

THE AIR FORCE LAW REVIEW



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PROTECTING FEDERAL RESERVED WATER RIGHTS ON
MILITARY INSTALLATIONS

*MAJOR JEFFREY T. HAWKINS**

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I. INTRODUCTION

The federal reserved water rights doctrine, first recognized by the U.S. Supreme Court over one hundred years ago,¹ dictates that when the federal government reserves land, it retains sufficient water, not previously appropriated, to achieve the reservation's primary purposes.² In arid western states, where water is scarce, state courts must frequently allocate water rights amongst thousands of parties in "general stream adjudications."³ In these cases, the federal government, through the McCarran Amendment, has waived sovereign immunity and consented to being joined as a party.⁴ State courts have issued diverse opinions, but generally tend to construe federal reservations' purposes very narrowly, often rejecting the federal government's claims.⁵ This constrictive reading, combined with the scarcity of water resources, especially in western states, has prompted the Department of Defense (DoD) to develop a policy to protect water rights necessary to achieve its military mission.⁶ This paper will examine the history of the federal reserved water rights doctrine, its application in state courts, and the DoD's efforts to protect water rights.⁷

II. JUDICIAL RECOGNITION OF THE FEDERAL RESERVED WATER RIGHTS DOCTRINE

In 1908, the Supreme Court first recognized the federal reserved water rights doctrine.⁸ In *Winters v. United States*, Congress had set aside a large land area in 1874 for several Indian tribes.⁹ However, in 1888, the tribes agreed to transfer the land back to the United States, except for a small tract which became known as the Fort Belknap Indian Reservation.¹⁰

¹ *Winters v. United States*, 207 U.S. 564, 576 (1908).

² *United States v. New Mexico*, 438 U.S. 699, 700 (1978).

³ See *infra* Part III.

⁴ Act of July 10, 1952, Pub. L. No. 945, 66 Stat. 560 (current version at 42 U.S.C. § 666 (2012)).

⁵ See *infra* Part III.

⁶ Memorandum from John Conger, Acting Deputy Under Sec'y of Def. for Installations and Env't to the Assistant Sec'ys of the Army, Navy, and Air Force for Installations and Env't (May 23, 2014) (on file with the author).

⁷ See *infra* Parts II–IV.

⁸ *Winters v. United States*, 207 U.S. 564, 576 (1908).

⁹ *Id.* at 567.

¹⁰ *Id.* at 568.

In 1889, the United States constructed houses and other buildings on the reservation and diverted 1,000 inches of water from the Milk River for the Indians' domestic and irrigation needs.¹¹ Prior to the United States or the Indians diverting any water, except for 250 inches pumped by a small water plant, non-Indians settled upstream along the Milk River.¹² They established homesteads following all applicable federal and state laws.¹³ In July 1898, the Fort Belknap Indians diverted 10,000 inches of water to irrigate 30,000 acres of cropland.¹⁴ In 1900, in compliance with federal and state laws, the non-Indian settlers built dams and reservoirs and diverted 5,000 inches of water from the Milk River.¹⁵ This left the Indians with insufficient water to support their agricultural needs.¹⁶ Consequently, the United States sought to enjoin the settlers from diverting water from the Milk River.¹⁷ The Court found there was an implied reservation of the water from the Milk River for irrigation purposes in the 1888 agreement, which established the Fort Belknap Indian Reservation.¹⁸ The Court looked to the purpose of the agreement and reasoned that Congress could not have intended to take away the large tract of arid land the Indians had used to maintain a nomadic lifestyle only to leave them with a small tract of arid land that required water if a civilized community were to be established.¹⁹

In 1955, the Supreme Court hinted the reserved water rights doctrine may also apply to non-Indian lands.²⁰ In *Federal Power Commission v. Oregon* (commonly referred to as the *Pelton Dam* case),²¹ the Federal Power Commission granted a license to build and operate a power facility and dam on the Deschutes River flowing through federal reserved land in Oregon.²² The State of Oregon, and others, challenged the federal government's authority to

¹¹ *Id.* at 566.

¹² *Id.* at 568.

¹³ *Id.*

¹⁴ *Id.* at 566.

¹⁵ *Id.* at 569.

¹⁶ *Id.* at 567.

¹⁷ *Id.* at 565.

¹⁸ *Id.* at 577.

¹⁹ *Id.* at 576.

²⁰ *Fed. Power Comm'n v. Oregon*, 349 U.S. 435 (1955).

²¹ *E.g., In re Water of Hallet Creek Sys.*, 749 P.2d 324, 335 (Cal. 1988).

²² *Fed. Power Comm'n v. Oregon*, 349 U.S. 435, 440 (1955).

grant the license.²³ The Court held that the Federal Power Commission did in fact possess such authority.²⁴ It reasoned that under the Federal Power Act, the Commission has the authority to grant such licenses on federal reservations as long as the water's use does not interfere with others' vested rights.²⁵ The case did not explicitly address implied water rights, but did support the idea that state water laws were not necessarily applicable to federal reservations.²⁶

In 1963, the Supreme Court explicitly extended the federal implied water rights doctrine to non-Indian lands.²⁷ In *Arizona v. California*, at issue were the water rights of Arizona, California, Nevada, New Mexico, Utah, and the United States to water from the Colorado River and its tributaries.²⁸ The United States asserted its claim for water to support recreational areas, wildlife refuges, Indian reservations, and other public lands.²⁹ In resolving the dispute, the Court held that the federal government had reserved water rights for Indian reservations and other federal lands.³⁰ The Court explicitly stated the implied water rights reservation was equally applicable to non-Indian federal lands.³¹

In 1976, the Supreme Court expounded upon the implied water rights doctrine.³² In *Cappaert v. United States*, the issue was whether Nevada ranchers could permissibly pump water from wells near federally reserved land.³³ In 1952, President Truman, by proclamation, had reserved land surrounding Devil's Hole, noting that Devil's Hole contained a subterranean pool that was home to a very rare desert fish.³⁴ He stated that the "pool is of such outstanding scientific importance that it should be given special protection...."³⁵ In 1968, Nevada ranchers began pumping water from wells two and half miles

²³ *Id.* at 441.

²⁴ *Id.* at 452.

²⁵ *Id.* at 444–45.

²⁶ *See id.* at 447–448.

²⁷ *Arizona v. California*, 373 U.S. 546, 601 (1963).

²⁸ *Id.* at 550.

²⁹ *Id.* at 595.

³⁰ *Id.* at 601.

³¹ *Id.*

³² *Cappaert v. United States*, 426 U.S. 128 (1976).

³³ *Id.* at 138.

³⁴ *Id.* at 141.

³⁵ *Id.*

from Devil’s Hole.³⁶ The water they were pumping was from an underground source hydrologically connected to the Devil’s Hole pool.³⁷ As a result of the ranchers’ pumping activity, water level at Devil’s Hole decreased to such a level to inhibit the rare desert fish’s spawning activity, thereby threatening extinction.³⁸ In affirming both the District Court and Ninth Circuit’s decisions, the Supreme Court explained “that when the [f]ederal [g]overnment withdraws its land from the public domain and reserves it for a federal purpose, the [g]overnment, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.”³⁹ The Court noted that the “issue is whether the [g]overnment intended to reserve unappropriated and thus available water.”⁴⁰ Intent is inferred from the purpose for which the land was reserved.⁴¹ The Court explained that the federal government’s reserved water rights vest at the time of the reservation and are superior to future appropriators’ rights.⁴² It said reserved water rights do not depend on equity requiring courts to balance competing interests.⁴³ Therefore, in 1976 the scope of the reserved water rights doctrine appeared to be expansive.⁴⁴

³⁶ *Id.* at 138.

³⁷ *Id.* at 136.

³⁸ *Id.*

³⁹ *Id.* at 138.

⁴⁰ *Id.* at 139.

⁴¹ *Id.*

⁴² *Id.* at 138.

⁴³ *Id.* at 139 n.4.

⁴⁴ Although *Cappaert* involved a dispute over water beneath the ground, it did not extend the reserved water rights doctrine to groundwater. *Id.* at 142. The U.S. Supreme Court has not settled the question of whether the reserved water rights doctrine applies to groundwater. See *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1263 (9th Cir. 2017) (holding that the reserved water rights doctrine applies to groundwater), *cert denied*, *Desert Water Agency v. Agua Caliente Band of Cahuilla Indians*, 138 S. Ct. 469 (2017), and *cert denied* *Coachella Valley Water Dist. v. Agua Caliente Band of Cahuilla Indians*, 138 S. Ct. 468 (2017). The 9th Circuit is the only federal circuit court that has taken a position on this issue and state courts have come to differing conclusions. See *In re the Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 989 P.2d 739, 746–47 (Ariz. 1999) (finding that the reserved water rights doctrine extends to groundwater), *cert denied*, 530 U.S. 1250 (2000); *In re the Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76, 99–100 (Wyo. 1988) (holding that the reserved water rights doctrine does not apply to groundwater).

However, in 1978, the Supreme Court reduced the doctrine's scope.⁴⁵ In *United States v. New Mexico*, the United States asserted the implied water rights doctrine in an effort to protect water from the Rio Mimbres that originated in the Gila National Forest.⁴⁶ The federal government argued "that Congress intended to reserve minimum instream flows for aesthetic, recreational, and fish-preservation purposes."⁴⁷ In rejecting the government's argument, and upholding the New Mexico Supreme Court's decision, the Court found Congress did not reserve national forests for recreational, wildlife-preservation, environmental, and aesthetic purposes.⁴⁸ The Court looked to the Organic Administration Act of 1897 and found Congress had reserved national forests for only two purposes—a supply of timber and water flow conservation.⁴⁹ The Court reviewed the implied water rights jurisprudence and stated that "[e]ach time this Court has applied the 'implied-reservation-of-water doctrine,' it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated."⁵⁰ It stated that when water is valuable only for a secondary purpose, the implication is Congress intended the United States to secure water rights as any other private or public appropriator would.⁵¹ Although the Court did not reject the implied water rights doctrine, it did note Congress could explicitly reserve water for aesthetic, wildlife, and recreational purposes, as it did in legislation creating the Lake Superior National Forest and Yosemite National Park.⁵² The *New Mexico* Court instructed that the legislation reserving federal lands and the specific purposes for which the lands were reserved will determine the existence and quantity of federal reserved water rights.⁵³ The Supreme Court has not provided further guidance on this issue.⁵⁴

⁴⁵ *United States v. New Mexico*, 438 U.S. 696, 700–01 (1978).

⁴⁶ *Id.* at 698.

⁴⁷ *Id.* at 705.

⁴⁸ *Id.* at 708.

⁴⁹ *Id.* at 707.

⁵⁰ *Id.* at 700.

⁵¹ *Id.* at 701.

⁵² *Id.* at 710.

⁵³ *Id.* at 718.

⁵⁴ *See, e.g., John v. United States*, 720 F.3d 1214, 1241 (9th Cir. 2013).

III. STATE APPLICATION OF THE FEDERAL RESERVED WATER RIGHTS DOCTRINE

Since 1978, most of the litigation involving federal water rights has taken place in western state courts through their all-inclusive and continuing “general stream adjudications,” which allocate scarce water resources among thousands of users.⁵⁵ Pursuant to the McCarran Amendment, the federal government has consented to being joined as a party in “a general adjudication of all of the rights of various owners on a given stream.”⁵⁶ These actions are commonly referred to as “general stream adjudications.”⁵⁷ The purpose of the McCarran Amendment was to allow states to adjudicate all conflicting claims to water rights at the same time without being burdened with the federal government invoking sovereign immunity.⁵⁸

States have generally adopted two primary legal systems to govern water allocation.⁵⁹ Western states use prior appropriation water law systems in which water is considered a property right and historically senior water users or appropriators are granted priority over newer users.⁶⁰ That is, the first user to divert water for beneficial use has a superior right over later users.⁶¹ This is different than the riparian water law system followed by eastern states in which water is not a property right and landowners are permitted to take water from water sources flowing through their property for reasonable use.⁶² Although dividing water law into two separate legal regimes provides an easy explanation of how water is generally allocated in the United States, in reality, many states follow hybrid systems.⁶³ Some western states include riparian rights in the larger prior appropriation construct and some eastern states use permit systems that separate riparian ownership and water usage.⁶⁴

⁵⁵ *Federal Reserved Water Rights and State Law Claims*, U.S. DEP’T OF JUSTICE (May 12, 2015), <https://www.justice.gov/enrd/federal-reserved-water-rights-and-state-law-claims>.

⁵⁶ *Dugan v. Rank*, 372 U.S. 609, 618 (1963) (citing Act of July 10, 1952, Pub. L. No. 945, 66 Stat. 560).

⁵⁷ *E.g.*, *United States v. Puerto Rico*, 144 F. Supp. 2d 46, 50 (D.P.R. 2001).

⁵⁸ *Id.* at 49.

⁵⁹ JAMES RASBAND ET AL., *NATURAL RESOURCES LAW AND POLICY* 842 (3d ed. 2016).

⁶⁰ Captain Michael T. Palmer, *Department of Defense Water Rights: A Proposed Policy*, 64 *NAVAL L. REV.* 28, 34–35 (2015).

⁶¹ *Id.* at 36.

⁶² *Id.* at 35.

⁶³ RASBAND ET AL., *supra* note 59, at 842.

⁶⁴ *Id.*

Moreover, states employ many variations within the broader riparian and prior appropriation legal regimes.⁶⁵

Water law litigation in western states has produced diverse results. In 1982, the Colorado Supreme Court generally acknowledged the existence of federal reserved rights of unappropriated waters in sufficient amounts to achieve the federal reservation's primary purpose.⁶⁶ In a "general stream adjudication," the court specifically held that the United States did not have an implied water right for instream flow into national forests nor a water right for recreational purposes at the Dinosaur National Monument, as those rights were unnecessary to satisfy the primary purpose of those reservations.⁶⁷ Conversely, the court accepted a reserved right for public springs and water holes for stock-watering and domestic purposes.⁶⁸ In 2008, Colorado water courts recognized federal reserved water rights for the Gunnison National Park's Black Canyon and the Great Sand Dunes National Park.⁶⁹

The Idaho Supreme Court has produced inconsistent decisions through its application of the federal reserved water rights doctrine. In 1987, the State of Idaho initiated a "general stream adjudication" for competing water claims in the Snake River Basin.⁷⁰ The case involved 150,000 claims for water rights, of which 50,000 were filed by the federal government on behalf of four Indian tribes and ten federal agencies.⁷¹ The Idaho Department of Water Resources made initial determinations with respect to the water claims.⁷² The claimants were then permitted to file objections with the assigned District Court.⁷³ If the claimants were unsatisfied with the District Court's decision, they could appeal to the Idaho Supreme Court.⁷⁴

⁶⁵ *Id.*

⁶⁶ *United States v. Denver*, 656 P.2d 1, 15–20 (Colo. 1982).

⁶⁷ *Id.* at 34–35.

⁶⁸ *Id.* at 36.

⁶⁹ *Federal Reserved Water Rights and State Law Claims*, U.S. DEP'T OF JUSTICE (May 12, 2015), <https://www.justice.gov/enrd/federal-reserved-water-rights-and-state-law-claims>.

⁷⁰ Michael C. Blumm, *Reversing the Winters Doctrine?: Denying Reserved Water Rights for Idaho Wilderness and Its Implications*, 73 U. COLO. L. REV. 173, 180 (2002).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

The United States appealed the District Court’s decision with respect to federal water rights for certain wilderness areas and the Hells Canyon National Recreation Area.⁷⁵ The Idaho Supreme Court determined all unappropriated water within each of the subject wilderness areas must be reserved in order to satisfy the purposes of the wilderness reservations.⁷⁶ The court looked to the Wilderness Act of 1964 and reasoned the primary purpose—wilderness preservation and protection—would be defeated without the reservation of all unappropriated water within the wilderness areas.⁷⁷ With respect to the Hells Canyon National Recreation Area, the court found the federal government held a reserved water right to all unappropriated water; however, unlike the wilderness areas, the court determined that the federal water rights were specifically expressed in the Act, which states that the recreation area “shall comprise the lands and waters.”⁷⁸

The Idaho Supreme Court’s decision, decided on a 3-2 vote, was unpopular within the state and met with public protests.⁷⁹ Soon after the decision was released, Justice Cathy Silak, the justice who wrote the majority opinion, was defeated in her reelection bid.⁸⁰ However, before she left the bench the Idaho Supreme Court reversed itself on rehearing.⁸¹ Justice Silak wrote a dissenting opinion.⁸² Chief Justice Linda Copple Trout, who was facing reelection, changed her initial opinion, swinging the court in the opposite direction.⁸³ In its reversal, the court found no implied federal reserved water rights attached to the wilderness areas.⁸⁴ It reasoned that the purpose of the Wilderness Act was only to preserve land and prevent development, and that purpose could be fulfilled without restricting water diverters upstream from the wilderness areas.⁸⁵ It noted Congress was capable of expressly reserving water rights, but failed to do so; therefore, it should be inferred that Congress did not intend to reserve such rights.⁸⁶ With respect

⁷⁵ *In re* SRBA, No. 39576, 1999 WL 778325, at *2 (Idaho Oct. 1, 1999).

⁷⁶ *Id.* at *8–9.

⁷⁷ *Id.*

⁷⁸ *Id.* at *11–13.

⁷⁹ Blumm, *supra* note 70, at 186.

⁸⁰ *Id.* at 188.

⁸¹ *Id.* at 189.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Potlatch Corp. v. United States*, 12 P.3d 1260, 1268 (Idaho 2000).

⁸⁵ *Id.* at 1266–67.

⁸⁶ *Id.* at 1264.

to the Hells Canyon Recreation Area, it found “all unappropriated waters” were not needed to fulfill the purpose of the recreation area.⁸⁷ It remanded the case back to the lower court to determine some lesser amount of water needed to satisfy such purpose.⁸⁸

Interestingly, some petitioners in the case argued the implied water rights doctrine disappeared in 1963, the year after the U.S. Supreme Court expressly extended it to non-Indian lands in *Arizona v. California*.⁸⁹ The argument essentially was that after the *Arizona* decision, Congress was aware of the conflict between state and federal water rights; therefore, it would have included language expressly reserving water rights in the Wilderness Act of 1964 if it had wanted to reserve such rights.⁹⁰ The majority opinion did not adopt this argument, deciding the case instead on a very narrow reading of the Wilderness Act’s purpose, but the argument was accepted by Chief Justice Trout who authored a concurring opinion.⁹¹

The same day it issued the opinion reversing itself on the case addressing federal reserved water rights for Hells Canyon Recreation Area and certain wilderness areas, the Idaho Supreme Court also handed down an opinion finding the Sawtooth National Recreation Area had no federal reserved water rights.⁹² It reasoned that water was unnecessary to satisfy the primary purpose of the federal reservation.⁹³ It determined the primary purpose of the Sawtooth National Recreation Area was residential development and mining despite there being statutory language discussing the protection and preservation of fish and wildlife.⁹⁴ Therefore, the court again based its decision on a narrow reading of the reservation’s purpose.⁹⁵

In 2001, the Idaho Supreme Court found the Deer Flat National Wildlife Refuge, consisting of almost one hundred islands in the Snake River, did

⁸⁷ *Id.* at 1269.

⁸⁸ *Id.* at 1270.

⁸⁹ Michael C. Blumm, *Federal Reserved Water Rights as a Rule of Law*, 52 IDAHO L. REV. 369, 371 (2016).

⁹⁰ *Id.*

⁹¹ *Potlatch Corp. v. United States*, 12 P.3d 1260, 1271 (Idaho 2000).

⁹² *Idaho v. United States*, 12 P.3d 1284, 1290–91 (Idaho 2000).

⁹³ *Id.* at 1290.

⁹⁴ *Id.* at 1289.

⁹⁵ *See id.* at 1290–91.

not require reserved water.⁹⁶ It reasoned the purpose of the reservation was to protect migratory birds, and water was not necessary to achieve that purpose.⁹⁷

The appellate courts in New Mexico (affirmed by the U.S. Supreme Court in *United States v. New Mexico*), Colorado, and Idaho are the only state appellate courts that have reviewed the application of federal reserved water rights for non-Indian lands.⁹⁸ The results have varied and are fact specific, but generally state courts have tended to read the purpose of the federal reservation narrowly.⁹⁹ Some commentators have suggested state courts are sensitive to political pressures and possible negative consequences of declaring federal water rights senior to state rights, as appears to have happened in Idaho with the court's reversal in the Snake River Basin adjudication.¹⁰⁰ Other commentators have argued the implied water rights doctrine is non-existent for land reserved after 1955, when the Supreme Court first provided for the possibility that the doctrine may apply to non-Indian lands in *Pelton Dam*.¹⁰¹ This is essentially the position adopted by Chief Justice Trout in the Idaho Snake River Basin case; however, these commentators take it even further by extending the doctrine's disappearance to 1955 rather than 1963 when the Supreme Court expressly extended the implied water rights doctrine to non-Indian lands in *Arizona v. California*.¹⁰²

IV. THE DoD'S PROTECTION OF THE WATER RIGHTS DOCTRINE

This constrictive application of the implied water rights doctrine, combined with water scarcity, has prompted federal agencies to strenuously protect those rights.¹⁰³ This is especially true within the DoD.¹⁰⁴ In 2014, Mr.

⁹⁶ *United States v. Idaho*, 23 P.3d 117 (Idaho 2001).

⁹⁷ *Id.* at 126.

⁹⁸ Lawrence J. MacDonnell, *General Stream Adjudications, The McCarran Amendment, and Reserved Water Rights*, 15 WYO. L. REV. 313, 336 (2015).

⁹⁹ *Id.* at 337–40.

¹⁰⁰ *Id.* at 342–43; Blumm, *supra* note 70, at 188–89.

¹⁰¹ Jeffrey C. Fereday & Christopher H. Meyer, *What is the Federal Reserved Water Rights Doctrine, Really? Answering This Question in Idaho's Snake River Basin Adjudication*, 52 IDAHO L. REV. 341, 342–45.

¹⁰² *Id.* at 357–62.

¹⁰³ See, e.g., Memorandum from John Conger, Acting Deputy Under Sec'y of Def. for Installations and Env't to the Assistant Sec'ys of the Army, Navy, and Air Force for Installations and Env't (May 23, 2014) (on file with the author).

¹⁰⁴ See *id.*

John Conger, the acting deputy under secretary of defense for installations and environment, promulgated a DoD policy addressing water rights. The policy dictated each DoD installation must “[b]e prepared to assert and preserve its water rights under [f]ederal and [s]tate law as is necessary to support mission requirements.”¹⁰⁵ Similarly, in 2014, the Secretary of the Army issued a directive detailing the Army’s water rights policy.¹⁰⁶ The directive notes the Army needs sufficient water to satisfy mission requirements without major disruptions.¹⁰⁷ It states that “increasing demand for water to support growing populations and economic development places stress on the same supplies of ground and surface water that Army installations depend on to fulfill their missions.”¹⁰⁸ It sets out a policy to “identify, assert, defend and preserve its water rights to the maximum extent possible under [s]tate and [f]ederal law to sustain mission capability.”¹⁰⁹

Little federal case law exists applying the implied water rights reservation to military installations.¹¹⁰ In *Nevada ex rel. Shamberger v. United States*, decided in 1958, the district court considered whether the Navy required state permits to drill wells on the Hawthorne Naval Ammunition Depot in Nevada.¹¹¹ The court held the Navy was not required to obtain permits because the Navy was entitled to federal reserved water rights for the installation.¹¹² Additionally, although not a case involving a military installation, the U.S. Supreme Court has made clear the implied water rights doctrine applies to “any federal enclave.”¹¹³ Thus, the DoD should be able to rely upon the federal water rights doctrine to secure water for the purposes for which the federal government reserved the land.¹¹⁴

¹⁰⁵ *Id.*

¹⁰⁶ JOHN M. MCHUGH, DIR. 2014-08, WATER RIGHTS POLICY FOR ARMY INSTALLATIONS IN THE UNITED STATES (May 12, 2014), available at <http://www.asaie.army.mil/Public/ES/doc/SA%20Signed%20Army%20Water%20Rights%20Directive%2012%20May%202014.pdf>.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Captain Michael T. Palmer, *Department of Defense Water Rights: A Proposed Policy*, 64 NAVAL L. REV. 28, 43 (2015).

¹¹¹ *Nevada ex rel. Shamberger v. United States*, 165 F. Supp. 600, 601 (D. Nev. 1958), *aff'd on other grounds*, 279 F.2d 699 (9th Cir. 1960).

¹¹² *Id.* at 610.

¹¹³ *United States v. Dist. Ct. for Eagle Cty.*, 401 U.S. 520, 522 (1971).

¹¹⁴ *See id.*

However, considering the constrictive application of the doctrine by the Supreme Court in *United States v. New Mexico*¹¹⁵ and the narrow reading of reservations' purposes used by state courts, the DoD will likely have a high burden protecting its water rights.¹¹⁶ It will have to show the water being claimed is necessary to achieve the primary purposes of the military reservation.¹¹⁷

In deciding these matters, state courts will look to the executive order or authorizing legislation corresponding to the federal land reservation. To illustrate, consider President Ulysses S. Grant's 1869 reservation of land for what is now F.E. Warren Air Force Base in Wyoming:

Executive Mansion

June 28, 1869

The reservations at Forts Laramie, Fetterman, D.A. Russell, and Fred Steele, Wyoming Territory. Fort Sedgwick, Colorado Territory, and the enlargement of the reservation at Fort Sanders (formerly Fort John Buford) Wyoming Territory, as described in the accompanying plats and notes of survey and published in General Orders No. 34. Headquarters Department of the Platte June 3, 1869. approved [sic] by the Secretary of War. are [sic] made for military purposes and the Secretary of the Interior will cause the same to be noted in the General Land Office to be reserved as military posts.

U.S. Grant

President¹¹⁸

¹¹⁵ See *United States v. New Mexico*, 438 U.S. 696, 701 (1978).

¹¹⁶ See *supra* Part III.

¹¹⁷ See *id.*

¹¹⁸ Captain Kirk S. Samuelson, *Reserved Water Rights on Air Force Property*, 22 A.F. L. REV. 302, 310 (1981).

In this reservation, the words “made for military purposes” are the only indication of the reservation’s purpose.¹¹⁹ The question for state courts is what is included within “military purposes.”¹²⁰

According to published Army guidance, the primary purpose of a military reservation incorporates “all municipal and industrial uses of water necessary to sustain a self-contained community, including water adequate for the morale and welfare needs of the Army community.”¹²¹ Thus, the DoD could argue that functions such as recreation, in-stream flows, and wildlife enhancement on military reservation are included in the primary purposes for which the military reservation was established; however, when state courts focus on the words “military purposes,” they may be hesitant to accept this argument.¹²² Considering that state courts have a tendency to narrowly construe federal reservations’ primary purposes, they may want to narrowly focus on military operations or activities that go toward organizing, training, and equipping military members as primary military purposes.¹²³ Convincing a state court that a military reservation also needs water for things that help increase the morale and welfare of the military community, and that this too is a primary purpose, may be challenging.¹²⁴

In these cases, the DoD could point to the implied water rights doctrine’s long precedential history.¹²⁵ In accordance with the basic principles of property law, when the federal government reserves land for a specific purpose, it maintains pre-existing property rights associated with the land that are not otherwise transferred to the state.¹²⁶ With respect to pre-existing water rights connected with non-Indian federal land, the Supreme Court recognized over fifty years ago that the federal government held sufficient water rights needed to achieve the land reservation’s purpose.¹²⁷ It is important these rights be protected and not be overturned through constrictive application of

¹¹⁹ *See id.*

¹²⁰ *See supra* Part III.

¹²¹ JOHN M. MCHUGH, DIR. 2014-08, WATER RIGHTS POLICY FOR ARMY INSTALLATIONS IN THE UNITED STATES (12 May 2014), available at <http://www.asaie.army.mil/Public/ES/doc/SA%20Signed%20Army%20Water%20Rights%20Directive%2012%20May%202014.pdf>.

¹²² *See supra* Part III.

¹²³ *See supra* Part III.

¹²⁴ *See supra* Part III.

¹²⁵ *See supra* Part III.

¹²⁶ Blumm, *supra* note 70, at 373.

¹²⁷ *Arizona v. California*, 373 U.S. 546, 601 (1963).

the water rights doctrine or acceptance of the argument that implied water rights disappeared for land reserved after the 1955 *Pelton Dam* case or the 1963 *Arizona* case.¹²⁸

Moreover, state courts should be mindful that Congress and the President are capable of specifically stating when federal water rights will not attach to a federal reservation.¹²⁹ For instance, the Colorado Wilderness Act of 1993 states, “Nothing in this Act shall be construed as a creation, recognition, disclaimer, relinquishment, or reduction of any water rights of the United States....”¹³⁰ Similarly, when President Bill Clinton reserved federal land in 1996 for the Grand Staircase-Escalante National Monument, he stated, “This proclamation does not reserve water as a matter of Federal law.”¹³¹ Absent language addressing water rights, state courts should be faithful to Supreme Court precedent and accept the DoD’s explanation of why it needs a certain quantity of water for military purposes.¹³² If the DoD cannot faithfully rely on the implied water rights doctrine, it will be forced to spend limited funds to purchase water, reduce missions, or close recreational venues, thereby reducing morale of military members and their families.¹³³ Thus, if the President or Congress want to eliminate or narrow the scope of the federal water rights doctrine, they may do so; but state courts should not do it by narrowly interpreting the primary purposes of federal land reservations.¹³⁴

Beyond relying on the implied water rights doctrine to protect federal water rights, there are other ways the DoD can ensure it has sufficient water to fulfill its military purpose. For example, the DoD can negotiate compromise agreements with the states under which the states agree to recognize the DoD’s

¹²⁸ JOHN M. MCHUGH, DIR. 2014-08, WATER RIGHTS POLICY FOR ARMY INSTALLATIONS IN THE UNITED STATES (12 May 2014), available at <http://www.asaie.army.mil/Public/ES/doc/SA%20Signed%20Army%20Water%20Rights%20Directive%2012%20May%202014.pdf>.

¹²⁹ Blumm, *supra* note 70, at 384.

¹³⁰ Colorado Wilderness Act of 1993, Pub L. No. 103-77, § (8)(b)(2)(B), 107 Stat. 756, 762 (1993).

¹³¹ Establishment of the Grand Staircase-Escalante National Monument, 61 Fed. Reg. 50,223, 50,225 (Sept. 18, 1996).

¹³² JOHN M. MCHUGH, DIR. 2014-08, WATER RIGHTS POLICY FOR ARMY INSTALLATIONS IN THE UNITED STATES (12 May 2014), available at <http://www.asaie.army.mil/Public/ES/doc/SA%20Signed%20Army%20Water%20Rights%20Directive%2012%20May%202014.pdf>.

¹³³ *See id.*; Captain Michael T. Palmer, *Department of Defense Water Rights: A Proposed Policy*, 64 NAVAL L. REV. 28, 44 (2015).

¹³⁴ *See MacDonnell, supra* note 98, at 342–43.

right to certain amounts of water for military purposes.¹³⁵ These negotiated rights are sometimes referred to as “hybrid” rights and their flexibility can help satisfy both federal and state interest.¹³⁶ A good illustration of a “hybrid” rights agreement was used in Nevada to settle a dispute between the Air Force and the State of Nevada in the Las Vegas Artesian Basin Adjudication.¹³⁷ In that agreement, the state recognized the Air Force’s right to use nearly 5,000 acre feet of groundwater per year “to fulfill defense operational activities and/or emergencies.”¹³⁸ In return, the Air Force agreed to first obtain its water from the Colorado River under existing contractual rights if it continued to buy surface water.¹³⁹ The Air Force’s right to groundwater recognized in this agreement was described as the National Defense Water Right.¹⁴⁰

An additional way the DoD can attempt to ensure sufficient water supplies is by asserting federal sovereign immunity. Under sovereign immunity, the United States cannot be sued unless it has expressly consented to being sued.¹⁴¹ With the McCarran Amendment, Congress expressly waived sovereign immunity within the context of “general stream adjudications.”¹⁴² However, this waiver only extends to “suits”¹⁴³ “for the adjudication of rights to the use of water of a river system or other source.”¹⁴⁴ It must be “a case involving a general adjudication of ‘all of the rights to owners on a given stream.’”¹⁴⁵ Outside this context, the DoD could still potentially claim sovereign immunity.¹⁴⁶

¹³⁵ Jeremy Nathan Jungreis, “Permit” Me Another Drink: A Proposal for Safeguarding the Water Rights of Federal Lands in the Regulated Riparian East, 29 HARV. ENV’T L. REV. 369, 393–94 (2005).

¹³⁶ *Id.* at 394.

¹³⁷ Michael J. Cianci, Jr. et al., *The New National Defense Water Right – An Alternative to Federal Reserved Water Rights for Military Installations*, 48 A.F. L. REV. 159, 172 (2000).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *United States v. Mitchell*, 445 U.S. 535, 538 (1980).

¹⁴² *See supra* Part III.

¹⁴³ *United States v. Puerto Rico*, 287 F.3d 212, 218 (1st Cir. 2002) (rejecting the argument that the word “suit” includes administrative proceedings as the word “suit” “refers specifically to an action in a judicial forum).

¹⁴⁴ *Dugan v. Rank*, 372 U.S. 609, 618 (1963), *citing* the McCarran Amendment, 43 U.S.C. § 666.

¹⁴⁵ *Id.*, *citing* S. Rep. No. 755, 82d Cong., 1st Sess. 9 (1951).

¹⁴⁶ *See supra* note 145 and accompanying text, and *infra* notes 148–50 and

States may try to counter a sovereign immunity assertion by looking to other statutes in which the federal government has waived sovereign immunity.¹⁴⁷ For example, under Section 313 of the Clean Water Act, the United States has waived sovereign immunity with respect to “the control and abatement of water pollution.”¹⁴⁸ However, the state would have the difficult task of showing that the DoD’s withdrawal of surface or groundwater results in a violation of state water quality standards.¹⁴⁹ States could also try to rely on the Safe Drinking Water Act (SDWA), which does contain a sovereign immunity waiver; however, state water allocation decisions focus on the quantity of water to which each user is entitled.¹⁵⁰ In contrast, the SDWA is focused on the quality of water being delivered to the end user.¹⁵¹ Moreover, for the sovereign immunity waiver to apply, water quality standards promulgated by state and local authorities pursuant to the SDWA must be objective.¹⁵² State water allocation decisions are subjective decisions tailored to satisfy competing interests; therefore, the sovereign immunity waiver should not be applicable.¹⁵³

Hence, the DoD may still have a strong argument that it is entitled to sovereign immunity in water allocation determinations outside the “general stream adjudication” context.¹⁵⁴ However, if the DoD attempts to obtain needed water by regularly asserting sovereign immunity, states may respond by modifying their water allocation laws so that they fit within one of the existing statutory sovereign immunity waivers.¹⁵⁵ The states could also lobby Congress to extend the McCarran Amendment’s sovereign immunity waiver beyond the “general stream adjudication” context.¹⁵⁶

accompanying text.

¹⁴⁷ See *supra* note 145 and accompanying text, and *infra* notes 148–50 and accompanying text.

¹⁴⁸ Clean Water Act § 313, 33 U.S.C. § 1323(a) (2016).

¹⁴⁹ Jungreis, *supra* note 135, at 400.

¹⁵⁰ *Id.* at 403.

¹⁵¹ *Id.*

¹⁵² *Id.* (citing *Florida Dep’t of Envtl. Regulation v. Silex Corp.*, 606 F. Supp. 159, 163 (M.D. Fla. 1985)).

¹⁵³ *Id.* at 404.

¹⁵⁴ See *supra* notes 147–53 and accompanying text.

¹⁵⁵ Jungreis, *supra* note 135, at 405.

¹⁵⁶ See *id.*

Thus, in many cases, the DoD should be able to secure needed water for military reservations by relying upon the implied water rights doctrine.¹⁵⁷ However, negotiating “hybrid” agreements and asserting sovereign immunity are alternative ways the DoD could obtain needed water.¹⁵⁸

V. CONCLUSION

When the federal government reserves land, it reserves the pre-existing water rights necessary to achieve the primary purposes of the reservation.¹⁵⁹ This concept, known as the reserved water rights doctrine, was first recognized by the Supreme Court over one hundred years ago¹⁶⁰ and explicitly extended to non-Indian lands over fifty years ago.¹⁶¹ Most of the recent litigation involving federal water rights has taken place in western state courts.¹⁶² These courts have the difficult task of allocating limited water among thousands of competing claims.¹⁶³ In doing so, they have had a tendency to read the purposes of federal reservations very narrowly, severely constricting federal rights.¹⁶⁴ This has prompted federal agencies like the DoD to develop policy to ensure it asserts and defends these water rights so it may accomplish its military mission.¹⁶⁵ The President or Congress may certainly eliminate the federal water rights doctrine, but it would be improper for state courts to do so through overly constrictive application of this doctrine.¹⁶⁶

¹⁵⁷ See *United States v. Dist. Ct. for Eagle Cty.*, 401 U.S. 520, 522 (1971).

¹⁵⁸ See *supra* notes 135–56 and accompanying text.

¹⁵⁹ *Winters v. United States*, 207 U.S. 564, 576 (1908); *Arizona v. California*, 373 U.S. 546, 601 (1963).

¹⁶⁰ *Winters v. United States*, 207 U.S. 564, 576 (1908).

¹⁶¹ *Arizona v. California*, 373 U.S. 546, 601 (1963).

¹⁶² *Federal Reserved Water Rights and State Law Claims*, U.S. DEP’T OF JUSTICE (May 12, 2015), <https://www.justice.gov/enrd/federal-reserved-water-rights-and-state-law-claims>.

¹⁶³ See Blumm, *supra* note 70, at 180.

¹⁶⁴ See *supra* Part III.

¹⁶⁵ Memorandum from John Conger, Acting Deputy Under Sec’y of Def. for Installations and Env’t to the Assistant Sec’ys of the Army, Navy, and Air Force for Installations and Env’t (May 23, 2014) (on file with the author).

¹⁶⁶ See Lawrence J. MacDonnell, *General Stream Adjudications, The McCarran Amendment, and Reserved Water Rights*, 15 WYO. L. REV. 313, 342–43 (2015).

EXPLORING THE LEGAL NUANCES OF DISABILITY
SEPARATION VERSUS ADMINISTRATIVE DISCHARGE FOR
MENTAL CONDITIONS IN THE MILITARY

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I. INTRODUCTION

One day during a meeting with the installation staff judge advocate, a commander expresses concern about one of her troops. Recently referred to mental health, the member is being considered for disability evaluation. The member is having problems in the unit, frequently engaging in disruptive conduct. The commander is considering discharge action and wants to know what options are available. Meanwhile, at a different military installation, an enlisted service member arrives for a scheduled appointment with military defense counsel. The member tells the attorney he has been diagnosed with a personality disorder and served with notification that he is being considered for administrative discharge. The member insists his problems in the unit began a few months after returning from a deployment to Afghanistan. The member wants to know his legal rights and whether he would be entitled to any medical benefits if he is separated.

These situations are not uncommon in the military. Many mental disorders begin to manifest themselves in early adulthood,¹ the time when many choose to begin military careers. Additionally, the link between military service and mental disorders, such as Post Traumatic Stress Disorder (PTSD), is generally known and fairly well documented.² These realities, coupled with the public and political scrutiny surrounding mental health issues in the military,³ make it vitally important for judge advocates to understand the applicable legal authorities and requirements. Situations involving military separation based on mental conditions present challenges for military legal

¹ See Ronald C. Kessler et al., *Lifetime Prevalence and Age-of-Onset Distributions of DSM-IV Disorders in the National Comorbidity Survey Replication*, 62 ARCH. GEN. PSYCHIATRY 593, 593, 597 (June 2005) (finding that three fourths of most mental disorders manifest themselves by age 24).

² See *infra* Part IV.

³ To illustrate the level of attention this issue tends to garner, Congress in 2014 directed the Government Accountability Office (GAO) to issue a report evaluating “the use by the Secretaries of the military departments...of the authority to separate members of the Armed Forces from the Armed Forces due to unfitness for duty because of a mental condition not amounting to disability, including separation on the basis of a personality disorder or adjustment disorder...”; “the extent to which the [service branches] failed to comply with regulatory requirements in separating [service members] on the basis of personality or adjustment disorder”; and “the impact of such a separation on the ability of veterans so separated to access service-connected disability compensation, disability severance pay, and disability retirement pay.” National Defense Authorization Act for Fiscal Year 2014, Pub. L. 113-66, § 574, 127 Stat. 672, 772–73 (2013) [hereinafter FY14 NDAA]. The findings of this report are discussed below in Parts IV and V.

practitioners, as the processes established by the Department of Defense (DoD) for dealing with members with mental conditions can be confusing and difficult to navigate. The scenarios above illustrate this point; although both involve military members apparently suffering from mental conditions, the former member may qualify for disability evaluation and the latter member likely does not. Based on this fundamental distinction, the two individuals can expect to receive vastly different levels of due process prior to separation from the service and will very likely be eligible for distinct post-separation benefits. This article describes these two major processes for separating members based on mental conditions—separation due to disability and administrative separation—and highlights legal issues surrounding both processes.

Part II of this article provides an overview of the medical disability evaluation and separation process for military members. Part III discusses the distinct administrative discharge process faced by members who are afflicted with a mental condition not constituting disability. Part IV explores some of the relevant data and statistics associated with both processes and mental conditions generally in the military service. Part V highlights some of the significant issues presented by the disability evaluation and administrative discharge processes as well as some of the obstacles faced by legal practitioners attempting to advise clients undergoing these processes. Finally, Part VI recommends potential solutions to address some of the issues and challenges at play in this area.

II. MEDICAL SEPARATION OR RETIREMENT FOR MENTAL ILLNESS CONSTITUTING DISABILITY

Military members with a mental disorder that qualifies for disability are evaluated under the DoD's centralized disability evaluation program.⁴ Based on the results of the evaluation and the characteristics of the service member, he or she ultimately may be medically separated or retired. The final results will also determine which, if any, benefits the member will be eligible to receive.

A. Basis for Disability Separation

The Veterans Affairs Schedule for Rating Disabilities (VASRD) lists defects and conditions that constitute disability.⁵ This schedule includes

⁴ See *infra* Part II.B.

⁵ See 38 U.S.C. § 1155 (2012) (providing the Secretary of Veterans Affairs with authority

certain mental disorders⁶ and neurocognitive disorders.⁷ A service member diagnosed with one of these conditions may be medically separated or retired provided the condition makes the individual unfit for service.⁸

A service member will be considered “unfit” when the evidence sufficiently establishes that the member, due to disability, is unable to reasonably perform duties of his or her office, grade, rank, or rating.⁹ A service member may also be considered unfit when: the member’s disability represents a decided medical risk to the member’s health or to the welfare or safety of other members; or the member’s disability imposes unreasonable requirements on the military to maintain or protect the member.¹⁰ Assessments of fitness are heavily fact-driven and require consideration of various factors, including the member’s ability to perform common military tasks, performance on physical fitness tests, suitability for deployment, and need for any special qualifications.¹¹

For a member to qualify for compensation based on disability—either in the form of severance or continual retirement benefits—the condition must have been incurred during or aggravated by the member’s military service.¹² Each service makes these findings based on the facts and circumstances unique to each case.¹³ These determinations can at times be difficult, particularly when the member is in the Guard or Reserves. Additionally, a member will not be entitled to disability benefits if the condition resulted from the

to create a schedule for rating disabilities).

⁶ A full schedule of mental disorders and accompanying disability ratings is published in 38 C.F.R. § 4.130 (2018).

⁷ A full schedule of neurocognitive disorders and accompanying disability ratings is published in 38 C.F.R. § 4.124a (2018).

⁸ See 10 U.S.C. §§ 1201–1206 (2012) (articulating the authority of the secretary of the military department concerned to retire and separate active-duty or reserve service members based on disability).

⁹ U.S. DEP’T OF DEF. INSTR. 1332.18, DISABILITY EVALUATION SYSTEM (DES) encl. 3, app. 2, para. 2.a (5 Aug. 2014) [hereinafter DoDI 1332.18].

¹⁰ *Id.* encl. 3, app. 2, para. 2.b.

¹¹ See *id.* encl. 3, app. 2, para. 4.a.

¹² *Id.* encl. 3, app. 3, para. 1.b; see also 10 U.S.C. §§ 1201–1206 (2012). Service members with more than eight years of active-duty service will be legally presumed to have incurred or aggravated a condition during military service. 10 U.S.C. § 1207a (2012).

¹³ Each service component makes these determinations through its respective process for making line of duty (LOD) evaluations. This process is discussed *infra* Part II.B below.

member's intentional misconduct or willful neglect, or was incurred during a period of unauthorized absence.¹⁴

B. Process for Disability Separation

The Disability Evaluation System (DES) is the DoD's mechanism for determining whether a service member should be returned to duty, separated, or retired because of disability.¹⁵ A military member must be eligible for DES referral. Active-duty members and members of a reserve component whose condition was incurred or aggravated during active service are generally eligible for referral,¹⁶ unless: (1) the member has a condition not constituting physical disability;¹⁷ (2) the member is pending an approved punitive discharge or dismissal; (3) the member is pending administrative separation for a basis authorizing an under other than honorable conditions (UOTHC) service characterization, regardless of the member's actual approved service characterization;¹⁸ (4) the member is not physically present and accounted for; or (5) the member's disability resulted from the member's intentional

¹⁴ 10 U.S.C. § 1207 (2012); DoDI 1332.18, *supra* note 9, encl. 3, app. 3, para. 1.a. Again, each service component makes these determinations also through its respective process for LOD evaluations, discussed *infra* Part II.B.

¹⁵ DoDI 1332.18, *supra* note 9, para. 3.a. For a more detailed summary of the DES, see Hugh A. Spires, Jr., *The Air Force Physical Disability Evaluation System: What Every Attorney Should Know Before they Practice*, 41 THE REPORTER, no. 2, 2014, at 30.

¹⁶ Specifically, the following persons are eligible for referral to the PEB: (1) service members on active duty or in a reserve component who are on orders to active duty specifying a period of more than thirty days; (2) reserve members who are not on orders to active duty specifying a period of more than thirty days but who incurred or aggravated a medical condition while the member was ordered to active duty for more than thirty days; (3) cadets at the U.S. Military Academy, the U.S. Air Force Academy, or midshipmen of the U.S. Naval Academy; (4) service members previously determined unfit, serving in a permanent limited duty status, and for whom the period of continuation has expired; and (5) other service members who are on orders to active duty specifying a period of thirty days or less if they have a medical condition that was incurred or aggravated in the line of duty (in certain situations). DoDI 1332.18, *supra* note 9, encl. 3, app. 1, para. 3.a. These requirements are derived from 10 U.S.C. §§ 1201–1206 (2012).

¹⁷ Such conditions can potentially lead to administrative discharge. Part III *infra* discusses this circumstance as it applies to individuals afflicted with non-disability mental conditions.

¹⁸ Per DoD policy, however, the services should normally evaluate for disability members facing punitive discharge or pending administrative separation when warranted as a matter of equity or good conscience. DoDI 1332.18, *supra* note 9, encl. 3, app. 1, para. 4.b.

misconduct or willful neglect, or was incurred during a period of unauthorized absence or excess leave.¹⁹

If required by the circumstances, the military service may also make a line of duty (LOD) determination to confirm the member's eligibility for disability,²⁰ including whether a condition is pre-existing, whether a condition is aggravated by military service, and any indications of misconduct or negligence.²¹ LOD determinations are separate from the DES process and are made in accordance with the regulations of the service concerned.²² Service members on continuous orders to active duty for more than thirty days are presumed to have entered their current period of military service in sound condition when the disability was not noted at the time the member entered active duty.²³ Further, service members on active duty for thirty days or more are presumed to have incurred diseases or injuries in the LOD unless the disease or injury was noted at time of entry into service.²⁴ Both presumptions may be overcome by clear and unmistakable evidence to the contrary.²⁵ Neither presumption applies to reserve service members serving on active-duty orders of thirty days or less.²⁶

¹⁹ *Id.* encl. 3, app. 1, para. 4.a.

²⁰ *Id.* encl. 3, app. 3, para. 6. LOD determinations further assist the PEB in satisfying the statutory requirements of 10 U.S.C., §§ 1201–1206 (2012).

²¹ DoDI 1332.18, *supra* note 9, encl. 3, App. 3, para. 6.a(1). At a minimum, LOD determinations will be required in the following circumstances: (1) injury, disease, or medical condition that may be due to the service member's intentional misconduct or willful negligence, such as a motor vehicle accident; (2) injury involving the abuse of alcohol or other drugs; (3) self-inflicted injury; (4) injury or disease possibly incurred during a period of unauthorized absence; (5) injury or disease apparently incurred during a course of conduct for which charges have been preferred; or (6) injury, illness, or disease of RC members on orders specifying a period of active duty of thirty days or less (in certain circumstances). *Id.* encl. 3, app. 3, para. 6.d.

