation, if the investigator determines that a suspect's continued denials are deceptive, then the investigator increases the amount of psychological pressure applied against the suspect.[202] This process, of course, goes astray when the interrogator mistakenly interprets the suspect's truthful denials as deceptive denials.[203] In that case, as the suspect offers additional truthful denials, the interrogator ratchets up the psychological pressure through the use of interrogation tactics.[204] In that case, the interrogator targets an innocent person with more and more manipulative and deceptive psychological interrogation tactics.[205]

1. Behavior Symptom Analysis Defined

Jayne and Buckley describe BSA as "the systematic observation of a suspect's behavioral responses during a structured interview."[206] The investigator observes the suspect's behavior in three distinct areas: verbal, paralinguistic, and nonverbal.[207] "Verbal" refers to the suspect's "word choice and arrangement of words" in response to preplanned questions; "paralinguistic" refers to the "characteristics of speech falling outside the spoken word" such as rate, tone, length, and continuity of speech during the interview; and "nonverbal" behavior includes "posture, arm and leg movements, eye contact, and facial expressions."[208] Field Manual 3-19.13 divides the behavioral responses into "verbal" and "nonverbal" and includes the "paralinguistic" behaviors as a subset of the verbal behaviors.[209] During an interview, the investigator observes the suspect's behavior in each area and makes inferences about the suspect's truthfulness.[210] For example, according to Inbau:

---

[201] *See id.*; Meissner & Kassin, *supra* note 183, at 477.
[202] *See* Meissner & Kassin, *supra* note 183, at 477; Leo, *supra* note 190, at 298.
[203] *See* Ofshe & Leo, *supra* note 4, at 986–87.
[204] *See id.*
[205] *See id.*; *see also* JAYNE & BUCKLEY, *supra* note 194, at 227–30 (recommending that investigators "portray increased confidence in the suspect's guilt" and confront the suspect with the existence of fictitious evidence during the interrogation).
[206] JAYNE & BUCKLEY, *supra* note 194, at 67.
[207] INBAU ET AL., *supra* note 2, at 125.
[208] *Id.* at 125; JAYNE & BUCKLEY, *supra* note 194, at 67.
[209] *See* FM 3-19.13, *supra* note 33, at 4-18 to 4-20.
[210] INBAU ET AL., *supra* note 2, at 125–26.

> Deceptive suspects generally do not look directly at the investigator; they look down at the floor, over to the side, or up at the ceiling, as if to beseech some divine guidance when answering questions. They feel less anxiety if their eyes are focused somewhere other than on the investigator; it is easier to lie while looking at the ceiling or floor.[211]

According to the BSA theory, truthful subjects are sincere, helpful, concerned, and cooperative; deceptive subjects are insincere, unhelpful, unconcerned, and uncooperative.[212] The manuals provide numerous other examples of allegedly deceptive and truthful behaviors.[213] No single behavior alone indicates deception.[214] According to the manuals, the BSA should be "accomplished by evaluating clusters of behavior."[215]

2. Behavior Symptom Analysis: Pseudoscientific Guesswork

According to John E. Reid & Associates, Inc., "research studies demonstrated that interviewers specifically trained and experienced in BSA can correctly identify the truthfulness of a person 85% of the time."[216] Jayne and Buckley state emphatically that BSA is supported by research as well as "the common sense belief that the behavior of a subject during structured questioning can often reveal whether or not the subject is telling the truth or withholding information."[217] Some studies support the notion that investigators trained in the principles of BSA are able to detect truth or deception above "chance levels."[218] On the other hand, several studies challenge the notion that investigators trained in BSA can reliably detect deception above chance levels.[219] The results of

---

[211] *Id.* at 151.
[212] *Id.* at 128–30.
[213] *See id.* at 121–153; JAYNE & BUCKLEY, *supra* note 194, at 224, 227–30 (1999).
[214] FM 3-19.13, *supra* note 33, at 4-19.
[215] *Id.*
[216] John E. Reid & Assocs., Inc., http://www.reid.com/services/r_behavior.html (last visited Nov. 15, 2007); *see also* INBAU ET AL., *supra* note 2, at 123 (reporting eighty-six percent accuracy in evaluating truthful suspects and eighty-three percent accuracy in evaluating deceptive suspects).
[217] JAYNE & BUCKLEY, *supra* note 194, at 66.
[218] *See generally* Horvath et al., *supra* note 185.
[219] *See generally* Saul M. Kassin & Christina T. Fong, *"I'm Innocent!": Effects of Training on Judgements of Truth and Deception in the Interrogation Room*, 23 L. & HUM.

one study were "unambiguous" in finding that the techniques taught by John E. Reid & Associates, Inc., did not increase a person's ability to detect deception.[220]

Interestingly, the CAAF recently expressed doubt about an interrogator's ability to accurately interpret body language.[221] In a unanimous opinion, the CAAF overturned a conviction which had been based on an alleged adoptive admission by the accused.[222] The court explained its rationale for distrusting the interrogator's interpretation of the accused's body language:

> [T]hat admission rested upon a law enforcement officer's interpretation of body language. Without some additional written, verbal, or video confirmation, this amounted to a confession by gesture of a critical element of the offense—and the only contested element of the offense. *Gestures and reactions vary from person to person under the pressure of interrogation.* As a result, the military judge's decision to admit evidence of Appellant's head nodding without adequate foundation was prejudicial error.[223]

This statement, of course, contradicts the key assumption behind BSA: that an interrogator can accurately judge truth or deception based upon "gestures and reactions."[224]

"[If] gestures and reactions vary from person to person under the pressure of interrogation," then those gestures and reactions cannot be consistently categorized as either truthful or deceptive and thus cannot be accurately observed and interpreted from one suspect to the next.[225] For example, FM 3-19.13 asserts: "An innocent person will generally sit upright, appearing more relaxed and casual. In most cases, he will go so

---

BEHAV. 499 (1999), *available at* http://www.williams.edu/Psychology/Faculty/Kassin/research/confessions.htm; Kassin et al., *supra* note 40, at 188–89.

[220] *See* Kassin & Fong, *supra* note 219, at 512. *But see* INBAU ET AL., *supra* note 2, at 124–25 (blaming the negative results of some studies on the difficulties associated with recreating realistic interview and interrogation conditions in a controlled setting).

[221] *See* United States v. Datz, 61 M.J. 37, 44 (2005).

[222] *Id.*

[223] *Id.* (emphasis added).

[224] *See id.*; John E. Reid & Assocs., Inc., http://www.reid.com/services/r_behavior.html (last visited Nov. 15, 2007).

[225] *See Datz*, 61 M.J. at 44.

far as to lean toward the interviewer inviting the questions and demonstrating an eagerness to resolve the issue . . . ."[226] However, if these particular "gestures and reactions vary from person to person under the pressure of interrogation," then they cannot be accurate indicators of truth or deception at all.[227] Military law enforcement, however, categorizes the "sit upright . . . [and] lean toward the interviewer" gesture and reaction as an example of truthful behavior.[228]

The CAAF appears to agree with the leading false confession experts that BSA is at best "pseudoscientific guesswork."[229] Therefore, the only explanation for the *Bresnahan* majority opinion is that the court lacks an understanding as to the chain of events that starts with BSA and ends with a false confession.[230] That chain of events is further described below.

C. Behavior Symptom Analysis and Investigator Bias

1. "Prejudgments of Guilt Confidently Made But Frequently In Error" [231]

Some studies indicate that instead of bolstering an investigator's effectiveness, reliance upon BSA may in fact hinder the search for truth because it contributes to investigator bias.[232] One study found that those who received training in BSA were actually *less* accurate in judging truth or deception.[233] Accuracy aside, however, those who received training in BSA were "more self-confident and more articulate about the reasons for their often erroneous judgments."[234] Those who received training were more articulate in explaining their judgments of truth or deception, but they were not actually more accurate in judging truth or deception.[235] A

---

[226] FM 3-19.13, *supra* note 33, at 4-20.
[227] *See Datz*, 61 M.J. at 44.
[228] *See* FM 3-19.13, *supra* note 33, at 4-20.
[229] *See* Ofshe & Leo, *supra* note 4, at 986.
[230] *See* Ofshe & Leo, *supra* note 4, at 986–1001 (providing detailed description of how police elicit true and false confessions); *see generally* Kassin & Gudjonsson, *supra* note 8 (scrutinizing the interrogation process from the pre-interrogation interview through *Miranda* warnings, interrogation tactics, and why people confess).
[231] Kassin et al., *supra* note 34, at 189.
[232] *See id.* at 187.
[233] *See* Kassin & Fong, *supra* note 219, at 512.
[234] *Id.*
[235] *Id.*

second study concluded that "even experienced detectives—many of whom were specially trained in interviewing and interrogation—also did not exceed chance level performance."[236] That second study, led by Professor Saul M. Kassin, described the phenomenon of investigator bias:

> Compared to others, [experienced detectives] also exhibited a deception response bias, leading them to commit an abundance of false positive errors. Thus the pivotal decision to interrogate a suspect may well be based on prejudgments of guilt confidently made but frequently in error . . . . [R]esearch suggests that once people form a belief, they tend unwittingly to seek, interpret, and create information in ways that verify that belief.[237]

Police interrogators are often very confident but very wrong in their detection of deception; therefore, investigator bias is the first crucial step in the chain of events leading to a false confession.[238]

Because BSA is at best "pseudoscientific guesswork," the police often choose to employ very persuasive interrogation tactics "against the wrong target"—an innocent person.[239] This problem is compounded by the previously mentioned tendency among investigators to use more interrogation tactics when the pre-interrogation evidence is weak or moderate.[240] As mentioned in Section II.D, this problem is compounded even further by the relatively higher rate of *Miranda* waiver by innocent suspects than by guilty suspects.[241] Thus, in certain cases, investigators choose to interrogate an innocent person and then compound the mistake by piling on the number and type of interrogation tactics as the suspect continues to deny guilt.[242]

---

[236] Kassin et al., *supra* note 34, at 189.
[237] *Id.*
[238] *See id.* at 188–89.
[239] Ofshe & Leo, *supra* note 4, at 986.
[240] *See* Leo, *supra* note 190, at 298.
[241] *See* Kassin & Norwick, *supra* note 102, at 211.
[242] *See* Leo, *supra* note 190, at 298.

An interrogator who is overconfident in his judgment of guilt will "tend unwittingly to seek, interpret, and create information in ways that verify that belief."[243] Thus the next step in the chain of events leading to a false confession is the investigator's contamination of the suspect's statement.[244] Professor Kassin explains:

> In most documented false confessions . . . the statements ultimately presented in court are highly scripted by investigators' theory of the case; they are rehearsed and repeated over hours of interrogation; and they often contain vivid details about the crime, the scene, and the victim that became known to suspects through secondhand sources.[245]

As explained in Section III.D, the interrogator convinces the suspect to include the secondhand information in the "confession" through the use of powerful psychological tactics.[246]

2. Stepping Down the Accusation: Every Suspect Is Guilty of Something

The interrogation technique known as "stepping down the accusation" illustrates the overconfidence advocated in *Criminal Interrogation and Confessions*.[247] "The successful interrogator must possess a great deal of inner confidence in his ability to detect truth or deception, elicit confessions from the guilty, and stand behind decisions of truthfulness."[248] An interrogator should never acknowledge that BSA led him to erroneously conclude that a person is guilty when in fact that person is innocent.[249]

---

[243] Kassin et al., *supra* note 34, at 189.
[244] *See id.*; *see also* FM 3-19.13, *supra* note 33, at 4-2 ("[S]everal studies have proven that erroneous information inserted into a scenario is frequently incorporated in future witness accounts by the individuals who were provided such information.").
[245] Kassin et al., *supra* note 34, at 224.
[246] *See* Kassin et al., *supra* note 34, at 188–89.
[247] INBAU ET AL., *supra* note 2, at 320–21 (explaining how to handle "[d]enials coming from a probably innocent suspect").
[248] *See id.* at 78 (quoting Kassin & Gudjonsson, *supra* note 8, at 41).
[249] *See* INBAU ET AL., *supra* note 2, at 320–21.

According to this approach to interrogation, every suspect is guilty of something.[250] John E. Reid and Associates teaches that "[w]hen the investigator senses that the suspect may be innocent, he should begin to diminish the tone and nature of the accusatory statements."[251] However, "no statement should be made immediately that [the suspect] is clear of any subsequent investigation."[252] The interrogator should not apologize for subjecting an innocent person to the stress of the interrogation room but instead should blame the suspect for misleading the interrogator in some way.[253] In the rare case when the interrogator begins to doubt his initial judgment of guilt, the interrogator is taught to probe for "indications of something the suspect may have done of a less relevant nature that evoked the suspicion about his commission of the principal act."[254] As the logic goes, the suspect must be guilty of something because the BAI results indicated that the suspect was attempting to deceive the investigator.[255]

"[T]he decision by police to interrogate suspects on the basis of their observable interview behavior is a decision that is fraught with error, bias, and overconfidence."[256] Their overconfident refusal to acknowledge errors leads police interrogators to employ powerful psychological interrogation tactics against innocent people.[257] The employment of those psychological tactics is the final step in the chain of events that ends in false confession. Section III.D briefly describes those interrogation tactics.

D. Psychological Interrogation: Isolation, Confrontation, Deception, Despair

"Modern Psychological interrogation is a gradual yet cumulative process; each technique builds on the next as the investigator seeks to emphasize the overriding strength of the State's case and the futility of

---

[250] *See id.*
[251] *Id.* at 320.
[252] *Id.* at 321.
[253] *See id.* at 320–21.
[254] *Id.* at 321.
[255] *See id.* at 321 ("[T]he investigator should soften the accusation to the point of indicating that the suspect may not have actually committed the act but was only involved in it in some way, perhaps merely has some knowledge about it, or else harbors a suspicion as to the perpetrator.").
[256] Kassin & Gudjonsson, *supra* note 8, at 39.
[257] *See* Ofshe & Leo, *supra* note 4, at 986.

the suspect's denials."[258] The interrogator begins by isolating the suspect in a "small, barely furnished, soundproof room housed within the police station."[259] The interrogation room is intended to "remove the suspect from familiar surroundings and isolate him or her, denying access to known people and settings, in order to increase the suspect's anxiety and incentive to extricate himself or herself from the situation."[260] Once the suspect is isolated, the confrontational interrogation may begin.[261]

As explained earlier, interrogation is a confrontational monologue, not a conversation between the suspect and investigator.[262] A successful interrogation requires planning and preparation.[263] A skilled interrogator communicates to the suspect that the interrogator knows key details about the suspect's life, career, and family—this technique "is extremely beneficial in increasing anxiety at key points of the interrogation

---

[258] Drizin & Leo, *supra* note 10, at 916.

> The most effective technique used to persuade a suspect that his situation is hopeless is to confront him with seemingly incontrovertible evidence of his guilt, whether or not any actually exists. . . . Over and over again, the investigator conveys the message that the suspect has no meaningful choice but to admit to some version of the crime because continued resistance—in light of the extensive and irrefutable evidence against him—is simply futile. These techniques are thus designed to persuade the suspect to perceive his situation, and thus his options, much differently than when he first entered the interrogation room.

Id. at 913–14 (2004) (citation omitted).

[259] Kassin & Gudjonsson, *supra* note 8, at 42; *see also* INBAU ET AL., *supra* note 2, at 51 ("The principal psychological factor contributing to a successful interview or interrogation is privacy . . . ."); FM 3-19.13, *supra* note 33, at 4-8 to 4-9 ("An interrogation needs to be strictly planned and controlled. An interrogation should rarely, if ever, be conducted in a suspect-supportive environment. The location selected for an interrogation should be supportive to the interrogator and provide absolute privacy.").

[260] Kassin & Gudjonsson, *supra* note 8, at 42; *see also* FM 3-19.13, *supra* note 33, at 4-25 ("[T]here should be a two-way mirror installed in the interview room that allows other investigative personnel to observe the interrogation . . . . This allows the observers to point out issues that create anxiety in the suspect . . . .).

[261] *See* Taslitz, *supra* note 7 ("[I]nterrogations often take place with suspects isolated from both lawyers and intimates. There is good reason to believe that significant numbers of ordinary people under such circumstances 'can be led to agree that they have engaged in misconduct, even serious misconduct, when they are entirely innocent.'" (citation omitted)).

[262] *See supra* Section III.A.

[263] *See* FM 3-19.13, *supra* note 33, at 4-23.

process."[264] Outside the interrogation room, the interrogator develops "themes,"[265] "ploys,"[266]and "alternative questions"[267] for use against the suspect during the interrogation. *Criminal Interrogation and Confessions* describes the use of these techniques as the "Reid Nine Steps of Interrogation."[268] The interrogation process described in FM 3-19.13 is consistent with the "Reid Nine Steps."[269]

---

[264] *Id.* 4-24.

[265] *See* INBAU ET AL., *supra* note 2, at 232 ("Immediately after the direct, positive confrontation . . . the investigator should begin the development of a 'theme.' This involves presenting a 'moral excuse' for the suspect's commission of the offense or minimizing the moral implications of the conduct."); *see also* FM 3-19.13, *supra* note 33, at 4-27 to 4-28.

> A theme may be designed to pry at those things most important to the suspect, which is why it is vital during the rapport-building [interview] stage for investigators to seek out the things that will help a suspect better recognize the situation for what it is . . . . For instance, if a suspect has a strong relationship with his mother, investigators may want to have him reflect on how his mother would feel about the situation. This could also be effective when used with how he handles himself subsequent to the incident.

FM 3-19.13, *supra* note 33, at 4-27 to 4-28.

[266] *See* INBAU ET AL., *supra* note 2, at 427–28 ("[T]rickery and deceit represent a continuum of false representations ranging from demeanor and attitude to outright lies concerning the existence of evidence."); FM 3-19.13, *supra* note 33, at 4-16 ("The use of trickery, deceit, ploys, and lying is legally permissible during the course of an interrogation . . . .").

[267] *See* FM 3-19.13, *supra* note 33, at 4-30 to 4-31 ("The alternative question is designed to help the suspect feel that the investigator understands and does not judge him. . . ."); INBAU ET AL., *supra* note 2, at 353 ("The alternative question . . . presents the suspect a choice between two explanations . . . . [T]he suspect may be asked, 'Did you blow that money on booze, drugs, and women . . . or did you need it to help out your family?'").

[268] INBAU ET AL., *supra* note 2, at 209–397. The Nine Steps are:

> Step 1 – Direct, Positive Confrontation
> Step 2 – Theme Development
> Step 3 – Handling Denials
> Step 4 – Overcoming Objections
> Step 5 – Procurement and Retention of a Suspect's Attention
> Step 6 – Handling the Suspect's Passive Mood
> Step 7 – Presenting an Alternative Question
> Step 8 – Having the Suspect Orally Relate Various Details of the Offense
> Step 9 – Converting an Oral Confession into a Written Confession

Id. at vi.

[269] *Compare id. with* FM 3-19.13, *supra* note 33, at ch. 4.

Professors Ofshe and Leo have described the psychological interrogation process in broad terms as "a two-step process of social influence."[270] "In the first step, the interrogator accuses the suspect of committing the crime and lying about it, cuts off the suspect's denials, attacks his or her alibi (occasionally attacking the suspect's memory), and often cites real or fabricated evidence to buttress these claims."[271] During this first step, the interrogator uses "themes,"[272] "ploys,"[273]and "alternative questions."[274] "This step is designed to plunge the suspect into a state of hopelessness and despair and to instill the belief that continued denial is not a means of escape."[275]

Once the suspect achieves this hopeless and desperate state, the interrogator enters the second step in which he "suggests inducements that motivate the suspect by altering his or her perceptions of self-interest."[276] Kassin and Gudjonsson explain:

> The inducements that are used can be arrayed along a spectrum: At the low end are moral or religious inducements suggesting that confession will make the suspect feel better; in the midrange are vague assurances that the suspect's case will be processed more favorably if he or she confesses; at the high end are inducements that more expressly promise or imply leniency in exchange for confession or threaten or imply severe treatment if the suspect refuses to confess.[277]

Of course, explicit promises of leniency and explicit threats of severe treatment are generally illegal and if exposed may lead to suppression of a suspect's statement.[278] Interrogators are taught techniques to avoid such problems.[279]

---

[270] Kassin & Gudjonsson, *supra* note 8, at 33; *see also* Ofshe & Leo, *supra* note 4, at 989–90 (elaborating in much greater detail).
[271] Kassin & Gudjonsson, *supra* note 8, at 46.
[272] *See* INBAU ET AL., *supra* note 2, at 232.
[273] *See id.* at 427–28.
[274] *See* FM 3-19.13, *supra* note 33, at 4-30 to 4-31.
[275] Kassin & Gudjonsson, *supra* note 8, at 46.
[276] *Id.* (citation omitted).
[277] *Id.*
[278] *See* INBAU ET AL., *supra* note 2, at 420.
[279] *See id.* at 419–24 ("Communicating these incentives in a legal manner is an important consideration of confession admissibility."); FM 3-19.13, *supra* note 33, at 4-31, 4-47

Deception is fundamental to the psychological interrogation model.[280] The interrogator must deceive the suspect into believing that confession is in the suspect's best interest.[281] This becomes problematic when an interrogator's use of the BSA principles leads to an erroneous determination of a suspect's guilt.[282] If an innocent person, disoriented and confused by the interrogation experience, is temporarily deceived into thinking that "self-interest" dictates agreeing to the interrogator's demand to admit to a crime, a false confession may result.[283] This type of false confession is known as a "coerced compliant confession."[284] An

---

(instructing interrogators to include rapport-based questions, such as, "How were you treated by CID and/or MPI today?" in the body of the suspect's written statements).

[280] *See* INBAU ET AL., *supra* note 2, at 427 ("Many of the interrogation techniques presented in this text involve duplicity and pretense.").

[281] *See id.*

> The purpose for interrogation is to persuade a suspect *whom the investigator believes* to be lying about involvement in a crime to tell the truth. The only way this can be accomplished is by allowing the suspect to believe that he will benefit in some way by telling the truth. Ordinary people do not act against self-interest without at least a temporary perception of positive gain in doing so.

Id. at 419 (emphasis added).

[282] *See* Kassin & Gudjonsson, *supra* note 8, at 39 ("[T]he decision by police to interrogate suspects on the basis of their observable interview behavior is a decision that is fraught with error, bias, and overconfidence."); Ofshe & Leo, *supra* note 4, at 986–87 ("If an interrogation is poorly founded—based on guesses, hunches, or pseudoscientific behavioral cues . . . . [the interrogator] may . . . use a very aggressive or a hostile questioning style that emphasizes the power and authority of his role, and eventually . . . use coercive tactics.").

[283] *See* INBAU ET AL., *supra* note 2, at 412–16.

[284] *See id.*

> [A] coerced compliant confession occurs when the suspect claims that he confessed to achieve an instrumental gain. Such gains include being allowed to go home, bringing a lengthy interrogation to an end, or avoiding physical injury. In a review of 350 trials occurring during the twentieth century involving persons believed to have been innocent, 49 of those cases (14 percent) involved a possible false confession. Of those 49 confessions, the coerced compliant was the most prevalent category (45 percent).

Id. at 412–13 (citations omitted).

innocent suspect may also come to doubt his own memory of events and agree to a "coerced internalized confession."[285]

E. Pragmatic Implication: Reading Between the Lines

An interrogator need not make explicit promises or threats in order to communicate an intended message to a suspect.[286] As explained above, "[c]ourts will generally frown upon confessions wherein the investigator directly" promises leniency or threatens harsh treatment.[287] On the other hand, implying consequences or rewards is legally permissible.[288]

"'Pragmatic Implication' refers to the sending and processing of implicit meanings in communication, as occurs when an individual 'reads between lines.'"[289] When an interrogator exaggerates or lies about "the strength of the evidence and the magnitude of the charges [he] communicates by pragmatic implication" to the suspect that the suspect will receive "a relatively severe sentence" unless the suspect cooperates and provides a confession.[290] On the other hand, an interrogator may "lull the suspect into a false sense of security by mitigating the crime, making excuses for the suspect, or blaming the victim . . . imply[ing] a relatively light sentence for the suspect who does confess."[291] Professor Kassin describes these techniques of pragmatic implication as "maximization" and "minimization"—maximizing the consequences for refusing to confess or, alternatively, minimizing the consequences for confessing.[292]

---

[285] *See id.* ("Coerced internalized confessions . . . occur when the investigator successfully convinces an innocent suspect that he is guilty of a crime he does not remember committing." *Id.* at 414.).

[286] *See* Saul M. Kassin & Karlyn McNall, *Police Interrogations and Confessions: Communicating Promises and Threats by Pragmatic Implication*, 15 L. & HUM. BEHAV. 233, 241–42 (1991).

[287] *See* INBAU ET AL., *supra* note 2, at 420.

[288] *See id.* at 419–22.

[289] Drizin & Leo, *supra* note 10, at 915 n.138 (2004) (citations omitted).

[290] Kassin & McNall, *supra* note 286, at 247.

[291] *Id.*

[292] *See id.*

> [T]wo types of approaches recommended by Inbau et al. can be distinguished. One is what we call *maximization*, a "hard-sell" technique in which the interrogator tries to scare and intimidate the suspect into confessing by making false claims about evidence (e.g., staging an eyewitness identification or a fraudulent lie-detector test) and exaggerating the seriousness of the offense and the magnitude of

F. Precautions Against False Confession

The interrogation manuals state emphatically that if applied correctly, the psychological interrogation methods they advocate will not cause an innocent suspect to confess falsely.[293] Even if this assertion were true, many police investigators are not as skilled as they should be at employing precautions against false confession.[294] Expert assistance is necessary to dissect the interrogation methods applied to a particular suspect and to determine whether or not those methods were applied in accordance with the guidelines in the manuals.[295] If those methods were not applied in accordance with the guidelines in the manuals, then expert testimony is necessary to educate the military judge and panel members as to the errors committed by the interrogator.[296]

Both FM 3-19.13 and *Criminal Interrogations and Confessions* describe precautions to be taken during an interrogation.[297] Threatening a suspect with the death penalty or the loss of her children are obvious examples of coercive, not to mention illegal, interrogation methods that should be avoided.[298] A young suspect with low intelligence is the most obviously vulnerable person that might render an untrustworthy

---

> the charges. . . . The second approach is what we call minimization, a "soft-sell technique in which the police interrogator tries to lull the suspect into a false sense of security by offering sympathy, tolerance, face-saving excuses, and even moral justification, by blaming a victim or accomplice, by citing extenuating circumstances, or by playing down the seriousness of the charges."

Id.

[293] *See* INBAU ET AL., *supra* note 2, at 421. Inbau emphatically rejects the notion that suspects will form beliefs based upon "pragmatic implication." *See id.* at 420–21. For example, Inbau flatly rejects the idea that pragmatic implication would cause an innocent suspect to believe "that the consequences of their crime are not that severe . . . ." Inbau asks: "Would an innocent suspect be likely to form these beliefs and decide to confess because of them?" *Id.* at 421. Inbau answers his own question in the negative: "To this the answer is clearly 'No!'" *See id.*

[294] *See* GOVERNOR'S COMMISSION, *supra* note 7, at 40 (recommending additional training for police interrogators on the causes of false confessions).

[295] *See* McMurtrie, *supra* note 6, at 1274.

[296] *See id.*

[297] *See* FM 3-19.13, *supra* note 33, at 4-31 to 4-32 ("Because juries tend to place a great deal of weight in confessions when deliberating a case, it is paramount that investigators and interrogators implement safeguards to prevent false confessions.").

[298] *See id.* at 4-31.

confession or admission.[299] Actions by the interrogator can also contaminate a suspect's statement.[300] Inbau and Reid advise interrogators to exercise caution when dealing with "intent issues."[301] Interrogators should, "[f]ocus the interview on behaviors rather than intentions."[302] If these and other guidelines are not followed, a false confession may result.[303]

G. The Gap Between Legally Voluntary and Factually Reliable

A confession can be legally voluntary, but psychologically involuntary. Inbau and Reid explain:

> [N]o confession following interrogation is completely voluntary in the psychological sense of the word. . . . At what point an investigator's words, demeanor or actions are so intense or powerful as to overcome the suspect's will cannot be universally defined. Each suspect must be considered individually, and consideration must be given with respect to such factors as his previous experience with police, his intelligence, mental stability, and age.[304]

Expert assistance is necessary to examine and explain the complex psychological interplay of "an investigator's words, demeanor or actions" with a particular suspect's characteristics.[305]

---

[299] *See id.* The manual, however, provides no guidance on how an investigator is to determine the intelligence quotient, language aptitude, or test scores of an eighteen year old private, for example. *See id.*

[300] *See id.* at 4-32 (advising against showing a suspect crime scene photos or taking a suspect to the crime scene before getting a confession).

[301] *See* INBAU ET AL., *supra* note 2, at 46–48 ("Because of the nature of intent issues, the investigator must take special care with respect to corroborating a confession.").

[302] *See id.* at 47 ("Physical actions or statements either occurred, or they did not. However, intentions can be subject to perceptual distortions, similar to beliefs or opinions."). A similar problem not explicitly identified in the manuals may occur when an interrogator asks a rape suspect if an intoxicated rape victim was able to consent. If the issue at trial is the alleged victim's level of intoxication, then the suspect's admission that the victim was "probably not" able to consent may not be meaningful unless corroborated by the suspect's description of the victim's physical movements, etc. *See id.*

[303] *See id.* at 46–48.

[304] *See id.* at 417.

[305] *See id.* Inbau et al. lend support to the notion that an interrogation is much too complex to examine in the abstract: "for psychological and legal reasons, a confession

Inbau and Reid are careful to instruct interrogators on the legal limits of their interrogation tactics. They explain how to go up to the legal line without crossing it: "[E]ven though overbearing a suspect's free will could, in a broad sense, incorporate cognitive elements, the legal essence of coercion involves real or threatened physical activities."[306] These "physical activities" include real or threatened physical harm, increased prison time, or promises of leniency.[307] While explicit threats or promises are not legally permissible, implying such consequences or benefits is legally permissible: "It should be emphasized that merely discussing real consequences during an interrogation does not constitute [legal] coercion. It is only when the investigator uses real consequences as leverage to induce a confession through the use of threats or promises that coercion may by claimed."[308] Interrogators are thus taught to obtain legally voluntary and thus admissible statements, but this does not necessarily mean that those statements are "trustworthy."[309]

The *Bresnahan* dissent recognized the gap between legally voluntary and factually reliable.[310] Judge Erdmann explained, "[a]lthough Bresnahan's confession was voluntary and therefore admissible at trial, the defense counsel made a colorable showing that there was a reasonable possibility she could raise doubt in the members' minds as to the reliability of that confession."[311] Denied expert assistance, the accused was denied the opportunity to mount a defense against the intuitive notion held by the panel members that a person would not confess to a crime he did not commit.[312] By denying Bresnahan expert assistance, the court denied him a fair opportunity to defend himself.[313]

---

should not be separated from the interrogation that produced it." *See id.* at 412. On the other hand, Inbau et al. would place the ultimate "responsibility of determining whether a confession is true or false . . . upon the investigator who obtained it." *Id.* at 411. If all investigators were truly objective, this suggestion might be worthwhile. However, the reliability of confessions and admissions is an issue for judges or juries to decide. *See* MCM, *supra* note 5, MIL. R. EVID. 304.

[306] *See* INBAU ET AL., *supra* note 2, at 417–18.

[307] *See id.*

[308] *See id.* at 418.

[309] *See id.* at 424.

[310] *See* United States v. Bresnahan, 62 M.J. 137, 148 (2005) (Erdmann, J., and Effron, J., dissenting).

[311] *Id.*

[312] *See* McMurtrie, *supra* note 6, at 1274.

[313] *See Bresnahan*, 62 M.J. at 148 (Erdmann, J., and Effron, J., dissenting).

Confession in the interrogation room does not always equal factual guilt in the courtroom.[314]

H. A More Rational Military Justice System

1. Deception In the Interrogation Room, Distraction in the Courtroom

> [I]nterrogations . . . frequently require the use of psychological tactics and techniques that could well be classified as "unethical," if evaluated in terms of ordinary, everyday social behavior.[315]

Deceptive tactics in the interrogation room distract from the search for truth in the courtroom. This is especially true in the military courtroom because military officers and noncommissioned officers place greater emphasis on ethical values such as respect, honor, and integrity.[316] Deceptive tactics do not go over well with military panels.[317] An accused has the right to expose the unethical methods used by

---

[314] *See id.*

> Confessions, even those that have been found to be voluntary, are not conclusive of guilt. . . . Stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?

Id. (quoting Crane v. Kentucky, 476 U.S. 683, 689 (1986)).

[315] INBAU ET AL., *supra* note 2, at xi–xii.

[316] *See e.g.*, U.S. DEP'T OF ARMY, FIELD MANUAL 1, THE ARMY 1-15 to 1-16 (June 2005).

> The Army is a values-based organization. It upholds principles that are grounded in the Constitution and inspire guiding values and standards for its members. These principles are best expressed by the Army Values . . . .
> . . . .
> RESPECT – Treat people as they should be treated . . . HONOR – Live up to all the Army Values . . . INTEGRITY – Do what's right – legally and morally . . . .

Id.

[317] *See* FM 3-19.13, *supra* note 33, at 4-16.

interrogators even if those methods are legally permissible.[318] Even if unethical conduct by police interrogators does not "sway" the military judge, the panel members "may be more concerned."[319]

In recent years, police training manuals have reluctantly acknowledged that unethical interrogation methods have become a distraction in the courtroom:

> Although lying rarely results in a confession being thrown out, it is frequently a factor used in a deliberation for panel members and judges who are not certain they can completely trust the officer who they know to be a convincing liar . . . . Defense attorneys have become very adept at bringing out lies told during interrogations in courtroom settings and at turning these lies into credibility issues for the panel.[320]

The use of unethical methods in the interrogation room distracts from the search for truth in the courtroom by moving the focus away from the merits of the psychological interrogation model and toward the integrity of the interrogator.[321]

2. A More Rational Approach: Educate the Factfinder

Military courts should encourage the use of experts to frame the arguments of counsel and assist panel members in overcoming their preconceptions concerning interrogation methods and false

---

[318] *See* United States v. Leiker, 37 M.J. 418, 420 (C.M.A. 1993) ("An accused has the right to present evidence at trial about what interrogation techniques were used in order to prove that he was questioned as a suspect rather than as a witness or to establish involuntariness of a statement." (citing Crane v. Kentucky, 476 U.S. 683)).

[319] *See* Steven A. Drizin, *Defending a False or Coerced Confession Case in the Post-DNA Age: What Do You Need to Know to Represent Your Clients Effectively?*, 12 WISCONSIN DEFENDER 4 (2004) (describing how defense counsel are able to develop evidence for use in attacking their clients' confessions); *see also* GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK 37 (2003) ("Although such measures are commonly allowed in American courts, they raise serious questions about the ethical nature of this form of interrogation. Public awareness of this kind of police behaviour must inevitably undermine the public's respect for the professionalism of police officers.").

[320] FM 3-19.13, *supra* note 33, at 4-16.

[321] *See id.*

confessions.[322] *United States v. Houser* provides a model for using social psychology to educate panel members in order to overcome "widely held misconceptions."[323] At trial, the defense brought to the members' attention the rape victim's failure to resist, failure to report immediately, her lack of anxiousness, and her inconsistent acts and statements.[324] The prosecution responded by offering the testimony of a counseling psychologist, Dr. Remer, to explain the counter-intuitive behaviors displayed by someone suffering from rape trauma syndrome.[325] The Court of Military Appeals[326] concluded that the military judge did not abuse his discretion in admitting Dr. Remer's testimony.[327]

The *Houser* court explained that MRE 702[328] is a very liberal standard.[329] The court explained:

> The test is not whether the jury could reach some conclusion in the absence of the expert evidence, but whether the jury is qualified without such testimony "to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject. . . ."[330]

---

[322] *See* United States v. Houser, 36 M.J. 392, 400 (C.M.A. 1993); *see also* McMurtrie, *supra* note 6, at 1273–74 ("[T]he research of social scientists in these areas contains findings that are counter-intuitive and therefore expert testimony can assist the trier of fact.").
[323] *See Houser*, 36 M.J. at 398.
[324] *Id.*
[325] *Id.* at 393, 398–99.
[326] Predecessor to the Court of Appeals for the Armed Forces.
[327] *Houser*, 36 M.J. at 400.
[328] Military Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MCM, *supra* note 5, MIL. R. EVID. 702.
[329] *Houser*, 36 M.J. at 398.
[330] *Id.* (citations omitted).

The court held that rape trauma syndrome was proper subject matter for expert testimony, even though rape trauma syndrome was not recognized in Diagnostic and Statistical Manual III.[331] Dr. Remer testified that rape trauma syndrome was developed by interviewing victims each with varying responses along a "continuum."[332] In other words, rape trauma syndrome is based upon the same "observational, as opposed to experimental, techniques" as false confession theory.[333]

The *Houser* court emphasized that Dr. Remer "was very careful not to confuse or mislead the court members."[334] The court explained:

> Dr. Remer made it clear that her testimony was to give a framework within which to consider the arguments made by the defense in the context of what happens in some rape cases, but she would not usurp the role of the factfinder. . . . Furthermore, Dr. Remer did not violate our prohibition against expert witnesses' testifying about the credibility of the victim.[335]

Military judges could readily apply the same stringent controls to expert testimony on the psychological interrogation tactics employed in a particular case.[336] Military judges could also easily prohibit experts from "testifying about the credibility" of the accused's confession.[337]

---

[331] *See id.* at 396–98; *see also* AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980).
[332] *See id.* at 395–96.
[333] United States v. Hall, 974 F. Supp. 1198, 1205 (C.D. Ill. 1997).

> [T]he science of social psychology, and specifically the field involving the use of coercion in interrogations, is sufficiently developed in its methods to constitute a reliable body of specialized knowledge under Rule 702. While Dr. Ofshe and his peers utilize observational, as opposed to experimental, techniques, this is wholly acceptable in the established field of social psychology.

Id.
[334] *Houser*, 36 M.J. at 400.
[335] *Id.*
[336] *See, e.g.*, *Hall*, 974 F. Supp. at 1205.

> The Court cautions Defendant, however, that it will hold Dr. Ofshe to his word that he will only testify to the correlation between false confessions and the various factors espoused by him. Thus, he can testify that false confessions do exist, that they are associated with the use of certain police interrogation techniques, and that certain of

The CAAF should encourage rational discourse concerning the merits of psychological interrogation by acknowledging the general reliability of false confession theory and the probative value of expert testimony describing psychological interrogation methods.[338] As the *Houser* court explained in reference to rape trauma syndrome evidence, "[s]uch testimony assists jurors in disabusing themselves of widely held misconceptions."[339] The current focus in the courtroom on the integrity of police interrogators and the investigative process detracts from rational decision making.[340] The military justice system would be better served by a more sophisticated analysis of psychological interrogation methods both before and during trial.[341] Defense counsel, of course, must do their part to identify the psychological interrogation methods that police use against their clients and then educate military judges on the link between those methods and the research suggesting that those interrogation methods produce misleading and false confessions.[342] Military courts should then encourage a more rational analysis of those psychological interrogation methods by granting defense motions for employment of expert witnesses able to frame the issues for the factfinder.[343]

IV. Conclusion

Military justice practitioners must strive to fill the "gap in our knowledge as to what in fact goes on in the interrogation room."[344]

> those techniques were used in Hall's interrogation in this case. Dr. Ofshe *cannot* explicitly testify about matters of causation, specifically, whether the interrogation methods used in this case caused Hall to falsely confess. . . . Dr. Ofshe will simply provide the framework which the jury can use to arrive at its own conclusions.

Id.

[337] *See id.*

[338] *See* McMurtrie, *supra* note 6, at 1271–74; United States v. Hall, 974 F. Supp. 1198, 1205 (C.D. Ill. 1997).

[339] *See Houser*, 36 M.J. at 398.

[340] *See* FM 3-19.13, *supra* note 33, at 4-16.

[341] *See* GOVERNOR'S COMMISSION, *supra* note 7, at 40, 109, 124 (recommending expert assistance to educate police, judges, and attorneys on interrogation methods).

[342] *See* Drizin, *supra* note 319, at 22–24 (listing helpful hints for defending confession cases).

[343] *See* MCM, *supra* note 5, R.C.M. 703(d); *Hall*, 974 F. Supp. at 1205; *Houser*, 36 M.J. at 400.

[344] *See* Miranda v. Arizona, 384 U.S. 436, 448 (1966).

Military law enforcement places great emphasis on collecting confession evidence as a means of solving cases even though this evidence is often unreliable.[345] Most judges and lawyers are uninformed as to the extent of the false confession problem and the psychological interrogation methods at the root of that problem.[346] Justice demands that key players within the military justice system overcome their predisposition against the need for experts to analyze and expose the pseudoscience behind psychological interrogation methods and the consequences of those methods.[347]

The time for uninformed skepticism is over. The false confession problem is real. Because of the work of organizations such as the *Innocence Project*, we now know that false confessions are a leading cause of wrongful conviction and that many innocent people have falsely confessed.[348] We also know that there are many more wrongly convicted people who are never exonerated and a concomitant number of false confessions.[349] A well-reasoned dialogue concerning the merits of psychological interrogation methods is a prerequisite to both reforming interrogation methods and to achieving justice. If during trial, military justice practitioners expose the pseudoscience behind psychological interrogation methods, eventually law enforcement will react by adopting reasonable reforms for the interrogation room.[350] Military law

---

[345] *See* FM 3-19.13, *supra* note 33, at 4-2 ("Although testimonial evidence can be the most beneficial evidence in many investigations, it is also the least reliable form of evidence.").

[346] *See* McMurtrie, *supra* note 6, at 1273-74; *see also* Governor's Commission, *supra* note 7, at 40, 96, 111.

[347] *See id.*

[348] *See supra* Sections II.A–B and accompanying notes.

[349] *See* Sullivan, *supra* note 10, at 120 ("[W]e must face the likelihood that there are a vast number of persons now in our prisons who are innocent of the crimes for which they were convicted.").

[350] *See* FM 3-19.13, *supra* note 33, at 4-16 (advising interrogators against lying to suspects about the existence of fictitious evidence in large part because of the negative emphasis defense attorneys and panel members have placed on such blatantly deceptive tactics during trial.); *see, e.g.*, GOVERNOR'S COMMISSION, *supra* note 7, at 24 (advocating that law enforcement videotape interrogations as one means of combating the false confession problem.). Field Manual 3-19.13 recommends against telling suspects that evidence exists when in fact it does not. *See* FM 3-19.13, *supra* note 33, at 4-16. Instead of outright lying about the existence of evidence, FM 3-19.13 recommends confronting the suspect with "potential evidence." *See id.* This recommendation does not remove deceit from the interrogation room. *See supra* Section III.D and accompanying notes. Deception is fundamental during every stage of psychological interrogation including rapport building, theme development, and using alternative questions. *See id.* Skilled defense attorneys are able to emphasize the inherent deception in psychological

enforcement and the military justice system will benefit from the added scrutiny.

The military justice system needs a more rational means of examining the interrogation process. Counsel must have access to experts who can provide a well-reasoned analysis of the interrogation methods used against a particular accused. Without both expert assistance and expert testimony, the courtroom analysis will continue to focus on the integrity of police interrogators and the investigative process. We can do better. The military courts should encourage rational analysis of the interrogation process both before and during trial; our panel members are capable of deciding whether or not the problems associated with psychological interrogation methods apply to a particular case.[351]

The CAAF's refusal in *United States v. Bresnahan* to craft a rational standard for demonstrating the necessity of expert assistance in this area reveals a fundamental lack of comprehension as to the nature of the pseudoscientific psychological interrogation methods used by military law enforcement.[352] The reality of the false confession phenomenon calls for a more enlightened view of the psychological interrogation methods that too often bring unreliable evidence into the courtroom. The court should adopt a standard similar to the "colorable showing" test suggested by the *Bresnahan* dissent: once the defense has made a "colorable showing" that police interrogators used psychological interrogation methods against an accused, the court should acknowledge the necessity for expert assistance and direct the Government to appoint the expert.[353] By adopting this standard, the CAAF would make tremendous progress toward eliminating pseudoscience from the interrogation room—the same pseudoscience that obscures justice in the courtroom.

---

interrogation, even if interrogators abandon one or more blatantly deceptive tactics. *See id.*

[351] *See* UCMJ art. 25(d)(2) (2005) ("When convening a court-martial, 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.").

[352] *See* McMurtrie, *supra* note 6, at 1271–74.

[353] *See supra* notes 24–25 and accompanying text.

THE DOCTRINE OF COMMAND RESPONSIBILITY AND ITS APPLICATION TO SUPERIOR CIVILIAN LEADERSHIP: DOES THE INTERNATIONAL CRIMINAL COURT HAVE THE CORRECT STANDARD?

MAJOR JAMES D. LEVINE II*

I. Introduction

In 1998, the Rome Statute of the International Criminal Court (ICC) codified the doctrine of command, or superior, responsibility in Article 28.[1] Article 28 is unique in the development of the doctrine of superior responsibility in that it specifically provides for different mens rea standards depending upon whether the superior is a military commander or a civilian non-military superior.[2] Providing different standards of knowledge has met with some controversy and concern.[3]

---

* Judge Advocate, U.S. Army. Presently assigned as the Brigade Judge Advocate, 2d Brigade Combat Team, 3d Infantry Division, Fort Stewart, Ga., currently deployed in support of Operation Iraqi Freedom. LL.M., 2006, The Judge Advocate General's Legal Center and School, United States Army, Charlottesville, Va.; J.D., 1997, Quinnipiac University School of Law; B.A., 1990, University of California at Santa Barbara. Previous assignments include Defense Counsel, Darmstadt, Germany, 2003–2005; Trial Counsel, I Corps and Fort Lewis, Fort Lewis, Wash., 2001–2003; Administrative Law Attorney, I Corps and Fort Lewis, Fort Lewis, Wash., 2001; Physical Evaluation Board Soldiers' Counsel, I Corps and Fort Lewis, Fort Lewis, Wash., 2000–2001; Legal Assistance Attorney, I Corps and Fort Lewis, Fort Lewis, Wash., 2000; Platoon Leader, 15th Transportation Company, Fort Sill, Ok., 1993–1994; Platoon Leader, 418th Transportation Company, Somalia, 1993; Platoon Leader, 471st Transportation Company, Fort Sill, Ok., 1992–1993. Member of the bars of Connecticut and the U.S. District Court for the District of Connecticut. This article was submitted in partial completion of the Master of Laws requirements of the 54th Judge Advocate Officer Graduate Course.