²² As of the date of this publication, the controlling regulations for each service are: U.S. DEP'T OF AIR FORCE INSTR. 36-2910, LINE OF DUTY (MISCONDUCT) DETERMINATION (8 Oct. 2015); U.S. DEP'T OF ARMY REG. 600-8-4, LINE OF DUTY POLICY, PROCEDURES, AND INVESTIGATIONS (4 Sept. 2008); U.S. SEC'Y OF NAVY INSTR. 1770.3D, MANAGEMENT AND DISPOSITION OF INCAPACITATION AND INCAPACITATION BENEFITS FOR MEMBERS OF NAVY AND MARINE CORPS RESERVE UNITS (17 Mar. 2006); U.S. DEP'T OF NAVY JUDGE ADVOCATE GENERAL INST. 5800.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL, Ch. II, ADMINISTRATIVE INVESTIGATIONS (26 June 2012).

²³ DoDI 1332.18, *supra* note 9, encl. 3, app. 3, para. 7.b(1).

²⁴ *Id.* para. 7.c(1).

²⁵ *Id.* paras. 7.b(2), 7.c(1).

²⁶ *Id.* paras. 7.b(5), 7.c(2).

Eligible service members will proceed through one of three DES processes:²⁷ the Legacy Disability Evaluation System (LDES),²⁸ the Integrated Disability Evaluation System (IDES),²⁹ or the Expedited Disability Evaluation System (EDES).³⁰ Regardless of which specific process is used, the DES consists of two significant components. The first is medical evaluation, which includes a medical evaluation board (MEB). The second is disability evaluation, which includes a physical evaluation board (PEB) and appellate review.³¹ Although the medical examinations are performed by the Department of Veterans Affairs (VA),³² each military service provides oversight of both the MEB and PEB components.³³

The purpose of the evaluation component is to confirm whether the service member has a medical condition that may render the member unfit for service.³⁴ The MEB is the DES's primary means of achieving this aim. The MEB for any given case is comprised of two or more physicians, who may be

²⁷ *Id.* para. 3.b.

²⁸ The service components use the LDES for non-duty-related disability cases and for service members who entered the DES prior to the IDES being implemented at a given military treatment facility. Subject to the written approval of the Undersecretary of Defense for Personnel and Readiness, the service components may also use the LDES process for service members who are in initial entry training status, including trainees, recruits, cadets, and midshipmen. *Id.* encl. 3, paras. 1.b(1)–(2); *see also generally* U.S. DEP'T OF DEFENSE MANUAL 1332.18., VOL. 1, DISABILITY EVALUATION SYSTEM (DES) MANUAL: GENERAL INFORMATION AND LEGACY DISABILITY EVALUATION SYSTEM (LDES) TIME STANDARDS (5 Aug. 2014) (articulating LDES procedures).

²⁹ The DoD and VA jointly launched IDES in November 2007 with the intent of creating an integrated process to deliver DoD and VA benefits as soon as possible following release from active duty. *See* U.S. DEP'T OF DEFENSE REPORT TO CONGRESSIONAL COMMITTEES: ASSESSMENT AND RECOMMENDATIONS REPORT: CONSOLIDATION OF THE DISABILITY EVALUATION SYSTEM, para. 1.1 (20 Nov. 2014), <https://www.health.mil/Reference-Center/Reports/2014/11/20/Consolidation-of-the-Disability-Evaluation-System> [hereinafter DoD DES Consolidation Report]; *see also generally* U.S. DEP'T OF DEFENSE MANUAL 1332.18, VOL. 2, DISABILITY EVALUATION SYSTEM (DES) MANUAL: INTEGRATED DISABILITY EVALUATION SYSTEM (IDES) (5 Aug. 2014) [hereinafter DoDM 1332.18, Vol. 2] (specifying IDES procedures).

³⁰ The service components use the EDES for consenting service members determined to have a catastrophic illness or injury incurred in the line of duty. DoDI 1332.18, *supra* note 9, encl. 3, para. 1.b(3).

³¹ *Id.* encl. 3, para. 1.a.

³² *See* DoD DES Consolidation Report, *supra* note 29, para. 1.1.

³³ *See id.*

³⁴ DoDI 1332.18, *supra* note 9, encl. 3, para. 2.a, 2.d.

civilian or military.³⁵ One of these physicians must have detailed knowledge of the standards pertaining to medical fitness, patient disposition, and disability separation processing.³⁶ Additionally, any MEB listing a behavioral health diagnosis must contain a thorough behavioral health evaluation and be endorsed by a psychiatrist or a doctorate-level psychologist.³⁷

Ultimately, an MEB documents the medical status and duty limitations of service members who meet the DoD's disability referral criteria.³⁸ A service member undergoing an MEB may request assignment of an impartial and independent physician or health care professional to review and counsel the member on the MEB's findings and recommendations, as well as advise the member as to whether the MEB results reflect the full spectrum of the member's injuries and illnesses.³⁹ Members may rebut the MEB's findings and recommendations.⁴⁰

If the service member cannot perform the duties of his or her office, grade, rank, or rating, the MEB refers the case for disability evaluation, provided the member is eligible for referral.⁴¹ The PEB's objective is to determine the fitness of service members with medical conditions to perform their military duties and, for members determined unfit because of duty-related impairments, their eligibility for benefits.⁴² The PEB process includes the informal physical evaluation board (IPEB), formal physical evaluation board (FPEB), and appellate review of PEB findings and recommendations.⁴³

The IPEB reviews the case, to include any LOD determinations,⁴⁴ to make initial findings and recommendations without the member being

³⁵ *Id.* encl. 3, para. 2.b.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* encl. 3, para. 2.a. For a listing of the criteria, see *supra* notes 9–10 and accompanying text.

³⁹ DoDI 1332.18, *supra* note 9, encl. 3, para. 2.e(4). This requirement is derived from the National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, § 1612, 122 Stat. 3, 441–43 (2008).

⁴⁰ DoDI 1332.18, *supra* note 9, encl. 3, para. 2.e(5).

⁴¹ *Id.* encl. 3, para. 2.d. For a discussion of the referral eligibility criteria, see *supra* notes 16–19 and accompanying text.

⁴² DoDI 1332.18, *supra* note 9, encl. 3, para. 3.a.

⁴³ *Id.* encl. 3, para. 3.a.

⁴⁴ *Id.* encl. 3, para. 2.i(1).

present.⁴⁵ The IPEB consists of at least two military personnel at field grade, or civilian equivalent, or higher.⁴⁶ In cases of a split opinion, a third voting member will be assigned to provide the majority vote.⁴⁷ The service member may accept or rebut the IPEB's findings, or may request an FPEB.⁴⁸

The FPEB must be comprised of at least three members and may include military and civilian representatives. A majority of the FPEB members must not have participated in the adjudication process of the same case at the IPEB.⁴⁹ The FPEB will, at a minimum, consist of a president, who should be a military member in the grade of O-6, or civilian equivalent; a medical officer;⁵⁰ and a line officer (or non-commissioned officer at the E-9 level for enlisted cases) familiar with duty assignments.⁵¹ Reserve members are entitled to Reserve representation on the PEB.⁵² At the FPEB, the service member will be entitled to address the IPEB's findings, including issues pertaining to fitness, the percentage of disability, degree or stability of disability, administrative determinations, or duty-related determinations.⁵³ The member has a right to appear at the FPEB as well as to be heard by the FPEB, personally or through a representative.⁵⁴ Members also have a right to legal representation.⁵⁵ They may also present evidence and produce witnesses for the FPEB's consideration.⁵⁶

The record of FPEB proceedings will document: (1) the fitness determination; (2) the code and percentage rating assigned an unfitting and compensable disability based on the VASRD;⁵⁷ (3) the reason an unfitting

⁴⁵ *Id.* encl. 3, para. 3.b.

⁴⁶ *Id.* encl. 3, para. 3.d(1).

⁴⁷ *Id.*

⁴⁸ *Id.* encl. 3, para. 3.b. The requirement for a service member deemed unfit to request a formal hearing is derived from 10 U.S.C. § 1214 (2012).

⁴⁹ DoDI 1332.18, *supra* note 9, encl. 3, para. 3.d(2).

⁵⁰ The physician cannot be the service member's physician, cannot have served on the service member's MEB, and cannot have participated in a temporary disability retirement list (TDRL) re-examination of the service member. *Id.* encl. 3, para. 3.d(2)(b).

⁵¹ *Id.* encl. 3, para. 3.d(2)(a).

⁵² *Id.* encl. 3, para. 3.d(2)(c). This requirement is derived from 10 U.S.C. § 12643 (2012).

⁵³ DoDI 1332.18, *supra* note 9, encl. 3, para. 3.g.

⁵⁴ *Id.* encl. 3, para. 3.h(2).

⁵⁵ *Id.* encl. 3, para. 3.h(3).

⁵⁶ *Id.* encl. 3, para. 3.h(6).

⁵⁷ The standards for determining compensable disabilities are specified in DoDI 1332.18,

condition is not compensable; (4) if being retired permanently or temporarily, the nature and permanency of the disability; and (5) any required administrative determinations.⁵⁸ Additionally, the record of all proceedings for FPEB evaluation will include a written explanation in support of each finding and recommendation.⁵⁹

If ultimately assigned a disability rating, the rating will take into account all medical conditions that affect the member's fitness for duty.⁶⁰ A service member may be determined unfit based on the cumulative effect of multiple impairments even though each condition individually would not be sufficient to establish that the member is unfit.⁶¹ When a mental disorder developed in service as a result of a highly stressful event is severe enough to bring about the member's release from active military service, the disability rating will be no less than 50 percent and a follow-up examination must be scheduled within six months of separation.⁶²

Service members are entitled to appeal FPEB results to their respective military departments.⁶³ The military branch must provide the member a written response to an FPEB appeal that specifically addresses each issue presented.⁶⁴ Certain claims may also be appealed to the Board of Veterans' Claims⁶⁵ or through the U.S. Court of Appeals for Veterans Claims.⁶⁶

Given all the required steps and levels of review, the DES process as a whole can be lengthy. The DoD has published guidance that it expects

supra note 9, encl. 3, App. 3. Within the IDES, ratings are rendered by the Disability Rating Activity Site (D-RAS). DoDM 1332.18, Vol. 2, *supra* note 29, encl. 2, para. 3.a(13).

⁵⁸ DoDI 1332.18, *supra* note 9, encl. 3, para. 3.j.

⁵⁹ *Id.* encl. 3, para. 3.j.

⁶⁰ *Id.* para. 3.e.

⁶¹ *Id.* encl. 3, app. 2, para. 4.d.

⁶² 38 C.F.R. § 4.129 (2018).

⁶³ DoDI 1332.18, *supra* note 9, encl. 3, para. 3.l.

⁶⁴ *Id.*

⁶⁵ See 38 U.S.C. §§ 511, 7104 (2012) (recognizing the Board of Veterans' Claims authority to settle questions of law and fact related to VA benefits).

⁶⁶ See *id.* § 7252 (2012) (providing that the Court of Appeals for Veterans Claims has exclusive jurisdiction to review decisions of the Board of Veterans' Claims).

80 percent of active-duty cases to be processed in 295 days⁶⁷ and the same percentage of reserve cases to be processed in 305 days.⁶⁸

As with all service members, members undergoing DES evaluation are potentially subject to administrative discharge for other reasons if warranted by the circumstances. For example, a military member engaging in insubordinate or disruptive conduct may potentially be discharged on the basis of that misconduct.⁶⁹ In cases where administrative discharge action is served upon a member pending disability evaluation, the two processes proceed in parallel subject to applicable service regulations.⁷⁰ The secretary concerned generally maintains the authority ultimately to determine the appropriate basis of the member's separation.⁷¹

C. Potential Benefits Associated with Disability Separation

Service members found unfit for service under the DES will be separated, with or without severance pay, or retired, permanently or temporarily. Determining the exact benefits to which each member is entitled depends on the results of the DES process as well as the status of the service member in question.

The member will be separated without severance pay if the medical condition was not incurred or permanently aggravated by military service, and the member has less than eight years of active-duty service.⁷² The member will also be separated with no severance pay if the member suffered the disabling condition while being absent without leave or while engaged in an

⁶⁷ DoDM 1332.18, Vol. 2, *supra* note 29, encl. 7, para. 2.a.

⁶⁸ *Id.* encl. 7, para. 3.a.

⁶⁹ On this note, DoD policy recognizes that a member facing discharge for a basis authorizing a UOTHC discharge, such as misconduct, is generally ineligible for DES referral. *See* DoDI 1332.18, *supra* note 9, encl. 3, app. 1, para. 4.a(3). However, the Secretary concerned may authorize referral "when the medical impairment or disability evaluation is warranted as a matter of equity or good conscience." *Id.* encl. 3, app. 1, para. 4.b.

⁷⁰ Practitioners in this area should consult their respective service regulations. *See infra* notes 99 and 108 for a listing of applicable regulations.

⁷¹ *See* DoDI 1332.18, *supra* note 9, encl. 3, app. 1, para. 4.b (recognizing the authority of the secretary of the military department concerned to evaluate for disability members pending administrative separation).

⁷² 10 U.S.C. §§ 1203, 1206, 1207a (2012).

act of misconduct or willful negligence.⁷³ Service members who are separated without severance pay are eligible for health care and other benefits⁷⁴ through the VA to the same extent as service members separated for other reasons.⁷⁵ Medical separation with severance pay⁷⁶ is available to service members who have fewer than twenty years of service and are assigned a disability rating of less than 30 percent.⁷⁷ Members separated for a service-connected disability will also generally be entitled to medical care through the VA⁷⁸ as well as other VA benefits.⁷⁹ Moreover, all members separated from active duty are eligible for other benefits through the DoD.⁸⁰ Service members who have served twenty years or more are eligible for retirement,⁸¹ and active-duty members with at least fifteen years of service prior to the end of Fiscal Year 2018 may be eligible for early retirement under the Temporary Early Retirement Authority (TERA).⁸²

⁷³ *Id.* § 1207 (2012).

⁷⁴ A comprehensive listing of potential veterans' benefits is provided in 38 U.S.C., Parts II and III (2012). Significant examples include: burial benefits, *see id.*, ch. 23; the all-volunteer educational assistance program, *see id.*, ch. 30; Post-9/11 educational assistance, *see id.*, ch. 33; and housing and small business loans, *see id.*, ch. 37.

⁷⁵ *See id.* § 5303A (setting forth minimum service requirements and general eligibility criteria for entitlement to benefits). The health care benefits to which service members are generally entitled are also discussed *infra* Part III.C.

⁷⁶ Severance pay is calculated at two months of the service member's basic pay for each year of service, not exceeding nineteen years of service. 10 U.S.C. § 1212 (2012).

⁷⁷ *Id.* §§ 1203, 1206, 1212 (2012).

⁷⁸ *See* 38 U.S.C. § 1710 (2018) (specifying veterans' eligibility criteria for medical care).

⁷⁹ *See supra* note 74.

⁸⁰ A comprehensive listing of benefits provided to members separated from active-duty service is provided in 10 U.S.C., ch. 58. Significant examples include: pre-separation counseling, *see id.* § 1142; transitional health care, *see id.* § 1145; temporary commissary and exchange benefits, *see id.* § 1146; and various employment benefits, *see, e.g., id.* §§ 1144, 1152, 1153, 1154.

⁸¹ *See* 10 U.S.C. § 1293 (authorizing retirement of warrant officers); *id.* § 3911 (authorizing retirement of Army officers); *id.* § 3914 (authorizing retirement of Army enlisted members); *id.* § 6323 (authorizing retirement of Navy and Marine Corps officers); *id.* § 6330 (authorizing transfer to Fleet Reserve of Navy and Marine Corps enlisted members); *id.* § 8911 (authorizing retirement of Air Force officers); *id.* § 8914 (authorizing retirement of Air Force enlisted members).

⁸² TERA is a discretionary early retirement program enacted through the National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81, § 504, 125 Stat. 1298, 1389–1391 (2011). The program is available only to active-duty members with fifteen to twenty years of service. *Id.* (reinstating the National Defense Authorization Act for Fiscal Year 1993, Pub. L. 102-484 § 4403, 106 Stat. 2315, 106 Stat. 2315, 2702–04 (1992))

Service members who are assigned a disability rating of at least 30 percent are eligible for medical retirement.⁸³ If the IPEB or FPEB determines the member's disability is permanent and stable, the member qualifies for permanent medical retirement.⁸⁴ If the board finds the service member's disability is not permanent and stable, the member will be placed on the temporary disability retirement list (TDRL) and provided benefits⁸⁵ on a temporary basis.⁸⁶ Members on the TDRL must be physically examined at least once every eighteen months to reassess the member's condition.⁸⁷ A service member may be placed on the TDRL for no longer than five years.⁸⁸ If physical examination finds the member fit for duty, the member will be returned to duty or discharged as appropriate.⁸⁹ If the reexamination reveals that the member remains unfit for duty, but the disability rating is adjusted to below 30 percent, the member will be separated with severance pay,⁹⁰ unless the member qualifies for standard retirement based on having served for twenty years or longer.⁹¹ If the examination reveals that the condition is unchanged or has become permanent and stable, the member will be permanently retired.⁹²

III. ADMINISTRATIVE DISCHARGE FOR MENTAL DISORDER NOT CONSTITUTING PHYSICAL DISABILITY

Certain mental conditions are not eligible for disability benefits for medical and policy reasons. Service members who are afflicted with these

⁸³ See 10 U.S.C. §§ 1201, 1202, 1204, 1205 (2012). Service members who are retired vice separated are eligible for certain benefits, to include permanent access to medical care, *see id.* § 1074; commissary privileges, *see* U.S. DEP'T OF DEFENSE INSTR. 1330.17, DoD COMMISSARY PROGRAM, encl. 2, para. 3.c (18 June 2014); and regular monetary compensation. Compensation is calculated at the higher of the following: (1) the member's retired base pay multiplied by the 2.5 percent of the member's years in service; or (2) the member's retired base pay multiplied by the percentage of disability, not to exceed 75 percent. 10 U.S.C. § 1401.

⁸⁴ 10 U.S.C. §§ 1201, 1204 (2012).

⁸⁵ Members placed on the TDRL will receive a minimum of 50 percent of their retired base pay. *Id.* § 1401 (2012).

⁸⁶ *Id.* §§ 1202, 1205 (2012).

⁸⁷ *Id.* § 1210(a) (2012).

⁸⁸ *Id.* § 1210(b) (2012).

⁸⁹ *Id.* § 1210(f) (2012).

⁹⁰ *Id.* §§ 1203, 1206, 1210(e) (2012).

⁹¹ *Id.* § 1210(d) (2012).

⁹² *Id.* § 1210(b)–(c) (2012).

conditions face the prospect of undergoing the administrative discharge process, provided the condition interferes with the member's military service. The exact level of due process afforded to the member is guided by DoD policy, but depends largely on applicable service regulations and factors unique to the member, such as length of service and rank. The final results of the process and the traits of the service member determine which benefits the member is eligible to receive; although these benefits are generally limited when compared to military disability benefits.

A. Basis for Administrative Discharge

The secretaries of the military departments are authorized to administratively separate a service member for certain congenital or developmental defects that are not compensable under the VASRD, if those defects interfere with assignment to or performance of duties.⁹³ Such conditions include personality disorders or other mental disorders not constituting disability, such as anxiety or adjustment disorder.⁹⁴

The DoD's instruction governing separation of enlisted personnel expressly states that the secretary of the military department concerned may authorize separation of enlisted personnel on the basis of non-disability conditions that interfere with assignment to or performance of duty.⁹⁵ However, for enlisted personnel, separation based on personality disorder or other mental disorder not constituting a physical disability is authorized only if a diagnosis by an authorized mental health provider concludes the disorder is so severe that the member's ability to function effectively in the military environment is significantly impaired.⁹⁶ For commissioned officers, the applicable DoD instruction does not explicitly provide that an officer may be separated for a personality disorder or a mental disorder not constituting a physical disability.⁹⁷ Rather, the instruction authorizes separation for substandard per-

⁹³ DoDI 1332.18, *supra* note 9, para. 3.i.

⁹⁴ *Id.*; *see also* 38 C.F.R. § 4.127 (2018) (stating that personality disorders are not diseases or injuries for compensation purposes).

⁹⁵ U.S. DEP'T OF DEFENSE INSTR. 1332.14, ENLISTED ADMINISTRATIVE SEPARATION, encl. 3, para. 3.a(8) (22 Mar. 2018) [hereinafter DoDI 1332.14]. This authority is derived from 10 U.S.C. §§ 1169, 12681.

⁹⁶ DoDI 1332.14, *supra* note 95, encl. 3, para. 3.a(8)(c)(1).

⁹⁷ *See generally* U.S. DEP'T OF DEFENSE INSTR. 1332.30, SEPARATION OF REGULAR AND RESERVE COMMISSIONED OFFICERS, Encl. 2, para. 1 (25 Nov., 2013) [hereinafter DoDI 1332.30].

formance of duty,⁹⁸ and the services have used this basis to justify separation due to personality disorders or similar disorders that adversely affect duty performance.⁹⁹ In proceeding under this basis, the Air Force, the Navy, and the Marine Corps in their respective regulations expressly require a diagnosis of personality disorder or similar mental disorder before an officer may be administratively separated for such a disorder.¹⁰⁰ Army regulations carry no such requirement.¹⁰¹

Additionally, per the controlling DoD instruction, an enlisted member may only be separated for a personality disorder or other mental disorder not constituting a physical disability if: (1) as noted above, a diagnosis by

⁹⁸ *Id.* encl. 2, para. 1. This authority is derived from 10 U.S.C. §§ 1181, 12681, 12683.

⁹⁹ See U.S. DEP'T OF AIR FORCE INSTR. 36-3206, ADMINISTRATIVE DISCHARGE PROCEDURES FOR COMMISSIONED OFFICERS, para. 2.3.7 (2 June 2017) [hereinafter AFI 36-3206] (authorizing separation of Air Force active-duty officers with “[m]ental disorders that interfere with the officer’s performance of duty and don’t fall within the purview of the medical disability process”); U.S. DEP'T OF AIR FORCE INSTR. 36-3209, SEPARATION AND RETIREMENT PROCEDURES FOR AIR NATIONAL GUARD AND AIR FORCE RESERVE MEMBERS, para. 2.34.7 (20 Sept. 2011) [hereinafter AFI 36-3209] (authorizing separation of Air Force Reserve and Air National Guard officers with “[c]haracter and behavior disorders when such disorders interfere with performance of duty”); U.S. DEP'T OF ARMY REG. 600-8-24, OFFICER TRANSFER AND DISCHARGES, para. 4-2.a(6) (13 Sept. 2011) [hereinafter AR 600-8-24] (authorizing elimination of Army active-duty officers with “characteristic disorders”); U.S. DEP'T OF ARMY REG. 135-175, SEPARATION OF OFFICERS, para. 2-10.g (29 Nov. 2017) [hereinafter AR 135-175] (authorizing involuntary separation of Army National Guard and Army Reserve officers with “character disorders”); U.S. SEC'Y OF NAVY INSTR. 1920.6C, ADMINISTRATIVE SEPARATION OF OFFICERS, encl. 3, para. 1.a(6) (25 Aug. 2015) [hereinafter SECNAVINST 1920.6C] (authorizing separation of Navy and Marine Corps active and reserve officers with “[p]ersonality disorders, when such disorders interfere with the officer’s performance of duty and have been diagnosed by a physician or clinical psychologist”).

¹⁰⁰ See AFI 36-3206, *supra* note 99, para. 2.3.7 (requiring Air Force active-duty officers receive diagnosis of mental disorder from a psychiatrist or clinical psychologist); AFI 36-3209, *supra* note 99, para. 2.34.7.1 (mandating Air National Guard and Air Force Reserve officers be evaluated by a psychiatrist or psychologist who confirms diagnosis of mental disorder); SECNAVINST 1920.6C, *supra* note 99, encl. 3, para. 1.a(6) (stating that personality disorder may be the basis for separating Navy and Marine Corps officers when the disorder has been diagnosed by a physician or clinical psychologist).

¹⁰¹ See generally, AR 600-8-24, *supra* note 99 (governing discharge of Army active-duty officers); AR 135-175, *supra* note 99 (governing separation of Army National Guard and Army Reserve officers). That said, evidence of such a diagnosis would almost certainly be presented to a board of inquiry given the board must find sufficient evidence to substantiate the basis for any administrative separation by preponderance of the evidence. See AR 600-8-24, *supra* note 99, paras. 4-6.a, 4-11, 4-15.b(2); AR 135-175, *supra* note 99, paras. 2-20.a(1).

an authorized mental health provider concludes that the disorder is so severe that the member's ability to function effectively in the military environment is significantly impaired;¹⁰² (2) the member has been formally counseled in writing on specific performance deficiencies and has been afforded an opportunity to overcome those deficiencies; and (3) the member has been counseled in writing on the diagnosis of a personality disorder or other mental disorder not constituting a physical disability.¹⁰³ If the member has served or is currently serving in an imminent danger pay (IDP) area,¹⁰⁴ a diagnosis of personality disorder or mental disorder not constituting physical disability will: (1) be corroborated by a peer or higher-level mental health professional, (2) be endorsed by the surgeon general of the military department concerned, and (3) address PTSD¹⁰⁵ and other mental illness co-morbidity.¹⁰⁶

B. Process for Administrative Separation

Discharge proceedings on the basis of a mental disorder are governed by the same general requirements that apply to discharge proceedings for other bases, and the exact process used depends largely on the member's rank and time in service. The controlling DoD regulations set forth different baseline procedural requirements for enlisted personnel and officers. In contrast to the DES, the administrative discharge process is typically processed by the

¹⁰² The same policy notes: "[o]bserved behavior of specific deficiencies should be documented in appropriate counseling or personnel records. Documentation will include history from supervisors, peers, and others, as necessary to establish that the behavior is persistent, interferes with assignment to or performance of duty, and has continued after the enlisted Service member was counseled and afforded an opportunity to overcome the deficiencies" DoDI 1332.14, *supra* note 95, Encl. 3, para. 3.a(8)(c)(1)(b).

¹⁰³ *Id.* encl. 3, paras. 3.a(8)(c)(1)–(3).

¹⁰⁴ A military member qualifies for IDP if the member was in a foreign area in which the member was subject to the threat of physical harm or imminent danger on the basis of civil insurrection, civil war, terrorism, or wartime conditions. U.S. DEP'T OF DEFENSE INSTR. 1340.09, HOSTILE FIRE PAY AND IMMINENT DANGER PAY, para. 4.a(4) (20 Apr., 2010). Combatant Commanders submit requests for IDP designations for specific geographic areas, which are either approved or disapproved by the Principal Deputy Under Secretary of Defense for Personnel and Readiness. *Id.* encl. 1, paras. 1.f, 4.a.

¹⁰⁵ Unless found fit for duty by the DES process, an enlisted member may not be separated for personality disorder or other mental disorder not constituting physical disability if the member is also diagnosed with service-related PTSD. DoDI 1332.14, *supra* note 95, encl. 3, para. 3(a)(8)(c)(4)(c).

¹⁰⁶ *Id.* encl. 3, para. 3.a(8)(c)(4).

member's command with the assistance of the local staff judge advocate's office, rather than by a specialized, centralized entity.¹⁰⁷

Enlisted personnel¹⁰⁸ must first be notified in writing of: (1) the basis for the proposed separation, (2) the fact that the separation action could lead to discharge, (3) the least favorable characterization of discharge possible, (4) the right to obtain copies of documents that will be considered by the separation authority, (5) the right to submit statements, and (6) the right to legal counsel.¹⁰⁹ If the enlisted member has six or more years of total active and reserve military service, the member must be notified in writing of the right to request an administrative discharge board.¹¹⁰ A board will be composed of at least three experienced commissioned, warrant, or noncommissioned officers.¹¹¹ The majority of the board must be commissioned or warrant officers and at least one member must serve in the grade of O-4 or higher.¹¹² Even in cases involving discharge for a mental disorder, there is

¹⁰⁷ See generally DoDI 1332.14, *supra* note 95; DoDI 1332.30, *supra* note 97.

¹⁰⁸ What follows is an overall summary of the administrative discharge process for enlisted personnel. Practitioners should always consult the pertinent instructions and regulations for their specific military service. See generally U.S. DEP'T OF AIR FORCE INSTR. 36-3208, ADMINISTRATIVE SEPARATION OF AIRMEN [hereinafter AFI 36-3208] (8 June, 2017) (governing discharge of Air Force active-duty enlisted personnel); AFI 36-3209, *supra* note 99 (governing separation of inactive Air Force Reserve and Air National Guard members); U.S. DEP'T OF ARMY REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (19 Dec., 2016) [hereinafter AR 635-200] (governing separation of Army enlisted personnel on active duty); U.S. DEP'T OF ARMY REG. 135-178, ENLISTED ADMINISTRATIVE SEPARATIONS [hereinafter AR 135-178] (17 Nov., 2017) (governing separation of Army National Guard and Army Reserve enlisted personnel); U.S. DEP'T OF NAVY MILITARY PERSONNEL MANUAL 1910-120, SEPARATION BY REASON OF CONVENIENCE OF THE GOVERNMENT – PHYSICAL OR MENTAL CONDITIONS (15 Mar., 2012) [hereinafter MILPERSMAN 1910-120] (governing separation of active and reserve enlisted members of the Navy); MARINE CORPS ORDER 1900.16, SEPARATION AND RETIREMENT MANUAL (26 Nov., 2013) [hereinafter MCO 1900.16] (governing administrative separation of active-duty and reserve members of the Marine Corps).

¹⁰⁹ DoDI 1332.14, *supra* note 95, encl. 5, para. 2.a.

¹¹⁰ *Id.* encl. 5, para. 2.a(7). If an administrative board is required the enlisted member must also be notified in writing of the right to legal representation at the board, the right to waive his or her procedural rights, that failure to respond after being afforded a reasonable opportunity to consult with counsel constitutes a waiver of procedural rights, and that failure to appear without good cause will constitute a waiver of the right to be present at the hearing. *Id.* encl. 5, para. 3.a.

¹¹¹ *Id.* encl. 5, para. 3.e(1)(a). Enlisted members appointed to a board must be in the grade of E-7 or higher and must be senior to the respondent. *Id.*

¹¹² *Id.* If the respondent is an enlisted member of a Reserve Component, the board will include at least one reserve officer. *Id.* encl. 5, para. 3.e(1)(b).

no requirement that any board member possess any level of medical knowledge or specialized experience.¹¹³ Board members may be challenged only for cause.¹¹⁴ During the board, the enlisted member may be represented by counsel, testify, call witnesses, and present evidence for consideration.¹¹⁵ At the conclusion of the hearing, the board will make findings and recommendations as to separation and service characterization.¹¹⁶ All findings must be supported by a preponderance of the evidence.¹¹⁷ Ultimately, regardless of whether or not the enlisted member is entitled to a board, the separation authority will be a special court-martial convening authority or higher.¹¹⁸ The member must be medically evaluated prior to separation, and the results of any examination must be reviewed by the appropriate authorities responsible for evaluating, reviewing, and approving the separation.¹¹⁹ In cases involving enlisted members not in entry-level status,¹²⁰ the member administratively discharged solely for a mental disorder may receive either an honorable or under honorable conditions (general) service characterization depending on applicable service regulations.¹²¹

¹¹³ See generally *id.* encl. 5, para. 3.e(1).

¹¹⁴ *Id.* encl. 5, para. 3.e(1)(d).

¹¹⁵ *Id.* encl. 5, para. 3.e(6).

¹¹⁶ *Id.* encl. 5, para. 3.e(7).

¹¹⁷ *Id.* encl. 5, para. 3.e(7)(b).

¹¹⁸ *Id.* encl. 5, para. 2.d(1).

¹¹⁹ *Id.* encl. 5, paras. 9.a–b. This requirement is derived from 10 U.S.C. §§ 1145, 1177 (2012).

¹²⁰ A separation will be described as an entry-level separation if separation processing is initiated while an enlisted service member is in entry level status, except in unusual circumstances. DoDI 1332.14, *supra* note 95, encl. 4, para. 3.c(1)(a). An enlisted member qualifies for entry-level status during: (1) the first 180 days of continuous active military service; (2) the first 180 days of continuous active service after a service break of 92 days of active service. A service member of a Reserve Component who is not on active duty or is serving under a call or order to active duty for 180 days or less begins entry-level status upon enlistment in the Reserve Component and terminates: (1) 180 days after beginning training if the service member is ordered to active duty for training for one continuous period of 180 days or more; or (2) 90 days after beginning the second period of active-duty training if the service member is ordered to active duty for training under a program that splits the training into two or more separate periods of active duty. *Id.* glossary.

¹²¹ The pertinent DoD instruction contemplates either an honorable or general service characterization for enlisted members discharged solely on this basis. *Id.* encl. 3, para. 3.b. However, the instructions and regulations for the respective service branches reflect that such members will generally receive only an honorable service characterization. See AFI 36-3208, *supra* note 108, para. 5.7 (mandating honorable characterization for active-duty Air Force enlisted personnel); AFI 36-3209, *supra* note 99, tbl.3.1, r. 20 (requiring honorable characterization for enlisted Air National Guard or Air Force

The separation process for officers is similar to the discharge process for enlisted members.¹²² Probationary officers¹²³ may be separated without a board provided the officer's Show Cause Authority (SCA)¹²⁴ determines that an honorable or under honorable conditions (general) characterization is appropriate;¹²⁵ however, the member must be notified in writing of: (1) the reason action was initiated and the recommended service characterization, (2) the option to tender a resignation, (3) the right to submit a rebuttal and matters for consideration, and (4) the right to confer with legal counsel.¹²⁶ Non-probationary officers are entitled to a board of inquiry if the SCA determines the officer should be required to show cause for retention in the military.¹²⁷ At least 30 days prior to the board hearing date, the officer must be notified in writing of the reasons for the action and the least favorable service characterization the officer may receive.¹²⁸ A board will be composed

Reserve members); AR 635-200, *supra* note 108, para. 5–13.h (requiring honorable characterization for active-duty Army enlisted members unless they have also been convicted of a court-martial offense); *but see*, AR 135-178, *supra* note 108, paras. 6–8 (stating enlisted members of the Army National Guard or Army Reserve will receive an honorable characterization, unless a general is warranted based on the member's record); MILPERSMAN 1910-120, *supra* note 108, para. 4 (stating enlisted Navy active and reserve members will receive an honorable characterization, unless a general characterization is otherwise warranted); MCO 1900.16, *supra* note 108, tbl.6-1 (allowing enlisted members of the Marine Corps to receive either an honorable or general service characterization).

¹²² What follows is a summary of the overall process for administrative separation of officers. Practitioners should consult the pertinent instructions and regulations for their specific branch of military service. *See generally supra* note 99 (listing each service's governing regulations for officer separations).

¹²³ A probationary officer is a commissioned officer on the active-duty list with fewer than six years of active commissioned service, or a reserve commissioned officer with fewer than six years of commissioned service. DoDI 1332.30, *supra* note 97, Glossary.

¹²⁴ Each military branch establishes policy on who will act as the SCA for a particular officer; however, the DoDI instruction states that the SCA must be: (1) the Secretary concerned; (2) officers not below the grade of O-8 designated by the Secretary concerned to determine, based on a record review, that an officer be required to show cause for retention in the military service; (3) commanders of reserve personnel centers; (4) commanders exercising general court-martial convening authority; (5) all general or flag officers who have a judge advocate or legal advisor available; or (6) the Directors of the Army and Air National Guard (for Title 10 Active Guard Reserve officers only). *Id.*

¹²⁵ A discharge solely on the basis of a mental condition affecting duty performance will be characterized as either honorable or general. *Id.* encl. 7, para. 1.

¹²⁶ *Id.* encl. 6, para. 1.a.

¹²⁷ *Id.* encl. 3, para. 2.b(4).

¹²⁸ *Id.* encl. 5, para. 4.a.

of at least three commissioned officers in the grade of O-5 or higher and in the same military service as the respondent.¹²⁹ Each board member will be senior to the respondent, and at least one member must serve in the grade of O-6 or higher.¹³⁰ As with enlisted boards, there is no requirement that any board member possess any level of medical, psychiatric, or specialized experience.¹³¹ Board members may be challenged only for cause.¹³² The officer may be represented by counsel, testify, call witnesses, and present evidence for the board's consideration.¹³³ At the conclusion of the hearing, the board will make findings as well as recommendations as to separation and service characterization,¹³⁴ all of which must be supported by a preponderance of the evidence.¹³⁵ The officer will undergo a medical examination as required by federal law¹³⁶ and service regulations.¹³⁷ The secretary of the military department concerned will act as the separation authority for all officers.¹³⁸ Officers separated solely on the basis of a non-disability mental condition may receive an honorable or general service characterization.¹³⁹

¹²⁹ *Id.* encl. 4, paras. 1.a, 2.a–b.

¹³⁰ *Id.* encl. 4, para. 2.b. If the respondent is a member of a reserve component, at least one voting member must be a reserve component officer. *Id.* encl. 4, para. 1.a.

¹³¹ *See generally id.* encl. 4.

¹³² *Id.* encl. 5, para. 1.

¹³³ *Id.* encl. 5, paras. 4.c–k.

¹³⁴ *Id.* encl. 5, paras. 5, 6.

¹³⁵ *Id.* encl. 3, para. 3.c(3).

¹³⁶ Federal law requires all members involuntarily separated from active duty to receive a medical examination prior to discharge. 10 U.S.C. §§ 1145(a)(2)(A), (a)(5)(A) (2012).

¹³⁷ *See* U.S. DEP'T OF AIR FORCE INSTR. 48-123, MEDICAL EXAMINATION AND STANDARDS, ch. 7 (31 Oct. 2014) (discussing medical examination prior to separation of Air Force members); U.S. DEP'T OF ARMY REG. 40-501, STANDARDS OF MEDICAL FITNESS, ch. 3 (4 Aug. 2011) (discussing standards and procedures for medical examination of Army members being separated); U.S. DEP'T OF NAVY MILITARY PERSONNEL MANUAL 1900-808, PHYSICAL EXAMINATION FOR SEPARATION (13 Apr. 2005) (requiring medical examination of Navy personnel prior to separation); MCO 1900.16, *supra* note 108, para. 1011 (describing medical separation procedures for Marine members).

¹³⁸ DoDI 1332.30, *supra* note 97, encl. 3, para. 3.d(2), encl. 6, para. 2.a.

¹³⁹ *Id.* encl. 7, para. 1. Certain service branches mandate officers separated on this basis receive an honorable, while others do not. *Compare* AR 600-8-24, *supra* note 99, para. 4–17.d (requiring honorable characterization for Army active-duty officers); AR 135-175, *supra* note 99, paras. 2–10.g (mandating honorable characterization for Army Reserve Component officers); SECNAVINST 1920.6C, *supra* note 99, encl. 4, para. 12.b(1) (requiring honorable characterization for Navy and Marine officers); *with* AFI 36-3206, *supra* note 99, para. 2.1.1 (allowing Air Force active-duty officers to receive honorable or general characterization), *and* AFI 36-3209, *supra* note 99, tbl.2.1, r. 35 (permitting

Service members who seek review of discharge determinations may file a request with the Discharge Review Board (DRB) for their respective department.¹⁴⁰ The DoD has promulgated general procedures and standards for these review boards.¹⁴¹ If a military member seeking review by the DRB was deployed in support of a contingency operation and at any time after the deployment was diagnosed with PTSD or a traumatic brain injury, the board must include a member who is a physician, clinical psychologist, or psychiatrist.¹⁴² A discharged member may also seek relief through the service's Board of Corrections of Military Records (BCMR).¹⁴³ Determinations made by the BCMR are final and generally not subject to judicial review.¹⁴⁴

When compared to the DES, the administrative discharge process is far more streamlined. Each service is responsible for establishing processing timelines for enlisted administrative separations.¹⁴⁵ Per DoD policy, enlisted notification-only cases should be resolved in fifteen working days, and cases that involve a board hearing should be processed in fifty working days.¹⁴⁶ The DoD has not published similar processing timelines for officer administrative separations.¹⁴⁷

C. Potential Benefits Associated with Administrative Discharge

Service members who are separated for a non-disability mental disorder are eligible to receive health care benefits from the VA to the same

honorable or general characterization for Air Force Reserve Component officers).

¹⁴⁰ See 10 U.S.C. § 1553 (providing the authority of the Secretary of each military department to establish boards of review to review non-punitive discharges).

¹⁴¹ See generally U.S. DEP'T OF DEF. INSTR. 1332.28, DISCHARGE REVIEW BOARD (DRB) PROCEDURES AND STANDARDS (4 Apr. 2004).

¹⁴² 10 U.S.C. § 1553(d)(2).

¹⁴³ See *id.* § 1552 (articulating the authority for and jurisdiction of BCMRs).

¹⁴⁴ See *id.* § 1552(a)(4) (stating “[e]xcept when procured by fraud, a correction under this section is final and conclusive on all officers of the United States”).

¹⁴⁵ DoDI 1332.14, *supra* note 95, encl. 5, para. 7.a.

¹⁴⁶ *Id.* encl. 5, para. 7.a(1).

¹⁴⁷ See generally DoDI 1332.30, *supra* note 97; but see AFI 36-3206, *supra* note 99, para. 4.31 (stating that active-duty Air Force officer cases should be processed “as efficiently as possible while protecting the officer’s rights throughout the administrative discharge process”); SECNAVINST 1920.6C, *supra* note 99, para. 10 (setting a thirty day processing goal for Navy and Marine Corps officer separations not meeting a board, and a ninety day processing goal in cases requiring a board of inquiry).

extent as other members separated under honorable or general conditions.¹⁴⁸ Separated members are generally eligible for health care benefits if they have served twenty-four continuous months or the full period of assigned active-duty time.¹⁴⁹ Members who served in an IDP or hostile fire area are eligible for an enhanced priority rating under the VA enrollment system.¹⁵⁰ Additionally, service members separated from active duty may be entitled to other benefits through the DoD,¹⁵¹ and all separated members may be eligible for other VA benefits.¹⁵² Some benefits, such as the post-9/11 educational assistance program,¹⁵³ require the member to have received an honorable service characterization. Service members who have served twenty years or more may apply for retirement,¹⁵⁴ and active-duty members with at least fifteen years of service prior to the end of fiscal year 2018 may be eligible for early retirement under TERA.¹⁵⁵

IV. DATA AND STATISTICS

A great deal of data is available on mental health issues in the DoD. This data reveals that mental health conditions are far from uncommon in the military, and that those responsible for overseeing separation of members based on such conditions do not always get it completely right. These facts underscore the importance of military legal professionals understanding the processes described in this article.

¹⁴⁸ The Government Accountability Office (GAO) accurately summarized these benefits in its recent report relating to administrative discharge of military members on the basis of personality disorder or mental disorder not constituting disability. *See* U.S. GOV'T ACCOUNTABILITY OFFICE REPORT TO CONGRESSIONAL COMMITTEES NO. GAO-15-266: DEFENSE HEALTH CARE: BETTER TRACKING AND OVERSIGHT NEEDED OF SERVICEMEMBER SEPARATIONS FOR NON-DISABILITY MENTAL CONDITIONS, app. I (Feb. 2015) [hereinafter GAO-15-266], <https://www.gao.gov/assets/670/668519.pdf>. This report was directed by Congress in FY14 NDAA, *supra* note 3, § 574.

¹⁴⁹ 38 U.S.C. § 5303A (2012).

¹⁵⁰ *Id.* § 1710(e)(1)(D).

¹⁵¹ *See supra* note 80 (describing various benefits the DoD provides to separated military members).

¹⁵² *See supra* note 74 (summarizing certain VA benefits available to separated service members).

¹⁵³ 38 U.S.C. § 3311(c).

¹⁵⁴ *See supra* note 81 (describing military retirement authorities for the different service branches).

¹⁵⁵ *See supra* note 82 (identifying the legal authority for TERA).

The prevalence of mental health issues in the various military services is well documented. The pressures of military service, particularly in the deployed environment, can detrimentally impact the mental health of service members. A comprehensive study conducted from May 2003 to April 2004 on Soldiers and Marines returning from deployments supporting Operations Enduring Freedom (OEF) and Iraqi Freedom (OIF) revealed that 19.1 percent of members returning from Iraq and 11.3 percent of members returning from Afghanistan reported mental health problems.¹⁵⁶ According to that same study, approximately 12 percent of members who served in Iraq were diagnosed with a mental condition.¹⁵⁷ A later study published in 2008 estimated that of the 1.64 million service members deployed to support OEF or OIF, approximately 300,000 suffer from PTSD.¹⁵⁸ More recently, a study commissioned by the U.S. Army and published in 2014 found that about 25.1 percent of *non-deployed* U.S. Army personnel met criteria for a mental disorder.¹⁵⁹ These numbers substantiate the military's general need for comprehensive systems to address the mental health needs of service members.

Available data also reflects that a significant number of service members suffering from mental problems are evaluated for disability through the DES. The National Center for Veterans Analysis and Statistics (NCVAS) regularly publishes statistics on the number of veterans entitled to disability benefits.¹⁶⁰ According to one NCVAS report, over four million individuals received some level of compensation or benefits in fiscal year 2013.¹⁶¹ The NCVAS does not track the reasons for disability entitlement;¹⁶² however,

¹⁵⁶ Charles W. Hoge et al., *Mental Health Problems, Use of Mental Health Services, and Attrition from Military Service after Returning from Deployment to Iraq or Afghanistan*, 295 J. AM. MED. ASS'N 1023, 1023–24 (Mar. 1, 2006).

¹⁵⁷ *Id.* at 1023, 1028.

¹⁵⁸ INVISIBLE WOUNDS OF WAR: PSYCHOLOGICAL AND COGNITIVE INJURIES, THEIR CONSEQUENCES, AND SERVICES TO ASSIST RECOVERY 103 (Terri Tanielian & Lisa H. Jaycox eds., 2008), https://www.rand.org/content/dam/rand/pubs/monographs/2008/RAND_MG720.pdf.

¹⁵⁹ Robert J. Uranso et al., *The Army Study to Assess Risk and Resilience in Servicemembers (Army STARRS)*, 77 PSYCHIATRY 107, 114 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4075436/pdf/nihms-601138.pdf>.

¹⁶⁰ These statistics are accessible through the VA's official website. U.S. DEPARTMENT OF VETERANS AFFAIRS, <http://www.va.gov/vetdata> (last visited Apr. 28, 2018).

¹⁶¹ COMPENSATION AND PENSION BY COUNTY: 2013 (Nat'l Ctr. for Veterans Analysis & Statistics ed.), https://www.va.gov/vetdata/docs/SpecialReports/2013_Compensation_and_Pension_by_County.xlsx.

¹⁶² *See generally id.*

a report prepared by the Division of Preventative Medicine at the Walter Reed Army Institute of Research noted that of the 28,871 service members who underwent disability evaluation in fiscal year 2012, 9,729—nearly 34 percent—were diagnosed with a disability-qualifying psychiatric condition.¹⁶³ Additionally, the same report notes of the total members who diagnosed with a medical condition, the vast majority—about 93 percent—were declared unfit for duty.¹⁶⁴

Turning to those members who underwent administrative discharge vice disability separation, the Government Accountability Office (GAO) recently published a report on the DoD's tracking and accountability over discharges for non-disability mental conditions.¹⁶⁵ In its report, the GAO found that three of the four military services—the Army, Navy, and Marine Corps—do not track the total number of service members separated for a mental condition not constituting disability.¹⁶⁶ The data that is available, however, reveals that the number of service members who undergo this process is not insignificant. The Vietnam Veterans of America (VVA) estimated based on records obtained from the DoD under the Freedom of Information Act that in 2009, 1,187 members were discharged for a personality disorder.¹⁶⁷ In 2014, the Air Force, which as the GAO Report noted has a system of accounting for active-duty enlisted members separated for a non-disability mental disorder,¹⁶⁸ discharged 324 active-duty enlisted Airmen who had completed basic training on this basis.¹⁶⁹ Twenty of these members were

¹⁶³ TRI-SERVICE DISABILITY EVALUATION SYSTEMS DATABASE ANALYSIS AND RESEARCH: ANNUAL REPORT 2013, tbl.4, 7A, 7B, 7C, 7D (Accession Med. Standards Analysis & Research Activity ed., 2013), http://www.amsara.amedd.army.mil/Documents/AMSARA_AR/AMSARA%20AR%202013_final.pdf.

¹⁶⁴ *Id.* tbl.10.

¹⁶⁵ GAO-15-266, *supra* note 148.