[1] Rome Statute of the International Criminal Court art. 28, July 17, 1998, 2187 U.N.T.S. 90, 106 (1998) [hereinafter Rome Statute].

[2] *Id.* art. 28(1)(a), (2)(a).

[3] *See* Kai Ambos, *Superior Responsibility*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 863–70 (Antonio Casesse et al. eds., 2002); Norman Dorsen & Jerry Fowler, *The International Criminal Court: An Important Step Toward Effective International Justice*, *in* ACLU INT'L CIVIL LIBERTIES REP. (May 1999), *available at* http://www.aclu-sc.org/attach/i/Intl_CivLib_Report_1999.pdf; Matthew Lippman, *The Evolution and Scope of Command Responsibility*, 13 LEIDEN J. INT'L L. 139, 165 (Mar. 2000); Per Saland, *International Criminal Law Principles*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE ISSUES: NEGOTIATIONS, RESULTS 189, 204 (Roy S. Lee ed., 1999); Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)*, 25 YALE J. INT'L L. 89, 93–94, 120–24 (2000).

The doctrine of superior responsibility holds a superior criminally responsible for the criminal conduct of his subordinates.[4] Command responsibility can be subdivided into two different types of responsibility, direct and indirect.[5] Direct responsibility involves holding a superior criminally responsible for issuing unlawful orders.[6] Indirect or imputed criminal responsibility involves holding a superior criminally responsible for failing to take action in order to prevent criminal activity of subordinates, investigate allegations of criminal activity of subordinates, and report or punish subordinates who are found to have committed criminal acts.[7] This article will focus on the indirect or imputed form of superior responsibility.[8] Criminal responsibility is based on the superior's omissions.[9] The doctrine consists of three general elements: (1) the existence of a superior-subordinate relationship; (2) actual or constructive knowledge of the superior that a criminal act was about to be or had been committed; and (3) failure by the superior to take reasonable and necessary measures to prevent the crimes or punish the wrongdoers. These will be explored further during the course of the article.

---

[4] Prosecutor v. Delalic (Čelebici), Case No. IT-96-21-T, Judgement, ¶ 333 (Nov. 16, 1998); M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 290 (2003); M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 345 (1996).

[5] BASSIOUNI, *supra* note 4, at 290; L. C. Green, *Command Responsibility in International Humanitarian Law*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 319, 320 (1995); BASSIOUNI & MANIKAS, *supra* note 4, at 345; Major William H. Parks, *Command Responsibility for War Crimes*, 62 MIL L. REV. 1, 2 (1973).

[6] BASSIOUNI, *supra* note 4, at 290; Green, *supra* note 5, at 320.

[7] BASSIOUNI, *supra* note 4, at 290–91; Green, *supra* note 5, at 320.

[8] This article will refer to the doctrine of imputed command or superior responsibility as superior responsibility. The doctrine is better known as command responsibility and any mention or references to that term are used interchangeably with superior responsibility. This article adopts the use of the term superior responsibility from a suggestion first read in W.J. Fenrick, *Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT'L L. 103, 110 n.21 (1995) [hereinafter Fenrick, *Prosecutions Before the ICTY*], in which Fenrick states: "it is possible that a new term of art such as superior responsibility should be developed," and next uncovered in Ambos, *supra* note 3, at 824 n.1, referring to Fenrick's article and footnote. Because this article is focusing on the civilian superior and how the doctrine is applied to them, use of the term superior is chosen over the word command to encompass a broader category of individuals. *See also* Sonja Boelaert-Suominen, *Prosecuting Superiors for Crimes Committed by Subordinates: A Discussion of the First Significant Case Law Since the Second World War*, 41 VA. J. INT'L L. 747, 750 (2001).

[9] BASSIOUNI, *supra* note 4, at 293–94; Ambos, *supra* note 3, at 824.

This article will address the creation of a different mens rea standard for civilian superiors in Article 28 and discuss whether in fact this change really increases the difficulty of a successful prosecution. Part II will provide an overview of the historical development of the doctrine of superior responsibility. The modern application of the doctrine will be discussed in Part III. Part IV will examine the elements of the superior responsibility doctrine as identified in Article 28 of the Rome Statute. Finally, in Part V, three scenarios will be presented involving civilian superiors and subordinate criminal conduct, and then Article 28 will be applied and a potential result discussed.

II. Historical Development of the Doctrine of Superior Responsibility

A. Pre-World War II

The idea of holding a commander criminally liable for the actions of his subordinates emerges from the concept of command responsibility, that is, the notion that a commander is generally responsible for his command.[10] The doctrine of command responsibility can be traced back in time to the writings of Sun Tzu.[11] An early recording of the concept of superior responsibility for the actions of others was made by Grotius, who stated that "[a] community, or its rulers, may be held responsible for the crime of a subject if they know of it and do not prevent it when they could and should prevent it."[12] The doctrine continued to develop in Europe by identifying individuals in command as potentially criminally liable for their orders to subordinates and their subordinates' criminal behavior.[13] For instance, in 1439, King Charles VII of France issued the following ordinance:

> The King orders that each captain or lieutenant be held responsible for the abuses, ills and offences committed by members of his company, and that as soon as he

---

[10] *See* William J. Fenrick, *Article 28*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 515, 516 (Otto Triffterer ed., 1999) [hereinafter Fenrick, *Article 28*]; Parks, *supra* note 5, at 2.

[11] *See* BASSIOUNI & MANIKAS, *supra* note 4, at 351; Parks, *supra* note 5, at 3–4.

[12] 2 HUGO GROTIUS, DE JURE BELLI AC PACIS 523 (James Brown Scott ed., Francis W. Kelsey trans., 1925) (1625). Grotius also stated: "With respect to toleration we must accept the principle that he who knows of a crime, and is able and bound to prevent it but fails to do so, himself commits a crime." *Id.*

[13] *See* Parks, *supra* note 5, at 4–5 (providing an overview and application of the doctrine).

> receives any complaint concerning any such misdeed or abuse, he bring the offender to justice so that the said offender be punished in a manner commensurate with his offence, according to these Ordinances. If he fails to do so or covers up the misdeed or delays taking action, or if, because of his negligence or otherwise, the offender escapes and thus evades punishment, the captain shall be deemed responsible for the offence as if he had committed it himself and shall be punished in the same way as the offender would have been.[14]

In the United States, an early pronouncement of the doctrine can be found in the eleventh article of the 1775 Massachusetts Articles of War, providing that:

> Every Officer commanding, in quarters, or on a march, shall keep good order, and to the utmost of his power, redress all such abuses or disorders which may be committed by any Officer or Soldier under his command; if upon complaint made to him of Officers or Soldiers beating or otherwise ill-treating any person, or committing any kind of riots to the disquieting of the inhabitants of this Continent, he, the said commander, who shall refuse or omit to see Justice done to this offender or offenders, and reparation made to the party or parties injured, as soon as the offender's wages shall enable him or them, upon due proof thereof, be punished, as ordered by General Court-Martial, in such manner as if he himself had committed the crimes or disorders complained of.[15]

---

[14] Green, *supra* note 5, at 321 (quoting ORDONNANCES DES ROIS DE FRANCE DE LA TROISIEME RACE (Louis Guillaume de Vilevault & Louis de Brequigny eds., 1782)).

[15] *See* Parks, *supra* note 5, at 5. This language was further adopted by the American Articles of War in 1775 and 1776. *Id.* For further examples of the adoption of the command responsibility doctrine in the United States, and its application from the War of 1812 through the American presence in the Philippines in the 1900s, *see id*. at 6–10.

In 1907, the doctrine received implicit recognition in the Fourth Hague Convention respecting the laws and customs of war on land.[16] Article 1 of the Annex to the Convention provides that in order for an armed force to receive the rights of a lawful belligerent, it must be "commanded by a person responsible for his subordinates."[17] In addition to recognizing the importance of a responsible commander, the Convention also imposed upon an occupying commander the responsibility to maintain public order and safety.[18] While not specifically addressing or defining the responsibility of a commander for the actions of his subordinates, Article 3 of the Convention recognized the responsibility of a nation for "all acts committed by persons forming part of its armed forces."[19]

After the end of hostilities at the conclusion of World War I, the first international attempt was made to hold commanders accountable for the crimes of their subordinates.[20] The Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties presented a report recommending the creation of an international tribunal to prosecute violators of the laws and customs of war arising out of World War I.[21] One conclusion of the report was that "[a]ll persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution."[22] Due to objection and disagreement of some commission members, no international tribunal was ever

---

[16] Fenrick, *Article 28*, *supra* note 10, at 516; Yuval Shany & Keren R. Michaeli, *The Case Against Ariel Sharon: Revisiting the Doctrine of Command Responsibility*, 34 N.Y.U. J. INT'L L. & POL. 797, 817 (2002).

[17] Convention (IV) Respecting the Laws and Customs of War on Land, Annex (Regs.), art. 1, Oct. 18, 1907, 36 Stat. 2277, 2295–96, 1 Bevans 631, 643–44 [hereinafter Hague IV].

[18] *Id.* Annex (Regs.), art. 43, 36 Stat. at 2306, 1 Bevans at 651.

[19] Hague IV art. 3, 36 Stat. at 2290, 1 Bevans at 640.

[20] *See* Prosecutor v. Delalic (Čelebici), Case No. IT-96-21-T, Judgement, ¶¶ 335–36 (Nov. 16, 1998); COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 3530 (Yves Sandoz et al. eds. 1987) [hereinafter COMMENTARY TO THE ADDITIONAL PROTOCOLS].

[21] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, Report Presented to the Preliminary Peace Conference, *reprinted in*, 14 AM. J. INT'L. L. 95 (1920) [hereinafter Authors of the War Report]; *see also* Parks, *supra* note 5, at 11.

[22] Authors of the War Report, *supra* note 21, at 117.

formed,[23] but a small number of individuals were tried by the German Supreme Court at Leipzig, Germany.[24]

B. Post-World War II

The first international application of the doctrine of superior responsibility occurred after the conclusion of World War II, at the Nuremburg and Tokyo tribunals.[25] The post-World War II cases are important because they form the foundation and precedent for future development and application of the doctrine. Neither the Nuremberg nor Tokyo charters specifically addressed the concept of holding a superior accountable for the actions of his subordinates,[26] although both addressed the issue of "direct command responsibility."[27] These cases had a

---

[23] *See* BASSIOUNI & MANIKAS, *supra* note 4, at 354; Parks, *supra* note 5, at 12–13. The United States objected to the proposed trial by international tribunal, preferring military tribunals instead. *See* Authors of the War Report, *supra* note 21, at 139–47. Japan objected to prosecution in the case where "the accused, with knowledge and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to, or repressing acts in violation of the laws and customs of war." *Id.* at 152.

[24] *See* Parks, *supra* note 5, at 13–14. Twelve of the forty-five people identified by the allies were tried by the German Supreme Court and six were convicted of various Law of War violations. *Id.*; *see also* Ambos, *supra* note 3, at 828 (pointing out that the Leipzig Trial did not apply the doctrine of superior authority). "The German Reichsgericht did not even know this doctrine and only judged the defendants on the basis of the ordinary rules of participation as laid down in the Strafgesetzbuch." *Id.* Parks concludes that prior to entering into World War II, there existed "a custom of command responsibility, codified in large part by the Hague Conventions of 1907 and the 1929 Red Cross Convention, and with somewhat of a warning based on the essentially unfilled demands of the Versailles Treaty that concepts of command responsibility would be implemented at the conclusion of any future conflict." Parks, *supra* note 5, at 14.

[25] Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 A.J.I.L. 573, 573 (1999); Andrew D. Mitchell, *Failure to Halt, Prevent or Punish: The Doctrine of Command Responsibility for War Crimes*, 22 SYDNEY L. REV. 381, 388 (2000); Shany & Michaeli, *supra* note 16, at 818; Timothy Wu & Yong-Sung Kang, *Criminal Liability for the Actions of Subordinates—The Doctrine of Command Responsibility and its Analogues in United States Law*, 38 HARV. INT'L L.J. 272, 274 (1997).

[26] Mitchell, *supra* note 25, at 388; Shany & Michaeli, *supra* note 16, at 818; Vetter, *supra* note 3, at 105.

[27] Vetter, *supra* note 3, at 105. Both charters contained the following language: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan." *Id.* (quoting Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Charter of the International Military Tribunal, 59 Stat. 1544, 1546, 82 U.N.T.S. 279, 284; Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, at 11).

significant impact in establishing international recognition for and development of the doctrine of command responsibility, specifically holding superior commanders and civilians responsible for the actions of their subordinates.

1. Yamashita

The case which generated the most controversy is that of General Tomoyuki Yamashita.[28] General Yamashita was the commander of the Fourteenth Army Group of the Japanese Imperial Army responsible for the Philippine Islands from 9 October 1944, until he surrendered on 3 September 1945.[29] During this time period, General Yamashita was both the military commander of all Japanese forces in the Philippines and the military governor of the Philippines.[30] On 2 October 1945, General Yamashita was charged with failing to discharge his duties as a commander to control the soldiers of his command from committing atrocities and other crimes against Americans, American allies and Filipinos in the Philippines.[31] At trial, Yamashita denied knowledge of the atrocities committed and asserted that his command and control were

---

[28] *See* BASSIOUNI & MANIKAS, *supra* note 4, at 354–55; Major Bruce D. Landrum, *The Yamashita War Crimes Trial: Command Responsibility Then and Now*, 149 MIL. L. REV. 293, 297–98 (1995); Parks, *supra* note 5, at 22. For a detailed explanation and analysis of the Yamashita case see RICHARD L. LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY (1982); A. FRANK REEL, THE CASE OF GENERAL YAMASHITA (1949); Parks, *supra* note 5, at 22–38.

[29] Transcript of Record at 3519, United States v. Tomoyuki Yamashita, Before the Military Commission Convened by the Commanding General, United States Army Forces, Western Pacific, Oct. 1945-Dec. 1945 [hereinafter Transcript]; *see also* Parks, *supra* note 5, at 22.

[30] *Id.* at 22–23.

[31] Transcript, *supra* note 29, at 31–32. The charge read as follows:

> Tomoyuki Yamashita, General Imperial Japanese Army, between 9 October 1944 and 2 September 1945, at Manila and at other places in the Philippine Islands, while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he, General Tomoyuki Yamashita, thereby violated the laws of war.

Id. at 31.

disrupted by fighting the Americans, distance, time, and the inability to inspect his troops.[32] He was tried by an American military commission of five general officers who convicted him and sentenced him to death by hanging.[33]

Yamashita's defense counsel successfully sought review before the United States Supreme Court.[34] The issues before the Court concerned the lawfulness of the military commission's power to try Yamashita; whether the charge preferred stated an offense in violation of the law of war; and whether Yamashita was provided a fair trial.[35] The Court decided all issues in favor of the United States.[36]

The *Yamashita* trial is of importance in the development of the command responsibility doctrine because it recognized the affirmative duty of a commander to take appropriate measures under the circumstances to ensure his subordinates abide by the law of war; that failing to do so violates the law of war; and that a properly constituted tribunal of another nation has jurisdiction over a former enemy commander.[37]

---

[32] *Id.* at 3654–57.

[33] *Id.* at 4063. None of the general officers were attorneys. *See* Parks, *supra* note 5, at 30. In its opinion, the commission stated:

> Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true in all armies throughout recorded history. It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nonetheless, where murder and rape and vicious, revengeful actions are widespread offenses, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.

Transcript, *supra* note 29, at 4061.

[34] *In re* Yamashita, 327 U.S. 1 (1946).

[35] *Id.* at 6.

[36] *Id.* at 25.

[37] *See* Parks, *supra* note 5, at 37.

2. Tribunals of German War Criminals

In Germany, the trials of German war criminals were conducted by a number of different courts. The most famous was the International Military Tribunal at Nuremberg which tried twenty-two of the most senior German war criminals.[38] Superior responsibility was only an indirect concern before that tribunal.[39] The trials with the greatest impact on the development of the superior responsibility doctrine were those conducted by military tribunals of the four Allied Powers under Allied Control Council Law No. 10 (CCL 10).[40] A number of these cases directly contributed to the development of the doctrine.

In addressing the issue of superior responsibility, the tribunal's judgment in the *High Command Case*[41] expressly rejected a strict liability standard with respect to a commander's transmittal of an order.[42] The judgment also recognized the limited responsibility of commanders of occupied territories.[43] The tribunal required more than the widespread

---

[38] *See* Green, *supra* note 5, at 327–33. The International Military Tribunal was established by the London Charter which provided that: "The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment." Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 7, Aug. 8, 1945, 59 Stat. 1544, 1548, 82 U.N.T.S. 279, 288.

[39] *See* Green, *supra* note 5, at 333.

[40] *See id.* at 333–40; Ambos, *supra* note 3, at 828; Vetter, *supra* note 3, at 106.

[41] United States v. Von Leeb (High Command Case), 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Nuernberg, Oct. 1946–Nov. 1949, at 462 (1951). This case involved the prosecution of fourteen highly ranked German officers for, among other things, war crimes and crimes against humanity. Of particular importance was the responsibility of these individuals for passing illegal orders issued from higher down to their subordinates and for crimes committed by subordinates. *See* Lieutenant Commander Weston D. Burnett, *Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra*, 107 MIL. L. REV. 71, 116 (1985). The illegal orders included ordering the summary execution of captured Soviet political officers, *High Command Case*, and provisions permitting the German army to "liquidate ruthlessly" guerrilla fighters, and to make the prosecution of German soldiers discretionary for crimes committed against enemy civilians. *High Command Case*, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Nuernberg, Oct. 1946–Nov. 1949, at 517, 521, 522. Many of the accused in this case were commanders of occupied territories. *Id.* at 542–43.

[42] *Id.* at 510; *see also* Burnett, *supra* note 41, at 114; Parks, *supra* note 5, at 40, 63–64.

[43] *High Command Case*, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Nuernberg, Oct. 1946–Nov. 1949, at 543. The tribunal stated:

nature of the crimes that the *Yamashita* tribunal relied on to impute knowledge to a superior. In order to be criminally responsible for the crimes of subordinates, their actions needed to be traced back directly to the superior or the superior's failure to properly supervise amounted to criminal negligence on his part.[44]

> Military subordination is a comprehensive but not conclusive factor in fixing criminal responsibility. The authority, both administrative and military, of a commander and his criminal responsibility are related but by no means coextensive. Modern war such as the last war entails a large measure of decentralization. A high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure. He has the right to assume that details entrusted to responsible subordinates will be legally executed. The President of the United States is Commander in Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command. Criminality does not attach to every individual in this chain of command from that fact alone.

Id. at 543.

[44] *Id.* The tribunal stated:

> There must be a personal dereliction that can occur only where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of international law would go far beyond the basic principles of criminal law as known to civilized nations.
>
> . . . .
>
> We are of the opinion . . . that the occupying commander must have knowledge of these offences and acquiesce or participate or criminally neglect to interfere in their commission and that the offenses committed must be patently criminal.

Id. at 543–45; *see also* Christopher N. Crowe, *Command Responsibility in the Former Yugoslavia: The Chances for Successful Prosecution*, 29 U. RICH. L. REV. 191, 215 (1994). The tribunal found Von Leeb not guilty of implementing one order because "[h]e did not disseminate the order. He protested against it and opposed it in every way short of open and defiant refusal to obey." *High Command Case*, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Nuernberg, Oct. 1946–Nov. 1949, at 557. However, he was found guilty of implementing another order "by passing it into the chain of command," and not opposing the order or attempting to prevent it from being carried out. *Id.* at 560.

In the *Hostage Case*,[45] the tribunal found a commander criminally responsible for actions of his subordinates because of information he should have known.[46] Knowledge was imputed to him because of the reports that were received by his command which should have put him on notice that war crimes were taking place, or at the least that he needed more information to determine what exactly was going on within his area of responsibility.[47]

The French tribunal applied the superior responsibility doctrine to a civilian superior in the *Roechling* case.[48] Hermann Roechling was a German civilian industrialist who before the war owned an important steel works company.[49] During the war, he was ultimately appointed to head the German steel production in Germany and the occupied countries. Roechling utilized the services of prisoners of war and

---

[45] United States v. List (Hostage Case), 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Nuernberg, Oct. 1946–Nov. 1949, at 759 (1951). This case involved twelve German generals prosecuted for war crimes and crimes against humanity committed by soldiers under their command in Greece, Yugoslavia, and Albania. *Id.* at 765–76. The defendants claimed that orders or reports, some of which involved the killing of prisoners as a means of suppressing resistance and in reprisal for the killing of German soldiers, directed to them did not come to their attention and denied responsibility for some acts charged because they were away from their headquarters at the time committed. *Id.* at 1259, 1265–69.

[46] *See* Crowe, *supra* note 44, at 219–20.

[47] *See id.* at 219; Burnett, *supra* note 41, at 114. With respect to Field Marshal List, the tribunal concluded that as the commanding general of occupied territory he had a duty to maintain peace and order in the area of his command. *Hostage Case*, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Nuernberg, Oct. 1946–Nov. 1949, at 1271. Additionally, in discussing the responsibilities of a commander, the tribunal stated:

> He is charged with notice of occurrences taking place within that territory. He may require adequate reports of all occurrences that come within the scope of his power and, if such reports are incomplete or otherwise inadequate, he is obliged to require supplementary reports to apprize him of all the pertinent facts. If he fails to require and obtain complete information, the dereliction of duty rests upon him and he is in no position to plead his own dereliction as a defense.

Id. The tribunal convicted List based on his broad authority and responsibility as the commander of an occupied territory and his failure to keep himself informed and to read reports sent to him detailing the war crimes being committed in his area of responsibility. *See* Burnett, *supra* note 41, at 112.

[48] France v. Roechling, 14 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, app. B at 1061 (1951).

[49] *Id.* at 1077.

deportees.[50] The tribunal found Roechling guilty as a superior for the conditions that the workers lived and worked under at a number of steel plants, because even though it was his duty and responsibility, he did nothing to improve the "miserable situation."[51] Roechling's son-in-law was also found guilty of inhuman treatment of these workers because he failed to take any action to improve their situation and the tribunal specifically found that his relation to Roechling gave him sufficient authority "to obtain an alleviation in the treatment of these workers."[52]

3. International Military Tribunal for the Far East (Tokyo Tribunal)[53]

The Tokyo Tribunal further developed the application of superior responsibility to civilian superiors.[54] Responsibility to civilian superiors

---

[50] *Id.* at 1077–80.

[51] *Id.* at 1088–89. The tribunal stated:

> Whereas Roechling is not accused of having ordered this abominable treatment but of having tolerated it and of not having done anything in order to have it modified;
>
> . . . .
>
> [T]hat it was his duty as the head to inquire into the treatment accorded to the foreign workers and to the prisoners of war whose employment in his war plants was, moreover, forbidden by the rules of warfare, of which fact he must have been aware; that he cannot escape his responsibility by stating that the question had no interest for him; that his double position as chief of an important industry and as president of the RVE would have given him the necessary authority to bring about changes in the inhuman treatment of these workers; that witnesses have stated that several times he had the opportunity to ascertain what the condition of his personnel was during his visits to the plants; that he himself states that he came in contact with these men from Voelklingen, particularly with the internees from Etzenhofen, who were recognizable by the prison garb, but that he had never considered the condition of their existence, although their miserable situation was apparent to all those who passed them on the street.

Id.

[52] *Id.* at 1092.

[53] The International Military Tribunal for the Far East (IMTFE), known as the Tokyo Tribunal, was established to prosecute the only the major Japanese war crimes suspects charged with crimes against peace. KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW 19 (2001). Like the Nuremberg Tribunal, it created its own charter. *Id.*

[54] *See* Ambos, *supra* note 3, at 830; Lippman, *supra* note 3, at 145.

was applied with respect to the proper treatment of prisoners of war.[55] The Tokyo Tribunal adopted an actual or constructive knowledge requirement, thereby refining and replacing the *Yamashita* standard.[56] If a government official had knowledge of war crimes, he was required to take positive action to address the criminal activity.[57] Also, senior government officials could not rely on assurances that criminal activity would be stopped and ignore continued reports of continued activity.[58] The Tokyo Tribunal essentially clarified the responsibility of civilian government officials as to their duty to take affirmative action to prevent or punish subordinates who fail to abide by international or domestic law.[59]

---

[55] *See* Ambos, *supra* note 3, at 830; Lippman, *supra* note 3, at 145.

[56] Lippman, *supra* note 3, at 146. In the case of Shimada Shigetaro, Navy Minister from 1941 to 1944, he was acquitted based on a lack of knowledge with regards to the murders of prisoners. *Id.*

[57] *Id.* at 146. The application of the tribunal's knowledge standard is not without criticism. *See, e.g.*, Ambos, *supra* note 3, at 831 (discussing the case of Mamoru Shigemitsu, Minister of Foreign Affairs from 1943 to 1945, found guilty because he had knowledge of mistreatment of prisoners of war and as a member of the government he had a special responsibility for their well being); *see also* 2 THE TOKYO JUDGMENT: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (IMTFE) 1133–38 (B.V.A. Roling & C.F. Ruter eds., 1977) [hereinafter THE TOKYO JUDGMENT].

[58] Lippman, *supra* note 3, at 146–47. Illustrating this principle is the case of Koki Hirota, Foreign Minister from 1933 to 1936, after learning of the mistreatment of prisoners was assured by the War Ministry that this conduct would stop. *Id.* The tribunal found his reliance on these assurances and inaction amounted to criminal negligence. *Id.* This case is also criticized with the leading critic Judge Roling who authored a dissent in this case. *See* 2 THE TOKYO JUDGMENT, *supra* note 57, at 1121–27.

[59] *See* Fenrick, *Prosecutions Before the ICTY*, *supra* note 8, at 118. Fenrick argues that the Tokyo Tribunal's decision with respect to civilian superior responsibility stands for the following:

> (1) once the veil of statehood is pierced, international law may impose obligations on political and bureaucratic leaders in the same way that it imposes obligations on military leaders; (2) political and bureaucratic leaders may be held responsible for the acts of subordinates when they have ordered the commission of these acts; (3) political and bureaucratic leaders may be held responsible for the acts of subordinates when the leaders have a relationship with subordinates similar to those of a military commander and they fail to act to prevent or punish; and (4) political and bureaucratic leaders may be held responsible for the acts of subordinates when the leaders have a duty established either directly by international law or indirectly by domestic law or practice to ensure that their subordinates comply with the law and the leaders fail to fulfill that duty.

C. Geneva Conventions—1949

Despite the application and the development of the superior responsibility doctrine in the post-World War II trials, the Geneva Conventions of 1949[60] were silent on the doctrine.[61] It has been argued that this failure, coupled with the widespread nature of the civil wars of the time, led to a decline in the use of the doctrine for the next thirty-plus years.[62]

D. Field Manual 27-10, Section 501

In 1956, the United States Army addressed the doctrine in its Field Manual (FM) on the Law of Land Warfare. Paragraph 501 of that manual states:

> In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander. Such a

---

Id.

[60] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[61] *See* Bantekas, *supra* note 25, at 574; Mitchell, *supra* note 25, at 394. For an examination of the duties and requirements for military commanders that the Geneva Conventions of 1949 do specify, see Burnett, *supra* note 41, at 135–39.

[62] *See* Bantekas, *supra* note 25, at 574–75; Mitchell, *supra* note 25, at 394–95. Many of the civil wars fought during this time involved rebel armies lacking the formal command structures found in national armies thus prohibiting the application of superior responsibility because of the difficulty in identifying commanders or superiors. Bantekas, *supra* note 25, at 574–75. Bantekas also identifies the political environment of the times and "the political implications of such charges," as contributing factors to the decline in the use of the doctrine and refers to the case of United States Army Captain Medina as an example of national reluctance to convict officers for the crimes of their subordinates. *Id.* at 574, 574 n.14; *see infra* Part II.E for a discussion of the Medina case.

> responsibility arises directly when the acts in question have been committed in pursuance of an order of the commander concerned. The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.[63]

As paragraph 501 indicates, the Army adopted the mens rea requirement that a commander should have been aware of war crime violations of those under his control through reports received by him or through other means. This standard reflects that adopted by the tribunal in the *Hostage Case*.[64]

E. Vietnam

In 1971, the U.S. Army brought to trial Captain Ernest Medina, a company commander, for responsibility of his subordinates' actions in the My Lai massacre.[65] The controversial aspect of this case related to the doctrine of command responsibility and the military judge's instructions to the panel.[66] The military judge's instructions concerning the responsibility of the commander stated:

> In relation to the question pertaining to the supervisory responsibility of a Company Commander, I advise you that as a general principle of military law and custom a military superior in command is responsible for and required, in the performance of his command duties, to

---

[63] U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE ¶ 501 (18 July 1956).
[64] *See supra* notes 45–47 and accompanying text.
[65] United States v. Medina, 43 C.M.R. 243 (C.M.A. 1971). For more history of the facts surrounding the My Lai massacre, *see* WILLIAM R. PEERS, THE MY LAI INQUIRY (1979); MICHAEL R. BELKNAP, THE VIETNAM WAR ON TRIAL: THE MY LAI MASSACRE AND COURT-MARTIAL OF LIEUTENANT CALLEY (2002).
[66] *See* BASSIOUNI & MANIKAS, *supra* note 4, at 362–63; Bantekas, *supra* note 25, at 574 n.14; Kenneth A. Howard, *Command Responsibility for War Crimes*, 21 J. PUB. L. 7, 7 (1972) (Howard was the military judge in the Medina case.).

> make certain the proper performance by his subordinates of their duties as assigned by him. In other words, after taking action or issuing an order, a commander must remain alert and make timely adjustments as required by a changing situation. Furthermore, a commander is also responsible if he has actual knowledge that troops or other persons subject to his control are in the process of committing or are about to commit a war crime and he wrongfully fails to take the necessary and reasonable steps to insure compliance with the law of war. You will observe that these legal requirements placed upon a commander require actual knowledge plus a wrongful failure to act. Thus mere presence at the scene without knowledge will not suffice. That is, the commander subordinate relationship alone will not allow an inference of knowledge. While it is not necessary that a commander actually see an atrocity being committed, it is essential that he know that his subordinates are in the process of committing atrocities or are about to commit atrocities.[67]

This instruction makes actual knowledge a requirement for conviction in contrast to the "should have knowledge" language of FM 27-10.[68] Captain Medina was acquitted of all charges.[69]

F. Additional Protocol I, Geneva Conventions (1977)

The first international codification of the doctrine occurred in 1977, in Additional Protocol I to the Geneva Conventions of 12 August 1949.[70] With respect to the doctrine, there were differing views as to the knowledge element and what standard would apply.[71] The conference

---

[67] Howard, *supra* note 66, at 10–11.
[68] *See supra* notes 63–64 and accompanying text.
[69] Homer Bogart, *Medina Found Not Guilty of All Charges on Mylai*, N.Y. TIMES, Sept. 23, 1971, at 1.
[70] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) arts. 86, 87, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].
[71] *See* COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 20, ¶ 3545 n.31; LAEL, *supra* note 28, at 134; Crowe, *supra* note 44, at 224–25.

adopted the *Hostage Case* precedent and rejected two proposals for a should-have-known standard.[72]

1. Article 86

Article 86 of Additional Protocol I is entitled "Failure to Act" and states:

> 1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.
> 2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.[73]

Article 86 refers to "superiors" and is not limited to military superiors.[74]

2. Article 87

Article 87 provides actual duties for commanders to follow regarding the issue of possible breaches of the Conventions.

> 1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and,

---

[72] *See* LAEL, *supra* note 28, at 134; Crowe, *supra* note 44, at 225. The United States proposal stated: "If they knew or should reasonably have known in the circumstances at the time." COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 20, ¶ 3545 n.31.
[73] Protocol I, *supra* note 70, art. 86.
[74] *See* COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 20, ¶¶ 3540–48.

> where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.
> 2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
> 3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.[75]

Although an important step in the development of International Humanitarian Law and imposing obligations upon the parties to a conflict, Additional Protocol I is not without its shortcomings. Additional Protocol I failed to provide for international jurisdiction over breaches of its provisions, therefore, the creation of a means to enforce this agreement would require further international consensus.[76] Additionally, the United States has not ratified Additional Protocol I and has objected to certain articles contained therein.[77]

G. Lebanon—Sabra & Shatilla Massacre

Between September 16 and September 18, 1982, at the Sabra and Shatilla refugee camps in Beirut, Lebanon, over 800 Palestinian and

---

[75] Protocol I, *supra* note 70, art. 87.
[76] Fenrick, *Prosecutions Before the ICTY*, *supra* note 8, at 104 (quoting the ICRC's preliminary remarks made on the setting up of an International Tribunal for the former Yugoslavia in 1993 and the need to rely on a United Nations' resolution rather than existing international humanitarian law).
[77] Howard S. Levie, *The 1977 Protocol I and the United States*, 38 ST. LOUIS U. L.J. 469 (1993). The United States does not object to either Articles 86 or 87. Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL. 419 (1987).

Lebanese civilians were killed.[78] These killings were carried out by the Lebanese Christian Phalangists in response to the assassination of their leader a few days earlier.[79] These events transpired in the course of the Israeli invasion of Lebanon in order to destroy the Palestine Liberation Organization's military infrastructure located there.[80] The Israeli and Phalangist forces worked together to control Beirut.[81] Despite concerns about potential harm to the inhabitants of the camps by the Phalangists, the decision was made by the Israeli military, including the Minister of Defence Ariel Sharon, to allow the Phalangists to enter the refugee camps without Israeli Defence Forces (IDF) accompanying them.[82] After the massacre was discovered, Israel established a Commission of Inquiry (the Kahan Commission), headed by the President of the Supreme Court, to look into the details of what transpired.[83]

The Commission concluded that direct responsibility for the massacre belonged to the actual perpetrators—the Phalangist militia.[84] More importantly for purposes of superior responsibility, the Commission also concluded that "everyone who had anything to do with events in Lebanon should have felt apprehension about a massacre in the camps, if armed Phalangist forces were to be moved into them without the I.D.F. exercising control and effective supervision and scrutiny of them."[85] Clearly finding the doctrine of command responsibility applicable to Israeli military authorities,[86] the Commission also found

---

[78] Final report of the Commission of Inquiry into the Events at the Refugee Camps in Beirut (1983) (Authorized Translation), *reprinted in* 22 I.L.M. 473, 491 (1983) [hereinafter Kahan Report].
[79] *Id.* at 473–74.
[80] *Id.* at 476–77.
[81] *Id.* at 477–78.
[82] *Id.* at 479–81; *see also* Green, *supra* note 5, at 361–62.
[83] Kahan Report, *supra* note 78, at 473; *see also* Green, *supra* note 5, at 362.
[84] Kahan Report, *supra* note 78, at 493.
[85] *Id.* at 498.
[86] *Id.* at 496. In its report, the Commission responded to objections voiced over finding any indirect responsibility on the part of Israel if no direct responsibility on Israel's part were found by stating:

> [T]hose who made the decisions and those who implemented them are indirectly responsible for what ultimately occurred, even if they did not intend this to happen and merely disregarded the anticipated danger. . . . It is also not possible to absolve of such indirect responsibility those persons who, when they received the first reports of what was happening in the camps, did not rush to prevent the continuation of the Phalangists' actions and did not do everything within their power to stop them.

that the Israeli Defence Minister shared responsibility for the decision to allow the Phalangists to enter the camps.[87] The Commission, however, did not find the Defense Minister responsible for failing to do more in response to learning of the atrocities being committed.[88] As a result of the Commission's report, Sharon was forced to resign as the Defense Minister, but remained in Prime Minister Menachem Begin's cabinet as a Minister without portfolio.[89]

III. Modern Application

A. International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)

The first application of the command responsibility doctrine by international criminal tribunals to crimes unrelated to World War II has taken place at the ICTY and ICTR.[90] These ad hoc tribunals were created by the United Nations as a result of the international discovery of widespread ethnic violence and atrocities committed in the former Yugoslavia and Rwanda respectively.[91]

Id.

[87] *Id.* at 502–03. Regarding Defense Minister Sharon, the Commission stated:

> It is our view that responsibility is to be imputed to the Minister of Defense for having disregarded the danger of acts of vengeance and bloodshed by the Phalangists against the population of the refugee camps, and having failed to take this danger into account when he decided to have the Phalangists enter the camps. In addition, responsibility is to be imputed to the Minister of Defense for not ordering appropriate measures for preventing or reducing the danger of massacre as a condition for the Phalangists' entry into the camps. These blunders constitute the nonfulfillment of a duty with which the Defense Minister was charged.

Id. at 503.

[88] *Id.* at 503; s*ee* Green, *supra* note 5, at 367 (arguing that the Commission's decision to not hold Sharon responsible for making further inquiries at that time a political decision).

[89] Shany & Michaeli, *supra* note 16, at 797. The Commission recommended that Sharon resign as defense minister and if not that Prime Minister Menachem Begin consider removing him from office. Kahan Report, *supra* note 78, at 519.

[90] Boelaert-Suominen, *supra* note 8, at 784.

[91] *See* BASSIOUNI, *supra* note 4, at 422–34.

Both the ICTY and ICTR have articles in their respective statutes addressing the superior responsibility doctrine.[92] The language of these two statutes is almost identical.[93] Both make a superior criminally responsible for identified crimes of a subordinate if the superior "knew

---

[92] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 art. 7(3), May 25, 1993, 32 I.L.M. 1192, 1194 [hereinafter ICTY Statute]; Statute of the International Tribunal for Rwanda art. 6(3), Nov. 8, 1994, 33 I.L.M. 1602, 1604–05 [hereinafter ICTR Statute]. The military regulations of the Socialist Federal Republic of Yugoslavia (SFRY) concerning the application of the international law of war to the armed forces dated 1988 include a paragraph entitled Responsibility for the acts of subordinates which states:

> The commander is personally responsible for violations of the law of war if he knew or could have known that his subordinate units or individuals are preparing to violate the law, and he does not take measures to prevent violations of the law of war. The commander who knows that the violations of the law of war took place and did not charge those responsible for the violations is personally responsible. In case he is not authorized to charge them, and he did not report them to the authorized military commander, he would also be personally responsible.
> A military commander is responsible as a participant or an instigator if, by not taking measures against subordinates who violate the law of war, he allows his subordinate units and individuals to continue to commit the acts.

Federal Secretariat for National Defence, Regulations Concerning the Application of the International Law of War to the Armed Forces of SFRY art. 21 (1988), *reprinted in* BASSIOUNI & MANIKAS, *supra* note 4, at 661.

[93] Article 7(3) of the ICTY Statute states:

> The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

ICTY Statute, *supra* note 92, at 1194. Article 6(3) of the ICTR Statute states:

> The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

ICTR Statute, *supra* note 92, at 1604–05.

or had reason to know that the subordinate was about to commit such acts or had done so,"[94] and then failed to prevent the acts or "to punish the perpetrators thereof."[95]

B. ICTY & ICTR Jurisprudence

The Trial Chambers of both the ICTY and ICTR have addressed the doctrine of superior responsibility and dealt specifically with its application to civilian and non-military superiors. A review of their decisions provides a view of the modern development of the doctrine and some of the specific areas that have been addressed.

As to the applicability of ICTY Article 7(3) and ICTR Article 6(3) to civilians, the Tribunals have determined that superior responsibility applies to both military commanders and civilian superiors in positions of authority.[96] In determining whether an individual is a superior for purposes of criminal responsibility, it is the actual possession or non-possession of powers of effective control over the actions of the individual's subordinates that is dispositive.[97] As stated previously, one of the elements of the superior responsibility doctrine requires a senior-subordinate relationship between the accused superior and the subordinate perpetrator of the crime. This element is crucial because the doctrine exists to punish the superior for failing to take action against the subordinate perpetrator.

One way to determine whether such a relationship exists, especially in the non-military situation, is to examine the "effective control" that the superior has over the subordinate. The ICTY Trial Chamber has held that "in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons

---

[94] ICTY Statute, *supra* note 92, at 1194; ICTR Statute, *supra* note 92, at 1604–05.
[95] ICTY Statute, *supra* note 92, at 1194; ICTR Statute, *supra* note 92, at 1604–05.
[96] Prosecutor v. Musema, ICTR Case No. 96-13-T, Judgement & Sentence, ¶¶ 127–48, 864, 866 (Jan. 27, 2000); Prosecutor v. Kayishema & Ruzindana, Case No. ICTR 95-1-T, Judgement, ¶¶ 213–16 (May 21, 1999); Prosecutor v. Delalic (Čelebici), Case No. IT-96-21-A, Judgement, ¶¶ 195-96, 240 (Feb. 20, 2001); Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgement, ¶ 75 (June 25, 1999); Prosecutor v. Delalic (Čelebici), Case No. IT-96-21-T, Judgement, ¶ 363 (Nov. 16, 1998);
[97] Prosecutor v. Halilović, Case No. IT-01-48-T, Judgement, ¶ 58 (Nov. 16, 2005); Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgement, ¶ 301 (Mar. 3, 2000); *Aleksovski*, Case No. IT-95-14/1-T, Judgement, ¶ 76; *Čelebici*, Case No. IT-96-21-A, ¶ 197; *Čelebici*, Case No. IT-96-21-T, Judgement, ¶ 370.

committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of the offenses."[98] The formal designation as a commander is not controlling, as this authority can be either de jure or de facto.[99] Furthermore, even if the perpetrators were not the direct subordinates of the superior, he could still be criminally responsible for their actions "insofar as he exercises effective control over them."[100] In reaching these conclusions, the ICTY Trial Chamber in *Čelebici* examined the post-World War II precedent and some of the questionable results where individuals with mere powers of influence or persuasion were found guilty under the superior responsibility doctrine.[101] The ICTY approach appears to be a safeguard from stretching the doctrine too far as applied to those non-military commanders.

Knowledge on the part of the superior of offenses committed by his subordinates can be proved by either direct or circumstantial evidence, but can not be presumed.[102] A superior will only be held criminally responsible if the prosecution can prove that there was some specific evidence actually available to him that could have provided notice that his subordinates were planning or committing offenses.[103] It is enough that the information available to the superior indicated that further investigation was required to determine if offenses were being planned or committed.[104]

In terms of how far a superior must go to prevent the commission of offenses by subordinates, the ICTY jurisprudence states that this inquiry must be determined on a case-by-case basis, but that criminal responsibility should attach only when the superior fails "to take such

---

[98] *Blaškić*, Case No. IT-95-14-T, Judgement, ¶¶ 300-01; *Čelebici*, Case No. IT-96-21-T, Judgement, ¶ 378.
[99] *Blaškić*, Case No. IT-95-14-T, Judgement, ¶ 300; *Čelebici*, Case No. IT-96-21-T, Judgement, ¶ 378; *Blaškić*, Case No. IT-95-14-T, Judgement, ¶ 300.
[100] *Blaškić*, Case No. IT-95-14-T, Judgement, ¶ 301.
[101] *Čelebici*, Case No. IT-96-21-T, Judgement, ¶¶ 364-378. The ICTY Trial Chamber specifically discussed the *Roechling* and *Hirota* cases in their examination of precedent. *Id.* ¶ 376. *See also supra* notes 52, 58 and accompanying text.
[102] *Čelebici*, Case No. IT-96-21-T, Judgement, ¶ 386. In *Čelebici*, the trial chamber identified a list of indicia that it could consider in determining whether a superior possessed the required knowledge. *Id.*; *see also Halilović*, Case No. IT-01-48-T, Judgement, ¶ 66; *Blaškić*, Case No. IT-95-14-T, Judgement, ¶ 307.
[103] *Čelebici*, Case No. IT-96-21-T, Judgement, ¶ 393.
[104] *Id.*

measures that are within his material possibility."[105] Those measures possible under the circumstances are required regardless of whether the superior has a recognized legal authority to prevent or punish.[106] Also, the reporting of crimes or suspected activity to appropriate authorities by a civilian superior may satisfy the element requiring the superior to take disciplinary action.[107]

A number of civilian superiors in different positions have been prosecuted in the ICTY and ICTR. Jean Kambanda, the Prime Minister of the Interim Government of Rwanda from 8 April 1994, to 17 July 1994, pled guilty to being responsible for acts of genocide and crimes against humanity.[108] He specifically acknowledged that he participated in numerous meetings with other government officials where the massacres of Tutsis were monitored, but nothing was done to stop them.[109] Omar Serushago, a prominent local civilian and leader of the Interahamwe militia group in the Gisenyi Prefecture, also pled guilty to being responsible for acts of genocide and crimes against humanity in violation of Article 6(3) of the ICTR Statute.[110] A director of a tea factory, Alfred Musema was convicted of acts of genocide and the crime

---

[105] *Id.* ¶ 395; *see Halilović*, Case No. IT-01-48-T, Judgement, ¶ 73; *Blaškić*, Case No. IT-95-14-T, Judgement, ¶¶ 302, 335; Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgement, ¶ 81 (June 25, 1999).

[106] *Halilović*, Case No. IT-01-48-T, Judgement, ¶ 73; *Čelebici*, Case No. IT-96-21-T, Judgement, ¶ 395.

[107] *Aleksovski*, Case No. IT-95-14/1-T, Judgement, ¶ 78. The trial chamber in Aleksovski recognized that a civilian superior's power to discipline subordinates may not be the same as that of a military commander.

> Although the power to sanction is the indissociable corollary of the power to issue orders within the military hierarchy, it does not apply to the civilian authorities. It cannot be expected that a civilian authority will have disciplinary power over his subordinate equivalent to that of the military authorities in an analogous command position. To require a civilian authority to have sanctioning powers similar to those of a member of the military would so limit the scope of the doctrine of superior authority that it would hardly be applicable to civilian authorities.

Id.; *see Blaškić*, Case No. IT-95-14-T, Judgement, ¶¶ 302, 335; *Aleksovski*, Case No. IT-95-14/1-A, Judgement, ¶¶ 70–77.

[108] Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgement & Sentence, ¶ 5 (Sept. 4, 1998).

[109] *Id.* ¶ 39.

[110] Prosecutor v. Serushago, Case No. ICTR 98-39-S, Sentence, ¶ 26 (Feb. 5, 1999).

of extermination committed by the employees of the tea factory.[111] The Musema tribunal found that he had both de jure and de facto control over the employees of the tea factory.[112] In another ICTR case, Clement Kayishema, a prefect in Rwanda, was found guilty as a superior for acts of genocide committed by his subordinates.[113]

In ICTY cases, Zdravko Mucic, a civilian, was found to be the de facto commander of the Čelebici prison-camp and therefore criminally responsible as the superior for the acts of the personnel of the camp.[114] Also, Zlatko Aleksovski the civilian prison warden of the Kaonik prison was held responsible as a superior for the detention conditions and the crimes committed by the guards inside the prison.[115]

The ICTY and ICTR tribunals provide the first application of the law of superior responsibility to actual cases since the end of World War II. The analysis of the trial and appellate chambers in identifying customary international law with respect to superior responsibility and its application to cases involving both international and internal armed conflict, and to both military and civilian superiors, should prove to be an instructive reference when the International Criminal Court begins adjudicating cases involving these issues.[116]

C. International Criminal Court (ICC)

On 17 July 1998, the Statute of the ICC was adopted by the Rome Diplomatic Conference.[117] This marked the culmination of earlier

---

[111] Prosecutor v. Musema, Case No. 96-13-T, Judgement & Sentence, ¶¶ 894–95, 949–51 (Jan. 27, 2000).
[112] *Id.* ¶ 894.
[113] Prosecutor v. Kayishema & Ruzindana, Case No. ICTR 95-1-T, Judgement, ¶¶ 555, 559, 563, 569 (May 21, 1999).
[114] Prosecutor v. Delalic (Čelebici), Case No. IT-96-21-T, Judgement, ¶ 775 (Nov. 16 1998).
[115] Prosecutor v. Aleksovski, Case No. IT-95-14/1-T, Judgement, ¶¶ 118, 138 (June 25, 1999).
[116] In its review of the *Čelebici* case, the ICTY Appellate Chamber made the following recognition of the state of customary law with respect to civilian superiors: "Civilian superiors undoubtedly bear responsibility for subordinate offences under certain conditions, but whether their responsibility contains identical elements to that of military commanders is not clear in customary law." *Čelebici*, Case No. IT-96-21-A, Appeal Judgement, ¶ 240 (Apr. 8, 2003).
[117] Rome Statute for the International Criminal Court Adopted by the United Nations Diplomatic Conference of Plenipotentiares on the Establishment of an International

efforts, beginning with the post-World War I attempt to create an international court to hold responsible those charged with starting that war, the Nuremburg and Tokyo trials after World War II, and the ad hoc trials of the ICTY and ICTR, to the creation of a permanent international criminal court.[118] The goal of the Rome Statute is a court providing "for the effective prosecution and punishment of serious violations of international humanitarian law wherever such abuses may occur and by whomever they may be perpetrated."[119] The Rome Statute entered into force on 1 July 2002.[120]

Of primary importance to the doctrine of superior responsibility is the establishment of Article 28 of the Rome Statute, entitled Responsibility of Commanders and other Superiors.[121] Article 28 of the ICC reads:

> In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:
>
> 1. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control,

---

Criminal Court, 17 July 1998, U.N. Doc. A/CONF. 183/9, *reprinted in* 37 I.L.M. 999. *See also* THE STATUTE FOR THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 39 (M. Cherif Bassiouni ed., 1998).

[118] *See* Antonio Cassese, *From Nuremburg to Rome: International Military Tribunals to the International Criminal Court*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 3–18 (Antonio Cassese et al. eds., 2002).

[119] *Id.* at 18. Under the Rome Statute, the ICC has jurisdiction over the crime of genocide; crimes against humanity; war crimes; and the crime of aggression. Rome Statute, *supra* note 1, art. 5. Article 5 states in part: "The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole." *Id.* The ICC can exercise jurisdiction if a State that is a party to the Rome Statute is: (1) the location of the criminal conduct in question; (2) the State of registration of a vessel or aircraft where the criminal conduct occurred; (3) the State of which the accused person is a national; or (4) a State that is not a party to the statute accepts the jurisdiction of the ICC. *Id.* art. 12. Crimes are brought to the attention of the ICC by: referral to the ICC prosecutor from either a State party to the Rome Statute or the United Nations Security Council; or the prosecutor's independent initiation of an investigation. *Id.* arts. 13, 14, 15.

[120] International Criminal Court, http://www.icc-cpi.int/about/ataglance/history.html (last visited Dec. 5, 2007). As of 17 October 2007, there are 105 countries who are States Parties to the Rome Statute. International Criminal Court, http://www.icc-cpi.int/asp/statesparties.html (last visited Dec. 5, 2007). The United States is not a State Party. *Id.*

[121] Rome Statute, *supra* note 1, art. 28.

> or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
> (a) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
> (b) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
> 2. With respect to superior and subordinate relationships not described in paragraph (1), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates where:
> (a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
> (b) The crimes concerned activities that were within the effective responsibility and control of the superior; and
> (c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.[122]

For the first time, the superior responsibility of civilians is specifically distinguished from that of military commanders.

The doctrine of command responsibility, identified as direct responsibility in the introduction, is also addressed in the Rome Statute, but independent of Article 28. Direct responsibility is covered under Article 25 which is entitled Individual Criminal Responsibility.[123] Article

---

[122] *Id.*
[123] *Id.* art. 25.

25 specifically addresses the individual who orders, solicits, or induces the commission of a covered crime.[124]

D. International Committee of the Red Cross (ICRC)—Customary International Law Study

In a 2005 publication cataloguing customary international law of armed conflict, two ICRC authors addressed the individual responsibility of superiors for the actions of subordinates in their Rule 153.[125] Rule 153 states:

> Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible.[126]

The ICRC interprets a number of points about the doctrine as being established in customary international law. These include: application of the doctrine in both international and non-international armed conflict;[127] liability for both military personnel and civilians under the doctrine;[128] that the command subordinate relationship can be both de jure and de facto;[129] that the doctrine is not limited to the direct knowledge of the superior but also constructive knowledge;[130] that failure to punish subordinates who commit war crimes can result from failing to investigate or report to higher authorities;[131] and that the term "necessary and reasonable measures" is limited to such measures within a superior's

---

[124] *Id.* art. 25(3).
[125] 1 JEAN-MARIE HENCKAERTS & LOUIS DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 558 (2005).
[126] *Id.*
[127] *Id.* at 559–60.
[128] *Id.* at 561.
[129] *Id.*
[130] *Id.* at 561–62.
[131] *Id.* at 562–63.

power to include taking an important step toward dispensing punishment or reporting the matter to competent authorities.[132]

E. Summarizing the Development and Application of Superior Responsibility

The doctrine of superior responsibility has evolved from a general concept of the responsibility of a military commander, to a legal concept of a superior's criminal responsibility for the crimes of subordinates. Responsibility now applies to both military and non-military or civilian superiors. Additionally, the doctrine has evolved from essentially judge or tribunal-crafted law to internationally drafted codifications, most recently that contained in the Rome Statute. Part IV will discuss this most recent codification of the doctrine.

IV. Examination of Civilian Liability under ICC Article 28

This section will examine the elements of the superior responsibility doctrine as they exist in Article 28. As previously stated, the superior responsibility doctrine essentially has three elements: (1) the existence of a superior-subordinate relationship; (2) actual or constructive knowledge of the superior that a criminal act was about to be or had been committed; (3) failure by the superior to take reasonable and necessary measures to prevent the crimes or punish the wrongdoers.[133] Article 28(2)(b) of the Rome Statute addressing non-military superiors arguably creates another element which will be discussed below.[134]

A. The Superior–Subordinate Relationship

Article 28 of the ICC bifurcates the approach to dealing with superiors. Article 28(1) applies to a "military commander or person effectively acting as a military commander,"[135] whereas Article 28(2) applies to "superior and subordinate relationships not described in

---

[132] *Id.* at 563.
[133] *See* Prosecutor v. Delalic (Čelebici), Case No. IT-96-21-T, Judgement, ¶ 346 (Nov. 16, 1998).
[134] *See infra* notes 150 to 157 and accompanying text.
[135] Rome Statute, *supra* note 1, art. 28(1).

paragraph 1."[136] Under Article 28, a factual analysis needs to be undertaken to determine if a civilian (non-military) accused is "effectively acting as a military commander" or not, in order to determine which elements under the statute apply. It appears that during the drafting of the Rome Statute, the need to differentiate these two types of superiors resulted in this final product.[137] Some have criticized this bifurcation and argue that it will allow a civilian superior to avoid criminal responsibility.[138] In Part V, this article will apply Article 28(2) to a number of civilian superior scenarios, determine a possible outcome, and evaluate whether this argument is fair.

The key aspect of the superior-subordinate relationship with respect to liability is the superior's effective authority and control.[139] "The possibility of control forms the legal and legitimate basis of the superior's responsibility; it justifies his or her duty of intervention."[140] With respect to civilian superiors under Article 28(2), this is potentially even more important.[141] Effective authority and control applies to both a de jure and de facto superior.[142] At trial, just how effective an accused's authority and control was over the subordinates in question will strengthen the prosecution's case.[143]

Another aspect to the superior-subordinate relationship is identified in Article 28(2)(b). "The crimes concerned activities that were within the

---

[136] *Id.* art. 28(2).

[137] *See* Saland, *supra* note 3, at 189. Saland was a member of the ad hoc committee who worked on the drafting of the Rome Statute.

> An idea developed for a new structure for the article that would incorporate different requirements for military and civilian superiors. But another very difficult issue entered the debate. It was pointed out that there could very well be situations where crimes were committed by de facto forces. It would not be acceptable to have less stringent requirements for de facto commanders than those for military commanders in regular armed forces. One could also imagine situations where regular military units were put under a civilian command to perform, for example, public works.

Id. at 203.

[138] *See* Vetter, *supra* note 3, at 116.

[139] *See* Fenrick, *Article 28*, *supra* note 10, at 520–21.

[140] Ambos, *supra* note 3, at 853.

[141] *See id.* at 857–60; Bantekas, *supra* note 25, at 582–83.

[142] *See* Fenrick, *Article 28*, *supra* note 10, at 521.

[143] *See, e.g.*, Prosecutor v. Musema, Case No. 96-13-T, Judgement & Sentence, ¶¶ 894–95, 949–51 (Jan. 27, 2000).

effective responsibility and control of the superior."[144] This element does not apply to the military commander or person effectively acting as a military commander. It appears to be a limitation on the imposition of criminal liability on a civilian superior. One interpretation posited is that it is a causation requirement.[145] Another is that it identifies the fact that civilian superiors don't have the same degree of control over subordinates as military commanders have.[146] A third and final interpretation is that this represents the idea that there cannot be effective control "with regard to non-work related activities of the subordinates."[147] Along these lines, this could also be viewed as a limitation on liability based on the scope of the relationship of the superior and subordinate.[148] If the criminal acts are unrelated to the nature of the relationship, the argument goes, then it is unfair to impose liability for not controlling subordinates' behavior where there is no duty to do so, as it is outside the responsibility of the superior.[149]

B. Mens Rea

Perhaps the most controversial of the elements in Article 28 is the knowledge element and the differences that exist for military and civilian superiors. Actual knowledge on the part of any type of superior that his subordinates, "were committing or about to commit such crimes,"[150] is sufficient and an easy way to satisfy the knowledge requirement if that evidence exists. The controversy surrounds the more stringent requirement from the prosecutor's perspective regarding civilian superiors under Article 28(2)(a), which states that "[t]he superior . . . consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes."[151] This

---

[144] Rome Statute, *supra* note 1, art. 28(2)(b).
[145] *See* Vetter, *supra* note 3, at 119.
[146] *See id.* at 120.
[147] Ambos, *supra* note 3, at 858; *see also* Fenrick, *Article 28*, *supra* note 10, at 522 ("[Non-military subordinates] are within the effective responsibility and control of a superior while at work or while engaged in work related activities. . . . Their work superiors do not normally have control over them when they are not so engaged.").
[148] *See* Ambos, *supra* note 3, at 858 (identifying the related argument made in Wu & Kang, *supra* note 25, at 295).
[149] Wu & Kang, *supra* note 25, at 290–95.
[150] Rome Statute, *supra* note 1, art. 28(1)(a), (2)(a).
[151] *Id.* art. 28(2)(a). For discussion or recognition of the controversy between the knowledge requirements for military superiors and civilian superiors *see* Saland, *supra*

is in contrast to the "owing to the circumstances at the time, should have known" standard applied to military superiors.[152] One commentator has identified that in order to satisfy this knowledge element, the prosecution must prove: "that information clearly indicating a significant risk that subordinates were committing or were about to commit offenses existed, that this information was available to the superior, and that the superior, while aware that such category of information existed, declined to refer to the category of information."[153]

This standard for civilian superiors essentially eliminates culpability for negligent supervision. At least one commentator has identified this as a reckless or a willful blindness standard.[154] It falls somewhere between actual knowledge and negligence.[155]

With respect to the impact that the new knowledge standard for civilian superiors will have in the courtroom, it has been identified that the key question may be the ICC's determination as to whether a superior's duty to remain informed is reduced.[156] If the duty is lowered,

---

note 3, at 204; Ambos, *supra* note 3, at 863–70; Vetter, *supra* note 3, at 120–24; Lippman, *supra* note 3, at 165.

[152] Rome Statute, *supra* note 1, art. 28(1)(a).; *see also* Fenrick, *Article 28*, *supra* note 10, at 521.

[153] *See id.* Fenrick also identifies the following factors, taken from *Čelebici*, that might be used to determine if a non-military superior had the requisite knowledge:

> [T]he number of illegal acts; the type of illegal acts; the scope of illegal acts; the time during which the illegal acts occurred; the number and type of troops involved; the logistics involved, if any; the geographical location of the acts; the widespread occurrence of the acts; the tactical tempo of operations; the modus operandi of similar illegal acts; the officers and staff involved; the location of the commander at the time.

Id. at 519.

[154] Ambos, *supra* note 3, at 870; *see also* Prosecutor v. Delalic (Čelebici), Case No. IT-96-21-T, Judgement, ¶ 387 (Nov. 16, 1998) (differentiating the situation where a superior "ignores information within his actual possession compelling the conclusion that criminal offences are being committed, or are about to be committed, by his subordinates," with that where the superior "lacks such information by virtue of his failure to properly supervise his subordinates."); Wu & Kang, *supra* note 25, at 284–85 (examining the various mens rea standards employed by the superior responsibility doctrine).

[155] Ambos, *supra* note 3, at 870.

[156] *See* Vetter, *supra* note 3, at 124. In addressing the issue of the superior's duty with regards to remaining informed, the *Čelebici* trial chamber stated:

> In this respect, it is to be noted that the jurisprudence from the period

this will allow the superior to fail to acquire the necessary information to learn of any criminal or questionable behavior of subordinates and ultimately affect the evidence available at trial.[157] On the other hand, if the duty to remain informed remains the same, the level of information and reports received by the superior should be the same and increase the potential evidence available at trial.[158] Ultimately, this controversy will be decided when and if the ICC actually applies it in a case.

C. Failure to Act

The final element under Article 28 is the superior's failure to act. This element is identical for both military commanders and civilian superiors, requiring proof that the superior "failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."[159] The latter part of this element, submitting the matter to a competent authority, was added to address the situation where either a civilian superior or a military commander is not in a position to prosecute.[160] International law recognizes that superiors

> immediately following the Second World War affirmed the existence of a duty of commanders to remain informed about the activities of their subordinates. Indeed, from a study of these decisions, the principle can be obtained that the absence of knowledge should not be considered a defence if, in the words of the Tokyo judgement, the superior was 'at fault in having failed to acquire such knowledge.'

Čelebici, Case No. IT-96-21-T, Judgement, ¶ 388; *see also* United States v. List (Hostage Case), 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Nuernberg, Oct. 1946-Nov. 1949, 751, 1271 (1951).

[157] *See* Vetter, *supra* note 3, at 124.

[158] *See id.*

[159] Rome Statute, *supra* note 1, arts. 28(1)(b), (2)(c).

[160] *See* Saland, *supra* note 3, at 204.

> Another issue which needed further discussion related to a commander's or civilian superior's power to prevent or repress the commission of crimes. It was pointed out that civilian superiors, in particular, are not always themselves in a position to prosecute. In some systems the same would be true of military commanders, who have to submit the matter to the civilian system of police, prosecutors and courts. For these reasons submission of crimes to the competent authorities for investigation and prosecution was added in both sub-paragraphs 1(b) and 2(c) of Article 28, as part of the responsibility applicable to both commanders and civilian superiors.

may be limited in the amount of power they have in this area and does not require them to perform the impossible.[161]

A superior's required action or failure to act depends on the timing of when he acquires knowledge of the criminal actions of subordinates.[162] If knowledge is acquired prior to the crimes taking place, the superior is required to take all necessary and reasonable preventive measures within his power.[163] If the crime has already taken place, then the superior is required to take repressive action or to submit the matter to competent authorities to conduct an investigation.[164] Essentially, a prosecutor will need to establish that after the accused acquired knowledge of the potential criminal act, he failed to take all necessary and reasonable measures to prevent the act from happening. If the accused acquired knowledge after the criminal act occurred, then the prosecutor will need to prove that the accused failed to discipline the subordinate perpetrator, or if the superior does not have the power to discipline, that she failed to submit the matter to an authority with disciplinary power over the subordinate.[165]

Id.

[161] *See* Protocol I, *supra* note 70, arts. 86, 87; COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 20, ¶¶ 3524, 3548, 3562. In *Čelebici*, the trial chamber stated: "It must, however, be recognized that international law cannot oblige a superior to perform the impossible. Hence, a superior may only be held criminally responsible for failing to take such measures that are within his powers." *Čelebici*, Case No. IT-96-21-T, Judgement, ¶ 395.

[162] *See Čelebici*, Case No. IT-96-21-T, Judgement, ¶ 394; Ambos, *supra* note 3, at 862; Fenrick, *Article 28*, *supra* note 10, at 519–20.

[163] *See Čelebici*, Case No. IT-96-21-T, Judgement, ¶ 394; Ambos, *supra* note 3, at 862; Fenrick, *Article 28*, *supra* note 10, at 519–20.

[164] *See Čelebici*, Case No. IT-96-21-T, Judgement, ¶ 394; Ambos, *supra* note 3, at 862; Fenrick, *Article 28*, *supra* note 10, at 518.

[165] *See Čelebici*, Case No. IT-96-21-T, Judgement, ¶ 394 (recognizing that this is a fact-specific analysis).

> It is the view of the Trial Chamber that any evaluation of the action taken by a superior to determine whether this duty has been met is so inextricably linked to the facts of each particular situation that any attempt to formulate a general standard in abstracto would not be meaningful.

Id.

V. Scenario Applications

This section will apply Article 28 to three hypothetical scenarios involving different civilian superiors and analyze the potential outcomes before the ICC. Analysis will focus on the factual development of the scenarios as they relate to the elements of Article 28(2). Assume for the purposes of all three scenarios that the country of Latvia has invaded Estonia in order to secure access to the Gulf of Finland. Additional facts will be provided for each scenario.

A. Civilian Contractor

1. Factual Scenario

In this scenario, the Acme Security & Support Services (Acme) is a private Australian contractor who has contracted with the government of Latvia to provide logistical support to Latvia's military. Support includes the delivery of fuel, food, and other supplies from Riga, the capital of Latvia, to Estonia where the Latvian Army is engaged in armed conflict with Estonia. The logistical support is carried out primarily by armed truck convoy. All personnel on the convoys are members of Acme to include the security contingent. Mick Dundee is the CEO of Acme. Over the course of a two-week period, large numbers of civilians of Estonia are found dead along the Main Supply Route (MSR) used by the Acme convoys. On the Acme website, a video showing civilians being shot, a grenade being tossed at them, and even apparently being hit by vehicles, is accessible through a link. The video is shot from the view of a moving vehicle with a time date image located on the video indicating these events have occurred twice over the last two weeks.[166]

As a result of public outrage over the video an investigation is conducted by Latvia's Minister of Justice. The results of the investigation indicate that on three occasions, convoys returning from Estonia to Latvia operated by Acme intentionally targeted Estonian civilians along the MSR and killed or wounded over three hundred. Evidence exists that Mick was on-site at the Acme Logistics base located in Latvia during the entire time these crimes took place. He was not on any of the convoys. Further evidence suggests that the video was posted to the Acme website between the second and third incident. There is no

[166] This hypothetical is not based on any specific incident.

evidence clearly establishing that he knew that Acme employees were committing these crimes or that he effectively acted as a military commander. Finally, after the investigation was initiated Mick fired all the Acme employees on the convoys in question. Mick is formally brought to trial before the ICC charged with a violation of Article 28 as the superior criminally responsible for the war crimes of his subordinates.[167]

2. Application of legal framework

First, the prosecutor must prove that Mick was the superior of the Acme employees who committed the crimes. This can be done by showing that as the CEO of the company, he holds the power to hire or fire any of the employees. The prosecution must also establish the company leadership structure. Second, the prosecutor must establish that the crimes in this case concerned activities that were within the responsibility and control of Mick, that is, the delivery of supplies by Acme to Latvia's military. These crimes occurred while the Acme convoys were returning from making their deliveries in Estonia along the MSR. As the subordinates did not deviate from their assigned route these facts should satisfy the element.

The more difficult issue will be proving the knowledge element. As required by Article 28(2)(a), the prosecutor must prove that Mick "consciously disregarded information which clearly indicated" that his subordinates "were committing or about to commit such crimes."[168] Evidence indicating that Mick saw the video, heard of the video, heard his subordinates talking about what occurred on the convoys, the existence of any after action reports indicating that the convoy needed to defend itself or came across the victims, would assist in proving the knowledge element. The issue of accountability over ammunition could also help the prosecution. If it could be shown that Mick knew of the expenditure of large amounts of ammunition this could strengthen the argument that he consciously disregarded information indicating that crimes were being committed.

---

[167] For purposes of the scenario assume there are no problems with jurisdiction over Mick or the crimes described.

[168] Rome Statute, *supra* note 1, art. 28(2)(a).

Under the Article 28(2)(a) knowledge standard it is very likely that the prosecution will be unlikely to succeed in satisfying the ICC that Mick had the required mens rea. Contrast this with the knowledge standard under Article 28(1)(a), and those factors just listed have a much stronger probability of satisfying the knowledge element.

The prosecution also needs to satisfy the final element—showing that Mick failed to take all necessary and reasonable measures within his power to prevent or repress the commission of the crimes.[169] Because this element is so closely related to the knowledge element assume for purposes of this discussion that the prosecutor satisfied the knowledge element. Is Mick's action of firing his subordinates enough to satisfy this requirement? The defense would probably argue that Mick had no power to discipline the subordinates. What about the fact that an investigation had already started? This factor hinges on when the prosecution established that Mick had the requisite knowledge. Before the final convoy left base? Immediately after the convoy returned to Acme LOGbase? If Mick learned of the conduct before either the final convoy left base or the investigation started and fired the subordinates without reporting the conduct to the proper authorities, the prosecution should meet its burden.[170]

3. Result—Just or Unjust?

Given the facts and evidence in this scenario, without the assumptions, a finding of not guilty is probably the just result. There is little evidence to establish that Mick consciously disregarded information clearly indicating that these crimes were taking place. Even under the military commander standard this evidence doesn't appear to satisfy the knowledge element.

B. Civilian Mayor

1. Factual Scenario

In the Estonian capital of Tallinn, Mayor Igor Hertz has remained in his position despite the occupation of Tallinn by Latvian forces. Igor

[169] *Id.* art. 28(2)(c).
[170] *See supra* notes 160–64 and accompanying text.

sympathizes with the Latvians, and his cooperation is rewarded by being placed in charge of the rebuilding, security, and safety of the city after its destruction in its capture. The Latvian Army is extremely disciplined and adheres strictly to the laws of war and customary international law. Early reports of the ICRC have commended the Latvian military in this adherence. To assist in the rebuilding of Tallinn, Igor is given the services of a Latvian Infantry Battalion to secure construction projects from sabotage from Estonian insurgents. Igor is able to tell the battalion commander which projects to guard, but he does not have the power to discipline the commander or any of the soldiers.

The main project is the repair of port facilities. The neighborhood closest to the port received the least amount of damage and its inhabitants have either remained in or returned to their homes. Igor directs the battalion to guard the port and to police the neighborhood closest to the port. A report is aired in the local newspaper that several women living in this neighborhood have been raped by Latvian soldiers guarding the port. Igor hears this story, but dismisses it because he cannot believe these disciplined soldiers would do such a thing. After the story airs, his office begins to receive a number of complaints from the women of the neighborhood indicating that this is true. After two days of complaints, he visits the Latvian battalion commander who assures him that there is no truth to these stories. Igor feels assured and returns to his duties at the mayor's office. The complaints do not subside.

After a few months, the port facility is repaired. Igor is rewarded with an invitation to come to Riga, the Latvian capital, to discuss becoming the Minister of Northern Estonia. While in Riga, the ICRC publishes a report indicating that rapes have been committed throughout Tallinn and most especially in the neighborhood closest to the port. The report also indicates that numerous reports and complaints about this were made to the mayor's office. The world media grabs the story. Extremely upset, the Latvian President decides to turn Igor over to the ICC for prosecution. The battalion commander and his unit are returned to Latvia where the perpetrators are subject to the Latvian military justice system. Igor is brought to trial and charged under Article 28.

2. Application of legal framework

The first question here is whether Igor had effective authority and control over the Latvian infantry battalion. The evidence indicates that the battalion was placed under Igor's control and that he had the authority to direct their actions. The only limit indicated was his ability to discipline the soldiers. This will probably not prevent the prosecution from proving that the Latvian soldiers were subordinates of Igor. As discussed prior, the drafters of Article 28 identified that there may be situations where military units are placed under the control of civilian superiors and civilian superiors may be unable to discipline.[171]

Were the rapes crimes concerning activities within the effective responsibility and control of the superior? The facts indicate that Igor directed the infantry battalion to guard the port and police the neighborhood where the rapes occurred. The prosecution should be on firm ground here to satisfy its burden as to this element.

Did Igor consciously disregard information which clearly indicated that his subordinates were raping the women in the neighborhood? Again, as with the previous scenario, this is the tougher element for the prosecution to prove. Under these facts, Igor first hears of the rape allegations in the local paper. He chooses to ignore the story and does nothing. Does a story in a newspaper rise to the level of clearly indicating as Article 28(2)(a) requires? Probably not. The facts then tell us that his office began to receive reports directly about the alleged rapes. Again, Igor chooses to do nothing after the first day, but then after the second day of reports he approaches the battalion commander. The defense should be able to successfully argue that this action indicates that he did not disregard information, and in fact reported these allegations to someone who had the authority to investigate and possibly prosecute. The prosecution's response is to argue that Igor's reliance on only the commander's assertions is not enough, especially when the complaints continued to come to his office. The outcome is difficult to determine, but the ICC will probably decide in Igor's favor.

Change the facts to Igor never confronting or speaking to the battalion commander. Under these facts, the prosecution's chances are stronger in satisfying both the knowledge element and the failure to act element. Igor is ignoring numerous reports that arguably clearly indicate

---

[171] *See supra* note 136 and accompanying text.

that his subordinates are raping the women of the neighborhood under their protection. Satisfy the knowledge element here and the failure to act is satisfied because no action is taken by Igor.

3. Result—Just or Unjust?

An acquittal of Igor under the facts above appears to be an unjust result. As the mayor is charged with the safety of the city, Igor's duty encompasses the prevention of rape of local women. His reliance on the battalion commander's assurance was misplaced especially with the repeated complaints. Igor had the ability to direct the soldiers' actions, he could have conducted an investigation, he could have reassigned the unit, he could have raised his concerns to a higher authority than the battalion commander.

C. Civilian Area Administrator

1. Factual Scenario

Tom Jones is appointed to be the Administrator of the Estonian Provisional Authority (EPA). He is responsible for the reconstruction of post-conflict Estonia. Within this responsibility is the authority to enter into contracts, spend money, and represent the Latvian government with respect to matters concerning reconstruction. All employees of the EPA ultimately fall under the responsibility of Jones. He can take administrative action against them and terminate their employment.

One area of particular interest is the city of Parnu. The EPA plans to relocate the capital of Estonia there. Insurgent activity and large scale resistance to reconstruction efforts plague the city. Jones directs a working group to solve the problem and to work with the military to do so. The solution is the forced relocation of thousands of civilian citizens of Parnu. While the actual physical removal of the citizens is done by military and police forces, the logistics of the relocation is planned, funded, and supervised by the EPA working group.

Months after beginning, the reconstruction of Parnu is well underway. Jones visits the city and sees remarkable progress. He receives no reports of continued resistance and congratulates his working group for their resolution of this problem. He never asks how they

decided to resolve the issue. Reports generated concerning the contracting and spending of EPA reconstruction efforts come into his office, but are sent to individuals responsible for those areas. Jones receives a monthly report, but only in the big picture. He does not question the spending for the relocation of the citizens of Parnu. Again, an ICRC report exposes the forced relocation of the Parnu citizens. Mr. Jones and his staff are turned over to the ICC for prosecution.

2. Application of legal framework

Did Jones have effective authority and control over the EPA working group that carried out the forced relocation?[172] The answer to this is yes. As the facts indicate, the employees of the EPA are all subject to Jones's authority. Was the forced relocation an activity within the effective responsibility and control of Mr. Jones? This element is slightly more difficult. While not personally directing the relocation, it was still carried out by EPA employees and with EPA funding as a process to satisfy the EPA's charge of reconstructing and particularly relocating the capital. This element is probably satisfied by those facts.

Did Jones consciously disregard information which clearly indicated that his subordinates were committing or about to commit this crime? Once again, this is the toughest element for the prosecution to prove. The evidence indicates that there were reports dealing with the spending to relocate the citizens, but how detailed were they? The more details as to what exactly this money was being spent on would strengthen the prosecution's case. Also, the facts indicate a lack of clear follow up as to how the initial problem with the resistance was dealt with. This could be Jones trying to turn a blind eye to this problem, but the facts do not entirely support a conclusion that he was trying to ignore the resolution of the problem. As mentioned before, one of the key aspects of this case will be how the ICC interprets the civilian superior's duty to remain informed.[173] If the ICC adopts the duty to remain informed of a subordinate's actions, then in this case, Jones arguably should have asked how the problem was resolved.

---

[172] For purposes of this scenario, assume the forced relocation of the Parnu citizens is criminal under Article 7(1)(d) of the Rome Statute. *See* Rome Statute, *supra* note 1, art. 7(1)(d).

[173] *See supra* notes 155–57 and accompanying text.

3. Result—Just or Unjust?

It would appear that resolution of this case depends on how the ICC determines a civilian superior's duty to remain informed. If the historical trend is followed, then the duty remains high and Jones will most likely be convicted. If the duty standard is lowered, the prosecution's chances of success are weakened. In this case and under the facts given, that may not necessarily be the wrong decision. Does Jones truly deserve to be criminally responsible for his subordinates' actions here because he failed to know what was happening? While clearly if he had known about it, Jones could have taken action to prevent or repress the actions, it is unclear that he knew of the crimes and so should not be held criminally responsible.

D. Summation of Scenarios

As the scenarios indicate, there are a number of critical elements that the prosecution will need to establish: whether the superior had effective authority and control, whether the crimes were within the superior's effective responsibility, what information existed, and what the information indicated. The critical issue will be what is meant by "consciously disregarded." Perhaps assistance can be found in examining why this difference in knowledge standards exists in the first place. The answer appears to start with the United States delegation to the Preparatory Committee to the Rome Statute.[174] Concerns over a civilian superior's degree of control and ability to prevent and punish apparently generated the distinction in knowledge standards found in Article 28.[175] Furthermore, it appears that there were extensive negotiations and political compromises in drafting the text of what

---

[174] *See* Saland, *supra* note 3, at 203, stating:

> During the Preparatory Committee meetings, the United States raised an important point: whether civilian superiors would normally have the same degree of control as military commanders and should therefore incur the same degree of responsibility. A further elaboration of this point was also raised, namely, whether civilian superiors would be in the same position as military commanders to prevent or repress the commission of crimes by their subordinates and punish the perpetrators.

Id.

[175] *Id.*

eventually became Article 28.[176] Given these concerns, this author concludes that eliminating the application of criminally culpable negligence to civilian superiors addressed the Preparatory Committee's concerns. This is accomplished in the sense that a non-military organization may be organized in any of a multitude of ways, from the strict hierarchical to one of loose control. The degree of supervision can also vary. By requiring more than negligence for civilian superiors, Article 28 attempts to eliminate the risk that a civilian superior will be held to a higher standard than is appropriate given his or her situation.

VI. Conclusion

Superior responsibility has evolved from its application to military commanders to encompassing civilians acting as military commanders to non-military civilian superiors. The post-World War II tribunals developed the doctrine with actual cases and shaped a concept into a more refined doctrine.[177] From the end of those tribunals until the creation of the ICTY and ICTR tribunals, the doctrine developed through various efforts to codify it.[178] The recent creation of the ICC has taken the doctrine and not only codified it, but added new elements.[179] Article 28 has created requirements that the subordinates' crimes concern an activity within the superiors' effective responsibility and control. Furthermore, Article 28 has created a new knowledge standard applicable to non-military civilian superiors.[180]

It is the difference in knowledge standards that has raised concerns.[181] Presently, the ICC has not heard a case and therefore has not interpreted what this new civilian superior standard means. The concern appears to be that civilian superiors will be able to avoid criminal responsibility because of the difficulty in proving that they consciously disregarded information clearly indicating that subordinates

---

[176] E-mail from Michael A. Newton, Acting Associate Clinical Professor of Law, Vanderbilt University School of Law, to author (Mar. 20, 2006, 10:33 EST) (on file with author) (discussing the drafting of Article 28 by the working group and departure of final draft of Article 28 from previous drafts, specifically language unique to civilian superiors, in order to achieve consensus to extend doctrine to civilian superiors).
[177] *See supra* notes 28 to 59 and accompanying text.
[178] *See supra* notes 63–64, 70–76, 90–95 and accompanying text.
[179] *See* Rome Statute, *supra* note 1, art. 28(2)(a).
[180] *Id.* art. 28(2)(a), (b).
[181] *See, e.g.*, Vetter, *supra* note 3, at 120–24.

were committing or planning to commit crimes.[182] Also, this different standard will weaken any deterrent effect the doctrine might have as to civilian superiors.[183] In raising these concerns, comparison has been drawn to previous cases, arguing that the outcomes would be different and now the convicted would be acquitted.[184] The failure in this argument is ignoring whether those prior cases were rightly decided.[185] How much did victor's justice have to play in the outcome?[186]

The Rome Statute recognizes a difference between a military commander or someone effectively acting as a military commander, and a civilian superior.[187] This is an important difference primarily because of the different levels of inherent responsibility that each holds. Military commanders are entrusted with a tremendous amount of responsibility, and the nature of the military commander-subordinate structure allows a commander the requisite tools to fulfill his duty. The military by its nature requires a higher standard of discipline.[188] A civilian non-military hierarchy does not have this structure. In recognition of the military's heightened discipline, most nations in the world have separate justice systems for the military and civilians. Thus, Article 28 recognizes that civilian superiors operate in an environment lacking the disciplined structure of the military. It would appear from the limited history of the drafting of the Rome Statute, that concerns over a civilian superior's degree of control and ability to prevent and punish prompted this decision.[189] Because of these concerns, a civilian superior should not be held to the same mens rea requirement, because this could impose criminal responsibility where it should not exist. This cautious approach appears to be a response to the outcomes of some of the cases decided immediately after World War II. The ICTY Trial Chamber in *Čelebici* also appeared to take a cautious approach in applying criminal responsibility to non-military civilian superiors.[190]

---

[182] *See id.*
[183] *See id.* at 94.
[184] *See id.* at 125–36.
[185] *See, e.g.*, Ambos, *supra* note 3, at 831.
[186] *See, e.g.*, 1 THE TOKYO JUDGMENT, *supra* note 57, at 457–58; 2 *id.* at 1126–28, 1137–38.
[187] Rome Statute, *supra* note 1, art. 28(1), (2).
[188] COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 20, ¶ 3549.
[189] *See supra* note 174 and accompanying text.
[190] *See* Prosecutor v. Delalic (Čelebici), Case No. IT-96-21-T, Judgement, ¶¶ 364–378 (Nov. 16, 1998).

From the scenarios in Part V, it is unclear whether the creation of a separate knowledge standard for civilian superiors is necessarily unfair compared to the standard required for the military-type superior. Ultimately, the ICC will actually have to apply Article 28(2)(a) to a genuine set of facts to resolve the issue. Leading to that day, it appears that the elements of Article 28(2) do not diminish its deterrent value or impose an insurmountable obstacle for successful prosecution of civilian superiors.

LEGISLATING MILITARY DOCTRINE: CONGRESSIONAL USURPING OF EXECUTIVE AUTHORITY THROUGH DETAINEE INTERROGATIONS

MAJOR JAMES A. BARKEI*

I. Introduction

Congress must restrain itself from legislating military doctrine and permit the Executive to exercise its authority in control of military operations, including detainee interrogations. Recent passage of the Detainee Treatment Act of 2005 (DTA) signifies Congress's foray into the realm of legislating military doctrine and operations.[1] Congress's overreaching arm endangers the nation's military by restricting doctrinal development in the face of an ever-changing enemy. The President of the United States, as the head of the Executive branch of government that includes the Department of Defense (DOD) and its military forces, bears the responsibility for directing the manner in which military operations implement doctrine, including detainee interrogations.[2] The current U.S. Army Field Manual (FM) 2-22.3, *Human Intelligence Collector Operations*, states in its preface that the tactics, techniques, and procedures within the FM exist in accordance with the DTA.[3] Through

---

* Judge Advocate, U.S. Army. Presently assigned as Professor, The Judge Advocate General's Legal Center and School, United States Army, Charlottesville, Virginia. LL.M., 2007, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia; J.D., Chicago-Kent College of Law 1998; B.A. Trinity University, Economics 1995. Previous assignments include: Officer-in-Charge, Hohenfels Law Center, Germany 2004–2006; Chief, International & Operational Law, 1st Infantry Division, Operation Iraqi Freedom 2004; Operational Law Attorney, United States Army Europe & 7th Army 2002–2004; Trial Counsel and Administrative Law Attorney, 7th Infantry Division, Fort Carson, Colorado 1999–2002. Member of the bars of the United States Supreme Court and the State of Wisconsin. This article was submitted in partial completion of the Master of Laws requirements of the 55th Judge Advocate Officer Graduate Course.

[1] Detainee Treatment Act of 2005, 42 U.S.C.S. § 2200dd (LEXIS 2007) (to be codified at 42 U.S.C. § 2200dd).

[2] *Cf.* Dep't of State, International Information Programs, Outline of U.S. Government ch. 3, http://usinfo.state.gov/products/pubs/outusgov/ch3.htm [hereinafter Outline] (last visited Nov. 27, 2007).

[3] U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS vi (6 Sept. 2006) [hereinafter FM 2-22.3]. The preface states:

> In accordance with the Detainee Treatment Act of 2005, the only interrogation approaches and techniques that are authorized for use against any detainee, regardless of status, characterization, are those authorized and listed in this Field Manual. Some of the approaches

this Act, Congress effectively stifled the creativity and adaptability of the military, in essence freezing interrogation techniques.[4]

The nation's military requires the ability to employ adaptable processes to overcome the challenges of the chaotic and unpredictable battlefield in the twenty-first century.[5] While the U.S. Armed Forces stand glued to their now-limited interrogation doctrine, a rapidly changing enemy modifies its behavior to thwart known tactics, techniques, and procedures that bind the operations of the military.[6] The DTA further compounds the disadvantage faced by the U.S. Armed Forces because many of its foes do not comply with international legal obligations under the law of armed conflict.[7] Enemies that fail to obey the rules of war, coupled with legislative restrictions on military operations, could lead to failure in the Global War on Terror (GWOT).[8]

The Executive must be able to rely on the office's decision-making powers to effectively and successfully wage war. While the political structure of the United States will always leave the Executive branch

---

> and techniques authorized and listed in this Field Manual also require additional specified approval before implementation. This manual will be reviewed annually and may be amended or updated from time to time to account for changes in doctrine, policy, or law, and to address lessons learned.

Id.

[4] *See* 42 U.S.C.S. § 2200dd; Geoffrey S. Corn, *Legislating Law of War Compliance: A High Price to Pay*, JURIST, Sept. 19, 2006, *available at* http://jurist.law.pitt.edu/forumy/2006/09/legislating-law-of-war-compliance-high.php.

[5] LEONARD WONG, DEVELOPING ADAPTIVE LEADERS: THE CRUCIBLE EXPERIENCE OF OPERATION IRAQI FREEDOM v (2004), *available at* http://www.strategicstudiesinstitute.army.mil/pdffiles/PUB411.pdf.

[6] *Cf*. HEADQUARTERS, DEP'T OF ARMY, U.S. ARMY WHITE PAPER, CONCEPTS FOR THE OBJECTIVE FORCE 5 (2001) [hereinafter WHITE PAPER], http:/www.army.mil/features/WhitePaper/ObjectiveForceWhitePaper.pdf (stating the threat of a changing and adaptable enemy).

[7] *See, e.g.*, Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2804 (2006) (Thomas, J., dissenting) (noting that Hamdan was an unlawful combatant), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, *as recognized in* Boumediene v. Bush, 2007 U.S. App. LEXIS 3682 (D.C. Cir. Feb. 20, 2007).

[8] Numerous decisions and articles touch upon the status of detainees and interrogation policies under international law; however, that topic is beyond the scope of this article. *Hamdan*, 126 S. Ct. at 2804; Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Kenneth Anderson, *The Military Tribunal Order: What to Do with Bin Laden and al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL'Y 591 (2002); Arsalan M. Suleman, *Recent Development: Detainee Treatment Act of 2005*, 19 HARV. HUM. RTS. J. 257 (2006).

subject to being second-guessed by Congress, and will always remain accountable to the people, the office's unitary decision-making power and expediency are tailor-made for military doctrine and interrogations.[9] When the policies and execution of the nation's laws and military operations do not exactly conform to the will of Congress, this does not mean that the Executive lacks power to implement the political decisions made.[10] Instead, the conflict raises the matter of separation of powers, a struggle existing since the nation's inception.[11] Discerning the superiority of power in governing military operations, particularly when the Executive's position is contrary to that of Congress, is neither clear nor easy.[12]

This article discusses the issue of control over the military and its operations between the Executive and Congress, an issue not new to American politics.[13] The study finds its base in Articles I and II of the Constitution,[14] and examines the historical precedence of congressional and Executive powers, including the Executive's inherent authority.[15] As expected, the Framers' construct creates an area of concurrent authority between the Executive and Congress with respect to governance of the U.S. Armed Forces, as both branches enjoy such enumerated powers.[16] The deductive exercise shows that the Supreme Court and history provide support for the Executive's superior authority in governing how the military conducts its operations, including development and implementation of its doctrine.[17] Consequently, this analysis concludes that the Executive possesses greater constitutional authority as the

---

[9] *See* CASS R. SUNSTEIN, MINIMALISM AT WAR 17 (2004).

[10] *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (stating that the strength of executive authority relates to either constitutional authorization, congressional authorization, or to an absence of any express authorization or will).

[11] *See* THE FEDERALIST NOS. 47, 51 (James Madison).

[12] *Steel Seizure*, 343 U.S. at 635–38 (Jackson, J., concurring).

[13] *See* Richard Hartzmann, *Congressional Control of the Military in a Multilateral Context: A Constitutional Analysis of Congress's Power to Restrict the President's Authority to Place United States Armed Forces under Foreign Commanders in United Nations Peace Operations*, 162 MIL. L. REV. 50, 82–89 (1999).

[14] U.S. CONST. arts. I, II.

[15] *Contra* HAROLD H. HOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 45 (1990).

[16] *Id.*

[17] *See Steel Seizure*, 343 U.S. at 587 (Jackson, J., concurring) (stating that the Executive controls the day-to-day operations of the military); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 29 (1866) (noting that Congress cannot interfere with the Executive's command of the military or its operations).

Commander in Chief and guardian of the Constitution than Congress regarding the control of military operations and its corresponding doctrine.[18]

II. The Role of Doctrine in Military Operations

The DOD defines military doctrine as "[f]undamental principles by which the military forces or elements thereof guide their actions in support of national objectives. It is authoritative but requires judgment in application."[19] Military commands establish these fundamental principles and procedures to ensure that units adhere to a common operating guide and operate efficiently.[20] Tactical operations and training produce lessons learned regarding successes and failures of operations.[21] Military leaders analyze and refine the lessons learned and then publish them for adoption by military units as doctrine.[22] While doctrine provides certain rules or methods by which to conduct operations, judgment and initiative remain a commander's responsibility and essential tool.[23] Military doctrine should be dynamic, reflecting

---

[18] *Cf.* U.S. CONST. art. II, § 2.

[19] JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (12 Apr. 2001, *as amended through* 17 Oct. 2007) [hereinafter JOINT PUB. 1-02]. The *American Heritage Dictionary of the English Language* further defines military doctrine as "a statement of official government policy, especially in foreign affairs and military strategy." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000).

[20] U.S. DEP'T OF ARMY, FIELD MANUAL 5-0, ARMY PLANNING AND ORDERS PRODUCTION v (20 Jan. 2005) [hereinafter FM 5-0].

[21] CHAIRMAN OF JOINT CHIEFS OF STAFF, INSTR. 5120.02A, JOINT DOCTRINE DEVELOPMENT A-6 (31 Mar. 2007) [hereinafter JCS INSTR. 5120.02A] ("A major influence on doctrine is lessons and observations from operations, exercises, and training. This review provides a standard from which to judge what works and what does not work. As a military institution, these lessons also consider changes in the threat and operational environment.").

[22] *See id.* at A-2 ("[D]octrine represents what is taught, believed, and advocated as what is right (i.e., what works best)"); Corn, *supra* note 4.