¹⁶⁶ GAO-15-266, *supra* note 148, at 9. It is further notable that this 2015 report was preceded by a GAO Report in 2008, which similarly found that the DoD and military services generally lacked sufficient oversight to ensure the services adhered to DoD's administrative separation requirements. *See* U.S. GOV'T ACCOUNTABILITY OFFICE REPORT TO CONGRESSIONAL ADDRESSEES NO. GAO-09-31, DEFENSE HEALTH CARE: ADDITIONAL EFFORTS NEEDED TO ENSURE COMPLIANCE WITH PERSONALITY DISORDER SEPARATION REQUIREMENTS (Oct. 2008) [hereinafter GAO-09-31], <https://www.gao.gov/assets/290/283014.pdf>.

¹⁶⁷ MELISSA ADER ET AL., CASTING TROOPS ASIDE: THE UNITED STATES MILITARY'S ILLEGAL PERSONALITY DISORDER DISCHARGE PROBLEM 2, 8 (Mar. 2012), https://law.yale.edu/system/files/documents/pdf/Clinics/VLSC_CastingTroopsAside.pdf.

¹⁶⁸ GAO-15-266, *supra* note 148, at 9.

¹⁶⁹ The official data for separations is maintained by the Air Force Personnel Center. The numbers cited in this article are derived from the Web-Based Administrative Separation

entitled to a board, though only two members ultimately requested one.¹⁷⁰ These discharges comprised approximately 8.5 percent of the Air Force's total number of active-duty enlisted administrative discharge cases.¹⁷¹ Based on these statistics, an installation-level staff judge advocate or military defense counsel could expect to face this type of case in about one of every eleven to twelve administrative discharge cases. Considering the majority of these cases do not meet a board and the DoD's short target metric for resolving such cases,¹⁷² military legal practitioners can reasonably expect that they will not have a great deal of time to advise their respective clients.

Records from the DRBs for the various military services further confirm that these discharges are not exactly a rarity. Of the 354 cases published by the Air Force DRB for 2014, nineteen cases listed a mental disorder as either a primary or secondary basis, and in sixteen additional cases the respondents contended that mental issues contributed to their discharge.¹⁷³ Of the 3,324 cases published by the remaining three services¹⁷⁴ for 2013,¹⁷⁵ 247 listed a non-disability mental condition as a basis for discharge,¹⁷⁶ and an additional 556 cases involved Respondents claiming to have been suffering from mental conditions.¹⁷⁷

Publicly available data also shows the various offices processing these administrative discharges do so less than perfectly. The above-referenced

Program (WASP), which is accessible by Air Force JAG personnel. These numbers do not include service members who are separated during basic military training, and do not include discharges from Sheppard Air Force Bases, Texas, as these cases are not entered into WASP.

¹⁷⁰ See *supra* note 169.

¹⁷¹ *Id.*

¹⁷² DoD's target metric is to complete notification-only enlisted discharge proceedings within fifteen work days. DoDI 1332.14, *supra* note 95, encl. 5, para. 7.a(1).

¹⁷³ These numbers were taken from a review of the various reports published by the Air Force DRB for 2014. These reports are accessible online. DoD BOARDS OF REVIEW READING ROOMS, <http://boards.law.af.mil/index.htm> (last visited Apr. 28, 2018).

¹⁷⁴ The published cases by service were as follows: for the Army DRB, 1,589; for the Navy DRB, 1,026; and for the Marine Corps DRB, 709. See *id.*

¹⁷⁵ As of the date of publication of this Article, the Army, Navy, and Marine Corps had not published complete listings of cases reviewed in 2014. See *id.*

¹⁷⁶ The numbers separated by service are as follows: for the Army, 47; for the Navy, 70; for the Marine Corps, 34. See *id.*

¹⁷⁷ The numbers broken down by service are as follows: for the Army, 284; for the Navy, 120; for the Marine Corps, 152. See *id.*

GAO report noted that between fiscal years 2008 and 2012, multiple services reported less than 90 percent compliance with all the requirements set by DoD policy.¹⁷⁸ After 2012, the DoD discontinued the requirement for services to issue compliance reports, so the GAO report did not provide data for any following years.¹⁷⁹ It is noteworthy, however, that the Air Force DRB took some form of corrective action in eleven of the combined thirty-five cases published in 2014 that indicated the Respondent did or may have suffered from a mental condition.¹⁸⁰ Similarly, in 2013 the DRBs of the Army, Navy, and Marine Corps granted some type of relief in forty-nine cases where the Respondent's record showed some sign of mental condition.¹⁸¹

V. ISSUES AND CHALLENGES PRESENTED BY SEPARATION FOR MENTAL CONDITIONS

Thus far, this article has presented an overview of the military's two major processes for separating members with mental conditions as well as some of the facts and figures relevant to these processes. Even a cursory examination of this information reveals certain issues or "problem areas" associated with these processes, as well as challenges facing legal professionals providing advice in this area of military practice. This section highlights some of these issues and challenges.

The mere existence of two classes of mental conditions—those that qualify for disability and those that do not but are still potential grounds for discharge—in itself presents a significant issue because of the great disparity in the level of due process¹⁸² and the potential benefits¹⁸³ afforded in each process. These differences have drawn a certain degree of public scrutiny,¹⁸⁴ and

¹⁷⁸ GAO-15-266, *supra* note 148, at 12. Specifically, in 2012 the Air Force and Marine Corps reported that they out of compliance with the requirement to notify the service member that the diagnosis of a personality disorder does not qualify as a disability. The Air Force also did not report full compliance with the requirement that the member's diagnosis be endorsed by the Air Force's Surgeon General when the member served in an IDP area. *Id.* at 12–13. A white paper published by VVA also reported less than 100 percent compliance with DoD requirements by various branches from Fiscal years 2008 through 2010. ADER ET AL., *supra* note 167, at 11.

¹⁷⁹ GAO-15-266, *supra* note 148, at 20.

¹⁸⁰ *See* DoD BOARDS OF REVIEW READING ROOMS, *supra* note 173.

¹⁸¹ *See id.*

¹⁸² *Compare* Part II.B, with Part III.B.

¹⁸³ *Compare* Part II.C, with Part III.C.

¹⁸⁴ *See, e.g.*, FY14 NDAA, *supra* note 3, § 574 (directing the GAO to issue a report based

even caused some to question the fairness of the system currently in place.¹⁸⁵ While the disparate nature of the military's two processes is by no means a trivial matter, these distinctions are driven by high-level policy decisions¹⁸⁶ as well as fiscal and political constraints. As such, they are largely beyond the control of military legal practitioners. Nonetheless, practitioners should be generally aware of the disparities if for no other reason than to educate and better advise their respective clients.

Another glaring issue relates to the practical difficulties associated with medically diagnosing individuals with specific mental conditions. The standards are fairly black and white in terms of which conditions qualify for disability processing and which conditions are potential grounds for administrative discharge; however, the actual process of diagnosing mental disorders is anything but clear and simple.¹⁸⁷ Diagnosing mental conditions

on concerns over the DoD's process of administratively discharging members afflicted with non-disability mental conditions); Patricia Kime, *Bill Requires Yearly Mental Health Checkups*, A.F. TIMES, Dec. 29, 2014: A13 (acknowledging congressional efforts to assist members who were discharged for personality or adjustments disorders); Richard Blumenthal, *Senator Blumenthal: New Policy will Help Veterans who have PTSD*, NEW HAVEN REGISTER, Nov. 9, 2014, at A10 (noting that various members received improper discharges prior to the U.S. government's official recognition of PTSD as a mental disorder).

¹⁸⁵ See, e.g., Lane Filler, *Troubled Soldiers Deserve Informed Evaluations*, NEWSDAY (N.Y.), Apr. 23, 2014, at A26 (stating "[t]hose who have risked life and limb and sacrificed their mental health shouldn't be saddled with less than honorable discharges that leave them ineligible for benefits . . ."); James Dao, *Branding a Soldier With 'Personality Disorder'*, N.Y. TIMES, Feb. 24, 2012, at A1 (questioning the level of command influence in diagnosing members with certain mental disorders); ADER ET AL., *supra* note 167 (generally criticizing the military's separation of members based on personality, adjustment, and similar disorders).

¹⁸⁶ These policy-level decisions are in part guided by medical science. For a discussion on the medical distinction between personality disorders and mental conditions that may warrant disability, see generally R. E. Kendell, *The Distinction between Personality Disorder and Mental Illness*, 180 BRITISH J. PSYCH. 110 (2002). See also generally, Steven K. Erickson, *The Myth of Mental Disorder: Transubstantive Behavior and Taxometric Psychiatry*, 41 AKRON L. REV. 67 (2008) (discussing *inter alia* the psychiatric community's gradual recognition of personality disorders as medically diagnosable conditions).

¹⁸⁷ See generally Simone Hoermann et al., *Problems with the Diagnostic System for Personality Disorders*, MENTALHELP.NET (Dec. 6, 2013), <https://www.mentalhelp.net/articles/problems-with-the-diagnostic-system-for-personality-disorders> (discussing difficulties associated with diagnosing personality disorders); Jonathan Shedler & Drew Westen, *Refining Personality Disorder Diagnosis: Integrating Science and Practice*, 161 AM. J. PSYCHIATRY 1350 (proposing expansion of diagnostic criteria for personality

inherently involves subjective analysis, and different experts can reach different conclusions based on the same available facts.¹⁸⁸ Although this issue is by no means insignificant, exploring it in depth would go beyond the intent of this article, and would be more aptly done by experts in the field of psychology or psychiatry.¹⁸⁹ Military practitioners should be generally aware of this issue and the impact it could have on their cases. At the minimum, practitioners should be cognizant of the importance of members obtaining thorough medical assessments by qualified professionals.

The time associated with undergoing each process presents additional concerns. The DES process is generally long and cumbersome. As noted above, even if they meet the DoD's processing goals, these cases can take ten months to resolve.¹⁹⁰ This processing time can at times be frustrating for those involved. Service members undergoing the process are generally retained on active duty pending evaluation.¹⁹¹ This fact coupled with the uncertainty associated with the process could hinder members' ability to plan for their futures. Conversely, the member's command may be frustrated by the impacts to the mission, particularly in cases where the member has already undergone discharge proceedings for misconduct, but is still pending disability evaluation and the dual-tracked process requires the appropriate authority to determine under which basis the member will be separated. Although the DES process is largely controlled by medical professionals and centralized organizations within each service, legal practitioners who understand and appreciate the lengthy nature of the process find themselves in a far better position with respect to advising clients and managing client expectations.

On the other hand, the administrative discharge process is often relatively short, at least when compared to the DES. Even in cases where the

disorders).

¹⁸⁸ On this point, the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-V) recognizes two different diagnostic models for personality disorders: a categorical model, and a dimensional model. *See* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS [hereinafter DSM-V], §§ II and III (Am. Psychiatric Ass'n, 5th ed.) (2013); *see also* Hoermann et al., *supra* note 187 (discussing the alternate diagnostic models in the DSM-V); *see also generally* Shedler & Westen, *supra* note 187 (discussing alternate views on diagnosing mental conditions).

¹⁸⁹ For examples of substantive discussion on this subject, *see* Hoermann et al., *supra* note 187; Shedler & Westen, *supra* note 187; Kendell, *supra* note 186.

¹⁹⁰ *See* DoDM 1332.18, Vol. 2, *supra* note 29, encl. 7, paras. 2.a, 3.a. (articulating target timelines for DES processing).

¹⁹¹ *Id.* paras. 3.g–h.

service member is entitled to a board, the DoD maintains a processing goal of fifty working days in enlisted cases.¹⁹² Non-board enlisted cases are expected to be resolved in fifteen working days.¹⁹³ This streamlined nature creates its own set of issues and challenges. The short timeline has created a perception to some that the military is trying to push “unwanted” people out.¹⁹⁴ This perception may be further exacerbated by the lesser degree of due process afforded by the discharge process, such as the fact that persons with no medical training are the ultimate fact-finders and not all cases require a medical diagnosis of a mental condition in order for the action to proceed.¹⁹⁵ The relatively short timeline also presents practical challenges to legal professionals attempting to navigate through the nuanced requirements associated with this type of discharge. Staff judge advocates must ensure their staffs take the time necessary to ensure the process satisfies all legal requirements. Defense counsel should similarly understand the applicable procedural and substantive requirements to best advocate for and protect the rights of their clients.

Apart from general time concerns, a number of systemic issues exist within the DoD’s process for administratively separating service members for a non-disability mental condition. The GAO in its recent report directed by Congress pointed out several of these issues. Specifically, the report noted that three of the four services do not have a system in place to track the total number of members discharged for a non-disability mental condition.¹⁹⁶ The

¹⁹² DoDI 1332.14, *supra* note 95, encl. 5, para 7.a(1).

¹⁹³ *Id.*

¹⁹⁴ See, e.g., Jacqueline Klimas, *Obama Signs Veterans Suicide-Prevention Bill*, WASH. TIMES (Feb. 12, 2015), <http://www.washingtontimes.com/news/2015/feb/12/obama-signs-veterans-suicide-prevention-bill> (contending “[s]ome allege that the Defense Department has blamed [PTSD] discharges on a personality disorder . . .”); Tom Philpott, *Navy Accused of Abusing Clause*, DAILY PRESS (NEWPORT NEWS, VA.), Dec. 2, 2013, at A2 (alleging Navy medical personnel misuse “administrative separation authority . . . on many sailors and Marines whose medical conditions should be screened through the [DES]. . .”); Dao, *supra* note 185, at A1 (noting that veterans’ advocates have accused the DoD of using the diagnosis of mental conditions to “discharge troops because it considers them troublesome or wants to avoid giving them benefits for service-connected injuries.”); see also generally ADER ET AL., *supra* note 185 (criticizing the military’s separation of members based on personality, adjustment, and similar disorders from Fiscal years 2001 through 2010).

¹⁹⁵ Compare DoDI 1332.14, *supra* note 95, encl. 3, para. 3.a(8)(c)(4)(a) (requiring peer review of a diagnosis in enlisted cases, but only where the member has served or is currently serving in an IDP area), with DoDI 1332.30, *supra* note 97 (containing no such requirement for officers).

¹⁹⁶ GAO-15-266, *supra* note 148, at 9.

one service that did have such a system—the Air Force—only tracked the number of active-duty enlisted discharges.¹⁹⁷ The GAO further noted the DoD generally has little oversight on this issue.¹⁹⁸ Apart from putting the DoD at odds with internal control standards applicable to all federal agencies,¹⁹⁹ this apparent lack of oversight hinders the organization’s ability to identify trends or detect any problems that may exist in the process. The GAO also noted that the regulations and policies implemented by the different services did not address all DoD requirements for separations based on non-disability mental conditions.²⁰⁰ From fiscal years 2008 through 2012, certain services and service components themselves reported that they had not fully complied with all the DoD requirements.²⁰¹ For example, in 2013, the Air National Guard reported that it had not been separating any members on the basis of non-disability mental conditions because it did not have a process to obtain a mental health assessment or diagnosis.²⁰² These deficiencies indicate that at least some discharged service members were separated without being afforded the full protections offered by DoD’s discharge policy.²⁰³

One systemic issue not identified in the GAO report centers on how the different services administer the DoD’s discharge policy, and more specifically on the distinct treatment of service members based on their rank and service affiliation. For example, the various military services maintain different policies on service characterization for enlisted members separated for a mental condition not constituting disability. Air Force policy requires an honorable discharge in such cases, as does the Army for its active-duty personnel.²⁰⁴ The remaining services, however, allow for either an honorable

¹⁹⁷ *Id.*

¹⁹⁸ *See id.* at 20 (stating “[b]eyond the limited review DoD conducted of the military services’ compliance reports for personality disorder separations, which was discontinued after fiscal year 2012, DoD and military service officials stated they do not conduct any oversight of all non-disability mental condition separations.”); *see also generally* GAO-09-31, *supra* note 166.

¹⁹⁹ *See generally* U.S. GOV’T ACCOUNTABILITY OFFICE / ACCOUNTING & INFORMATION MANAGEMENT DIVISION NO. 00-21.3.1, STANDARDS FOR INTERNAL CONTROL IN THE FEDERAL GOVERNMENT (Nov. 1999), <https://www.gao.gov/assets/80/76455.pdf> (mandating all federal agencies maintain internal controls to ensure accountability over intra-agency requirements).

²⁰⁰ GAO-15-266, *supra* note 148, at 17–20.

²⁰¹ *Id.* at 12–16.

²⁰² *Id.* at 18–20.

²⁰³ *Id.* at 22.

²⁰⁴ AFI 36-3208, *supra* note 108, para. 5.7; AFI 36-3209, *supra* note 99, tbl.3.1, r. 20; AR

or general service characterization for its enlisted members.²⁰⁵ In other words, an enlisted Marine with a less than stellar service record who is discharged for a non-disability mental condition faces the prospect of a general service characterization, while a Soldier or Airman with the same (or worse) record discharged on the same basis is guaranteed an honorable characterization. Perplexingly, the services also maintain distinct policies for officers and enlisted personnel. The Army,²⁰⁶ the Navy,²⁰⁷ and the Marine Corps²⁰⁸ require officers to receive an honorable characterization if discharged solely based on a mental condition, while the Air Force permits officers separated on the basis of a non-disability mental condition to receive either an honorable or general service characterization.²⁰⁹ Furthermore, DoD administrative discharge policy mandates additional procedural protections for enlisted members who have deployed to an IDP area and are facing separation due to a mental condition, to include peer review of the diagnosis and endorsement by the surgeon general for the respective military service.²¹⁰ These same protections are not mandated in the DoD's policy for officer separations.²¹¹ These distinctions, at least on their surface, appear arbitrary, and the various policies and regulations offer no explanation for them.

VI. RECOMMENDATIONS

As previously noted, correcting some of the issues identified above would require sweeping changes in how the DoD views individuals suffering from mental conditions. Such macro-level changes would likely necessitate significant investment of time and resources from Congress and DoD policy-makers. The DoD, however, could address many of the issues with far more modest measures.

635-200, *supra* note 108, para. 5–13.h.

²⁰⁵ AR 135-178, *supra* note 108, para. 6–8; MILPERSMAN 1910-120, *supra* note 108, para. 4; MCO 1900.16, *supra* note 108, tbl.6-1.

²⁰⁶ AR 600-8-24, *supra* note 99, para. 4–17.d; AR 135-175, *supra* note 99, para. 2–10.g.

²⁰⁷ SECNAVINST 1920.6C, *supra* note 99, encl. 4, para. 12.b(1).

²⁰⁸ *Id.*

²⁰⁹ AFI 36-3206, *supra* note 99, para. 2.1.1; AFI 36-3209, *supra* note 99, tbl.2.1, r. 35.

²¹⁰ DoDI 1332.14, *supra* note 95, encl. 3, para. 3.a(8)(c)(4) (requiring peer review of a diagnosis in enlisted cases, but only where the member has served or is currently serving in an IDP area).

²¹¹ *See generally* DoDI 1332.30, *supra* note 97.

At the outset, the DoD and the services should work to implement the changes recommended by the GAO in its recent report. These recommendations are limited solely to the administrative discharge process. Specifically, the GAO recommended that: (1) all military departments use the appropriate separation codes to ensure proper tracking of separations for non-disability mental conditions, (2) the Air Force implement a process to ensure Air National Guard members suffering from a non-disability mental condition are separated under the appropriate basis, (3) all services update their respective administrative discharge policies to incorporate all DoD requirements, (4) that the services implement an appropriate process to ensure oversight of the discharge process and compliance with DoD requirements,²¹² (5) and that the DoD conduct a review of the processes used by the military services to oversee separations to ensure compliance with DoD requirements.²¹³ The DoD has largely concurred with these recommendations.²¹⁴ Implementing these changes would help ensure general oversight and accountability of administrative discharges. Such oversight would effectively alleviate concerns about whether the DoD fairly and consistently executes its discharge processes.

Apart from the specific changes recommended by the GAO, the DoD should consider standardizing the military services' various administrative discharge policies. Specifically, the services should normalize their policies relating to service characterization and additional procedural protections for recently deployed personnel. At present, service members with effectively the same mental conditions can expect to receive substantively different protections based on their rank and service affiliation.²¹⁵ Little to no justification has been articulated for this disparate treatment based on what most would view to be arbitrary factors. By implementing standardized policies, or at

²¹² This recommendation actually combines two separate GAO recommendations. The first specified that the Air Force, the Navy, and the Marine Corps—those services reporting less than 90 percent compliance with DoD requirements for administrative separation based on non-disability mental conditions—“implement processes to oversee such administrative separations, such as reinstating the requirement of annual compliance reporting of a sample of administrative separations, using current DoD policy requirements as review criteria....” GAO-15-266, *supra* note 148, at 24. The second states that the Army should ensure that its “planned oversight of separations for non-disability mental conditions is implemented and incorporates reservists and National Guard members separated for such conditions, or that Army implement another process to oversee such administrative separations using current DoD policy requirements as review criteria....” *Id.*

²¹³ *Id.* at 23–24.

²¹⁴ *Id.* at 29–31.

²¹⁵ See *supra* notes 204–211 and accompanying text.

least articulating reasoned justifications for disparate treatment of certain members, the DoD and services would bolster the overall legitimacy and equity of the administrative discharge process.

The DoD should also explore the possibility of adding certain generally applicable due process protections when discharging any service member for a non-disability mental condition. As noted above, diagnosing these conditions can be a complex process, and at times professionals may disagree.²¹⁶ In light of these realities, the DoD may benefit from allowing members who dispute a particular diagnosis to request a second opinion or professional independent review. In board-eligible cases, the service might offer the opportunity for the respondent to request an independent mental health provider to serve as an advisor to the board, or even a voting board member. Adding such protections would necessarily increase the time needed to process these cases. But even without effecting such changes, the DoD should consider revising their recommended target timelines for completing these specific types of cases to account for their inherent complexities. Implementing these additional requirements would not only enhance the rights of service members and promote more accurate results, but would also delegitimize the argument that the military improperly uses this basis for discharge to quickly force out “unwanted” personnel.

Finally, the Judge Advocate General Corps of the respective services should educate legal personnel, particularly at the installation level, on both the disability evaluation and administrative discharge processes as they apply to mental conditions. The statistics discussed above demonstrate that military legal practitioners at the installation level can reasonably expect to encounter these cases frequently.²¹⁷ And the data also shows that errors in processing these cases are not altogether uncommon, at least with respect to administrative discharge for non-disability mental conditions.²¹⁸ Educating legal personnel in the field would likely reduce any procedural errors arising in these cases. Additionally, providing training at this level would improve the overall efficacy and integrity of the separation processes. Staff judge advocates who are familiar with the DES can explain to commanders what potential impacts that process will have on the member and the unit. In administrative discharge cases—even where the members in question are also undergoing disability evaluation—judge advocates who understand the

²¹⁶ See *supra* notes 187–189 and accompanying text.

²¹⁷ See *supra* notes 167–177 and accompanying text.

²¹⁸ See *supra* notes 178–181 and accompanying text.

nuances of both processes can more intelligently address legal issues such as *mens rea*, the existence of aggravating or mitigating factors, proper forum, and whether the government has taken the required steps to lawfully effect discharge. In so doing, military legal practitioners can more effectively advocate for their respective clients to the ultimate fact-finders in discharge proceedings, thereby resulting in a fairer process that respects the rights of all concerned.

VII. CONCLUSION

Separating military members afflicted with mental health conditions is an issue that is both contentious and necessary. That said, given the current state of world affairs and potential for long-term involvement in those affairs by U.S. military forces, the issue is not one that is likely to disappear anytime soon. Given the continual scrutiny these cases often attract and the desire to strike the right balance between doing what is right for the military organization and what is right for the individual military members who sacrifice for their country, judge advocates should expect this to be a dynamic and evolving area of military legal practice. The DoD and military legal practitioners must work diligently at their respective levels to ensure the proper legal processes are followed, and strive to improve these processes when feasible and appropriate.

APPLYING THE U.S. AND ICRC STANDARDS FOR DIRECT
PARTICIPATION IN HOSTILITIES TO CIVILIAN SUPPORT
OF U.S. MILITARY OPERATIONS

*MAJOR JAY C. JACKSON**

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I. INTRODUCTION

In an armed conflict, international law maintains that “innocent civilians must be kept outside hostilities as far as possible and enjoy general protection against danger arising from hostilities.”¹ A number of treaties outline the protection of both the civilian population and individual civilians from the dangers of military operations.² However, the protection of civilians is not absolute; it exists only “unless and for such time as they take a direct part in hostilities.”³ In other words, international law distinguishes between the non-combatant civilian trying to survive an armed conflict from the civilian who has decided to participate directly in the armed conflict. Unfortunately, none of the treaties that discuss civilians taking a direct (or active) part in hostilities actually defines what that phrase means.

¹ COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 615 (Jean S. Pictet ed., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS]; *see also* 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 3 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (The principle of “distinction,” universally accepted as customary international law, asserts that parties engaged in an armed conflict “must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.”).

² *See generally* Geneva Convention (I) 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 [hereinafter Geneva Convention I]; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention (IV) 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 [hereinafter Geneva Convention IV].

³ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 51(3), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 13(3), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II]; *see also* *Third Additional Protocol to the Geneva Conventions*, INT’L COMM. OF RED CROSS (Dec. 1, 2007), <https://www.icrc.org/eng/resources/documents/misc/emblem-keyfacts-140107.htm> (describing Additional Protocol III, which entered into force on January 14, 2007 and establishes the “red crystal,” an additional emblem for use by Governments and the International Red Cross and Red Crescent Movement).

In counterterrorism operations throughout the world, the U.S. Department of Defense (DoD) has interpreted “direct participation in hostilities” broadly, targeting not only civilians whose acts are intended to cause “actual harm” to their enemies, but also civilians who engage in acts which represent “an integral part of combat operations,” or those that “effectively and substantially contribute” to combat operations.”⁴ The U.S. position, in many ways, contrasts that of the International Committee of the Red Cross (ICRC), whose narrower view of direct participation in hostilities is limited to conduct that meets a three-part test. The ICRC standard requires the civilian’s action to meet a certain threshold of harm, to have a direct causal link to the harm that results from the act, and to be specifically designed to support one belligerent and harm another.⁵

This article applies the ICRC and U.S. interpretations of direct participation in hostilities to various acts undertaken every day by civilians in support of U.S. military operations. Part II reviews the foundations of international humanitarian law protecting civilians in armed conflict. Part III introduces the concept of direct participation in hostilities, and sets forth both the ICRC and DoD interpretations of that phrase. In Part IV, these standards are applied to various activities performed by civilians in support of U.S. military activities including (1) operators of remotely-piloted aircraft, (2) civilians engaged in military operations in cyberspace, and (3) civilians providing various “combat support services”⁶ to the U.S. military. Part IV then examines differences in the ICRC and DoD standards and explores how the nature and timing of the acts, as well as their geographic proximity to the battlefield, may cause civilians to lose their protection from being attacked as a military target.

The analysis leads to four recommendations, described in Part V. First, both the ICRC and DoD should clarify the terms “integral” and “effective and substantial,” respectively, which they use to define direct participation in hostilities. Second, both the DoD and the ICRC need to update and revise, as

⁴ See U.S. DEP’T OF DEF., LAW OF WAR MANUAL ¶ 5.8.3 (2016 ed. 2015) [hereinafter LAW OF WAR MANUAL].

⁵ NILS MELZER, INT’L COMM. OF RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 46 (2009) [hereinafter ICRC GUIDANCE].

⁶ JOINT CHIEFS OF STAFF, JOINT PUBLICATION 4-0, JOINT LOGISTICS, at GL-5 (2013) (defining combat support services as “[t]he essential capabilities, functions, activities, and tasks necessary to sustain all elements of all operating forces in theater at all levels of war”) [hereinafter JOINT PUBLICATION 4-0].

necessary, their definitions and guidance in order to account for the unique challenges that exist in cyberspace. Third, the DoD should eliminate geographic proximity as a factor for determining when civilians have taken a direct part in hostilities. Finally, the ICRC should reject the “revolving door” principle, the idea that individuals who participate in hostilities on a recurrent basis can “regain protection from attack between their operations.”⁷ The DoD, which has already rejected the revolving door principle, should specifically address in its *Law of War Manual* the legal and policy implications of this rejection on civilians who support U.S. military operations.

II. OBLIGATION NOT TO ATTACK CIVILIANS UNLESS THEY TAKE A DIRECT PART IN HOSTILITIES

There is universal agreement among States that civilians must be protected from attack during periods of armed conflict. The four Geneva Conventions of 1949⁸ are the foundational authorities for modern international humanitarian law. During their drafting, “the discussions were dominated by a common horror of the evils caused by [World War II] and a determination to lessen the sufferings of war victims.”⁹ The Geneva Conventions built upon a growing body of international humanitarian law, including the Hague Conventions of 1907, which included a provision prohibiting the “attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended.”¹⁰ But two other multilateral instruments—the 1977 Protocols Additional to the Geneva Conventions, known as Additional Protocol I and Additional Protocol II—detail the modern protections for civilians universally accepted today.¹¹

Additional Protocol I provides detailed protections for victims of international armed conflicts. Additional Protocol I defines international armed conflicts as:

⁷ Michael N. Schmitt, *The Status of Opposition Fighters in a Non-International Armed Conflict*, 88 INT’L L. STUD. 119, 136 (2012).

⁸ See Geneva Convention I, *supra* note 2; Geneva Convention II, *supra* note 2; Geneva Convention III, *supra* note 2; Geneva Convention IV, *supra* note 2.

⁹ INT’L COMM. OF RED CROSS, THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY ON GENEVA CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 8 (Jean S. Pictet ed., 1958).

¹⁰ Hague Convention (IV) Respecting the Laws and Customs of War on Land, annex, art. 25 (Oct. 18, 1907).

¹¹ Additional Protocol I, *supra* note 3; Additional Protocol II, *supra* note 3.

all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them... [and] all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.¹²

Additional Protocol II provides protection for civilians in non-international armed conflicts, those armed conflicts which are not covered by Additional Protocol I “and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups.”¹³

Article 13 of Additional Protocol II mirrors the first three paragraphs of Article 51 of Additional Protocol I, to wit:

1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.¹⁴

¹² Geneva Convention I, *supra* note 2, art. 2; Geneva Convention II, *supra* note 2, art. 2; Geneva Convention III, *supra* note 2, art. 2; Geneva Convention IV, *supra* note 2, art. 2; *see also* Additional Protocol I, *supra* note 3, art. 1(3) (“This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions.”).

¹³ Additional Protocol II, *supra* note 3, art. 1(1) (noting that, in order to qualify as non-international armed conflicts, the organized armed groups must “under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”) Moreover, Article 1, paragraph 2, of Additional Protocol II expressly does not apply to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.” *Id.* art. 1(2).

¹⁴ *Id.* art. 13; Additional Protocol I, *supra* note 3, art. 51.

This third paragraph, which protects civilians “unless and for such time as they take a direct part in hostilities,”¹⁵ is the main focus of this article.

Though the United States has ratified all four Geneva Conventions,¹⁶ it is not a party to the Additional Protocols.¹⁷ If it was, express requirements protecting civilians “against the dangers arising from military operations” and providing that civilians “shall not be the object of attack...[or subjected to] [a]cts or threats of violence the primary purpose of which is to spread terror,” would apply directly to the United States as a matter of treaty.¹⁸ Nonetheless, the United States is still bound by the Additional Protocol requirements to the extent they represent customary international law.¹⁹

A multilateral treaty can lead to the formation of customary international law if the treaty is of a fundamentally “norm-creating character,” if it enjoys widespread and representative participation, and if sufficient time has elapsed to allow the customary law to develop.²⁰ Here, the 1949 Geneva

¹⁵ Additional Protocol I, *supra* note 3, art. 51(3); Additional Protocol II, *supra* note 3, art. 13(3).

¹⁶ *Treaties, States Parties, and Commentaries: United States of America*, INT’L COMM. OF RED CROSS, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=US (last visited Apr. 7, 2017); *see also* 1 FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 346 (1949), https://www.loc.gov/frd/Military_Law/pdf/Dipl-Conf-1949-Final_Vol-1.pdf (the U.S. representative stated that “[t]he Government of the United States fully supports the objectives of this Convention.”).

¹⁷ *Treaties, States Parties, and Commentaries*. *But see* Ben Schreckinger, *Trump Calls Geneva Conventions ‘the Problem’*, POLITICO (Mar. 30, 2016), <http://www.politico.com/blogs/2016-gop-primary-live-updates-and-results/2016/03/donald-trump-geneva-conventions-221394> (referencing President Donald Trump’s comment that “[t]he problem is we have the Geneva Conventions, all sorts of rules and regulations, so the soldiers are afraid to fight.... I think we’ve got to make some changes, some adjustments.”).

¹⁸ Additional Protocol I, *supra* note 3, art. 51; Additional Protocol II, *supra* note 3, art. 13; *see also* U.S. CONST. art. VI (declaring that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”).

¹⁹ Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 33 U.N.T.S. 993 (defining customary international law as “evidence of a general practice accepted by law”).

²⁰ *North Sea Continental Shelf* (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 42 (Feb. 20, 1969). *North Sea Continental Shelf* concerned the delimitation of the continental shelf among Germany, Denmark, and the Netherlands. *Id.* at 5. Denmark and the Netherlands were states parties to the 1958 Geneva Convention on the Continental Shelf, but Germany was not. *Id.* at 19–20. Denmark and the Netherlands nonetheless maintained that Germany was “bound to accept delimitation on an equidistance – special circumstances

Conventions and the 1977 Additional Protocols are of a fundamentally “norm-creating character” since they impose as their primary obligation a non-derogable human right. Second, they enjoy “a very widespread and representative participation.”²¹ Every member of the United Nations has ratified or acceded to the 1949 Geneva Conventions, and 174 States have ratified or acceded to Additional Protocol I.²² Also, at the time of ratification, Article 51 of Additional Protocol I was adopted by 77 votes in favor, one against, and 16 abstentions.²³ Similarly, 168 States have ratified or acceded to Additional Protocol II,²⁴ Article 13 of which was adopted by consensus.²⁵ Finally, many decades have passed since the treaties entered into force, while extensive and uniform state practice has shown a general recognition that “States must never make civilians the object of attack.”²⁶ In fact, the International Court of

basis, because the use of this method is not in the nature of a merely conventional obligation, but is, or must now be regarded as involving, a rule that is part of the corpus of general international law...binding on the Federal Republic automatically and independently of any specific assent, direct or indirect.” *Id.* at 28.

²¹ *Id.* at 42.

²² STATES PARTY TO THE FOLLOWING INTERNATIONAL HUMANITARIAN LAW AND OTHER RELATED TREATIES AS OF 14-MAY-2018, INT’L COMM. OF RED CROSS, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp> (select “States Party to the Main Treaties” under “Reference Documents”) (last visited May. 14, 2018) [hereinafter STATES PARTY].

²³ INT’L COMM. OF RED CROSS, 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 107 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter CUSTOMARY INTERNATIONAL HUMANITARIAN LAW] (citing 6 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS (GENEVA 1974–1977), at 16 (1977) [hereinafter GENEVA OFFICIAL RECORDS]).

²⁴ STATES PARTY, *supra* note 22, at 6.

²⁵ 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 23, at 107 (citing GENEVA OFFICIAL RECORDS, *supra* note 23, at 134).

²⁶ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8, 2006) [hereinafter *Nuclear Weapons Advisory Opinion*]; see also H.C.J. 769/02 Public Committee against Torture in Israel v. Government of Israel (2006) (Isr.) [hereinafter *Torture in Israel Case*] (holding “[c]ustomary international law regarding armed conflicts protects ‘civilians’ from harm as a result of the hostilities...[as] expressed in article 51(2) of The First Protocol”) (citing YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 201 (4th ed. 2005)) (judgment available in English at http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf); David Kretzmer, *Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?*, 16 EUR. J. INT’L L. 171, 192 (2000); ORNA BEN-NAFTALI & YUVAL SHANI, INTERNATIONAL LAW BETWEEN WAR AND PEACE 142, 269 (2006); ANTONIO CASSESE, INTERNATIONAL LAW 420 (2d ed. 2005); Marco Roscini, *Targeting and Contemporary Aerial Bombardment*, 54 INT’L & COMP. Q. 411, 418 (2005); Vincent-Joël Proulx, *If the Hat Fits Wear It, If the Turban Fits Run for Your Life: Reflection on the Indefinite Detention and Targeted Killings of*

Justice has called that proposition one of the “cardinal principles contained in the texts constituting the fabric of humanitarian law.”²⁷

The United States has acknowledged the principle that the civilian population and individual civilians may not be the object of direct attack as customary international law.²⁸ In 2007, John Bellinger, then U.S. Department of State Legal Advisor, described the recent history of this position, demonstrating that rather than a desire to limit civilian protections, the failure of the United States to ratify Additional Protocol I was based on its concerns that the Additional Protocol’s protections were counterproductive to the common goal:

President Reagan decided not to submit Additional Protocol I of the Geneva Conventions to the Senate for ratification in part because he feared that the treaty contained a disincentive to follow the laws of war by extending combatant status [protections] in certain cases to those who do not follow the rules. As former Department of State Legal Adviser Abe Sofaer explained, “inevitably, regular forces would treat civilians more harshly and with less restraint if they believed that their opponents were free to pose as civilians while retaining their right to act as combatants and their POW status if captured.”²⁹

Suspected Terrorists, 56 HASTINGS L. J. 801, 879 (2005); George Aldrich, *Laws of War on Land*, 94 AM. J. INT’L L. 42, 53 (2000)).

²⁷ *Nuclear Weapons Advisory Opinion*, *supra* note 26, at 257 (concluding that “these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.”).

²⁸ See Memorandum from W. Hays Parks on 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications to John H. McNeil, Assistant General Counsel (International), Office of the Secretary of Defense (May 8, 1986) (“We view the following provisions as already part of customary international law... Civilians: Articles 51, paragraph 2”); Michael J. Matheson, *Remarks, Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 419, 426 (1987) (“We support the principle that the civilian population as such, as well as individual citizens, not be the object of acts or threats of violence the primary purpose of which is to spread terror among them, and that attacks not be carried out that would clearly result in collateral civilian casualties disproportionate to the expected military advantage.”).

²⁹ John Bellinger, *Unlawful Enemy Combatants*, OPINIO JURIS (Jan. 17, 2007, 7:01 AM), <http://opiniojuris.org/2007/01/17/unlawful-enemy-combatants/>.

Accordingly, Bellinger agreed with the “general principle of international law that civilians lose their immunity from attack when they engage in hostilities,” but he ultimately disagreed “with the contention that [the entirety of Article 51 of Additional Protocol I] is customary international law.”³⁰

More recently, the U.S. DoD has provided extensive guidance on the application of force to civilians during armed conflicts.³¹ The United States, although not a party to the Additional Protocols, adheres to two key principles consistent with those treaties. First, the United States accepts and affirms that “it has long been recognized that there is no right to make [civilians] the object of attack.”³² Second, U.S. forces may target “[c]ivilians who take a direct part in hostilities [since they] forfeit protection from being made the object of attack.”³³ Thus, the United States is largely in agreement with the international community with respect to a general protection of civilians in armed conflict.

The *Department of Defense Law of War Manual* (“*Law of War Manual*”), first released in June 2015, is intended to reflect “sound legal positions based on relevant authoritative sources of the law, including as developed by the DoD or the U.S. Government under such sources, and to show in the cited sources the past practice of DoD or the United States in applying the law of war.”³⁴ Section V of the *Law of War Manual* is devoted to the Conduct of Hostilities. It addresses, among other things, protection of civilians during armed conflict, the concept of direct participation in hostilities, and civilian membership in non-State armed groups.³⁵ The U.S. position concerning the protection of civilians from the brutality of armed conflict largely mirrors that of the ICRC and the States party to the Additional Protocols. The *Law of War Manual*, for instance, expresses the DoD’s view that “[t]he protection of civilians against the harmful effects of hostilities is one of the main

³⁰ *Id.*

³¹ See LAW OF WAR MANUAL, *supra* note 4.

³² *Id.* ¶ 4.2.1 (footnotes omitted).

³³ *Id.* ¶ 5.8.

³⁴ *Id.* at v (noting that the *Law of War Manual* contains the legal views of only the DoD: “Although the preparation of this Manual has benefited from the participation of lawyers from the Department of State and the Department of Justice, this Manual does not necessarily reflect the views of any other department or agency of the U.S. Government or the views of the U.S. Government as a whole.”).

³⁵ *Id.* ¶¶ 5.2, 5.7, 5.8.

purposes of the law of war.”³⁶ The *Law of War Manual* contains a specific list of prohibitions—“negative duties”³⁷—to respect civilians and refrain from directly attacking them. U.S. forces, for example, do not make civilians the object of attack, nor do they attack military objectives when “the expected incidental loss of civilian life, injury to civilians, and damage to civilian objects would be excessive in relation to the concrete and direct military advantage expected to be gained.”³⁸

There being a general consensus on the necessity to protect civilians during both international and non-international armed conflict “unless and for such time as they take a direct part in hostilities,”³⁹ considerable questions remain as to exactly what that phrase means. Article 3 of all four 1949 Geneva Conventions, known as Common Article 3, requires States to provide “humane” treatment for “[p]ersons taking no active part in the hostilities” during “armed conflict not of an international character.”⁴⁰ Similarly, Additional Protocols I and II protect civilians from direct attack “unless and for such time as they take a direct part in hostilities.”⁴¹ Hostilities are generally regarded as “acts of war that by their nature or purpose struck at the personnel and materiel of enemy armed forces,”⁴² but uncertainty remains concerning the kind and extent of participation that could cause a civilian to lose protection from direct attack.

One issue can be quickly dismissed, since there appears to be a consensus concerning its resolution: although the English translation of Common Article 3 refers to an “active” part in hostilities⁴³ and the Additional Protocols

³⁶ *Id.* ¶ 5.2.

³⁷ *Id.*

³⁸ *Id.* ¶ 5.2.2.

³⁹ Additional Protocol I, *supra* note 3, art. 51(3); Additional Protocol II, *supra* note 3, art. 13(3).

⁴⁰ Geneva Convention I, *supra* note 2, art. 3; Geneva Convention II, *supra* note 2, art. 3; Geneva Convention III, *supra* note 2, art. 3; Geneva Convention IV, *supra* note 2, art. 3.

⁴¹ Additional Protocol I, *supra* note 3, art. 51(3); Additional Protocol II, *supra* note 3, art. 13(3).

⁴² COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 1, at 1453 (also noting that “several delegations considered that the term ‘hostilities’ also covers preparations for combat and returning from combat”).

⁴³ Geneva Convention I, *supra* note 2, art. 3; Geneva Convention II, *supra* note 2, art. 3; Geneva Convention III, *supra* note 2, art. 3; Geneva Convention IV, *supra* note 2, art. 3.

refer to a “direct” part in hostilities,⁴⁴ they nonetheless mean the same thing. According to the ICRC,

Although the English texts of the Geneva Conventions and Additional Protocols use the words “active” and “direct,” respectively, the consistent use of the phrase “*participent directement*” in the equally authentic French texts demonstrate that the terms “direct” and “active” refer to the same quality and degree of individual participation in hostilities.⁴⁵

This interpretation has been affirmed by international courts like the International Criminal Tribunals for Rwanda⁴⁶ and the Former Yugoslavia.⁴⁷ It has also been adopted by the U.S. DoD.⁴⁸ However, the DoD adds an interesting qualifier about the interpretation of the term:

Another reason for treating the terms “active” and “direct” the same in this context is that they are understood to be terms of art addressing a particular legal standard, and there are a range of views as to what that legal standard means. Thus, there may be different views about what the underlying standard means, even when there is agreement on the appropriate term to describe that standard. Accordingly, there seems to be little value in distinguishing between the two terms for the purposes of applying this legal rule.⁴⁹

This hedging foreshadows the next, most important debate in this area: how to define “direct participation in hostilities” and what activities may cause a civilian to lose protection from direct attack during an armed conflict. Part III sets forth the views of the ICRC and DoD, respectively.

⁴⁴ Additional Protocol I, *supra* note 3, art. 51(3); Additional Protocol II, *supra* note 3, art. 13(3).

⁴⁵ ICRC GUIDANCE, *supra* note 5, at 43.

⁴⁶ See Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment ¶¶ 629 (Int’l Crim. Trib. for Rwanda Sept. 2, 1998).

⁴⁷ See Prosecutor v. Tadić, Case No. IT-94-1, Judgment ¶¶ 614–15 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997).

⁴⁸ See LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.1.1.

⁴⁹ *Id.*

III. DEFINING DIRECT PARTICIPATION IN HOSTILITIES

A. ICRC Interpretive Guidance

In 2009, the ICRC published its comprehensive *Interpretive Guidance On The Notion Of Direct Participation In Hostilities Under International Humanitarian Law (ICRC Guidance)*.⁵⁰ In preparation for the *ICRC Guidance*'s publication, the ICRC studied "first and foremost, the rules and principles of customary and treaty [international humanitarian law,] and, where necessary, the *travaux préparatoires* of treaties, international jurisprudence, military manuals, and standard works of legal doctrine."⁵¹ At the invitation of the ICRC, five informal expert meetings were held from 2003 to 2008, "each bringing together 40 to 50 legal experts from academic, military, governmental, and nongovernmental circles."⁵² In many instances, the resulting *ICRC Guidance* has served as a starting point from which States, academics, and non-governmental organizations have begun their own analyses. However, as one U.S. government lawyer notes, the *ICRC Guidance* "has not become the gold standard that might originally have been hoped for."⁵³

The ICRC determined that a civilian's act must exhibit three cumulative requirements in order to constitute direct participation in hostilities. First, "[t]he act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack."⁵⁴ Second, there must be a "direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part."⁵⁵ Third, "the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another."⁵⁶ These

⁵⁰ See ICRC GUIDANCE, *supra* note 5.

⁵¹ *Id.* at 9.

⁵² *Id.*

⁵³ Stephen Pomper, *Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress through Practice*, 88 INT'L L. STUD. 181, 186 (2012).

⁵⁴ *Id.* at 46.

⁵⁵ *Id.*

⁵⁶ *Id.*

three requirements are referred to as “threshold of harm,” “direct causation,” and “belligerent nexus,” respectively.⁵⁷

1. Threshold of Harm

Under the *ICRC Guidance*, the first element of direct participation in hostilities requires that, before civilians lose the protections afforded them under the Additional Protocols and customary international law, the likely harm resulting from their hostile action must exceed a certain threshold.⁵⁸ As a starting point, the *ICRC Guidance* notes that this harm could be either “harm of a specifically military nature” or that which inflicted “death, injury, or destruction on persons or objects protected against direct attack.”⁵⁹ However, “the building of fences or roadblocks, the interruption of electricity, water, or food supplies, the appropriation of cars and fuel, the manipulation of computer networks, and the arrest or deportation of persons” fall short of this standard since, in the absence of adverse military effects, they do not “cause the kind and degree of harm required to qualify as direct participation in hostilities.”⁶⁰

2. Direct Causation

Next, in order for an action to negate protection from direct attack, it must, as the relevant treaties say, be “direct.”⁶¹ As the *ICRC Guidance* notes, the treaty requirement that participation in hostilities be direct “implies that there can also be ‘indirect’ participation in hostilities, which does not lead to such loss of protection.”⁶² These indirect activities include “the general war effort and war sustaining activities...that merely maintain or build up the capacity to cause...harm.”⁶³

⁵⁷ *Id.*

⁵⁸ *Id.* at 47.

⁵⁹ *Id.*

⁶⁰ *Id.* at 50.

⁶¹ See Additional Protocol I, *supra* note 3, art. 51(3); Additional Protocol II, *supra* note 3, art. 13(3).

⁶² ICRC GUIDANCE, *supra* note 5, at 51.

⁶³ *Id.* at 52; see also *id.* at 34–35 (defining “recruiters, trainers, financiers and propagandists” as examples of those who provide an indirect contribution to the war effort).

Adopting a plain-meaning reading of the word “direct,” the ICRC rejects any broader interpretation by embracing a position that “direct causation should be understood as meaning that the harm in question must be brought about in *one causal step*.”⁶⁴ In other words, providing an adversary with supplies and services, scientific research and design, and production and transport of weapons and equipment do not constitute direct participation in hostilities, and therefore would not result in a loss of protection against direct attack “unless carried out as an integral part of a specific military operation designed to directly cause the required threshold of harm.”⁶⁵ Examples of the latter include the identification and marking of targets and tactical intelligence “where the act constitutes an integral part of a concrete and coordinated tactical operation that directly causes such harm.”⁶⁶

Finally, the *ICRC Guidance* notes that the requirement of direct causation “refers to a degree of *causal proximity*,...not [merely]...*temporal* or *geographic proximity*.”⁶⁷ For example, deploying a weapon system remotely either in time (e.g., a pressure-triggered improvised explosive device implanted days before its ultimate target arrives) or distance (e.g., a remotely-piloted aircraft) can still constitute direct participation in hostilities.⁶⁸ Conversely, “although the delivery or preparation of food for combatant forces may occur in the same place and at the same time as the fighting, the causal link...remains indirect.”⁶⁹

Kenneth Watkin, Judge Advocate General of Canadian Forces from 2006 to 2010, has called the *ICRC Guidance* an “Opportunity Lost.”⁷⁰ Watkin

⁶⁴ *Id.* at 53 (emphasis added).