[23] JCS INSTR. 5120.02A, *supra* note 21, at A-2. The instruction states:

> [D]octrine is authoritative guidance and will be followed except when, in the judgment of the commander, exceptional circumstances dictate otherwise. . . . [I]t must be definitive enough to guide operations, while versatile enough to accommodate a wide variety of situations. . . . [D]octrine should foster initiative, creativity, and conditions that allow commanders the freedom to adapt to varying circumstances.

Id.

operational missions and necessities based on the various threats faced.[24] "History, training experiences, contemporary conflict, technological developments, and emerging threats to national security drive changes in doctrine."[25] Nowhere in this list of driving forces do we find Congress, and the basic tenets in development of military doctrine in the twenty-first century have not changed since the period of the great World Wars of the twentieth century.[26]

Doctrine drives the approach and methods of detainee interrogations.[27] It can range from broad military objectives and operations, such as joint warfare among the various U.S. military services,[28] to a narrow operation such as human intelligence collection.[29] Doctrine plays a role in planning military operations by guiding how the military will conduct the operation, e.g., how the military will fight or collect intelligence, in order to implement its strategy and achieve its objective.[30] It serves as the reference point for military servicemembers

---

[24] *Id.*

[25] WILLIAM O. ODOM, AFTER THE TRENCHES: THE TRANSFORMATION OF ARMY DOCTRINE, 1918-1939, at 3–4 (1999).

[26] U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS 1–14 (14 June 2001) [hereinafter FM 3-0] ("[Army doctrine] is rooted in time-tested principles but is forward-looking and adaptable to changing technologies, threats, and missions.").

[27] FM 2-22.3, *supra* note 3.

[28] JCS INSTR. 5120.02A, *supra* note 21.

[29] FM 2-22.3, *supra* note 3, at vi.

[30] *See, e.g.*, Frederick Kagan, *Army Doctrine and Modern War: Notes Toward a New Edition of FM 100-5*, PARAMETERS, Spring 1997, at 134–51 ("[D]octrine outlines planning procedures down to such details as the advisability of conducting planning brief-backs over maps or terrain models, such critical operational issues as conducting and exploiting penetrations, defending against enemy attacks, and the use of reserves receive little or no attention."); JCS INSTR. 5120.02A, *supra* note 21, at A-5, 6. The instruction states:

> [D]octrine provides a basis for analysis of the mission, its objectives and tasks, and developing the commander's intent and associated planning guidance. . . . [D]octrine provides fundamental guidance on how operations are best conducted to accomplish the mission. . . . [P]lans are developed in conformance with the criteria of adequacy, feasibility, acceptability, completeness, and compliance with joint doctrine.

Id.

to begin planning and executing their operations, and Congress hindered its development with the DTA.[31]

During planning, doctrine incorporates "the principles of war, operational art, and elements of operational design for successful military action, as well as contemporary lessons that exploit US advantages against adversary vulnerabilities."[32] This incorporation should involve creative application of doctrine to the operation.[33] Once the operation is underway, servicemembers apply doctrine to the threats, obstacles, and circumstances encountered on the battlefield during mission execution to achieve success.[34]

Military doctrine generally guides, or even dictates, how a member of the armed forces will respond to a situation, such as interrogation of a detainee.[35] On a symmetric or static battlefield, servicemembers may focus on the doctrinal methods taught and implemented during their training to address the threat or objective.[36] However, when the situation becomes fluid or asymmetric, doctrine may not effectively address the issue or threat.[37] Congress's passage of the DTA in 2005 dictated a static response to a fluid situation, or implemented a symmetric approach for an asymmetric threat.[38] The doctrinal interrogation techniques that military members rely upon, now restricted in development by law, may not adequately address the threat or create the conditions for mission accomplishment.[39] Congress bound the entire spectrum of military interrogations into one paper volume of an Army FM. Rather than

---

[31] JCS INSTR. 5120.02A, *supra* note 21, at A-2. The DTA hinders doctrine development by subjecting interrogation methods to Congressional oversight and compliance with an ineffective piece of legislation.

[32] *Id.*

[33] FM 5-0, *supra* note 20, at 3–9.

[34] JCS INSTR. 5120.02A, *supra* note 21, at A-3.

[35] *See* JOINT PUB. 1-02, *supra* note 19; JCS INSTR. 5120.02A, *supra* note 21.

[36] JCS INSTR. 5120.02A, *supra* note 21.

[37] *See* ARMY CENTRAL COMMAND, ARMY CENTRAL COMMAND COMBINED ARMS ASSESSMENT TEAM, INITIAL IMPRESSIONS REPORT 53 (Sept. 2002) [hereinafter ARCENT CAAT REPORT], http://action.aclu.org/torturefoia/released/050206.

[38] *See* Detainee Treatment Act of 2005, 42 U.S.C.S. § 2200dd (LEXIS 2007) (to be codified at 42 U.S.C. § 2200dd).

[39] *See* Luke M. Meriwether, Comment: *After Abu Ghraib: Does the McCain Amendment, as Part of the 2006 Defense Appropriations Act, Clarify U.S. Interrogation Policy or Tie the Hands of U.S. Interrogators?*, 14 TULSA J. COMP. & INT'L L. 155 (2006); *A Vietnam Moment: The McCain Amendment Would Hamstring U.S. Interrogators*, OPINION J., Oct. 30, 2005, http://www.opinionjournal.com/editorial/feature.html?id=110007477 [hereinafter *Vietnam Moment*].

allowing the Army's leaders and Soldiers to develop and implement necessary interrogation techniques and strategies, a bureaucratic body choked the development of doctrine by tying it to a document to which change generally occurs at a glacial pace. By the time the Army develops and vets a new interrogation procedure through the publication process of an FM subject to congressional intervention under the DTA, and then has it trained and implemented in real operations, the threat spurring that change will likely have already morphed.

Noting that the Army released a new FM on detainee interrogations after passage of the DTA without additional legislation, one may believe that the Army retains the ability to change doctrine as necessary.[40] However, the key issue remains that the military cannot develop and implement any doctrine outside the bounds of the DTA.[41] Even if the military proposed such changes, Congress must review and approve those changes, inevitably taking an extended period of time;[42] time that servicemembers on the battlefield may not be able to dedicate to seeking a change in the tactics, techniques, and procedures necessary to win the battle.

Doctrine is not strategy or policy, but it is closely related to these tenets as it "serves to make U.S. policy and strategy effective in the application of U.S. military power."[43] Military leaders apply doctrine to

---

[40] *See* FM 2-22.3, *supra* note 3, at vi.
[41] *See* § 2200dd (to be codified at 42 U.S.C. § 2200dd).
[42] *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 29 (1866) (noting the lack of timeliness for Congress's action) (citing Luther v. Borden, 48 U.S. (7 How.) 1, 42–45, THE FEDERALIST NO. 26 (Alexander Hamilton), and THE FEDERALIST NO. 41 (James Madison)).
[43] JCS INSTR. 5120.02A, *supra* note 21, at A-3, 4. The instruction states:

> Policy and doctrine are closely related, but they fundamentally fill separate requirements. Policy can direct, assign tasks, prescribe desired capabilities, and provide guidance for ensuring the Armed Forces of the United States is prepared to perform its assigned roles; implicitly policy can therefore create new roles and a requirement for new capabilities. Conversely, doctrine enhances the operational effectiveness of the Armed Forces by providing authoritative guidance and standardized terminology on topics of relevance to the employment of military forces. Most often, policy drives doctrine; however, on occasion, an extant capability will require policy to be created. . . . [D]octrine is inexorably linked to the development of national military strategy. In general terms, joint doctrine establishes a link between the "ends" (what must be accomplished) and the "means" (capabilities) by providing the "ways" (how) for joint forces to accomplish military strategic and operational objectives in support

operations while keeping national security strategy principles in mind.[44] International law also plays a significant part in the military doctrine of interrogations by setting the parameters for doctrine development and implementation.[45] The Geneva Conventions hold much of the international law forming the basis of doctrine.[46] Unfortunately, several decades have passed since the Geneva Conventions were signed. Looking at the nature of the GWOT, the U.S. Armed Forces currently conduct operations using tactics, techniques, and procedures that have outpaced the dated international laws as well as military doctrine.[47] Now, with Congress also placing itself in the process of doctrine development, military interrogation doctrine will likely continue to fall off the pace of the changing enemy.[48]

> of national strategic objectives. Joint doctrine also provides information to senior civilian leaders responsible for the development of national security strategy as to the core competencies, capabilities, and limitations of military forces.

Id. *See* DENNIS DREW & DON SNOW, MAKING STRATEGY: AN INTRODUCTION TO NATIONAL SECURITY PROCESSES AND PROBLEMS 163–74 (1988) ("In both peace and war, the influence of military doctrine can be negated, modified, or limited by any of the host of other factors that influence strategy decisions. The degree to which doctrine influences strategy depends on the relative importance of doctrine in the eyes of the decision-maker."); JACK D. KEM, CAMPAIGN PLANNING: TOOLS OF THE TRADE (2d ed. 2006), *available at* http://cgsc.cdmhost.com/cgi-bin/showfile.exe?CISOROOT=/p4013 coll11&CISOPTR=377.

[44] *See* National Security Council, *The National Security Strategy* (Mar. 2006), http://www.whitehouse.gov/nsc/nssall.html.

[45] Memorandum, Vice Admiral A.T. Church III, Director, Navy Staff, Dep't of the Navy, to Sec'y of Defense, subject: Report on DOD Detention Operations and Detainee Interrogation Techniques 2–3 (Mar. 7, 2005), *available at* http://www.aclu.org/images/ torture/asset_upload_file625_26068.pdf [hereinafter Church Report] ("Interrogation is constrained by legal limits. Interrogators are bound by U.S. laws, including U.S. treaty obligations, and Executive (including DoD) policy—all of which are intended to ensure humane treatment of detainees.").

[46] *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[47] *See* WONG, *supra* note 5, at 15. The main body of international law governing interrogation and military doctrine, the Geneva Conventions, were constructed in 1949. While additional protocols were drafted in the 1970s, the enemies, threats, and battlefield operations have changed significantly during the intervening six decades. Notably, the United States' war on terror involves forces that are neither party to or in compliance with the Geneva Conventions, e.g. Al Qaeda. *See* Eric Posner, *Apply the Golden Rule to al Qaeda?*, WALL ST. J., July 15, 2006, at A9.

[48] *Cf.*, WHITE PAPER, *supra* note 6; WONG, *supra* note 5.

III. The Detainee Treatment Act

In response to dramatic reports of detainee abuse and a perception that the highest levels of the U.S. Executive branch of government authorized and promoted questionable interrogation techniques, Congress passed the DTA.[49] Fortunately, the interrogation practices that resulted in acts of inhumane treatment by military personnel had no basis in the doctrine or policies set forth by the Executive and military leadership for the U.S. Armed Forces.[50] In fact, in February of 2002, the President issued a memorandum directing that all detainees be treated humanely,[51] well before the media focus on alleged abuses. Further,

---

[49] 151 CONG. REC. S14241 (daily ed. Dec. 21, 2005) (statement of Sen. Dodd); Emma V. Broomfield, Note: *A Failed Attempt to Circumvent the International Law on Torture: The Insignificance of Presidential Signing Statements Under the Paquete Habana*, 75 GEO. WASH. L. REV. 105, 106 (2006); Meriwether, *supra* note 39, at 171.

[50] FM 2-22.3, *supra* note 3; U.S. DEP'T OF ARMY, FIELD MANUAL 34-52, INTELLIGENCE OPERATIONS (Sept. 1992) [hereinafter FM 34-52] (superseded by FM 2-22.3); Church Report, *supra* note 45, at 2–3 (concluding that the DOD had not "[p]romulgated interrogation policies or guidance that directed, sanctioned, or encouraged the abuse of detainees."). The scope of this article is limited to U.S. Armed Forces interrogation doctrine and practices. The controversial interrogation method of waterboarding, as implemented by the Central Intelligence Agency and not practiced by the U.S. Armed Forces, lies beyond this scope. Neither FM 34-52 nor FM 2-22.3 contain waterboarding as a developed doctrine for interrogation. If waterboarding were to be deemed a legal method of interrogation for the military by appropriate authority, this analysis may be applied to the military's ability to develop the doctrine and implementation of the interrogation method in light of the restrictions of the Detainee Treatment Act. *See* John Diamond, *New Pentagon Rules Ban 'Abusive' Interrogation*, USA TODAY, Sept. 7, 2006, at 6A. *See* Memorandum from William J. Haynes II, General Counsel, to the Secretary of Defense, subject: Counter-Resistance Techniques (Nov. 27, 2002), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf (providing the list of proposed interrogation techniques outside of FM 34-52).

[51] Memorandum from George W. Bush, President of the United States, to the Vice President et al., subject: Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), *available at* http://lawofwar.org/Bush_memo_Genevas.htm [hereinafter White House Memo] ("[R]equiring that the detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva."). The argument that "extent appropriate" and "consistent with military necessity" leaves open the opportunity for military forces to ignore the humane treatment standard should not be confused with the general obligations of the military with respect to application of the Geneva Conventions. It appears that President Bush uses these terms in reference to the status of detainee rather than a deviation from a treatment standard. The interpretation that U.S. Armed Forces may forego treating detainees humanely based upon military necessity to accomplish a mission is a misreading of the statement. The true debate within the Executive was whether the Geneva Convention applied at all to detainees, but this debate did not subsume the underlying DOD policy of treating all detainees humanely. *See* Draft Memorandum from

absent from both the previous and recently published field manuals on interrogation procedures are provisions deemed illegal under domestic or international law.[52] Rather, servicemembers who violated existing standards acted on personal choices, exhibiting a lack of discipline that amounted to general misconduct.[53] Therefore, the DTA exists as unnecessary legislation for the military because previous military doctrine regarding detainee interrogations implemented during GWOT operations complied with humane treatment standards.[54]

The finding that individual criminal acts resulted in detainee abuses, not the authorized interrogation methods,[55] highlights the DTA as a legislative knee-jerk response. All DOD tactics, techniques, and procedures comply with international law, particularly the law of armed conflict.[56] Under the DOD Law of War Program, "[i]t is DOD policy that [m]embers of the DOD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations."[57] The overwhelming majority of interrogation practices complied with legal constraints, and even the adaptations implemented by interrogators in the theater of operations fell within legal parameters.[58] Lack of oversight, training, and specific

---

Alberto R. Gonzales, to the President, subject: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002), *available at* http://www.msnbc.msn.com/id/4999148/site/newsweek/. *Cf.* David E. Graham, *The Treatment and Interrogation of Prisoners of War and Detainees*, 37 GEO. J. INT'L. L. 61, 71–82 (2005). *Contra* Srividhya Ragavan & Michael S. Mireless, Jr., *The Status of Detainees from the Iraq and Afghanistan Conflicts*, 2005 UTAH L. REV. 619, 665–70 (2005).

[52] *See* FM 2-22.3, *supra* note 3; FM 34-52, *supra* note 50.

[53] Church Report, *supra* note 45, at 2–3.

[54] *See* White House Memo, *supra* note 51. The focus of the paper remains on military doctrine and not any other federal agency. Criticism of military interrogations with respect to torture are misplaced. The Central Intelligence Agency's interrogation methods fall under separate authority and a different mission. The DTA's focus on military interrogations is also misplaced by focusing on an Army FM.

[55] *See* Church Report, *supra* note 45, at 7.

[56] U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM 2 (9 May 2006) [hereinafter DOD DIR. 2311.01E].

[57] *Id.* The same policy was found in the previous version of the publication, indicating that the U.S. Armed Forces operated in accordance with the law of armed conflict prior to 2006, covering the military operations in both Iraq and Afghanistan. *See* U.S. DEP'T OF DEFENSE, DIR. 5500.77, DOD LAW OF WAR PROGRAM (9 Dec. 1998) (superseded by DOD DIR. 2311.01E).

[58] *See, e.g.*, Church Report, *supra* note 45, at 9. The Report concludes:

> Interrogation policies were effectively disseminated and interrogators

guidance regarding interrogation policy set the conditions for the relatively few acts of abuse.[59] Moreover, a servicemember's individual act of abuse already constituted a crime under domestic law such as the Uniform Code of Military Justice.[60] Therefore, the DTA added nothing to the international and criminal legal frameworks for U.S. military operations.[61]

The DTA does not list permissible interrogation techniques; rather, it limits the military's interrogation techniques and procedures to those

---

> closely adhered to the policies, with minor exceptions. Some of these exceptions arose because interrogation policy did not always list every conceivable technique that an interrogator might use, and interrogators often employed techniques that were not specifically identified by policy but nevertheless arguably fell within the parameters of FM 34-52. This close compliance with interrogation policy was due to a number of factors, including strict command oversight and effective leadership, adequate detention and interrogation resources, and GTMO's [Guantanamo Bay, Cuba] secure location far from any combat zone.

Id.

[59] *Id.* at 13.

[60] MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 16 (2005). Several provisions of the Uniform Code of Military Justice provide punitive measures for members of the Armed Forces who overstep the boundaries of legal interrogation. For example, Article 92 covers a servicemember's failure to obey orders or regulations. Article 93 covers a servicemember who maltreats or is cruel toward any person who is subject to his or her orders or commands. Article 128 covers assaults. Article 134 potentially covers any conduct that is either prejudicial to the good order and discipline in the armed forces or is of a nature to bring discredit upon the Armed Forces. No doubt should exist that these punitive articles provide an opportunity for the government to respond to any servicemember who oversteps the implemented interrogation procedures or crosses the boundary of acceptable humane treatment of detainees. *See also* DOD DIR. 2311.01E, *supra* note 56, at 5 ("Where appropriate, provide for disposition, under Reference (g), of cases involving alleged violations of the law of war by members of their respective Military Departments who are subject to court-martial jurisdiction.").

[61] Congressional motivation for passage of the DTA appears political; however, an argument that passage of the DTA could ease allies' tension in turning over detainees to American custody bears mention, but little fruit. The DTA neither affords a greater standard of protection for detainees than previously existed, nor does it bolster the standards of conduct of the U.S. Armed Forces. Correspondingly, allies should not have any additional motivation to hand over detainees to American custody as a result of the DTA. *See* Ryan P. Logan, Note: *The Detainee Treatment Act of 2005: Embodying U.S. Values to Eliminate Detainee Abuse by Civilian Contractors and Bounty Hunters in Afghanistan and Iraq*, 39 VAND. J. TRANSNAT'L L. 1605, 1639–40 (2006); FM 34-52, *supra* note 50.

condoned by Congress and specified in FM 2-22.3.[62] Not only did Congress inject its rule into an area constitutionally and historically within the governance of the Executive branch,[63] it also perilously bound the flexibility of the armed forces to implement adaptive tactics, techniques, and procedures related to detainee interrogations.[64] The preface of FM 2-22.3 reflects the congressional handcuffing of military operations by stating that a military member cannot utilize any interrogation technique not contained in the field manual, and the field manual reflectively states that none of its provisions contradict the DTA.[65] This effectively freezes the development of interrogation practices for the military, or at a minimum, presents the Executive with the hurdle of congressional acquiescence to any new interrogation procedures.[66] Considerable debate exists over whether controversial interrogation methods lead to actionable or truthful intelligence,[67] but analysis of the veracity of intelligence gathered using controversial methods lies beyond the scope of this article.[68]

---

[62] Detainee Treatment Act of 2005, 42 U.S.C.S. § 2200dd (LEXIS 2007) (to be codified at 42 U.S.C. § 2200dd). The statute dictates:

> In General—No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.

Id.

[63] *See* U.S. CONST. art. II, § 2; Hamilton v. Dillin, 88 U.S. (21 Wall.) 73 (1874) (considering the authority of the President to exercise war powers by restricting commerce with insurrectionary states); Fleming v. Page, 50 U.S. (9 How.) 603 (1850) (determining presidential exercise of control as military commander over foreign territory).

[64] *See* Meriwether, *supra* note 39; *Vietnam Moment*, *supra* note 39.

[65] 42 U.S.C.S. § 2200dd; FM 2-22.3, *supra* note 3, at vi.

[66] The restricting effect emanates from the fact that the only techniques that may be used are those contained in the FM, and the FM's provisions may not exceed the boundaries established by the DTA. 42 U.S.C.S. § 2200dd; FM 2-22.3, *supra* note 3, at vi.

[67] *See* Kim Lane Scheppele, *Symposium: Fighting Terrorism with Torture: Where to Draw the Line?: Hypothetical Torture in the "War on Terrorism"*, 1 J. NAT'L SECURITY L. & POL'Y 285, 335–37 (2006); John Diamond, *New Pentagon Rules Ban "Abusive" Interrogation*, USA TODAY, Sept. 7, 2006, at 6A ("No good intelligence is going to come from abusive practices." Lt. Gen. John Kimmons); Donna Miles, *GITMO Yielding Valuable Intelligence in a Safe, Disciplined Environment*, AM. FORCES PRESS SERV., June 3, 2004, http://www.defenselink.mil/news/newsarticle.aspx?id=26353.

[68] *See e.g.* Josh White, *Interrogation Research Is Lacking, Report Says*, WASH. POST, Jan. 16, 2007, at A15.

Perceptively, one may argue that Congress has not really frozen the interrogation methods because the FM leaves itself open to revision. However, that argument would result in the DTA becoming useless legislation because the DOD and the Department of Army could change FM 2-22.3 at its will, potentially implementing even more extreme doctrinal measures.[69] The DTA unduly burdens the U.S. military by forcing it to initiate the gnarly process of republishing an Army field manual under the meddlesome oversight of Congress should the military deem it necessary to implement a new interrogation technique not currently covered in the FM. Unnecessary congressional oversight and bureaucracy could result in a powerful deterrent to a change in interrogation doctrine. Inflexible implementation of interrogation techniques for the purpose of gathering intelligence results in one more advantage for the enemies of the United States.[70]

The President made the Executive's interpretations of the DTA clear in that it would not interfere with the office's constitutional authority as the unitary executive.[71] The DTA and the President's signing statement

---

[69] As an alternative to legislating detainee interrogations and military doctrine, the DOD could have inserted its own punitive language in FM 2-22.3 stating that the use of techniques not approved in the manual may be punishable under the Uniform Code of Military Justice or federal law. This step may have eliminated, or at least mitigated, congressional concerns.

[70] Static military doctrine permits an enemy to train to defeat the tactics, techniques, and procedures used by the Armed Forces. Flexibility does not necessitate the implementation of illegal or "abusive" methods.

[71] *See* Statement on Signing The "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006," 41 WEEKLY COMP. PRES. DOC. 1918 (Dec. 30, 2005) [hereinafter Signing Statement], http://www.whitehouse.gov/news/releases/2005/12/print/200512308.html. The President noted that:

> The executive branch shall construe section 8104, relating to integration of foreign intelligence information, in a manner consistent with the President's constitutional authority as Commander in Chief, including for the conduct of intelligence operations, and to supervise the unitary executive branch. Also, the executive branch shall construe sections 8106 and 8119 of the Act, which purport to prohibit the President from altering command and control relationships within the Armed Forces, as advisory, as any other construction would be inconsistent with the constitutional grant to the President of the authority of Commander in Chief.

Id. But see Erin Louise Palmer, *Reinterpreting Torture: Presidential Signing Statements and the Circumvention of U.S. and International Law*, 14 HUM. RTS. BR. 21 (2006)

attached to the DTA reflect the tension between Congress and the Executive with respect to governance of military operations and its doctrine.[72] This tension requires resolution through application of the Constitution and interpretations of the traditional arbiter of disputes between Congress and the Executive, the Judiciary.

IV. Constitutional Authority to Govern the U.S. Armed Forces

"By the Constitution, as originally adopted, no limitations were put upon the war-making and war-conducting powers of Congress and the President; and after discussion, and after the attention of the country was called to the subject, no other limitation by subsequent amendment has been made . . . ."[73] The Court's comments hold true today as the branches of the U.S. government obtain their authority to take action with respect to the military based upon their enumerated powers in the Constitution.[74] The Constitution establishes a bifurcated framework regarding regulation of the armed forces between the Executive and Congress.[75] Although bifurcated, it appears that the Framers understood that there must be a unity of command that bears ultimate responsibility for the operations of the armed forces, and that is the Executive.[76] It was

---

(stating that the President's signing statement should not have the effect of interpreting the law to circumvent existing legislation and international law).

[72] *See* Signing Statement, *supra* note 71; *see also* Broomfield, *supra* note 49, at 106.

[73] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 32–33 (1866). The Court stated:

> Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander in chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions.

Id. at 139–40.

[74] Robert S. Barker, *Government Accountability and Its Limits*, ISSUES OF DEMOCRACY (Aug. 2000), http://usinfo.state.gov/journals/itdhr/0800/ijde/barker.htm.

[75] *See* U.S. CONST. arts. I, II; *see also* Hartzmann, *supra* note 13, at 68–72 ("supporting Congress's authority to make rules for the government and regulate the land and naval forces").

[76] *See* U.S. CONST. art. II, § 2; *see also* Hartzmann, *supra* note 13, at 69 (noting "the application by the Framers of the fundamental constitutional principle of the separation of

in the Constitution that the Framers created the office of the Executive and bestowed within it the powers of Commander in Chief of the Armed Forces.[77] However, the power and authority of Commander in Chief does not necessarily act to the total exclusion of Congress; under optimal conditions, a mutual respect between the branches for exercising power over the military and its operations exists.[78]

The model of reciprocity has "come to be accepted as the appropriate way to approach questions of power."[79] Justice Jackson's opinion in *Youngstown Sheet & Tube Co. v. Sawyer* (*Youngstown*) highlights the model of reciprocity where he stated that "[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches a separateness but interdependence, autonomy but reciprocity."[80] This interdependence among each branch, while struggling to maintain as much constitutional authority as possible, has created tensions within the federal government.[81] Unfortunately, as Justice Jackson admits, no clear answer on the delineation of constitutional authority exists, and the best that the third branch of

---

powers, which in this instance was based on a concern for effective and efficient government.").

[77] *See* U.S. CONST. art. II, § 2; *see also* Hartzmann, *supra* note 13, at 74. Hartzmann writes:

> As finally drafted by the Framers, the new Constitution created the executive office of the President and transferred to that office certain military powers that had previously been assigned to the Congress under the Articles of Confederation. Instead of the commander in chief being an agent of the Congress serving at the order and direction of the Congress, the commander in chief function was incorporated independently into the office of the President, merging the military function of the supreme commander with the political function of the executive. Furthermore, the power to direct military operations was removed as one of Congress's named powers and not otherwise expressly mentioned in the new Constitution.

Hartzmann, *supra* note 13, at 74.

[78] *See* Hartzmann, *supra* note 13, at 121.

[79] Neil Kinkopf, *The Statutory Commander in Chief*, 81 IND. L.J. 1169, 1170 (2005).

[80] Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 635 (1952) (Jackson, J. concurring).

[81] *See* Hartzmann, *supra* note 13, at 106–09 (citing BRIGADIER GENERAL G. NORMAN LIEBER, REMARKS ON THE ARMY REGULATIONS (1898)).

government, the Judiciary, can add to a potential solution is a framework for analysis.[82]

A. Congressional Authority to Regulate the Armed Forces of the United States

Congress finds its authority for regulating the Armed Forces of the United States in Article I, Section 8, of the Constitution, primarily to raise, support, and regulate the armed forces, and make any other laws necessary to give effect to those charges. [83] While there is no point in arguing that Congress has no place in regulating the military, there are competing commentaries and support for both a narrow and expansive interpretation of Congress's "make rules" and "make all Laws" authorities.[84]

Brigadier General G. Norman Lieber argued in 1898 as The Judge Advocate General of the Army that Congress, without a doubt, held primacy over the Executive with respect to control over the military.[85] He extended his primacy theory by stating that the Executive could not encroach upon Congress's constitutional authority when exercising

---

[82] *See id.* at 637.

[83] U.S. CONST. art. I, § 8. Congress's powers are:

> To raise and support armies . . . [t]o provide and maintain a Navy . . . [t]o make Rules for the Government and Regulation of the land and naval Forces . . . and . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof.

Id.

[84] *See* Hartzmann, *supra* note 13, at 82–89; Memorandum, Office of the Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Alberto R. Gonzales, Counsel to the President, subject: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002) [hereinafter Interrogation Memorandum], *available at* http://www.washingtonpost.com/wp-srv/national/documents/dojinterrogationmemo20020801.pdf, *superseded by* Memorandum, Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Deputy Attorney General (Dec. 30, 2004), *available at* http://www.usdoj.gov/olc/18usc23402340a2.htm ("Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield.").

[85] *See* Hartzmann, *supra* note 13, at 106–09 (citing BRIGADIER GENERAL G. NORMAN LIEBER, REMARKS ON THE ARMY REGULATIONS (1898)).

control of the military.[86] General Lieber used the constitutional context of express grants of authority for Congress compared to construction of Executive powers within the Constitution to support his argument.[87]

---

[86] *Id.*

[87] *Id.* General Lieber argues:

> As to the subject matter of regulations for the government of the Army, no distinct line can be drawn separating the President's constitutional power to make them from the constitutional power of Congress "to make rules for the government and regulation" of the land forces. Regulations are, when they relate to subjects within the constitutional jurisdiction of Congress, unquestionably of a legislative character, and if it were practicable for Congress completely to regulate the methods of military administration, it might, under the Constitution do so. But it is entirely impracticable, and therefore it is in a great measure left to the President to do it. So far as Congress chooses to exercise its jurisdiction in this respect it occupies the field, and the President can not encroach on it. But when it does not do so, the President's power is of necessity called into action. It is, indeed, of the commonest occurrence for Congress to regulate a subject in part and for the Executive to regulate some remaining part, and this without any pretense of statutory authority, but upon the broad basis of constitutional power. We thus have a legislative jurisdiction and, subject to it, an executive jurisdiction extending over the same matter." He goes on to say "When Congress fails to make regulations with reference to a matter of military administration, but either expressly or silently leaves it to the President to do it, it does not delegate its own legislative power to him, because that would be unconstitutional, but expressly or silently gives him the opportunity to call his executive power into play. It is perhaps not easy to explain why, if regulations may, under the Constitution, be made both by the legislative and executive branches, one should have precedence over the other; but it is to be noticed that the power of Congress is the express one "to make rules for the government and regulation of the land and naval forces," whereas the power of the President is a construction of his position as Executive and commander in chief. The legislative power, by the words quoted, covers the whole field of military administration, but it is not always certain how far the executive power may go. It is not as well defined as the legislative power, but it is undoubtedly limited to so much of the subject as is not already controlled by the latter. The jurisdiction of the executive power is not, however, within this limit coextensive with that of the legislative power, because the legislative branch of the government has a constitutional field of operation peculiar to itself, and yet there are army regulations which seem to be of a legislative character. It is because of this that difficulty sometimes occurs—a difficulty which has in the past quite often taken the form of a difference of views between the War Department and the accounting officers of the Treasury.

General Lieber's argument exhibits flaws as he explains the basis for his theory. General Lieber relies on the fact that Congress is just too busy to become involved in the day-to-day regulation of the military and leaves the matter for the Executive to handle.[88] However, he argues that Congress can take back the reins of authority at any time.[89] Congress's "plate is too full" is a poor constitutional argument for the allocation or interpretation of authority for control of the armed forces. General Lieber also too easily dismisses the clear Commander in Chief powers bestowed upon the Executive under Article II by presuming that Congress always possesses a superior authority regarding the military and the Executive only exercises power in the absence of congressional action.[90] Congress's explicit power to regulate the armed forces actually focuses on its physical make-up, and not its operations other than the actual declaration of war.[91]

Congress's power to establish rules within the military does not lack for foundation, as seen in Article I of the Constitution.[92] In fact, scholars have noted that Congress's rulemaking power is plenary when applied to administration of the military, but cannot make the same finding regarding military operations.[93] Alexander Hamilton listed with precise clarity the powers reserved to Congress as declaration of war and raising and regulating the armed forces.[94] The Framers granted powers to Congress only to fund and fiscally restrain the military, as well as regulate its size.[95] The trap lies in ceding too much power to Congress under the fiscal and regulatory umbrellas, as warned by Alexander Hamilton and James Madison. The legislature has a "propensity . . . to intrude upon the rights, and to absorb the powers, of the other departments" and no department should be left at the mercy of another.[96] To posit that Congress can dictate to the Executive the manner in which Executive authority may be wielded is to make Congress the arbiter of

---

Id.

[88] *Id.*

[89] *Id.*

[90] *Id. See* U.S. CONST. art. II, § 2.

[91] *See* U.S. CONST. art. I, § 8.

[92] *Id.*

[93] *See* Hartzmann, *supra* note 13, at 117.

[94] THE FEDERALIST NO. 74, at 447 (Alexander Hamilton) (Clinton Rossier ed., 1961).

[95] U.S. CONST. art. I, § 8.

[96] THE FEDERALIST NO. 73, at 418 (Alexander Hamilton) (Clinton Rossier ed., 1961), NO. 48, at 309 (James Madison) (Penguin ed., 1987) (warning of legislative usurpations that may lead to tyranny); ANDREW C. MCCARTHY ET AL., NSA'S WARRANTLESS SURVEILLANCE PROGRAM: LEGAL, CONSTITUTIONAL, AND NECESSARY 43 (2006).

power, and not the Constitution.[97] Correspondingly, Article I, Section 8, should not be interpreted as the definitive declaration of authority over the military, when in fact it is only an implementing measure to ensure that the other branches have the requisite authority to carry out their powers.[98]

Another element of congressional authority lies in its control of the purse pursuant to Article I, Section 8, of the Constitution.[99] Wielding the power of the purse to promote or defeat political goals is a key and accepted strategy of politicians, but a grasp at straws for opponents and critics of the current administration to support Congress's involvement in military affairs.[100] Beyond politics, there exists a real constitutional threat by Congress's utilizing the power of the purse regarding military operations to the Executive's ability to carry out the office's obligations to protect and defend the nation.[101]

1. Judicial Support for Congressional Regulation of Military Operations

Promoters of legislative superiority in the realm of military operations cite the case of *Little v. Barreme*.[102] In 1799, President John Adams extended legislation passed by Congress for the seizure of American ships heading for a French port to include seizure of American ships emanating from French ports during the short war between the United States and France.[103] Subsequently, the Supreme Court held that

---

[97] *See* MCCARTHY ET AL., *supra* note 96, at 49.

[98] U.S. CONST. art. I, § 8 ("To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.").

[99] *Id.*

[100] Congress should use the power of the purse to regulate the size of the military and its expenditures for facilities, equipment, salary, and supplies, but it should not use the same power to inject itself into the actual operations of the Armed Forces. C*ontra* Russ R. Feingold, *On Opposing the President's Iraq Escalation Policy and Using the Power of the Purse to End Our Military Involvement in Iraq*, Feb. 16, 2007, http://feingold.senate.gov/~feingold/statements/07/02/20070216.htm.

[101] Patty Waldmeier, *Bush Vows to Defy Congress on Iraq plan*, FIN. TIMES, Jan. 15, 2007, http://www.ft.com/cms/s/294c7bf2-a427-11db-bec4-0000779e2340.html.

[102] Little v. Barreme, 6 U.S. (2 Cranch) 70 (1804) (holding that the President could not expand his authority to capture vessels conducting commerce not of a category identified by legislation).

[103] *Id.*

the President could not authorize seizure of American ships emanating from a French port, when Congress had only authorized seizure of American ships going to a French port.[104]

This case developed as a champion for congressional authority exceeding the Executive's in the arena of military affairs. However, the Department of Justice (DOJ) wisely highlights two critical differences in the *Little v. Barreme* case when comparing Congress's power to the Executive's: first, the 1799 law only applied to American ships and did not purport to direct any action by the Executive or the military with respect to engaging enemy ships or forces, and second, the specific law passed by Congress most likely fits well within an enumerated power of Congress with respect to regulating foreign commerce under Article I, Section 8, of the Constitution.[105] These represent marked differences from governing the conduct of military forces in prosecuting a war.[106] The Executive generally directs military powers toward foreign threats and lands. Further, rarely do Executive war power acts contain a primary focus on commercial activities, which naturally fit under express congressional authority.[107] These limiting factors undermine the application of *Little v. Barreme* to an argument supporting congressional legislation of military doctrine.

Proponents of congressional authority also highlight the Supreme Court decision in *Youngstown*, as the Court looked at whether the President's seizure of the nation's steel mills overstepped his authority in light of the Labor Management Relations Act (LMRA) of 1947.[108] President Harry S. Truman, embroiled in the Korean War, feared that a possible strike by steelworkers would result in a national catastrophe, cutting off the supply of steel and its byproducts to the U.S. Armed Forces.[109] However, the LMRA contained a specific framework for the seizure of private property by the Executive in case of a national

---

[104] *Id.*

[105] Memorandum, Alberto R. Gonzales, Attorney Gen., Dep't of Justice, to The Honorable William H. Frist, Majority Leader, United States Senate, subject: Legal Authorities Supporting the Activities of the National Security Agency Described by the President 33 (Jan. 19, 2006) [hereinafter NSA Memo], *available at* http://www.fas.org/irp/nsa/doj011906.pdf.

[106] *See id.* at 33.

[107] *See* U.S. CONST. art. I, § 8.

[108] *Id.*; Labor Management Relations Act of 1947, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141–197 (2000)).

[109] Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 582 (1952).

emergency.[110] President Truman did not follow this framework in the steel mill dispute when he ordered the seizure of the mills.[111] The steel mills brought suit, arguing that the President's seizure was an unlawful taking and lawmaking in violation of the LMRA and Constitution.[112] The President posited that he could execute the seizure because he possessed the authority to protect the nation in an extraordinary circumstance, a time of war, pursuant to Article II of the Constitution.[113] Finally, the Court held that the Executive's constitutional commander in chief powers were limited to the day-to-day fighting in a theater of war, and did not extend to taking possession of private property to alleviate a labor dispute.[114]

While championed for congressional authority, this case is easily distinguishable from the issue of military doctrine, and military interrogations in particular. The seizure of steel mills or private property falls within a traditional and enumerated area of congressional power: regulating commerce among the States in Article I, Section 8, of the Constitution.[115] Military doctrine and interrogations fit under the category of day-to-day operations of the military, specifically identified by the Court as being within the authority of the Executive to control.[116] The holding in *Youngstown* fails to provide a solid base for support of congressional control of the military; in fact, it reinforces the authority of the Executive with respect to military doctrine.[117]

2. Legislative Support for Congressional Regulation of Military Operations

The War Powers Resolution (WPR) also fails to bolster the constitutional basis for Congress's control of military operations.[118] During the era of the Vietnam conflict, Congress attempted to limit the

---

[110] *Id.* at 586.
[111] *Id.*
[112] *Id.* at 582–86; *see* 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141–197).
[113] *Steel Seizure*, 343 U.S. at 587.
[114] *Id.* at 587–89.
[115] U.S. CONST. art. I, § 8.
[116] *Steel Seizure*, 343 U.S. at 587.
[117] *See id.*
[118] War Powers Resolution, 50 U.S.C. §§ 1541–1548 (2000).

power of the Executive regarding the use of troops in armed conflict.[119] The WPR specifically applies to the introduction of troops into a conflict, but not how the troops wage the war once involved.[120] Congress entered the realm of governing military operations with some trepidation, as the WPR goes further to ensure that it has not encroached upon the constitutional authority of the Executive by mentioning that no provision in the law infringes upon Executive authority.[121] Congress even hedged its involvement further by noting that if any provision were found to be invalid (presumably by the Judiciary), that the remaining provisions of the law shall remain in effect.[122] This evasive language demonstrates the lack of solid foundation for Congress to exert authority over military operations in place of the Executive.

B. Executive Authority to Regulate the U.S. Armed Forces

The Constitution charges the Executive with protecting and defending the very same document and its ideals,[123] in addition to protecting the nation.[124] Holding true to the Constitution's intent,

---

[119] Mark T. Uyeda, Note, *Presidential Prerogative Under the Constitution to Deploy U.S. Military Forces in Low-Intensity Conflict*, 44 DUKE L.J. 777, 828 (1995); *see, e.g.*, 50 U.S.C. §§ 1541–1542 (2000):

> [The purpose is to] insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities . . . . The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situation where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

Id.

[120] 50 U.S.C. § 1547 ("Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred- from any provision of law . . . or from any treaty.").

[121] *Id.*; Uyeda, *supra* note 119, at 798–99.

[122] 50 U.S.C. § 1547.

[123] U.S. CONST. art. II, § 2.

[124] Protection of the Constitution relates more to freedom interests and structure rather than security of the nation's property. For example, the Executive possesses the authority to make treaties with foreign states with the advice and consent of the Senate. The United States has entered into treaties that govern some areas of military doctrine,

President Theodore Roosevelt believed that he was a steward of the people and should exert all power not specifically prohibited by the Constitution or Congress.[125] The Framers described the President's obligation to protect the Constitution as obliging the Executive to prevent outside intrusions, whether from Congress, the Judiciary, or a foreign state.[126] The Executive must protect the Constitution, the nation's territory and citizens, as well as the office's authority. All of these protections relate to the control and direction of the U.S. Armed Forces, its doctrine and operations.[127]

1. Executive Authority as Commander in Chief

Article II, Section 2, of the Constitution grants the President the title of Commander in Chief of the Army and Navy of the United States.[128] The Constitution lacks additional definitions of the roles and responsibilities of the Commander in Chief, but the Framers surely understood that the grant of authority covered the operational direction of the U.S. military.[129] Alexander Hamilton wrote that the only powers

---

including the area of interrogations, such as Geneva Convention III and Geneva Convention IV Relating to Prisoners of War and Civilians, respectively. These treaties do not necessarily touch upon the national security interests of the United States, as they do not offer protections to our citizens and military personnel within the borders of our country during the current conflict (the Geneva Conventions would offer protections to citizens in the United States if the conflict were to occur on United States soil). The treaties do offer protections for our citizens and military personnel when they find themselves in foreign areas during time of war or occupation, thereby protecting a freedom interest. *See* U.S. CONST. art. II; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[125] Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 662 (1952).

[126] THE FEDERALIST NO. 49 (James Madison), NO. 70 (Alexander Hamilton).

[127] *Contra* Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 32 (1993) (recognizing the Executive's authority to utilize the office's protective powers, he cannot concede that the President may use military forces at his will to the contrary of congressional wishes).

[128] U.S. CONST. art. II, § 2.

[129] THE FEDERALIST NO. 74, at 447 (Alexander Hamilton) (Clinton Rossier ed., 1961) (comparing the power over the military and the ability to declare war to that of the King of Britain, but dissecting the two authorities among the Executive and Congress); THE FEDERALIST NO. 69, at 417–18 (Alexander Hamilton) (Clinton Rossier ed., 1961). Hamilton writes:

> *First*. The President will have only the occasional command of such

reserved from the President with respect to the military were those already laid out in the Constitution as expressly granted to Congress.[130] Consequently, the Executive holds a better position than the legislature or Judiciary to control the U.S. Armed Forces.[131] A single individual with the assistance of advisors can more efficiently control and direct the military than an unwieldy group debating to reach a consensus for action such as within the Congress.[132] Hamilton penned that "unity is conducive to energy," and "[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished."[133] The energy of the Executive was sought by the Framers and vested as the unitary power over military operations.[134] Moreover,

---

> part of the militia of the nation as by legislative provision may be called into the actual service of the Union. The king of Great Britain and governor of New York have at all times the entire command of all the militia within their several jurisdictions. In this article, therefore, the power of the President would be inferior to that of either the monarch or the governor. *Second*. The President is to be commander in chief of the army and navy of the United States. In this respect, his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature.

Id.

[130] THE FEDERALIST NO. 74, at 447 (Alexander Hamilton) (Clinton Rossier ed., 1961).

[131] THE FEDERALIST NO. 70 (Alexander Hamilton).

[132] *Id.* at 424 (Alexander Hamilton).

[133] *Id.* The Executive holds a position that may respond more quickly than Congress when a need arises to change military interrogation doctrine and practices. While it took years to finalize FM 2-22.3 in light of the interrogation controversies that began in 2002, the DTA acts as an additional hurdle by including congressional concurrence in the doctrine and implementation of interrogation. The DTA effectively means that servicemembers may not employ interrogation methods not contained in the current version of FM 2-22.3. Congress thereby inserted its oversight into the development of doctrine, and added an additional hurdle of supposed approval of to-be-developed interrogation techniques. *See* Detainee Treatment Act of 2005, 42 U.S.C.S. § 2200dd (LEXIS 2007) (to be codified at 42 U.S.C. § 2200dd).

[134] Hartzmann, *supra* note 13, at 76–77. *But see* Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 644 (1952) (Jackson, J., concurring) (stating that the Executive does not have a monopoly with respect to war powers). Justice Jackson's statement should be read in consideration of Congress's authority to declare war, as well as to regulate the military by size and funding.

the holdings of the Supreme Court support the Executive's power to direct military campaigns under the Commander in Chief authority of the Constitution.[135] Much of this authority lies in the interpretive powers of the Executive as the Commander in Chief.[136]

2. Foreign Affairs and National Security Powers of the Commander in Chief

The Founders vested the responsibility and authority necessary to conduct the nation's foreign affairs and preserve the country's security within the Executive as Commander in Chief.[137] The Executive holds exclusive power when establishing foreign affairs, and the Executive promotes the foreign affairs objectives through the Commander in Chief powers when using military operations and tactics to support its policies.[138] As a limiting factor upon this power, the President cannot transcend the bounds of existing law, including international legal norms.[139] Military interrogations fall within this exclusive power as matters of foreign affairs and national security.[140] By design, military interrogations take place on foreign soil and subject foreign citizens to their means and methods; these facets sufficiently relate detainee interrogations to foreign affairs.[141]

The President also possesses powers to defend and protect the nation through Article II, Section 1, of the Constitution, known as the "Vesting

---

[135] *See* Hamilton v. Dillin, 88 U.S. (21 Wall.) 73, 7 (1874) (stating that the President is "constitutionally invested with the entire charge of hostile operations"); Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850) (holding that the President possessed the power to "employ [the military] in the manner he may deem most effectual to harass and conquer and subdue the enemy"); The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 688 (1862) (stating that the President was obliged to resist attack against the United States with all appropriate measures).

[136] *See* CHRISTOPHER S. KELLEY, RETHINKING PRESIDENTIAL POWER—THE UNITARY EXECUTIVE AND THE GEORGE W. BUSH PRESIDENCY 4–10 (2005). *Contra* KOH, *supra* note 15, at 45.

[137] THE FEDERALIST NO. 70 at 471–72 (Alexander Hamilton) (Clinton Rossier ed., 1961). *But see* Monaghan, *supra* note 127, at 52–53 (arguing that Congress delegated foreign affairs powers to the President).

[138] *Cf.* Hartzmann, *supra* note 13, at 77. *Contra* KOH, *supra* note 15, at 45.

[139] *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 175 (1866).

[140] Military operations are an extension of national security through the use of military forces to combat terrorism and national threats on territory other than United States.

[141] Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture*, 81 IND. L.J. 1255, 1262 (2005).

Clause."[142] The Vesting Clause grants the President plenary authority to direct the United States' interests outside the borders of this country, limited only by the Constitution itself and those restraints set by Congress in accordance with its enumerated powers.[143] In support of this vesting, James Madison wrote, "[t]he several departments being perfectly co-ordinate by the terms of their common commission, none of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers."[144]

The Court has weighed in on several occasions regarding the Executive's authority in foreign affairs: "The powers of the President in the conduct of foreign relations include the power, without consent of the Senate, to determine the public policy of the United States."[145] Foreign policy authority rests with the Executive by constitutional direction,

---

[142] U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").

[143] *The President's Compliance with the "Timely Notification Requirement" of Section 501(b) of the National Security Act*, 10 Op. O.L.C. 159, 160–1 (1986); *see also* Interrogation Memorandum, *supra* note 84. The opinion reveals:

> Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander in Chief authority in the President. There can be little doubt that intelligence operations, such as the detention and interrogation of enemy combatants and leaders, are both necessary and proper for the effective conduct of a military campaign. Indeed, such operations may be of more importance in a war with an international terrorist organization than one with the conventional armed forces of a nation-state, due to the former's emphasis on secret operations and surprise attacks against civilians. It may be the case that only successful interrogations can provide the information necessary to prevent the success of covert terrorist attacks upon the United States and its citizens. Congress can no more interfere with the Presidents' conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield. Just as statutes that order the President to conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States.

Id.

[144] THE FEDERALIST NO. 49 (James Madison).

[145] United States v. Pink, 315 U.S. 203, 229 (1942) (deciding whether the United States was entitled under an executive agreement to recover the assets of a Russian insurance company located in New York).

judicial interpretation, and the inherent powers of the office.[146] Further, because the entire nation elects the President, whereas specific voting districts select their congressional representatives, the President holds a better position as head of the diplomatic, military, and intelligence agencies to determine foreign policy.[147] Congress comprises far too unwieldy a body to effectively engage in foreign affairs, and the Judiciary by its nature plays no role. Military doctrine with respect to detainee interrogations supports not only national security, but foreign policy, both within the governing authority of the Executive.[148]

Utilizing a recent Supreme Court case analysis in *Hamdi v. Rumsfeld*, Justice Thomas' dissent promotes viewing national security and foreign affairs in a strict and simple constitutional framework.[149] Principally, according to Justice Thomas, the President has "primary responsibility . . . to protect the national security and to conduct the nation's foreign relations. . . . [I]t is crucial to recognize that judicial interference in these domains destroys the purpose of vesting primary responsibility in a unitary Executive."[150] The power to direct a military campaign in the interests of national security fits most justly within the Executive because servicemembers sacrifice themselves and conduct their operations at the direction of their commander.[151]

The Supreme Court provides further support for the Executive's constitutional authority being at its highest in the realm of national security.[152] The dissent in *Youngstown* remarked that the Executive has a "grave constitutional duty to act for the national protection in situations not covered by the acts of Congress."[153] The Executive should not act

---

[146] Uyeda, *supra* note 119, at 812.
[147] *Id.*
[148] *See* Church Report, *supra* note 45.
[149] Hamdi v. Rumsfeld, 542 U.S. 507, 580–82 (2004).
[150] *Id.* at 580–82.
[151] Hamdi v. Rumsfeld, 316 F.3d. 450, 463 (4th Cir. 2003), *rev'd*, 542 U.S. 507 (2004) ("The Constitutional allocation of the warmaking powers reflects not only the expertise and experience lodged within the executive, but also the more fundamental truth that those branches most accountable to the people should be the ones to undertake the ultimate protection and to ask the ultimate sacrifice from them.").
[152] Even in a case of military administration, the Court held that the Executive's national security powers hold more weight than Congress's regulatory authority. Dep't of the Navy v. Egan, 484 U.S. 518, 527–30 (1988) (considering whether a civilian employee who had been denied a security clearance required a hearing before such denial, and holding that the Executive or Agency is left to determine the appropriate process).
[153] Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 691 (1952) (Vinson, J., dissenting).

contrary to the laws passed by Congress, but it certainly can act for the benefit of the public when necessary, particularly in those instances where the authority is not clearly found in the Constitution or in previous legislation.[154] The President's national security powers, including detainee interrogations, should be generally permissive unless expressly restricted by the Constitution, international law, or upon command of Congress or the Supreme Court.[155] Accordingly, Congress and the courts should only make such a command upon the Executive when the conduct of military operations results in a clear contradiction of existing laws. Moreover, the Executive possesses a great advantage over Congress when faced with threats to the national security and application to military operations: the Executive has a direct link to information about current threats and control over several agencies that can respond to the threat.[156] The Executive must be able to act swiftly without compromising its sources, rely on its accumulated experience, and issue orders that will be obeyed without pause.[157]

3. Executive Powers in Emergency

The twenty-first century brought a period of national urgency, if not emergency, to the United States with respect to the GWOT. The Supreme Court has recognized over time that the Executive's power exhibits elasticity in times of national emergency or strife.[158] Those who believe that the Bush Administration pushed the boundary of torture should recognize that this Executive is not the only President to push the limits of Executive authority.[159] President Howard Taft, a conservator of

---

[154] *See id.* at 691–92.

[155] *Cf.* Meriwether, *supra* note 39, at 167 ("The government's reluctance to release information about the exact interrogation techniques used on detainees is obviously rooted in the need for operational security.").

[156] *See* Pearlstein, *supra* note 141; Outline, *supra* note 2.

[157] Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 644 (2003).

[158] *See, e.g.*, *Steel Seizure*, 343 U.S. at 691 (holding that the President did not have the authority to circumvent legislation and seize the nation's steel mills in anticipation of a workers strike when federal legislation laid out a specific procedure); s*ee also* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425–26 (1934) ("While emergency does not create power, emergency may furnish the occasion for the exercise of power."). *But see* Monaghan, *supra* note 127, at 32–33 (stating that the Constitution contains no provision for the suspension of laws or extension of powers in time of emergency).

[159] For an argument that a President stretched his authority too far, s*ee* Monaghan, *supra* note 127, at 6 (crediting Theodore Draper argument that "much of the wrong-doing in the Iran-Contra episode flowed directly from the constitutionally impermissible conception

Executive authority, believed that the presidential duty to take care that the laws of the nation be faithfully executed went beyond "express Congressional statutes."[160] President Woodrow Wilson censored cables, telegraphs and telephones at the onset of World War I pursuant to executive order[161] and President Franklin D. Roosevelt directed the Federal Bureau of Investigation to exercise censorship of news media and telecommunications after the attack on Pearl Harbor.[162] Additionally, President Abraham Lincoln wrote "that measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation."[163] He then asked Congress to get involved in his actions such as suspension of habeas corpus, arrests, and conscription.[164] The Executive has the requisite authority, just as exercised by these past Presidents, to interpret laws and obligations and formulate policy to preserve the nation in times of emergency.[165] A key difference between past Presidents and the twenty-first century lies in the ability of the media to inundate the public with both fact and opinion regarding the President's actions—making the issues much more divisive. Meanwhile, the country's citizenry cannot agree on whether the nation is experiencing a national emergency.[166] Like President George W. Bush, historically-respected

---

of presidential power . . . ."). Stretching the boundaries of executive authority in times of emergency does not necessarily equate to a morally correct course of action, but acceptance may be required in light of the Executive's constitutional mandate to preserve the security of the nation, particularly when the constitutional limits to that authority are not clearly defined.

[160] *Steel Seizure*, 343 U.S. at 689 (Vinson, J., dissenting) (pointing out that even President Taft, known for critiquing the Executive exercise of authority by President Theodore Roosevelt, himself admitted in his book, *Our Chief Magistrate and His Powers* 139–47 (1916), that Executive authority reached beyond a congressional statute).

[161] Exec. Order No. 2604 (Apr. 28, 1917).

[162] Jack A. Gottschalk, *Consistent with Security: A History of American Military Press Censorship*, 5 COMM. & L. 35, 39 (1983).

[163] Monaghan, *supra* note 127, at 27–28 (citing Abraham Lincoln, Letter of April 4, 1864, to A.G. Hodges, 10 COMPLETE WORKS OF ABRAHAM LINCOLN 66 (Nicolay and Hay ed. 1894)).

[164] *Id.*

[165] *Contra id.* at 30 (arguing that no President can disregard applicable legislation, even in an emergency).

[166] Whether or not one agrees that the current state of national security constitutes an emergency, citizens who fear that the use of emergency executive authority threatens their personal liberties are not necessarily justified in their fear. *See* Posner et al., *supra* note 157, at 626. Posner argues:

> The panic thesis argues that because fear causes decisionmakers to exaggerate threats and neglect civil liberties and similar values,

Presidents stood even more firmly in the belief that the duty to protect the nation exceeded the actual text of the Constitution,[167] moving from an emergency power to the inherent authority of the Executive.

4. Executive Inherent Authority

While debatable and inscrutable, the Executive possesses the inherent authority to solely regulate military doctrine.[168] The Constitution's enumerated powers do not comprise the complete foundation for authority among the branches of the federal government. Implied and inherent authorities permeate the stances of both the Executive and Congress, although neither implied or inherent authorities appear in the Constitution itself.[169] The judicial branch as well as scholars have looked beyond the text of the Constitution in light of the issue or problem at hand and applied practice and precedent to exert or categorize powers.[170] Justice Scalia summarized inherent authority best

---

> expanding decisionmakers' constitutional powers will result in bad policy. Any gains to national security would be minimal, and the losses to civil liberties would be great. Thus, enforcing the Constitution to the same extent as during periods of normalcy would protect civil liberties at little cost. We argue that this panic thesis is wrong and does not support the strict enforcement position.

Id. Contra American Civil Liberties Union, *FBI E-Mail Refers to Presidential Order Authorizing Inhumane Interrogation Techniques* (Dec. 20, 2004), *available at* http://www.aclu.org/safefree/general/18769prs20041220.html.

[167] *See* Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 689 (1952); Exec. Order No. 2604 (Apr. 28, 1917); Gottschalk, *supra* note 162, at 139; Monaghan, *supra* note 127, at 6, 27–28.

[168] *See Steel Seizure*, 343 U.S. at 634 (Jackson, J., concurring) (gleaning the Framers' visions under modern conditions must be "divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."). *But see* Broomfield, *supra* note 49, at 128–29 (by signing the Detainee Treatment Act and invoking inherent authority to interpret by carrying out Executive duties, the President needed constitutional authority to make such invocation, and this argument states that there is no constitutional authority present post-passage of the Act, along with no court having determined that the inherent authority includes authority to legislate); KOH, *supra* note 15, at 45 ("The vast majority of foreign affairs power the President exercises daily are not inherent constitutional powers, but rather powers that Congress has expressly or implicitly delegated to him by statute.").

[169] SUNSTEIN, *supra* note 9, at 49.

[170] *See, e.g.*, *Steel Seizure*, 343 U.S. at 610–11 ("It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss of which life has written upon them."); *see also* Uyeda, *supra* note

when he wrote that it was "not simply enough to repose the power to execute the laws (or to appoint) in the President; it was also necessary to provide him with the means to resist legislative encroachment upon that power. . . . [E]ven to disregard them when they are unconstitutional."[171]

The interpretive power of the Executive led to the moniker of unitary executive.[172] The unitary executive depends upon departmentalism to exercise interpretive power.[173] Instances such as Watergate and the Vietnam War stressed the faith and trust in the office of the President, and since those times, the Executive has postured itself on issues to solidify its authority and fend off attempts to strip the office of its powers.[174] After these disparaging events, the Presidency has sought to accomplish through administrative agencies what it could not accomplish through legislation, thereby pushing the bounds of presidential constitutional powers.[175]

The Executive's inherent authority emanates from the practical interpretations of the branch's authority under the Constitution,[176] applicable to military operations and doctrine. As aptly put by Justice Robert H. Jackson: "To be sure, the President has inherent authority to

---

119, at 802–10 (arguing that the President holds the authority to deploy military forces of the United States to foreign low-intensity conflicts without congressional authorization).

[171] Freytag v. Comm'r, 501 U.S. 868, 906 (1991).

[172] *Cf.* KELLEY, *supra* note 136, at 4.

[173] *Id.* This article utilizes the unitary executive theory in that the powers of the Executive are focused and centralized in the President.

[174] *Id.* at 9–10.

[175] *Id.* at 10.

[176] Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 640, 653 (1952). The Court stated:

> [C]lauses could be made almost unworkable, as well as immutable, by refusal to indulge in some latitude of interpretation for changing times . . . and . . . give to the enumerated powers the scope and elasticity afforded by what seem to be reasonable, practical implications instead of the rigidity dictated by a doctrinaire textualism. . . . As to whether there is imperative necessity for such powers, it is relevant to note the gap that exists between the President's paper powers and his real powers. The Constitution does not disclose the measure of the actual controls wielded by the modern presidential office. That instrument must be understood as an Eighteenth-Century sketch of a government hoped for, not a blueprint of the government that is.

Id.

oversee battlefield operations, and Congress has limited power to control such operations."[177] The weight of the two Justice's comments lends sufficient credibility to the inherent powers of the Executive to control military doctrine without congressional interference. Nevertheless, should one still believe that the area of military doctrine at least lends itself to concurrent authority, we can look to the decisions of the Judiciary beyond just the statements of Justices Jackson and Scalia.

C. The Supreme Court as Arbiter of Authority between Congress and the Executive

Often a zone of concurrent authority between the Executive and Congress exists in the area of regulating the activities of U.S. Armed Forces due to the constitutional structure of enumerated powers.[178] To mediate a power struggle between Congress and the Executive, the Framers also created the third branch of government, the Judiciary.[179] The Judiciary exists as the primary interpreter of the Constitution and the enumerated and inherent authorities of the federal government.[180] The time-tested and oft cited case of *Youngstown* provides a framework for sorting out the military authority disagreements among the Executive and Congress.[181]

1. Youngstown *and Military Doctrine*

While the holding in *Youngstown* cut against the authority of the Executive, the majority's opinion is easily distinguishable from application to the matter of control over military doctrine.[182] Congress had specifically laid out a process for the Executive and others to follow should the need ever arise to confiscate the private property of the labor industry.[183] The Executive only contradicted a congressional grant of authority through procedural noncompliance.[184] *Youngstown* also focused on domestic industries, only tangentially relating to the war

---

[177] *Id.*
[178] *Id.* at 638.
[179] THE FEDERALIST NO. 78 (Alexander Hamilton).
[180] *Id.*
[181] *Steel Seizure*, 343 U.S. 579.
[182] *See supra* sec. IV.A.1.
[183] *See Steel Seizure*, 343 U.S. at 582–84.
[184] *See id.*

efforts and war regulating authority of the Executive overseas.[185] Further, *Youngstown*'s issues did not involve military members' actions.[186] Lastly, the Court may very well have made a different ruling had President Truman issued an executive order directly related to military operations during the Korean War. Justice Jackson noted that it was not a claim of the Government that the seizure of the steel mills was in the nature of a military command.[187] Application of military doctrine to detainee interrogations bears a direct relation to a military command function. Unless the Executive's practices violate international law, Congress should restrain its ability to create laws with respect to the constitutional authority of the Executive in the matter of military operations.[188] *Youngstown*'s usefulness in its application to military doctrine rests more in the parallels of Justice Jackson's concurring opinion rather than in the holding of the Court itself.

The most useful part of the case for military doctrine application lies in Justice Jackson's test for measuring the weight of power exercised by the Executive in relation to congressional action.[189] Justice Jackson wrote that the President's powers strengthen or weaken based upon the actions taken by Congress, developing a three-part analysis:

> (1) when the Executive acts based upon express or implied congressional authorization, his power is at its zenith; (2) when the Executive exerts authority in an area shared with Congress without specific legislative action, then the authority is in a "zone of twilight" indicating the existence of authority, but weakened authority, and (3) when the Executive acts contrary to express or implied Congressional will, then the authority of the office is at its "lowest ebb."[190]

The issue of control over the military doctrine of detainee interrogations does not fit neatly into one of Justice Jackson's categories. Rather, it is useful to consider a spectrum from explicit congressional authorization

---

[185] *See id.*
[186] *See id.*
[187] *Id.* at 659 (Burton, J. concurring).
[188] *But see Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139–40 (1866) ("But this government of ours has power to defend itself without violating its own laws; it does not carry the seeds of destruction in its own bosom.").
[189] *Steel Seizure*, 343 U.S. at 634–40 (Jackson, J., concurring).
[190] *Id.* at 635–38; Uyeda, *supra* note 119, at 792.

to explicit congressional prohibition with respect to Executive action.[191] Therefore, for the proponent of legislative control, the issue of controlling military doctrine would fall on the spectrum of Executive authority at its "lowest ebb."[192] However, Justice Jackson, like several Bush Administration legal counselors, is not persuaded that the Executive can wield only those delegated powers in the Constitution.[193] Surely, Congress does not possess the impenetrable power to dictate the actions of Executive.[194]

Justice Jackson penned an additional explanation of his analysis by stating, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority or in which distribution is uncertain."[195] To further explain the "zone of twilight" that may exist in the area of military doctrine and control, Justice Jackson comments, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[196] It would be inappropriate to interpret Justice Jackson's analysis to find that the President has no authority when at its lowest ebb, but rather using Justice Jackson's own words that the President would then be relying on his own constitutional powers in the matter despite the direct contradiction to Congress's will as expressed in the DTA.[197] The Executive possesses the Constitutional powers necessary to establish military doctrine and interrogation policies utilizing the Commander in Chief powers, along with the inherent

---

[191] Dames & Moore v. Regan, 453 U.S. 654 (1981); MCCARTHY ET AL., *supra* note 96, at 51.
[192] *But see Steel Seizure*, 343 U.S. at 587 (controlling day-to-day theater of operations performed by the Commander in Chief through the military services as Executive branch agencies).
[193] *Id.* at 640; Interrogation Memorandum, *supra* note 84.
[194] *But see Steel Seizure*, 343 U.S. at 643–44 (stating that the President is not the Commander in Chief of the entire country).
[195] *Id.* at 637.
[196] *Id.* at 637–38.
[197] *Cf.* MCCARTHY ET AL., *supra* note 96, at 51; Detainee Treatment Act of 2005, 42 U.S.C.S. § 2200dd (LEXIS 2007) (to be codified at 42 U.S.C. § 2200dd).

authorities to promote national security and protect the nation, while satisfying Justice Jackson's test.[198]

2. Judicial Interpretation of Control of the Military Beyond Youngstown

An absence of Executive authority to regulate the U.S. Armed Forces would paralyze the military and the nation.[199] Justice Chase's concurring opinion in *Ex parte Milligan* highlights the Executive's exclusive authority to act within a military operational setting.[200] Congress has no power to interfere with the Executive's "command of the forces and the conduct of campaigns. That power and duty belong to the President as commander in chief."[201] At other points in history, the Court recognized congressional involvement in military operations as permissible under the Constitution, sometimes acknowledging Executive request for involvement.[202] A key distinction to these cases lies in the absence of congressional involvement in the means and methods of war operation.[203] Both the Framers of the Constitution and the Court intended and viewed the President as possessing concurrent authority to regulate the military, but retaining sole responsibility for governing military operations.[204]

---

[198] *Contra* Hamdan v. Rumsfeld*: Establishing a Constitutional Process, Hearing Before the S. Comm. on the Judiciary*, July 11, 2006 (testimony of Harold H. Koh, Dean, Yale Law School), *available at* http://Judiciary.senate.gov/testimony.cfm?id=1986&wit_id =5508 [hereinafter Koh Testimony] (relating that Congress has implemented myriad laws and regulations that enable the Executive and the military to engage the enemy, and that without such enabling legislations, the Executive would not be empowered to engage them in manner of unilateral decision).

[199] *See* United States v. Eliason, 16 U.S. 291 (1842) (holding that "the power of the executive to establish rules and regulations for the government of the army, is undoubted," and if there were not such power, the military could be paralyzed absent some other congressional action).

[200] *Ex parte Milligan*, 71 U.S. (4 Wall.) at 139–40.

[201] *Id.*

[202] *See* Hartzmann, *supra* note 13, at 99–101 (noting the request of the Executive for Congress to become involved in command relationships and organizational structure).

[203] Interrogation Memorandum, *supra* note 84.

[204] *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2; THE FEDERALIST NOS. 26, 69, 74 (Alexander Hamilton).

3. Deference to the Executive

The Supreme Court has also shown a significant measure of deference to the Executive when interpreting authority and implementation of laws regarding national security[205] and Article II duties.[206] Justice Jackson aptly wrote in *Youngstown*, "I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society."[207] Hence, courts hesitate to intrude upon the authority of the Executive in military and national security affairs.[208] This measure of deference offers an additional pillar of support for sole governance of military doctrine and operations within the Executive. The Executive's implementation of detainee interrogation techniques deserves deference from both the Judiciary and legislature.[209]

---

[205] Hamdi v. Rumsfeld, 316 F3d. 450, 463 (4th Cir. 2003), *rev'd*, 542 U.S. 507 (2004); SUNSTEIN, *supra* note 9, at 17.

[206] *See* United States v. Nixon, 418 U.S. 683, 710 (1970).

[207] Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 645 (1952) (Jackson, J., concurring).

[208] Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988); *see also* Orloff v. Willoughby, 345 U.S. 83, 93–94 (1953); Burns v. Wilson, 346 U.S. 137, 142, 144 (1953); Gilligan v. Morgan, 413 U.S. 1, 10 (1973); Schlesinger v. Councilman, 420 U.S. 738, 757–758 (1975); Chappell v. Wallace, 462 U.S. 296 (1983). *But see* SUNSTEIN, *supra* note 9, at 7. Sunstein writes that

> Courts should require clear congressional authorization before the executive intrudes on interests that have a strong claim to constitutional protection. . . . As a general rule, the executive should not be permitted to act on its own. The underlying ideas here are twofold: a requirement of congressional authorization provides a check on unjustified intrusions on liberty, and such authorization is likely to be forthcoming when there is good argument for it. A requirement of clear authorization therefore promotes liberty without compromising legitimate security interests.

Id.

[209] There may be an emerging consensus that the Executive should be granted *Chevron* deference except where individual rights are at issue. Accordingly, if the President is accused of exceeding his power while the authority is not clearly identified in the Constitution or statutory law, he should enjoy deference to the extent that his power-grab does not infringe upon individual rights deserving of more scrutiny. The Executive deserves deference in light of detainee interrogation decisions because the effects of such decisions do not touch upon the individual liberties of persons protected by the Constitution. *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005); Cass R. Sunstein,

Some fear the Executive wielding authority for the purpose of political gain or supremacy, or to quash political opposition.[210] The fear holds that if the courts deferred to the Executive on those matters, then democratic protections would fail under an aggressive Executive.[211] However, the fact that the Executive is subject to the political will of the citizenry, and that the Judiciary remains somewhat buffered from the tide of the will of the people, mitigates the potential threat to democracy.[212] The degree of deference can also vary depending upon how far removed the Executive practice is from its enumerated powers and the ability of the Judiciary to apply its expertise.[213] The closer the Executive can link its policies to the express language of the Constitution or statute, the greater deference it deserves.

The Executive's interpretation of international law and its limits and subsequent implementation of military doctrine to detainee interrogations also deserves deference.[214] Courts use international law to understand the scope of Executive powers as well as to decide whether statutory law or policies conform to international law.[215] The Executive, in presumed good faith, determines what laws apply to military operations, and implements them.[216] The Executive is undoubtedly bound by the prohibition against torture, and implements those detention interrogation

---

Administrative Law Goes to War, 118 HARV. L. REV. 2663 (2005); *see also* Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc., 467 U.S. 837 (1984) (holding that the Environmental Protection Agency's (an executive agency) interpretation of a statutory definition was entitled to deference when the decision represented a "reasonable accommodation of manifestly competing interests."). *But see* Kinkopf, *supra* note 79, at 1177 (attacking the application of *Chevron* deference by attempting to show that the distinction applied to individual rights could fail resulting in an unbalancing of power if the President enjoys deference in all areas—shows that if the President exercises authority under the Authorization to Use Military Force, it could infringe upon Congress's sole authority to declare war, an area that does not affect individual rights, but is still undeserving of deference. This is followed by a recommendation to apply the avoidance canon, in that the Court interprets statutes, when unclear, in a manner to avoid constitutional controversies.).

[210] Posner & Vermeule, *supra* note 157, at 644.

[211] *Id.* (commenting that this may be the price to pay for a democratic system of government).

[212] *Id.*

[213] *Id.*

[214] Bradley et al., *supra* note 209, at 2096.

[215] Kinkopf, *supra* note 79, at 1193.

[216] *See* DOD DIR. 2311.01E, *supra* note 56.

policies that reflect the nation's legal obligations.[217] Arguing that little or no deference should relate to the Executive's decisions would strip the office of any decision-making authority necessary to faithfully execute the laws of the nation.[218] Only when presented with severe ambiguity with respect to legal obligations or constitutional authority should another branch of government even consider becoming involved.

Scholars may debate the application of the Geneva Conventions to modern era conflicts and specifically terrorism, but there is no doubt that the administration has chosen the preservation of national security and flexibility over the aged conventions drafted to cover conventional warfare.[219] Now the argument may swing to whether Congress can dictate to the Executive that the nation's international legal interests trump the national security interest chosen by the President.[220] Consequently, even if one believes that the Executive is violating the law through the application of military doctrine to modern operations, there may be a higher calling to preserve the nation above obedience to the law. This would require an extension of deference by the other branches of government toward the Executive.[221]

D. Additional Checks and Balances on Executive Power

The Framers did not necessarily design the federal government to operate along clear lines of authority.[222] Beyond the traditional checks and balances of Congress and the Judiciary upon the Executive, other

---

[217] 18 U.S.C. §§ 2340–2340A (2000). *Contra* American Civil Liberties Union, *FBI E-Mail Refers to Presidential Order Authorizing Inhumane Interrogation Techniques* (Dec. 20, 2004), *available at* http://www.aclu.org/safefree/general/18769prs20041220.html.

[218] *Cf.* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2804 (2006) (Kennedy, J., concurring) (noting along with the majority that the level of deference, if any, for Executive decisions depends on the direct action of the Executive and language of legislation), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, *as recognized in* Boumediene v. Bush, 2007 U.S. App. LEXIS 3682 (D.C. Cir. Feb. 20, 2007).

[219] *See* Graham, *supra* note 51; Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97 (2004).

[220] A topic beyond the scope of this article. For a discussion on the interaction of international legal obligations and national security interests, *see* Jinks & Sloss, *supra* note 219.

[221] Monaghan, *supra* note 127, at 24 (citing Thomas Jefferson, Letter to John B. Colvin (Sept. 10, 1810), THOMAS JEFFERSON, PROPOSED CONSTITUTION FOR VIRGINIA, *reprinted in* 9 THE WRITINGS OF THOMAS JEFFERSON (Paul L. Ford ed., 1894)).

[222] *See* THE FEDERALIST NOS. 26, 69, 74 (Alexander Hamilton).

checks and balances on the power of the Executive have developed within the American political system. [223] The professional military and intelligence communities advise the Executive on means and methods of warfare and operations, as well as legal obligations understood by the military.[224] Considering that the President has the most direct link to the officials responsible for carrying out the defense of the nation, and the President is undoubtedly viewed as the key protector of the nation, it should follow that the Executive is in the best position to make policy decisions on military doctrine and implementation of these policies when prosecuting a war.[225] Congress may establish committees and call upon these same advisers to share their knowledge with the legislators, but the military and intelligence communities work for the Executive, giving the President the most expedient and unfettered access to this knowledge base.[226]

The media and nongovernmental organizations also provide public attention to the actions of the Executive and its agencies.[227] The political pressures of media exposure and corresponding public opinion can have profound effects upon the decisions of the Executive and Congress. Furthermore, the American public holds possibly the strongest check and

---

[223] MCCARTHY ET AL., *supra* note 96, at 25. McCarthy notes:

> Presidential power is a matter of objective constitutional fact. It is inevitable that this power should collide and compete with the power of Congress. That, indeed, is the nature of the system based on divided authority. If, however, the powers of any of the three branches came to be defined, rather than checked and balanced, by one of the others, that constitutional system, the basis of both our liberty and our security, would collapse.

Id.

[224] Pearlstein, *supra* note 141, at 1274 ("Both military doctrine and U.S. law have recognized for the past fifty years that commanders play a pivotal role in checking the appropriate use of military power."). Military leaders act as a check and balance on the Executive by providing military analysis to the civilian leadership of the military, who may, or may not be, trained and experienced in military operations. This provides a check and balance by way of providing information and input to the military decision-making process.

[225] *But see* SUNSTEIN, *supra* note 9, at 6 (arguing in support of minimalism approaches to Executive authority and providing a counter-argument to a sensible check and balance stemming from advice within the Executive, stating that these internal deliberations will only aggravate problems of potentially excessive wielding of power).

[226] Outline, *supra* note 2.

[227] Pearlstein, *supra* note 141, at 1257.

balance upon the Executive.[228] American citizens bear intolerance for governmental overreach, a typical form of political restraint and a check on power.[229] The political process of elections keeps the citizenry focused on the Executive office. Since the President is the lone leader of the Executive and key figurehead in American politics, his office is the target of the most centralized scrutiny.[230] The intense scrutiny bears an immeasurable check on the Executive when wielding authority and interpreting legal obligations, particularly in light of the transparency brought by the media and information age.[231] While all Presidential administrations resist transparency of the government in some way, particularly countermeasures to threats to national security, the trend giving public access to the governmental functions continues to grow.[232] These checks and balances may play an effective role in keeping the Executive's military measures within the scope of American acceptance without necessitating congressional legislation.

E. Congressional Grant of Authority

In passing the DTA, Congress should not have rebuked the very powers it condoned under the Authorization to Use Military Force (AUMF).[233] After September 11, 2001, Congress gave the Executive full authority to conduct military operations and apply military doctrine as necessary to defeat the enemies of the United States.[234] Then, Congress reversed its course by limiting the Executive's ability to develop

---

[228] *See* Robert V. Percival, *Presidential Management of the Administrative State: The Not-so-unitary Executive*, 51 DUKE L.J. 963, 963 (2001).
[229] *See* MCCARTHY ET AL., *supra* note 96, at 51.
[230] *Id.*
[231] Pearlstein, *supra* note 141, at 1257.
[232] *Id.*
[233] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).
[234] *Id.* The AUMF states:

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Id.

interrogation techniques in prosecuting military operations.[235] If Congress desired to be a consultant or advisor to the Executive in the conduct of military operations, it emasculated this goal by abandoning its vote of confidence in the Executive.[236] If the President sought congressional approval of a military venture and implementation of key doctrine, and Congress consented only to rescind its approval before the mission was accomplished, this would undoubtedly discourage the Executive from seeking that approval in the future.[237] This process would then undermine the political process within the federal government.[238]

The intention of detainee interrogations is to obtain actionable intelligence to promote the national security of the United States and the protection of its military forces,[239] precisely as authorized by the AUMF.[240] Once the President obtains authorization, he must be able to

---

[235] Detainee Treatment Act of 2005, 42 U.S.C.S. § 2200dd (LEXIS 2007) (to be codified at 42 U.S.C. § 2200dd).

[236] MCCARTHY ET AL., *supra* note 96, at 92. McCarthy argues,

> Congressional unwillingness to remain faithful to the letter and spirit of previous legislative actions fundamentally undermines the most compelling rationale often advanced for a prominent congressional role in decisionmaking: viz., the idea that if a president expends the effort to get Congress's support at the front end of some major and risky foreign policy venture, Congress will stay with the venture through thick and thin.

Id. Moreover, the President has previously exercised national security prerogatives and engaged in military actions without congressional authorization under Article I of the Constitution, and would not need to seek concurrence. *See* SUNSTEIN, *supra* note 9, at 21; Gregory Sidak, *To Declare War*, 41 DUKE L. J. 29 (1991) (President George H.W. Bush in Operation Desert Shield); Harold Koh, *The Coase Theorem and the War Power: A Response*, 41 DUKE L. J. 122 (1991) (commenting on Gregory Sidak's remarks on Operation Desert Shield).

[237] *See* MCCARTHY ET AL., *supra* note 96, at 92. While the DTA does not rescind Congress's approval to conduct military operations, the current debate in the federal government focuses on revoking congressional approval of the use of force. *See generally* To Repeal the Authorization for Use of Military Force Against Iraq Resolution of 2002 (Pub. L. No. 107-243) and to require the withdrawal of United States Armed Forces from Iraq, H.R. 413, 110th Cong. (2007), *available at* http://www.govtrack.us/congress/bill.xpd?tab=speeches&bill=h110-413.

[238] *See* MCCARTHY ET AL., *supra* note 96, at 92.

[239] Church Report, *supra* note 45, at 1.

[240] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

solely exercise the authority to prosecute the military operation.[241] Even though Justice O'Connor rightly wrote that a "state of war is not a blank check for the President,"[242] Congress nonetheless gave President Bush a powerful legal tool to wage the GWOT.[243] According to the DOJ, the AUMF falls within the first category of Justice Jackson's three-prong Executive authority analysis—acting within a congressional authorization with respect to measures taken to prosecute the war on terrorism and defend the nation.[244] Under the DOJ line of reasoning, the Executive is acting at the zenith of the office's powers, seldom to be overruled or contradicted.[245] The congressional authorization remains intact; therefore, the Executive's power pertaining to military operations in carrying out that authorization remains at its zenith.[246]

V. Necessity for Adaptability and Flexibility in Developing Military Doctrine

All branches of the military, particularly the Army, emphasize the process of creating future leaders who are self-aware and adaptable.[247] There should be no doubt that the enemy will train to endure and

---

[241] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 29 (1866) (citing Luther v. Borden, 48 U.S. (7 How.) 1 (1849), THE FEDERALIST NO. 26, (Alexander Hamilton), and THE FEDERALIST NO. 41 (James Madison)). The Court wrote:

> After war is originated, whether by declaration, invasion, or insurrection, the whole power of conducting it, as to manner, and as to all the means and appliances by which war is carried on by civilized nations, is given to the President. He is the sole judge of the exigencies, necessities, and duties of the occasion, their extent and duration. During the war his powers must be without limit, because, if defending, the means of offence may be nearly illimitable; or, if acting offensively, his resources must be proportionate to the end in view—"to conquer a peace." New difficulties are constantly arising, and new combinations are at once to be thwarted, which the slow movement of legislative action cannot meet.

Id.

[242] Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004).

[243] Reference to the GWOT includes Afghanistan and Iraq.

[244] NSA Memo, *supra* note 105, at 2.

[245] *See id.*

[246] *See* Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579 (1952).

[247] WHITE PAPER, *supra* note 6, at 5 (Early in the twenty-first century, the Army made a cognizant change to develop leaders who are "adaptive and self-aware—able to master transitions in the diversity of 21st century military operations.").

eventually defeat stagnant military doctrine, including interrogations.[248] Unfortunately, the U.S. Armed Forces experienced the consequences of the static application of doctrine to a fluid battlefield.[249] Moreover, the fluid battlefield coupled with congressional strangulation of interrogation development places the nation and its servicemembers at risk.[250]

---

[248] Church Report, *supra* note 45, at 1–5; *see also* WHITE PAPER, *supra* note 6, at 5 (remarking that because the enemy faced is adaptive, "[i]t's a constant struggle of one-upmanship. . . . [i]t's a constant competition to gain the upper hand." Many officers have remarked that the missions they were given or encountered were not addressed by military doctrine trained.). The White Paper also highlights that:

> In the Global War on Terror, the circumstances are different in that those we have faced in previous conflicts. Human intelligence, or HUMINT—of which interrogation is an indispensable component—has taken on increased importance as we face an enemy that blends in with the civilian population and operates in the shadows. And as interrogation has taken on increased importance, eliciting useful information has become more challenging, as terrorists and insurgents are frequently trained to resist traditional U.S. interrogation methods that are designed for EPWs. Such methods—outlined in Army Field Manual (FM) 34-52, *Intelligence Interrogation*, which was last revised in 1992—have at times proven inadequate in the Global War on Terror; and this has led to commanders, working with policy makers, to search for new interrogation techniques to obtain critical intelligence. . . . The initial push for interrogation techniques beyond those found in FM 34-52 came in October 2002 from the JTF-170 Commander, who, based on experiences to that point, believed that counter resistance techniques were needed in order to obtain actionable intelligence from detainees who were trained to oppose U.S. interrogation methods.

WHITE PAPER, *supra* note 6, at 5.

[249] ARCENT CAAT REPORT, *supra* note 37, at 13,243. The Report comments that:

> [D]octrinal approaches to "EPW" or "Detainee" operations initially utilized by CFLCC [Coalition Forces Land Component Command] did not take full advantage of the various policies adopted by civilian leadership to deal with the unique nature of this unconventional operation. The laws and policies regarding the war against terrorism must be used to the maximum extent possible and support flexibility for commanders instead of acting as restrictive barriers. The law permits greater latitude than what is exercised in conventional operations.

Id; see also Pearlstein, *supra* note 141, at 1264 n.38 ("Detainee doctrinal operations did not take full advantage of the policies adopted by the administration to deal with the unconventional operation. Doctrine interpretations support flexibility instead of acting as restrictive barriers.").

[250] *Cf.* ODOM, *supra* note 25, at 4. Odom argues:

The Framers intended the Executive to possess the power to defend the nation as the single branch of government that can act "quickly, decisively, and flexibly as needed."[251] There is a "fundamental need for flexibility in the conduct of foreign affairs and diplomacy," much like in the actual conduct of military operations.[252] "As the nature of threats to America evolves, along with the means of carrying those threats out, the nature of enemy combatants may change also. In the face of such change, separation of powers does not deny the executive branch the essential tool of adaptability."[253] Legislation can take the guesswork out of the equation for the military to ensure that its doctrine and practices comply with domestic and international law.[254] However, the DTA itself did not remove any questions or doubt regarding detainee interrogations. Military interrogation procedures already generally complied with existing laws.[255] Instead, the DTA cemented military doctrine making it that much more difficult to develop and implement on a changing battlefield.

> Impetus to change doctrine in peacetime originates from a change of mission or capabilities. Mission changes usually reflect shifts in threats to national security. New missions redefine army roles in support of a national strategy to counter a particular threat. Radical change to doctrine may be necessary if the new threat is considerably different from the old one. Doctrine appropriate for the small, frontier constabulary army found slight application in the war waged by the million-man American Expeditionary Force (AEF) in World War I. Similarly, doctrine for combating the insurgency could draw little from the U.S. experience in World War II or Korea. In both cases, the army revised doctrine to guide combat against a different foe.

Id.

[251] NSA Memo, *supra* note 105, at 24–25.

[252] Hartzmann, *supra* note 13, at 120.

[253] Hamdi v. Rumsfeld, 316 F3d. 450, 466 (4th Cir. 2003), *rev'd*, 542 U.S. 507 (2004).

[254] *See* Meriwether, *supra* note 39, at 185–86 (noting that Senator McCain acknowledged that there could be a scenario where human rights violations may be necessary to save many lives, but he did not want an exception in the DTA to swallow the rule; instead, those authorities who would adjudicate such violations could consider the circumstances accordingly). This type of reasoning, leaving it subject to the next person's adjudication, poses a danger to the servicemember; part of the purpose of interrogation military doctrine is to prevent an interrogator from being forced into making a Hobson's choice (an apparently free choice that offers only one real option).

[255] *See* Church Report, *supra* note 45.

Scholars state that broad policy decisions implemented by the Executive changed decades of settled practice.[256] The decades of settled practice are exactly what the agencies of the Executive can no longer implement on the battlefield and expect success, because the threats faced by the United States have drastically changed.[257] The United States may be said to have failed in its military operations in Vietnam because it applied conventional warfare methods to an unconventional war.[258] Similarly, a military or intelligence community that cannot adapt to or adopt new methods to defeat an ever-changing, twenty-first century enemy will experience failure. A lack of doctrinal development already played a part in the detainee abuses, because the U.S. military failed to adapt to the changing battlefield and tried to implement outdated techniques.[259] "These types of operations require a non-doctrinal approach to interrogation operations and innovative or 'outside the box' methods to interdiction operations."[260] To the contrary, congressional action is anything but swift, and the necessity of the military to respond to a changing threat is often imminent or immediate.[261] Consulting Congress on matters of military doctrine may be advisable, or even desirable, [262] but Congress's establishment of doctrine in legislation presents dangers because the U.S. Armed Forces will undoubtedly lose a tactical advantage if it must wait for Congress to act.[263] When Congress

---

[256] Pearlstein, *supra* note 141, at 1260.

[257] *See id.* (remarking that noncommissioned officers making statements regarding the abuses that took place in Iraq during interrogations complained that new interrogators were trained and stuck in Cold War-era techniques.).

[258] Major Matthew Kee Yeow Chye, *Victory in Low-intensity Conflicts*, POINTER (Oct.–Dec. 2000), *available at* http://www.mindef.gov.sg/safti/pointer/back/journals/2000/Vol26_4/4.htm.

[259] Church Report, *supra* note 45, at 2–3; ARCENT CAAT REPORT, *supra* note 37.

[260] ARCENT CAAT REPORT, *supra* note 37, at 53.

[261] *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 29 (1866) (citing Luther v. Borden, 48 U.S. (7 How.) (1849), THE FEDERALIST NO. 26 (Alexander Hamilton), and THE FEDERALIST NO. 41 (James Madison)). Congress could change the law to adapt to the new threat if the perceived legal methods do not adequately address the threat or problem, but this process takes time, leaving those who need the change in law to succeed awaiting the discussion and decision of hundreds of politicians.

[262] *See, e.g.*, Pearlstein, *supra* note 141, at 1281 (commenting on Congress's ability to bring in expert advice and hold hearings on a wide range of matters; however, intelligence matters present difficult challenges for Congress in the area of both obtaining and disseminating advice). Additionally, no requirement exists directing the Executive to seek congressional input in military operations. *See* NSA Memo, *supra* note 105, at 32 n.15.

[263] MCCARTHY ET AL., *supra* note 96, at 64 (stating that the goal of war is to defeat the enemy: "[t]hat objective would be undermined by a system that impelled the President to return to Congress every time battlefield developments warranted new tactics. It would

morphs military doctrine into a legal obligation, the resulting lack of creative ability on the part of the military and the Executive reduces the tools at their disposal to protect themselves and the nation.

VI. Conclusion

"It seems squarely in the political interest of both branches to leave the details of war fighting—of which detention and interrogation policy are part—to the Executive alone."[264] Even if one disagrees and sides with Congress in determining that governance of military doctrine is not outside the limits of legislative authority, one should examine the wisdom of such practice. Congressional restraint of Executive power in matters that receive great international attention might be viewed as a weakening or discrediting of the Executive, placing at peril all foreign policy objectives of the Executive.[265] The Executive could no longer lobby or persuade foreign allies to adopt innovative tactics, techniques, and procedures to combat the war on terrorism because the Executive could not do it.[266] Additionally, over time, a constant feud between Congress and the Executive can undermine the working relationship of the co-equal branches of government, and degrade their ability to promote progress in matters of substance.[267]

Opponents of this article would say that governance of the military is parceled out between Congress and the Executive, and that if either has a dominant role it would be the national lawmaker.[268] A compounding argument would point out that Executive authority is subject to legislative constraint lodged in the powers of the purse and declaration of war.[269] If Congress refuses to either fund the armed forces or declare

---

not only impossibly hamper military advance; it would inescapably educate the enemy about tactics and strategy.").

[264] Pearlstein, *supra* note 141, at 1274.

[265] *See generally* Hartzmann, *supra* note 13, at 120 (arguing that the Executive may be viewed as weak if Congress limits the President's authority to place U.S. troops under foreign command).

[266] Waging the war on terrorism involves a coalition of states, and success can be highly dependent upon the success of other state practices as well.

[267] *See* Hartzmann, *supra* note 13, at 121.

[268] *See, e.g.*, Koh Testimony, *supra* note 198 (relating that Congress has implemented a myriad of laws and regulations that enable the Executive and military to engage the enemy, and without such enabling legislations, would not be empowered to engage them in manner of unilateral decision).

[269] U.S. CONST. arts. I, II.

war, then the President lacks recourse to conduct military operations.[270] This would lead one to believe that the controlling share of power lies with Congress. However, this nation will experience greater success in the GWOT by empowering the more efficient, expedient, and energetic Executive branch to control military operations and doctrine.[271] Therefore, the superior authority with respect to military operations and doctrine should lie within the Executive.

"It's extremely difficult to second guess the American Navy, because the Americans rarely read their doctrine, and don't feel compelled to follow it."[272] It is precisely the innovative adaptations of Americans that led to the American military victories in the twentieth century, and the same flexibility needs to be in the tool kit of the American military in the twenty-first century. "In War, as in art, we find no universal forms; in neither can a rule take the place of talent. . . . Universal rules and the systems built upon them therefore can have no practical value."[273] Congress must restrain its appetite for legislating military affairs to enable the success of the United States and its Executive, and move away from those universal rules that do not effectively confront the twenty-first century's emerging threats.

---

[270] Jeffrey Rosen, *In Wartime, Who Has the Power?*, N.Y. TIMES, Mar. 4, 2007, at 1.
[271] *See* THE FEDERALIST NO. 70 (Alexander Hamilton).
[272] Sergei Gorshkov, Admiral of the Soviet Fleet, http://www.thedeckplate.com/quotes.htm.
[273] BARRY R. POSEN, THE SOURCE OF MILITARY DOCTRINE 21 (1984) (quoting General Helmuth von Moltke, Prussian Army).