⁶⁵ *Id.* (“[R]ecruitment and training of personnel is crucial to the military capacity of a party to the conflict, [but] the causal link with the harm inflicted on the adversary will generally remain indirect.”).

⁶⁶ *Id.* at 54–55.

⁶⁷ *Id.* at 55 (emphasis in original).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 N.Y.U. J. INT’L L. & POL. 641 (2010); see also W. Hays Parks, *Part IX Of The ICRC “Direct Participation In Hostilities” Study: No Mandate, No Expertise, And Legally Incorrect*, 42 N.Y.U. J. INT’L L. & POL. 769, 784 (2010) (describing the contention produced by one section of the *Guidance* during the drafting process: “Most experts’ comments, and particularly those of the military experts, were strongly critical for reasons ranging from questions as to the study’s remit to doubts about the ICRC’s “one size fits all” use-of-force formula

criticized the *ICRC Guidance*'s interpretation that those who perform "integrated support functions" (as opposed to a "continuous combat function") do not lose their protection as civilians "even though the functions they perform are the same ones for which members of state armed forces can be attacked."⁷¹ Watkin also asserted that "the [*ICRC Guidance*'s] focus on the tactical level of war does not match the realities of how warfare is conducted."⁷² As an example of both premises, Watkin cites "[a]n uninterrupted causal chain of events between the production of [an improvised explosive device] and the application of violence."⁷³ By limiting the loss of protection to those civilians who would plant or detonate the device rather than those who assemble, store, smuggle, purchase, or build it, the *ICRC Guidance* overtly protects those whose actions are a necessary component to the use of an often indiscriminate and terroristic weapon.⁷⁴

Watkin's critique is echoed by Michael N. Schmitt of the U.S. Naval War College.⁷⁵ In his analysis of opposition fighters involved in non-international armed conflicts, Schmitt picks up where Watkin left off, attacking the *ICRC Guidance*'s example concerning improvised explosive devices. Also concluding that the ICRC's direct causation requirement is "overly restrictive," Schmitt asserts that calling assembly of an improvised explosive device indirect participation "flies in the face of common sense; no State that engages in combat could reasonably accept it."⁷⁶

that would apply to combatants in international armed conflict and across the conflict spectrum to civilians taking a direct part in hostilities."); *Kenneth Watkin*, INT'L COMM. OF RED CROSS, <https://www.icrc.org/en/author/kenneth-watkin> (last visited May 16, 2017) (noting Mr. Watkin is a former Judge Advocate General of the Canadian Forces).

⁷¹ Watkin, *supra* note 70, at 644; see also Ryan T. Kresbach, *Totality of the Circumstances: The DoD Law of War Manual and the Evolving Notion of Direct Participation in Hostilities*, 9 J. NAT'L SEC. L. & POLICY 125, 155 (2017) ("The argument to include as targetable those serving combat support or combat service support roles for a non-State armed group is about more than just equity vis-à-vis their State armed forces counterparts. Rather, it focuses on the real contribution that those individuals provide to the overall support of their group's military mission.... Thus, the ICRC's threshold of harm analysis is under-inclusive by restricting the analysis to a focus on harm caused without similarly accounting for benefits bestowed." (footnotes omitted)).

⁷² Watkin, *supra* note 70, at 644.

⁷³ *Id.* at 658.

⁷⁴ *Id.*

⁷⁵ See Schmitt, *supra* note 7.

⁷⁶ *Id.* at 136.

3. Belligerent Nexus

Provided that an act satisfies the threshold of harm and direct causation elements, the ICRC also interprets international humanitarian law to require the acts which strip civilians of protection from direct attack to be “integral” to the ongoing international or non-international hostilities.⁷⁷ This nexus has components that relate to both the effect of the act and the purpose of the act:

in order to amount to direct participation in hostilities, an act must not only be *objectively likely* to inflict harm that meets the first two criteria, but it must also be *specifically designed to do so in support of a party to an armed conflict and to the detriment of another* (belligerent nexus).⁷⁸

The *ICRC Guidance* notes, however, that this element is distinguishable from subjective, specific, or hostile intent.⁷⁹ Those terms “relate to the state of mind of the person concerned, whereas belligerent nexus relates to the objective purpose of the act. That purpose is expressed in the design of the act or operation and does not depend on the mindset of every participating individual.”⁸⁰ So, for example, armed violence “which is not designed to harm a party to an armed conflict, or which is not designed to do so in support of another party” (e.g., theft for personal gain or the murder of a personal enemy) does not constitute participation in hostilities and must be addressed through law enforcement rather than the application of military force.⁸¹

⁷⁷ ICRC GUIDANCE, *supra* note 5, at 58.

⁷⁸ *Id.* (emphasis in original).

⁷⁹ *Id.* at 59.

⁸⁰ *Id.* (also noting that “[d]uring the expert meetings, there was almost unanimous agreement that the subjective motives driving a civilian to carry out a specific act cannot be reliably determined during the conduct of military operations and, therefore, cannot serve as a clear and operable criterion for “split second” targeting decisions.”) Furthermore, “there was agreement that hostile intent is not a term of [international humanitarian law], but a technical term used in rules of engagement (ROE) drafted under national law.... Therefore, it was generally regarded as unhelpful, confusing or even dangerous to refer to hostile intent for the purpose of defining direct participation in hostilities.” *Id.*

⁸¹ *Id.* at 58–59.

B. Law of War Manual

The U.S. DoD generally employs a broader, more flexible definition of direct participation in hostilities. As discussed above, civilians can take actions which cause them to lose their protection against direct attack by belligerents, a concept which is well established in the Additional Protocols and customary international law. The DoD has rejected the ICRC's criteria for when this occurs—threshold of harm, direct causation, and belligerent nexus⁸²—in favor of its own, less restrictive standard. According to the *Law of War Manual*:

At a minimum, taking a direct part in hostilities includes actions that are, by their nature and purpose, intended to cause actual harm to the enemy. Taking a direct part in hostilities extends beyond merely engaging in combat and also includes certain acts that are an integral part of combat operations or that effectively and substantially contribute to an adversary's ability to conduct or sustain combat operations. However, taking a direct part in hostilities does not encompass the general support that members of the civilian population provide to their State's war effort, such as by buying war bonds.⁸³

In other words, the DoD envisions different levels of participation in hostilities, from actions intended to cause *actual harm* to the enemy to

⁸² *Id.* at 46.

⁸³ LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.3 (footnotes omitted). But note a different view presented by the United States fifteen years ago in the context of children in armed conflict, one which seems to align more closely with the ICRC's interpretation of direct participation in hostilities. U.S. DEP'T OF STATE, INITIAL REPORT OF THE UNITED STATES OF AMERICA TO THE UN COMMITTEE ON THE RIGHTS OF THE CHILD CONCERNING THE OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICT (Sept. 14, 2002), <https://www.state.gov/documents/organization/84649.pdf> ("The United States understands the phrase 'direct part in hostilities' to mean immediate and actual action on the battlefield likely to cause harm to the enemy because there is a direct causal relationship between the activity engaged in and the harm done to the enemy. The phrase 'direct participation in hostilities' does not mean indirect participation in hostilities, such as gathering and transmitting military information, transporting weapons, munitions and other supplies, or forward deployment...there is no prohibition concerning indirect participation in hostilities or forward deployment. The term 'direct' has been understood in the context of treaties relating to the law of armed conflict...to mean a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and place where the activity takes place.").

those which are either (1) an integral part of combat operations or (2) that “effectively and substantially” contribute to an adversary’s ability to conduct or sustain combat operations.⁸⁴

Affording more flexibility to the warfighter than the *ICRC Guidance*, the *Law of War Manual* provides five additional criteria for decision-makers to consider, since a determination of whether a civilian is directly participating in hostilities is “likely to depend highly on the context.”⁸⁵ First, to what degree does the act cause harm to the opposing party?⁸⁶ This factor is not unlike the ICRC’s “threshold of harm” element.⁸⁷ Second, to what degree is the act connected to the ongoing hostilities? Here, the very idea that there can be degrees of connectedness seems contrary to the ICRC’s “direct causation” element.⁸⁸ Third, what was the specific purpose of the civilian’s act—was it “intended to advance the war aims of one party to the conflict to the detriment of the opposing party”?⁸⁹ This factor echoes the *ICRC Guidance*’s “belligerent nexus” element, which requires that a civilian’s hostile act be “integral” to the hostilities in order for that act to cause the civilian to lose their protection against direct attack.⁹⁰ Fourth, what is the “military significance of the activity to the party’s war effort”?⁹¹ Again, this factor is not considered by the ICRC, which views acts from a binary perspective (either “one causal step,” or not)⁹² rather than on a continuum (the *degree* of contribution to the war effort).⁹³ Finally, the *Law of War Manual* considers “the degree to which the activity is viewed inherently or traditionally as a military one.”⁹⁴

C. Duration of Loss of Protection

When civilians do directly participate in hostilities—however that may be defined—they do not lose their protection from direct attack indefinitely. Both Additional Protocols expressly state that protections remain

⁸⁴ LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.3.

⁸⁵ *Id.* (listing considerations which “may be relevant”).

⁸⁶ *Id.*

⁸⁷ See ICRC GUIDANCE, *supra* note 5, at 47.

⁸⁸ *Id.* at 53 (emphasis added).

⁸⁹ LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.3.

⁹⁰ See ICRC GUIDANCE, *supra* note 5, at 58.

⁹¹ LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.3.

⁹² ICRC GUIDANCE, *supra* note 5, at 53.

⁹³ LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.3.

⁹⁴ *Id.* ¶ 5.8.3.

“unless and *for such time as* they take a direct part in hostilities.”⁹⁵ Here, also, interpretations of that phrase are varied.

The Israel Supreme Court’s consideration of this issue may serve as an introduction. In *Public Committee Against Torture in Israel v. Israel*, the Court examined Israel’s employment of “a policy of preventative strikes which cause the death of [civilian] terrorists in Judea, Samaria, or the Gaza Strip.”⁹⁶ The Court concluded that the “for such time as” language in Additional Protocol I is customary international law; in fact, the court concluded that “*all* of the parts of article 51(3) of The First Protocol express customary international law.”⁹⁷ However, in attempting to ascertain how to interpret the phrase and determine its scope, the Court noted that “regarding the scope of the wording ‘and for such time’ there is no consensus in the international literature” and lamented that “there is no choice but to proceed from case to case.”⁹⁸ The Court nonetheless considered the two ends of the spectrum:

On the one hand, a civilian taking a direct part in hostilities one single time, or sporadically, who later detaches himself from that activity, is a civilian who, starting from the time he detached himself from that activity, is entitled to protection from attack. He is not to be attacked for the hostilities which he committed in the past. On the other hand, a civilian who has joined a terrorist organization which has become his “home”, and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack “for such time” as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility.⁹⁹

The *ICRC Guidance* adopts a narrower approach, applying its direct participation in hostilities factors (threshold of harm, direct causation, and belligerent nexus) to a definite time period. That time period is limited to preparatory measures leading up to the act, deployment, the act itself, and

⁹⁵ Additional Protocol I, *supra* note 3, art. 51(3); Additional Protocol II, *supra* note 3, art. 13(3) (emphasis added).

⁹⁶ *Torture in Israel Case*, *supra* note 26.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

the actor's return.¹⁰⁰ The "preparatory measures" must be "of a specifically military nature and so closely linked to the subsequent execution of a specific hostile act that they already constitute an integral part of that act."¹⁰¹ Here, the *ICRC Guidance* distinguishes between preparatory measures that aim to carry out a specific hostile act (direct participation) and preparatory measures aiming to establish the general capacity to carry out hostile acts (not direct participation).¹⁰² Examples of preparatory measures not constituting direct participation in hostilities "would commonly include purchase, production, smuggling and hiding of weapons; general recruitment and training of personnel; and financial, administrative or political support to armed actors."¹⁰³

Finally, both the physical deployment to and return from execution of an act is direct participation in hostilities since both constitute "an integral part of the act in question."¹⁰⁴ Here, Schmitt notes the significant dissent to the ICRC's apparent conclusion that individuals who participate in hostilities on a recurrent basis could "regain protection from attack between their operations."¹⁰⁵ The *ICRC Guidance* calls this "'revolving door' of civilian protection...an integral part, not a malfunction" of international humanitarian law. It prevents attacks on civilians who do not, at the time, represent a military threat.¹⁰⁶ One commentator, an attorney in the United States Marine Corps, asserts that:

If continuous participation in hostilities has occurred, and a demonstrated intent to continue similar participation can be reasonably established, it is unreasonable to require the military to wait until that individual has begun his next attack in order to target him. Rather, those who are continuously directly participating in hostilities are effectively members of the organized armed group who should be targetable until such time as it can be reasonably established that they have ceased functioning as such. A goal of the law of armed conflict should

¹⁰⁰ ICRC GUIDANCE, *supra* note 5, at 65–68.

¹⁰¹ *Id.* at 65–66.

¹⁰² *Id.* at 66.

¹⁰³ *Id.* at 66–67; *but see* Schmitt, *supra* note 7, at 136 ("[M]any of the experts involved in the project of developing the Guidance argued for a broader interpretation of 'preparatory'").

¹⁰⁴ ICRC GUIDANCE, *supra* note 5, at 67.

¹⁰⁵ Schmitt, *supra* note 7, at 136.

¹⁰⁶ ICRC GUIDANCE, *supra* note 5, at 70.

be to deter direct participation in hostilities by civilians. The ICRC approach would serve only to encourage it.¹⁰⁷

To do otherwise, Schmitt says, “flies in the face of military common sense and accordingly represents a distortion of [international humanitarian laws’] military advantage/humanitarian considerations balance.”¹⁰⁸

The ICRC also describes an alternative way that civilians might lose protection from direct attack: membership in an organized armed group. Determining whether a civilian is a member of an organized armed group is important since such membership may form an alternate legal basis for their loss of protection from direct attack. The “decisive criterion” for determining membership in an organized armed group under the *ICRC Guidance* “is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities,” called a “continuous combat function.”¹⁰⁹ Thus, according to the ICRC, an individual who is “recruited, trained and equipped” by a non-State armed group to participate in hostilities on its behalf assumes a continuous combat function and therefore forfeits the protection afforded to other civilians even if he or she has not yet personally carried out a hostile act.¹¹⁰ Similar to the loss of protection by other civilians, membership turns on whether the member’s activities constitute “hostilities”:

Individuals who continuously accompany or support an organized armed group, but whose function does not involve direct participation in hostilities, are not members of that group within the meaning of [international humanitarian law]... Thus, recruiters, trainers, financiers and propagandists may continuously contribute to the general war effort of a non-State party, but they are not members of an organized armed group belonging to that party unless their function additionally includes activities amounting to direct participation in hostilities.¹¹¹

The *ICRC Guidance*’s interpretation of the time period for which a civilian loses protection from direct attack (through either direct participation

¹⁰⁷ Kresbach, *supra* note 71, at 156.

¹⁰⁸ Schmitt, *supra* note 7, at 136.

¹⁰⁹ ICRC GUIDANCE, *supra* note 5, at 33.

¹¹⁰ *Id.* at 34.

¹¹¹ *Id.* (footnotes omitted).

in hostilities or membership in an organized group) has been the subject of some criticism. Echoing the objections of Schmitt above, another commentator, Bill Boothby, adopts a broader view than the ICRC of the “for such time as” element.¹¹² Boothby calls the *ICRC Guidance*’s concepts of preparation, deployment, and return overly restrictive.¹¹³ He points out that, whereas the ICRC’s own commentary on Additional Protocol I extends the obligation of combatants to distinguish themselves in “any action carried out with a view to combat,”¹¹⁴ the *ICRC Guidance* draws an artificial distinction between preparing for hostilities (i.e., specific acts of combat) and preparing for capacity to carry out hostile acts (i.e., combat generally).¹¹⁵

Second, Boothby criticizes the *ICRC Guidance*’s failure to address “revolving door” participation.¹¹⁶ Boothby concludes that the intervals between individual acts that constitute participation in hostilities may in some cases serve only as preparation for the next hostile act.¹¹⁷ His assertion follows closely the language in *Public Committee Against Torture in Israel* that “the rest between hostilities is nothing other than preparation for the next hostility.”¹¹⁸ Accordingly, civilians who conduct themselves in that way have forfeited their protection against direct attack. In the eyes of both Schmitt and Boothby, allowing “revolving door” participation ignores the realities of the modern battlefield in the same way as the restricted view of preparatory measures.

Let us . . . consider the position of the regular or persistent participant in an armed conflict who is . . . a civilian. If this individual, after each engagement, cleans, prepares, and conceals his weapon, thus remaining ready for the next engagement,

¹¹² Bill Boothby, “*And for Such Time As*”: *The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. INT’L L. & POL. 741 (2010).

¹¹³ *Id.* at 743.

¹¹⁴ COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 1, at 527.

¹¹⁵ Boothby, *supra* note 111, at 746–47.

¹¹⁶ *Id.* at 753.

¹¹⁷ *Id.* (citing Daniel Statman, *Targeted Killing*, 5 THEORETICAL INQ. L. 179, 195 (2004) (“[I]n war, much broader, blanket license to kill the enemy is granted: soldiers and officers can be killed while asleep, while doing office work, or while out on maneuvers. There is most decidedly no requirement to refrain from shooting at enemy soldiers until ascertaining that they are about to strike and hence must be stopped. With respect to high-ranking officers, this point is even clearer, as they can rarely be said to pose any immediate danger.”)).

¹¹⁸ *Torture in Israel Case*, *supra* note 26.

he should, in my view, be regarded as engaged in preparation through those acts of preparing the weapon and through the continuous act of concealment.¹¹⁹

Concerning the “continuous combat function,” Watkin laments the *ICRC Guidance*’s disconnect with the modern battlefield, where both State and non-State warfighting organizations require “commanders, planners, intelligence personnel, and fighters...and logistical support.”¹²⁰ Watkin concludes that “an interpretation that would grant protected civilian status to persons who are an integral part of the combat effectiveness of an organized armed group when their regular force counterparts performing exactly the same function” presents a “significant danger” to civilians who are not engaged in hostilities.¹²¹

The *Law of War Manual* also addresses the duration that one is liable to attack, expressly rejecting the “revolving door” protection described above:

In the U.S. approach, civilians who have taken a direct part in hostilities must not be made the object of attack after they have permanently ceased their participation because there would be no military necessity for attacking them. Persons who take a direct part in hostilities, however, do not benefit from a “revolving door” of protection. There may be difficult cases not clearly falling into either of these categories, and in such situations a case-by-case analysis of the specific facts would be needed.¹²²

In the U.S. view, the “revolving door” would offer greater protections to these civilians than lawful combatants, such as uniformed military personnel, “who may be made the object of attack even when not taking a direct part in hostilities.”¹²³ Referring to the idea as “farmer by day, guerilla by night,” the *Law of War Manual* asserts that such a rule would make the civilian population less safe since it would encourage individual civilians

¹¹⁹ Boothby, *supra* note 111, at 748.

¹²⁰ Watkin, *supra* note 70, at 680.

¹²¹ *Id.* at 675.

¹²² LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.4.

¹²³ *Id.* ¶ 5.8.4.2.

to attack their enemies and then blend back in with the protected civilian population.¹²⁴

Like the ICRC, the DoD concludes that civilians who become members of organized armed groups can lose their protection against direct attack, even when not immediately directly participating in hostilities. However, the DoD defines membership in an armed group more broadly. According to the *Law of War Manual*, civilians can be members of an organized armed group in two ways, either formally or functionally, and such civilians lose their protection against direct attack since they “share in their group’s hostile intent.”¹²⁵

According to the *Law of War Manual*, formal or direct information may indicate that an individual is a member of an armed group, including use of a rank or title, taking an oath of loyalty, or wearing a uniform.¹²⁶ An individual may even carry an identification card or have his or her name on a membership list.¹²⁷ Recognizing, however, that “in many cases [this type of information] will not be available because members of these groups seek to conceal their association with that group,” the DoD establishes an additional list of criteria for determining formal membership.¹²⁸ These factors include more circumstantial evidence that a civilian is a member of an armed group, including information that indicates that individuals are acting at the direction of group leadership or within its command structure, performing a function that is analogous to one performed by members of State military branches,

¹²⁴ *Id.*

¹²⁵ *Id.* ¶ 5.7.3 (“In some cases, hostile acts or demonstrated hostile intent may also constitute taking a direct part in hostilities. However, hostile acts and demonstrated hostile intent in some respects may be narrower than the concept of taking a direct part in hostilities. For example, although supplying weapons and ammunition in close geographic or temporal proximity to their use is a common example of taking a direct part in hostilities, it would not necessarily constitute a hostile act or demonstrated hostile intent. On the other hand, hostile acts and demonstrated hostile intent in some respects may be broader than the concept of taking a direct part in hostilities. For example, the use of force in response to hostile acts and demonstrated hostile intent applies outside hostilities, but taking a direct part in hostilities is limited to acts that occur during hostilities.”).

¹²⁶ *Id.* ¶ 5.7.3.1.

¹²⁷ *Id.*

¹²⁸ *Id.*

or accessing facilities that so-called “outsiders” would not be permitted to access (among other examples).¹²⁹

Similarly, the *Law of War Manual* recognizes that “[s]ome non-State armed groups might not be organized in a formal command structure,” and so determining formal membership might be even more difficult. Accordingly, in addition to the criteria set forth above for determining formal membership in an armed group, the *Law of War Manual* seeks a functional approach for groups that “lack a formal distinction between those members and non-members who nonetheless participate in the hostile activities of the group.”¹³⁰ Specifically, civilians may become “functional” members of an armed group when they are:

[1] following directions issued by the group or its leaders; [2] taking a direct part in hostilities on behalf of the group on a sufficiently frequent or intensive basis; or [3] performing tasks on behalf of the group similar to those provided in a combat, combat support, or combat service support role in the armed forces of a State.¹³¹

Two conclusions may be drawn. First, the *ICRC Guidance* interpretation of the time element of direct participation in hostilities is far narrower than that of the *Law of War Manual*. Second, while both the *ICRC Guidance* and *Law of War Manual* allow for targeting of members of organized armed groups, the DoD sets forth broad criteria for establishing membership¹³² while the ICRC only views civilians as members of armed groups when they engage in a “continuous combat function” analogous to a direct participation in hostilities.¹³³

D. Key Differences Between the *Law of War Manual* and *ICRC Guidance*

There are a number of major differences between the DoD and ICRC interpretations of direct participation in hostilities. First, the U.S. defines direct participation in hostilities much more broadly than the ICRC. Applying a “one causal step” test, the *ICRC Guidance* rejects a number of activities

¹²⁹ *Id.*

¹³⁰ *Id.* ¶ 5.7.3.2.

¹³¹ *Id.* (footnotes omitted).

¹³² LAW OF WAR MANUAL, *supra* note 4, ¶ 5.7.3.

¹³³ ICRC GUIDANCE, *supra* note 5, at 33.

that expressly meet the standard set forth in the *Law of War Manual*.¹³⁴ For example, the ICRC specifically excludes the assembly, storing, purchase, or smuggling of an improvised explosive device or its components from its definition of direct participation in hostilities.¹³⁵ The DoD explicitly includes “assembling weapons (such as improvised explosive devices) in close geographic or temporal proximity to their use.”¹³⁶ Similarly, while the *Law of War Manual* asserts that any determination of whether a civilian is participating in hostilities is “likely to depend highly on the context,”¹³⁷ the ICRC seems to state just the opposite: “the importance of the circumstances surrounding each case should not divert attention from the fact that direct participation in hostilities remains a legal concept of limited elasticity that must be interpreted in a theoretically sound and coherent manner reflecting the fundamental principles of [international humanitarian law].”¹³⁸

Second, the *Law of War Manual* rejects the ICRC idea of a “revolving door” of participation in hostilities. Both organizations agree that civilians lose protection while conducting preparatory measures leading up to the direct participation in hostilities (however defined), while travelling to the act, while committing the act itself, and during the actor’s return.¹³⁹ But the ICRC goes on to assert that “suspension of protection lasts exactly as long as the corresponding civilian engagement in direct participation in hostilities,” the so-called “revolving door.”¹⁴⁰ The DoD takes a contrary approach:

civilians who have taken a direct part in hostilities must not be made the object of attack after they have permanently ceased their participation because there would be no military necessity for attacking them. Persons who take a direct part in hostilities, however, do not benefit from a “revolving door” of protection.¹⁴¹

In coming to this conclusion, the *Law of War Manual* draws from *Public Committee against Torture in Israel*, which notes that “the ‘revolving door’

¹³⁴ *Id.*

¹³⁵ *Id.* at 54.

¹³⁶ LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.3.1.

¹³⁷ *Id.* ¶ 5.8.3 (listing considerations which “may be relevant”).

¹³⁸ ICRC GUIDANCE, *supra* note 5, at 42.

¹³⁹ *Id.* at 65–68; LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.3.1.

¹⁴⁰ ICRC GUIDANCE, *supra* note 5, at 70.

¹⁴¹ LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.4.

phenomenon, by which each terrorist has ‘horns of the alter’ to grasp or a ‘city of refuge’ to flee to, to which he turns in order to rest and prepare while they grant him immunity from attack, is to be avoided.”¹⁴²

Third, the DoD considers a civilian to have gained membership in an armed group under much broader circumstances than the ICRC. While the former attributes membership both formally and functionally—“analogous to one performed by members of state military branches”¹⁴³—the ICRC requires a “continuous combat function” similar to its definition of direct participation in hostilities.¹⁴⁴ As a result, those civilians who serve as “recruiters, trainers, financiers and propagandists” in an armed group, for example, would lose protection from direct attack in the eyes of the DoD, but not in the eyes of the ICRC.¹⁴⁵

In spite of some major differences, the interpretations of direct participation in hostilities in the *Law of War Manual* and *ICRC Guidance* have several things in common. Both recognize the principle of international humanitarian law that civilians should be protected against direct attack during armed conflict. Both assert that civilians may lose that protection if they take a direct part in hostilities or become a member of an organized armed group, and neither believes that mere participation in the general war effort leads to loss of protection.¹⁴⁶

IV. APPLICATION OF U.S. AND ICRC STANDARDS FOR DIRECT PARTICIPATION IN HOSTILITIES

This section begins with a brief review of the use of civilians to support U.S. military functions. Next, the U.S. and ICRC standards for direct participation in hostilities will be applied to a number of factual scenarios. Most importantly, the analysis will examine whether the United States, by holding a broader view than the ICRC of when civilians lose their protection from direct attack, may subject its own civilians to undesirable targeting on the U.S. homeland or elsewhere.

¹⁴² *Torture in Israel Case*, *supra* note 26.

¹⁴³ LAW OF WAR MANUAL, *supra* note 4, ¶ 5.7.3.1.

¹⁴⁴ ICRC GUIDANCE, *supra* note 5, at 33.

¹⁴⁵ *Id.* at 34 (footnotes omitted).

¹⁴⁶ *Id.* at 52; LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.3.

A. Civilian Support of U.S. Military Operations

1. Background

The DoD employs nearly 800,000 civilians.¹⁴⁷ These civilian employees serve in more than 750 occupations, including engineering, transportation, logistics, supply management, acquisition, intelligence analysis, and security imagery and mapping.¹⁴⁸ In addition to these directly-employed civilians, the DoD also contracts with civilian businesses in order to procure goods and services not organic to the government.

This outsourcing occurs on an immense scale. For example, the number of defense contractors accompanying U.S. forces in Afghanistan peaked in 2012 at more than 117,000, compared to the 88,000 members of the U.S. military then in country.¹⁴⁹ Also notable, of those contractors, “more than 70 percent were foreign nationals receiving money from American companies and agencies.”¹⁵⁰ Even following a reduction of the U.S. military footprint in Afghanistan, as of 2016, nearly 29,000 defense contractors were still employed there—more than three times the number of U.S. service members.¹⁵¹

As for Iraq, recent figures reflect that over 2,000 defense contractors were in the country as of January 2016, compared to fewer than 4,000 U.S. service members.¹⁵² This reflects a significant reduction from the 2007 “surge” during which time there were 162,428 defense contractors in Iraq.¹⁵³ In 2016, defense contractors in Iraq served primarily in maintenance and logistics (30 percent) and translator (20 percent) roles, as well as “security, transportation, construction, communication support, training, management

¹⁴⁷ *Civilian Careers*, U.S. DEP’T OF DEF., http://godefense.cpms.osd.mil/careers_more.aspx (last visited Jan. 19, 2017).

¹⁴⁸ *Id.*

¹⁴⁹ Leo Shane III, *Report: Contractors Outnumber U.S. Troops in Afghanistan 3-to-1*, MILITARY TIMES (Aug 17, 2016), <http://www.militarytimes.com/articles/crs-report-afghanistan-contractors>.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Marcus Weisgerber, *Back to Iraq: US Military Contractors Return in Droves*, DEFENSE ONE (Feb. 23, 2016), <http://www.defenseone.com/threats/2016/02/back-iraq-us-military-contractors-return-droves/126095/>.

¹⁵³ *Id.*

and administrative roles.¹⁵⁴ One would expect a continued expansion of civilian defense contractors in Iraq as the United States continues to pursue its military campaign against the Islamic State of Iraq and Syria (ISIS).

According to one investigation, “[t]he Pentagon’s reliance on contractors is a relatively recent phenomenon. In 1991, the massive U.S.-led force that pushed Iraq’s troops out of neighboring Kuwait in the Persian Gulf War was nearly 100% military personnel.¹⁵⁵ But after the DoD reduced its military force following the end of the Cold War, it was forced to improvise in the conflicts that arose after the terror attacks on September 11, 2011, and by 2010, “the number of contractors in Iraq and Afghanistan had surpassed the number of U.S. military personnel and federal civilian employees [in those theaters].”¹⁵⁶

2. Authority and Guidance

The authority for the use of both civilian employees and contractors is built into the DoD force model. The *Law of War Manual* notes that “DoD policies have often addressed the use of non-military personnel to support military operations”¹⁵⁷ and recognizes that civilian employees and contractors have a greater risk of death or injury “incidental to an enemy attack” when

¹⁵⁴ *Id.*

¹⁵⁵ W.J. Hennigan, *Air Force Hires Civilian Drone Pilots for Combat Patrols; Critics Question Legality*, L.A. TIMES (Nov. 27, 2015), <http://www.latimes.com/nation/la-fg-drone-contractor-20151127-story.html>. *But see* U.S. DEP’T OF DEF., CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS 599 (1992) (“In Operations Desert Shield and Desert Storm, the United States employed civilians both as career civil service employees and indirectly as contractor employees. Civilians performed as part of the transportation system, at the forward depot level repair and intermediate level maintenance activities and as weapon systems technical representatives. Civilians worked aboard Navy ships, at Air Force (USAF) bases, and with virtually every Army unit. Only the Marine Corps (USMC) did not employ significant numbers of civilians in theater. This civilian expertise was invaluable and contributed directly to the success achieved.”).

¹⁵⁶ Hennigan, *supra* note 155.

¹⁵⁷ LAW OF WAR MANUAL, *supra* note 4, ¶ 4.15 (citing U.S. DEP’T OF DEF., INSTR. 3020.41, OPERATIONAL CONTRACT SUPPORT (OCS) (Dec. 20, 2011); U.S. DEP’T OF DEF., INSTR. 1100.22, POLICIES AND PROCEDURES FOR DETERMINING WORKFORCE MIX (Apr. 12, 2010); U.S. DEP’T OF DEF., DIR. 1404.10, DoD CIVILIAN EXPEDITIONARY WORKFORCE (Jan. 23, 2009); U.S. DEP’T OF DEF., INSTR. 1400.32, DoD CIVILIAN WORK FORCE CONTINGENCY AND EMERGENCY PLANNING GUIDELINES AND PROCEDURES (Apr. 24, 1995); U.S. DEP’T OF DEF., INSTR. 3020.37, CONTINUATION OF ESSENTIAL DoD CONTRACTOR SERVICES DURING CRISES (Nov. 6, 1990 Incorporating Change 1, Jan. 26, 1996)).

they accompany military forces in a combat zone.¹⁵⁸ Beyond the possibility of being collateral damage to an attack on a military objective, if these “persons authorized to accompany the armed forces”—both civilian employees and contractors—take a direct part in hostilities, they are subject to direct attack from enemy forces.¹⁵⁹ Still, the *Law of War Manual* advises that:

Although international law does not prohibit States from using persons authorized to accompany the armed forces to provide support that constitutes direct participation in hostilities, commanders should exercise care in placing such personnel in situations in which an attacking enemy may consider their activities to constitute taking a direct part in hostilities, as there may be legal and policy considerations against such use.¹⁶⁰

In the next section, this dilemma is examined more closely, including a description of several areas in which “an attacking enemy may consider activities [by U.S. civilians] to constitute taking a direct part in hostilities.”¹⁶¹

B. Factual Scenarios

1. Operation of Remotely-Piloted Aircraft

The MQ-9 Reaper is an armed, remotely-piloted aircraft “employed primarily against dynamic execution targets and secondarily as an intelligence collection asset.”¹⁶² According to the U.S. Air Force, the MQ-9 is capable of performing the following missions: “intelligence, surveillance, reconnaissance, close air support, combat search and rescue, precision strike, buddy-lase [i.e., “lasing” a target for another aircraft to strike], convoy/raid

¹⁵⁸ LAW OF WAR MANUAL, *supra* note 4, ¶ 4.15.2.3.

¹⁵⁹ *Id.* ¶ 4.15 (although the *Law of War Manual* states this fact in the negative: “Persons authorized to accompany the armed forces may not be made the object of attack unless they take direct part in hostilities.”).

¹⁶⁰ *Id.* ¶ 4.15.2.2. *But see* M.H.F. CLARKE ET AL., COMBATANT AND PRISONER OF WAR STATUS, ARMED CONFLICT AND THE NEW LAW: ASPECTS OF THE 1977 GENEVA PROTOCOLS AND THE 1981 WEAPONS CONVENTION (Michael A. Meyer ed., 1989) (“Any civilian who does participate [in hostilities] by committing hostile acts is liable to punishment after a proper trial.”).

¹⁶¹ LAW OF WAR MANUAL, *supra* note 4, ¶ 4.15.2.2.

¹⁶² *MQ-9 Reaper*; U.S. AIR FORCE (Sept. 23, 2015), <http://www.af.mil/AboutUs/FactSheets/Display/tabid/224/Article/104470/mq-9-reaper.aspx>.

overwatch, target development, and terminal air guidance.”¹⁶³ MQ-9s are equipped with a “Multi-Spectral Targeting System” which integrates an infrared sensor, TV cameras, a laser range finder, designator, and illuminator and can carry 3,750 pounds of Hellfire missiles and so-called “smart bombs.”¹⁶⁴

Late in 2015, reports indicated for the first time that the U.S. Air Force was employing civilian defense contractors to fly MQ-9 Reapers.¹⁶⁵ The civilian contractors were flying MQ-9s assigned to track suspected militants and “other targets” throughout the globe.¹⁶⁶ The contractors themselves worked from ground stations near Las Vegas, Nevada.¹⁶⁷ In 2015, civilian contractors “flew” two four-aircraft patrols a day (eight flights), but that tempo was planned to expand to ten patrols per day (40 flights) by 2019.¹⁶⁸

Civilians also fly remotely-piloted aircraft for the U.S. Central Intelligence Agency (CIA). Recent reporting, for example, indicated that “President Donald Trump has given the Central Intelligence Agency secret new authority to conduct drone strikes.”¹⁶⁹ The new authority stands in contrast to President Obama’s “cooperative approach.... The CIA used drones and other intelligence resources to locate suspected terrorists and then the military conducted the actual strike.”¹⁷⁰ Though details are naturally not publicly available, one may assume that either civilian employees or contractors are flying the CIA’s aircraft as well.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Hennigan, *supra* note 155.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Gordon Lubold & Shane Harris, *Trump Broadens CIA Powers, Allows Deadly Drone Strikes*, WALL ST. J. (Mar. 13, 2017), <https://www.wsj.com/articles/trump-gave-cia-power-to-launch-drone-strikes-1489444374>; see also Paul D. Shinkman, *Report: Trump Gives CIA Authority for Drone Strikes*, U.S. NEWS & WORLD REP. (Mar. 14, 2017), <https://www.usnews.com/news/politics/articles/2017-03-14/report-trump-gives-cia-authority-for-drone-strikes>; Greg Jaffe & Karen DeYoung, *Trump Administration Reviewing Ways to Make It Easier to Launch Drone Strikes*, WASH. POST (Mar. 13, 2017), https://www.washingtonpost.com/world/national-security/trump-administration-reviewing-ways-to-make-it-easier-to-launch-drone-strikes/2017/03/13/ac39ced0-07f8-11e7-b77c-0047d15a24e0_story.html?utm_term=.2600d30362f3.

¹⁷⁰ Lubold & Harris, *supra* note 169.

a. Employment of Weapons

A retired U.S. Air Force general officer who was interviewed for the MQ-9 article expressed his opinion that contractors were not in danger of crossing the line into a combatant's role since weapons were deployed on less than two percent of missions.¹⁷¹ First, this statement neglects the possibility that weapons may be deployed more frequently in the future, should U.S. interests require it. Second, assuming that contractors have, even on rare occasions, employed weapons from their MQ-9s, these civilian contractors are in fact taking a direct part in hostilities.

When contractors or CIA employees deploy weapons from an MQ-9, they clearly meet the three-part ICRC test for threshold of harm since the contractor's action is likely to inflict injury or death,¹⁷² even if the strike is unsuccessful due to a miss or weapon malfunction. Similarly, the "direct causation" requirement is satisfied because the injury or death is brought about in "one causal step"—namely, when the pilot pulls the trigger.¹⁷³ Finally, there is a belligerent nexus because, in this case, there is no ambiguity about the detriment to the enemy.¹⁷⁴ Applying the DoD standard does not change the result since firing a missile or dropping a bomb on an enemy is, "by [its] nature and purpose, intended to cause actual harm to the enemy."¹⁷⁵

b. Aerial Surveillance

The use of the MQ-9s in missions not involving the deployment of weapons is a closer question. But even if "most flights provide aerial surveillance or intercept and analyze electronic emissions from the ground,"¹⁷⁶ such surveillance and intelligence gathering could constitute direct participation in hostilities. The *ICRC Guidance* recognizes that "[t]he required standard of direct causation of harm must take into account the collective nature and complexity of contemporary military operations."¹⁷⁷ The *ICRC Guidance*

¹⁷¹ Hennigan, *supra* note 155.

¹⁷² ICRC GUIDANCE, *supra* note 5, at 47.

¹⁷³ *Id.* at 53.

¹⁷⁴ *Id.* at 58.

¹⁷⁵ LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.3 (footnotes omitted).

¹⁷⁶ Hennigan, *supra* note 155; *see also* Lubold & Harris, *supra* note 168 ("The CIA used drones and other intelligence resources to locate suspected terrorists and then the military conducted the actual strike.").

¹⁷⁷ ICRC GUIDANCE, *supra* note 5, at 54.

uses the example of a remotely-piloted aircraft to demonstrate this principle: “attacks carried out by unmanned aerial vehicles may simultaneously involve a number of persons, such as computer specialists operating the vehicle through remote control, individuals illuminating the target, aircraft crews collecting data, specialists controlling the firing of missiles, radio operators transmitting orders, and an overall commander.”¹⁷⁸ For these other roles, direct causation only occurs when the act serves as “an integral part of a concrete and coordinated tactical operation that directly causes such harm.”¹⁷⁹ The pilot’s geographic proximity to the battlefield is irrelevant.¹⁸⁰

Accordingly, under the *ICRC Guidance*, use of an MQ-9 as an intelligence, surveillance, and reconnaissance platform would constitute direct participation in hostilities if it identifies or marks targets, or provides tactical intelligence to enable an attack by other friendly forces.¹⁸¹ Conversely, if a civilian-piloted MQ-9 takes part in a patrol but fails to take part in a direct attack, or if it gathers data for general rather than tactical use, its pilot—according to the ICRC interpretation—has not taken a direct part in hostilities. In many instances, given the persistent presence of MQ-9s over many U.S. areas of operations, it may be difficult to determine when this general presence has become a “concrete and coordinated tactical operation.”¹⁸²

This is where the *ICRC Guidance* and *Law of War Manual* diverge. Under the *Law of War Manual*, civilians take a direct part in hostilities not just when they take “certain acts that are an integral part of combat operations,” but when they do anything that “effectively and substantially contribute[s] to an adversary’s ability to conduct or sustain combat operations.”¹⁸³ Among its examples of taking a direct part in hostilities, the DoD specifically references “providing or relaying information of immediate use in combat operations.”¹⁸⁴ Although the immediate use qualifier sounds similar to the ICRC requirement

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 54–55.

¹⁸⁰ *Id.* at 55 (“[I]t has become quite common for parties to armed conflicts to conduct hostilities through...remote-controlled (i.e. geographically remote) missiles, unmanned aircraft and computer network attacks. The causal relationship between the employment of such means and the ensuing harm remains direct regardless of temporal or geographical proximity.”).

¹⁸¹ *Id.* (footnotes omitted).

¹⁸² *Id.* at 54–55.

¹⁸³ LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.3.

¹⁸⁴ *Id.* ¶ 5.8.3.1.

that the act constitute “an integral part of a concrete and coordinated tactical operation,”¹⁸⁵ three observations indicate that such a narrow reading is not appropriate. First, this example falls within the larger category of acts that “effectively and substantially contribute” to a belligerent’s “ability to conduct or sustain combat operations” and therefore constitute direct participation in hostilities.¹⁸⁶ Second, one notes the use of “of” rather than “for” in the operative sentence.¹⁸⁷ “Relaying information *of* immediate use” seems to indicate that the information could be of imminent value even if not actually employed.¹⁸⁸ Had the *Law of War Manual* said, “relaying information *for* immediate use,” one might read that the information’s use is a required element for the collection to qualify as direct participation in hostilities. Third, when compared with “Examples of Acts Not Considered Taking a Direct Part in Hostilities”—like sympathy or moral support, buying war bonds, police services, or journalism—it is clear that combat intelligence operations are of a different nature than those that do not constitute direct participation in hostilities.¹⁸⁹ Finally, even if the above arguments were to fail, the contractors would still lose their protection from direct attack when they become members of an organized armed group—namely, the United States military (or a division of the CIA engaged in combat operations). Membership occurs when the civilians act at the direction of group leadership or within its command structure, perform a function that is analogous to one performed by the U.S. military, and access facilities off limits to most non-military individuals.¹⁹⁰ Whether the pilots are civilians employed by the CIA or contractors used by the Air Force, the nature of their work would satisfy the *Law of War Manual* requirements of formal membership in an organized armed group.

c. Maintenance and Logistics Operations

This subsection considers the result if the contractors are another step removed from the actual operation of the MQ-9, to the physical upkeep of the MQ-9s and their sensors, communications systems, and weapons. For years civilians have been contracted to serve in these roles in areas of combat operations, “typically working alongside military and federal civilian counterparts as a team, often doing the same type of work, sometimes

¹⁸⁵ ICRC GUIDANCE, *supra* note 5, at 54–55.

¹⁸⁶ LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.3.

¹⁸⁷ *Id.* ¶ 5.8.3.1.

¹⁸⁸ *Id.* (emphasis added).

¹⁸⁹ *Id.* ¶ 5.8.3.2.

¹⁹⁰ *Id.* ¶ 5.7.3.1.

indistinguishable in appearance to outsiders.”¹⁹¹ In fact, contractor employees “provide logistics support, software maintenance, flight operations support, aircraft repair, ground control and other work on most Air Force drones.”¹⁹²

Under the *ICRC Guidance*, the highest hurdle to showing that maintenance and logistical support are direct participation in hostilities is that there must be “a direct causal link between a specific act and the harm likely to result.”¹⁹³ The *ICRC Guidance* recognizes, however, that some operations are collective in nature, requiring the actions of many individuals to effectively execute them.¹⁹⁴ In these cases, “where a specific act does not on its own directly cause the required threshold of harm, the requirement of direct causation would still be fulfilled where the act constitutes an integral part of a concrete and coordinated tactical operation that directly causes such harm.”¹⁹⁵ But whether weapons and aircraft maintenance can ever be an integral part of a tactical operation is not certain—indeed, the only time the *ICRC Guidance* mentions the maintenance of weapons is to say that, in the context of membership in an armed group, civilians whose function is limited to the maintenance of weapons “do not assume continuous combat function

¹⁹¹ Kerik D. Clanahan, *Wielding a “Very Long, People-Intensive Spear”: Inherently Governmental Functions and the Role of Contractors in U.S. Department of Defense Unmanned Aircraft Systems Missions*, 70 A.F. L. REV. 119, 167– (2013) (citing Stephen M. Blizzard, *Contractors on the Battlefield: How Do We Keep From Crossing the Line?*, 2004 A.F. J. LOGISTICS 11 (noting that contractors handled 28 percent of weapons systems maintenance, even though the Bush administration wanted to increase contractor responsibility to 50 percent)); Michael E. Guillory, *Civilianizing the Force: Is the United States Crossing the Rubicon?*, 51 A.F. L. REV. 111, 123–24 (2001) (discussing the numerous contractors deployed in support of highly technical, modern weapons systems); Karen L. Douglas, *Contractors Accompanying the Force: Empowering Commanders with Emergency Change Authority*, 55 A.F. L. REV. 127, 134–35 (2004) (“The third type of battlefield contract is a system contract for the support and maintenance of equipment throughout the system’s lifecycle. Such systems include vehicles, weapon systems, and aircraft and communications systems deployed with the military.”) (footnotes omitted); see also U.S. GEN. ACCOUNTING OFFICE, GAO-08-1087, MILITARY OPERATIONS: DOD NEEDS TO ADDRESS CONTRACT OVERSIGHT AND QUALITY ASSURANCE ISSUES FOR CONTRACTS USED TO SUPPORT CONTINGENCY OPERATIONS 29 (2008) (“[I]n fiscal year 2002, Congress provided the Air Force with \$1.5 billion to acquire 60 additional unmanned Predator aircraft; however, according to Air Force documents, the Air Force did not have the additional 1,409 personnel needed to maintain these new assets. As a result, the Air Force used contractors to support the additional aircraft.”).

¹⁹² Hennigan, *supra* note 155.

¹⁹³ ICRC GUIDANCE, *supra* note 5, at 51.

¹⁹⁴ *Id.* at 54.

¹⁹⁵ *Id.* at 54–55.

and, for the purposes of the principle of distinction, cannot be regarded as members of an organized armed group.”¹⁹⁶ It therefore appears unlikely that maintenance by a civilian contractor could, under the *ICRC Guidance*, amount to “an integral part of a concrete and coordinated tactical operation that directly causes such harm,” thereby constituting direct participation in hostilities.¹⁹⁷ This result seems to confirm that, just because an activity like aircraft maintenance is absolutely required in order for the aircraft to achieve its ultimate purpose, does not mean that the activity is necessarily “integral” under the *ICRC Guidance*.¹⁹⁸

The *Law of War Manual*, on the other hand, clearly extends direct participation to those whose acts “effectively and substantially contribute to an adversary’s ability to conduct or sustain combat operations.”¹⁹⁹ Using this standard, maintenance support of MQ-9s constitutes direct participation in hostilities, since without such maintenance, the MQ-9 would not fly and therefore could not fulfill its military purpose. In examining each of the *Law of War Manual’s* factors, several are prominent. First, it is difficult to imagine the optimization of a deadly aircraft like the MQ-9, with its sensors and weapons, as anything but an act which “by [its] nature and purpose, [is] intended to cause actual harm to the enemy.”²⁰⁰ Second, the logistics and maintenance required for the operation of a military aircraft is “connected to military operations,” “intended to advance the war aims of one party,” “contributes to a party’s military action against the opposing party,” and “is traditionally performed by military forces in conducting military operations against the enemy (including combat, combat support, and combat service support functions).”²⁰¹ In these circumstances, the factors demonstrate the clear combat role of the civilian maintainer under the *Law of War Manual*.

In conclusion, there are clear differences between the application of ICRC and DoD standards for direct participation in hostilities for MQ-9 operations. Under the *ICRC Guidance*, civilian employees and contractors

¹⁹⁶ *Id.* at 35.

¹⁹⁷ *Id.* at 54–55.

¹⁹⁸ *Id.*

¹⁹⁹ LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.3.