ALL ABOARD! MAKING THE CASE FOR A COMPREHENSIVE REROUTING POLICY TO REDUCE THE VULNERABILITY OF HAZARDOUS RAILCARGOES TO TERRORIST ATTACK

ROSS C. PAOLINO*

Graniteville, South Carolina, two a.m. While most of Graniteville's residents are sound asleep in their homes, a Norfolk Southern Railway Company freight train is steadily approaching their small town. Graniteville's residents are oblivious to the abrupt devastation that will rouse them from their sleep within the hour. As three a.m.[1] approaches, a deafening explosion rocks Graniteville as the Norfolk Southern train collides with a parked train at a railroad crossing.[2] Although the collision derails three locomotives and sixteen railcars, it is the rupturing of a single tank car carrying chlorine gas that results in catastrophe.[3] The ruptured chlorine tanker sends an estimated 11,500 gallons of toxic chlorine gas spewing into the air.[4] The toxic cloud of chlorine gas ultimately leads to eight deaths, 630 injuries, and the evacuation of 5400 residents.[5] After the accident, the neighborhoods surrounding Graniteville are uninhabitable for days.[6]

---

* J.D. Candidate 2008, The George Washington University Law School; Associate, The George Washington Law Review. I would like to extend a special thanks to Steven Roberts for without his help and expertise in the area of Homeland Security, this note would not be possible. I would also like to thank Professor Michael Allen, Stetson University College of Law, for his invaluable guidance throughout the writing process, as well as my parents, Jeffrey and Rosemary Paolino for their unconditional support. Please note the positions and views in this note are solely that of the author and do not represent the opinions of those who have provided their expertise in the subject matter.

[1] The collision occurred just before 3:00 a.m. on 6 January 2005. Environmental Protection Agency, *Norfolk Southern Graniteville Derailment*, Jan. 21, 2005, http://www.epa.gov/region04/graniteville/index.htm (last visited Dec. 5, 2007).

[2] Pierre Thomas, *Growing Potential for Hazmat Accidents*, Jan 7, 2005, http://abcnews.go.com/WNT/story?id=393986&page=1.

[3] Rail Transportation Security, 71 Fed. Reg. 76,852 (Dec. 21, 2006) (to be codified 49 C.F.R. pts. 1520 and 1580) (discussing chemical accidents which provided the impetus for the proposed legislation).

[4] S. 419 Amended, 2005–2006 Leg. (Ca. 2005), *available at* http://www.kcra.com/download/2006/0524/9269062.pdf.

[5] Rail Transportation Security, 71 Fed. Reg. 76,852; NAT'L TRANSP. SAFETY BD., RAILROAD ACCIDENT REPORT, COLLISION OF NORFOLK SOUTHERN FREIGHT TRAIN 192 WITH STANDING NORFOLK SOUTHERN LOCAL TRAIN P22 WITH SUBSEQUENT HAZARDOUS MATERIALS RELEASE AT GRANITEVILLE, SOUTH CAROLINA JANUARY 6, 2005 at 1 (2005).

[6] D.C. Councilmember Kathy Patterson, Chair, Committee on the Judiciary, Statement on Introduction of the Prevention in Hazardous Materials Transportation Emergency Act of

Every day, more than one million shipments of hazardous chemicals are transported throughout the nation's infrastructure; a large percentage of these chemicals are transported by rail and are prone to becoming airborne, and potentially deadly, in the event of an accident.[7] Although the devastation in Graniteville was accidental, it illustrates the potential catastrophic human and economic losses that could result from a coordinated terrorist strike on a train transporting these chemicals.[8] Despite the danger of an attack that could dwarf the fatalities of the September 11th attacks, and the known use of this devastating method of attack by terrorist insurgents in Iraq, the Federal Government has essentially done little to protect Americans from the dangers posed by these toxic chemicals.[9]

Unwilling to leave their citizens vulnerable while the Federal Government remains stagnant on the issue, state and local lawmakers have begun to consider legislation for rerouting trains carrying toxic

---

2005 at 3 (Feb. 1, 2005) [hereinafter Patterson Introductory Statement] (on file with author).

[7] *See* H.R. 99, 110th Cong. § 2(1) (2007); Michael Pimentel, *The Preempt Bill: On Track Toward Addressing Rail-Related Terrorism?*, 32 TRANSP. L.J. 57, 63 (2004) ("Nearly half of the hazardous materials shipped in the U.S. move by rail. Sometimes these freight trains travel through densely populated urban areas, which creates the potential for a very serious accident. For instance, the New York City area had two million tons of hazardous materials travel through it on freight cars in 2004."); *see also* Thomas, *supra* note 2 ("Every day, sulphuric and hydrochloric acid, ammonia and chlorine are shipped by the ton via rail and truck. They are among the industrial chemicals used to manufacture everything from purified water to fertilizer, plastics and artificial turf used in stadiums. The chemicals are also lethal, capable of killing everyone in a small city in short order."); Matthew L. Wald, *Tighter Rule on Hazardous Railcargo Is Ready*, N.Y. TIMES, Dec. 14, 2006, at A1 ("Each year, the railroads carry 1.7 million shipments of hazardous materials, of which 100,000 are toxic chemicals prone to becoming airborne in an accident. About 80 percent of the shipments that can become poison gases are chlorine, for purifying water and other applications, or anhydrous ammonia, for fertilizer.").

[8] *See* D.C. CODE ANN. § 8–1421(1) (LEXIS 2007); Patterson Introductory Statement, *supra* note 6 (arguing that a terrorist attack near the U.S. Capitol, using a chemical rail shipment, could result in thousands of deaths and $5 billion in damages).

[9] *See PBS: Toxic Transport* (PBS television broadcast June 6, 2006) [hereinafter *PBS: Toxic Transport*], *transcript available at* http://www.pbs.org/now/transcript/226.html) ("I'm sorry to say since 9/11 we have essentially done nothing in this area [of chemical transportation security]. We've made no material reduction in the inherent security of our chemical sector. If a terrorist were to attack that sector, there is the potential for casualties on the scale or in excess of 9/11."–Richard Falkenrath, former deputy Homeland Security advisor to President George W. Bush, now currently serving as New York City's deputy commissioner for counter-terrorism). *See also infra* notes 20–21 and accompanying text.

chemicals away from urban population centers.[10] The inherent problem with such legislation is the likely invalidation for violating the Commerce Clause of the U.S. Constitution, as well as preemption by existing federal law.[11] Despite such invalidation, it is entirely unacceptable to allow the American people to dangle in the cross-hairs of a very real and dangerous terrorist threat until the Federal Government acts decisively.

This article argues for the adoption of a system of petitionary exceptions, whereby a state or local government, through a petition to the Department of Homeland Security (DHS), can receive the authority to reroute trains carrying toxic chemicals away from densely populated urban areas until the Federal Government passes comprehensive legislation to protect the nation's railway infrastructure. Such a system would allow DHS to engage in a risk-based approach[12] in granting rerouting authority, thereby minimizing the effects on interstate commerce. Furthermore, DHS could remain consistent with the opinions of security experts in immediately eliminating the potential for a terrorist attack,[13] yet still leave open the opportunity for federal action on the issue.

Part I of this article articulates the vulnerability of the Nation's railway infrastructure to terrorist attack and the inadequacies of the protections currently in place. Part II discusses the Washington, D.C. City Council's local efforts to combat the threat posed to hazardous railcargoes. Part III describes the actions of numerous localities in following the D.C. City Council's lead to protect their jurisdictions from terrorist attack, but also predicts the ultimate failure of these efforts on

---

[10] *See* Robert H. Jerry, II & Steven E. Roberts, *Regulating the Business of Insurance: Federalism in an Age of Difficult Risk*, 41 WAKE FOREST L. REV. 835, 852 (2006) (citing D.C. CODE ANN. § 8–1421 (LEXIS 2007)) (discussing the Washington D.C. City Council's efforts to pass the Terrorism in Prevention in Hazardous Materials Transportation Emergency Act of 2005, which banned certain shipments of hazardous cargo from passing within a 2.2 mile radius of the U.S. Capitol).

[11] CSX Transp., Inc. v. Williams, 406 F.3d 667, 669–70 (D.C. Cir. 2005).

[12] *See* U.S. DEP'T OF HOMELAND SEC., NATIONAL INFRASTRUCTURE PROTECTION PLAN 91 (2006) [hereinafter NATIONAL INFRASTRUCTURE PROTECTION PLAN], *available at* http://www.dhs.gov/xlibrary/assets/NIPP_Plan.pdf (stating that a risk-based approach relies on the maxim that resources should be directed to the areas of greatest priority in order to enable the effective management of risk.).

[13] *See* S. 1256, 109th Cong. (2005) (explaining that, according to security experts, rerouting is the only way to immediately eliminate the dangers posed by hazardous railcargoes).

various grounds. Part IV sets forth a system of petitionary exceptions to reduce the vulnerability of hazardous railcargoes to terrorist attack. Finally, Part V explains how this system of petitionary exceptions should ultimately constitute one layer of a multi-faceted and comprehensive policy to protect the Nation's railway infrastructure from terrorist attack.

I. The Vulnerability of the Nation's Railway Infrastructure

This section addresses the vulnerabilities of the U.S. rail infrastructure by examining the reality of the threat posed to the infrastructure by a terrorist attack, as well as the inadequacy of the safeguards currently in place to avert such an attack.

A. The Reality of the Threat

The greatest threat to the security of the American people is a terrorist armed with a chemical, biological, radiological, or nuclear weapon.[14] History is riddled with examples of chemical catastrophes that, although accidental, provide a riveting example of the potential devastation of a chemical terrorist attack on American soil.[15] Within only the past few years, accidents involving chemical railcars have killed several people and prompted the evacuation of thousands more.[16] Rail

---

[14] *See Hearing Before the S. Select Comm. on Intelligence*, 110th Cong. 2 (2007) (testimony of Robert Mueller, Director of Federal Bureau of Investigation), *available at* http://intelligence.senate.gov/070111/mueller.pdf (indicating al-Qa'ida remains interested in acquiring chemical, biological, radiological, and nuclear materials to attack the United States); *see also* Pimentel, *supra* note 7, at 60 ("The use of biological or chemical weapons in the rail system is a real and not a theoretical threat.").

[15] "On December 3, 1984, near Bhopal, India, highly toxic methyl isocyante escaped from a chemical plant operated by Union Carbide India Ltd. The toxic cloud killed approximately 3,800 people and maimed thousands more." Jerry & Roberts, *supra* note 10, at 851; *see also* Union Carbide Corp., Chronology, http://www.bhopal.com/pdfs/chrono05.pdf (last visited Dec. 5, 2007).

[16] In October 2007, railcars carrying spent nuclear fuel derailed outside the Shearon Harris nuclear power plan near Raleigh, North Carolina. *Nuclear Fuel on Derailed Train*, ST. PETERSBURG TIMES, Oct. 27, 2007, http://www.sptimes.com/2007/10/27/Business/Nuclear_fuel_on_derai.shtml. In August 2007, human error allowed a "runaway" chlorine railcar to barrel down the tracks outside Las Vegas, Nevada at speeds over fifty miles-per-hour. Edward Lawrence, *New Details About a Runaway Railcar Carrying Chlorine*, LAS VEGAS EYEWITNESS NEWS, Oct. 8, 2007, *available at* http://www.klas-tv.com/Global/story.asp?S=7185563&nav=menu102_1. In March 2007, a train carrying liquefied propane derailed and exploded, forcing evacuations in the town

shipments of toxic chemicals often pass through highly-populated urban areas and represent an extremely attractive target for terrorists.[17] Although opponents to rerouting maintain that it only transfers the risk to other jurisdictions, the transferred risk would no longer be that of a terrorist attack, but rather the pre-existing risk of non-terrorist related transportation accidents.[18]

The U.S. Naval Research Laboratory estimates that nearly 100,000 deaths or injuries could result, within only thirty minutes, from an attack on a chemical railcar during a populated event on the National Mall.[19]

---

of Oneida, N.Y. William Kates, *Train Tank Cars Explode in Upstate N.Y.*, WASH. POST, Mar. 12, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/03/12/AR20070312200329.html?sub=AR. In February 2007, the derailment of a train carrying hazardous chemicals prompted the evacuation of roughly 300 residents of Kanawha County, West Virginia. *Train Derailment Evacuates Community*, THE VALLEY'S FOX NEWS, Feb. 6, 2007, *available at* http://www.whsv.com/news/headlines/5597976.html. In January 2007, a runaway railcar carrying 30,000 gallons of highly toxic butyl acetate resulted in an explosion requiring the evacuation of nearby homes and businesses. Cassondra Kirby, *Human Error Likely Cause of 4 Runaway Cars—Railworkers May Have Forgotten to Set Brake*, LEXINGTON HERALD, Jan. 17, 2007, at A1. In January 2007, the derailment of a train transporting highly flammable chemicals outside of Louisville, Kentucky caused a toxic fire resulting in a state ordered evacuation of all homes within a one-mile radius and directions for residents to keep their windows shut and to take their pets inside. Theo Emery & Matthew Wald, *Chemical Train Derails in Kentucky: Evacuations Are Ordered*, N.Y. TIMES, Jan. 17, 2007, at A13. In March 2005, a leaking chemical railcar caused the evacuation of more than 6,000 people in Salt Lake City, Utah; in January 2006, the derailment of a train carrying chlorine gas resulted in nine deaths in Graniteville, South Carolina; in June 2004, the derailment of train carrying chlorine gas and sodium hydroxide resulted in forty-four injuries and three deaths; in August 2002, a malfunction during the offloading of chlorine gas from a railroad tanker resulted in sixty-seven injuries. S. 419 Amended, 2005–2006 Leg. (Ca. 2005).

[17] S. 1256 § 1(b)(4).

[18] *See infra* Part IV.C.1.

[19] § 1(b)(9). The U.S. Naval Research Laboratory is not alone in its estimations:

> A report by the Chlorine Institute found that a 90-ton rail tanker, if successfully targeted by an explosive device, could cause a catastrophic release of an extremely hazardous material, creating a toxic cloud 40 miles long and 10 miles wide. The Environmental Protection Agency estimates that in an urban area a toxic cloud could extend for 14 miles.

Id. § 1(b)(7)–(8). Even more troubling is that so little can be done in the moments following such an attack. Although the full extent of the damage is determined by a number of factors, such as the chemical involved, prevailing wind conditions and other environmental factors, initial first responders not wearing protective materials could be

Terrorist insurgents in Iraq have taken advantage of this potential for devastation by using explosives to weaponize chlorine tankers, killing, injuring, and sickening scores of innocent civilians.[20] American and Iraqi officials have stated that the use of weaponized chlorine gas as "dirty bombs" has brought fears of a new and deadly insurgent tactic with the potential to create mass casualties and large-scale panic.[21]

The recognition of using a railcar loaded with toxic chemicals as a weapon of mass destruction (WMD)[22] is not new. In fact, the U.S. intelligence community recognizes that al-Qa'ida[23] is focused on targeting the U.S. rail infrastructure for an attack, particularly by using "hazardous material containers" to carry out the attack.[24] These concerns are further heightened by the FBI's seizure of al-Qa'ida photographs of U.S. railroad engines, cars, and crossings.[25]

---

overwhelmed by the toxic gases and die shortly after exposure. *See* Patterson Introductory Statement, *supra* note 6.

[20] Insurgents began weaponizing chlorine gas in early January 2007 in an effort to spread havoc and derail the U.S. military campaign in Iraq. Kirk Semple, *Suicide Bombers Using Chlorine Gas Kill 2 and Sicken Hundreds in Western Iraq*, N.Y. TIMES, Mar. 18, 2007, *available at* 2007 WLNR 5097748.

[21] *See, e.g.*, Charlie Savage, *Chlorine Attacks in Iraq Spur Warnings in U.S.: Water-Plant Vigilance Urged*, BOSTON GLOBE, July 24, 2007, in National Section; Richard A. Oppel, et al., *14 More American Servicemen Are Killed in Iraq, Most of Them by Makeshift Bombs*, N.Y. TIMES, June 4, 2007, at sec. A; Damien Cave, *Iraq Insurgents Use Chlorine in Bomb Attacks*, N.Y. TIMES, Feb. 22, 2007, *available at* http://www.nytimes.com/2007/02/22/world/middleeast/22iraq.html?ref=world; *Scores Choke in Poison Gas Attack*, CNN, Feb. 21, 2007, http://www.cnn.com/2007/WORLD/meast/02/20/iraq.main/index.html; Borzou Daragahi, *2 Are Killed by Another Bomb with Chlorine*, L.A. TIMES, Feb. 21, 2007, *available at* http://www.latimes.com/news/nationworld/world/la-fg-iraq22feb22,0,6794172.story?coll=la-home-headlines.

[22] *See* Jerry & Roberts, *supra* note 10, at 853 ("A railcar loaded with ultra-hazardous material is similar to a warhead loaded with a chemical agent."); *see also* S. 1256 § 1(b)(3) ("According to security experts, certain extremely hazardous materials present a mass casualty terrorist potential rivaled only by improvised nuclear devices, certain acts of bioterrorism, and the collapse of large occupied buildings.").

[23] Al-Qa'ida is the official spelling of this terrorist organization. *See* U.S. Dept. of State, *Foreign Terrorist Organizations*, Oct. 11, 2005, http://www.state.gov/s/ct/rls/fs/37191.htm.

[24] Press Release, Federal Bureau of Investigation, FBI Issues Threat Communication on Al-Qaeda Targeting U.S. Railway Sector (Oct. 24, 2002) [hereinafter *FBI Press Release*], *available at* www.fbi.gov; *see also* S. 1256 § 1(b)(4); *supra* note 13 and accompanying text.

[25] *FBI Press Release*, *supra* note 24; *see also* Pimentel, *supra* note 7, at 68 ("[B]ecause aviation is now more protected and predictable, it is more likely terrorists will target the vulnerable rail transportation system.").

Deadly attacks on rail systems throughout the world present the troubling reality that America's rail infrastructure is a vulnerable terrorist target. Since September 11th, al-Qa'ida has orchestrated attacks on the rail systems in Madrid, killing 191 people and wounding more than 1500; in London, killing fifty-two people and injuring 700; and in Mumbai, India, killing nearly 200 people and injuring hundreds more.[26] In the first few months of 2007 in New York City alone, "there have been [twenty-two] bomb threats and [thirty-one] intelligence leads related to subway attack plots."[27] The terrorist threat to the nation's rail infrastructure is obviously real—an attack using a weaponized chemical railcar would not only result in mass casualties, but also cripple the infrastructure. Given the reality of the threat, why is the attention and funding afforded to the nation's rail system equivalent to what one expert equates to "an embarrassment?"[28]

B. The Inadequate Efforts to Combat the Threat

After the September 11th attacks, the Federal Government developed standardized and heightened security measures to protect U.S. airlines, airports, and maritime ports, yet did not afford proportional protection to the U.S. rail system.[29] Given the fact that attacks on the rail system are far more likely than attacks on the aviation infrastructure, largely because rail security has lagged behind other transportation infrastructures, the vulnerability of the U.S. rail system is particularly troubling.[30] A federal civil action brought by the State of Nevada in June of 2002 highlighted the problem.[31] Nevada sued "the Department of

[26] Lieutenant Colonel Andrew S. Williams, *The Interception of Civil Aircraft over the High Seas in the Global War on Terror*, 59 A.F. L. REV. 73, 78 (2007); *PM Asks Pak to Walk the Talk on Terror*, HINDU TIMES, Oct. 4, 2006, *available at* 2006 WLNR 17238270.

[27] Carol Eisenberg, *Waking Up to Terror*, NEWSDAY, Mar. 7, 2007, at A3, *available at* 2007 WLNR 4376606.

[28] *Id.*

[29] The two pieces of comprehensive legislation passed in the wake of the September 11th attacks include the Maritime Transportation Security Act of 2002 and the Aviation and Transportation Security Act of 2002. Maritime Transportation Security Act of 2002, Pub. L. No. 107–295, 116 Stat. 2064 (2002); Aviation and Transportation Security Act of 2002, Pub. L. No. 107–71, 115 Stat. 597 (2001) (codified as amended at 49 U.S.C. § 44917 (Supp. 2004)); *see also* S. 419 Amended, 2005–2006 Leg. (Ca. 2005) (indicating the absence of federal legislation dealing with the nation's railroads following the September 11th attacks).

[30] Pimentel, *supra* note 7, at 62.

[31] *Id.* at 63–64.

Energy for failing to 'address the environmental impacts and terrorism risks from tens of thousands of . . . rail . . . shipments of high-level radioactive waste through 44 states, 109 major cities and 703 counties with a combined population of 123 million.'"[32]

On 11 March 2004, terrorists attacked commuter trains in Madrid, Spain, killing 191 people.[33] The attack on public commuter trains seemed to provide an impetus for the U.S. Congress finally to take the security of the nation's rail infrastructure seriously. Shortly after the attacks in Madrid, the Senate Commerce, Science, and Transportation Committee approved the Rail Security Act of 2004.[34] Unfortunately, the legislation never left the Senate and never became law.[35] Recent efforts to reintroduce similar legislation, particularly the Rail Security Act of 2005, never advanced.[36] Legislation aimed at rerouting hazardous railcargoes away from highly populated areas has been introduced in the past two Congresses to no avail, and present motivations by Congress to enact greater security to the Nation's transportation infrastructures, namely The Improving America's Security Act of 2007[37] (which incorporates the Surface Transportation & Rail Security Act of 2007[38]) will likely run aground by a veto by President Bush.[39] As it currently stands, the Nation's rail system is the last major transportation

---

[32] *Id.* (quoting *Nevada Suit Alleges Irregularities in EIS Are 'Tantamount to Fraud,'* NUCLEAR WASTE NEWS, June 12, 2002).

[33] *Terrorism: Key Dates*, CNN, Sept. 27, 2006, http://www.cnn.com/2006/POLITICS/09/27/elec.keydates.terrorism/index.html.

[34] S. 2273, 108th Cong. (2004). The Rail Security Act of 2004 would have monumentally increased funding for rail security and required DHS to conduct vulnerability assessments of the U.S. rail infrastructure and to ultimately make recommendations for securing the infrastructure.

[35] *Id.*

[36] H.R. 2351, 109th Cong. (2005); 151 Cong. Rec. 63 E972 (2005).

[37] S. 4, 110th Cong. (2007).

[38] S. 184, 110th Cong. (2007). The Surface Transportation & Rail Security Act of 2007 has been incorporated into The Improving America's Security Act of 2007 by amendment. DEMOCRATIC POLICY COMM., SUMMARY AND BACKGROUND OF THE IMPROVING AMERICA'S SECURITY ACT OF 2007 (Feb. 28, 2007), http://democrtas.senate.gov/dpc/dpc-new.cfm?doc_name=lb-110-1-34.

[39] Press Release, Rep. Edward J. Markey, House Committee Approves Rep. Markey Amendment to Re-Route Security-Sensitive Materials Around High Population, Urban Centers (Mar. 13, 2007), *available at* 2007 WLNR 4777959 [hereinafter Rep. Markey Press Release]; Nicole Gaouette, *Senate Anti-Terrorism Debate Starts with Turmoil*, LOS ANGELES TIMES, Mar. 1, 2007, *available at* http://www.latimes.com/news/nationworld/washingtondc./la-na-terror1mar01,1,1162828.story?ctrack=1&cset=true.

infrastructure without comprehensive legislation addressing the vulnerability to a catastrophic terrorist attack.[40]

If unsuccessful congressional action were not enough, the Bush Administration has made no material effort to reduce the risk to trains carrying hazardous chemicals and continues to defend the status quo.[41] As evidence of the current state of rail *insecurity* in the United States, *Pittsburgh Tribune* journalist Carl Prine was able to walk into rail yards and gain access to rail tankers containing some of the deadliest chemicals in the country.[42] To understand the inherent vulnerability of a railcar carrying hazardous chemicals, one need only look at most graffiti-laden railcars and ask: "If an adolescent graffiti artist can get access to a railcar, can't a terrorist?"[43] Richard Falkenrath, New York City's Deputy Commissioner for Counter-Terrorism and President George W. Bush's former Deputy Homeland Security Advisor, maintains that America has made no material reduction in the inherent vulnerability of its chemical sector.[44]

Additionally, the failure to secure the railway transportation of hazardous chemicals is particularly astonishing, given the negligence actions brought in the wake of the 1993 World Trade Center (WTC) bombing.[45] Plaintiffs injured in the 1993 attack on the WTC alleged that the Port Authority of New York and New Jersey failed to implement proper security measures after becoming aware that the WTC was a highly symbolic target, vulnerable to a terrorist attack.[46] An interesting aspect of the litigation was not the claims for negligent security, but rather the apparent rise of a new tort for negligent failure to plan.[47] Under negligent failure to plan, a defendant is liable for failing to take reasonable steps to eliminate or diminish known or reasonably

---

[40] *See FBI Press Release*, *supra* note 24; *see also* S. 1256 § 1(b)(4), 109th Cong. (2005); *supra* note 13 and accompanying text.
[41] P.J. Crowley, *Get on the Right Track*, CENTER FOR AM. PROGRESS, Dec. 14, 2006, http://www.americanprogress.org/issues/2006/12/rail_security.html.
[42] Rep. Markey Press Release, *supra* note 39.
[43] Crowley, *supra* note 41.
[44] *See PBS: Toxic Transport*, *supra* note 9; *see also* S. 1256 § 1(b)(10) ("The Federal Government has made no material reduction in the inherent vulnerability of hazardous chemical targets inside the United States.").
[45] *In re* World Trade Ctr. Bombing Litig., 776 N.Y.S.2d 713 (N.Y. Sup. Ct. 2004) (alleging negligent security caused injuries suffered in the wake of the 1993 World Trade Center bombing).
[46] *Id*.
[47] *Id*. at 467–74.

foreseeable risks that could ultimately cause harm.[48] Although there is scant case law on the tort of negligent failure to plan, after the events of September 11th, acts of terrorism on American soil can no longer be dismissed as improbable. Evidence that terrorists are interested in using chemical-laden railcars as potential WMDs, paired with the Federal Government's failure to provide comprehensive and adequate security to the nation's railcars, creates a recipe for enormous liability in the post-9/11 world.[49]

On 15 December 2006, DHS proposed new rail regulations for the transportation of hazardous materials, designed to strengthen the security of hazardous cargo traversing the nation's railroads.[50] The new regulations require heightened physical security at rail yards; better communication, coordination, and security awareness during movements; and fewer delays during the transportation of hazardous chemicals. Nonetheless, the new regulations still leave open the possibility for attack, because they do nothing to actually reduce the amount of chemical railcars traveling through the heart of the nation's most densely populated cities.[51] Although welcomed, the new regulations fall short of what many cities are demanding and what numerous security experts maintain as the only immediate method of eliminating the inherent danger of chemical railcars as WMDs: rerouting.[52]

---

[48] *See* Ken Lerner, *Governmental Negligence Liability Exposure in Disaster Management*, 23 URB. LAW. 333, 341–45 (1991) (discussing the liabilities for negligent failure to plan).

[49] *See supra* notes 19–29 and accompanying text.

[50] Press Release, Dep't of Homeland Sec., DHS Targets High Risk Hazardous Materials in Transit (Dec. 15, 2006), *available at* http://www.dhs.gov/xnews/releases/pr_1166200220343.shtm.

[51] Crowley, *supra* note 41; *see* Chemical Facility Anti-Terrorism Standards, 71 Fed. Reg. 78,276 (Dec. 28, 2006) (to be codified at 6 C.F.R. pt. 27); Rail Transportation Security, 71 Fed. Reg. 76,852 (Dec. 21, 2006) (to be codified 49 C.F.R. pts. 1520 & 1580); Hazardous Materials: Enhancing Rail Transportation and Security for Hazardous Materials Shipments, 71 Fed. Reg. 76,834 (Dec. 21, 2006) (to be codified at 49 C.F.R. pts. 172 & 174).

[52] Chemical Facility Anti-Terrorism Standards, 71 Fed. Reg. 78,276; Rail Transportation Security, 71 Fed. Reg. 76,852; Hazardous Materials: Enhancing Rail Transportation and Security for Hazardous Materials Shipments, 71 Fed. Reg. 76,834; *see also* Tony Quesada, *New Hazardous Materials Transport Rules "Don't Help" Cities*, AM. BUS. DAILY, Dec. 25, 2006, http://www.mlive.com/business/ambizdaily/bizjournals/index.ssf?; S. 1256 § 1(b)(12), 109th Cong. (2005).

II. Frustrations over Federal Inaction in Protecting the Vulnerabilities of Hazardous Railcargoes to Terrorist Attacks Motivate Washington, D.C. to Take Action

This section discusses the motivations behind Washington, D.C.'s efforts to enact an ordinance rerouting hazardous railcargoes to prevent the catastrophic effects of a terrorist attack. This section also examines the reasoning of the U.S. Court of Appeals for the D.C. Circuit in preventing the enforcement of this rerouting ordinance.

A. The D.C. City Council Finds the Status Quo Unacceptable

In order to better allocate terrorism-prevention funding to high-risk targets and facilities, DHS compiled a list of hypothetical "worst case" scenarios. At the top of the Department's list was the potentially mammoth death toll resulting from a chlorine railcar explosion.[53] Federal agencies realize this danger, yet the few existing regulations in place remain focused on safety, not security, and will not prevent the use of a chlorine railcar as a WMD.[54]

Confronted by the dangers of a post-9/11 world and the perceived failure of the Federal Government to adequately address the rerouting of hazardous chemicals away from highly populated areas, the Washington, D.C. City Council (D.C. Council) felt compelled to take action to protect its citizens, businesses, and visitors.[55] The D.C. Council, led by Councilmember Kathy Patterson, passed the Terrorism Prevention in

---

[53] Kara Sissell, *DHS Scenarios Include Chlorine, Refinery Attacks*, CHEMICAL WK., Mar. 23, 2005, http://chemweek.com/inc/articles/t/2005/03/23/052.html.

[54] *See* 68 Fed. Reg. § 14,514 (2003); *supra*, note 40. For example, in line with the newly proposed DHS rail security regulations requiring increased tracking of chemical railcars, the Dow Chemical Company recently announced the "Dow Chemical Company Railcar Shipment Visibility Initiative"—an advanced communications network aimed at enhancing supply chain security and tracking of rail-bound hazardous chemical shipments by using Global Positioning Systems. *Dow Chemical, CHEMTREC Launch New Track and Trace Program for Chemicals*, SUPPLY & DEMAND CHAIN EXECUTIVE, Mar. 21, 2007, *available at* http://www.sdcexec.com/web/online/FulfillmentLogistics-News/Dow-Chemical--CHEMTREC-Launch-New-Track-and-Trace-Program-for-Chemicals/29$9318. The system will allow Dow to pinpoint the locations and conditions of its chemical railcars and allow for better coordination with emergency responders in the case of an accident. *Id.* While Dow's efforts should be recognized, this monitoring system is arguably aimed primarily at increasing the efficiency of emergency response, not preventing the attack from occurring in the first place.

[55] Patterson Introductory Statement, *supra* note 6.

Hazardous Materials Transportation Emergency Act of 2005[56] (D.C. Act), becoming the first local jurisdiction prohibiting the rail or truck transportation of hazardous materials through highly populated urban areas.[57]

B. Swift Opposition Jeopardizes the D.C. Act

The D.C. Council's action was immediately challenged. CSX Transportation, Inc. (CSX), a rail transporter of hazardous materials, filed for an injunction to prevent the enforcement of the D.C. Act.[58] CSX alleged, inter alia, that the D.C. Act violated the Commerce Clause of the U.S. Constitution and was preempted by the Federal Railroad Safety Act (FRSA),[59] the Hazardous Materials Transportation Act (HMTA),[60] and the Interstate Commerce Commission Termination Act.[61] Essentially, the issue before the D.C. Circuit was "whether the [D.C. Council] could use its police powers to temporarily prohibit rail transportation of hazardous materials within D.C. until the Federal Government had more thoroughly addressed the threat of terrorist attack on trains and put sufficient safeguards in place."[62] Although the U.S. District Court for the District of Columbia denied the injunction, the D.C. Circuit ultimately granted the injunction, opining that the FRSA preempted the D.C. Act.[63]

The FRSA authorizes a state to enact its own railroad safety laws until the Department of Transportation (DOT) enacts a regulation that covers the subject matter of the state law.[64] Under DOT rule HM-232,[65]

---

[56] No. 16–43, 52 D.C. Reg. 3048 (Feb. 15, 2005) (preventing the transportation of hazardous chemicals by rail or truck within a 2.2 mile radius of the U.S. Capitol, a corridor termed the "Capital Exclusion Zone").
[57] CSX Transp., Inc. v. Williams, 406 F.3d 667, 669 (D.C. Cir. 2005).
[58] *Id.* at 669–70.
[59] Federal Railroad Safety Act, 49 U.S.C. §§ 20101–21311 (2000).
[60] Hazardous Materials Transportation Act, 49 U.S.C. §§ 5101–5127 (2000).
[61] Interstate Commerce Commission Termination Act, 49 U.S.C. §§ 10101–11908 (2000).
[62] Elizabeth A. Moore, Note, *Federalism v. Terrorism: Damaging D.C.'s Defense Against Chemical Attacks in CSX Transportation, Inc. v. Williams*, 74 GEO. WASH. L. REV. 771, 773 (2006) (citing CSX Transp., Inc. v. Williams, No. Civ.A. 05–338EGS, 2005 WL 902130, at *1 (D.D.C. Apr. 18, 2005), *rev'd*, 406 F.3d 667 (D.C. Cir. 2005)).
[63] *CSX Transp.*, 406 F.3d at 673–74; *see also id.* at 773–74 (The FRSA, originally enacted in 1970, promotes safety and aims to reduce accidents within the U.S. railroad infrastructure.).
[64] Moore, *supra* note 62, at 775 (citing 49 U.S.C. § 20106).

transporters of hazardous chemicals are required to formulate written security plans addressing security risks and ultimately put the plans into operation.[66] Because such plans would likely address the en route security of hazardous chemicals, the D.C. Circuit held that HM-232 likely covered the subject matter of the D.C. Act.[67] Regardless of whether HM-232 covered the subject matter of the D.C. Act, however, the FRSA provides a safe harbor provision allowing states to enact stricter laws than existing DOT or DHS regulations if the state law is "(1) 'necessary to eliminate or reduce an essentially local safety or security hazard,' (2) was 'not incompatible' with HM-232; and (3) did 'not unreasonably burden interstate commerce.'"[68] The D.C. Circuit held that the D.C. Act did not address an "essentially local safety or security hazard,"[69] "appeared to be incompatible with HM-232,"[70] and unreasonably burdened interstate commerce.[71] Given the absence of the three conditions needed for protection by the FRSA safe harbor provision, the D.C. Circuit held that the D.C. Act was preempted by the FRSA.[72]

---

[65] Hazardous Materials: Security Requirements for Offerors and Transporters of Hazardous Materials, 68 Fed. Reg. 14,510 (Mar. 25, 2003) (codified at 49 C.F.R. pt. 172). "The purpose of HM–232 is to 'address security risks related to the transportation of hazardous materials' by 'motor vehicle, railcar, or freight container.'" Moore, *supra* note 62, at 774 (citing 49 C.F.R. § 172.800 (2003)).

[66] Moore, *supra* note 62, at 774 (quoting 68 Fed. Reg. at 14,517) ("The security plan, at a minimum, must include three elements: (1) personnel security procedures such as background checks for those employees with access to hazardous materials; (2) procedures to 'address the assessed risk that unauthorized persons may gain access to the hazardous materials'; and (3) 'measures to address the assessed security risks of shipments of hazardous materials . . . en route from origin to destination.'").

[67] *CSX Transp., Inc.*, 406 F.3d at 672.

[68] Moore, *supra* note 62, at 775 (citing *CSX Transp., Inc.*, 406 F.3d at 671).

[69] *See CSX Transp., Inc*, 406 F.3d at 672 (quoting Norfolk & W. Ry. Co. v. Pub. Util. Comm'n of Ohio, 926 F.2d 567, 571 (6th Cir. 1991) (explaining the intent of the FRSA exception is to apply when local situations cannot be adequately addressed by uniform national standards)).

[70] *See id.* at 673 (noting that the D.C. Act is incompatible with HM–232 because "[t]he D.C. Act's routing restriction does not allow a carrier operating within the Capitol Exclusion Zone to exercise the discretion expressly conferred by HM–232.").

[71] *Id.* at 671–72 (quoting 49 U.S.C. § 20106). Regarding the burden on interstate commerce, the court was concerned with the cumulative effect of a number of jurisdictions passing similar legislative bans, opining that "[i]t would not take many similar bans to wreak havoc with the national system of hazardous materials shipment." *Id.* at 673.

[72] *Id.*

The D.C. Circuit's ruling dealt a strong blow to the D.C. Council's efforts to protect its citizenry from a catastrophic terrorist attack using hazardous railcargoes. Despite the Federal Government's lackadaisical protection of this area of the infrastructure, the D.C. Circuit refused to accept the D.C. Council's valiant efforts to fill this security gap. The ruling that was expected to send ripples throughout the country, but achieved no such result.

III. Litigation over the D.C. Act Has Not Reached Its Finality, Yet Various Localities Are Already Taking Similar Action—What Does the Future Hold for These Ordinances?

This section examines the multitude of state and local governments that have entertained rerouting ordinances similar to the D.C. Act. Additionally, this section predicts the unenforceability of these ordinances on numerous grounds, namely federal preemption under the FRSA and the HMTA, as well as invalidation under the dormant Commerce Clause.

A. Numerous Localities Are Mimicking the Actions of the D.C. City Council

The CSX battle[73] will likely wage on for some time, yet it is explicitly clear that while the D.C. Circuit's opinion handed a defeat to the D.C. Council, it has not dissuaded a plethora of other state and local governments from embarking on similar legislation to block certain rail shipments of hazardous chemicals within their jurisdictions.[74] State and local governments, like the D.C. Council, are frustrated with the lack of comprehensive attention, protection, and funding given to the nation's rail infrastructure, compared to other transportation infrastructures, and have followed the D.C. Council's lead in taking matters into their own

---

[73] The D.C. Act was put on hold by the D.C. Circuit until the legality of the ban could be sorted out by the lower courts. Oral arguments pertaining to the legality of the D.C. Act were heard before U.S. District Court Judge Emmet Sullivan in late January 2007—the decision could take upwards of a year to be handed down. Kara Sisell, *Oral Arguments Heard in D.C. Hazmat Rerouting Case*, CHEMICAL WK., Jan. 31, 2007, *available at* 2007 WLNR 2946352; *CSX Argues Again Against Ban on Hazardous Materials in D.C.*, U.S. RAIL NEWS, Feb. 7, 2007, *available at* 2007 WLNR 3622220.

[74] Joe Fiorill, *D.C. Train Ban Remains on Hold While Other Cities Efforts Advance*, GOV'T EXECUTIVE, Aug. 11, 2005, http://www.govexec.com/dailyfed/0805/081105gsn1.htm.

hands.[75] To date, the list of state and local governments that have considered such legislation is extensive: Albany,[76] Baltimore,[77] Boston,[78] California,[79] Buffalo,[80] Chicago,[81] Cleveland,[82] Hershey,[83] Las

---

[75] *See Cities Tackle Chemical Transportation Security*, OMB WATCH, Aug. 8, 2005, [hereinafter OMB WATCH], http://www.ombwatch.org/article/articlereview/2976/1/247?TopicID=1 (indicating local efforts to reroute hazardous chemicals arose out of inadequate action on behalf of the Federal Government). In 2005, TSA spent roughly $4.5 billion on airline security compared to a meager $150 million spent on rail security. P.J. Crowley, *Lax Rail Security Forces Cities to Act*, CENTER FOR AM. PROGRESS, Apr. 4, 2005, http://www.americanprogress.org/issues/kfiles/b617031.html. "[W]e move about 25 billion American riders every year as opposed to about 800 million on airplanes. And yet, we spend 80 times more on airline security than we do on buses, trains, subways." *Meet the Press: Terrorism Strikes Again* (NBC television broadcast July 10, 2005) [hereinafter *Meet the Press*], *available at* http://www.msnbc.msn.com/id/8471990/.

[76] Wald, *supra* note 7.

[77] Crowley, *supra* note 75. In Baltimore, City Council Kenneth Harris sponsored the legislation. *See* OMB WATCH, *supra* note 75; Fiorill, *supra* note 74; Wald, *supra* note 7.

[78] The Boston ordinance, a near mirror image of the D.C. Act, would prohibit the transportation of hazardous materials within a 2.5 mile radius of Copley Square. City Councilmembers Stephen Murphy and Jerry McDermott, like the D.C. Council, cited federal inaction as a key factor in pursuing the legislation. *See* OMB WATCH, *supra* note 75; Mimi Hall, *Cities May Ban Trains with Chemicals—Some See Risk of Terrorist Attack*, USA TODAY, June 22, 2006, http://www.usatoday.com/news/nation/2006-06-22-chemical-trains_x.htm; David Wedge, *Hub Wants Hazmat Ban on Trains Rolling into City*, BOSTON HERALD, May 25, 2005, at A4; Wald, *supra* note 7.

[79] Wedge, *supra* note 78. *See also* S. Res. 419 Amended, 2005–2006 Leg. (Ca. 2005) (The bill would require the creation of a hazardous rail tank car database and prohibit the railway transportation of certain hazardous chemicals above certain threshold quantities.).

[80] Hall, *supra* note 78; Wedge, *supra* note 78; Wald, *supra* note 7.

[81] Wald, *supra* note 7. The efforts of the D.C. Council motivated Chicago Health Committee chairman Ed Smith in an effort to create exclusion zones within 2.2 miles of the area of the city where the most dangerous forms of hazardous chemicals are transported. *See* Fran Spielman, *Expert: Reroute Dangerous Cargo—Hazmat Train Shipments are Threat to City, Alderman Told*, CHI. SUN-TIMES, June 28, 2005, at A16.

[82] Wald, *supra* note 7. In Cleveland, Councilman Matthew Zone introduced legislation prohibiting the transportation of hazardous chemicals within the city unless a permit is issued by the city's fire chief. Cleveland's efforts are the not the first time the city has attempted to restrict the transportation of hazardous chemicals. Several years ago, regulations restricting truck shipments of hazardous chemicals were set into place. OMB WATCH, *supra* note 75; *see also* CLEV., OHIO, ORDINANCE 928–05 (Aug. 16, 2006), *available at* http://www.ombwatch.org/homeland/Ord928.pdf.

[83] Although there is no evidence that local officials have drafted legislation to prohibit the transportation of hazardous chemicals through their locality, there is an effort by The Pennsylvania Legislative Board of the Brotherhood of Locomotive Engineers and Trainmen Union, following an accident in Derry Township, PA, to secure rail legislation that will improve the security of Pennsylvania. Hershey Philbin Assocs., *Derry Township Accident Raises Concerns on Rail Security*, http://www.hersheyphilbin.com/news/ble/070706.html (last visited Dec. 5, 2007).

Vegas,[84] Memphis,[85] Minneapolis,[86] Philadelphia,[87] Pittsburgh,[88] and St. Louis.[89]

B. Federal Preemption and Violations of the Commerce Clause Will Cause the Demise of Ordinances Similar to the D.C. Act

Although state and local governments have taken the admirable first steps in protecting their citizenry from the dangers posed by trains transporting hazardous chemicals, the likelihood of any such legislation withstanding the onslaught of litigation by the Federal Government and the Nation's railcarriers appears grim, at best. Although the litigation over the D.C. Act has not fully run its course, it seems inevitable that federal courts will strike down all of the state and local ordinances just as the D.C. Circuit attacked the D.C. Act, namely by relying on preemption under the FRSA, preemption under the HMTA or facial challenges under the dormant Commerce Clause.[90]

1. FRSA Preemption

As discussed in Part II.B, the safe harbor provision of the FRSA allows a state or local government to enact more stringent legislation than existing DOT or DHS regulations related to railroad security if the legislation (1) is necessary to eliminate or reduce an essentially local safety or security hazard; (2) is not incompatible with a law, regulation, or order of the U.S. Government; and (3) does not unreasonably burden interstate commerce.[91]

Perhaps the D.C. Circuit reached the wrong conclusion in invalidating the D.C. Act, because the D.C. Act arguably fell within the

---

[84] Hall, *supra* note 78.
[85] Delen Goldberg & Mark Weiner, *Tracking CSX Troubles: Accidents Are Up Since Detour; So Is Concern About Hazardous Cargo in Urban Areas*, POST-STANDARD, Mar. 18, 2007, at A1, *available at* 2007 WLNR 5228756.
[86] *Id*.
[87] *Id.*; Crowley, *supra* note 75; Wald, *supra* note 7.
[88] Hall, *supra* note 78.
[89] Wald, *supra* note 7.
[90] *See generally* CSX Transp., Inc. v. Williams, 406 F.3d 667 (D.C. Cir. 2005) (invalidating the D.C. Act under the basis of preemption by the Federal Railroad Safety Act and the burden placed on interstate commerce).
[91] 49 U.S.C. § 20106 (2000).

purview of the FRSA safe harbor provision.[92] The contention that the D.C. Circuit reached the wrong conclusion rests on the premise that the D.C. Act qualified as an "essentially local safety or security hazard."[93] Although the D.C. Circuit may have correctly identified Washington D.C.'s monuments, embassies, and buildings as national in *character*, the heightened terrorist threat that correlates with these symbolic targets is essentially a local concern because those who work and reside within the city are more vulnerable to a terrorist attack compared to citizens from other cities across the country. For example, as one of DHS's seven "High Threat Target Cities,"[94] Washington, D.C. is considered by the insurance industry to be 100 times more likely than other cities to be the target of a terrorist attack.[95] Additionally, for nearly four years after the September 11th attacks, Reagan National Airport was the only airport in the entire United States that required all passengers on inbound or outbound flights to remain in their seats thirty minutes after take-off or before landing.[96]

The Nation's capital faces unique and localized terrorist threats after the events of September 11th. Despite the compelling argument of D.C.'s localized terrorist threat, however, it is highly unlikely that other federal courts would afford the protection of the FRSA safe harbor provision by holding that a state or local ordinance addresses an "essentially local safety or security hazard," when the D.C. Circuit failed

---

[92] Moore, *supra* note 62, at 778–82 (arguing, *inter alia*, the D.C. Act fits within the "essentially local" exception of the FRSA).

[93] *Id.* at 779 (quoting Maryland Three Airports: Enhanced Security Procedures for Operations at Certain Airports in the Washington, D.C., Metropolitan Area Flight Restricted Zone, 70 Fed. Reg. 7150, 7152–7153 (Feb. 10, 2005) (codified at 49 C.F.R. pt. 1562) ("The D.C. Act does address a local safety or security hazard. 'Because of its status as home to all three branches of the Federal Government, as well as numerous Federal buildings, foreign embassies, multinational institutions, and national monuments of iconic significance, the Washington, D.C., Metropolitan Area continues to be an obvious high priority target for terrorists.' Uniform national security standards are not specific enough to adequately confront the unique security threats that the nation's capital faces.")).

[94] Friends of the Earth, D.C. Environmental Network—Terrorist Threat: Dangerous Cargo, http://www.foe.org/camps/reg/dcen/cargo/ (last visited Apr. 4, 2007).

[95] Press Release, D.C. Dep't of Ins., Sec., & Banking, DISR Reaches Agreement with ISO on Terrorism Loss Costs (Feb. 14, 2003), *available at* http://disr.dc.gov/disr/cwp/view,a,11,q,578224,disrNav_GID,1632.asp.

[96] Moore, *supra* note 62, at 779–80 (citing Spencer S. Hsu & Sara Kehaulani Goo, *30-Minute Airport Rule to Be Lifted*, WASH. POST, July 14, 2005, at A1).

to accept Washington, D.C.'s vast monuments, embassies, buildings, and infrastructure as "essentially local."[97]

2. HMTA Preemption

Although the D.C. Circuit did not expressly hold that the HMTA preempted the D.C. Act, the concurring opinion of Judge Karen Henderson emphasized the HMTA as likely grounds for invalidation of the act.[98] A state law is preempted under the HMTA if (1) it is impossible to comply with the requirements of state law and federal regulations enacted under the HMTA or by DHS, or (2) the state law requirement becomes an obstacle to carry out federal regulations enacted under the HMTA or by DHS.[99] According to Judge Henderson, the D.C. Act created an obstacle to carrying out Federal Regulation HM-232.[100]

Under HM-232,[101] each railcarrier may create individual plans for en route security. Judge Henderson maintained, however, that the D.C. Act subsumed a railcarrier's ability to carry out HM-232, because the D.C. Act created a complete moratorium on the transportation of hazardous chemicals within a 2.2 mile radius of the U.S. Capitol.[102] Because new state and local ordinances, like the D.C. Act, will also prohibit the rail transportation of hazardous chemicals through densely populated urban corridors, it is likely that these ordinances will also be incompatible with HM-232, thereby leading to their invalidation under the preemption doctrine.[103]

---

[97] *See* CSX Transp., Inc. v. Williams, 406 F.3d 667, 672 (D.C. Cir. 2005) (arguing the need to protect the U.S. Capitol from terrorist attack is of "quintessentially national concern"); 49 U.S.C. § 20106 (2000).

[98] *CSX Transp., Inc.*, 406 F.3d at 674–75 (Henderson, J., concurring).

[99] *Id.* at 675 (citing 49 U.S.C. § 5125(a)).

[100] *Id.*

[101] Hazardous Materials: Security Requirements for Offerors and Transporters of Hazardous Materials, 68 Fed. Reg. 14,510 (Mar. 25, 2003) (codified at 49 C.F.R. pt. 172).

[102] *CSX Transp., Inc.* 406 F.3d at 675.

[103] The likely preemption of local ordinances rerouting trains carrying hazardous cargo by HMTA is also supported by the dispute over prohibitions regarding the transportation of spent nuclear fuel. *See generally, e.g.*, Jersey Cent. Power & Light Co. v. Township of Lacey, 772 F.2d 1103 (3d Cir. 1985), *cert. denied*, 475 U.S. 1013 (1985) (finding local ordinance prohibiting the importation of spent nuclear fuel to be preempted by HMTA).

3. Invalidation under the Dormant Commerce Clause

In addition to the Commerce Clause's affirmative function of authorizing congressional actions, it also serves a negative function by limiting state and local government regulation.[104] This "negative" function is commonly known as the "dormant" Commerce Clause—a principle holding that state and local laws are unconstitutional if the law places an undue burden on interstate commerce.[105] If Congress legislates in a particular area, a state or local law that conflicts with it is struck down under federal preemption.[106] Under the dormant Commerce Clause, however, even if Congress has not regulated a particular area and allowed its commerce power to lay "dormant", state and local laws can still be struck down as unconstitutionally burdening interstate commerce.[107] Accordingly, even in the absence of congressional action to reroute hazardous railcargoes, state and local rerouting ordinances can still be struck down as unconstitutional under the dormant Commerce Clause.

It is likely that federal courts will find state and local ordinances similar to the D.C. Act to be burdensome to interstate commerce, and therefore unconstitutional.[108] The D.C. Circuit was particularly concerned with the practical and cumulative impact resulting from numerous cities passing legislation similar to the D.C. Act.[109] The court

---

[104] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW—PRINCIPLES AND POLICIES 401 (2d ed. 2002)

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] The actuality that rerouting would affect less than five percent of chemicals transported by rail, *see infra* Part IV. C.3, presents an interesting question of whether a burden to interstate commerce actually exists at all, and whether such local ordinances governing rerouting would ultimately be struck down. *See* Moore, *supra* note 62, at 773 (arguing the D.C. Act did not unreasonably burden interstate commerce). A state law addressing a "legitimate local public interest" that allegedly burdens interstate commerce will be upheld "unless the burden imposed on such commerce is clearly excessive in relation to the punitive local benefits." *Id.* (quoting Pike v. Bruce Church, Inc., 391 U.S. 137, 142 (1970)). A local law rerouting a chemical railcar to avert the catastrophic consequences of terrorist attack, that only affects such a small percentage of chemical railcargo, may not be unreasonable at all to some courts. *Id.* at 773 (arguing the D.C. Act's incidental burden on interstate commerce is not unreasonable).

[109] CSX Transp., Inc., v. Williams, 406 F.3d 667, 673 (D.C. Cir. 2005). *See* S. Pac. v. Ariz., 325 U.S. 761, 774–75 (1945) (The court struck down a state law limiting train lengths as unconstitutional. The court appeared to take the position that the state regulation put in place did very little to enhance safety, while creating a substantial burden on interstate commerce.).

maintained that various ordinances and state regulations restricting the transportation of hazardous chemicals through the nation's rail infrastructure would "wreak havoc."[110] When the D.C. Circuit handed down its opinion, it cited only one regulation, similar to the D.C. Act, which was currently in the works.[111] With over a dozen additional jurisdictions considering similar bans only two years after the D.C. Council first enacted the D.C. Act, a federal court would be remiss if it did not see the plausible burden on interstate commerce in the wake of their enactments.[112]

IV. Federal Inaction Paired with Invalidation of State and Local Action Creates a Conundrum Leaving Chemical Railcargoes Throughout the Country Unprotected—Creating a Solution with a System of Petitionary Exceptions

This section sets forth a proposed system of petitionary exceptions designed to better combat the terrorist threat posed to hazardous railcargoes. This section begins with a discussion of the unique characteristics of the rail infrastructure in terms of security and then proceeds to examine the framework of the system of petitionary exceptions.

A. The Unique Characteristics of the Nation's Rail Infrastructure Call for an Equally Unique Plan

The Nation's rail infrastructure is expansive; each day, more than 550 freight carriers transport cargo over nearly 142,000 miles of track, while nearly 11.3 million passengers in thirty-five metropolitan areas use

---

[110] *CSX Transp., Inc.*, 406 F.3d at 673. Peggy Wilhide of the Association of American Railroads further explains the interstate commerce issue that would possibly result from allowing state and local regulations to restrict the transportation of hazardous chemicals: "D.C. will do it, then Philadelphia will do it, then Miami will do it . . . and you will virtually shut down the transportation of hazardous materials in this country." *PBS: Toxic Transport*, *supra* note 9.

[111] *CSX Transp., Inc.*, 406 F.3d at 673 (citing S. Res. 419 Amended, 2005–2006 Leg. (Ca. 2005)).

[112] *See* Tony Quesada, *CSX Fights D.C.-Area Rail Buffer*, JACKSONVILLE BUS. J., Feb. 25, 2005, http://www.bizjournals.com/jacksonville/stories/2005/02/28/story3.html?page=2 (Peter Fitzgerald, a business law professor at Stetson University College of Law opines on difficulty in D.C. being able to maintain the ordinance, given the strong nature of the Commerce Clause).

some form of rail transit.[113] The rail infrastructure has multiple entry points, few barriers to access, and numerous transfer points; unlike the aviation infrastructure, which can be closely monitored through controlled checkpoints and points of entry, the rail infrastructure clearly creates greater difficulties from a security standpoint.[114] The most practical manner to protect the Nation's rail infrastructure is by establishing "an overlapping, flexible, [and] multi-layered security regime."[115] While the newly proposed DHS regulations[116] provide a base for protecting the vulnerability of railcars transporting hazardous chemicals, the Federal Government must adopt a comprehensive rail strategy.[117] Moreover, given the unique challenges presented by the vast interconnectivity of the infrastructure, the Federal Government should welcome and incorporate state and local efforts to fill gaps in the policy, particularly when it comes to rerouting.[118]

B. The System of Petitionary Exceptions

The Federal Government should enact a system of petitionary exceptions, whereby DHS would have the authority to allow state and local governments to reroute trains carrying hazardous materials in the face of apparent preemption and Commerce Clause conflicts. A state or local government would begin the process by petitioning DHS for rerouting authority. The petition would identify the hazardous cargoes currently transported through the locality; the unique threats and vulnerabilities posed to the locality by these cargoes; and alternate and viable rerouting options. Utilizing the existing anti-terrorism security

---

[113] U.S. GOV'T ACCOUNTABILITY OFF., REP. NO. GAO–06–557T, PASSENGER RAIL SECURITY: EVALUATING FOREIGN SECURITY PRACTICES AND RISK CAN HELP GUIDE SECURITY EFFORTS 5 (2006); *The Status of Railroad Economic Regulation: Hearing Before the H. Comm. on Transp. & Infrastructure*, 108th Cong. 1 (2004) (statement of Edward R. Hamberger).

[114] *See Statement of Kip Hawley, Transportation Security Administration, Assistant Secretary: Hearing Before the S. Comm. on Homeland Security & Governmental Affairs*, 109th Cong. 2 (2005) (statement of Kip Hawley), *available at* http://www.tsa.gov/assets/pdf/testimony_london_attacks_hawley_sept_21.pdf ("While commercial passenger aviation is a closed system that can be closely monitored at controlled checkpoints, passenger rail and mass transit are open systems without controlled checkpoints—hence, the security missions for those systems needs to be different.").

[115] *Id.*

[116] *See supra* notes 50–51 and accompanying text.

[117] *See* Crowley, *supra* note 75 (describing the immense task of securing the nation's rail infrastructure and need for a credible national rail strategy).

[118] *See id.*

framework, DHS would then determine whether rerouting is appropriate and accordingly grant or deny rerouting authority to the locality.

In the absence of comprehensive legislation addressing the security of the nation's railways, the dormant Commerce Clause will likely invalidate state and local laws which allegedly place an undue burden on interstate commerce.[119] The dormant Commerce Clause is typically used to invalidate state and local laws that attempt to cover a problem that is national, not local, in scope.[120] The system of petitionary exceptions championed by this article challenges the maxims of the dormant Commerce Clause and the preemption doctrine. Because the vulnerabilities of trains carrying hazardous materials is a national security threat, it would traditionally be reserved as a matter for the Federal Government to handle under the dormant Commerce Clause. However, this note argues that until the Federal Government acts adequately and comprehensively, the threat is actually better combated at the local level.[121]

Critics of this system will likely argue that calling for state and local control of rerouting hazardous railcargoes is inconsistent with allowing DHS, a federal agency, to control which jurisdictions will receive rerouting authority. Moreover, if the Federal Government is unwilling to enact comprehensive rail security legislation, what impetus would it have to enact legislation giving DHS rerouting authority?

The subtlety of involving DHS as the final decision-maker, however, is necessary to sidestep a major culprit of federal inaction on this issue—the paralysis of Congress. A major reason for the failed national efforts to secure the nation's railways is that with regards to this particular section of our infrastructure, there appears to be no galvanized public support or vehement public opposition for action, thereby allowing the

---

[119] *See* CHEMERINSKY, *supra* note 104, at 401 ("[E]ven if Congress has not acted—even if its commerce power lies dormant—state and local laws can still be challenged as unduly impeding interstate commerce."). For a more detailed discussion of the dormant Commerce Clause and its implications, see Chemerinsky at 401–33.

[120] *See* Cooley v. Bd. of Wardens, 53 U.S. 299, 319 (1851) (holding the critical question in a dormant Commerce Clause analysis is whether the subject at issue requires uniform regulation on a national level, or diverse local legislation).

[121] Prof. Erwin Chemerinsky describes a new model under which preemption should operate, which he calls "federalism by empowerment." *See* Erwin Chemerinsky, *Empowering States: The Need to Limit Federal Preemption*, 33 PEPP. L. REV. 69, 74 (2005) (arguing for an alternative view of federalism that empowers government at all levels).

railroad lobby to maintain the status quo.[122] Passing legislation to give DHS rerouting authority does not involve potential infringement on individual constitutional freedoms, and therefore is unlikely to stir up the stiff public opposition triggered by other post-September 11th legislation.[123] However, unless there is a large shift in public support behind rerouting legislation, Congress will allow the railroad lobby to maintain the current inadequate level of security to the infrastructure.[124] The danger in ceding to the railroad lobby until widespread public support amasses, however, is that such momentous shifts in public support for enhancing aspects of transportation security only arise in the wake of a terrorist attack or catastrophe.[125]

The consequences of placing an overhaul of rail security on the congressional backburner, until a terrorist strike galvanizes public support behind the issue, are far too grave after the events of September 11th. By allowing DHS to constitute the final decision-maker in rerouting authority, state and local governments will become the catalyst for added security—rather than congressional action, symbiotically attached to the peaks and troughs of public opinion.

Before this system is set forth in further detail, it is important to note that exceptions from the reach of preemption and the Commerce Clause are common. State and local laws can create a burden on interstate

---

[122] *See* Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 17 OR. L. REV. 339, 361 (2000) (arguing that legislative enactments are strongly correlated with public opinion).

[123] In the post-September 11th world, the enactment of comprehensive security legislation is often met with the consolation that Americans must give up certain conveniences and privacy to achieve a higher level of security. The reality of this situation creates a nexus, which ultimately requires heightened public support in order to enact comprehensive security legislation—unless Americans are willing to give up these conveniences and levels of privacy, the legislation will undoubtedly fail. *See* Josef Braml, *Rule of Law or Dictates of Fear: A German Perspective on American Civil Liberties in the War Against Terrorism*, FLETCHER F. WORLD AFF. Summer/Fall 2003, at 121 ("[T]he higher the fear, the greater the willingness to curtail liberty to protect safety."). Legislation authorizing DHS as the final arbiter of rerouting requires no such support.

[124] *See* McAdams, *supra* note 122, at 361.

[125] *See* Pimentel, *supra* note 7, at 57 (criticizing the actions of nations to enhance its transportation security only in the wake of catastrophic attacks). Although public support exponentially expands for security legislation after a terrorist attack, reliance on this form of support creates an added danger because such support tapers off as the emotions of the attack ware off. *See, e.g.*, Braml, *supra* note 123, at 119–21 (describing opinion polling after September 11th, which found citizens' willingness to give up civil liberties for greater security, dissipated as time wore on).

commerce by violating the dormant Commerce Clause, yet remain constitutional if approved by Congress.[126] Congress has frequently given the states power to act on an issue of national concern through a combination of no preemption and affirmative Commerce Clause consent.[127] The primary examples of such congressional action on behalf of Congress are evident in the areas of prohibition and insurance regulation.[128]

It is again worth noting the security environment in which a system of petitionary exceptions fits. The Bush Administration believes the security of the nation's rail infrastructure belongs in the hands of the Federal Government and not the states; however, the Federal Government's current system does not adequately protect the states, largely because the Federal Government will not consider rerouting opportunities.[129] The system advocated here would work from the existing DHS risk-based and risk management framework, combined with the proposed DHS rail security regulations, to create a systematic method of rerouting trains carrying hazardous materials away from highly populated urban areas.

---

[126] *See* CHEMERINSKY, *supra* note 104, at 429 (quoting Western & S. Life Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648, 652–53 (1981)) ("If Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge.").

[127] *See* Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 880 (1985) (indicating the McCarran-Ferguson Act exempts the insurance industry from the restrictions of the Commerce Clause); *see also id.* at 884 (O'Connor, J., dissenting) (opining that Congress, through the McCarran-Ferguson Act, "explicitly suspended Commerce Clause restraints on state taxation of insurance and placed insurance regulation firmly within the purview of the several states").

[128] *See generally id.* at 880 (majority opinion) (indicating the McCarran-Ferguson Act exempts the insurance industry from the restrictions of the Commerce Clause); W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648, 652–53 (1981) (finding the McCarran-Ferguson Act removes, entirely, any restriction on a state's power to tax the insurance business created by the Commerce Clause); Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 431 (1946) (upholding the congressional approval of state taxes on out-of-state insurance companies, a practice otherwise unconstitutional); Wilkerson v. Rahrer, 140 U.S. 545, 562 (1891) (upholding the constitutionality of state laws restricting both the sale and importation of alcohol). Such congressional action has also gone beyond the realm of prohibition and insurance. *See* Ne. Bancorp. v. Bd. of Governors, 472 U.S. 159, 174 (1985) (finding congressional approval of state laws regarding the purchase of in-state banks by out-of-state holding companies acted as an exception to what would otherwise be considered a dormant Commerce Clause violation).

[129] *PBS: Toxic Transport*, *supra* note 9.

1. Working from the Existing Risk-Based Framework

The DHS primarily uses a risk-based framework to determine where to allocate anti-terrorism funds, and is "guided by a straightforward principle: *Resources must be directed to areas of greatest priority to enable effective management of risk.*"[130] The risk-based approach affords a great deal of flexibility in effectively responding to the actual terrorism threats the United States faces; instead of allocating funding to each locality or anti-terror category equally, DHS can afford more funding to areas that face a higher terrorism risk.[131] Homeland Security Secretary Michael Chertoff explains:

> [A risk-based approach means] . . . we look at where consequences . . . would be catastrophic, where the vulnerabilities would be, where the threats are. And that means we look at infrastructure, some of it can be where there's population, some of it might be where there's important electrical grids or important transportation hubs. So again, we want to be first, very focused and specific and use really disciplined analytic tools other than the traditional method of distributing packets of money across the country.[132]

Therefore, under a risk-based approach, DHS allocates more funding to high-risk localities such as New York and Washington, D.C.[133] Aside from the risk-based approach to allocating anti-terrorism funding, DHS enhances the protection of the country's critical infrastructures[134] through a similar framework called "risk management."[135] Although DHS is

---

[130] NATIONAL INFRASTRUCTURE PROTECTION PLAN, *supra* note 12.
[131] *Meet the Press*, *supra* note 75.
[132] *Id.* For a more detailed account of the risk-based approach, *see* NATIONAL INFRASTRUCTURE PROTECTION PLAN, *supra* note 12.
[133] *Meet the Press*, *supra* note 75.
[134] *See* 42 U.S.C. § 5195(c)(e) (2000) ("[T]he term 'critical infrastructure' means systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.").
[135] *See* NATIONAL INFRASTRUCTURE PROTECTION PLAN, *supra* note 12, at 4 (Risk management "establishes the processes for combining consequence, vulnerability, and threat information to produce a comprehensive, systematic, and rational assessment of national or sector risk."). For a more detailed layout of the risk management framework,

criticized, at times, for the manner in which it allocates anti-terrorism funding under the risk-based approach,[136] it is important to note that the proposed system of petitionary exceptions uses this methodology as a template for a more nationalized and refined federal and state partnership, to better combat the national threat posed by hazardous railcargoes.

2. Utilizing Components from Proposed DHS Rail Security Regulations

The DHS used these risk-based methodologies in its proposed rail security regulations to identify geographic areas warranting heightened attention because of unique vulnerabilities to terrorism.[137] These forty-six geographic areas, designated as High Threat Urban Areas[138] (HTUAs), qualify for the enhanced security measures proposed by the new DHS rail security regulations, particularly the heightened reporting and shipping requirements for those railcarriers transporting hazardous materials.[139] The HTUAs include many major U.S. cities, such as Boston, Dallas, Los Angeles, Miami, New York City, and Washington, D.C.[140] Additionally, the HTUAs include a "buffer-zone", providing protection for those cities and localities located within a ten-mile radius of the major city.[141]

As discussed in Part II.B, the newly proposed DHS rail regulations fail to address rerouting and do not adequately protect a railcar with

---

see U.S. DEP'T OF HOMELAND SEC., NATIONAL INFRASTRUCTURE PROTECTION PLAN—RISK MANAGEMENT FRAMEWORK (2006), *available at* http://www.dhs.gov/xlibrary/assets/NIPP_RiskMgmt.pdf.

[136] Kevin Bohn, *Homeland Security Grants Rile D.C., N.Y.C.: Feds Say Cuts Result from New Formula, Smaller Total Budget*, CNN, June 16, 2006, *available at* http://www.cnn.com/2006/US/05/31/homeland.grants/index.html.

[137] Rail Transportation Security, 71 Fed. Reg. 76,852, 76,861 (Dec. 21, 2006) (to be codified 49 C.F.R. pts. 1520 & 1580). In identifying the HTUAs, DHS considered the following variables: "(1) threat, or the likelihood of a type of attack that might be attempted; (2) vulnerability, or the likelihood that an attacker would succeed; and (3) consequence, or the impact of an attack occurring." *Id.* In determining, the total terrorism risk posed to a HTUA, DHS also considered, collectively, the asset-based risk and geographically based risk. *Id.*

[138] "Each HTUA consists of a city limit or combined adjacent city limits, plus a 10-mile buffer zone extending from the city border(s)." *Id.*

[139] *Id.*

[140] *Id.* at 76,886–76,887.

[141] *Id.* at 76,861; 76,886–76,887.

hazardous material from the vulnerabilities of a terrorist attack; however, the regulations utilize the risk-based methodologies and create a strong foundation for a system of petitionary exceptions. Under this system, after state or local governments petition DHS for permission to reroute trains carrying hazardous chemicals, DHS can utilize the designations of HTUAs to aid in determining whether the petitioning locality faces a unique threat and vulnerability that warrants rerouting approval. For example, under this system, DHS would likely give rerouting authority to cities identified as HTUAs such as Phoenix, Boston, or Philadelphia, or other jurisdictions exhibiting unique vulnerability to terrorist attack. The DHS, however, would not cede such authority to smaller localities outside of an HTUA designation, where a terrorist attack on trains transporting hazardous chemicals is far less likely.[142] Fred Millar, a former member of the Washington, D.C. local Emergency Planning Committee, provides additional support: "[With] all due respect to the citizens of Luray, Virginia, . . . you can't believe too many terrorists spend their nights trying to figure out how to blow up a railcar in Luray, Virginia."[143]

C. Addressing the Opposition

This subsection addresses the primary arguments opposing a rerouting policy. Specifically, these arguments include risk shifting; the use of alternative transportation vehicles for hazardous cargoes; and the cascading effects of numerous rerouting ordinances.

1. Does Rerouting Shift the Risk?

Opponents of such a system will maintain that the rerouting of trains carrying hazardous materials merely shifts the risk to other cities and can actually create more danger because the added travel times increase the risk of accidents.[144] Such a contention is somewhat skewed. First, the rerouting of railcargo is not unheard of and can be accomplished safely. Specifically, before litigation over the D.C. Act, CSX Transportation

---

[142] *See id.* at 76,886–76,887 (setting forth cities and localities designated as HTUAs).
[143] *PBS: Toxic Transport*, *supra* note 9.
[144] Sally Quinn, *Hell on Wheels*, WASH. POST, Mar. 12, 2006, at B8; *see also PBS: Toxic Transport*, *supra* note 9 ("If you reroute outside the big cities, you're just gonna [sic] simply shift the risk to other cities."—Peggy Wilhide, Association of American Railroads).

willingly rerouted or held hazardous railcargoes away from Washington, D.C. during national security events such as State of the Union addresses and Fourth of July celebrations.[145] While the D.C. Act is being litigated, CSX has begun "a voluntary, anti-terrorism detour of trains carrying hazardous material around Washington, D.C."[146] Second, the ultimate focus of using a risk-based methodology to reroute hazardous cargoes is to remove the probability of catastrophic destruction that would result from a terrorist attack on a railcar in a densely populated urban area. By removing this risk from a populated area, the risk is naturally transferred elsewhere. Although the reality may be uncomfortable to swallow, the consequences of an attack on a chemical railcar in a small town dwarf the consequences of a similar attack in a major U.S. city.[147]

Critics of rerouting proposals have cited an increase in rail accidents on the rail lines used for rerouting as evidence of the transferred risk.[148] Since CSX voluntarily rerouted hazardous railcargoes away from Washington, D.C., "an additional [thirteen] freight trains per day, carrying hazardous cargo," travel through Syracuse and Central New York, contributing to eleven accidents, compared to no accidents before the voluntary rerouting plan began.[149] What becomes lost in translation is that once hazardous cargoes are rerouted, the population centers these cargoes traverse are no longer considered high-value terrorist targets.[150] The danger of an accident on these alternate lines is largely a product of the increased traffic on the aging rail infrastructure in these areas—a problem that can be solved by providing adequate funding to the nation's rail infrastructure.[151]

---

[145] Memorandum from D.C. Councilmember Kathy Patterson, Chair, Comm. on the Judiciary, to fellow Councilmembers (Nov. 23, 2004) (on file with author).
[146] Goldberg & Weiner, *supra* note 85.
[147] It is important to keep in mind that the obvious goal of terrorist strike is to cause death on a large scale; therefore, although the risk is transferred to a less vulnerable and populated area, is the smaller locality still even an attractive terrorist target? *See also PBS: Toxic Transport*, *supra* note 9 (Fred Millar indicates the consequences of a chlorine release in a small town is far less than the consequences of a similar release in Washington, D.C.).
[148] Goldberg & Weiner, *supra* note 85.
[149] *Id.*
[150] *PBS: Toxic Transport*, *supra* note 9.
[151] Goldberg & Weiner, *supra* note 85.

2. Should Other Methods of Transportation Be Utilized to Move Hazardous Chemicals Through the Country?

Other critics of rerouting maintain that these hazardous chemicals should be transported by other means, such as trucks.[152] Removing hazardous cargo from trains and placing it on trucks merely compounds the problem and greatly increases the risk because of the higher probability of an accident.[153] Additional opponents of rerouting argue that the real solution is to replace these hazardous chemicals with safer chemicals.[154] Although this is a novel idea, the chemical industry lobby has vehemently opposed congressional attempts to require safer alternatives. Given that safer alternatives are not economically feasible, this possible solution has failed.[155] Even with the possibility of substituting safer chemicals, the heavy industry reliance on certain chemicals, such as chlorine for water purification, will not allow rapid substitution, thereby making chemical substitution an impractical solution to combat the terrorist threat.[156] Accordingly, rerouting is the first step to combat the threat to hazardous railcargoes because it is the simplest and most comprehensive way to combat the threat to hazardous railcargoes.[157]

---

[152] Steve Dunham, *Hazmats Ride Rails Alongside Commuters*, FREE LANCE-STAR, May 15, 2005, http://fredericksburg.com/News/FLS/2005/052005/05152005/171182/index_ /html?page=1.

[153] Each year 3.1 billion tons of hazmat chemicals are transported throughout the country by truck, rail, pipeline, and water. AM. SOC'Y OF SAFETY ENG'RS, HAZARDOUS MATERIALS—SAFETY INFORMATION GUIDE (2006), *available at* http://www.asse.org/newsroom/docs/ASSEHazamtBrochurelores102506.pdf. Forty-three percent of this hazmat tonnage is carried by truck. OFF. OF HAZARDOUS MATERIALS SAFETY RESEARCH & SPECIAL PROGRAMS ADMIN., HAZARDOUS MATERIALS SHIPMENTS (1998), *available at* http://hazmat.dot.gov/pubs/hms/hmship.pdf. Of an estimated 5000 hazardous spills during the past thirty years in Maryland, roughly 3500 took place on the highways, while only 217 occurred on the railways. *Id.*

[154] *PBS: Toxic Transport*, *supra* note 9.

[155] *Id.*

[156] Carl Prine, *No Consensus on Rail Shipment Regulations*, PITTSBURGH TRI. –REV., Jan. 15, 2007, http://www.pittsburghlive.com/x/pittsburghtrib/news/specialreports/s_48790.html.

[157] Quinn, *supra* note 144; *see also PBS: Toxic Transport*, *supra* note 9.

3. Will Allowing State and Local Governments to Reroute Hazardous Railcargoes Create an Inefficient Cascading Effect?

Perhaps the strongest argument of rerouting opponents is that allowing state and local governments to reroute hazardous railcargoes sets a dangerous precedent, resulting in copy-cat legislation that will ultimately bring a halt to the transportation of critical chemicals through the nation's rail system.[158] Although the argument seems plausible on its face, it amounts to nothing more than a misrepresentation. Allowing both DHS and individual localities to combat the vulnerabilities posed to hazardous railcargoes creates a federal-state partnership,[159] guarding against evils that exist in an exclusively federal or state approach.

The petitionary rerouting system advocated by this article employs DHS in a substantive role. Under the proposed petitionary rerouting system, localities can only receive rerouting authority after petitioning DHS. By giving DHS this ultimate rerouting authority, the system avoids inefficiencies and confusion that would result if each locality enacted its own rerouting legislation, thereby requiring rail shippers to remain cognizant of a multitude of varying rerouting legislations for different jurisdictions within the continental United States. Additionally, DHS's substantive role protects the Nation from the danger of local governments engaging in economic protectionism,[160] disguised in the

---

[158] *Judge Backs Ban on Hazardous Cargo*, Apr. 19, 2005, CNN.COM (on file with author). The opposition of certain politicians to rerouting should also be viewed with some degree of skepticism. Representative Steven C. LaTourette, R–Ohio and Representative Corrine Brown, D–Fla, both staunch advocates of the D.C. Act, received thousands of dollars in campaign contributions from CSX Transportation. Sean Madigan, *Hill Bill Aims to End District of Columbia's Interference with Toxic Rail Freight*, CONG. Q.—HOMELAND SEC. (May 4, 2005) (on file with author). Mr. LaTourette received nearly $24,000 from the railroad industry during the 2005 campaign cycle. *Id.* Moreover, since 1998, CSX Transportation has given Mr. LaTourette $6,500 and Ms. Brown $15,000. *Id.*

[159] "Coordinated federal policy is necessary for protection of America's rail systems, including freight, passenger and commuter services." Pimentel, *supra* note 7, at 72.

[160] *See* Catherine Gage O'Grady, *Targeting State Protectionism Instead of Interstate Discrimination Under the Dormant Commerce Clause*, SAN DIEGO L. REV., May–June 1997, at 588 ("[A] per se invalid protectionist state statute will be defined as one that uses, manipulates, or substantially affects the channels of interstate commerce purposefully to isolate the state from the national economy or protect resident economic interests from the national market. It is a statute that purposefully makes use of the State's own borders or the network of the interstate market to improve the position of local residents and actors simply because they are local.").

cloak of terrorism prevention.[161] The use of DHS oversight will prevent a confusing maze of rerouting restrictions and prevent state and local governments from looking after their own security interests at the expense of other jurisdictions.

Additionally, under the proposed system, DHS would only allow rerouting for chemicals that pose an actual health risk or would cause large-scale injuries in the event of a terrorist attack.[162] These chemicals "that are toxic by inhalation, highly explosive, or highly flammable" ultimately account for "less than 5% of all hazardous materials shipped."[163] CSX, in particular, estimates that it would only have to reroute 2.3% of its hazardous cargo each year.[164] Therefore, because rerouting affects such a small number of shipments, it is unrealistic to paint a picture of log-jammed rail lines backing up the transportation of essential chemicals throughout the railway infrastructure.

The arguments against this proposed system of petitionary exceptions simply are not persuasive enough to defeat the benefits and protection the system provides. The unique vulnerabilities of the rail infrastructure require an equally unique and outside-the-box method of thinking. The utilization of existing framework, the strength of a federal-state partnership, and the considerable reduction in the opportunity to use hazardous railcargoes as weapons of mass destruction, make the system worthy of support.

---

[161] The danger of localities engaging in economic protectionism by rerouting or prohibiting the transportation of hazardous railcargoes through its densely populated areas is analogous to past disputes over the transportation of commercial hazardous wastes and spent nuclear fuel. *See* Edward A. Fitzgerald, *The Waste War:* Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources and Chemical Waste Management, Inc. v. Hunt, 13 STAN. ENVTL. L.J. 78, 104–06 (1994) (discussing the invalidation of an Alabama law charging different hazardous waste fees to out-of-state waste because of economic protectionism).

[162] The position is similar to that in Senator Biden's rail security legislation that unfortunately never left the Senate. *See* Press Release, Office of Senator Joseph Biden, Biden Bill Safeguards Cities from Chemical Attacks (June 16, 2005), *available at* http://biden.senate.gov/newsroom/details.cfm?id=238999.

[163] *Id.*; Fiorill, *supra* note 74; *see also* S. 1256 § 2(A)(i)–(iii), 109th Cong. (2005) (defining "extremely hazardous material" as those materials that are "(i) toxic by inhalation; (ii) extremely flammable; or (iii) highly explosive.").

[164] Moore, *supra* note 62, at 781 (citing Defendants' Memorandum of Points and Authorities in Opposition to Plaintiff's Application for a Preliminary Injunction and Plaintiff's Motion for Summary Judgment at 3, CSX Transp., Inc. v. Williams, No. Civ.A. 05–338EGS, 2005 WL 902130 (D.D.C. Apr. 18, 2005)).

V. A System of Petitionary Exceptions Should Be Merely One Layer of a Multi-tiered and Comprehensive Policy to Secure the Nation's Rail Infrastructure from Terrorist Attack

A system of petitionary exceptions will largely eliminate the probability of a catastrophic terrorist attack on a chemical railcar near a densely populated U.S. city.[165] However, there will be instances where rerouting is not feasible. The rerouting alternatives of two vulnerable jurisdictions could conflict, and rerouting the hazardous cargo away from certain jurisdictions may be implausible. In such situations, this system, although originally designed as a "quick fix" until the Federal Government adequately addresses the vulnerabilities to this aspect of the nation's railway infrastructure, can ultimately constitute one layer of a multi-tiered, comprehensive plan to address this distinct terrorism risk.[166]

In our post-September 11th world, our Nation is engaged in a complex struggle with fanatical extremists. Our nation's security rests not only on our ability to protect ourselves, but also on our ability to uncover our enemy's next move. Given the stakes, hubris on behalf of any sector of our government which mistakenly believes that it alone can provide for our protection, is extremely dangerous and irresponsible.

The proposed DHS rail security regulations alone will not protect this Nation from terrorists trying to use a chemical railcar as a WMD. The system of petitionary exceptions advocated by this note, alone, will also not categorically eliminate this method of attack. Together, however, these measures begin to form a comprehensive and multifaceted approach, creating a blanket of protection that eliminates the vulnerabilities of this segment of the infrastructure. Recent history demonstrates how the lack of a multi-tiered scheme of protection between federal and state government exacerbated the disaster and devastation resulting from Hurricane Katrina—despite the storms ferocity, a multi-tiered disaster response system would have likely saved thousands of lives and billions of dollars.[167] Given the open nature and

---

[165] *Supra* Part IV.

[166] The DHS Secretary Michael Chertoff explains the approach needed to protect the nation's mass transit systems: "We've got to tailor the approach we take to the particular type of transportation we're talking about and that's the kind of discipline analysis we need to bring to the problem." *Meet the Press*, *supra* note 75.

[167] *See* Michael Greenberger, *The Alfonse and Gaston of Governmental Response to National Public Health Emergencies: Lessons Learned from Hurricane Katrina for the Federal Government and the States*, 58 ADMIN. L. REV. 611, 612 (2006) (arguing that the

unique vulnerabilities of the nation's rail system, multiple security layers afford greater protection compared to a single-minded approach that leaves the Nation susceptible to a terrorist attack.[168]

Since September 11th, the American people have been barraged with hypothetical, and at times, implausible terrorist plots. The impracticality of some of these schemes, along with the absence of a terrorist attack on American soil since September 11th, should not lull this nation into a false sense of security. The threat of a terrorist organization converting a train transporting hazardous chemicals into a potential WMD is a very real and well-documented scenario. Unfortunately, the Federal Government's inability to adequately address the security of chemical railcargoes traveling through our major cities has made this scenario not only a real, but a plausible manner of attack.

Rerouting these chemical shipments away from vulnerable localities is the only effective method to remove the danger. Although these localities have attempted to compensate for the Federal Government's ineffectiveness in this area, their valiant efforts in enacting rerouting ordinances will likely be defeated on legal grounds by federal preemption and the Commerce Clause. The refusal of the Federal Government to address this particular category of rail security and the likely legal defeat of localities' attempts to fill the gaps creates a dangerous nexus that ultimately leaves the American people dangling in the cross-hairs.

The solution is fairly simple: implement a system whereby jurisdictions facing unique vulnerabilities can petition DHS for rerouting authority, and protect this system from invalidation by federal preemption and the dormant Commerce Clause. The system utilizes the risk-based methodologies already employed by DHS, and works from the existing framework of HTUAs established by proposed federal rail security regulations. Given the distinct challenges created by the wide-

---

devastation and destruction following Hurricane Katrina illustrates the need for better federal and state government coordination during natural disasters).

[168] For example, when rerouting hazardous railcargoes becomes impossible, another layer of safeguards should afford protection. One plausible alternative is to transport these chemical cargoes using "next generation" rail tank cars being developed by Dow Chemical Company, "designed to resist puncture in accidents or terrorist attacks." Emery & Wald, *supra* note 16. Moreover, a serious effort could also be made to find safer and alternative chemicals to replace those chemicals that pose the most danger during transportation. *PBS: Toxic Transport*, *supra* note 9.

open characteristics of the Nation's rail infrastructure, a layered and flexible strategy is required to provide adequate security. A system of petitionary exceptions should ultimately form one layer of a multi-faceted approach that will deny terrorist organizations the ability to inflict physical and psychological carnage, by using our own rail infrastructure against us.

THE THIRTY-FIFTH KENNETH J. HODSON LECTURE ON CRIMINAL LAW*

H.F. "SPARKY" GIERKE[1]

"Reflections of the Past: Continuing to Grow, Willing to Change, Always Striving to Serve"

I. Introduction

First of all, I want to thank you for the kind and warm introduction. Secondly, I want thank those who honored me by inviting me to deliver the 35th Annual Kenneth J. Hodson Lecture. I'm particularly pleased to have this honor because I served as an Army JAG officer from 10 May 1967 until 15 April 1971; almost all that time, General Hodson was the TJAG. He, indeed, was an extraordinary Judge Advocate who made outstanding contributions to the military justice system. It was, indeed, a high honor to serve under him.

I would also like to bring greetings from all of my colleagues at the court. As a senior judge, I still feel and always will feel that I am part of the court.

I am very pleased to have the opportunity to speak to this audience because you and I have some common experiences and goals.

---

* This lecture is an edited transcript of a lecture delivered on 28 March 2007 by Senior Judge, U.S. Court of Appeals for the Armed Forces, H.F. "Sparky" Gierke to members of the staff and faculty, distinguished guests, and officers attending the 55th Graduate Course at The Judge Advocate General's Legal Center and School, Charlottesville, Virginia. 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] Currently serving as Senior Judge, U.S. Court of Appeals for the Armed Forces; Chief Judge (Retired), United States Court of Appeals for the Armed Forces, 1991–2006; Justice of the North Dakota Supreme Court, 1983-1991; Distinguished Jurist in Residence and Coordinator of Lawyering Skills and Values, Dwayne O. Andreas School of Law, Barry University, Orlando, Florida.

First, we both have had the privilege to serve as a Judge Advocate. Second, we enjoy this privilege in a special military justice system. We serve a military that has the goal to provide for our national defense and security. To help accomplish that purpose, the military justice system provides each service member with a fair trial and quality legal services.

As I reflect back on my experiences in the military justice system, I will, for the most part, do so from the perspective of a judge. Many of you in this audience have had or will have the experience of being a judge. Some of you have or will have some of your richest professional experiences on the bench. Your experiences will mold you, shape you, and make you who you are. I believe we are better lawyers and people because we have developed, changed, and grown while embracing this unique and special privilege of serving as a judge. I have entitled my remarks *Continuing to Grow, Willing to Change, Always Striving to Serve*.

A. Continuing to Grow

If you want to be a good judge, you have to be passionate about both the law and life. You must stay eager to learn and to grow. Justice John Paul Stevens, in a 2005 speech at Fordham Law School, stated it best: "[L]earning on the job is essential to judging."[2] I can reaffirm the truth of this statement. In my nearly twenty-five years as a military judge, North Dakota Supreme Court justice, and judge on the Court of Appeals for the Armed Forces, I can say that the capacity to grow is one of the top qualities of being a competent, successful, and happy judge.

President Bush recently appointed two new judges to our court, Judge Scott Stuckey and Judge Margaret Ryan, both sworn in on the fifth of this month. If someone were to ask me what qualities we should look for in future judges, I would say immediately the capacity to grow in the job. Holmes said, "Experience is the life of the law."[3] In the context of my present remarks, I would say, "The ability to learn from our experiences is the lifeblood of good judges."

---

[2] Charles Lane, *With Longevity on Court, Steven's Center-Left Influence Has Grown*, WASH. POST, Feb. 21, 2006, at A01.

[3] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Kessinger Pub. 2005) (1881) ("The life of the law has not been logic; it has been experience.").

Some of you may be new judges and you may be questioning your own experience to assume this important duty. Good for you. I hope so. It is a mark of your humility and character that you have these self doubts. I had those doubts when I reported to Vietnam as a full-time military judge.

I was very fortunate to have as my supervising judge Major Dennis Hunt, the senior full-time special court judge. He was very bright, more experienced, very patient, and helpful. I recall his insisting that new judges in country tour the Long Binh jail—he felt we should have that experience before we started locking people up in that facility. If you balance your doubts and reservations with a healthy shot of commitment to learn, you will be well on your way to being a fine judge. Now, I could devote my entire presentation to this subject of professional growth, but time does not permit me to do so. I want to make two points on the subject.

Point number one: I believe that the key to professional growth is *to be the best judicial colleague you can be.* I know that some of you are trial judges. You may view your work as a lonely challenge. I have walked in your shoes. You are right, it is solitary work. But you do not have to be alone or do it alone. Your presence today puts you in the network—friends and colleagues here at the JAG School. My advice is to *form strong relationships with colleagues*. Find other judges you trust, respect, and connect with. In these relationships, dare to confide and discuss your cases and your challenges.

Most importantly—improve your capacity to listen. Let me say that again. *Improve your capacity to listen*. If I were to begin my legal career anew, I would hope to be a better listener. If you want to grow professionally, become a master of the art of listening.

Point number two: If you want to become a better lawyer or judge, *become a better person*. The profession of judging is a humbling experience. When you sit in judgment of a fellow citizen and service member, you are forced to ask yourself a lot of questions. This experience of being a judge has made me look in the mirror hard and deep. Why? When we understand ourselves, we have a better capacity to understand others. I believe that self-awareness is the beginning of wisdom that is the essence of judging. I am not about to tell you how to do this. You've probably already been doing this very well.

So keep on doing what you are doing to grow and develop as a person. Rejuvenation is how we keep going. Take care of yourself and your families, friends, and colleagues.

B. Willing to Change

Whenever I have an opportunity to speak to an audience like this, it stimulates me to reflect (look back) and project (look forward). Today, I look back remembering when I was a young Army captain from the University of North Dakota just beginning this lifetime adventure. For me it has been a wonderful experience in the journey from the family ranch in western North Dakota to the privilege of being the Chief Judge of the Court of Appeals for the Armed Forces. But I don't think we can just look back. We have to also look ahead.

I have a strong conviction that our best days are ahead because I have seen a military justice system that is dynamic and embraces change. Today it is appropriate to talk about being open to change—willing to change. From my perspective, a strength of our military justice system has been its capacity to change with the times. For a few minutes, let's look back and then look ahead and see where I hope we can move forward together.

1. Looking Back

From May 1967 to April 1971, I was privileged to serve as a captain in the Judge Advocate General's Corps, United States Army. During the first part of my service in the Army JAG Corps, I performed duties as a legal assistance officer and later as a trial counsel and defense counsel. Until 1 August 1969, the effective date of the Military Justice Act of 1968,[4] I was part of a system where, in special courts-martial, we had people incarcerated for six months, forfeiting two-thirds of their pay and being reduced to the lowest enlisted grade without the presence of a law-trained person in the courtroom. It's difficult for me to now fathom that was going on as late as 1969.

[4] Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968).

As a result of the Military Justice Act of 1968, there was a need for more military judges. In 1969, just before going to Vietnam, I attended the military judge course here at the JAG School. Between the end of the military justice school and my report date to Vietnam, I went back to the family ranch in North Dakota to spend Christmas. During that time, I received a call from a Colonel Tom Jones from the Office of Career Management—he asked me if I would like to serve as a full-time military judge. I asked if I could have a couple of days to decide and he granted that. When he called back, I decided to give it my best shot. By the way, the trip to Vietnam was quite memorable. I flew out of Minot, North Dakota—temperature twenty-five degrees below zero. When I arrived in Vietnam, it was 110 degrees above zero.

From December 1969 to December 1970, I served as a full-time military judge at the special court level in the Republic of Vietnam, presiding over more than 500 courts-martial. In recent years, I have questioned that number but my staff researched it and found that the Army tried over 41,000 courts martial in 1970.

This was a challenging time to be sitting on the bench. We were serving in a combat zone. We tried cases in some very nice courtrooms but we also tried some cases in bunkers out in the field. Of course, we had many courtrooms that fit in between the two extremes referenced above. There were six full-time special court military judges in country. Major Hunt assigned us to the various commands as the demand dictated. The first six months I flew in helicopters or small fixed wing aircraft from USARV[5] headquarters in Long Binh. The next three months I flew out of Camp Horne, XXIV Corps headquarters in Da Nang, and during my last three months in country, I flew out of Chu Lai, Americal Division headquarters. During my tour of duty in southeast Asia, I had the privilege of meeting and working with, among others, Dennis Hunt, John Naughton, Tom Crean, Bill Suter, Ron Holdaway, and Lee Foreman—all who went on to have outstanding careers in the Army JAG Corps.