²⁰⁰ *Id.*

²⁰¹ *Id.* It will be interesting to see whether future revisions of the *Law of War Manual* define activities which are “traditionally performed by military forces” or modify that factor in light of the United States’ continued use of contractors to fly and maintain remotely-piloted aircraft. *See supra* pp. 83–84.

who employ weapons from an MQ-9 clearly take a direct part in hostilities. Those who fly the MQ-9 and employ its sensors for surveillance purposes only are taking a direct part in hostilities only if the operation serves as “an integral part of a concrete and coordinated tactical operation that directly causes such harm.”²⁰² Finally, under the *ICRC Guidance*, maintenance and logistics support of aircraft do not appear to constitute direct participation in hostilities. Conversely, all three activities do constitute direct participation in hostilities under the *Law of War Manual*, since even supporting roles “effectively and substantially contribute to [the U.S. military’s] ability to conduct or sustain combat operations.”²⁰³

2. Operations in Cyberspace

The already difficult task of interpreting direct participation in hostilities becomes even more challenging in cyberspace.²⁰⁴ The primary challenge is that characteristics of war taken for granted in “traditional” direct participation in hostilities in the physical world—and backed up by millennia of experience—are less clear in cyberspace. For example, both the ICRC and the DoD would agree that one who pulls the trigger of a gun and shoots at his enemy is, assuming other relevant criteria are met, taking a direct part in hostilities. But what if this same individual is inserting malicious code? Does it matter if the code has a physical effect on the receiving end? What if the code is simply designed to spy or steal from the enemy?

Over a three-year period, the concept of direct participation in hostilities in cyberspace (among many other aspects of “cyber warfare”) was examined by the International Group of Experts at the Invitation of the NATO Cooperative Cyber Defence Centre of Excellence. The fruit of their

²⁰² ICRC GUIDANCE, *supra* note 5, at 54–55.

²⁰³ LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.3.

²⁰⁴ See TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE 564 (Michael N. Schmitt ed., 2017) [hereinafter TALLINN MANUAL 2.0] (defining cyberspace as “[t]he environment formed by physical and non-physical components, characterized by the use of computers and the electro-magnetic spectrum, to store, modify, and exchange data using computer networks.”); LAW OF WAR MANUAL, *supra* note 4, ¶ 16.1.1 (citing JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-12 (R), CYBERSPACE OPERATIONS, at GL-4 (Feb. 5, 2013) (defining cyberspace as “[a] global domain within the information environment consisting of interdependent networks of information technology infrastructures and resident data, including the Internet, telecommunications networks, computer systems, and embedded processors and controllers.”)). The *ICRC Guidance* does not define, nor does it expressly discuss, operations in cyberspace.

labors was the 2013 *Tallinn Manual on the International Law Applicable to Cyber Warfare*; expanded and updated in 2017 as the *Tallinn Manual 2.0*. The *Tallinn Manual 2.0* ultimately concluded that, as in the physical world, civilians in cyberspace “enjoy protection against attack unless and for such time as they directly participate in hostilities.”²⁰⁵

The challenge remains, however, in determining just what constitutes direct participation in hostilities in cyberspace. In general, the *Tallinn* experts agreed with the criteria set forth in the *ICRC Guidance* to determine whether a civilian takes a direct part in hostilities: threshold of harm, direct causation, and belligerent nexus.²⁰⁶ In this section, both ICRC and U.S. standards for direct participation in hostilities are applied to activities in cyberspace. This is done by borrowing one commentator’s division of roles: those who actually execute cyber operations (the figurative “trigger pullers”), those who install and maintain the programs on computer systems, and those who design and write the programs that are used.²⁰⁷

a. Execution of Cyber Operations

For the purposes of this section, the DoD’s definition of cyber operations is used—i.e., “The employment of cyberspace capabilities where the primary purpose is to achieve objectives in or through cyberspace.”²⁰⁸ Objectives can be achieved in cyberspace by using computers to “disrupt, deny, degrade, or destroy information resident in computers and computer networks, or the computers and networks themselves.”²⁰⁹ Similarly, cyber operations could consist of such actions as “reconnaissance (e.g., mapping a network), seizure of supporting positions (e.g., securing access to key network systems or nodes), and pre-emplacment of capabilities or weapons (e.g., implanting cyber access tools or malicious code).²¹⁰ For the purposes of this article, defensive tools like firewalls and anti-virus software do not constitute cyber operations since, rather than “achiev[ing] objectives in or

²⁰⁵ TALLINN MANUAL 2.0, *supra* note 204, at 428.

²⁰⁶ *Id.* at 429.

²⁰⁷ David Turns, *Cyber Warfare and the Notion of Direct Participation in Hostilities*, 17 J. CONFLICT & SECURITY L. 279, 289 (2012).

²⁰⁸ JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-0, JOINT OPERATIONS, at GL-8 (2011) [hereinafter JOINT PUBLICATION 3-0].

²⁰⁹ LAW OF WAR MANUAL, *supra* note 4, ¶ 16.1.2.1.

²¹⁰ *Id.*

through cyberspace,²¹¹ they are designed to protect internal systems from the cyber operations of others. They are, in effect, the shield rather than sword. On the other hand, certain cyber operations can have dramatic offensive effects in the physical realm. For instance, the *Law of War Manual* considers examples of “cyber operations that: (1) trigger a nuclear plant meltdown; (2) open a dam above a populated area, causing destruction; or (3) disable air traffic control services, resulting in airplane crashes.”²¹²

One prominent example of a cyber operation with significant effects in the physical domain is the 2010 “Stuxnet” operation. Stuxnet is the name given to a computer program designed to attack the computer systems that controlled certain centrifuges in use at the nuclear enrichment facility in Natanz, Iran.²¹³ The operation, reportedly performed by the United States and Israel, “temporarily took out nearly 1,000 of the 5,000 centrifuges Iran had spinning at the time to purify uranium. . . Internal Obama administration estimates say [Iran’s nuclear program] was set back by 18 months to two years.”²¹⁴ In light of the significant damage caused to Iranian centrifuges and its uranium program, some of the *Tallinn* experts even concluded that the operation reached the threshold of “armed attack” under Article 51 of the Charter of the United Nations.²¹⁵

Application of the *ICRC Guidance* standard to the Stuxnet attack on Iran’s facilities results in a conclusion that the actors²¹⁶ took a direct part in hostilities. First, the Stuxnet actors met the ICRC threshold of harm requirement because the destruction of the centrifuges was either “of a specifically

²¹¹ JOINT PUBLICATION 3-0, *supra* note 208, at GL-8.

²¹² LAW OF WAR MANUAL, *supra* note 4, ¶ 16.3.1.

²¹³ David E. Sanger, *Obama Order Sped Up Wave of Cyberattacks Against Iran*, N.Y. TIMES (June 1, 2012), <http://www.nytimes.com/2012/06/01/world/middleeast/obama-ordered-wave-of-cyberattacks-against-iran.html>; *see also* Peter Beaumont & Nick Hopkins, *US Was ‘Key Player in Cyber-attacks on Iran’s Nuclear Programme*, GUARDIAN (June 1, 2012), <https://www.theguardian.com/world/2012/jun/01/obama-sped-up-cyberattack-iran>; Kim Zetter, *How Digital Detectives Deciphered Stuxnet, the Most Menacing Malware in History*, WIRED (July 11, 2011), <https://www.wired.com/2011/07/how-digital-detectives-deciphered-stuxnet/>.

²¹⁴ Sanger, *supra* note 213.

²¹⁵ TALLINN MANUAL 2.0, *supra* note 204, at 342; *see also* U.N. Charter art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations. . .”).

²¹⁶ For the sake of argument, this article hypothesizes that those who executed the Stuxnet attack were civilians and not uniformed military personnel.

military nature” (if the centrifuges were enriching uranium for a military purpose, whether for nuclear weapons or power) or it represented destruction of civilian objects (if the enrichment was for purely peaceful purposes).²¹⁷ The extent of the harm caused by Stuxnet was captured by the *New York Times*’ observation that, for the first time, the United States had “used cyberweapons to cripple another country’s infrastructure, achieving, with computer code, what until then could be accomplished only by bombing a country or sending in agents to plant explosives.”²¹⁸ Second, even if the actor who “launched” Stuxnet was geographically removed from its effects or the program “lurked” for days or weeks before causing the centrifuges’ destruction, the harm brought about by Stuxnet’s operator was still accomplished in “one causal step.” This is because the ICRC causal step requirement refers to direct causation as a causal factor, not a temporal or geographic factor:

For example, it has become quite common for parties to armed conflicts to conduct hostilities through delayed (i.e. temporally remote) weapons-systems, such as mines, booby-traps and timer-controlled devices, as well as through remote-controlled (i.e. geographically remote) missiles, unmanned aircraft and computer network attacks. The causal relationship between the employment of such means and the ensuing harm remains direct regardless of temporal or geographical proximity.²¹⁹

Finally, and most clearly among the other factors, there was a belligerent nexus because Stuxnet was designed to and actually did inflict harm on an enemy of the actor.²²⁰

A review of the attack under the *Law of War Manual*’s definition and factors results in an even clearer conclusion that the Stuxnet operation, had it been perpetrated by civilians, would have constituted direct participation in hostilities. Here, the actions necessary to deploy Stuxnet were “by their nature and purpose, intended to cause actual harm to the enemy”; and so

²¹⁷ ICRC GUIDANCE, *supra* note 5, at 47.

²¹⁸ Sanger, *supra* note 213.

²¹⁹ ICRC GUIDANCE, *supra* note 5, at 55.

²²⁰ *Id.* at 58. However, as the *ICRC Guidance* notes, “Belligerent nexus should be distinguished from concepts such as subjective intent and hostile intent. These relate to the state of mind of the person concerned, whereas belligerent nexus relates to the objective purpose of the act. That purpose is expressed in the design of the act or operation and does not depend on the mindset of every participating individual.” *Id.* at 59.

they did, setting Iran's nuclear weapons program back between 18 months and two years.²²¹ Moreover, the *Law of War Manual* specifically considers effects that could be relevant in the cyber domain and are likely to become more so as technology advances. Cyber operations can be used to “damage material belonging to the opposing party”²²² by disabling internal or external websites, servers, or vital communications. Conversely, defenses are regularly deployed to “defend military objectives against enemy attack”²²³ in the cyber domain; a network firewall is analogous to an armed sentry in the physical domain. Finally, hacking into the enemy's network or other resources could simply be another means of “providing or relaying information of immediate use in combat operations.”²²⁴

b. Installation and Maintenance of Systems Used for Cyber Operations

Assuming that a planned cyber operation is of sufficient scale to meet the threshold for direct participation in hostilities, this section analyzes whether the civilians who install and maintain hardware and software through which the operation is conducted could also be directly participating in hostilities and thus lose their protection from direct attack. The analysis here is no different than that in the physical world, where individuals must support combat operations ultimately executed by aircraft, ships, missiles, bombs, and tanks.

Under the *ICRC Guidance*, as with the maintenance of MQ-9 aircraft and its systems, in order to constitute direct participation in hostilities, the element of direct causation requires the act to serve as “an integral part of a concrete and coordinated tactical operation that directly causes such harm.”²²⁵ As mentioned above, the only time the *ICRC Guidance* comes close to describing this kind of maintenance support to combat operations is to say that civilians who maintain weapons “do not assume continuous combat function” for the purpose of recognition in an organized armed group.²²⁶ It therefore

²²¹ Sanger, *supra* note 213 (but also noting that “some experts inside and outside the government are more skeptical, noting that Iran's enrichment levels have steadily recovered, giving the country enough fuel [in 2012] for five or more weapons, with additional enrichment.”).

²²² LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.3.1.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ ICRC GUIDANCE, *supra* note 5, at 54–55.

²²⁶ *Id.* at 35.

appears unlikely that civilian maintenance of hardware or software, regardless of whether that hardware or software is ultimately used in the physical world or in cyberspace, would amount to “an integral part of a concrete and coordinated tactical operation” under the *ICRC Guidance*.²²⁷

On the other hand, an analysis of installation and maintenance of hardware and software for use in a cyber operation under the *Law of War Manual* appears to indicate that civilians directly participate in hostilities when they maintain the hardware and software through which cyber operations will be conducted against an enemy. Recall that the *Law of War Manual* extends direct participation beyond civilians whose actions cause direct harm to the enemy and includes “certain acts that are an integral part of combat operations or that effectively and substantially contribute to an adversary’s ability to conduct or sustain combat operations.”²²⁸ The maintenance of hardware and software that is used to engage in cyber operations meets this test because the equipment thus used must be ready to employ upon order by competent authority.²²⁹

In spite of this conclusion, the case for including civilians who maintain equipment for cyber operations is less clear than the case for those who maintain physical weapon systems. For example, whereas the MQ-9 is “by [its] nature and purpose, intended to cause actual harm to the enemy,”²³⁰ cyber operations can run the gamut from offensive operations that cause physical damage or bodily harm to interception of communications which cause no actual, direct harm at all. On the other hand, and similar to the logistics and maintenance required for physical weapons systems, cyber operations are “connected to military operations,” “intended to advance the war aims of one party,” “[contribute] to a party’s military action against the opposing party,” and are “traditionally performed by military forces in conducting military operations against the enemy (including combat, combat support, and combat service support functions).”²³¹ Practically speaking, this means the attacker must know the nature, and perhaps the purpose, of the hardware

²²⁷ *Id.* at 54–55.

²²⁸ LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.3.

²²⁹ Although cyber operations have been defined above to exclude defensive operations, keeping software secure from cyber penetration by others, perhaps by the use of firewalls and anti-virus software requiring regular updates, could also constitute “maintenance” of the cyber weapon.

²³⁰ LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.3.

²³¹ *Id.*

or software being maintained in order to determine whether the maintainer is taking a direct part in hostilities. Accordingly, ascertaining whether a civilian has satisfied this factor of direct participation in hostilities may be nearly impossible in the cyber domain.

c. Design of Systems Used for Cyber Operations

Under either the ICRC or DoD standard, it is most difficult to discern whether civilians who engineer the code that will be used in cyber operations are directly participating in hostilities, since these civilians are furthest from the actual effects that the tool will have on adversaries. Nonetheless, it is crucial to determine whether such civilians are protected by international humanitarian law from direct attack; it should be especially important to the U.S. DoD, which employs tens of thousands of civilians in its National Security Agency (NSA) and Cyber Command.²³²

Under the *ICRC Guidance*, determining whether computer design and programming could reach the level of direct participation in hostilities is likely to be highly fact dependent. A computer program conducting network intrusion, espionage, or damage to military systems or persons would almost certainly meet the low bar for “threshold of harm,” since

[w]hen an act may reasonably be expected to cause harm of a specifically military nature, the threshold requirement will generally be satisfied regardless of quantitative gravity. In this context, military harm should be interpreted as encompassing not only the infliction of death, injury, or destruction on mili-

²³² Anne Gearan, “No Such Agency” *Spies on the Communications of the World*, WASH. POST (June 6, 2013), https://www.washingtonpost.com/world/national-security/no-such-agency-spies-on-the-communications-of-the-world/2013/06/06/5bcd46a6-ceb9-11e2-8845-d970ccb04497_story.html (“The agency is so secretive that estimates of the number of employees range from the official figure of about 35,000 to as high as 55,000.”); Oriana Pawlyk, *Calling up the Reserves: Cyber Mission is Recruiting*, A.F. TIMES (Jan. 3, 2015), <https://www.airforcetimes.com/story/military/careers/air-force/2015/01/03/us-cyber-command-recruiting/21226161/> (discussing a “Defense Department-wide effort that will put in place 133 cyber mission force teams with 6,000 personnel by 2017.”); Kenneth Corbin, *U.S. Cyber Command Struggles to Retain Top Cybersecurity Talent*, CIO (June 7, 2016), <http://www.cio.com/article/3080014/government/u-s-cyber-command-struggles-to-retain-top-cybersecurity-talent.html> (“Within Cyber Command’s Cyber National Mission Force, which is comprised of 39 teams scattered around the country, about 80 percent of the personnel are military, with the balance made up of civilians.”).

tary personnel and objects, but essentially *any consequence adversely affecting the military operations or military capacity of a party to the conflict*.²³³

Second, the creation of a program for offensive or defensive cyber operations could very well meet the “belligerent nexus” criterion if the act “was in support of a party to an armed conflict and to the detriment of another.”²³⁴ So, for example, any of the actions described above (network intrusion, espionage, or damage to military systems) would satisfy the “belligerent nexus” requirement if it was “*specifically designed to do so in support of a party to an armed conflict and to the detriment of another*.”²³⁵ Operations in cyberspace that are not designed to harm an adversary, like cybercrime—including installation of ransomware for personal gain or general criminal activity conducted through cyberspace (like human trafficking or illicit drug trade)—would fall short of direct participation in hostilities.²³⁶ However, as in the physical world, a belligerent nexus could exist if this inter-civilian cybercrime was “motivated by the same political disputes or ethnic hatred that underlie the surrounding armed conflict and where it causes harm of a specifically military nature.”²³⁷

Nonetheless it appears that, even if the criteria for threshold of harm and belligerent nexus were satisfied, it is unlikely that the design of a computer program would meet the *ICRC Guidance*’s test for direct causation, since “direct causation should be understood as meaning that the harm in question must be brought about in one causal step.”²³⁸ In fact, “scientific research and design” and “production and transport of weapons and equipment” are expressly excluded from acts which would result in a loss of protection from direct attack.²³⁹

²³³ ICRC GUIDANCE, *supra* note 5, at 47 (emphasis added) (footnotes omitted).

²³⁴ *Id.* at 58.

²³⁵ *Id.* (emphasis added).

²³⁶ *See id.* at 58–59.

²³⁷ *Id.* at 63.

²³⁸ *Id.* at 53.

²³⁹ *Id.* (“[A]lthough the recruitment and training of personnel is crucial to the military capacity of a party to the conflict, the causal link with the harm inflicted on the adversary will generally remain indirect”).

An application of the *Law of War Manual* differs primarily in its abandonment of the ICRC’s “one causal step”²⁴⁰ test. Under DoD guidance, “[t]aking a direct part in hostilities... includes certain acts that are an integral part of combat operations or that effectively and substantially contribute to an adversary’s ability to conduct or sustain combat operations” as long as those acts are, “by their nature and purpose, intended to cause actual harm to the enemy.”²⁴¹ “Those who design and write the programs used for offensive or defensive [cyber] operations”²⁴² to be used against military targets could fall squarely within this definition in certain circumstances. The following factors would be especially relevant in the cyber context: “the degree to which the act causes harm to the opposing party’s persons or objects,” “the degree to which the act is connected to military operations,” “whether the activity is intended to advance the war aims of one party to the conflict to the detriment of the opposing party,” and “the military significance of the activity to the party’s war effort.”²⁴³

An additional consideration, which could be relevant under both the ICRC and DoD standards, regarding system design was recently reported in the press:

Over a 24-hour period, top U.S. cyber defenders engaged in a pitched battle with Russian hackers who had breached the unclassified State Department computer system and displayed an unprecedented level of aggression that experts warn is likely to be turned against the private sector.... “It was hand-to-hand combat,” said NSA Deputy Director Richard Ledgett... Ledgett said the attackers’ thrust-and-parry moves inside the network while defenders were trying to kick them out amounted to “a new level of interaction between a cyber attacker and a defender.”²⁴⁴

²⁴⁰ *Id.*

²⁴¹ LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.3 (footnotes omitted).

²⁴² David Turns, *supra* note 207, at 289.

²⁴³ LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.3.

²⁴⁴ Ellen Nakashima, *New Details Emerge About 2014 Russian Hack of the State Department: It Was ‘Hand to Hand Combat’*, WASH. POST (Apr. 3, 2017), https://www.washingtonpost.com/world/national-security/new-details-emerge-about-2014-russian-hack-of-the-state-department-it-was-hand-to-hand-combat/2017/04/03/d89168e0-124c-11e7-833c-503e1f6394c9_story.html.

This scenario could change the analysis, even for the ICRC, if the design of the program was being “carried out as an integral part of a specific military operation,”²⁴⁵ perhaps simultaneous to its employment. Based on the NSA official’s description likening cyber operations to “hand-to-hand combat,”²⁴⁶ it appears that Russian software design may have been occurring just prior to or nearly simultaneously with its execution, with one or more operators executing a program while at the same time tweaking the program’s code to maximize its effects against an adversary. In that case, the designer appears to have become a primary actor—not unlike the co-pilot of a combat aircraft—rather than the aircraft’s past creator since “the act [now] constitutes an integral part of a concrete and coordinated tactical operation that directly causes such harm.”²⁴⁷

In conclusion, the above analysis shows that it is generally more difficult to ascertain whether an act constitutes direct participation in hostilities in cyberspace as compared to the physical realm. Although the analysis is challenging in the academic sense, it may be nearly impossible in a combat scenario since the opacity of cyberspace masks the actions, intent, or even the identity of the actor. However, where cyber operators execute programs with military-like effects, both the *ICRC Guidance* and the *Law of War Manual* interpret such actions as direct participation in hostilities. Next, as in the physical realm, only the *Law of War Manual* views civilians who provide maintenance and logistic support of cyber activities as taking a direct part in hostilities. Finally, it appears that under the *ICRC Guidance*, the design of hardware or software that performs a cyber operation would generally lack the element of direct causation, while a fact-dependent analysis under the *Law of War Manual* is inconclusive, since the ultimate effect of the operation appears to influence the analysis. However, recent developments showing a contemporaneous back-and-forth between cyber actors blur the line between the designers and operators of these systems, demonstrating that the determination of direct participation in hostilities is fact-dependent.

3. Combat Support Services

On January 19, 2017, two B-2 Spirit bombers took off from Whiteman Air Force Base, Missouri, in the heartland of the United States.²⁴⁸ Many

²⁴⁵ ICRC GUIDANCE, *supra* note 5, at 53.

²⁴⁶ Nakashima, *supra* note 244.

²⁴⁷ ICRC GUIDANCE, *supra* note 5, at 54–55.

²⁴⁸ Eric Schmitt & Michael R. Gordon, *U.S. Bombs ISIS Camps in Libya*, N.Y. TIMES

hours later and without stopping, those same aircraft dropped over 100 satellite-guided bombs, killing more than 80 militants near Sirte (or Surt), Libya.²⁴⁹ The B-2s refueled at least five times along the way and returned to Whiteman Air Force Base more than 30 hours later.²⁵⁰ This was not the only instance of Whiteman Air Force Base serving as a launching point for combat operations: B-2s flew 25 hours to drop 90,000 pounds of bombs over Libya in 2011,²⁵¹ and the aircraft have demonstrated U.S. capabilities to potential adversaries on numerous occasions, including flights to the Pacific and the Mediterranean.²⁵² These missions would of course not be possible without a significant support structure back at Whiteman Air Force Base.

Of the nearly half-million members of the regular U.S. Air Force (313,242 active duty Airmen and 141,197 permanent, full-time, U.S. civilian employees), only 12,681 (2.79 percent) are pilots.²⁵³ This section explores the extent to which civilians serving in combat support service roles—“[t]he essential capabilities, functions, activities, and tasks necessary to sustain all elements of all operating forces in theater at all levels of war”²⁵⁴—may be subject to direct attack by virtue of their direct participation in hostilities, again applying the ICRC and DoD interpretations of that concept. To facilitate

(Jan. 19, 2017), <https://nyti.ms/2jCLEHo>; see also Lucas Tomlinson & Jennifer Griffin, *B-2 bombers Kill Nearly 100 ISIS Terrorists in Libya*, FOX NEWS (Jan. 19, 2017), <http://www.foxnews.com/world/2017/01/19/b-2-bombers-strike-isis-in-libya.html>; Andrew deGrandpre & Stephen Losey, *U.S. Airstrikes Kill “Several Dozen” Islamic State Fighters in Libya*, A.F. TIMES (Jan. 19, 2017), <https://www.airforcetimes.com/articles/air-force-b-2-bombers-strike-isis-camps-in-libya>; Terri Moon Cronk, *U.S. Airstrikes Kill 80 ISIL Fighters in Libya, Carter Says*, U.S. CENTRAL COMMAND (Jan. 19, 2017), <http://www.centcom.mil/MEDIA/NEWS-ARTICLES/News-Article-View/Article/1054868/us-airstrikes-kill-80-isis-fighters-in-libya-carter-says/>.

²⁴⁹ Schmitt & Gordon, *supra* note 248.

²⁵⁰ Tomlinson, *supra* note 248.

²⁵¹ Richard Hartley-Parkinson, *Touchdown: B-2 Stealth Jets Return After Epic 11,500 Mile Journey to Bomb Libyan Aircraft Shelters*, DAILY MAIL (Mar. 21, 2011), <http://www.dailymail.co.uk/news/article-1368337/Libya-crisis-B2-stealth-bombers-25-hour-flight-Missouri-Tripoli.html>.

²⁵² See Jay Solomon, Julian E. Barnes & Alastair Gale, *North Korea Warned: U.S. Flies Stealth Bombers Over Peninsula in Show of Might*, WALL ST. J. (Mar. 29, 2013), <https://www.wsj.com/articles/SB1000142412788732350100457838916210632364>; David Cenciotti, *All You Need to Know About Last Week’s B-2 Stealth Bombers Round Trip Mission Across the Atlantic*, AVIATIONIST (Sept. 18, 2013), <https://theaviationist.com/2013/09/18/b-2-atlantic-mission/>.

²⁵³ *Air Force Demographics*, A.F. PERSONNEL CENTER, <http://www.afpc.af.mil/Air-Force-Demographics> (last visited Apr. 7, 2017).

²⁵⁴ JOINT PUBLICATION 4-0, *supra* note 6, at GL-5.

the analysis, three recent civilian targets of U.S. direct action are compared to appropriate analogues that may support U.S. military operations.

a. Budget and Finance

On March 25, 2016, the U.S. DoD revealed that earlier in the week it had killed the Islamic State’s “top financier,” Abd al-Rahman Mustafa al-Qaduli.²⁵⁵ Applying the DoD’s standard for direct participation in hostilities,²⁵⁶ one can see why such a strike would have been authorized. Mr. Qaduli was believed to have been a “top Islamic State commander” and “the group’s top financier.”²⁵⁷ As a commander and Islamic State’s chief financial officer, his actions would have undoubtedly served as “an integral part” of the group’s combat operations or, at a minimum, “effectively and substantially” contributed to their ability to engage the United States and its allies in combat.²⁵⁸

DoD’s standard may also be applied to the civilian budget chief at Whiteman Air Force Base in Missouri, the point of departure and return of combat aircraft.²⁵⁹ The comptroller squadron at Whiteman Air Force Base

²⁵⁵ Michael S. Schmidt & Mark Mazzetti, *A Top ISIS Leader is Killed in an Airstrike, the Pentagon Says*, N.Y. TIMES (Mar. 25, 2016), <https://www.nytimes.com/2016/03/26/world/middleeast/abd-al-rahman-mustafa-al-qaduli-isis-reported-killed-in-syria.html>.

²⁵⁶ Though we here examine whether Mr. Qaduli took a direct part in hostilities, it is certainly possible, perhaps more probable, that Mr. Qaduli was targeted based on his membership in an organized armed group or an operational role in Islamic State attacks. See Schmidt & Gordon, *supra* note 255. Ashton Carter, then-U.S. defense secretary, announced Mr. Qaduli’s death and noted that “We are systematically eliminating ISIL’s cabinet” and “Striking leadership is necessary.... They are senior, they’re experienced, and so eliminating them is an important objective and it achieves an important result. But they will be replaced, and we’ll continue to go after their leadership.” General Joseph F. Dunford, Jr., Chairman of the Joint Chiefs of Staff, added that “we’ve started to affect their command and control in a negative way.” *Id.* See also LAW OF WAR MANUAL, *supra* note 4, ¶ 5.7.3 (“Like members of an enemy State’s armed forces, individuals who are formally or functionally part of a non-State armed group that is engaged in hostilities may be made the object of attack because they likewise share in their group’s hostile intent.”) (citing *Al-Adahi v. Obama*, 613 F.3d 1102 (D.C. Cir. 2010) (“Whatever his motive, the significant points are that al-Qaida was intent on attacking the United States and its allies, that bin Laden had issued a fatwa announcing that every Muslim had a duty to kill Americans, and that Al-Adahi voluntarily affiliated himself with al-Qaida.”)).

²⁵⁷ Schmidt, *supra* note 255.

²⁵⁸ LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.3.

²⁵⁹ The same analysis could potentially be applied to civilians providing combat service support at Shaw Air Force Base (home to U.S. Air Forces Central Command) or MacDill Air Force Base (home to both U.S. Central Command and U.S. Special Operations

manages all funds appropriated to the base by Congress, “develop[ing] and execut[ing] financial plans, interpret[ing] financial policy and furnish[ing] fiscal guidance for commanders at every level.”²⁶⁰ Civilians engaged in this mission might very well serve as an integral part of combat operations or contribute “effectively and substantially” to the base mission since they manage all of the funds appropriated to the base by Congress.²⁶¹ To the extent Mr. Qaduli served in a very high position within the Islamic State, one might note that the combat power of one of Whiteman’s B-2s far exceeds that of the entire Islamic State.²⁶²

On the other hand, it is difficult to see how a base budget chief might lose his protection from direct attack under the *ICRC Guidance’s* interpretation of direct participation in hostilities. This is because, under the *ICRC Guidance*, the act in question (managing appropriated funds) would support “the general war effort and war sustaining activities,”²⁶³ an act which is removed from the B-2’s weapons employment by more than “one causal step.”²⁶⁴

b. Transportation of Senior Commanders and Weapons

The United States has similarly targeted those providing logistical support to the leaders of organized groups, like Salim Hamdan, a Yemeni national who served as Osama bin Laden’s driver between 1996 and 2001.²⁶⁵ As bin Laden’s personal driver, Hamdan drove or accompanied him to various training camps, press conferences, and lectures. Hamdan also transported weapons for al Qaeda and received weapons training at al Qaeda-sponsored camps.²⁶⁶ As in previous examples, we only examine here whether Hamdan

Command), among others.

²⁶⁰ *509th Comptroller Squadron*, WHITEMAN AIR FORCE BASE, <http://www.whiteman.af.mil/Units/509th-BW-Staff-Agencies/509th-Comptroller-Squadron> (last visited Feb. 15, 2017).

²⁶¹ LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.3.

²⁶² *See B-2 Spirit Fact Sheet*, U.S. AIR FORCE (Dec. 16, 2015), <http://www.af.mil/AboutUs/FactSheets/Display/tabid/224/Article/104482/b-2-spirit.aspx>. The B-2 can carry 40,000 pounds of conventional or nuclear weapons and employ them anywhere in the world. *Id.* Moreover, “[i]ts low-observable, or ‘stealth,’ characteristics give it the unique ability to penetrate an enemy’s most sophisticated defenses and threaten its most valued, and heavily defended, targets.” *Id.*

²⁶³ ICRC GUIDANCE, *supra* note 5, at 52.

²⁶⁴ *Id.* at 53.

²⁶⁵ *Hamdan v. Rumsfeld*, 548 U.S. 557, 570 (2006).

²⁶⁶ *Id.*

took a direct part in hostilities through his role as a driver and transporter, even though he may have also lost his protection against direct attack based on his membership in an organized armed group.

Although Hamdan was captured and not killed,²⁶⁷ he may also have lost his protection from direct lethal action as viewed through the lens of the later-adopted *Law of War Manual*. Taken as a whole, Hamdan’s acts—driving bin Laden to “official” al Qaeda functions, transporting weapons, and training in terrorist camps—may very well have risen to the level of direct participation in hostilities if those acts “effectively and substantially” contributed to al Qaeda’s ability to conduct or sustain operations.²⁶⁸ Similarly, transporting weapons in close geographic or temporal proximity to actual combat might provide a sufficient nexus to hostilities to be labeled direct participation in those hostilities.²⁶⁹ On the other hand, none of these acts seems, on its own, to provide effective and substantial support to the military effort—particularly as performed by a low-level operative—and none mirrors any of the specific examples of direct participation in hostilities set forth in the *Law of War Manual*.²⁷⁰

Application of the *ICRC Guidance* test to Hamdan would also produce a result that depends on the specifics of his actions. For example, if he served only generally as bin Laden’s driver and transported weapons to and from a training camp that did not serve as a launching point for combat operations, Hamdan’s actions would not meet the ICRC’s direct participation in hostilities threshold. First, these acts are unlikely to inflict death or cause “harm of a specifically military nature” to the enemy (threshold of harm).²⁷¹ Second, any harm that did occur would have resulted from actions that occurred further than “one causal step” from Hamdan’s support activities (direct causation).²⁷² Finally, there are significant questions as to whether a rear echelon driver and transporter’s actions were “specifically designed to directly cause the

²⁶⁷ *Id.* at 566 (Hamdan was captured by Afghan militia forces in November 2001 and turned over to the U.S. military); see also *Petition for Writ of Certiorari, Hamdan v. Rumsfeld*, 2005 WL 1874691, at 2 (Aug. 8, 2005) (“Hamdan was captured by indigenous forces while attempting to flee Afghanistan and return his family to Yemen. After being turned over to American forces, he was taken in June 2002 to Guantanamo Bay Naval Base, where he was placed with the general detainee population at Camp Delta.”).

²⁶⁸ *LAW OF WAR MANUAL*, *supra* note 4, ¶ 5.8.3.

²⁶⁹ *Id.*

²⁷⁰ *Id.* ¶ 5.8.3.1.

²⁷¹ *ICRC GUIDANCE*, *supra* note 5, at 47.

²⁷² *Id.* at 53.

required threshold of harm in support of a party to the conflict [al Qaeda] and to the detriment of another [the United States]” (belligerent nexus).²⁷³

However, if Hamdan delivered bin Laden—an operational commander—and weapons to the front lines of combat, the *ICRC Guidance* would provide a different outcome. In that case, the *ICRC Guidance* expressly recognizes that the transport of weapons “as an integral part of a specific military operation designed to directly cause the required threshold of harm” (e.g., an attack) would meet the standard for direct causation.²⁷⁴ Since those same activities would constitute support of al Qaeda to the detriment of its enemies, the belligerent nexus standard would also be met.²⁷⁵ In summary, under the ICRC standard, Salim Hamdan’s actions constituted direct participation in hostilities if they were performed as an integral part of a specific military operation designed to cause military harm to his organization’s enemies.

Whether (and how) Hamdan took a direct part in hostilities is relevant because the DoD also employs third-country nationals to support combat operations. Imagine, for example, that the DoD employs an Italian, a fictional Marco Rossi, to transport the commander of Naval Air Station (NAS) Sigonella to and from his home in Sicily. Suppose also that Rossi—fluent in English, trustworthy, and reliable—is also used to transport weapons from Italian ports to NAS Sigonella. As NAS Sigonella serves as a launching point for military operations against the Islamic State in North Africa,²⁷⁶ Rossi may unwittingly be taking a direct part in hostilities.

The analysis mirrors that of Hamdan. Under the *Law of War Manual*, transporting a senior commander and weapons constitutes direct participation in hostilities if those acts “effectively and substantially” contributed to a group’s ability to conduct or sustain operations.²⁷⁷ The *Law of War Manual*’s use of geographic proximity as a factor increasing the likelihood that conduct was direct participation in hostilities²⁷⁸ tips the balance against Rossi taking a direct part in hostilities (since Italy is relatively far removed from hostilities

²⁷³ *Id.* at 58 (emphasis omitted).

²⁷⁴ *Id.* at 53.

²⁷⁵ *Id.* at 58.

²⁷⁶ Gordon Lubold & Julian E. Barnes, *Italy Quietly Agrees to Armed U.S. Drone Missions Over Libya*, WALL ST. J. (Feb. 22, 2016), <https://www.wsj.com/articles/italy-quietly-agrees-to-armed-u-s-drone-missions-over-libya-1456163730?mg=id-wsj>.

²⁷⁷ LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.3.

²⁷⁸ *Id.*

on the African continent), but it is hardly clear why, since the range of NAS Sigonella's military aircraft allows them to perform combat missions across the Mediterranean.²⁷⁹ Nonetheless, without a sufficient nexus to combat operations—perhaps Rossi transported weapons to storage or back to the continental United States for maintenance—it is difficult to see how any singular act provided “substantial” support to the U.S. military, and as with Hamdan, Rossi's actions are not described in any of the specific examples listed in the *Law of War Manual*.²⁸⁰

Similarly, the *ICRC Guidance* analysis for Rossi's direct participation in hostilities is fact-specific. As with Hamdan, Rossi's generalized support actions in Italy fail to satisfy the “one causal step” test.²⁸¹ But if Rossi drove the NAS Sigonella commander to base in response to urgent intelligence that provided the opportunity for an imminent U.S. strike, or if he delivered weapons directly to U.S. combat aircraft on the flight line, his actions could have constituted direct participation in hostilities under either the *ICRC Guidance* or *Law of War Manual*. In these cases, Rossi is serving as “an integral part of a specific military operation,” and thus loses his protection from direct attack.²⁸² Rossi's status as an Italian national rather than a U.S. national is irrelevant to the analysis under either standard.

c. Public Affairs

The above examples involve civilians providing combat service support in a very tangible way: one civilian managed the money integral to combat operations and another was responsible for transporting a senior commander and weapons. A perhaps more distant example involves the power of information. This section focuses on whether a civilian's service as a spokesman, social media organizer, propagandist, recruiter, or representative to the media may cause him or her to lose protection from direct attack. The essential question is whether these activities, absent other aggravating factors, can constitute direct participation in hostilities.

Abu Muhammad Al-Adnani fulfilled such a role for the Islamic State until he was killed in a U.S. airstrike on August 30, 2016.²⁸³ Al-Adnani served

²⁷⁹ See Lubold & Barnes, *supra* note 276.

²⁸⁰ See *LAW OF WAR MANUAL*, *supra* note 4, ¶ 5.8.3.1.

²⁸¹ *ICRC GUIDANCE*, *supra* note 5, at 53.

²⁸² *Id.*

²⁸³ Robin Wright, *Abu Muhammad Al-Adnani, the Voice Of ISIS, is Dead*, *NEW YORKER*

as the Islamic State's chief propagandist, "central" to the organization's messaging efforts.²⁸⁴ Again disregarding Al-Adnani's operational role and status as a member of an organized armed group, his actions are examined here to determine whether serving as an organization's mouthpiece alone can constitute direct participation in hostilities.

Under the *ICRC Guidance*, it is difficult to see how Al-Adnani's conduct could represent direct participation in hostilities since propaganda alone is so far removed from "direct" combat operations.²⁸⁵ The best argument for including Al-Adnani's conduct within the *ICRC Guidance*'s threshold is that his propaganda and recruiting efforts were so crucial to the Islamic State that they represented "an integral part" of each and every tactical operation.²⁸⁶ Al-Adnani's importance has been explained as follows:

"He's the voice of ISIL [also referred to as ISIS], and he has been the one advocating for all these horrific attacks in Iraq and Syria and around the world. He has been crucial to their efforts. If it's true [the fact of Al-Adnani's death], it's a significant setback to them." Adnani gained fame for churning out slick videos of ISIS beheading Western hostages and gunning down local opponents in mass executions, with the black ISIS flag flying in the background. His bloodthirsty recruiting tactics attracted thousands of foreign fighters, from five continents.²⁸⁷

This description notwithstanding, the *ICRC Guidance* makes clear that just because a civilian is indispensable to an armed group's combat operations does not mean that he or she is taking a direct part in hostilities, since the acts may not be directly causal to the resulting harm.²⁸⁸ But the above description would likely cause Al-Adnani to lose his protection from direct attack under the *Law of War Manual* standard since serving as "the voice of ISIL" and recruiting thousands of foreign fighters go beyond "the general

(Aug. 30, 2016), <http://www.newyorker.com/news/news-desk/abu-muhammad-al-adnani-the-voice-of-isis-is-dead>.

²⁸⁴ *Id.*

²⁸⁵ See *ICRC GUIDANCE*, *supra* note 5, at 53 ("[D]irect causation should be understood as meaning that the harm in question must be brought about in one causal step.").

²⁸⁶ *Id.* at 54.

²⁸⁷ Wright, *supra* note 283.

²⁸⁸ *ICRC GUIDANCE*, *supra* note 5, at 54.

support that members of the civilian population provide to their State's war effort" and represent actions that "effectively and substantially contribute to [the Islamic State's] ability to conduct or sustain combat operations,"²⁸⁹ since his efforts led to the recruitment of thousands of fighters to replace dead, injured, or deserted members.

How would these same standards for direct participation in hostilities apply to civilians filling public affairs roles in the U.S. military? The U.S. Army, for example, allows students and recent college graduates to serve as public affairs interns whose duties include writing and releasing news, serving as liaisons and escorts to news media, establishing communication plans, and even providing direct assistance to commanders.²⁹⁰ As with Al-Adnani above, it is unlikely that an Army public affairs intern would exceed the threshold for direct participation in hostilities under the *ICRC Guidance* since public affairs functions rarely cause harm in one causal step.

However, under the *Law of War Manual*, a U.S. Army public affairs intern could directly participate in hostilities if his or her actions meet the standard of "effective and substantial" contribution to the U.S. military war effort.²⁹¹ Most public affairs actions, especially as performed by an unseasoned intern without the experience or influence to affect large-scale operations, would be unlikely to inflict a high degree of harm on enemy persons or objects or be closely linked to the actual hostilities. On the other hand, certain psychological operations directly intended to influence the enemy (as opposed to inform the press, for example) could constitute direct participation in hostilities since they would have a higher degree of connection to the hostilities themselves. This conclusion seems to be reinforced by the DoD's own definition of information operations: "[t]he integrated employment, during military operations, of information-related capabilities in concert with other lines of operation to influence, disrupt, corrupt, or usurp the decision-making of adversaries and potential adversaries while protecting our own."²⁹²

²⁸⁹ See *LAW OF WAR MANUAL*, *supra* note 4, ¶ 5.8.3.

²⁹⁰ *Pursue a Career in Army Public Affairs*, U.S. ARMY, <https://www.army.mil/internship/index.html> (last visited Feb. 17, 2017).

²⁹¹ See *LAW OF WAR MANUAL*, *supra* note 4, ¶ 5.8.3.

²⁹² JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-13, INFORMATION OPERATIONS GL-3 (Aug. 11, 2011, updated Nov. 20, 2014; *but see* JOINT CHIEFS OF STAFF, JOINT PUBLICATION 3-13.2, MILITARY INFORMATION OPERATIONS SUPPORT II-9 (Jan. 7, 2010, updated Dec. 20, 2011) (distinguishing the focus of information operations, "adversary audiences," from the focus of public affairs, "U.S., allied, national, international, and internal audiences"—while these roles are blurred for ISIS, they are not for the DoD).

In conclusion, this section demonstrates that the DoD is more likely to interpret combat support services as direct participation in hostilities than the ICRC. The DoD views civilian support to military forces in the areas of budget and finance as direct participation in hostilities, while providing transportation (of senior leaders or weapons) or public affairs functions could constitute direct participation in hostilities in certain conditions. Under the *ICRC Guidance*, it appears that budget/finance and public affairs functions would be highly unlikely to constitute direct participation in hostilities. On the other hand, certain transportation functions could represent direct participation in hostilities—but only if the acts served as “an integral part of a specific military operation.”²⁹³

C. Summary of Conclusions

Before proceeding to a number of recommendations that arise from the above analysis, the following table summarizes the author’s conclusions as to whether certain conduct may cause a civilian to lose his or her protection from direct attack, under both the *ICRC Guidance* and *Law of War Manual*.

²⁹³ ICRC GUIDANCE, *supra* note 5, at 53.

Table 1

SUMMARY OF CONCLUSIONS:
WHETHER CERTAIN ACTS CONSTITUTE DIRECT PARTICIPATION IN HOSTILITIES
UNDER THE ICRC AND DoD INTERPRETATIONS

| Civilian Support to U.S. Military Operations | Application of ICRC Guidance | Application of Law of War Manual |
|---|---|---|
| MQ-9 Operations: Employing Weapons | Direct participation in hostilities | Direct participation in hostilities |
| MQ-9 Operations: Aerial Surveillance | Fact-dependent ²⁹⁴ | Direct participation in hostilities |
| MQ-9 Operations: Maintaining Sensors and Weapons | Not direct participation in hostilities | Direct participation in hostilities |
| Cyber Operations: Execution | Direct participation in hostilities | Direct participation in hostilities |
| Cyber Operations: Installing and Maintaining Systems | Not direct participation in hostilities | Direct participation in hostilities |
| Cyber Operations: Design of Systems | Fact-dependent ²⁹⁵ | Fact-dependent ²⁹⁶ |
| Supporting the Military: Budget and Finance | Not direct participation in hostilities | Direct participation in hostilities |
| Supporting the Military: Transportation | Fact-dependent ²⁹⁷ | Fact-dependent ²⁹⁸ |
| Supporting the Military: Public Affairs | Not direct participation in hostilities | Fact-dependent ²⁹⁹ |

²⁹⁴ See *supra* pp. 85-87.

²⁹⁵ *Id.* at 98-101.

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 104-107.

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 107-110.

V. RECOMMENDATIONS

The above analysis demonstrates that the different interpretations between the *Law of War Manual* and *ICRC Guidance* provide room for improving the clarity and consistency in interpretation of “direct participation in hostilities” that results in a civilian’s loss of protection from direct attack. In that regard, this section makes four recommendations. First, both the ICRC and DoD should define the operative phrases “integral” and “effective and substantial,” respectively. Second, both the *Law of War Manual* and the *ICRC Guidance* should address how to determine whether a civilian takes a direct part in hostilities in the cyber domain. Third, geographic proximity should be eliminated from the *Law of War Manual* as a factor in determining whether a civilian has taken a direct part in hostilities.³⁰⁰ Fourth, in light of the ICRC “revolving door” of direct participation in hostilities and the *Law of War Manual*’s rejection of the same, the *ICRC Guidance* should reject the “revolving door” and the *Law of War Manual* should expand its analysis of when its own civilians may be taking a direct part in hostilities.³⁰¹

A. Define Essential Terminology

Both the ICRC and the DoD recognize that some acts that do not themselves cause direct harm to an enemy may nonetheless constitute direct participation in hostilities—yet neither defines the operative terms it uses to describe such acts. For instance, the *ICRC Guidance* includes acts “carried out as an integral part of a specific military operation designed to directly cause the required threshold of harm.”³⁰² Similarly, the *Law of War Manual* includes as direct participation in hostilities “certain acts that are an integral part of combat operations or that effectively and substantially contribute” to those combat operations.³⁰³

The phrase “integral part” is used by both interpretations but defined by neither. Furthermore, neither organization’s examples or factors shed much light on when an act crosses the threshold from non-integral to integral. In some cases, the examples confuse matters further. For example, the ICRC

³⁰⁰ See LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.3.

³⁰¹ See *id.* ¶ 5.8.4.

³⁰² ICRC GUIDANCE, *supra* note 5, at 53 (similarly, “recruitment and training of personnel is crucial to the military capacity of a party to the conflict, [but] the causal link with the harm inflicted on the adversary will generally remain indirect”).

³⁰³ LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.3.

specifically excludes “production...of weapons and equipment” from acts which would result in a loss of protection from direct attack.³⁰⁴ Maintenance of combat equipment also appears to be excluded since, in the context of membership in an armed group, civilians whose role is limited to the maintenance of weapons “do not assume [a] continuous combat function.”³⁰⁵ This presents a contradiction since both design of a combat platform (whether hardware or software) and maintenance are absolutely integral—“essential to the completeness”³⁰⁶—to any combat mission. The same may be said of many other activities expressly excluded from the definition of direct participation in hostilities by the ICRC, including transportation, recruiting, and training, as well as those that are impliedly excluded, like maintenance and logistics functions.³⁰⁷

Both the ICRC and DoD must clearly define “integral,” while the DoD should also describe what it means to “effectively and substantially contribute” to those combat operations.³⁰⁸ While these terms may have intentionally been left undefined in order to maximize flexibility, it is important for civilians to know when they have crossed the line from a “potentially important, but still indirect, impact on the military capacity or operations of that party”³⁰⁹ to an integral contribution, thus losing protection from direct attack.

In the alternative, the ICRC and DoD may choose to omit the terms altogether. The terms are not part of the relevant body of international humanitarian law, which discusses only a “direct part in hostilities.”³¹⁰ Perhaps focusing on the language of the relevant law by attempting to define the word “direct,” without creating ambiguous gradations between direct and indirect, would remove some of the unnecessary uncertainty.

³⁰⁴ ICRC GUIDANCE, *supra* note 5, at 53.

³⁰⁵ *Id.* at 35.

³⁰⁶ *Integral*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/integral> (visited Apr. 6, 2017) (defining “integral” as “essential to completeness...lacking nothing essential: entire”).

³⁰⁷ ICRC GUIDANCE, *supra* note 5, at 53.

³⁰⁸ *See* LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.3.

³⁰⁹ ICRC GUIDANCE, *supra* note 5, at 53.

³¹⁰ Additional Protocol I, *supra* note 3, art. 51(3); Additional Protocol II, *supra* note 3, art. 13(3).

B. Clarify Direct Participation in Hostilities in Cyberspace

Both the *ICRC Guidance* and *Law of War Manual* should provide specific guidance concerning direct participation in hostilities in cyberspace. The ICRC's distinction between general and tactical operations is nearly impossible to discern in cyberspace. On the other hand, the DoD's exclusion of geographic proximity and the non-physical nature of the domain cause additional confusion. This section concludes with a number of recommendations addressing these issues.

As described above, the *ICRC Guidance* draws a distinction between an act that "constitutes an integral part of a concrete and coordinated tactical operation" that causes harm to the enemy (direct participation in hostilities) and other acts that serve a more general, strategic purpose (not direct participation in hostilities).³¹¹ But in cyberspace, it is nearly impossible to draw this distinction. One commentator observed that while "[i]n the purely physical world it is usually simple to distinguish espionage from bellicose activity... it can be difficult for the party on the receiving end of a cyber operation to distinguish between espionage and military attack (including actions leading up to an attack)."³¹²

For example, it is impossible to know whether the insertion of malicious code into software controlling a dam's water flow³¹³ is intended to open the dam and kill thousands (a concrete and coordinated tactical operation that causes harm) or to simply steal its power-generating technology (not a concrete and coordinated tactical operation that causes harm). Under the *ICRC Guidance*, generalized intelligence gathering fails to meet the standard for direct causation, but intelligence gathering for a specific operation does

³¹¹ ICRC GUIDANCE, *supra* note 5, at 54–55 ("Examples of such acts would include, *inter alia*, the identification and marking of targets, the analysis and transmission of tactical intelligence to attacking forces, and the instruction and assistance given to troops for the execution of a specific military operation." (footnotes omitted)).

³¹² Gary Brown, *Spying and Fighting in Cyberspace: What is Which?*, 8 GEO. J. NAT'L SECURITY L. & POL'Y 621, 624 (2016).

³¹³ Paul F. Roberts, *New York Dam Hack Underscores Threat For Connected Utilities*, CHRISTIAN SCIENCE MONITOR (Dec. 23, 2015), <http://www.csmonitor.com/World/Passcode/2015/1223/New-York-dam-hack-underscores-threat-for-connected-utilities> ("Reports that Iranian hackers breached the computer network at a small, aging dam in Westchester County, N.Y., once again highlight how exposed many US utilities are to even the simplest digital assaults.... Iran hackers manipulated a cellular modem connection in 2013 to probe the dam's supervisory control and data acquisition (SCADA) systems.").

meet the standard.³¹⁴ This means that the owner of the computer system must know the civilian's subjective intent before responding with a direct attack—clearly a near impossibility.

Cyberspace also highlights the way in which geographic proximity is irrelevant to direct participation in hostilities. On the one hand, the cyber domain allows for actors to be literally anywhere in the world and still have significant effects in the intended geographic location. U.S. Cyber Command and the NSA, for example, are located at Fort Meade, in Maryland, far from the areas in which the U.S. military is engaged in combat.³¹⁵ Civilian employees of these agencies can directly impact military operations, without regard to their physical proximity to the battlefield.

On the other hand, just because civilians are engaged in actions in cyberspace near the area of military operations does not necessarily mean that those actions should cause them to lose protection from direct attack. Intelligence operations in cyberspace are illustrative of the challenge. One example is the U.S. government's "Real Time Regional Gateway," a program that deployed 18,000 NSA civilians to combat zones all over the world.³¹⁶ The program's goals were diverse, with civilians analyzing "phone conversations, military events, road-traffic patterns, public opinion—even the price of potatoes."³¹⁷

This diversity of goals and functions presents problems under the ICRC construct, where one takes a direct part in hostilities only if they serve as "an integral part of a concrete and coordinated tactical operation" that causes harm to the enemy.³¹⁸ It is easy to see the nexus between direct participation in hostilities and relaying the content of phone conversations to special operators who need civilians to be "coffee-breath close in order to have that

³¹⁴ ICRC GUIDANCE, *supra* note 5, at 54–55.

³¹⁵ See David E. Sanger, Julie Hirschfeld Davis, & Eric Schmitt, *Obama is Considering Removing NSA Leader*, N.Y. TIMES (Nov. 19, 2016), <https://www.nytimes.com/2016/11/20/us/politics/obama-remove-nsa-leader-michael-rogers.html>.

³¹⁶ Siobhan Gorman, Adam Entous, & Andrew Dowell, *Technology Emboldened the NSA*, WALL ST. J. (June 9, 2013), <https://www.wsj.com/articles/SB10001424127887323495604578535290627442964?mg=id-wsj>; see also Catherine Herridge, *Inside the Government's Secret NSA Program to Target Terrorists*, FOX NEWS (May 17, 2016), <http://www.foxnews.com/politics/2016/05/17/inside-governments-secret-nsa-program-to-target-terrorists.html>.

³¹⁷ Gorman, Entous & Dowell, *supra* note 316.

³¹⁸ ICRC GUIDANCE, *supra* note 5, at 54–55.

shared situational understanding.”³¹⁹ On the other hand, it is difficult to see how the price of potatoes might be sufficiently tied to a tactical operation.

This application to real-world operations reveals how the *ICRC Guidance* is lacking. First, there is no real reason to delineate among civilian analysts in the area of military operations who provide intelligence to support tactical operations and those who do so for more comprehensive reasons. Second, it fails to account for civilian analysts who do both. Finally, the *ICRC Guidance* fails to account for the many generalized pieces of information that, when combined with other such information, can provide a group with information that ultimately supports a “concrete and coordinated tactical operations.”³²⁰ For example, if information gathered by each of ten civilians is unable, on its own, to provide a combat operator with information needed to conduct an operation, those civilians are protected from direct attack under the *ICRC Guidance*. However, if those ten pieces of information are gathered by the same civilian, compiled, and provided to a combat operator in such a manner that it serves as “an integral part”³²¹ of an operation, that civilian is no longer protected from direct attack.

Finally, both the *Law of War Manual* and *ICRC Guidance* should be updated to specifically address the unique challenges of determining when a civilian has taken a direct part in hostilities in cyberspace. Factors or examples should be modified to include civilians in cyberspace. For example, the DoD might expressly eliminate the geographic proximity of the actor as a factor. Both the *ICRC Guidance* and the *Law of War Manual* might also focus on the effects of the cyber operation—as do the *Tallinn* experts—and any such consideration must address the challenge of not knowing the civilian actor’s ultimate intent. As an alternative, the DoD should consider authorizing only uniformed military personnel to engage in certain activities, from the design, installation, and maintenance of systems to the operations themselves.

C. Eliminate Geographic Proximity as a Factor

The problem of geographic proximity is not limited to the cyber domain. Indeed, the *ICRC Guidance* expressly discounts the use of geographic proximity as a factor in determining when civilians are taking a direct part

³¹⁹ Herridge, *supra* note 316.

³²⁰ ICRC GUIDANCE, *supra* note 5, at 54–55.

³²¹ *Id.*

in hostilities³²² while the *Law of War Manual* expressly includes it,³²³ even though in almost every other area the DoD defines direct participation in hostilities much more broadly than the ICRC. As stated above, the *ICRC Guidance's* direct causation requirement is “causal” and is not indicative of temporal or geographic proximity.³²⁴ The *ICRC Guidance*, therefore, views as direct participation in hostilities “the loading of bombs onto an airplane for a direct attack on military objectives in an area of hostilities,”³²⁵ even when that loading occurs, for example, at Whiteman Air Force Base, Missouri, or NAS Sigonella, Italy.

The DoD, on the other hand, considers “the degree to which the act is connected to the hostilities, such as the degree to which the act is temporally or geographically near the fighting.” Although only one of several relevant considerations, this particular element is faulty in two regards. First, the requirement is outdated and fails to take into account the realities of the modern battlefield. U.S. Air Force contractors flying remotely-piloted aircraft from Nevada—more than 7,000 miles from Afghanistan—are no less taking a direct part in hostilities than those human pilots physically present in Afghanistan’s airspace. Also, as described above, geographic proximity is irrelevant in cyberspace, the domain in which hostile activities seem to be growing most rapidly. Second, the U.S. standard discriminates against less-developed belligerents. For example, this element makes it more likely that an armed opposition group could be targeted for making its weapons in a warehouse near the area of combat operations; at the same time, civilians participating in the State’s production of equally deadly weapons at a physical location further from combat operations would be less likely to meet the DoD’s test for direct participation in hostilities. The nation that can conduct combat operations from furthest away geographically benefits from the inclusion of “geographic proximity” in any test to determine whether its civilians are directly participating in hostilities.

This is perhaps exactly why the DoD includes geographic proximity as a factor, since it works to the advantage of U.S. military operations at present—but it should be eliminated, nonetheless. Failure to do so presents a number of problems. First, while a standard that benefits a technologically

³²² *Id.* at 55.

³²³ See *LAW OF WAR MANUAL*, *supra* note 4, ¶ 5.8.3 (“the degree to which the act is temporally or geographically near the fighting”).

³²⁴ *ICRC GUIDANCE*, *supra* note 5, at 55.

³²⁵ *Id.* at 66.

advanced superpower may provide a direct advantage the United States, it neglects the detriment that standard could have on small U.S. allies (like Israel or North American Treaty Organization members in western Europe), should they find themselves in a conflict with a better resourced adversary. Second, a biased standard degrades U.S. credibility in counterterrorism operations that rely on civilians' direct participation in hostilities as a legal basis for their targeting. The United States already encounters criticism for its global operations; it gains nothing by adopting an outdated and self-serving criterion for direct participation in hostilities found nowhere else in international law. Whatever the standard for direct participation in hostilities, it should be universally applicable to civilians, regardless of the sophistication of the armed group they support. Third, the geographic proximity factor makes civilians supporting U.S. military operations more likely to be targeted when they are in closer geographic proximity to military operations, as opposed to when they are more distant—even though, absent other factors, there is no reason they should be. Employing the DoD's own *Law of War Manual*, an enemy of the United States may very well determine that the geographic proximity of a U.S. civilian is the tipping point that moves an otherwise protected civilian's acts to the realm of direct participation in hostilities. Finally, the geographic proximity factor creates an incentive for civilians to provide necessary military support further away from the area of operations, which could increase the likelihood of attacks against civilians in areas not otherwise involved in the hostilities. For example, a U.S. adversary in Syria might move support operations to Turkey in order to gain the legal protection that reduced geographic proximity might provide.³²⁶ By encouraging that result through the geographic proximity factor, the area of hostilities would expand into Turkey and put additional innocent civilians at risk. Conversely, if the geographic proximity factor was omitted, the U.S. adversary would be more likely to stay where he could most efficiently influence operations: in the already existing area of hostilities. Perhaps it is for this very reason that the ICRC, whose mission includes the "humanitarian protection and assistance for victims of armed conflict,"³²⁷ employs a narrower definition of direct participation in hostilities than the DoD in every single area but this one. By focusing on the activity of the actor rather than the proximity to combat operations, the relevant guidance can deter belligerents from

³²⁶ See Charles J. Dunlap, Jr., *Lawfare: A Decisive Element of 21st Century Conflicts?*, 54 *JOINT FORCES Q.* 34, 35 (2009) (discussing the use or misuse of law "as a substitute for traditional military means to achieve an operational objective.").

³²⁷ *Mandate and Mission*, INTERNATIONAL COMMITTEE OF THE RED CROSS, <https://www.icrc.org/en/who-we-are/mandate> (last visited Apr. 6, 2017).

expanding the area of active hostilities. For these reasons, the DoD should eliminate “the degree to which the act is temporally or geographically near the fighting”³²⁸ as a consideration for determining whether a civilian takes a direct part in hostilities.

D. Reject (but Account for) the “Revolving Door”

The urgency for resolving these issues stems largely from the United States’ (and many others’) rejection of “revolving door” participation in hostilities,³²⁹ which views the Additional Protocol’s “for such time as” language as literal. In other words, under this view, civilians are only subject to direct attack during preparatory measures leading up to the act, deployment, the act itself, and the actor’s return.³³⁰ For the reasons set forth above, it is clear that the ICRC should abandon its “revolving door” limitation. If the United States rejects the ICRC’s position, it must either (1) accept the resulting conclusion that it is lawful to fatally attack civilians who are sleeping in their beds far from the area of military operations or (2) assign only to military members those tasks which constitute direct participation in hostilities.

A number of examples highlight the conundrum. Under the current DoD view, contractors maintaining MQ-9s in the Middle East are no more subject to direct attack than the civilian pilots who live and work near Las Vegas. Similarly, NSA civilians engaged in cyber operations constituting direct participation in hostilities from Ft. Meade, Maryland, have no more protection than those NSA civilians deployed to areas of military operations in support of the “Real Time Regional Gateway.”³³¹ Notably, civilians who directly participate in hostilities from the United States—and do not benefit

³²⁸ See LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.3.

³²⁹ *Id.* ¶ 5.8.4; *Torture in Israel Case*, *supra* note 26 (“[A] civilian who has joined a terrorist organization which has become his “home”, and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack “for such time” as he is committing the chain of acts.”); ICRC GUIDANCE, *supra* note 5, at 65–68 (limiting direct participation in hostilities to the preparatory measures leading up to the act, deployment, the act itself, and the actor’s return); Schmitt, *supra* note 7 (the “revolving door” approach “flies in the face of military common sense and accordingly represents a distortion of LOAC’s military advantage/humanitarian considerations balance” (footnotes omitted)); Boothby, *supra* note 111 (calling the ICRC Guidance’s concepts of preparation, deployment, and return overly restrictive); LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.4.2 (“Persons who take a direct part in hostilities, however, do not benefit from a “revolving door” of protection”).

³³⁰ ICRC GUIDANCE, *supra* note 5, at 65–68.

³³¹ Gorman, *supra* note 317; *see also* Herridge, *supra* note 316.

from “revolving door” participation—may be attacked at home, on their way to work, on vacation, or any other time before they have permanently ceased taking part in hostilities.³³²

The lack of “revolving door” protection for civilians may be of little consequence to the DoD. This is because, while the United States is largely capable of attacking civilian belligerents anytime and anywhere across the globe, the enemies of the United States—primarily non-State actors and groups—currently lack the capability to identify, locate, and attack any individual civilian actor within the United States. The Yemeni whose vehicle is destroyed by a Hellfire missile has little ability to identify the civilian MQ-9 pilot, sensor operator, or maintainer who is responsible, let alone retaliate.

But U.S. policies and interpretation of international humanitarian law need to foresee future conflicts as well. One can imagine the consequences of civilian direct participation from the homeland should the United States face an adversary (whether a nation-State, a terrorist organization, or a significant State sponsor of a terrorist organization) with the capability of targeting civilians anywhere in the world. Should such an adversary use no more authority than the DoD’s own legal guidance, it could lawfully attack civilian contractors in Las Vegas, intelligence personnel in Maryland, budget managers in Missouri, or Italian drivers in Sicily. Again, given the DoD’s rejection of “revolving door” participation in hostilities, those civilians could be targeted on their way to work, on vacation, or at any other time before they have permanently ceased taking part in hostilities.³³³ Coming to the same conclusion, one commentator, Ryan Kresbach, adds that such targeting “could additionally result in [the civilian’s] family and neighbors being considered collateral damage in a proportionality analysis, something that would never happen if he were only considered to be directly participating in hostilities while actually conducting planning.”³³⁴

If the DoD is not willing to assume the risk of direct attack against civilian employees and contractors, it will need additional resources from Congress. The increased use of contractors and civilians to support military operations is a natural result of under-resourcing,³³⁵ and it will take Congressional action to ensure that traditional military functions are filled only by

³³² See LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.4.1.

³³³ *Id.* ¶ 5.8.4.2.

³³⁴ Kresbach, *supra* note 71, at 157.

³³⁵ See Hennigan, *supra* note 155.

uniformed members of the U.S. military. Even if it is not possible (or fiscally prudent) to do so across the board, it may be wise nonetheless to ensure that certain functions are only performed by uniformed service members—especially for those positions that most certainly represent direct participation in hostilities (even under the *ICRC Guidance*). Examples include civilians who operate remotely-piloted aircraft or engage in intelligence or offensive operations in cyberspace.

VI. CONCLUSION

In their respective publications, both the ICRC and the DoD strive to interpret fairly the clause “direct participation in hostilities” so as to ensure appropriate legal protection of civilians associated with military operations. By adopting a narrow definition of direct participation, the ICRC seeks to protect as many civilians as possible from the dangers of armed conflict. Conversely, by taking a broad approach, the DoD seeks to allow targeting of non-State actors engaged in military operations who are embedded within the civilian population, thereby allowing for what it regards as an appropriate balance between effective combat operations and protection of civilians and civilian objects.³³⁶ While significant parts of both approaches have merit, this article made four recommendations for clarity and consistency. First, the ICRC and DoD should define the terms they use to interpret direct participation in hostilities. Second, both the *Law of War Manual* and the *ICRC Guidance* should be updated to address direct participation in hostilities in the cyber domain. Third, geographic proximity should be eliminated from the *Law of War Manual* as a factor in determining whether a civilian takes a direct part in hostilities.³³⁷ And finally, the ICRC must reject the “revolving door” notion of direct participation in hostilities, while the DoD must robustly address the impact of its rejection on civilians supporting U.S. military operations.³³⁸ These recommendations would serve a number of useful purposes.

First, they clarify the rules of international humanitarian law for the belligerents who must implement them. Using geographic proximity as a factor to determine whether a civilian has directly participated in hostilities, for example, disregards the way modern communication technologies

³³⁶ *But see* LAW OF WAR MANUAL, *supra* note 4, ¶ 5.8.3 (where one exception to the general broadness of the DoD standard is its inclusion of geographic proximity as a factor in determining whether one has taken a direct part in hostilities).

³³⁷ *Id.*

³³⁸ *Id.* ¶ 5.8.4.

have shaped combat. Similarly, a closer examination of civilian action in cyberspace, unforeseen during the signing of the Geneva Conventions or its Additional Protocols, is necessary to operators in that domain. Clear public guidance should indicate what cyber operations are appropriate for civilians, and which should be restricted to uniformed military members. Though the opacity of cyberspace would render any guidance less than perfect—and the pace of advancing technology would require frequent reassessment—the import of clarifying when and whether a civilian cyber operator may be subject to direct attack demands deeper examination.

Second, the above recommendations tend to limit the perfidious use of international humanitarian law as a sword rather than shield.³³⁹ By adopting such a narrow view of direct participation in hostilities and adopting a “revolving door” notion for direct participation in hostilities, the *ICRC Guidance* encourages combatting civilians to hide among the innocent civilian population rather than join a legitimate State military or other organized armed group. Similarly, by allowing a civilian to engage in “revolving door” participation in hostilities, the ICRC endangers the innocent civilians with whom the belligerent blends (or, at best, renders an unfair combat advantage to a civilian whose enemies are morally or politically averse to the collateral damage that would result from an attack). On the other hand, any complaints by the United States of the unfairness of “revolving door” participation are undermined by its military’s—the military best equipped to engage in combat from great distance—use of geographic proximity as a factor in determining whether a civilian has directly participated in hostilities.

Finally, from the U.S. perspective, the above recommendations would assist officials in avoiding unintended negative “legal and policy considerations”³⁴⁰ that come from the employment of civilians in actions that constitute direct participation in hostilities. This may require engagement with Congress to ensure that all or most traditional military functions are fulfilled only by uniformed members of the U.S. military. These recommendations will facilitate the common interest of the ICRC and the United States in protecting civilians from the harms of future armed conflict.

³³⁹ See generally Dunlap, *supra* note 326.

³⁴⁰ LAW OF WAR MANUAL, *supra* note 4, ¶ 4.15.2.2.

UNDOING THE UNSWORN: THE UNSWORN STATEMENT’S
HISTORY AND A WAY FORWARD

*MAJOR JOHN S. REID**

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I. INTRODUCTION

An Air Force staff sergeant stands convicted. After hours of deliberation, the court-martial members (the military jury) found him guilty of a violent rape against a family member. Throughout the trial the military judge ruled meticulously on evidentiary matters, finding inadmissible many pieces of evidence offered by both the government and the defense due to concerns about their probative value and prejudicial effect. As the court-martial moves through the sentencing phase, the accused (the military defendant) rises to give an “unsworn statement.” Speaking directly to the court-martial members, the accused gives a largely unfettered speech, opening the floodgate of otherwise inadmissible evidence. In his statement he proceeds to “impeach the verdict,” making claims of fact that conflict with the finding of guilt. He makes numerous assertions that are inadmissible in findings or sentencing. After he is done, the military judge turns to the court-martial members and instructs them that they are not to consider much of what they just heard during their deliberations. With the accused’s unsworn statement still fresh in their memory, and the human temptation to ignore the military judge’s instructions to set aside much of what they just heard spinning in their minds, the members retire to a deliberation room and craft a sentence. Shortly thereafter, the court-martial members return with a verdict: to be reprimanded, to be reduced in grade from E-5 to E-4 (a one rank reduction), and to be confined to the limits of the base for two months. It is essentially a sentence of no punishment for the crime of rape.¹

In military courtrooms around the world, this strange ritual unfolds. If convicted, the accused stands and makes a statement to the court-martial members. During this statement the accused may introduce matters otherwise entirely inadmissible and irrelevant, often surprising the prosecution with new information. While the prosecution may rebut factual assertions within the unsworn statement with evidence of its own, the accused may not be cross-examined. Following the accused’s unsworn statement, the military judge promptly instructs the court-martial members to disregard any irrelevant or inadmissible matters brought to their attention by the unsworn statement. This unusual and counterintuitive procedure is a largely unfettered weapon for the defense to systematically lower sentences by bringing otherwise collateral and inadmissible matters to the attention of the court-martial members.

¹ This scenario is based on the facts of *United States v. Bard*, Dover Air force Base, Delaware, 20 November 2014, a case in which the author took part. This anecdote is representative of countless similar situations that regularly occur in military courts.

The civilian equivalent of the unsworn statement, termed the right of “allocution,” exists broadly in civilian jurisdictions.² However, the expansive scope of the unsworn statement and its potential impact on the sentence adjudged is unique to the military justice system. Through a misinterpretation of history by the Court of Appeals for the Armed Forces, the unsworn statement became a creature divorced from its historical purpose and intent. The military and Congress should now seriously examine whether the military unsworn statement truly serves the aims of equitable sentencing.³

It is an ideal time to re-examine the desired scope of unsworn statements in military trial practice in an effort to ensure equitable sentencing. The military faces a crisis of confidence with segments of the public, as well as bipartisan criticism from Congress over its handling of military justice matters.⁴ Congress’s concern has focused on cases like those discussed above—where it appears the military justice system failed. To address the issue, Congress initiated “blue ribbon” panels. These panels were to consider how the military prevents and responds to reports of sexual assaults as well

² See Celine Chan, *The Right to Allocution: A Defendant’s Word on Its Face or Under Oath?*, 75 Brook. L. Rev. 579 (2009), available at <http://brooklynworks.brooklaw.edu/blr/vol75/iss2/8> (tracing the primary aims of allocution from common law to current practice; arguing that allocution, in its present form fails to achieve its fundamental purposes to promote sentencing accuracy and equity; and recommending reforming allocution in line with the State of California to provide an evidentiary standard for allocution to bolster the credibility/reliability of these statements, thereby benefiting both the accused and the tribunal to which they are allocuting).

³ U.S. DEP’T OF THE ARMY PAM. 27-9, MILITARY JUDGES’ BENCHBOOK para. 2-5.24 (29 Jan. 2017) [hereinafter MJBB] (stating a just sentence is one that “will best serve the ends of good order and discipline, the [rehabilitative] needs of the accused, and the welfare of society.”).

⁴ Members of Congress, most notably Senator Kristen Gillibrand have questioned the efficacy of the military justice system, and routinely called for a series of “Military Justice Improvement Acts” to potentially remove military commanders from case disposition decisions, particularly with regard to sexual assault cases. See, e.g., Press Release, Sen. Kristin Gillibrand, Ahead of Vote on National Defense Bill, Gillibrand and Grassley Lead Bipartisan Coalition Calling On Senate to Finally Pass Legislation To Address Crisis of Sexual Assault in the Military (May 24, 2016), available at <https://www.gillibrand.senate.gov/news/press/release/ahead-of-vote-on-national-defense-bill-gillibrand-and-grassley-lead-bipartisan-coalition-calling-on-senate-to-finally-pass-legislation-to-address-crisis-of-sexual-assault-in-the-military>; Darren Samuelson, *Paul, Cruz join Gillibrand on military sex-assault bill*, Politico (July 16, 2013, 12:00 AM), <http://www.politico.com/story/2013/07/rand-paul-ted-cruz-kirsten-gillibrand-sexual-assault-push-094244>.

as reexamine sexual assault statutes.⁵ As a result, Congress and the executive branch enacted significant changes to the military justice system.⁶ Despite this intense scrutiny of the military justice system, the unsworn statement managed to escape modification.⁷ By addressing the unsworn statement, Congress can achieve the goal of more equitable sentencing through a relatively modest change to the military justice system.

This article will first explore the history of the right of allocution from its common law genesis. It will then trace how the common law right of allocution found its way into both American courts and the military justice system as a statutory or regulatory creation. The article will examine the radically differing paths the right of allocution took as it developed in both the military and civilian contexts. Finally, the article addresses potential alterations to the military unsworn statement that would result in a more just military sentencing procedure.

II. THE RIGHT OF ALLOCUTION AT COMMON LAW

In Great Britain, at common law (beginning in the 12th Century) the criminal defendant typically had no right to an attorney or to testify in his or her own defense.⁸ British society became concerned with this seemingly inequitable arrangement. Thus, what some scholars deemed the “ancient and obscure ritual” known as allocution was born.⁹ Because the defendant had

⁵ See Judicial Proceedings Panel reports, <http://jpp.whs.mil/>.

⁶ See MANUAL FOR COURTS-MARTIAL, UNITED STATES, Rule for Court-Martial (RCM) 1001A (2016) [*hereinafter* MCM]; Exec. Order No. 13,696, 80 Fed. Reg. 35,783 (Jun. 22, 2015); National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013).

⁷ There were no substantive modifications to regulatory provision governing the accused’s unsworn statement during sentencing at a court-martial, currently recognized by Rule for Court-Martial 1001(c)(2)(C). Rather, in their draft provisions for a 2018 version of the Manual for Courts-Martial, the Department of Defense Joint Services Committee on Military Justice, tasked with drafting the Manual for Courts-Martial, has relocated that provision, verbatim, to RCM 1001(d)(2)(C), in conjunction with implementing regulations for the Military Justice Act of 2016. See Joint Service Committee on Military Justice, Proposed Executive Order: 2017 Amendments to the Manual for Courts-Martial United States, annex 2, §2, <http://jsc.defense.gov/Portals/99/Documents/Section2RCMs.pdf?ver=2017-07-19-103212-560>.

⁸ See Marvin Becker & George Heidelbaugh, *Right to Counsel in Criminal Cases an Inquiry Into the History and Practice in England and America*, 28 Notre Dame L. Rev. 351, 354–356 (1953); *Wilson v. United States*, 149 U.S. 60, 65 (1893).

⁹ Paul W. Barrett, *Allocution*, 9 Mo. L. Rev. 115, 255 (1944); Jonathan Scofield,

no attorney to argue their case, the defendant was granted the right to speak before being sentenced.

Beginning in the 17th Century, after being found guilty, the defendant was asked by the judge: “Do you know of any reason why judgment should not be pronounced on you?”¹⁰ This moment at trial was crucial because in common law Britain every felony except petty larceny and mayhem could carry the death penalty.¹¹ Unfortunately for the defendant, there were limited excusing factors that could be brought to the court’s attention at this time, such as pregnancy or insanity.¹² Interestingly, allowing such statements at common law was possibly a precursor to modern “excuse” defenses.¹³

At common law, “[t]he point of [allocution] was not to elicit mitigating evidence or a plea for leniency, but to give the defendant a formal opportunity to present one of the strictly defined legal reasons which required the avoidance or delay of sentencing: he was not the person convicted, he had benefit of clergy or a pardon, he was insane, or if a woman, she was pregnant.”¹⁴ Today, where the right to an attorney is guaranteed, “the common law reasons or uses for allocution have long since disappeared.”¹⁵

III. ALLOCUTION IN THE AMERICAN LEGAL TRADITION

The common law tradition of allocution has survived in modern legal systems based on two rationales: mitigation and humanization. Mitigation has strong roots in common law, while humanization is a modern concept embraced by many jurisdictions.¹⁶ While each jurisdiction defines mitigation on its own terms, mitigation evidence is generally accepted as evidence that,

Comment, *Lights, Camera, Allocution: Contemporary Relevance of Director’s Dream*, 62 TUL. L. REV. 207, 209 (1987) (“The right of a prisoner to speak in his own behalf before sentencing, sometimes called the allocutus, was recognized by the common law as early as 1682.”); See also *Green v. United States*, 365 U.S. 301, 304 (1961).

¹⁰ Barrett, *supra* note 9, at 115.

¹¹ *Id.* at 116.

¹² See 4 WILLIAM BLACKSTONE, COMMENTARIES *387–370; JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 761, 618–620 (2d ed. 1816).

¹³ Kimberly A. Thomas, *Beyond Mitigation: Towards a Theory of Allocution*, 75 FORDHAM L. REV. 2641, 2647 (2007).

¹⁴ *State v. Ferman-Velasco*, 333 Or. 422 (2002) (citing Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 HARV. L. REV. 821, 832–33 (1968)).

¹⁵ Barrett, *supra* note 9, at 254.

¹⁶ *Id.*

while not legally excusing the conduct, explains factors and circumstances regarding the crime that may result in a lesser punishment. Humanization refers to the concept that each individual should have a sentence particularly tailored to the «nuances» of his or her personality.¹⁷

Where allocution rights still appear, they are codified by both the federal and state governments. The federal right of allocution is found in Federal Rule of Criminal Procedure Rule 32 (i)(4)(A), which states: “Before imposing sentence, the court must: (i) provide the defendant’s attorney an opportunity to speak on the defendant’s behalf; (ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and (iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant’s attorney.”¹⁸

In *Green v. United States*, the Supreme Court held that the drafters of Rule 32(a) intended that federal courts follow the same procedure used in the common law tradition—with the judge directly asking the defendant “if he had anything to say” before being sentenced.¹⁹ This duty to inquire, the Court declared, is an affirmative one.²⁰ The Court commented:

[T]he most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself. We are buttressed in this conclusion by the fact that the Rule explicitly affords the defendant two rights: “to make a statement in his own behalf,” and “to present any information in mitigation of punishment.”²¹

During the next term, in *Hill v. United States*, the Supreme Court addressed the issue of whether failure by a trial judge to advise a defendant of his or her allocution rights, consistent with the rule from *Green*, was reversible error on appeal.²² The Court held that, while a judge should advise a defendant of allocution rights, the failure to do so “is not, of itself, an error of the character or magnitude cognizable under a writ of habeas corpus.”²³

¹⁷ *Id.*

¹⁸ FED. R. CRIM. P. 32(i)(4)(A).

¹⁹ 365 U.S. 301, 304 (1961).

²⁰ *Id.*

²¹ *Id.*

²² *Hill v. United States*, 368 U.S. 424 (1962).

²³ *Id.* at 428.

The Court concluded that omission of allocution is neither a jurisdictional nor a constitutional error.²⁴ Finally, progressing to a consideration of the role of allocution in basic due process, the Court reasoned that omission of allocution “is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure.”²⁵

Green and *Hill* interpreted allocution rights through the regulatory lens of the Federal Rules of Criminal Procedure. Absent a statutory or regulatory allocution right, the Supreme Court has declined to declare a constitutional due process right for allocution exists.²⁶ The Court discussed the issue head-on in *McGautha v. California*, where the Supreme Court considered the cases of two petitioners in capital cases: McGautha (tried in a bi-furcated findings/sentencing trial in California); and Crampton (tried in a single verdict findings/sentencing trial in Ohio).²⁷

Crampton alleged that a trial procedure in which the jury determined both guilt and punishment after a single trial and in a single verdict, violated his right to allocution. The petitioner reasoned that in a single procedure trial exercising allocution could affect the guilt phase of the trial. If the defendant begged for mercy or apologized, this could be used against him in a finding of guilt. Additionally, the defendant could be cross-examined in allocution, further chilling his right. The defendant argued that this process, denying an unfettered opportunity in allocution, denied him due process. The Supreme Court rejected Crampton’s assertions that he should enjoy a near unconstrained opportunity for allocution, even in the context of a capital case. The Court stated, “We do not think that Ohio was required to provide an opportunity for petitioner to speak to the jury free from any adverse consequences on the issue of guilt. . . .”²⁸ Additionally, the *McGautha* Court noted that, even assuming due process does require the allowance of allocution, in the case before the Court, due process was satisfied. The defendant had liberal opportunity to present evidence “going solely to the issue of punishment,” such as “background evidence with a tenuous con-

²⁴ *Id.*

²⁵ *Id.*

²⁶ See *McGautha v. California*, 402 U.S. 183, 218 n.22 (1971), *vacated on other grounds sub nom.* *Crampton v. Ohio*, 408 U.S. 941 (1972).

²⁷ *McGautha*, 402 U.S. at 185.

²⁸ *Id.* at 219–220.

nection to the issue of guilt.”²⁹ With no further guidance from the Supreme Court, the majority of federal circuits ruling directly on the issue hold there is no constitutional guarantee to allocution.³⁰ However, a minority of circuits attempt to distinguish *McGautha* and find the right of allocution within the Due Process Clause.³¹

Twenty-three states recognize a state statutory or state constitutionally based right to allocution.³² The scope of this right of allocution varies across

²⁹ The central issue determined in *McGautha* was not the right of allocution but the issue of imposition of the death penalty without governing standards. The primary holding of the *McGautha* court regarding the death penalty was reversed a year later. *Furman v. Georgia*, 408 U.S. 238 (1972). This could cast doubt on the reliability of that same court’s opinion on this issue of allocution.

³⁰ Six federal circuit courts of appeal hold that there is *no* constitutional due process right to allocution. See *United States v. Li*, 115 F.3d 125, 132 (2d Cir. 1997) (The right to allocution “is a matter of criminal procedure and not a constitutional right.”); *United States v. Coffey*, 871 F.2d 39, 40 (6th Cir. 1989) (finding no constitutional basis for allocution, citing *Hill*); *United States v. Fleming*, 849 F.2d 568 (11th Cir. 1988) (“[T]he right to allocution is *not* constitutional.” (emphasis in original)); *United States v. De La Paz*, 698 F.2d 695, 697 (5th Cir. 1983); *Katz v. King*, 627 F.2d 568, 576 (1st Cir. 1980); *Segura v. Patterson*, 402 F.2d 249, 252 (10th Cir. 1968), *rev’d on other grounds*, 403 U.S. 946 (1971).

³¹ Two federal circuits specifically hold that there *is* a constitutional due process right to allocution. *Boardman v. Estelle*, 957 F.2d 1523, 1529–30 (9th Cir. 1992) (recognizing a due process right to allocution at sentencing when the accused affirmatively requests it); *Ashe v. North Carolina*, 586 F.2d 334, 336 (4th Cir. 1978) (“[W]hen a defendant effectively communicates his desire to the trial judge to speak prior to the imposition of sentence, it is a denial of due process not to grant the defendant’s request.”).

³² *State v. Young*, 853 P.2d 327, 360 (Utah 1993) (citing *State v. Allie*, 710 P.2d 430, 435 (Ariz. 1985) (ARIZ. R. CRIM. P. 26.10(b)(1)); *Beed v. State*, 609 S.W.2d 898, 913 (Ark. 1980); *People v. Garcia*, 752 P.2d 570, 575-77 (Colo. 1988) (COLO. R. CRIM. P. 32(b)); *State v. Carr*, 374 A.2d 1107, 1115–17 (Conn. 1977) (CONN. PRACTICE BOOK § 2330(2)); *Putman v. State*, 308 S.E.2d 145, 152 (Ga. 1983); *State v. Goodrich*, 546 P.2d 1180, 1187 (Idaho 1976) (I.C.R. 32(a)); *State v. Christensen*, 201 N.W.2d 457, 459-60 (Iowa 1972) (IOWA CODE § 789.6 (1966)); *State v. Engberg*, 400 P.2d 701, 705-06 (Kan. 1965) (KAN. STAT. ANN. § 62-1510 (1949)); *Commonwealth v. Whitford*, 452 N.E.2d 262, 266 (Mass. App. Ct. 1983) (MASS. R. CRIM. P. 28(b)); *People v. Howell*, 423 N.W.2d 629, 633-34 (Mich. 1988) (M.C.R. 6.101(G)(2)); *State v. Hanson*, 231 N.W.2d 104, 105 (Minn. 1975) (MINN. STAT. § 631.20 (1974)); *Johnson v. State*, 461 So. 2d 1288, 1292 (Miss. 1984) (no absolute right of allocution recognized); *State v. Scott*, 621 S.W.2d 915, 918 (Mo. 1981); *State v. Richter*, 378 N.W.2d 175, 181-82 (Neb. 1985) (NEB. REV. STAT. § 39-669.07 (1984)); *State v. Rose*, 548 A.2d 1058, 1107 (N.J. 1988) (RULES GOVERNING THE COURTS OF THE STATE OF N.J., R. 3:21-4(b)); *Tomlinson v. State*, 647 P.2d 415, 417 (N.M. 1982) (N.M. STAT. ANN. § 31-18-15.1 (1979)); *People v. Green*, 429 N.E.2d 415, 416 (N.Y. 1981) (N.Y. CRIM. PROC. LAW § 380.50 (1970)); *State v. McRae*, 320 S.E.2d 914, 915

jurisdictions. For example, Hawaii’s right to allocution is interpreted by its courts as largely unrestricted.³³ In other states, while the right of allocution exists, they do not require a judge to ask a defendant if he or she would like to speak prior to sentencing, and the judge may limit the scope of what the defendant may present.³⁴ For instance, Nevada limits the right of allocution to pleas for mercy³⁵ and California law stipulates that allocution cannot be used to attack the verdict during sentencing.³⁶

IV. ALLOCUTION IN THE MILITARY JUSTICE TRADITION

Allocution rights evolved uniquely in the military. Eventually termed “unsworn statements,” they began as something that resembled the common law right to allocution. This was fitting, as early court-martial practice, much like common law Great Britain, lacked many due process guarantees taken for granted today. Unitary findings and sentencing proceedings, no right of the accused to testify under oath on his behalf, and no right to defense counsel for the accused all necessitated the need for the additional safeguard of a military equivalent of the right of allocution.³⁷ Over time, the military justice system adopted due process safeguards that arguably obviated the need for the right of allocution. Strangely, even after court-martial procedure became more robust, the right of allocution only grew stronger.³⁸ Once formalized as a regulatory right in the Manual for Courts-Martial, and spurred by military

(N.C. Ct. App. 1984) (N.C. GEN. STAT. 15A-1334 (1983)); *State v. Gotsis*, 469 N.E.2d 548, 554 (Ohio Ct. App. 1984); *State v. Mak*, 718 P.2d 407, 430 (Wash. 1986)).

³³ See HAW. REV. STAT. § 706-604(1) (2018); *State v. Chung Hin Chow*, 883 P.2d 663, 668 (1994) (overturning case in which trial judge did not allow defendant to offer commentary on the credibility of a police officer’s testimony during sentencing).

³⁴ See, e.g., *People v. Lucero*, 3 P.3d 248, 263 (Cal. 2000); *Echavarria v. State*, 839 P.2d 589, 596 (Nev. 1992) (“The right of allocution is not intended to provide a convicted defendant with an opportunity to introduce unsworn, self-serving statements of his innocence as an alternative to taking the witness stand. The proper place for the introduction of evidence tending to establish innocence is in the guilt phase of trial.”).

³⁵ *Echavarria*, 839 P.2d at 596.

³⁶ *Lucero*, 3 P.3d at 263.

³⁷ Act of Mar. 16, 1878, ch. 37, 20 Stat. 30 (1878) (“The person charged shall be a competent witness at his own request, but not otherwise, and his failure to make such request shall not create any presumption against him.”); see also GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 132 (3d ed. rev. 1913); COLONEL WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS app. XIV at 390 (2d ed. rev. 1920); *id.* at 22, 165.

³⁸ U.S. DEP’T OF ARMY, A MANUAL FOR COURTS-MARTIAL, para. 79 (1928) [hereinafter 1928 MCM].

case law, the unsworn statement eventually evolved into an expansive near free-for-all.

A. Unsworn Statements Prior to the Manual for Courts-Martial

In 1775, the Second Continental Congress drafted the first military code for a federal military force in America: the Articles of War.³⁹ These articles were based on British military code.⁴⁰ They were revised and modified over the years.⁴¹ However, they lacked specificity for trial procedure.⁴² As a result, early courts-martial under these articles were generally hasty and haphazard affairs.⁴³ Courts-martial were generally considered “simple and summary” to the point that an opening statement was not necessary as the cases were sufficiently straight-forward.⁴⁴ The right to counsel was not guaranteed, though granting counsel was encouraged.⁴⁵ In the earliest of military courts-martial, similar to common law Britain, the accused had no right to take the stand in his own defense.⁴⁶ As a result it was only equitable to allow the common law practice of a statement of allocution by the accused. This statement was largely unfettered as the accused’s statement “was the only agency by means of which the accused could present to the court his side of the case, or bring to the attention of the court facts which had not been established by the testimony of the witnesses.”⁴⁷ For this reason, the accused’s statement was

³⁹ WINTHROP, *supra* note 38, at 22.

⁴⁰ *Id.*

⁴¹ *Id.* at 21–23.

⁴² *Id.* at 281–290.

⁴³ *See id.* at 281. As Congress considered changes to the military justice system in 1948, the subcommittee charged with the recommendations observed that, historically, the officers charged with administering and conducting courts-martial “had never been admitted to any bar outside of an officer’s club.” *Bills to Unify, Consolidate, Revise, and Codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the Comm. on Armed Services, 81st Cong. 120 (1949) [hereinafter UCMJ Hearings].*

⁴⁴ WINTHROP, *supra* note 38, at 283.

⁴⁵ *Id.* at 165. While granting defense counsel was encouraged, early military courts had no patience with defense attorneys who slowed the military justice process. Military practice was to “exclude [defense counsel] who unreasonably delays proceedings by repeated technical objections.” *Id.* at 166.

⁴⁶ *See* DAVIS, *supra* note 38.

⁴⁷ DAVIS, *supra* note 38.

broader than even the common law right, and could be considered not only for its arguments but also any alleged facts contained therein.⁴⁸

By 1878, the accused was given the right to take the stand in his own defense at court-martial.⁴⁹ However, the provision of defense counsel was still considered a privilege, not a right of the accused, until codified by Congress 1920.⁵⁰ For this reason, a right of allocution remained a necessary mechanism for the accused to bring arguments and factual assertions forward for his defense. However, the court could now consider the fact that the statement was not sworn in determining the weight it should be given.⁵¹ Disallowing cross-examination of the accused during his statement was only fitting. Pitting a potentially uneducated (and perhaps illiterate) accused against an educated attorney in cross-examination was not an equitable arrangement in the courtroom. Thus, the statement was allowed to be unsworn so as not to have a chilling effect on the accused putting on a defense. Indeed, it was commonplace for the government's judge advocate to be sporting and not even rebut the accused's statement.⁵² The statement also served as a closing argument of sorts. Until 1918, the statement was not termed an "unsworn statement," instead it was labeled the "concluding statement."⁵³ Similar to a closing argument in modern military courts, the concluding statement was altered so it could no longer be regarded as evidence.⁵⁴

Historically, this "concluding statement" was given "very considerable freedom...within certain limits."⁵⁵ The "concluding statement" could be oral or written in its format.⁵⁶ The accused was permitted to attack the government's case and claim that he was not guilty, just as in a true closing

⁴⁸ *Id.*

⁴⁹ WINTHROP, *supra* note 38, at app. XIV at 998 (citing Act of March 16, 1878, 20 Stat. 30 (1878)) ("In the trial of all indictments, informations, complaints, and other proceedings against persons charged with commission of crimes, offenses, and misdemeanors, in the United States courts,...and courts-martial...the person so charged shall, at his own request but not otherwise, be a competent witness.").

⁵⁰ Articles of War, art. 11 (1920); U.S. DEP'T OF ARMY, A MANUAL FOR COURTS-MARTIAL, para. 31a, b (1921) [hereinafter 1921 MCM] (mandating appointment of defense counsel in general and special courts-martial).

⁵¹ DAVIS, *supra* note 38, at 132-33.

⁵² *Id.* at 133.

⁵³ *Id.* at 299; U.S. DEP'T OF ARMY, A MANUAL FOR COURTS-MARTIAL, para. 290 (1918).

⁵⁴ WINTHROP, *supra* note 38, at 300.

⁵⁵ *Id.* at 299.

⁵⁶ *Id.* at 300.

argument today.⁵⁷ In the alternative, the accused could accept guilt and present matters in extenuation, in a manner more closely resembling a statement in allocution.⁵⁸ While the accused was given general free rein in this statement, he was not permitted to engage in “disrespectful language toward superiors or the court, [or] any insubordination and defiance of authorities.”⁵⁹ In his treatise on military law, Colonel Winthrop noted ominously that, in making his unsworn statement, the accused should be cautious in how he exercises that right, as an “indulgence in personalities not only weakens a defence [sic], but has the effect of disposing the pardoning power against lenity. . . .”⁶⁰ Indeed, where the statement “manifestly exceeds a reasonable freedom,” the court could cut off the accused with a warning, or even report the objectionable statement to the reviewing authority for preferral of further charges for “menacing words.”⁶¹

In 1890, this military practice of allowing what would later be styled as an “unsworn statement” at the close of the case was formalized. In what may be viewed as the predecessor to today’s Military Judges’ Benchbook,⁶² but was then termed the Instructions for Courts-Martial, the United States Army published a trial procedural guide, which made allowances for an unsworn statement by the accused.⁶³ Emanating from the Army rather than Congress, this military right of allocution held the force of only regulatory, not statutory law.

B. Unsworn Statements Post-Manual for Courts-Martial

From the initial formalization of court-martial practice and procedure in 1890 under the Instructions for Courts-Martial grew the Manual for Courts-Martial, initially promulgated in 1893.⁶⁴ Under the 1893 Manual for Courts-Martial, the historical practice of the accused offering an unsworn statement before guilt remained intact. The courts-martial procedural guide

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 299 n.17.

⁶¹ *Id.* at 300.

⁶² MJBB, *supra* note 3.

⁶³ CAPTAIN HENRY P. RAY, INSTRUCTIONS FOR COURTS-MARTIAL AND JUDGE ADVOCATES 10 (1890), https://www.loc.gov/rr/frd/Military_Law/pdf/manual-1890.pdf.

⁶⁴ LIEUTENANT ARTHUR MURRAY, A MANUAL FOR COURTS-MARTIAL (3d ed. 1893), https://www.loc.gov/rr/frd/Military_Law/pdf/manual-1893.pdf.

included in the Manual for Courts-Martial directed the judge advocate to ask the accused at the close of findings, “What have you to say in your own defense?”⁶⁵ At this point, the accused could “decline to be sworn” and make a statement.⁶⁶ This traditional understanding of the unsworn statement remained in practice throughout the coming decades.⁶⁷

The 1918 Manual for Courts-Martial provided further specificity. It also introduced the phrase “unsworn statement” into military parlance. The manual stated that, after all the evidence in the case has been submitted, “the accused, personally or by counsel... may make an *unsworn statement* as to the case.”⁶⁸ It also clarified that the “statement may consist of a brief summary or version of the evidence, with the facts, a presentation also of the law of the case and an argument both upon the facts and the law.”⁶⁹ The manual further noted that a “large freedom of expression” for the accused should be allowed in the statement, with the only limitation being “an attack upon such a superior of a personal character... [or] language of marked disrespect... ”⁷⁰ It should be remembered that in 1918, a common law rationale still existed for the unsworn statement. Despite congressional codification of the accused’s right to testify in 1878, the accused was still not guaranteed the right to defense counsel.

⁶⁵ *Id.* at 146.

⁶⁶ *Id.*

⁶⁷ See U.S. DEP’T OF ARMY, A MANUAL FOR COURTS-MARTIAL, COURTS OF INQUIRY, AND RETIRING BOARDS, AND OF OTHER PROCEDURE UNDER MILITARY LAW 73, 144 (Rev. ed. 1902) (stating the accused is permitted to make a “statement in his defense.”), <https://archive.org/details/courtsmartialman00unitrich>; U.S. DEP’T OF ARMY, A MANUAL FOR COURTS-MARTIAL, COURTS OF INQUIRY, AND RETIRING BOARDS, AND OF OTHER PROCEDURE UNDER MILITARY LAW 45 (Rev. ed. 1905) (directing “[t]he accused... may make a verbal or written statement.... The statement should not be sworn to...”), https://www.loc.gov/rr/frd/Military_Law/pdf/manual-1905.pdf; U.S. DEP’T OF ARMY, A MANUAL FOR COURTS-MARTIAL, COURTS OF INQUIRY, AND RETIRING BOARDS, AND OF OTHER PROCEDURE UNDER MILITARY LAW 46 (Rev. ed. 1908, corrected to Aug., 2010) (stating the accused “may make a verbal or written statement as to the case. The statement should not be sworn to....”), https://www.loc.gov/rr/frd/Military_Law/pdf/manual-1910.pdf.