We were attempting to implement the many changes just made to the UCMJ and the Manual for Courts-Martial. Article 16 was amended to create the position of military judge as the presiding officer and to require a military judge in every general court-martial.[6] Article 16

[5] United States Army Vietnam.
[6] Military Justice Act § 2(3), 82 Stat. at 1335.

authorized, but did not require, that a military judge be detailed to special courts-martial.[7] However, Article 19 provided that a special court-martial could not adjudge a bad-conduct discharge unless a qualified lawyer was detailed as defense counsel, a verbatim record of trial was made, and a military judge was detailed.[8] The requirement for a military judge at a special court-martial could be avoided if a military judge could not be detailed "because of physical conditions or military exigencies."[9] In such a case the convening authority was required to "make a detailed written statement, to be appended to the record, stating the reason or reasons a military judge could not be detailed."[10] Furthermore, Article 16 authorized trial by a military judge sitting alone.[11] It is my recollection that well over ninety percent of the trials that I presided over were judge alone trials.

Article 27 was amended to provide a right to counsel in special courts-martial.[12]

Article 66 replaced the boards of review with a single court of military review for each service.[13]

Notwithstanding the dramatic improvements in military justice, there were many who still perceived it to be fundamentally unfair. The massive build-up during the Vietnam War and strong anti-war sentiments heightened criticism of military justice.

Robert Sherrill published his book, *Military Justice is to Justice as Military Music is to Music*.[14]

My response to this book is that my wife, Jeanine, and I have, for each of the last fourteen years, attended at least one performance of the Marine Corps' evening parade at "8th & I"—and we think military music is something to be proud of as well.[15]

---

[7] *Id.*
[8] *Id.* § 2(5), 82 Stat. at 1336.
[9] *Id.*
[10] *Id.*
[11] *Id.* § 2(3), 82 Stat. at 1335.
[12] *Id.* § 2(10), 82 Stat. at 1337.
[13] *Id.* § 2(27) 82 Stat. at 1342–43.
[14] ROBERT SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC (1971).
[15] The Marine Barracks Washington is commonly referred to as "8th & I" due to its location in southeast Washington, D.C. Marine Barracks Washington D.C., http://www.

In 1969, the Supreme Court decided *O'Callahan v. Parker*.[16] Sergeant O'Callahan was stationed in Hawaii. While on pass, he broke into a hotel room, assaulted a girl, and attempted to rape her. He was tried and convicted by a general court-martial and sentenced to a dishonorable discharge, confinement for ten years, and total forfeitures. The Army Board of Review and Court of Military Appeals affirmed. O'Callahan filed a petition for a writ of habeas corpus in federal district court, claiming that the court-martial had no jurisdiction to try him for a non-military offense, committed off-post and off-duty. The district court denied relief and the court of appeals affirmed.

The Supreme Court granted certiorari and reversed, holding that the court-martial had no jurisdiction because the crimes were not service-connected. (The decision was 6-3, with Harlan, Stewart, and White dissenting.) Justice Douglas delivered the opinion of the court. After enumerating a litany of perceived defects in military justice, he commented that "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."[17]

At the time of the *O'Callahan* trial, there was probably quite a bit to criticize. As part of the celebration of the fiftieth anniversary of the enactment of the Uniform Code of Military Justice, we had a black tie dinner at the Fort Myer Officers' Club. Chief Justice Rehnquist was our guest speaker at the dinner. He quipped that his confidence in the military justice system was shaken when he served in the Army Air Corps in World War II. He said he walked through the orderly room and saw the results of a case posted before the court-martial had taken place.

The next big step in changing our system of military justice was the Military Justice Act of 1983[18] and the 1984 *Manual*.[19] The act modified Article 60 to simplify the staff judge advocate's post-trial review.[20] Article 62 was amended to permit the Government to appeal an adverse ruling of the military judge.[21] Article 66 was amended to overrule the

---

mbw.usmc.mil/ (last visited Oct. 15, 2007).
[16] 395 U.S. 258 (1969).
[17] *Id.* at 265.
[18] Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (1983).
[19] MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984) [hereinafter 1984 MCM].
[20] Military Justice Act of 1983 § 5, 97 Stat. at 1395–97.
[21] *Id.* at 1398.

Chilcote[22] decision by specifically authorizing a court of military review sitting en banc to reconsider a panel decision.[23] Article 67 was amended to permit an appeal by either side to the United States Supreme Court.[24] Since this amendment, the Supreme Court has granted certiorari in eight military cases decided by our court (counting *Weiss*[25] and *Hernandez*[26] as one case). Because these cases have been on the books for a long time and the majority of this audience is probably very familiar with them, I will just touch briefly on them.

Solorio v. United States:[27] Solorio was a member of the Coast Guard on active duty in Juneau, Alaska. He was charged with sexually abusing two young daughters of a fellow Coast Guard member. At his court-martial he moved to dismiss the charges for lack of jurisdiction, citing *O'Callahan* and arguing that his crimes were not service-connected. The court-martial granted the motion to dismiss, and the Government appealed. The Coast Guard Court of Military Review reversed the dismissal and reinstated the charges, and the Court of Military Appeals affirmed, holding that the offenses were service-connected.

The Supreme Court granted certiorari. Instead of turning the case on the question of service connection, the court overruled *O'Callahan*. The court made no specific comments about the quality of military justice. Instead, it faulted the *O'Callahan* decision's inaccurate reading of the history of court-martial jurisdiction and turned the case on the authority of Congress to "make rules for the government and regulation of the land and naval forces," and the plain language of the UCMJ.[28]

Weiss v. United States[29] involved the questions regarding the appointment of and tenure for military judges. This case and a companion case, *Hernandez v. United States*,[30] arose in the Marine Corps. Our court had addressed the tenure issue in *United States v.*

---

[22] United States v. Chilcote, 43 C.M.R. 123 (C.M.A. 1971), *cert. denied*, 467 U.S. 1218 (1984).
[23] Military Justice Act of 1983 § 7, 97 Stat. at 1402.
[24] *Id.* at 1402–03.
[25] Weiss v. United States, 510 U.S. 163 (1994).
[26] *Id.* (the U.S. Supreme Court consolidated the *Weiss* and *Hernandez* appeals when it granted certiorari).
[27] Solorio v. United States, 483 U.S. 435 (1987), *aff'g* 21 M.J. 251 (C.M.A. 1986).
[28] *Id.* at 447–51.
[29] Weiss v. United States, 510 U.S. 163 (1994).
[30] *Id.*

Graf,[31] holding that the absence of a fixed term of office for military judges was not a denial of due process. We held that the UCMJ provides sufficient judicial independence to satisfy the due process clause. Before the Supreme Court, the appellants contended that military trial and appellate judges have no authority because the method of their appointment by the Judge Advocate General violates the appointments clause of Article II of the Constitution and because their lack of tenure violates the Fifth Amendment's Due Process Clause.

The Supreme Court held that the appointments clause was not violated because all military judges are already appointed as "officers of the United States" by virtue of their appointments as commissioned officers.[32] The Supreme Court rejected the due process argument, holding that the applicable provisions of the UCMJ and corresponding service regulations sufficiently insulate military judges from the effects of command influence.[33]

Davis v. United States[34] involved an ambiguous invocation of the right to counsel. The Supreme Court used the decision of our court to resolve a split among the federal circuits concerning a suspect's right to counsel during police interrogation. The federal circuits had split three ways. Some circuits held that any mention of counsel required that the interrogation stop. Other circuits held that only an unequivocal request for counsel required that interrogation stop. Our court and some other circuits held that an equivocal mention of counsel required that interrogation about the offenses stop, but interrogators could question the suspect to clarify whether he desired to invoke his rights or continue questioning. The Supreme Court took a hard line, holding that interrogation may continue until the suspect unequivocally invokes his rights.

Justice Souter, joined by Blackmun, Stevens and Ginsburg, wrote a concurring opinion saying they would have simply affirmed the opinion of our court.

---

[31] 35 M.J. 450 (C.M.A. 1992).
[32] 510 U.S. at 175–76.
[33] *Id.* at 176.
[34] Davis v. United States, 512 U.S. 452 (1994).

Ryder v. United States[35] involved the validity of the appointment of a civilian judge (Chief Judge Baum) to the Coast Guard Court of Military Review (CGCMR). Chief Judge (C.J.) Baum had been appointed by the General Counsel of the Department of Transportation, who is the TJAG for the Coast Guard and empowered under Article 66(a) to assign CGCMR judges. In a companion case, *United States v. Carpenter*,[36] our court had held that C.J. Baum's appointment by the General Counsel was invalid, because the power to appoint "inferior officers" was limited to the President, the heads of departments, and the courts of law. While appellate review of the case was pending, the Secretary of Transportation appointed C.J. Baum to the court, in an effort to satisfy the Appointments Clause.

Our court held that C.J. Baum's appointment by the General Counsel was invalid, but that his acts had de facto validity, relying on *Buckley v. Valeo*.[37] The Supreme Court rejected our de facto validity rationale, held that C.J. Baum's appointment by the General Counsel was invalid, and remanded the case for further proceedings before a properly appointed Court of Military Review.

After the *Ryder* case was remanded from the Supreme Court, our court concluded that it was necessary to determine whether the CGCMR was properly constituted after the Secretary of Transportation appointed its civilian members. We held that the judges of the CGCMR are "inferior officers" within the meaning of the Appointments Clause, and that the Appointment by the Secretary of Transportation was valid.[38]

The Supreme Court upheld our court's characterization of CGCMR officers as "inferior officers" and the validity of C.J. Baum's appointment by the Secretary of Transportation in *Edmond v. United States*.[39] Edmond had argued that the authority of the Secretary of Transportation under 49 U.S.C. § 323(a) was a "default statute," and that Article 66(c) gave the exclusive power to appoint military judges to the Judge Advocate General (who for the Coast Guard is the General Counsel of the Department of Transportation).

---

[35] 515 U.S. 177 (1995).
[36] 37 M.J. 291 (C.M.A. 1993).
[37] 424 U.S. 1 (1976).
[38] United States v. Ryder, 44 M.J. 9 (1996).
[39] 520 U.S. 651 (1997).

The Supreme Court rejected that argument and held that 49 U.S.C. § 323(a) gave the Secretary of Transportation power to appoint judges of the Court of Criminal Appeals. The Supreme Court distinguished between the Secretary's power to appoint judges and the Judge Advocate General's power to assign judges. Article 66(c) talks in terms of assignment, not appointment.

Edmond had also argued that appellate military judges are principal officers under Article II, and thus must be appointed by the President and confirmed by the Senate. After an analysis of the duties of appellate military judges, their scope of authority, and the finality of their decisions, the Supreme Court concluded that they are "inferior officers" who may be appointed by the secretary of a department.[40]

Understandably, the Court of Criminal Appeals judges may not have been pleased that they were deemed to be inferior officers. That characterization could be interpreted to be demeaning—diminishing the importance of their work. However, I believe the following quote from the *Edmond* case makes it clear that was not the case.

The Supreme Court said in *Edmond*, "[T]he exercise of 'significant authority pursuant to the laws of the United States marks, not the line between principal and inferior officer for appointments clause purposes, but rather, as we said in *Buckley*, the line between officer and non-officer".[41]

Loving v. United States[42] involved the constitutionality of a death sentence imposed by a court-martial. The specific issue was whether the President, instead of the Congress, could prescribe the aggravating factors that permit imposition of a death sentence. The Court held that the President had the authority to prescribe aggravating factors under Articles 18, 56, and 36, UCMJ, and that the congressional delegation of authority did not violate the separation of powers doctrine.

An interesting sidelight to the decision in *Loving* is Justice Stevens's separate concurring opinion, joined by Justices Souter, Ginsburg, and Breyer. These four justices raise the question and reserve judgment on whether *Solorio* applies to capital cases. They suggest that they might

---

[40] *Id.* at 666.
[41] *Id.* at 662 (citing Buckley v. Valeo, 424 U.S. 1, 126 (1976)).
[42] 517 U.S. 748 (1996).

require a service-connection in capital cases. They didn't reach this issue, as there was adequate service connection in the *Loving* case.

United States v. Scheffer[43] involved the constitutionality of Military Rule of Evidence (MRE) 707, which prohibits admission of polygraph evidence in courts-martial.[44] The Supreme Court reversed a decision by our court where we held that the rule infringed an accused's Sixth Amendment right to present a defense. This was the first case in which the Solicitor General of the United States appealed to the Supreme Court to reverse our court.

Clinton v. Goldsmith[45] was another appeal by the Solicitor General. In *Goldsmith*, the Supreme Court reversed a decision of our court enjoining the President from dropping an Air Force officer from the rolls as a result of his court-martial sentence.

There have been further refinements in the military justice system.

C. Separate Chain of Command for Defense Counsel

In the late '70s and early '80s, the Army tested and implemented a separate chain of command for defense counsel and created a new organization, the U.S. Army Trial Defense Service. At about the same time, the Air Force established a chain of command composed of regional and circuit defense counsel. In May 1998, the Navy created a separate chain of command for defense counsel, assigning them to the Navy Legal Services Office (NLSO), separate from the SJA and trial counsel.

1. Further Development in the Navy

In some of their commands in Italy, the Navy is experimenting with moving the legal assistance and claims offices from the NLSO to the Trial Service Office. That leaves only the defense services in the NLSO.

---

[43] 523 U.S. 303 (1998).
[44] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 707 (2005) [hereinafter MCM].
[45] 526 U.S. 529 (1999).

2. Rules of Evidence

In 1980, President Carter promulgated the Military Rules of Evidence. These rules parallel the federal rules of evidence.

3. Independent Trial Judiciary

Although military judges were removed from the command of convening authorities many years ago, their lack of tenure has from time to time raised questions about their independence. The issue reached the Supreme Court in *Weiss v. United States*,[46] discussed earlier. Although the Supreme Court held that military judges are independent and insulated from unlawful command influence, there is some movement among the services to increase their independence. By regulation, the Army now provides a fixed term of office (three years, with specified exceptions) for military judges.[47]

4. Expansion of Court of Military Appeals

In 1989, Article 67 was amended and Articles 141–145 were added, to expand the Court of Military Appeals from three judges to five.[48] This change certainly inured to my benefit. With the retirement of Judge Robinson Everett in addition to the two new judgeships, there were three openings on the court.

5. Courts Renamed

In 1994, the Courts of Military Review were renamed as Courts of Criminal Appeals and the U.S. Court of Military Appeals was renamed U.S. Court of Appeals for the Armed Forces. These name changes were intended to more accurately reflect the role of the courts.

---

[46] 510 U.S. 163 (1994).
[47] *See* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE paras. 8.1.g (trial judges), 13.12 (appellate judges) (16 Nov. 2005) [hereinafter AR 27-10].
[48] National Defense Authorization Act for Fiscal Years 1990–1991, Pub. L. No. 101-189, § 1301, 103 Stat. 1352, 1569-74.

6. Expanded Jurisdiction for Special Courts-Martial

The Department of Defense (DOD) authorization bill for Fiscal Year 2000 was signed into law by President Clinton on 5 October 1999.[49] The bill includes an amendment to Article 19 that permits special courts-martial to impose confinement and forfeitures for up to one year instead of six months.[50]

7. Selection of Court-Martial Members

Some observers regard the selection of court members by the convening authority as the Achilles' heel of the system. Not too long ago, Congress directed the Department of Defense to study the feasibility of random selection of court members. The study was severely constrained because Congress directed that the study consider only options that are consistent with Article 25.[51] The Joint Service Committee on Military Justice, with input from members of the Code Committee, concluded that, within the constraints of Article 25, the present method of member selection is the most workable.

8. Change in the Number of Members in Capital Cases

In 2001, Congress enacted Article 25a, UCMJ, which requires a capital trial panel be "not be less than 12" members unless that number is "not reasonably available because of physical conditions or military exigencies . . . ."[52] In the recent capital case, *United States v. Akbar*, there were fifteen panel members.[53] In my view, the enactment of Article 25a will allay at least some of the concerns of the four Justices, who in a separate concurrence in the *Loving* case, reserved judgment regarding the applicability of *Solorio* in capital cases.

---

[49] National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, 113 Stat. 512.
[50] *Id.* § 577, 113 Stat. at 625.
[51] UCMJ art. 25 (2005).
[52] *Id.* art. 25a.
[53] *See, e.g.*, *Sergeant Sentenced to Death for Killing Two Officers in Iraq* [sic.], WASH. POST, Apr. 29, 2005, at A06.

9. Life Without Parole Has Been Added as a Sentencing Option

In 1997 Congress amended the UCMJ, enacting Article 56a.[54] This change allows a court-martial to adjudge a sentence of life without parole for "any offense for which a sentence of confinement for life may be adjudged."[55]

In 1994, twenty-five years after Justice Douglas's harsh criticism in *O'Callahan*, our system received some welcome Supreme Court recognition as a mature, sophisticated system. This recognition came and was highlighted in Justice Ginsburg's concurring opinion in *Weiss v. United States* in which she made the following observation: "Today's decision upholds a system of military justice notably more sensitive to due process concerns than the one prevailing through most of our country's history, when military justice was done without any requirement that legally trained officers preside or even participate as judges."[56]

Looking back, I see that we have made tremendous strides during the last forty years. What I see is a system that is open to improvement—to give service members the best. In my view, that has been the reason for the great strides that we have made. Because our men and women in uniform volunteer to put their lives in harm's way and give their best to preserve our freedom, we need to continue to work hard to make sure they always get the best from all of us.

10. Looking forward

Appreciating where we have come from, we have a more clear vision to look to the future. I want to share some views of others and some of my own ideas about opportunities to improve the military justice system.

---

[54] National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 581, 111 Stat. 1629, 1759.
[55] UCMJ art. 56a.
[56] Weiss v. United States, 510 U.S. 163, 194 (1994).

11. Proposals for change

In 2001, my good friend and former Chief Judge of our court—Walter T. Cox III—led a blue-ribbon panel that examined the military justice system. That panel included, among others, Rear Admiral John S. Jenkins, the highly-regarded former Judge Advocate General of the Navy and, at that time, Senior Associate Dean at the George Washington University Law School. Among other fundamental issues, the Cox Commission examined the roles of the convening authority and the military judge, and offered proposals to shift some responsibilities from the convening authority to the military judge. I was recently advised by Senior Judge Cox that he was going to reconvene the Cox Commission. As we look ahead, who do we see leading efforts to improve our system? Senior Judge Robinson Everett is there, where he has always been. He is a leader, visionary, and dear friend to our court and bar. At our Code Committee meeting in both 2004 and 2005, he made several proposals.

The first was to allow the accused to elect sentencing by the military judge after findings have been made by court-martial members. His second suggestion was to amend Articles 18 and 21 of the Code by adding words referring to the "law of nations" rather than the "law of war." Third, he recommended that the United States Court of Appeals for the Armed Forces be authorized to conduct discretionary review of cases tried by military tribunals. Fourth, Senior Judge Everett proposed that Congress broaden the authority of the United States Court of Appeals for the Armed Forces under the All Writs Act[57] in response to *Clinton v. Goldsmith*. Fifth, he proposed reexamining the issue of affording life tenure to the judges of the United States Court of Appeals for the Armed Forces. Sixth, he suggested the Code Committee examine a more effective manner in the review of administrative discharges, specifically other than honorable discharges. A committee chaired by Judge Erdmann considered these proposals and some of them are being studied by the DOD.

12. Applying Article III Precedent in an Article I Court

In the future a significant source of change may be the continued application of federal civilian cases construing the U.S. Constitution. We must be most sensitive to these issues that arise from federal civilian

[57] 28 U.S.C. § 1651 (2000).

courts in general and the Supreme Court in particular. I have written an article on this subject, entitled *The Use of Article III Case Law in Military Jurisprudence*, which can be found in the August 2005 edition of *The Army Lawyer*.[58] Our court's general approach is to apply the Bill of Rights' protections to service members absent a specific exemption for the military justice system or some demonstrated "military necessity that would require a different rule."[59] That standard comes from our 1976 decision in *Courtney v. Williams*[60] and was repeated recently in *United States v. Marcum.*[61] Recent Supreme Court cases that have and will continue to present issues in our military justice system include:

Lawrence v. Texas,[62] addressing the right to privacy. What is the potential impact on Article 125, the UCMJ's sodomy provision?

Ashcroft v. Free Speech Coalition,[63] striking down the portion of the child pornography prevention act that criminalized images appearing to be minors rather than of actual minors.

Crawford v. Washington,[64] addressing the scope of the Sixth Amendment right to confrontation.

Davis v. Washington,[65] follow-on case to *Crawford*.

Apprendi v. New Jersey,[66] interpreting constitutional due process and jury trial guarantees to require that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[67]

Ring v. Arizona,[68] applying the *Apprendi* principle to the Arizona capital sentencing proceedings that required the finding of an

---

[58] H.F. "Sparky" Gierke, *The Use of Article III Case Law in Military Jurisprudence*, ARMY LAW., Aug. 2005, at 25.
[59] Courtney v. Williams, 1 M.J. 267, 270 (C.M.A. 1976).
[60] 1 M.J. 267.
[61] 60 M.J. 198, 199 (2004).
[62] 539 U.S. 558 (2003).
[63] 535 U.S. 234 (2002).
[64] 541 U.S. 36 (2004).
[65] 126 S. Ct. 2266 (2006).
[66] 530 U.S. 466 (2000).
[67] *Id.* at 490.
[68] 536 U.S. 584 (2002).

aggravating factor. *Ring* required that a jury, rather than a judge, find the existence of the aggravating factor.

Wiggins v. Smith,[69] finding ineffective representation by a defense counsel in a capital case who failed to pursue leads and to expand the mitigation investigation into the defendant's traumatic life history.

Atkins v. Virgina,[70] holding that a person found to be mentally retarded cannot be sentenced to capital punishment. This authority was important most recently in *Parker v. United States*,[71] ordering that the Government shall provide petitioner with an appropriate expert consultant for purposes of the pending capital litigation and remanding to the United States Navy-Marine Corps Court of Criminal Appeals to consider the continued availability of the sentence to death in light of the following:

> Mental retardation is generally thought to be present if an individual has an IQ [intelligence quotient] of approximately 70 or below . . . there is a standard of error of measurement, which is approximately 5 points overall, [and] a full scale Intelligence Quotient (IQ) test administered prior to Petitioner's court-martial determined Petitioner's IQ to be 74.[72]

Those cases in which military courts determine it is appropriate to apply Article III precedent will certainly serve as vehicles for change (hopefully positive change) to the military justice system.

D. Five Questions

Between my time on the North Dakota Supreme Court and the Court of Appeals for the Armed Forces, I served as an appellate judge for twenty-three years. As those of you who have appeared before our court know, one thing appellate judges can do is ask questions. So, I would now like to pose some questions to you.

---

[69] 539 U.S. 510 (2003).
[70] 536 U.S. 335 (2002).
[71] 61 M.J. 63 (2005).
[72] *Id.*

First, is it time for a comprehensive reevaluation of the military justice system? Second, how can technology improve the military justice system? Third, should the structure of the military trial judiciary be changed? Fourth, how can the services continue to meet the need to develop our Judge Advocates to become military justice professionals? Fifth, how will international concerns affect our military justice system? I have asked these questions before both publicly and in writing. My written questions and thoughts regarding them are presented in 56 Air Force Law Review 249 (2005).[73]

In a speech that he delivered in 2000, Major General Bill Moorman, who was then the Judge Advocate General of the Air Force, asked some fundamental questions about change in the Military Justice System. He noted that the "central question" was whether the Uniform Code of Military Justice needed to be changed. General Moorman responded, "There can be only one answer. Of course it needs to be changed! For fifty years, the UCMJ and the *Manual for Courts-Martial* which implements it have been anything but static documents." I have already covered how, since enacting the current military justice system in 1950, Congress has revisited and revised the system. Now that more than twenty years have passed since the last major revision of our system, is it an appropriate time to determine how it is working? Can our system withstand the current enhanced public scrutiny? Of course it can. Could our system be improved? Same answer—of course it can. While time does not permit me to elaborate on my thoughts expressed in the five questions article, I would like to briefly discuss question three: structure of the trial judiciary.

The military trial judiciary is close to my heart because one of the formative experiences of my life was serving as a special court-martial judge in Vietnam. The office of military judge was brand new back then. It was a substantial evolution from the old position of "law officer."

Is it time to consider further evolution? Courts-martial are not standing courts, but instead come into existence with a convening order and referral, then disappear upon authentication of the record. While already bearing the costs of a standing court infrastructure, the military justice system does not receive some of the advantages that standing courts would offer. For example, because our courts-martial no longer

---

[73] H.F. "Sparky" Gierke, *Five Questions About the Military Justice System*, 56 A.F. L. REV. 249 (2005).

exist after authentication, we cannot have a trial level post-conviction hearing process—like that in place in the federal criminal justice system and each of the state criminal justice systems. Because there is no trial-level court to which an appellant can return to litigate collateral issues like ineffective assistance of counsel, conditions of confinement, and *Brady*[74] violations, we have been forced to cobble together a system replete with competing affidavits, application of the *Ginn*[75] framework, and *DuBay*[76] hearings.

Would a post-conviction procedure similar to that established by 28 U.S.C. § 2255 for federal civilian prisoners be preferable?

Should some of the functions currently vested in convening authorities or trial counsel be transferred to a standing military court system?

For example, in civilian criminal justice systems, the clerk of court typically issues subpoenas, which are equally available to defense counsel and prosecutors. Would that be more sensible than requiring one litigator to go to his or her opposing counsel to seek a subpoena? Also, in civilian criminal justice systems, defense counsel seeking funds for expert assistance or other litigation support typically make that request to the court, which has its own budget to provide such funding.

Would a standing court-martial system have a dedicated source of funding for defense support? Would that be preferable to draining command operational funds to provide defense support—and preferable to requiring convening authorities to make the first assessment of the necessity of providing assistance to the defense?

Is it unfair to require the defense to disclose its trial strategy to the Government to seek litigation support funds, while the Government bears no similar requirement to reveal its trial strategy to the defense? Should we instead follow the federal model—as the military justice system does in so many other areas—by permitting the defense to appear before the

---

[74] Brady v. Maryland, 373 U.S. 83 (1963) (holding that the Constitution requires the prosecution to disclose evidence that is favorable to the defense).
[75] United States v. Ginn, 47 M.J. 236 (1997) (setting forth six principles to consider in determining whether a post-conviction fact-finding hearing (*DuBay* hearing) is required).
[76] United States v. DuBay, 37 C.M.R. 411 (C.M.A. 1967).

judge in an ex parte hearing to try to establish the necessity of funding for an expert witness or other litigation support?

Would establishing a standing court-martial system also provide opportunities to further enhance military judicial independence? Do we need a separate judicial career track? In 1994, Professor Fred Lederer wrote an article in the *William and Mary Bill of Rights Journal* proposing a detailed judicial career path designed to promote professional development and institutional independence.[77] Perhaps some of his ideas are unworkable or would still be considered ahead of their time, but isn't it time to dust them off and take a fresh look at those provocative ideas?

I invite your attention to these questions that I have asked as well as the ideas set forth by the Cox Commission, Senior Judge Everett, Professor Lederer and anyone else whose goal is to improve our system of justice.

E: Striving to Serve

I previously mentioned General Moorman's speech in which he discussed change in the military justice system. The questions I asked in my five questions article are posed in the same spirit as General Moorman's questions. They are designed to stimulate thinking about—to borrow an old Army recruiting slogan—making the military justice system all it can be. My questions are not designed to push any agenda—other than to continue a dialogue about some of the fundamental issues facing our military justice system. By discussing these issues, we may discover paths to an even better military.

As I have previously stated, I had the privilege of being a member of the military justice family from 1967 to 1971. I have special affection for this audience because my life in the law began doing what you do. Perhaps I should speak only for myself, but I think my contemporaries would agree—you do it better. If not better lawyers, I think better officers. You have done a better job of blending in with the officer corps—serving shoulder to shoulder with the line officers. Another big change over the last forty years is the number of women who are serving

---

[77] Fredric I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary —a Proposal to Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL OF RTS. J. 629 (Winter 1994).

as JAG officers. They have made and continue to make outstanding contributions to the military justice system.

Because our men and women in uniform volunteer to put their lives in harm's way, and give their best to preserve our freedom, we have to work hard to make sure that they always get the best from all of us, a justice system that is second to none.

I'd like to close my remarks on a somewhat personal note. I think for most people there is something that serves as an inspiration or that shapes their approach to their work. I would like to share what that something has been for me. I was proud to be one of 15,000 Veterans who marched behind General William C. Westmoreland in an emotional parade down Constitution Avenue to dedicate the Vietnam Memorial on 13 November 1982. Six years later, while I was serving as National Commander of the American Legion, I was honored to share the podium with President Ronald Reagan when he spent his last Veterans Day as Commander-in-Chief at the memorial. He and First Lady Nancy Reagan walked hand in hand past the black granite walls, and left a note at the base of the memorial. The note said, "Our young friends, yes young friends, for in our hearts you will always be young, full of the love that is youth, love of life, love of joy, love of country. You fought for our country and for its safety and for the freedom of others with strength and courage. We love you for it. We honor you, and we have faith, as he does for all his sacred children, the Lord will bless you and keep you. The Lord will make his face to shine upon you and give peace now and forever more."

The Vietnam Veterans Memorial and those sentiments of President Reagan remind me every day that more than 58,000 of my fellow service members in Vietnam paid the ultimate price for freedom. I realize the magnitude of their sacrifice when I think of the privileges that I have enjoyed and continue to enjoy since returning home from Vietnam over thirty-six years ago: the privilege to pursue the profession for which I was educated; the privilege of not only raising my children, but enjoying their company as adults; the privilege of enjoying the laughter of my grandchildren. My comrades who made the ultimate sacrifice for our country are heroes, and some of them were friends and classmates at the University of North Dakota. I doubt there are very many people in this country that don't have a friend or family member that is remembered on that wall.

When I realize the wonderful opportunities I have had in my life, opportunities that those fallen heroes were deprived of, I feel obliged and privileged to do everything I can to honor their service and sacrifice. I believe we honor them and their sacrifices by providing today's men and women in uniform a justice system that is second to none, and protecting their legacy of a strong, just United States. The constitutional value that I engaged in as a judge on the Court of Appeals for the Armed Forces is justice, and in seeking justice I was guided by one overarching principle, fairness. Fairness includes two important dimensions: a court-martial, like any other trial, must be fair, and it must appear to be fair. The military justice system must meet both of these requirements to win and deserve the public's confidence. That confidence is particularly important in this era of an all-volunteer military. If our armed services are to convince Americans to entrust their precious daughters and sons to the military, the public must be confident that the military justice system will be fair.

Today, our nation is fighting a new war on terror, a type of war that was not envisioned by my generation. The men and women proudly serving in the armed forces are performing with loyalty, professionalism, and patriotism. We must stand behind these fine patriots and work to ensure our military justice system continues to serve them well. Today, I ask that all of us recommit ourselves to protecting and advancing the fairness of our military justice system. We owe that to all of the service members whose lives will be touched by the military justice system, and we owe it to all those young trial counsel and defense counsel who are the front line fighters in the struggle for justice.

My final thought for you is one of optimism. I am most optimistic because I know your talent, your commitment to our profession, to the men and women that serve our country in uniform, and to our nation. Our future is in your strong hearts, heads, and hands. Another source of my optimism for the military justice system is that when Judge Crawford and I retired from the court in September, we left it in very capable hands. Judge Effron, now Chief Judge, Judge Baker and Judge Erdmann are outstanding judges. Also, I am hearing very good things about the two new judges, Scott Stuckey and Margaret Ryan.

I also want to express praise and appreciation for the staff at our court. We have excellent people in chambers as well as those under the supervision of our Clerk of Court, Bill Decicco, and Deputy Clerk of Court, Dave Anderson, both extraordinary lawyers and leaders.

When I wrote President Bush informing him that I would not seek reappointment, I said that when I look into the eyes of our men and women in uniform today, I am rejuvenated and uplifted because I see that America's best days are yet to come. I hope for all of you that your best days are ahead. Thank you for listening to this message from a man who is, and always will be, proud to be an American. God bless our men and women in harm's way, and God bless the United States of America.

15 STARS: EISENHOWER, MACARTHUR, MARSHALL: THREE GENERALS WHO SAVED THE AMERICAN CENTURY[1]

REVIEWED BY FRED L. BORCH III[2]

Like *Nineteen Stars*,[3] in which author Edgar "Bo" Puryear examined the military careers of Eisenhower, MacArthur, Marshall, and Patton to see if there was a common denominator for outstanding leadership skills, author Stanley Weintraub compares and contrasts the careers of more "stars"—in this case, three men who held the super-rank of five-star general: Dwight D. Eisenhower, Douglas MacArthur, and George C. Marshall. Weintraub's goal, however, is quite different. He seeks to show how the three most influential five-star generals in U.S. history had interlocking careers that spanned more than five decades, and how their combined efforts were critical to America's victory in World War II and the rebuilding and re-integration of post-war Germany and Japan. Eisenhower, MacArthur, and Marshall, Weintraub maintains, "saved the American century."[4] It is a bold claim, and some might ask if it unjustly overlooks the contributions of Presidents Franklin D. Roosevelt and Harry S. Truman in shaping the face of American history. Whether Eisenhower, MacArthur, and Marshall "saved" the American century is open to question, but *15 Stars* convincingly shows that these three Army officers had a truly remarkable impact on modern history.

More importantly, the book succeeds in demonstrating that the contributions of Eisenhower, MacArthur, and Marshall are best understood by examining their lives together, adding a texture and depth to each man that a stand-alone biography can only achieve with difficulty. In fact, Weintraub's unique approach to examining how their lives were intertwined, and how that affected history, sets *15 Stars* apart from other recently published military biographies. Members of the Regiment who take the time to read this fine book will not be disappointed.

---

[1] STANLEY WEINTRAUB, 15 STARS: EISENHOWER, MACAARTHUR, MARSHALL: THREE GENERALS WHO SAVED THE AMERICAN CENTURY (2007).

[2] Regimental Historian & Archivist, The Judge Advocate General's Legal Center and School, Charlottesville, Va.

[3] EDGAR PURYEAR, NINETEEN STARS (2003).

[4] *Id.* at v.

Weintraub, a professor emeritus at Penn State University, is an accomplished author of biography and military history[5] who writes clearly and succinctly. He makes Eisenhower, MacArthur and Marshall come alive.

MacArthur was senior to both Eisenhower and Marshall; he was the only four-star general and Army Chief of Staff in the early 1930s, while Eisenhower and Marshall were still mid-grade officers. After retiring, he took a job as "Military Advisor" to the semiautonomous Commonwealth of the Philippines, with the rank of Field Marshal and "a gold eleven ounce marshal's baton" courtesy of Philippine President Manuel Quezon.[6] In Weintraub's view, MacArthur may have been a brilliant and able officer, but he was vain, pompous, and egotistical to a fault. Eisenhower, then a lieutenant colonel on MacArthur's staff in Manila, was appalled at his chief's personality. He recognized, however, that only "egotism [and] exclusive devotion to one's own interests" motivated MacArthur.[7] As then-Major General Enoch H. Crowder, who had once been an aide to MacArthur's father and who had subsequently served as The Judge Advocate General in World War I, put it: "Arthur MacArthur was the most flamboyantly egotistical man I had ever seen—until I met his son."[8]

MacArthur had an unbelievable public relations machine. In Weintraub's view (shared by this reviewer), he took credit for the good and managed to deflect the bad. His failure to defend the Philippines after the Japanese attack on Pearl Harbor was inexcusable, yet MacArthur managed to get a Medal of Honor out of it. His island-hopping strategy was the key to victory in the Pacific in World War II, and his bold, daring, and wildly successful amphibious landing at Inchon in 1951 continues to inspire students of military history. Yet, his Korean War race to the Yalu was ill-advised and his proposal for an air and sea bombardment of China's industrial capacity to wage war even more foolish. As Weintraub details, MacArthur even sent Washington a list of thirty-four targets for atomic bombs.[9] In the end, his own vanity—which manifested itself as insubordination to President Harry S. Truman—ended his career.

---

[5] STANLEY WEINTRAUB, 11 DAYS IN DECEMBER: CHRISTMAS AT THE BULGE 1944 (2006) (This book was widely acclaimed.).
[6] WEINTRAUB, *supra* note 1, at 92, 94.
[7] *Id.* at 95.
[8] *Id.* at 119.
[9] *Id.* at 450.

If egotism was the hallmark of MacArthur's character, Eisenhower was totally different: flexible, genial, and unpretentious. Eisenhower accomplished what perhaps no other American general could have done by building a multinational force and leading it in the liberation of Europe. Weintraub recounts how Eisenhower not only had to fight Hitler, but he had to struggle with men like British Field Marshal Bernard Montgomery, who routinely attempted to undercut him and belittled him behind his back. Eisenhower also had to deal with Prime Minister Winston Churchill, who resisted the idea for an Allied landing at Normandy in June 1944 almost until the last. But Eisenhower held the Allies together until the end and, after serving as Army Chief of Staff, was elected President in 1952.

Marshall is the real hero of the book. Modest and self-effacing, he was the epitome of selfless service. Moreover, he was a brilliant strategist. He not only orchestrated the successful ground and air strategy that ensured Allied victory, but made sure that the Army had the requisite number of Soldiers and Airmen to achieve success. Weintraub argues that Marshall deserves credit for many of the achievements nowadays attributed to Eisenhower and MacArthur.

Secretary of War Stimson—and President Roosevelt—wanted Marshall to take command of Operation Overlord, the Allied invasion of Europe. Both knew that the man who commanded the largest combined operation in the history of war would probably be universally celebrated as a great hero. Roosevelt certainly saw it that way; he wrote to General John J. Pershing, then a patient at Walter Reed Army hospital, that "it is only fair to give George [Marshall] a chance in the field . . . I want George to be the Pershing of the Second World War."[10] The job was Marshall's for the asking, but he refused because he believed he was more valuable in Washington. Had Marshall decided differently, history would have been very different. There almost certainly would not have been a President Eisenhower.

But Marshall was utterly without ambition. He deplored the idea of "five-star" rank. He thought it was unnecessary. As he told an interviewer in 1956, "I didn't want any promotion at all . . . I didn't need it."[11] Under pressure from Roosevelt and Stimson, however, Marshall finally accepted the rank of General of the Army.

---

[10] *Id.* at 196.
[11] *Id.* at 279–80.

After the war, Marshall hoped to retire and spend the remainder of his days on his Virginia farm. His sense of duty, however, led him to continue to serve, first as Secretary of State (overseeing the "Marshall Plan" that rebuilt Europe) and later as Secretary of Defense.

One of the major strengths of Weintraub's narrative is the manner in which he weaves facts and anecdotes into his narrative. More than a few show how the careers of Eisenhower, Marshall, and MacArthur were interconnected. For example, any of these three men might have led the Allied invasion of Normandy in June 1944, but Eisenhower got the job only because Marshall refused it. MacArthur wore all his ribbons on his uniform until he saw a photograph in the Australian press of Eisenhower in uniform with no decorations at all. MacArthur quietly stopped wearing his ribbon bars.[12] Eisenhower argued strenuously against awarding the Medal of Honor to MacArthur after the debacle in the Philippines in December 1941,[13] yet Marshall personally drafted the citation for the medal and took it to Roosevelt for his signature, because Marshall believed it would "offset any propaganda by the enemy directed against [MacArthur's] leaving his command and proceeding to Australia."[14]

In addition to showing how their lives were intertwined, some of Weintraub's anecdotes also give the reader insight into the character and personality of his subjects. For example, Eisenhower was a chain smoker and had a terrible temper. He also had an inappropriate relationship with his thirty-four year-old British civilian driver, Kay Summersby. General Omar Bradley referred to Summersby as "Ike's shadow";[15] Summersby traveled with a dog named Felix, and on the dog's collar was engraved: "This dog belongs to Ike and Kay."[16] Marshall intervened at least once to stop Eisenhower from favoring Summersby when Ike recommended her for a Legion of Merit. Marshall refused to permit its award.

MacArthur similarly had some character flaws. While Chief of Staff, the fifty-something MacArthur lived with his elderly mother at military quarters on Fort Myer, but he also kept an eighteen year old

---

[12] *Id.* at 117.
[13] *Id.* at 57.
[14] *Id.* at 58.
[15] *Id.* at 146.
[16] *Id.* at 409.

mistress at the Castleton Hotel on 16th Street in Washington.[17] MacArthur made $33,000 a year (plus a penthouse and expenses) while serving as the top military advisor in the Philippines[18] and, while still on Corregidor in February 1942, accepted $500,000 from Manuel Quezon as a gratuity.[19] By contrast, Eisenhower diplomatically refused Quezon's offer of $100,000 as a gift when he left Manila in December 1939.[20]

Not surprisingly, MacArthur and Eisenhower did not like each other. MacArthur called Eisenhower "the best clerk I ever had," while Eisenhower once said that he had "learned dramatics under MacArthur."[21]

Only George Marshall seems to have been without fault. When he put on his fourth star as Army Chief of Staff on 1 September 1939, he made $808.33 a month, plus $2,200 a year in allowances.[22] While this was sufficient and provided a comfortable life, it did not make him wealthy. Yet Marshall apparently did not care for gold, silver, or other riches. In the 1950s, Weintraub explains, Marshall was offered a million dollars "after taxes" by Henry Luce of *Time* and *Life* to write his memoirs. This was a huge sum at the time. Eisenhower and Churchill had already penned their books, and many others were cashing in on their wartime fame. But Marshall refused, saying to Luce, "You don't seem to understand. I am not interested in one million dollars."[23] Marshall also refused to serve on any corporate boards.

Weintraub's counter-factual musings—his "what ifs"—are thought-provoking. For example, he suggests that MacArthur might well have been President had he not rejected the opportunity to be the vice presidential candidate on a ticket with Republican Senator Robert Taft.[24] Weintraub reasons as follows: Taft was the front runner before the 1952 nominating convention, and MacArthur's name "might have swung the few votes necessary . . . to best Eisenhower in the early balloting."[25] It was a Republican year, as the Democrats had held the White House since

---

[17] *Id.* at 79–80.
[18] *Id.* at 95.
[19] *Id.* at 77.
[20] *Id.*
[21] *Id.* at 103.
[22] *Id.* at 101.
[23] *Id.* at 469.
[24] *Id.* at 486.
[25] *Id.*

1932 and the country was ready for change after Truman and an unpopular war on the Korean peninsula. Consequently, despite Taft's "negatives as a campaigner," he might well have been elected (as his father had been in 1908).[26] As Taft died of cancer on 31 July 1953, six months after the inauguration, MacArthur would have been propelled into the Oval Office.

For all its positive attributes, Weintraub's book contains some factual mistakes. He seems unable to get military equipment right. For example, at one point he has MacArthur taking off in a C-54 Skymaster but landing in a C-121 Constellation. He also repeats the popular but erroneous myth that the Army's ubiquitous one-quarter-ton wheeled vehicle derived its nickname "Jeep" from "general purpose"—and he makes that incorrect claim twice.[27]

Finally, at least for Judge Advocates, his discussion of Executive Order 9066, which required the forced removal and relocation of Americans of Japanese ancestry, is inadequate. Weintraub insinuates that the military was the prime mover behind this decision to put the Japanese in "remote, barren locations that were little more than concentration camps."[28] In fact, it was a political decision made by Roosevelt and his advisors; no one of stature dissented. Weintraub also suggests that, as "only 1,877 Japanese of the many loyal thousands in Hawaii were 'relocated,'" this necessarily means that Executive Order 9066 was both foolish and applied selectively. Serious students of World War II, however, know that the situation in Hawaii was completely different from events in California, Oregon, and Washington. First, given the numbers of Japanese-Americans in Hawaii, relocating them was logistically impossible. Second, as martial law was declared in Hawaii—and habeas corpus suspended during Army rule from 1941 to 1943—this was markedly different from the western United States where civilian rule continued. Weintraub should have been more honest in acknowledging why relatively few Japanese-Americans were relocated from the Hawaii.

---

[26] *Id.*

[27] *Id.* at 37, 228. Contrary to popular belief, the word "jeep" does not derive from "vehicle, general purpose." Rather, historians see two likely origins: First, a popular Popeye cartoon character named Eugene the Jeep had the ability to do anything, and this described the one-quarter-ton, high-horsepower vehicle that became a ubiquitous mode of transportation in the military. Second, World War I soldiers called any unproven piece of military hardware a "jeep," and this military slang described the new vehicle as well.

[28] *Id.* at 48.

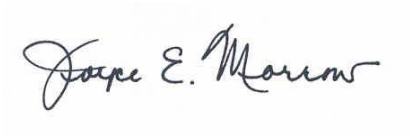
Additionally, *15 Stars* would be a better book—and more useful—if it had footnotes or endnotes. Weintraub uses what he calls "source notes" at the end of the text, but these are inadequate for the reader who wants to go directly to a specific source for some fact or event cited in the larger narrative. The lack of a bibliography also is disappointing.

These minor criticisms aside, however, this is a superb book about three great Army officers, and Weintraub's claim that they saved the American century is not hyperbole. Judge Advocates should read the book because it shows how the careers of America's most senior Army officers were intertwined before and during World War II, and how this interrelationship shaped both their lives and that conflict. As the war remains the single most important event of the twentieth century, that alone makes the book worth examining. But there also is every reason to believe that the careers and lives of senior officers in today's Army are just as intertwined, if not more so given the enhanced communication possibilities ushered in by the Internet. It follows that, given the constancy of human nature in history, reading stories and anecdotes about Eisenhower, Marshall, and MacArthur may provide insights into senior-level interpersonal relationships in today's Army.

By Order of the Secretary of the Army:

GEORGE W. CASEY, JR.
General, United States Army
Chief of Staff

Official:



JOYCE E. MORROW
Administrative Assistant to the
Secretary of the Army
0735401

U.S. GOVERNMENT PRINTING OFFICE: 1994-300-757:00001