⁶⁸ U.S. DEP’T OF ARMY, A MANUAL FOR COURTS-MARTIAL COURTS OF INQUIRY AND OF OTHER PROCEDURE UNDER MILITARY LAW, sec. I, para. 290 (Corrected to Aug. 1, 1918) (emphasis added), https://www.loc.gov/rr/frd/Military_Law/pdf/manual-1918.pdf.

⁶⁹ *Id.*

⁷⁰ *Id.* at para. 291.

The first non-common law rationale for an unsworn statement can be traced to the 1928 Manual for Courts-Martial. In 1920, Congress codified a statutory right to defense counsel in general and special courts-martial.⁷¹ This obviated the functional need for an unsworn statement as it existed at common law. However, the 1928 Manual for Courts-Martial retained the unsworn statement, maintaining the now entrenched historical practice of permitting the accused to submit an unsworn statement prior to the members determining guilt or innocence.⁷² The manual provided that “[t]he accused, whether he has testified or not, may make an unsworn statement to the court in denial, explanation, or extenuation of the offenses charged.”⁷³ Even in light of the due process advancement of the accused’s right to testify and right to counsel, the 1928 Manual for Courts-Martial declined to limit the scope of the “unsworn statement.” Instead, it repeated the well understood maxim, first set out by Col Winthrop and repeated in successive Manuals for Courts-Martial, that the “statement should not include what is properly argument, but ordinarily the court will not check a statement on that ground if it is being made orally and personally by an accused.”⁷⁴

Following World War II, criticism of the military justice system reached a crescendo, and Congress acted. It inaugurated a series of legislative hearings that ultimately led to the creation of the Uniform Code of Military Justice in 1950.⁷⁵ As part of this process, the Committee for the Armed Forces tasked a subcommittee with recommending changes to the military justice system.⁷⁶ While the surviving records of the legislative debate are largely devoid of discussion on unsworn statements, a record does exist of Colonel P. G. McElwee of the Judge Advocate Reserve testifying as to his experiences with what he viewed as abuses of the practice. Specifically,

⁷¹ Articles of War, art. 11 (1920); U.S. DEP’T OF ARMY, A MANUAL FOR COURTS-MARTIAL, para. 31a, b (1921), https://www.loc.gov/rr/frd/Military_Law/pdf/manual-1921.pdf, (mandating appointment of defense counsel in general and special courts-martial).

⁷² See 1928 MCM, *supra* note 39, at para. 76.

⁷³ *Id.*

⁷⁴ *Id.* Substantially similar language describing the permissive scope of the unsworn statement persists in the current MCM: “An unsworn statement ordinarily should not include what is properly argument, but inclusion of such matter by the accused when personally making an oral statement ordinarily should not be grounds for stopping the statement.” MCM, *supra* note 6, RCM 1001(c)(2)(C) discussion.

⁷⁵ Charles M. Schiesser & Daniel H. Benson, *Modern Military Justice*, 19 CATH. U. L. REV. 489 (1970). The criticism of military justice during the World Wars focused on its harsh and summary nature.

⁷⁶ *UCMJ Hearings*, *supra* note 44.

Col McElwee noted instances where an accused used an unsworn statement “in his own behalf in which he admitted [guilt]...but he had given certain explanations.... When we got through with that case, the first vote was... acquittal....”⁷⁷ Col McElwee went on to describe that the unsworn statement was the cause for the vote.⁷⁸ Essentially, the accused used the statement for the purpose of jury nullification. Col McElwee complained he had seen this “happen time and again.”⁷⁹

During this period the judge advocate general of the Navy compiled a synopsis of emerging recommendations from Congress for the military justice system.⁸⁰ The synopsis noted multiple recommendations to relocate the unsworn statement from the end of findings to the end of sentencing. The McGuire Committee of 1946 similarly recommended that the unsworn statement be moved to sentencing proceedings as opposed to its historical timing during findings.⁸¹ The Keeffe Board of 1947 suggested that such a statement should be a “sworn (or perhaps unsworn) statement in extenuation or mitigation....”⁸² The judge advocate general recommended adopting the Keeffe Board’s recommendation that the statement be *sworn*.⁸³

Ultimately, the implementation of these recommendations came through the Manual for Courts-Martial, not the Uniform Code of Military Justice, meaning the right to allocution remained a regulatory rather than a statutory right. The 1951 Manual for Courts-Martial provided for allocution in the pre-sentencing proceeding for the limited purpose of extenuation and mitigation,⁸⁴ and permitted the statement to remain unsworn.⁸⁵

⁷⁷ *Id.* at 126.

⁷⁸ *Id.*

⁷⁹ *Id.* Col McElwee found this issue to be such a problem that he proposed making the legal advisor a voting member of the military jury.

⁸⁰ U.S. DEP’T OF NAVY, SYNOPSIS OF RECOMMENDATIONS FOR THE IMPROVEMENT OF NAVAL JUSTICE (1947), http://www.loc.gov/rr/frd/Military_Law/Morgan-Papers/Vol-III_synopsis-of-recommendations.pdf.

⁸¹ *Id.* at 37.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES, para. 75c. (1951), https://www.loc.gov/rr/frd/Military_Law/pdf/manual-1951.pdf.

⁸⁵ *Id.* (providing that the accused may make “an unsworn statement to the court in extenuation or mitigation of the offenses of which he stands convicted”).

These changes should be evaluated in the context of the broad ongoing changes to court-martial procedure. Until 1928, courts-martial resembled trial courts at common law, deliberating on findings and sentencing simultaneously. That is, if during their deliberations on the verdict of the accused for the charged offenses, the members voted to convict, they would proceed to consideration of an appropriate sentence for that offense during the same closed-session deliberation.⁸⁶ When courts-martial were bifurcated into separate findings and sentencing proceedings, this resemblance disappeared, and along with it one of the common law justifications for an unsworn allocution. The 1951 Manual for Courts-Martial “unsworn statement” rule showed a marked and final departure from the common law rationale for allocution, and the evolution of the unsworn statement from a findings to a sentencing tool.

Given the evolution of allocution rights in the military, it appears the movement of the “unsworn statement” from findings to pre-sentencing hearing was a deliberate act by the drafters of the Manual for Courts-Martial to alter the unsworn statement from its historical origin and purpose. This move signaled that the unsworn statement was no longer a tool for litigation in findings. Instead, its purpose was to ensure just sentencing—as a tool for extenuation and mitigation. Sadly, because this change occurred through the Manual for Courts-Martial rather than legislation, we have no “legislative history” that explicitly states the purpose and reasoning behind the final provisions for the unsworn statement in the 1951 Manual for Courts-Martial. This arguably opened the door for an expansive series of case law interpretations that ultimately transformed the unsworn statement into the free-wheeling rhetorical exercise of today.

Following the promulgation of the Uniform Code of Military Justice and the 1951 Manual for Courts-Martial, military courts were left to determine the distance, if any, an unsworn statement could permissibly wander from the newly stated purpose of “extenuation or mitigation.” The initial answer from the military’s highest court was blunt and straight-forward: unsworn statements were not an unbounded opportunity for allocution; they were designed to deliver pertinent sentencing information as to extenuation and

⁸⁶ Compare 1921 MCM, *supra* note 51, at para. 294 (“After the statements and arguments, if any are made, have been concluded, the court will proceed to its judgment, which consists of the findings and sentence”), with 1928 MCM, *supra* note 39, at para. 79 (“In the event of conviction of an accused the court will open for the purpose of receiving as evidence such data as to his age, pay, and service.... This evidence... is for consideration by the court in fixing the kind and amount of punishment.”).

mitigation. The case of *United States v. Tokuichi Tobita* involved an American service member accused of sexually assaulting a Korean minor in the Korean city of Ascom.⁸⁷ Following his conviction, the accused attacked the verdict in his unsworn statement, claiming that he had not used force during the crimes of which he now stood convicted.⁸⁸ The law officer (the equivalent of the military judge at that time) cut off the accused and directed him and his defense counsel to confine the unsworn statement to matters “tending to lessen... [the accused’s] criminality.”⁸⁹ On appeal to the military’s highest appellate court, then termed the United States Court of Military Appeals (CMA) emphatically ruled that “[m]anifestly, this ruling of the law officer was proper....”⁹⁰ In so ruling, the court relied upon the plain meaning of “extenuation” as it appeared in the Manual for Courts-Martial, paragraph 75c(3).⁹¹ The *Tokuichi Tobita* case settled the purpose of the new unsworn statement for the following decade, until a reinterpretation of the permissible scope of the unsworn statement in the 1970s and 1980s.

In the interim, the permissible substance of the unsworn statement in the military remained steady; but the method of presentation began to evolve. Some defense counsel had their accused give the unsworn statement from a podium to the members, while others had their client take the stand to deliver their unsworn. Some even conducted the unsworn in a mock direct examination of their client on the witness stand.⁹²

In 1961, the Supreme Court decided *Green v. United States*, discussed above, holding that judges must query the defendant if he or she would like to make a statement in allocution. In 1970, the military’s highest court followed suit. In *United States v. Williams*, the military high court strongly urged military judges to remind an accused of his or her right to make an unsworn statement.⁹³ However, consistent with the Supreme Court’s ruling in *Green*, failure to advise the accused of this right to make an unsworn statement was not fatal on appeal.⁹⁴ The court reasoned that, unlike in the past, the accused

⁸⁷ 3 C.M.A. 267 (1953).

⁸⁸ *Id.* at 271.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *United States v. Harris*, 13 M.J. 653, 656 (N-M.C.M.R. 1982) (Byrne, J., concurring). These practices persist through the present day in military courts.

⁹³ 20 C.M.A. 47, 49 (1970).

⁹⁴ *Id.*

now had an absolute right to a defense attorney, who the court can presume has advised the accused of the right to make an unsworn statement.⁹⁵ Beyond that, *Tokuicki Tobita* remained good law.

In the 1970s military courts began to lay the groundwork for a radical new interpretation of the military accused's right to make an unsworn statement, diverging from then existing civilian federal practice. In 1971, the United States Army Court of Military Review stated in dicta that the government could not rebut an unsworn statement with evidence of the accused's lack of truthfulness⁹⁶ In 1976, the United States Air Force Court of Military Review formally held that the government could not rebut an unsworn statement with evidence of the accused's bad reputation for truthfulness.⁹⁷ The United States Navy Court of Military Review followed suit in 1978.⁹⁸ This development is significant because the federal courts followed a different path. The federal system allowed a judge to consider the defendant's character for truthfulness in the pre-sentencing report.⁹⁹ Judge Byrne, of the Navy-Marine Corps Court of Military Review, took issue with the military's emerging jurisprudence. In a case in which the court held that a prosecutor could not offer evidence of an accused's character for untruthfulness to rebut an unsworn statement, Judge Byrne wrote:

Assume for a moment that this appellant had been tried in federal district court. The federal rule would presently be satisfied, insofar as the accused's right to allocution is concerned, if the federal judge had specifically addressed the accused and said "Do you, the accused...have anything to say before I pass sentence..."The federal judge may consider the accused's character for truth and veracity.... As a contrast, *the members of a court-martial have been precluded from learning vital information concerning the accused who makes an unsworn statement because of the failure of [previous military decisions] to align military procedure with federal procedure....*¹⁰⁰

⁹⁵ *Id.*

⁹⁶ United States v. Stroud, 44 C.M.R. 480 (A.C.M.R. 1971).

⁹⁷ United States v. McCurry, 5 M.J. 502 (A.F.C.M.R. 1976).

⁹⁸ United States v. Shewmake, 6 M.J. 710 (N-M.C.M.R. 1978).

⁹⁹ *Id.* (citing FED. R. CRIM. P. 32(c)(2)).

¹⁰⁰ *Id.* at 656-657 (emphasis added).

Thus, the military unsworn took a trajectory away from the federal right of allocution. Importantly, nothing in the Manual for Courts-Martial indicates the intent to grant the military accused a greater right of allocution than a federal defendant. In fact, the language of the rules are comparable.¹⁰¹ However, the unsworn statement was now on the path to becoming an entirely different legal animal than the federal right of allocution.

In 1987, the Army's highest court dealt with the issue of an accused attempting to insert the victim's prior sexual history into his unsworn statement. In *United States v. Ezell*, the appellant, after being convicted of forcibly raping the victim, attempted to include in his unsworn statement the fact that the victim had worked as a year as a prostitute as well as other sexual matters from her past.¹⁰² The military judge precluded mention of such matters.¹⁰³ On appeal, the Army's highest court rejected his argument that he should be permitted to include such matters in his unsworn statement.¹⁰⁴ The court held that such matters were barred by the military's rape-shield rule from inclusion in the unsworn statement.¹⁰⁵ Furthermore, the court found that inclusion of such irrelevant facts is not constitutionally required under due process.¹⁰⁶ Thus, for a period of time, it appeared the court would return to its bright line rule from *Tokuichi Tobita*.

C. "We shall not speculate" – the Unsworn Statement Takes on a Life of its Own

In the 1990s, the United States Court of Appeals for the Armed Forces (CAAF) embarked on a series of decisions that radically altered the nature of the unsworn statement. This change initially came incrementally. In *United States v. Cleveland*, the prosecution attempted to rebut statements made by the accused in his unsworn statement regarding his wife's need for care

¹⁰¹ Compare FED. R. CRIM. P. 32 (i)(4)(A) ("Before imposing sentence, the court must: (i) provide the defendant's attorney an opportunity to speak on the defendant's behalf; (ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and (iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney"), with MCM, *supra* note 6, at RCM 1001(c)(2)(A) ("The accused may...make an unsworn statement...in extenuation, in mitigation or to rebut matters presented by the prosecution.").

¹⁰² 24 M.J. 690, 692–93.

¹⁰³ *Id.* at 693.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

due to medical issues, and that his feeling that he had “served well” in the military.¹⁰⁷ Specifically, the Government sought to introduce evidence that the accused had not previously sought help for his wife’s condition from the Air Force, and evidence of uncharged misconduct to demonstrate that he had not “served well.”¹⁰⁸ The court’s analysis primarily focused on the related issues of: (1) statements of fact vs. statements of opinion, and (2) the requirement that rebuttal evidence must directly explain, repel, counteract, or disprove “facts” the accused offered in his unsworn.¹⁰⁹ The court held that the accused’s statement that he *felt* he had served well was essentially an opinion and accordingly could not be “explained” or contradicted by the evidence of his prior misconduct while in service.¹¹⁰ Such a semantic distinction enables the submission of all manner of facts so long as they are proceeded by a talismanic “I feel,” “I think,” or the like. This distinction without a difference left the government largely helpless to educate the members as to the nature of the accused’s prior service.¹¹¹

United States v. Partyka expanded on the *Cleveland* ruling and further insulated the accused’s unsworn from attack.¹¹² The accused was found guilty of sodomy and three offenses of carnal knowledge with a fifteen year old girl.¹¹³ During the same time the accused was abusing the victim, she was simultaneously being molested by her stepfather at home.¹¹⁴ In his unsworn statement, the accused stated he was glad the victim was getting help after the “hell that she was going through with her stepfather . . .”¹¹⁵ He acknowledged that his actions may have also affected the victim’s mental health.¹¹⁶ However, he claimed that on several occasions he only had sexual relations with the victim after she threatened to falsely report him for rape if he did not have sex with her.¹¹⁷ The trial judge allowed the prosecution to rebut the unsworn with the testimony of an expert witness, a doctor who practiced psychology

¹⁰⁷ 29 M.J. 361, 362–363 (C.M.A. 1990).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 363–364

¹¹⁰ *Id.* at 364.

¹¹¹ *Id.* at 363.

¹¹² 30 M.J. 242 (C.M.A. 1990).

¹¹³ *Id.* at 242–243.

¹¹⁴ *Id.* at 243–244.

¹¹⁵ *Id.* at 244.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

and treated the victim.¹¹⁸ This expert witness testified as to her opinion of the unlikelihood that the victim's stepfather caused the majority of the victim's trauma or that the victim would threaten the accused with a false report if he did not have sex with her.¹¹⁹ The military's highest court held that the judge erred in allowing the rebuttal testimony of the expert witness.¹²⁰

The case could have easily been decided on the issue of what evidence could be properly defined as rebuttal. While the court did consider the government's rebuttal beyond the scope of the Rules, it also painted with broad brush strokes, stating, "We shall not speculate as to why for decades military law has granted accused service members the right to make an unsworn statement. However, so long as this valuable right is granted by the Manual for Courts-Martial, we shall not allow it to be undercut or eroded."¹²¹ This is a remarkable statement. The military high court explicitly stated it has no interest in understanding the historical underpinnings of the military unsworn statement.

The court went on to state that, even assuming the accused had placed the blame for the victim's trauma on another actor, such a claim would not be a statement of fact "within the contemplation of RCM 1001(c)(2)(C)."¹²² Thus, even if the accused made a statement that was false, and the government had evidence of its falsity, such a statement could not be rebutted by the government if the accused's statement was simply something the accused subjectively believed to be true. While the government could rebut the accused's statement that the victim had threatened him through testimony of the victim, they could not rebut a statement of subjective belief with the testimony of an expert witness. As in *Cleveland*, it seems as though the accused could now cloak any statement, even one they know to be untrue, in subjective belief, making it immune from government rebuttal.

One year later, in 1991, the military high court in *United States v. Rosato* further redefined the unsworn statement.¹²³ *Rosato* involved an accused found guilty of wrongful distribution, possession, and use of LSD.¹²⁴ Dur-

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 245.

¹²⁰ *Id.* at 247.

¹²¹ *Id.* at 246.

¹²² *Id.* at 247.

¹²³ 32 M.J. 93 (C.M.A. 1991).

¹²⁴ *Id.* at 93.

ing his unsworn, the accused referred to hearsay statements regarding the drug program he wished to enter.¹²⁵ The military judge found the statements to be collateral consequences of the court-martial sentence and therefore disallowed them in the unsworn statement.¹²⁶ Such issues are considered irrelevant in sentencing proceedings.¹²⁷ The court found that the military trial judge abused his discretion, holding that the prohibition against considering collateral consequences in sentencing did not extend to the accused's unsworn statement.¹²⁸ The ruling was not narrow. The court stated, "An unsworn statement should not include what is properly argument, but inclusion of such matter by the accused...should not be grounds for stopping the statement."¹²⁹ The court stated the unsworn statement has "been generally considered unrestricted."¹³⁰ Notably, in painting with such a broad brush, the court cited Col Winthrop's understanding of the unsworn statement, when it was included in findings by an accused who may be unrepresented.¹³¹ The CMA drew the outer limited of a permissible unsworn where the statement is "gratuitously disrespectful toward superiors or the court...[or] a form of insubordination or defiance of authority."¹³² Again, the court's understanding of the limits of the unsworn statement were drawn from historical times pre-dating the Manual for Courts-Martial.

The court in *Rosato, sub silentio*, overruled *Tokuichi Tobita*. No longer could a judge confine the unsworn statement to matters "tending to lessen...[the accused's] criminality."¹³³ The military high court set the outer limits of the unsworn as it was understood in the 19th century as opposed to the language set forth by the President in the Manual for Courts-Martial.

In 1996, the Air Force Court of Criminal Appeals attempted to contain and minimize the ruling set forth by the CMA in *Rosato*. In *United States v. Britt*, the Air Force high court noted that the decision in *Rosato* "was premised on the Winthrop and Davis discussions of the 19th century

¹²⁵ *Id.* at 94.

¹²⁶ *Id.*

¹²⁷ See *United States v. Griffin*, 25 M.J. 423 (C.M.A. 1988).

¹²⁸ *Rosato*, 32 M.J. at 95.

¹²⁹ *Id.* at 96.

¹³⁰ *Id.* (citing WINTHROP, *supra* note 38, at 299).

¹³¹ WINTHROP, *supra* note 38, at 299.

¹³² *Rosato*, 32 M.J. at 96 (citing DAVIS, *supra* note 47 at 132–133, and WINTHROP, *supra* note 38, at 299).

¹³³ *United States v. Tokuichi Tobita*, 3 C.M.A. 267, 271 (1953).

practice of permitting an accused a pre-findings statement.... Its migration, mutatis mutandis, to a presentencing right of allocution is a comparatively recent feature of military criminal jurisprudence....”¹³⁴ The court went on to state that unsworn statements should not be “unlimited” but be confined to “extenuation, ... mitigation, ... and ... matters in rebuttal to the prosecution,” just as R.C.M. 1001(c)(2) sets forth.¹³⁵ The Air Force court sought to make its ruling consistent with *Partyka* and *Rosato* while also signaling their concern with the broad language of the military’s high court. Thus, the court selectively read *Partyka* and *Rosato* as dealing with issues of relevance, not a generally unfettered unsworn statement.¹³⁶ In closing, the Air Force’s highest court stated emphatically that military judges could restrict the content of an unsworn statement where it does not address the “appellant’s crime (extenuation)... the peculiar fidelity, valor, or character of his service (mitigation)... [or] rebuttal....”¹³⁷

However, in *United States v. Grill*, the military high court issued its watershed decision that left little doubt the floodgates had been opened for unsworn statements.¹³⁸ The trial of the appellant in *Grill* was unremarkable. The appellant was convicted of the use, distribution, importation, and conspiracy to distribute anabolic steroids.¹³⁹ In pre-sentencing proceedings, the military judge precluded the accused from using his unsworn to make a sentencing comparison with his civilian co-conspirators. Specifically, the accused wish to inform the members that his civilian co-conspirators did not receive jail time for their offenses.¹⁴⁰ Such a sentence comparison is accepted as improper evidence for members to consider in sentencing under military law.¹⁴¹

The *Grill* court offered a brief commentary on the history of the unsworn statement, writing that the unsworn statement “has been recognized by the Manual for Courts-Martial ‘since the adoption of the Uniform Code of Military Justice’ and was ‘permitted prior to adoption of the Uniform Code....’”¹⁴² The *Grill* court also cited the *Rosato* decision’s broad statement

¹³⁴ 44 M.J. 731, 734 (1996).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 735.

¹³⁸ 48 M.J. 131 (C.A.A.F. 1998).

¹³⁹ *Id.* at 131.

¹⁴⁰ *Id.* at 132–133.

¹⁴¹ *See United States v. Mamaluy*, 27 C.M.R. 176 (C.M.A. 1959).

¹⁴² *Grill*, 48 M.J. at 132 (citing *United States v. Partyka*, 30 M.J. 242, 246 (C.M.A. 1990)).

that the unsworn statement was “generally considered unrestricted” throughout military history.¹⁴³ Just as the *Rosato* court noted, the *Grill* court stated that a military judge could only strip contents from an unsworn statement that were “gratuitously disrespectful toward superiors or the court [or] a form of insubordination or defiance to authority.”¹⁴⁴ The court explicitly held that the unsworn statement could contain evidence that would not be admissible in sworn testimony for sentencing.¹⁴⁵ The court held that any concern the trial judge had regarding members being confused or misled by the unsworn statement could only be addressed through an instruction to the members from the military judge.¹⁴⁶ This instruction could detail to the members what could properly be considered in sentencing.¹⁴⁷ The court went so far as to acknowledge that their interpretation of the “unfettered” unsworn statement could lead to a “plethora of mini-trials....”¹⁴⁸ The Court’s response to this concern was that, if their rule got out of hand, “the President has the authority to provide appropriate guidance in the Manual for Courts-Martial.”¹⁴⁹

In her dissent, Judge Crawford correctly noted that the unsworn statement, as it appears in the Manual for Courts-Martial, is a right granted by a specific procedural rule, not history or the United States Constitution.¹⁵⁰ She also addressed the majority’s contention that the unsworn statement should not be eroded due to its historical significance, writing, “Historically, military law permitted defendants to speak prior to sentencing because, generally, defendants were not permitted to testify and were not represented by counsel.”¹⁵¹ Judge Crawford wrote that the Manual for Courts-Martial allowed the defense to present matters in extenuation or mitigation and that beyond that judges may exclude irrelevant evidence.¹⁵² Unlike the majority opinion, Judge Crawford’s dissent reflected an accurate historical understanding of the unsworn statement.

¹⁴³ *Id.* (citing *United States v. Rosato*, 32 M.J. 93, 96 (C.M.A. 1991)).

¹⁴⁴ *Id.* (citing *Rosato*, 32 M.J. at 96).

¹⁴⁵ *Id.* at 133.

¹⁴⁶ *Id.* See also *United States v. Teeter*, 16 M.J. 68 (1983).

¹⁴⁷ *Grill*, 48 M.J. at 133.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 134 (Crawford, J., dissenting).

¹⁵¹ *Id.* (citing *United States v. Britt* 44 M.J. 731 (A.F. Ct. Crim. App. 1996)).

¹⁵² *Id.*

Months later, CAAF doubled down on its decision in *Grill*. In *United States v. Jeffery*, CAAF overturned a military judge’s refusal to permit the accused to say during his unsworn statement, “If he is not punitively discharged from the Air Force, it may be that he would be administratively discharged later on.”¹⁵³ *Jeffery* involved an accused convicted of indecent acts with a minor.¹⁵⁴ At trial, the military judge excluded this portion of the unsworn statement, concluding that commentary on the possibility of that accused later receiving an administrative discharge if no punitive discharge was adjudged at trial would be collateral to the sentencing proceedings.¹⁵⁵

CAAF cited its previous decisions in *Rosato* and *Grill*, again holding the unsworn statement should be largely unrestricted, while recognizing that the unsworn statement should not be “wholly unconstrained.”¹⁵⁶ However, the court laid down no standard for where a military judge should draw the line for matters that could be excluded from an unsworn statement. Instead, the court held that, in the specifics of the *Jeffery* case, the accused’s comments were “not outside the pale.”¹⁵⁷ No guidance was offered as to where the pale is planted.

Similarly, in *United States v. Macias*, the appellant sought to include in his unsworn statement that, per “Megan’s Law,” he would have to register as a sex offender as a result of his court-martial conviction.¹⁵⁸ Such a statement is inadmissible in sentencing as it is a collateral consequence.¹⁵⁹ The trial judge precluded such a statement from inclusion in the accused’s unsworn.¹⁶⁰ The

¹⁵³ 48 M.J. 229, 230 (C.A.A.F. 1998).

¹⁵⁴ *Id.* at 229.

¹⁵⁵ As to the exclusion of “collateral matters” from military pre-sentencing hearings, see *United States v. Griffin*, 25 M.J. 423, 424 (C.M.A. 1988) (“The general rule concerning collateral consequences of a sentence is that “courts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration.”). In some respects this ruling by the military judge appears to be prescient insofar as the Air Force Court of Criminal Appeals would later hold in *United States v. Friedmann* that administrative discharge is indeed a “collateral matter” and that reference to it by the accused during unsworn statement entitles the government to a limiting instruction. *United States v. Friedmann*, 53 M.J. 800, 804 (A.F. Ct. Crim. App. 2000).

¹⁵⁶ *Jeffery*, 48 M.J. at 230 (citing *Grill*, 48 M.J. at 133).

¹⁵⁷ *Id.*

¹⁵⁸ 53 M.J. 728, 729 (A. Ct. Crim. App. 1999).

¹⁵⁹ *United States v. Griffin*, 25 M.J. 423, 424 (C.M.A. 1988).

¹⁶⁰ *Macias*, 53 M.J. at 729.

court reversed, again citing *Grill* and *Rosato*.¹⁶¹ The court did state that “[t]he military judge has the discretion to exclude sentencing evidence having little probative value....”¹⁶² However, the court held that the military judge abused her discretion because the collateral consequences of a sex assault conviction are severe.¹⁶³ The court held that “[w]hile sex offenders deserve the opprobrium resulting from their criminal misconduct, they also deserve the opportunity to bring the legal collateral impacts of sex offender convictions to the attention of the sentencing authority via an unsworn statement.”¹⁶⁴ The court seemed to establish that some non-admissible evidence held more probative value than others. Rejecting the bright-line rule that evidence not in extenuation and mitigation is inadmissible, the court did not clearly establish what sort of non-admissible evidence was sufficiently “apposite,” “adverse,” and “stigma”-producing to the accused that it cannot be excluded by a military judge from an unsworn statement.¹⁶⁵

Within the last decade, the *Rosato* and *Grill* holdings have proven unworkable. The military’s highest court has not overruled these cases, but has made attempts to limit their broad holdings. The 2005 case *United States v. Barrier* was factually similar to *Grill*, wherein the appellant used a sentence comparison in his unsworn statement. The military’s highest court commented in dicta that “a military judge might appropriately preclude the introduction of information that in context is outside the scope of R.C.M. 1001, if the military judge determines that an instruction would not suffice... [f]or example, were an accused to offer a comparative review of sentences in the Air Force generally....”¹⁶⁶ The court went on to state that “each case will present different facts.... A military judge...might...[choose] to instruct or preclude given the specific statement at issue and depending on the context which it is presented.”¹⁶⁷

In a concurrence, Judge Crawford again attacked the lack of any clear standard for military judges to employ on the issue of unsworn statements.¹⁶⁸ Judge Crawford wrote that the military judge was left in the position of Alice

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 731.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *United States v. Barrier*, 61 M.J. 482, 485 (C.A.A.F. 2005).

¹⁶⁷ *Id.* at 486.

¹⁶⁸ *Id.* (Crawford, J., concurring).

in *Through the Looking Glass*, thinking to oneself, “It seems very pretty... but it’s rather hard to understand!... Somehow it seems to fill my head with ideas—only I don’t know exactly what they are!”¹⁶⁹ Judge Crawford stated emphatically that “[u]ntil we revisit *Grill*, return the unsworn statement to a form more consistent with law and history, and reassure military judges that they may exercise reasonable control over the sentencing case, the carousel will continue to operate.”¹⁷⁰

Months later, the military’s highest court continued to limit its previous holding in *Grill*. In *United States v. Johnson*, the appellant sought to introduce through his unsworn statement that he had passed a polygraph that he did not use drugs after being convicted of wrongful drug use.¹⁷¹ The court determined that the military judge acted properly in excluding such a statement from the unsworn, holding that “[p]olygraph evidence raises particular concerns on sentencing.... Appellant’s statement... could not reasonably have been offered for any other reason other than to suggest to the members that their findings of guilty were wrong.”¹⁷² The *Johnson* court seemingly went a step further in granting military judges the option to preclude from an unsworn statement a matter that impeaches or re-litigates the verdict.¹⁷³

The *Johnson* decision seemingly began to provide a workable rule for military justice practitioners: statements impeaching the verdict could be precluded from unsworn statements by the military judge. However, days after *Johnson*, the same court decided *United States v. Sowell* and muddied the waters of jurisprudence further.¹⁷⁴

The appellant in *Sowell* was a Seaman on trial for conspiracy and larceny.¹⁷⁵ Two of her three co-conspirators were never brought to trial; instead the military opted for discharge.¹⁷⁶ Her third co-conspirator was found not guilty at trial by court-martial.¹⁷⁷ At trial, Seaman Sowell’s alleged

¹⁶⁹ *Id.* (citing LEWIS CARROLL, *THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE* 24 (William Morris & Co., Inc. 1993)).

¹⁷⁰ *Id.* at 487.

¹⁷¹ 62 M.J. 31, 36 (C.A.A.F. 2005).

¹⁷² *Id.* at 37.

¹⁷³ *Id.*

¹⁷⁴ 62 M.J. 150 (C.A.A.F. 2005).

¹⁷⁵ *Id.* at 151.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

co-conspirator, Fire Controlman Third Class (FC3) Elliot, who had been found not guilty, took the stand to aid Sowell's defense and testified as to both of their innocence.¹⁷⁸ During findings argument, trial counsel attacked the credibility of FC3 Elliot, arguing that she had a motive to help Sowell with her testimony due to her own overlapping legal interests.¹⁷⁹ Ultimately, trial counsel insinuated that if Seaman Sowell were found guilty, FC3 Elliot may face trial.¹⁸⁰ In fact, FC3 Elliot had already been found not guilty. The members pronounced Sowell guilty and the case proceeded to sentencing.¹⁸¹ In her unsworn statement, Seaman Sowell sought to disclose to the members that FC3 Elliot had been found not guilty at trial.¹⁸² Presumably, she would also discuss that her other co-conspirators had been administratively discharged instead of facing court-martial. The military judge precluded these matters from being disclosed to the members in the unsworn statement, finding that they would be "a direct impeachment of the verdict...."¹⁸³

On its face, the military judge's instructions appeared entirely consistent with the *Johnson* decision. Indeed, CAAF stated, "Ordinarily, such information might properly be viewed in context as impeaching the members' findings."¹⁸⁴ However, CAAF found that "the Government's argument on findings opened the door to proper rebuttal" in the Accused's unsworn statement.¹⁸⁵ CAAF reasoned that trial counsel's argument in findings, that Elliot was a co-conspirator and thus also criminally liable, could be properly rebutted in the sentencing phase of trial, including in the accused's unsworn statement.¹⁸⁶ CAAF attempted to explain its ruling as narrow, writing its holding was "limited [to the] circumstances of this case...."¹⁸⁷ While the Court in *Sowell* attempted to limit its holding, it is difficult to imagine anything the defendant could introduce to impeach the verdict that would not somehow rebut the government's argument in finding. Indeed, evidence of a passed polygraph would directly rebut any government case that the accused is guilty.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 152.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

In recent cases, the military's highest court has attempted to leave its jurisprudence undisturbed while limiting the damage of *Grill*. In the 2014 case *United States v. Talkington* the appellant was convicted of sexual assault upon a victim who the appellant believed to be sleeping, and thus unable to consent.¹⁸⁸ In his unsworn statement, the appellant stated that he would have to register as a sex offender and that it would significantly inhibit his prospects of finding a job.¹⁸⁹ Under the military's jurisprudence, the military judge could not preclude such statements, though sex offender registration is a collateral consequence. However, following the unsworn statement, the military judge did instruct the jury that sex offender registration was a collateral consequence and "should not be a part of your deliberations...."¹⁹⁰ The appellant contended that not only should he be permitted to discuss inadmissible matters in his unsworn statement, but also that the judge should not be permitted to instruct the military jury that such matters are inadmissible in sentencing proceedings and should not be considered.¹⁹¹

The military's highest court preserved the status quo in *Talkington*, holding that *Riley* does allow the accused to discuss certain inadmissible and irrelevant matters in an unsworn statement, but that the military judge may instruct the members afterwards that such matters are irrelevant for their consideration. The *Talkington* court acknowledged that their jurisprudence was at odds with the language of the rule, stating, "[The rule] permits the presentation of matters in extenuation, mitigation, or rebuttal by an accused through an unsworn statement. Despite the limits of this rule, the Court has... held that the right to present an unsworn statement is 'generally considered unrestricted.'"¹⁹² Thus, the court settled into a somewhat contradictory solution to *Grill*: while the judge could not preclude the appellant from discussing inadmissible collateral consequences in his unsworn, such matters "should not be considered for sentencing."¹⁹³

As a result of this jurisprudence, today the military justice practitioners are left with little to guide them as they attempt to decipher the maze of unsworn statement jurisprudence. The unsworn statement is intended to be a relatively straight-forward portion of pre-sentencing proceedings. However,

¹⁸⁸ 73 M.J. 212, 213 (C.A.A.F. 2014).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 214.

¹⁹¹ *Id.* at 215.

¹⁹² *Id.* (citing *United States v. Rosato*, 32 M.J. 93, 96 (C.M.A. 1991)).

¹⁹³ *Id.* at 216.

due to the contradictory and confusing jurisprudence from the military's highest court, a puzzling dance unfolds in courts-martial across the world: the accused stands in front of the jury and makes a statement full of inadmissible, inflammatory, and legally irrelevant assertions. The military judge then instructs the members to ignore much of what they have just heard. With their heads spinning, the military jury then retires to deliberate upon a sentence. In his dissent in the *Talkington* case, Judge Baker accurately characterized the current state of unsworn statement jurisprudence as "inconsistent...and ambiguous...[leaving] military judges...to instruct their way through and around rocks and shoals of...case law."¹⁹⁴ As the court has wandered from the bright line rule that a military judge may properly exclude matters that do not address extenuation or mitigation, a patchwork quilt of rules has resulted. Military justice practitioners are left with their heads "filled with ideas—only [they] don't know exactly what they are."¹⁹⁵ What follows are the rules from case precedent that the military justice practitioner must attempt to decipher in determining what a military judge may or may not exclude from an unsworn statement:

¹⁹⁴ *Id.* at 219 (arguing military judge should not instruct on sex offender registration following mention in an unsworn statements).

¹⁹⁵ *United States v. Barrier*, 61 M.J. 482, 486 (C.A.A.F. 2005) (Crawford, J., concurring) (citing LEWIS CARROLL, *THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE* 24 (William Morris & Co., Inc. 1993)).

| Military Judge May Preclude... | Military Judge May Not Preclude... |
|--|---|
| Accused's unsworn to matters "tending to lessen...[the accused's] criminality:" (United States v. Tokuchi Tobita, 3 C.M.A. 267 (C.M.A. 1953)) | Accused's unsworn statement to matters relevant to extenuation and mitigation. (United States v. Grill, 48 M.J. 131 (C.A.A.F 1998) and United States v. Rosato, 32 M.J. 93 (C.M.A. 1991)) |
| Comparison of sentences generally within the military or sentences involving certain military co-conspirators (United States v. Barrier, 61 M.J. 482, 485 (C.A.A.F. 2005)) | Comparison of sentences with civilian co-conspirators (United States v. Grill, 48 M.J. 131 (C.A.A.F 1998)) |
| Statements that attack the verdict (United States v. Teeter, 16 M.J. 68 (C.M.A. 1983)) | Statements that attack the verdict if such statements rebut any matters within the Government's findings case (United States v. Sowell, 62 M.J. 150 (C.A.A.F. 2005)) |
| Statements that are gratuitously disrespectful towards superiors or the court (United States v. Rosato, 32 M.J. 93 (C.M.A. 1991)) | |
| | Discussion of service rehabilitation programs the accused wishes to complete (United States v. Rosato, 32 M.J. 93 (C.M.A. 1991)) |
| Statements regarding a polygraph (United States v. Johnson, 62 M.J. 31, 36 (C.A.A.F. 2005)) | |
| | Irrelevant Argument (United States v. Rosato, 32 M.J. 93 (C.M.A. 1991)) |
| Statements regarding the sexual history of a victim (United States v. Britt, 44 M.J. 731 (A.F. Ct. Crim. App. 1996)) | |

The above chart addresses only a limited number of inadmissible matters an accused may potentially attempt to include in an unsworn statement. Military judges, without a bright-line rule, is left to speculate as to which side of the above chart their ruling may fall. As a practical result, not wishing to be overturned on appeal, military judges generally favor not precluding inadmissible and controversial matters from being brought before the members. Instead, it is easier to instruct the military jury members afterwards to disregard the inadmissible matters. So the bizarre dance continues: the accused introduces inadmissible matters, the jury sits in surprise, and the military judge then instructs them that they should disregard what they just heard.

The hodge-podge of law described above results in an irreconcilable disagreement between CAAF's unpredictable unsworn statement jurisprudence and the basic rules of evidence. This impossible legal schema is recognized by some, causing the Army's Court of Criminal Appeals (ACCA) to recently go so far as to encourage military trial judge's to ignore CAAF precedent under the hope that it will be found to be "harmless error."¹⁹⁶ In a legal broadside against CAAF precedent, the ACCA offered the following opinion on the unsworn statement:

[I]t is unusual for a military judge to allow inadmissible information to come in front of the panel only to then tell the panel to ignore it. The alternative—prohibiting the information from coming in the first instance—would appear to be preferable....

As *Talkington* acknowledges, this is a problem created entirely by case law, and is contrary to Rule for Courts-Martial 1001(c)(2)(A), which limits the accused's unsworn statement to matters in extenuation, mitigation, or in rebuttal.... It would also appear to be tautological that there is little to be gained by allowing the introduction of inadmissible information.... The current state of the law would appear to elevate the right of the accused to admit irrelevant information over the military judge's authority to exclude that same information under the rules....

In our view, the "tension" described in *Talkington* is best resolved by allowing the military judge to limit unsworn statements to the matters allowed under the rules. Such a resolution is per se not prejudicial, is in accord with the rules for court-martial, and properly reflects the military judge's role as the presiding officer. The status quo, where the military judge is prohibited from enforcing the rules for courts-martial, is at least problematic.¹⁹⁷

The ACCA included in its opinion a footnote amounting to a wink and a nod that military judges may consider ignoring CAAF precedent on unsworn statements in their courtrooms, stating:

¹⁹⁶ United States v. Feliciano, ARMY 20140766, 2016 CCA LEXIS 512, at *13 (A. Ct. Crim. App. Aug. 22, 2016)

¹⁹⁷ *Id.* at *16–17.

Consider the following: Were a military judge to prevent an accused from mentioning sex offender registration during an unsworn statement, such an action will almost certainly be harmless error. Since the panel may be instructed to ignore the information during deliberations, there cannot be prejudice from excluding in the first instance what the panel would be told to ignore in the second.¹⁹⁸

Such statements made by a lower court, essentially advising its service's trial judges that they should consider ignoring CAAF's unsworn statement jurisprudence where it results in harmless error, is only illustrative of how truly unworkable CAAF's precedent has become. The ACCA is tacitly recognizing that under CAAF's interpretation of unsworn statements the military accused has been handed an unfettered weapon to substantially lower sentences. The ability to make irrelevant argument and introduce inadmissible matters to the members allows the accused the opportunity to poison the well of the jury before sentencing deliberations begin. Military defense counsel, acting in the zealous manner they should, have become adept at concealing their sentencing strategy until the unsworn statement, when a deluge of inadmissible matters are presented to the members. The result is inequitable.

Additionally, the problem with the unsworn statement is not confined solely to the issue of equity in sentencing. An unintended consequence of allowing unfettered unsworn statements is the risk to successful guilty pleas in the military. The military requires an accused who wishes to plead guilty to state in sworn testimony that he actually did commit the elements of the offense.¹⁹⁹ This sworn discussion between the military judge and the accused, during which the accused admits to every element of the offense, is termed the "Care inquiry," named after the case *United States v. Care*.²⁰⁰ If the accused, at any point during trial, appears to deny he committed any element of an offense, the guilty plea is no longer accepted by the court. If a guilty plea is no longer accepted by the court, the accused may lose the benefit of a pre-trial agreement that caps his punishment. When an accused is permitted an unfettered unsworn statement, it invites unsworn statements that are unintentionally inconsistent with the accused's *Care* inquiry. For instance, in *United States v. Schell*, the accused stated in his unsworn that he "never intended to do anything" after pleading guilty and successfully

¹⁹⁸ *Id.* at *15 n.4.

¹⁹⁹ *See United States v. Care*, 18 C.M.A. 535 (1969).

²⁰⁰ *Id.*

completing a *Care* inquiry.²⁰¹ While the military's highest court ultimately held that the appellant had not reneged on having the appropriate intent, unfettered unsworn statements open the door to such issues.²⁰²

V. CONTRASTING THE CURRENT STATE OF THE UNSWORN STATEMENT AND THE RIGHT OF ALLOCATION

Both the unsworn statement and the civilian right of allocation find their roots in common law. Today, both rights are granted by statute or regulation and both state mitigation as a purpose for their allowance.²⁰³ The military unsworn statement also refers to extenuation and rebuttal as a purpose.²⁰⁴ However, while both the unsworn statement and right of allocation share a similar genesis and intent, they evolved into radically different legal tools. Today, the military accused enjoys a broad and largely unfettered right to allocation. Contrast this with the federal defendant whose allocation right is narrow and well-defined.

In federal court, the right of allocation is well-defined and straightforward: it is a right concerned with allowing the defendant a few moments to present matters in mitigation, and the judge may interrupt a defendant and preclude irrelevant matters from inclusion in the statement.²⁰⁵ In fact, it is com-

²⁰¹ 72 M.J. 339, 341–345 (C.A.A.F. 2013).

²⁰² *Id.* at 345.

²⁰³ FED R. CRIM. P. 32(i)(4)(A) (“Before imposing sentence, the court must: (i) provide the defendant’s attorney an opportunity to speak on the defendant’s behalf; (ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence...”); MCM, *supra* note 6, at RCM 1001(c)(2)(A) (“The accused may...make an unsworn statement...in extenuation, in mitigation or to rebut matters presented by the prosecution.”).

²⁰⁴ MCM, *supra* note 6, at RCM 1001(c)(2)(A).

²⁰⁵ *See* United States v. Grose, 461 Fed. App’x. 786, 802–803 (10th Cir. 2012); United States v. Alden, 527 F.3d 653, 663 (7th Cir. 2008) (holding that when the trial judge “perceive[d] Alden’s statements to mean that he has nothing more to say in mitigation of his sentence and was not going to confine his comments to the boundaries of allocation, the district court properly interrupted Alden and continued with the sentencing.”); United States v. Muniz, 1 F.3d 1018, 1025 (10th Cir. 1993) (citing United States v. Barnes, 948 F.2d 325, 331 (7th Cir. 1991)); United States v. Arnett, No. CR-F-95-5287, 2006 U.S. Dist. LEXIS 102074, at *12 (E.D. Cal., 2006); Fontenot v. Blacketter, No. 04-1741-HA, 2006 U.S. Dist. LEXIS 59023, at *2, *9 (D. Or. 2006) (holding the judge did not violate defendant’s right of allocation where he interrupted defendant seventeen times and aggressively questioned defendant).

mon practice for a judge to do so.²⁰⁶ Judicial interruptions when a defendant is making irrelevant arguments are also permissible, and do not violate the right of allocution.²⁰⁷ The allocution portion of the trial is oftentimes rather informal, rather than the strict ritual that occurs in military court.²⁰⁸ The states typically follow the same approach as federal courts.²⁰⁹

²⁰⁶ *United States v. Carter*, 355 F.3d 920, 926–27 (6th Cir. 2004) (holding trial judge acted appropriately in disallowing irrelevant argument from inclusion in allocution statement); *United States v. Sampson*, No. 01-10384-LTS, 2016 U.S. Dist. LEXIS 72060 (D. Mass. 2016); *United States v. Gabrion*, No. 1:99-CR-76, 2002 U.S. Dist. LEXIS 1379, at *8 (W.D. Mich. 2002) (precluding matters from allocution that go beyond “a short plea for mercy or leniency or to show remorse”); *United States v. Wilson*, 493 F. Supp. 2d 509 (E.D. Pa. 2007) (holding judge should review defendant’s statement prior to submission and exclude inappropriate matters); *but see United States v. Li*, 115 F.3d 125, 130–134 (7th Cir. 1997) (finding judge erred in intimidating defendant during unsworn statement and giving only minutes before ending the allocution statement).

²⁰⁷ *See United States v. Garcia*, 664 Fed. App’x 175, 179 (3rd Cir. 2016) (no error where judge interrupted defendant’s statement in allocution once it wandered into irrelevant matters such as whether the defendant previously lied); *United States v. Vujovic*, 635 Fed. App’x. 265, 272–73 (6th Cir. 2015) (finding the judge acted lawfully cutting off defendant during allocution when it included irrelevant argument); *United States v. Covington*, 681 F.3d 908, (7th Cir. 2012) (court acted reasonably when interrupting defendant during irrelevant matters presented in the allocution statement in an attempt to “refocus the defendant’s statement on mitigation...”); *United States v. Abboud*, 441 Fed. App’x. 331, 336 (6th Cir. 2011) (judge did not err when interrupting appellant’s allocution to state, “I’m not going to allow you to go on for an extensive period of time here, sir, to rehash or revisit some of the things already put before the Court in the brief, the legal arguments”); *United States v. Kellogg*, 955 F.2d 1244, 1250 (9th Cir. 1992) (trial judge’s interruption of defendant during irrelevant argument did not violate the right of allocution); *Ashe v. North Carolina*, 586 F.2d 334, 336–37 (4th Cir. 1978) (The court interrupted defendant’s statement as he made irrelevant argument and the court held the “right to allocution was not violated.”).

²⁰⁸ *See United States v. Franklin*, 902 F.2d 501, 507 (10th Cir. 1995) (rejecting defendant’s argument that district judge was required to renew an invitation to defendant after his counsel finished speaking, stating, “Wisely, neither Rule 32(a)(1)(C) nor any case law requires such a rigid procedural formula. Neither [the defendant] nor his counsel indicated that [the defendant] wished to accept the court’s invitation to speak on his own behalf. *United States v. Archer*, 70 F.3d 1149, 1151-1152 (10th Cir. 1995) (finding the right of allocution was afforded where judge asked the defense to step forward to the lectern and asked them, “Do any of you wish to make a statement in mitigation of punishment...”); *United States v. Flores*, 959 F.2d 83, 88 (8th Cir. 1991) (holding that the right of allocution was afforded when the district court asked defendant, “Do you know of any reason why the Court should not pronounce sentence? That is, are you ready to receive the Court’s sentence?” and defendant replied “Yes, sir”); *Fontenot*, 2006 U.S. Dist. LEXIS 59023, at *6 (no error even where judge interrupted defendant 17 times while being “curt”).

²⁰⁹ *See Hardy v. Superior Court*, 48 A.3d 50, 65–66 (Conn. 2012) (no error where court

Compare this with military court where the military judge generally may not preclude an accused from making irrelevant argument.²¹⁰ Military judges should, and do, instruct members to disregard irrelevant matters the accused presented in the unsworn statement. However, with the proverbial cat out of the bag, the effectiveness of such an instruction is debatable. Thus, when a criminal defendant in federal court wanders into irrelevant argument or inadmissible matters during their statements in allocution, a federal judge may interject with, “This is not the place for that. You can raise those issues on appeal,”²¹¹ or, “Sir, you were convicted. I don’t want to hear any more about that,”²¹² or, “I have to cut you off at this point. Everything you are testifying to right now or giving me...is directly contrary to the jury’s findings.”²¹³ Contrast this with the military judge who, with limited exceptions, must sit in silence as the accused comments on inflammatory and irrelevant matters during an unsworn statement, only to instruct surprised members afterwards to ignore what they have just heard. At no other time in a courtroom does a military judge have to wait until irrelevant information has been offered to the court-martial members or a jury before telling them it must be disregarded. This practice is tantamount to allowing a witness examination proceed to its conclusion, full of inappropriate questions and answers, and afterwards have

did not allow statement in allocution to continue once it became apparent defendant would simply repeat earlier statements); *Capano v. State*, 781 A.2d 556, 438–40 (Del. 2001) (judge did not err in interrupting the defendant when he failed to comply with the judge’s rule for allocution); *State v. Bay*, 736 A.2d 469, 491–92 (N.J. 1999) (Under New Jersey law, a defendant may not deny guilt or rebut facts in evidence and the court may strike offending portions of such a statement, allow the state to respond, or even permit limited cross-examination of the defendant.); *State v. Copeland*, No. CA2007-02-039, 2007 Ohio App. LEXIS 5402, at **7–8 (Ohio Ct. App. 2007) (no error where judge interrupted defendant and did not allow him to continue once the statement began addressing irrelevant matters); *State v. Hofmann*, No. E-03-057, 2004 Ohio App. LEXIS 6026, at **15–20 (Ohio Ct. App. 2004) (trial judge acted lawfully interrupting defendant refusing to allow him to finish allocution statement after defendant included irrelevant argument); *State v. Rogers*, 4 P.3d 1261, 1270-72 (Ore. 2000) (Oregon law allows the trial court to exercise broad discretion over the content and duration of a statement in allocution.); *State v. Ellison*, 346 P.3d 853, 855–856 (Wash. Ct. App. 2015) (holding no error where judge interrupted allocution statement when used for improper purpose); *Wilson v. State*, 155 P.3d 1009, 1009, 1012–13 (Wyo. 2007) (holding that a trial judge has “inherent authority to exercise reasonable control over the presentation of evidence, and that authority extends to the authority to limit allocution,” and that the judge may cut the statement short if it is too long.).

²¹⁰ See *United States v. Rosato*, 32 M.J. 93 (C.M.A. 1991).

²¹¹ *Muniz*, 1 F.3d at 1025.

²¹² *United States v. Carter*, 355 F.3d 920, 924 (6th Cir. 2004).

²¹³ *Vujovic*, 635 Fed. App’x. at 272.

the judge turn to the jury and say, “There were some inappropriate matters in that examination I must now instruct you to disregard.”

Beyond the issue of what a judge may preclude from inclusion in the unsworn statement, the unsworn statement and right of allocution developed differently in another significant way. It is common in military court for defense counsel to cloak the unsworn in the trappings of a sworn statement. The accused will give an unsworn statement from the witness stand, often in a question and answer format with their defense attorney. Military appellate courts have not provided case law on whether a judge may disallow such a practice. However, in light of the unpredictable unsworn statement jurisprudence, military judges would not know if they will be reversed on such a ruling. Contrast this with federal court, where a judge may clearly restrict the physical location in the courtroom from where the defendant may give an unsworn statement.²¹⁴ Such practice in federal court ensures that, if a jury is rendering the sentence, they do not place undue weight on the contents of the statement in allocution.

Additionally, it is important to note the significance of sentencing report in federal court. There, a probation officer prepares a sentencing report for the court prior to sentencing.²¹⁵ This report may contain information on the defendant’s truthfulness.²¹⁶ Contrast this with military court, where military juries may get very little information about the accused. Regardless of the military accused’s reputation for truthfulness, such matters may not ordinarily be brought to the attention of the military jury members to appropriately temper the unsworn statement.²¹⁷ Thus, regardless of history for truthfulness, the military accused gets to stand before the court and offer statements without the risk of his or her truthfulness being called into question.

Another significant difference is that in federal court, there is no right for the defendant to submit a written statement to the jury in allocution.²¹⁸ Compare this to the regulatory right of the accused to submit a written unsworn statement for the members to consider in sentencing in addition to

²¹⁴ United States v. Wilson, 493 F. Supp. 2d 509, 510 (E.D. Pa. 2007) .

²¹⁵ FED R. CRIM. P. 32 (c)(1).

²¹⁶ United States v. Harris, 13 M.J. 653, 656 (N-M.C.M.R. 1982) (Byrne, J., concurring).

²¹⁷ *Id.*

²¹⁸ FED R. CRIM. P. 32(i)(4)(A).

the oral unsworn statement.²¹⁹ This difference gives even greater weight to the unsworn statement in military courtrooms.

In sum, at first blush both the military unsworn statement and the right of allocution appear to be similar statutory or regulatory creations. However, due to the military’s highest court interpreting the unsworn statement consistent with 18th and 19th century understandings, rather than drafter’s intent, they have evolved into radically different creatures. The military accused enjoys a largely unfettered right. In contrast, the federal defendant is entitled to a right solely concerned with mitigation.

VI. THE WAY FORWARD

At present, the unsworn statement jurisprudence resembles an old car, unfit for the road, to which mechanics continually apply makeshift repairs in an attempt to keep the vehicle running. Permitting otherwise inadmissible and “collateral” matters to populate unsworn statements is counter-productive. It invites and necessitates limiting instructions that deprive the members of clarity at the very time it is most needed. Unfortunately, the unintended side effect of this poorly constructed legal vehicle is that the floodgates have been opened for defendants to re-litigate their trials in sentencing with irrelevant and inadmissible assertions. As Congress alters the military justice system, it has overlooked a unique and troubling aspect of military justice that oftentimes directly affects the sentences of those convicted of sexual assault, rape, and other crimes. As military leaders and Congress contemplate further changes to military justice, the unsworn statement should be addressed.

The military must also consider that the unsworn statement reinforces a negative perception of the military. A powerful negative image of the military is that of an alien and outdated society with unique rules and procedures that are non-transparent. This impression spills over into public perception of the military justice system.²²⁰ Many view the military justice

²¹⁹ MCM, *supra* note 6, at RCM 1001(c)(2)(C).

²²⁰ See Chelsea J. Carter, *Missteps, closed culture undermine confidence in military justice system*, CNN (Mar. 24, 2012, 9:12 AM), <http://www.cnn.com/2012/03/24/world/meast/afghanistan-bales-perception/>; Richard Lardner, *Opaque military justice system shields child sex abuse cases*, ASSOCIATED PRESS (Nov. 24, 2015), <http://bigstory.ap.org/article/c7c2772ba05c4241a9bcebcf745d1c71/opaque-military-justice-system-shields-child-sex-abuse>; *The Good Wife: Double Jeopardy* (CBS television broadcast Oct. 5, 2010) (Alicia Florrick defends a military member at court-martial where the rules of procedure, rules of evidence, and a biased judge seemingly railroad her client).

system as “inside baseball,” ruled by antiquated procedures and rules.²²¹ This perception is largely faulty. In fact, the military courtroom in most ways mirrors practice in any federal court. However, the military’s use of a legal tool that is alien to the civilian legal mind and purports to trace its lineage to 18th Century military practice (though, in fact, its origin is regulatory) only aggravates the negative perception that military law is an antiquity based on opaque procedures. Military justice procedures should not be a mystery to be deciphered only by those in seats of authority; rather, it must be transparent and sensible on its face. The current interpretation of the unsworn statement can only be understood by experienced military justice practitioners. This can only further distrust of the military justice system by outsiders.

Remarkably, despite military justice coming under intense scrutiny for its perceived light sentences at courts-martial, the unsworn statement has somehow escaped blame. Instead, while civilian society is moving away from mandatory minimums, the military began embracing them out of concern with seemingly unjust sentences given by military juries.²²² Before enacting further extreme measures, the low hanging fruit should be gathered. The unsworn statement is a creature of statute and invokes no constitutional right. This esoteric and misinterpreted rule should first be addressed before more severe fixes are applied.

The ideal solution to the problem of the unsworn statement is action by the military’s highest court to overturn its decisions in *Grill* and *Rosato*. However, such a hope may never come to fruition. Appellate courts are hesitant to overturn precedent. *Grill* is now a well-known fixture in the constellation of military justice jurisprudence. The recent decisions from CAAF

²²¹ As a military defense counsel working with civilian defense counsel in courts-martial cases, I was astonished at their perceptions of the court-martial process as a passage impossible to navigate. While the court-martial process does differ from the federal court process, they are largely congruous. Despite my assurances, civilian defense counsel clung to the belief that there existed some *sub rosa* rules or procedures at play.

²²² Mortimer Zuckerman, *Get a Little Less Tough on Crime: American prisons are unjustly overcrowded, and it’s time to change that*, U.S. NEWS AND WORLD REPORT (May 9, 2014, 1:00 PM), <http://www.usnews.com/opinion/articles/2014/05/09/its-time-for-prison-reform-and-an-end-to-mandatory-minimum-sentences>; Evin Bernick & Paul Larkin, *Reconsidering Mandatory Minimum Sentences: The Arguments for and Against Potential Reforms*, THE HERITAGE FOUNDATION (Feb. 10, 2014), <http://www.heritage.org/research/reports/2014/02/reconsidering-mandatory-minimum-sentences-the-arguments-for-and-against-potential-reforms>; Carrie Wentzel, *Establishing Sentencing Guidelines for Military Courts-Martial* 1 (Muir S. Fairchild Research Information Center, Nov. 2014), <http://www.dtic.mil/dtic/tr/fulltext/u2/1012807.pdf>.

indicate a willingness to live with the contradictory and muddy jurisprudence of the unsworn statement. Furthermore, with military justice seemingly under criticism from all directions, the military does not have the luxury to wait and see if the military high court corrects its jurisprudence.

For these reasons, Congress should take action. The initial issue of how to spur Congressional action is challenging. The issues regarding unsworn statements may be easily understood by experienced military justice practitioners, but for civilians who have little exposure to the military justice system, it is unrealistic to expect a proactive approach. Rather, Congress should become informed on the issue by subject matter experts and then act. Numerous victim advocacy groups have spent years fighting for the rights of military sexual assault victims. Such advocacy groups should take interest in the unsworn statement. As it is currently judicially constructed, the unsworn statement serves to minimize the sentences of the military accused, often through the introduction of inflammatory and irrelevant matters. Victims' advocacy groups such as the Service Women's Action Network, Protect Our Defenders, and Human Rights Watch should educate and push Congress to take action and alter the unsworn statement.

An alternative to advocacy groups urging Congress to act is the Department of Defense itself to push action. The Department of Defense often submits legislative proposals to Congress for changes to the UCMJ.²²³ The most efficient way to effect change in the near future is for the Department of Defense to submit proposed change to the unsworn statement to Congress. Through such action, the military can demonstrate its commitment to justice in our military courtrooms.

Perhaps more difficult is the second issue of what form reform of the unsworn statement should take. The unsworn statement should not be done away with completely. When appropriately utilized, the right of allocution is a valuable tool for sentencing. In a survey of 516 federal judges who employ the federal right of allocution in their courtroom, 99 percent indicated satisfaction with the right to allocution and opposed its elimination from the federal rules.²²⁴ A right to allocution is not the problem. Rather, misinterpretation of the unsworn statement by the military appellate courts poses a threat to fair-

²²³ See *Defense Department Proposes UCMJ Changes*, U.S. DEP'T OF DEFENSE (Dec. 28, 2015), <https://www.defense.gov/News/Article/Article/638108/defense-depart/>.

²²⁴ Mark W. Bennett & Ira P. Robbins, *Last Words: A Survey and Analysis of Federal Judges' Views on Allocution in Sentencing*, 65 Ala. L. Rev. 735, 747-48 (2014).

ness in the courtroom. Congress's intent in drafting the right to an unsworn statement was not to grant an unfettered right that duplicated an antiquated military rule of court from a time when a military accused had no right to counsel. This intent must somehow be made crystal clear.

Clarifying Congress's intent that the military right of allocution should be limited to extenuation and mitigation is difficult when the rule is already drafted with such language.²²⁵ Congress cannot pass the same rule again, worded in the same manner, but add language to the effect of, "Extenuation and mitigation means only extenuation and mitigation." Congress must clearly signal through an alteration to the rule itself that the past interpretation by CAAF is faulty. Thankfully, there is recent evidence of a successful means to reform a military rule in the National Defense Authorization Act for Fiscal Year 2016 (NDAAFY16). In the NDAAFY16, Congress dictated an amendment to the Military Rule of Evidence rule 304 corroboration requirements.²²⁶ This amendment was made in response to CAAF's decision in *United States v. Adams*, which appeared to raise the traditional "scintilla" standard for corroboration.²²⁷ By directing the military to utilize the rules from "United States district courts," NDAAFY16 effectively adopted federal case law into military practice.²²⁸

The best option is that Congress adopt the language of the Federal Rules for Criminal Procedure regarding the right of allocution wholesale into the Manual for Courts-Martial. This language would clearly signal the intent that the Rules for Courts-Martial mirror federal practice. Recently, the military adopted wholesale the National Crime Victims Act into its law.²²⁹ Thus, military victims' rights laws now mirror federal practice. A similar step could be taken with the unsworn statement, bringing it into line with the federal right of allocution. The advantage of such action is that the federal case law associated with the language of Rule of Criminal Procedure Rule 32 (i)(4)(A) applies, leaving little room for misinterpretation of congress-

²²⁵ See MCM, *supra* note 6, at RCM 1001(c)(2)(C).

²²⁶ National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 545, 129 Stat. 726, 820.

²²⁷ *United States v. Adams*, 74 M.J. 137 (C.A.A.F. 2015)

²²⁸ National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 545, 129 Stat. 726, 820.

²²⁹ Zachary D. Spilman, *2013 Changes to the UCMJ – Part 6: Practice notes*, CAAFLOG (Jan. 10, 2014), <http://www.caaflog.com/2014/01/10/2013-changes-to-the-ucmj-part-6-practice-notes/>.

sional intent. The term itself, “allocution,” should be adopted in the place of “unsworn statement.” This will make apparent the intent that the federal right, not the unsworn statement as interpreted by CAAF, apply to courts-martial. Further, such action lends legitimacy to military justice as military justice would further mirror federal practice.

It is important to note that altering the unsworn statement in no way impacts the right of a victim to make an unsworn statement. Recently, Congress reformed military justice to allow a victim to make an unsworn statement in sentencing.²³⁰ Interestingly, like the right to allocution, victim impact statements can also be traced to common law.²³¹ While issues of basic fairness should be considered when weighing the accused’s right of allocution against the victim’s ability to make an unsworn statement, there are no constitutional concerns. The consensus among the federal circuits, based upon the Supreme Court’s prior rulings, is that allocution is not a due process right for the criminal defendant. Therefore, it is only statutory in nature. What the legislature gives, it may also take away. Additionally, the Supreme Court has held that victim impact statements are not unconstitutional under the Eighth or Fourteenth Amendment.²³² Thus, there is no rule that, if unsworn statements are to be given, they must be given in equal measures to both parties. As a result, currently each of the fifty states allow victim impact statements in some form.²³³ In contrast, twenty-two states allow defendants a meaningful

²³⁰ MCM, *supra* note 6, at RCM 1001A.

²³¹ Mark Stevens, *Victim Impact Statements Considered in Sentencing*, 2 Cal. Crim. L. Rev. 3, 2 (2000) (“Victims were allowed to speak in support of the Crown in ‘keeping the King’s peace....’”).

²³² *Payne v. Tennessee*, 501 U.S. 808 (1991).

²³³ Carrie L. Mulholland, *Sentencing Criminals: The Constitutionality of Victim Impact Statements*, 60 Mo. L. Rev. 731, 6 (1995) (citing ALASKA STAT. §§ 12.55.022, 12.55.185 (1984); ARIZ. REV. STAT. ANN. § 13-702 (Supp. 1994); ARK. CODE ANN. §§ 5-65-102, 5-65-109 (Michie Supp. 1991); CAL. PENAL CODE § 1191.1 (West Supp. 1994); COLO. REV. STAT. §§ 24-4.1-302, 24-4.1302.5 (Supp. 1994); CONN. GEN. STAT. ANN. § 54-220 (West 1994); DEL. CODE ANN. tit. 11, § 4331 (Supp. 1993); D.C. CODE ANN. § 23-103 (West 1989); FLA. STAT. ANN. § 921.143 (West Supp. 1994); GA. CODE ANN. § 17-10-1.1 (Harrison Supp. 1994); IDAHO CODE § 19-5306(1)(b)(3) (Supp. 1994) (*see State v. Wersland*, 873 P.2d 144 (Idaho 1994) (holding impact statements from victim’s parents were admissible)); 725 ILL. COMP. STAT. ANN. 120/6 (Smith-Hurd Supp. 1995); IND. CODE ANN. § 35-38-18.5 (Burns Supp. 1994); IOWA CODE ANN. § 901.3 (West Supp. 1994); KAN. STAT. ANN. § 8-1019 (Supp. 1994); KY. REV. STAT. ANN. §§ 421.500, 421.520 (Michie/Bobbs-Merrill Supp. 1994); LA. CODE CRIM. PROC. ANN. art. 875(B) (West Supp. 1994); ME. REV. STAT. ANN. tit. 15, § 6101, tit. 17A § 1257 (West Supp. 1994); MD. ANN. CODE OF 1957 art. 41, § 4-609 (1993); MASS. GEN. LAWS ANN. ch. 258B, § 3(p) (West Supp. 1994); MICH. COMP. LAWS ANN. §§ 780.752, 780.791 (West Supp. 1994); MINN. STAT. ANN.

right of allocution.²³⁴ As the states have made apparent, allowing a victim to make an unsworn statement does not affect what right of allocution, if any, is granted to a defendant.

What is troubling about the current state of unsworn statement jurisprudence for both the accused and victim is that they are not on equal footing. As detailed throughout this article, the accused's unsworn statement is largely unfettered. In contrast, the victim's unsworn statement is appropriately confined to matters of relevance to sentencing. In a recent published, *en banc* decision by the Air Force Court of Criminal Appeals, *United States v. Hamilton*, the court held that the victim impact statement is not "evidence" and is therefore not subject to the Military Rules.²³⁵ However, the Court still took pains to point out that there was not unfettered authority for a victim to allocute.²³⁶ Rather, the scope of the victim's statement must still fit within the

§§ 611A.01, 611A.037 (West Supp. 1994); MISS. CODE ANN. § 99-19-151, et seq. (Supp. 1994) (bound); MO. REV. STAT. § 217.762 (1994); MONT. CODE ANN. § 46-18-112 (Supp. 1993); NEB. REV. STAT. ANN. § 29-2261 (1989); N.H. REV. STAT. ANN. § 651:4-a (Supp. 1993); N.J. STAT. ANN. § 2C:44-6 (West Supp. 1995); N.M. STAT. ANN. §§ 31-26-3, 31-26-4 (Michie Supp. 1994); N.Y. CRIM. PROC. LAW § 390.30(3)(b) (McKinney Supp. 1994); N.C. GEN. STAT. § 15A-825 (1985); N.D. CENT. CODE §§ 12.1-34-01, 12.1-34-02(14) (1993); OHIO REV. CODE ANN. §§ 2947.051, 2929.12 (Anderson Supp. 1994); OKLA. STAT. ANN. tit. 22, §§ 982, 984 (West Supp. 1995); OR. REV. STAT. §§ 137.530(3), 144.790(3) (1993); PA. STAT. ANN. tit. 71, P.S. § 180-9.3 (Supp. 1995); R.I. GEN. LAWS § 12-28-3 (1993); S.C. CODE ANN. § 16-3-1550 (Law. Co-op. 1993); S.D. CODIFIED LAWS ANN. § 23A-28C-1 (Supp. 1995); TENN. CODE ANN. §§ 40-35-207, 40-38-203 (1994); TEX. CODE CRIM. PROC. ANN. § 56.03 (West Supp. 1995); VT. STAT. ANN. tit. 13, § 7006 (Supp. 1993); VA. CODE ANN. §§ 19.2-264.5, 19.2-299.1 (Michie 1994); WASH. REV. CODE ANN. §§ 7.69.020, 7.69.030 (West Supp. 1994); W. VA. CODE §§ 61-11A-2, 6111A-3 (1995); WIS. STAT. ANN. § 950.04 (West 1994); WYO. STAT. §§ 7-21-101, 713-303 (1994). Alabama allows victim impact statements by procedure though no statute exists. *See* DIANE SANK, TO BE A VICTIM: ENCOUNTERS WITH CRIME AND JUSTICE 40 n.3 (1991). Additionally, for a period of time, Hawaii was the lone state not allowing a victim impact statement. That is no longer the case. *See* HAW. REV. STAT § 706-604 (2018).

²³⁴ *See supra* text accompanying note 25.

²³⁵ *United States v. Hamilton*, 77 M.J. 579, 585–586 (A.F. Ct. Crim. App. 2017).

²³⁶ In the pertinent part, the court explained:

Our holding here is not to suggest that unsworn victim statements are unfettered or that the right to be reasonably heard is infeasible as the *Kenna* court held. 435 F.3d at 1016. The military judge has the obligation to ensure the content of a victim's unsworn statement comports with the defined parameters of victim impact or mitigation as defined by the statute and R.C.M. 1001A.

Id.

confines of the two broad categories of victim statement subject matter under RCM 1001A, namely: (1) victim impact, and (2) mitigation, as defined in RCM 1001A(b)(2) and (3), respectively.²³⁷ *Hamilton* is notable as it provides a corollary for a possible way ahead on judicial construction of the scope of the accused's unsworn statement, that is: a return to an unsworn statement tightly tied to "extenuation" and "mitigation" evidence as defined in RCM 1001(c)(1)(A) and (B).

VII. CONCLUSION

The right of allocution is an important one. However, the military's highest court's confusion of the 18th and 19th century understanding of the unsworn statement with the post-World War II regulatory intent in the Manual for Courts-Martial has resulted in a largely unfettered weapon for the accused in sentencing. In a day where the military justice system is under intense scrutiny, the military unsworn statement cannot continue in its current form. Without a change, the unsworn statement will continue to lure court-martial members to lower sentences through consideration of inadmissible matters, notwithstanding limiting instructions to the contrary.

The resulting disproportionately lenient sentences may stir some in Congress to continue to see the military justice system as a broken one that needs fixing. This belief may cause Congress to resort to more extreme remedial measures. The unsworn statement is the proverbial "low-hanging fruit" Congress or the Joint Services Committee (JSC) should pick first. Properly reforming the unsworn statement in no way impacts a military accused's constitutional due process rights, as allocution is a regulatory, not a constitutional right. Ultimately, justice in sentencing depends upon accurate and relevant information. While more extreme measures, such as further mandatory minimums, may be deemed necessary in the future by Congress, less invasive reforms may achieve the same result.

²³⁷ "Victim Impact" is defined as "any financial, social, psychological, or medical impact on the victim directly relating to or resulting from the offense of which the accused is found guilty." MCM, *supra* note 6, at RCM 1001A(b)(2). "Mitigation" is defined as "a matter to lessen the punishment to be adjudged by the court-martial or furnish grounds for a recommendation for clemency." *Id.* at RCM 1001A(b)(3).

While the unsworn statement escaped modification in the recent changes to the UCMJ and Manual for Courts-Martial, Congress and the JSC should revisit the issue.²³⁸ The Manual for Courts-Martial should be amended to facilitate this process by adopting, wholesale, the federal jurisprudential construction of the right of allocution, bringing the services into line with federal practice. Such action limits potential confusion of the issues in sentencing while ensuring greater consistency and fairness by keeping the proceedings focused on the relevant. Just as importantly, bringing the unsworn statement into line with the federal right of allocution will ultimately result in public confidence that sentences from members have been insulated against the influence of irrelevant and inflammatory matters.

²³⁸ The enactment of the Military Justice Act of 2016 culminated the most comprehensive review of the entire Uniform Code of Military Justice and Manual for Courts-Martial since the inauguration of the Rules for Courts-Martial and Military Rules of Evidence in the MCM in 1983. Military Justice Act of 2016, Pub. L. No. 114-328, §§ 5001–5542, 130 Stat. 2894–2968. Unfortunately, it does not appear that the scope of an accused’s unsworn statement received much attention from the Military Justice Act of 2016, or the implementing provisions of the Act in the Manual for Courts-Martial. In drafting the report and draft legislation that would eventually become the Military Justice Act of 2016, the Military Justice Review Group recommended creating sentencing guidelines for courts-martial (similar in concept to, but different in application from, the U.S. Department of Justice’s Sentencing Guidelines). REPORT OF THE MILITARY JUSTICE REVIEW GROUP, PART I: UCMJ RECOMMENDATIONS 577 (22 December 2015), http://ogc.osd.mil/images/report_part1.pdf. Ultimately, that recommendation was not adopted. Instead, Congress did opt to mandate military judge alone sentencing as the “default” sentencing option in non-capital case courts-martial. Military Justice Act of 2016, at § 5236. What Congress and the MJRG failed to do was consider potential modifications to the expansive scope of the accused’s unsworn statement in lieu of this new sentencing dynamic. However, there is still time, as the changes mandated by the Military Justice Act of 2016 do not take effect until 1 January 2019, allowing Congress and the Department of Defense the opportunity to design reforms to the unsworn statement to accord with the comprehensive reforms put in place by the Military Justice Act of 2016.

FAKE NEWS AND KILL-SWITCHES:
THE U.S. GOVERNMENT’S FIGHT TO RESPOND TO AND
PREVENT FAKE NEWS

*MAJOR WILLIAM D. TORONTO**

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I. INTRODUCTION

Imagine a massive assembly, at the Mall in Washington, D.C. in which protestors travel from all over the world to demand the United States cease its alleged aggressive foreign policy, destabilizing other countries. U.S. intelligence sources have confirmed that a “fake news” organization, one believed to be an agent of a foreign unfriendly government, is planning to attend the event. The recently created Global Engagement Center (GEC) has already labeled this organization as broadcasting anti-U.S. propaganda.¹ The GEC and U.S. intelligence sources have confirmed that this fake news station is planning to deliberately falsify facts at this event to enflame negative domestic sentiments against the United States. As opposed to traditional mainstream news media, this group uses wireless Facebook live-streaming technology to report and flood social media with its false reporting. Additionally, intelligence sources indicate there is a possibility that irritated attendees may lash out and turn it into a violent protest. To prevent this, U.S. authorities contact Internet Service Providers (ISPs) in the D.C. area to order them to block all wireless Facebook traffic throughout the duration of the planned event in the vicinity of the protests.

The problem of fake news has America’s attention in light of news and events surrounding the presidential election of 2016. What can the United States do to solve this problem? Does shutting off part of the telecommunications network as done above violate the First Amendment as a prior restraint on speech? Does the U.S. government have authority to take such action for purposes of national security?

Part II will examine the problem of fake news, and highlight that this problem is not new. Part III will discuss possible solutions to fake news using the GEC, or more directly, shutting off part or all telecommunications channels. Part IV will discuss the law relating to prior restraint and executive authority relating to matters of national security. Some discussion will also touch on the argument by some on the proposition that access to the Internet is a fundamental right.

¹ See *infra* Part II.

II. FAKE NEWS

“Don’t believe everything you read on the Internet” – Abraham Lincoln²

Well before the 2016 presidential election, on March 16, 2016, U.S. Senator Rob Portman introduced the “Countering Information Warfare Act.”³ It called for the creation of a “Center for Information Analysis and Response” (CIAR) whose purpose would be to analyze foreign propaganda and information warfare, expose it, and counter it by advancing “fact-based narratives that support United States allies and interests.”⁴ This was introduced to respond to the threat of foreign governments using propaganda and disinformation tools to undermine U.S. national security objectives.⁵ On May 10, 2016, it was introduced as the Countering Foreign Propaganda and Disinformation Act in the United States House of Representatives, co-sponsored by Republican Congressman Adam Kinzinger.⁶ The bill was then introduced on July 14, 2016 as the Countering Foreign Propaganda and Disinformation Act in the United States Senate sponsored again by Senator Rob Portman.⁷ It passed through the House and the Senate, was added to the National Defense Authorization Act (NDAA) of 2017, and signed into law on December 23, 2016.⁸ The only significant change from when the bill was first introduced was the name of the organization it created—from the CIAR to the Global Engagement Center (GEC). One of its stated purposes is to “support the development and dissemination of fact-based narratives and analysis to counter propaganda and disinformation directed at the United States and United States allies and partner nations.”⁹

² An obviously fake quote to introduce the topic.

³ S. 2692, 114th Cong. (2016), <https://www.congress.gov/bill/114th-congress/senate-bill/2692/text>.

⁴ *Id.*

⁵ *Id.*

⁶ H.R. 5181, 114th Cong. (2016), <https://www.congress.gov/bill/114th-congress/house-bill/5181/text>.

⁷ S. 3274, 114th Cong. (2016), <https://www.congress.gov/bill/114th-congress/senate-bill/3274>.

⁸ Pub. L. No. 114-328, 130 Stat. 2000 (2016) [hereinafter NDAA 2017].

⁹ *Id.*

In a December 23, 2016 press release, Senator Rob Portman stated:

Our enemies are using foreign propaganda and disinformation against us and our allies, and so far the U.S. government has been asleep at the wheel. But today, the United States has taken a critical step towards confronting the extensive, and destabilizing, foreign propaganda and disinformation operations being waged against us by our enemies overseas. With this bill now law, we are finally signaling that enough is enough.... The use of propaganda to undermine democracy has hit a new low. But now we are finally in a position to confront this threat head on and get out the truth.¹⁰

The tone of the general reaction to the idea that a non-friendly foreign nation is conducting propaganda and disinformation operations against the U.S. is that this is something novel, and the U.S. must do something about it. However, history has shown that the U.S. Government itself has been willing, able, and well-practiced at using just such methods and more to secure its own interests—even going so far as to sponsor regime change in foreign nations.

On August 19, 1953, the democratically elected prime minister of Iran, Mohammed Mossadegh, was overthrown in a coup orchestrated and executed by U.S. and British forces.¹¹ A declassified CIA document explaining the genesis of operation TPAJAX, specified that “the military coup that overthrew Mosadeq [sic]... was carried out under CIA direction as an act of U.S. foreign policy, conceived and approved at the highest levels of government.”¹²

In another document, titled “The Battle for Iran,” a table of contents describes “Appendix C. The Legend: The Iranian Operation in the Press.”¹³ A part of the overall operation was specifically directed propaganda and disinformation in the Iranian press. At the time, U.S. and British governments feared the growing Cold War threat of the Soviets swooping in to take control

¹⁰ Press Release, Senator Rob Portman, President Signs Portman-Murphy Counter-Propaganda Bill into Law, (Dec. 23, 2016), <http://www.portman.senate.gov/public/index.cfm/2016/12/president-signs-portman-murphy-counter-propaganda-bill-into-law>.

¹¹ Malcolm Byrne, *CIA Admits it was Behind Iran's Coup*, FOREIGN POL. (Aug. 19, 2013), <http://foreignpolicy.com/2013/08/19/cia-admits-it-was-behind-irans-coup/>.

¹² *Id.*

¹³ *Id.*

in Iran, giving them not only greater oil resources but also port access to the Persian Gulf.¹⁴ These fears, combined with the desire to protect national interests, instigated not merely a propaganda campaign to affect an election, but rather an entire regime change to protect oil interests and prevent the spread of Russian power.

In 1979, the Somoza government in Nicaragua was ousted by the Sandinistas.¹⁵ Events intensified until 1981 when the United States began to take active involvement in the region, primarily because of Nicaragua's support for guerrillas in El Salvador.¹⁶ While U.S. action involved diplomatic tools such as sanctions and the suspension of U.S. aid, it also included U.S. support of the Contras, a guerilla force opposed to the Sandinista government. This support ultimately generated Nicaragua's filing of a claim against the United States for engaging in "military and paramilitary activities in and against Nicaragua" at the International Court of Justice (ICJ).¹⁷ In essence, Nicaragua claimed that the United States violated international law regarding the prohibition against the use of force and the principle for non-intervention by supporting the paramilitary activities of the Contras.¹⁸ So in the realm of propaganda and meddling with foreign countries, the U.S. is an experienced player.

However, foreign state-sponsored propaganda is not all we have to be concerned about in the world of disinformation. We also need to think about bored, yet creative, teenagers. The town of Veles, Macedonia, became the epicenter of the discussion surrounding the issue of "fake news" during the final weeks of the 2016 presidential election.¹⁹ Over 100 pro-Trump websites, many containing sensationally falsified stories were registered in this small city of 55,000 inhabitants.²⁰ The incentive wasn't political change or any kind of ideology, but rather the capability for a group of young men to make large sums of money from automated advertising engines like Google's AdSense.²¹ The more viral they could make the article they posted, mostly written else-

¹⁴ *Id.*

¹⁵ *Summaries of Judgments, Advisory Opinions and Orders of the International Court of Justice: 1948–1991*, U.N. Doc. ST/LEG/SER.F/1, at 125 (1992).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 161.

¹⁹ Samantha Subramanian, *Inside the Macedonian Fake-News Complex*, WIRED (Feb. 15, 2017), <https://www.wired.com/2017/02/veles-macedonia-fake-news/>.

²⁰ *Id.*

²¹ *Id.*

where, the more money they would bring in.²² This was particularly attractive to a group of youth without a clear future, living in a once-thriving industrial city now full of shuttered factories and shuttered opportunities.²³ One young man earned \$16,000 between August and September of 2016; the average salary in Macedonia is \$371 per month.²⁴

This is only a recent display of the kind of incentives at play in advertising and the media. Mirko Ceselkoski is a special kind of coach, paid to train others in how to “prepare, populate, and promote their websites.”²⁵ He says that for five to six hours of work per day, one can earn up to \$1,000 per month.²⁶ Some of the group in Veles took his course, but Ceselkoski says, “I never instructed my students to write fake stories.”²⁷ After the election, Google retracted its service from this group, many of whom called Ceselkoski to complain they weren’t getting paid.²⁸ The very infrastructure of the modern Internet, built and funded by advertising revenue, creates incentives to spread fake news as much as possible, not by focused efforts of a foreign nation with an agenda, but by offering the chance at easy money.

In summary, not only must the U.S. be concerned with hostile foreign propaganda and disinformation, but it also must address the concerns raised by the account of Veles, Macedonia, where a group of young men propagated volumes of fake and salacious news without any motivation other than money. Policy and industry practices will need to adjust and address this additional vector of fake news flooding the U.S. news space.

III. POTENTIAL SOLUTIONS

A. Global Engagement Center

One of the stated purposes of the Global Engagement Center (GEC) is to “support the development and dissemination of fact-based narratives and analysis to counter propaganda and disinformation directed at the United

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

States and United States allies and partner nations.”²⁹ As shown in the last section, propaganda wars and campaigns of subversion are business as usual in the world of international competition. What is new to the scene is an officially designated entity, the GEC, which will weigh in and publicly label the fake news, and create a whole host of new questions. Presumably, we can expect the GEC to publish officially approved “fact-based narratives” that will counter various “fake news” stories, as determined by the GEC. Through its own analysis, the GEC will determine whether certain news is “fake.” Without knowing exactly how it will do this, we can presume that stories that are outright false and salacious would qualify. However, what if a GEC “fact-based narrative” determination is challenged? A news outlet would presumably lose many readers/viewers by being labelled “fake news” by the GEC and would likely pursue a remedy and remuneration. How would they go about doing that? Who would settle the dispute? And at what point will the GEC draw the line? What if something is not exactly false, but merely biased and very harsh toward the U.S. government? Might this also be labelled fake news?

Critics of the new GEC call it the “Ministry of Truth” and point out that even before the news explosion of the topic of fake news “the US government was already planning its legally-backed crackdown on anything it would eventually label as ‘fake news.’”³⁰ “[The law’s] purpose is to set the federal government up as the plenary arbiter of truth,” another critic complains, “and to marginalize any and all narratives that don’t accord with whatever line gets pushed out of 1600 Pennsylvania Avenue. It’s Orwell’s Ministry of Truth in drag.... [The law] isn’t just bad on its own merits—it’s also tailor-made for abusive expansion by an unbridled chief executive.”³¹ Ironically, some falsely reported that fake news had been criminalized, which sparked Snopes to clarify the reality.³²

One legislator from the State of California decided to get into the spirit of the war on fake news as well. Assembly member Edward Chau

²⁹ NDAA 2017, *supra* note 8.

³⁰ Tyler Durden, *Obama Quietly Signs the “Countering Disinformation and Propaganda Act” into Law*, ZEROHEDGE (Dec. 26, 2016), <http://www.zerohedge.com/news/2016-12-24/obama-signs-countering-disinformation-and-propaganda-act-law>.

³¹ *Id.*

³² Numerous small web outlets inaccurately asserted that President Obama signed a “Christmas bill” criminalizing alternative media in December 2016. *See Obama Signs Christmas Bill Making Alternative Media Illegal*, SNOPEs (26 Dec. 26 2016), <http://www.snopes.com/obama-signs-christmas-bill-making-alternative-media-illegal/>.

introduced Assembly Bill 1104 on February 17, 2017, titled the “California Political Cyberfraud Abatement Act.”³³ It criminalized “a false or deceptive statement designed to influence the vote on any issue submitted to voters at an election or on any candidate for election to public office.”³⁴ Dave Maass of the Electronic Frontier Foundation (EFF) stated that when he heard news of this bill, it was “a censorship bill so obviously unconstitutional, we had to double check that it was real.”³⁵ He wrote:

This bill will fuel a chaotic free-for-all of mudslinging with candidates and others being accused of crimes at the slightest hint of hyperbole, exaggeration, poetic license, or common error. While those accusations may not ultimately hold up, politically motivated prosecutions—or the threat of such—may harm democracy more than if the issue had just been left alone.

On October 10, 2017, the bill was approved by the Governor, and filed with the secretary of state.³⁶ Future California elections will indicate how effective this law is.

The GEC, which will label fake news, and issue counter-points with fact-based narratives, arguably abridges the freedom of the press. In 1938, the Supreme Court ruled against a hand-bill license requirement: “Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of the press by subjecting it to license and censorship.”³⁷ In 1958, the Second Circuit stated that “[a]bridgment of such

³³ See Assemb. B. 1104, 2017–18 Reg. Sess. (Cal. 2017), https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB1104 (final version of the bill). The bill was enacted as an amendment to the California Elections Code. See CAL. ELEC. CODE § 18320 (2017).

³⁴ Tyler Durden, *California Senator Forced to Pull Bill Banning “Fake News” After Realizing it’s Idiotic*, ZEROHEDGE (Mar. 31, 2017, 9:25 PM), <https://www.zerohedge.com/news/2017-03-31/california-senator-forced-pull-bill-banning-fake-news-after-realizing-its-idiotic>

³⁵ Dave Maass, *California Bill to Ban “Fake News” Would Be Disastrous for Political Speech*, ELECTRONIC FRONTIER FOUND., (Mar. 27, 2017), <https://www.eff.org/deeplinks/2017/03/california-bill-ban-fake-news-would-be-disastrous-political-speech>.

³⁶ See *supra* note 34 and accompanying text.

³⁷ *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938).

rights, even though unintended, may inevitably follow from varied forms of governmental action.”³⁸

In 2014, the Eighth Circuit evaluated whether a provision of the Minnesota Fair Campaign Practices Act passed strict scrutiny.³⁹ The provision states:

A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast of paid political advertising or campaign material... with respect to the effect of a ballot question, that is designed or tends to... promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

The court held that it did not pass strict scrutiny,⁴⁰ and then commented on the role of the government in the veracity of the press:

The citizenry, not the government, should be the monitor of falseness in the political arena. Citizens can digest and question writings or broadcasts in favor or against ballot initiatives just as they are equally poised to weigh counterpoints.

The opinion then cited *McIntyre v. Ohio Elections Commission*,⁴¹ which stated:

People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is responsible, what is valuable, and what is truth.”⁴²

³⁸ *Garland v. Torre*, 259 F.2d 545, 548 (2d Cir. 1958).

³⁹ *281 Care Comm. v. Arneson*, 766 F.3d 774 (8th Cir. 2014).

⁴⁰ *Id.* at 789.

⁴¹ 514 U.S. 334 (1995).

⁴² *Arneson*, 766 F.3d at 796 (citing *McIntyre*, 514 U.S. at 348 n.11).

While the fake news in question today is not exactly *anonymous*, the principles of citizen responsibility with respect to judgement remain persuasive.

Could the effect of a GEC label of “fake news” act as an unconstitutional license? One could argue that now that the government is in the business of labelling what is and what is not “legitimate” news, news organizations now operate under a presumptive license until such a time as the government decides to delegitimize them and effectively cancel their license. The very existence of a state-controlled entity that pronounces who is and is not “fake” functions like an unconstitutional license on the press. And yes, while the GEC would be issuing “fact-based narratives,” putting into practice the law that “the remedy for speech that is false is speech that is true,”⁴³ the act of “exposing” what the GEC declares as “fake” functions like cancelling the presumptive license to be a legitimate news organization.

What about international law? Article 2 of the United Nations (UN) Charter states that “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. . . .”⁴⁴ What has been considered a “use of force”? One non-use of force is “economic force.”⁴⁵ And although it can be catastrophic for the target state, espionage is likewise not considered a use of force, nor is there any international law criminalizing it. Article 51 of the Charter establishes that states have the inherent right of self-defense in the event of an “armed attack.”⁴⁶ “Fake news” would only ever qualify as propaganda and misinformation. It is not espionage or economic force, neither of which are considered uses of force. As a result, there is no way to categorize such disinformation operations as an “armed attack” justifying self-defense.

In summary, the new GEC will expose foreign hostile disinformation operations and also publish “fact-based narratives” to counter such efforts. GEC pronouncements will raise a host of new questions, such as: Could those pronouncements be challenged, and how? Who would settle the issue,

⁴³ United States v. Alvarez, 567 U.S. 709, 727 (2012).

⁴⁴ U.N. Charter art. 2, ¶ 4, <http://www.un.org/en/charter-united-nations/>.

⁴⁵ Summary Report of Eleventh Meeting of Comm. I/1, 6 Documents of the United Nations Conference on International Organization 331, 334–35 (1945). This proposal was defeated, and the inclusion of economic activity as a potential unlawful use of force was left out of the Charter.

⁴⁶ U.N. Charter art. 51.

and how? What if something is not exactly false, but merely biased and very harsh toward the United States? Some critics consider the GEC as the new “Ministry of Truth.” Under the First Amendment, arguably the very existence of a state-controlled entity that pronounces who is and is not “fake” functions like an unconstitutional license on the press.

B. Kill Switches

What I mean by using the phrase “kill switch,” is shutting down all or part of the network, like Walter Peck from *Ghostbusters*.⁴⁷ Whether the government has direct control over that network, as in the BART case,⁴⁸ or the more usual case where the government orders an ISP to do it, the result for the user is the same, as the content cannot transit the network. Although much of the below law and policy did not contemplate the social networks of today with each individual carrying their own computer and news broadcast capability, the underlying principles behind communicating with others via technological means remain the same, and the power of the government to control those means continues to matter. This part will begin with some telecommunications history, and then discuss recent events.

Two notable telecommunications shutdown events occurred since the turn of the century, New York City tunnels in 2005, and San Francisco’s underground transit system in 2011.

1. Twentieth Century Interventions into Telecommunications.

In the turmoil of the First World War, both houses of Congress issued a resolution on July 16, 1918:

[T]he President...is authorized and empowered whenever he shall deem is necessary for the national security or defense to supervise or to take possession and assume control of any telegraph, telephone, marine cable, or radio system...as may be needful or desirable for the duration of the war...⁴⁹

⁴⁷ *GHOSTBUSTERS* (Columbia Pictures 1984). In the movie, Walter Peck, an agent from the Environmental Protection Agency, completely shuts down the Ghostbusters’ ghost containment system, thereby initiating a process that nearly brings about the end of the world.

⁴⁸ See *infra*, Part II.B.4.

⁴⁹ H.R.J. Res. 309, 65th Cong., 40 Stat. 904 (1918) (enacted).

Six days later, on July 22, 1918, a presidential proclamation followed:

I, Woodrow Wilson, . . . do hereby take possession and assume control of each and every telegraph and telephone system, and every part thereof, within the jurisdiction of the United States, including all equipment . . . and all materials and supplies.⁵⁰

President Wilson directed that the telephone and telegraph lines be put under the supervision of the Postmaster General, Albert S. Burlison, as of midnight on July 31, 1918.⁵¹ This takeover lasted for about a year.⁵² Mr. Burlison *officially* advised return of control as early as April of 1919.⁵³ Mr. Burlison was in reality “anxious to retain his hold over the wires,” and introduced the failed “Moon Resolution,” which would have extended the period of government control indefinitely.⁵⁴ He was one of many at the time in favor of government-controlled telecommunications.⁵⁵ The cables weren’t actually seized in this manner until November 16, 1918, five days *after* the armistice was signed,⁵⁶ although it’s likely the seizure procedure had already started before the signing of the armistice. While in the government’s control, rates rose as much as 100 percent.⁵⁷

Nearly sixteen years later, on June 19, 1934, Congress approved the “Communications Act of 1934.” Section 606(a) states:

During the continuance of a war . . . the President is authorized, if he finds it necessary for the national defense and security, to direct that such communications as in his judgment may be essential to the national defense and security shall have preference or priority with any carrier Any carrier . . . shall

⁵⁰ 40 Stat. 1807 (1918).

⁵¹ *Id.* at 1808.

⁵² Michael A. Janson & Christopher S. Yoo, *The Wires Go to War: The U.S. Experiment with Government Ownership of the Telephone System During World War I*, 91 TEX. L. REV. 983, 985 (2013); *see also Burlison Advises Return of Cables and Wire Systems*, N.Y. TIMES, April 29, 1919, at 1.

⁵³ *Id.*

⁵⁴ *Id.* at 1, 6.

⁵⁵ Janson & Yoo, *supra* note 52, at 993.

⁵⁶ *Id.*

⁵⁷ *Id.*

be exempt from any and all provisions in existing law...by reason of giving preference or priority....⁵⁸

The President invoked this power via Executive Order 8964, which took effect December 10, 1941, three days after the attack at Pearl Harbor.⁵⁹ It related to the use and control of radio stations and preference or priority of communications. It was revoked effective February 24, 1947 by Executive Order 9831.⁶⁰

Additionally, Section 606(d) of the 1934 Communications Act specifies:

[U]pon proclamation by the President that there exists a state or threat of war involving the United States, the President... may...(2) cause the closing of any facility or station for wire communication, or (3) authorize the use or control of any such facility or station and its apparatus and equipment by any department of the Government under such regulations as he may prescribe, upon just compensation to the owners.⁶¹

While it appears the President has never invoked this section, it reflects the earlier 1918 resolution. The legislative history for this section (originally specified as Section 606(c)) indicates that this authority was an extension of the principle in the Radio Act of 1927.⁶² One legal scholar proposes that the language of the statute is inherently limiting, specifying control of only the “stations” as opposed to entire *systems*.⁶³ He points to the legislative history, quoting Walter S. Gifford, then president of AT&T, in a hearing on the bill before the Senate Committee on Interstate Commerce, March 14, 1934:

This paragraph might be deemed to confer upon the President the power, which he has not sought, to take over the control and operation of the telephone *system* of the country, upon proclamation by him of the existence of a national emergency. At least until such time as the President shall indicate that

⁵⁸ 47 U.S.C. § 606 (1934).

⁵⁹ 6 Fed. Reg. 6367 (Dec. 12, 1941).

⁶⁰ 12 Fed. Reg. 1363 (Feb. 26, 1947).

⁶¹ 47 U.S.C § 606(d) (2018).

⁶² David W. Opperbeck, *Does the Communications Act of 1934 Contain a Hidden Internet Kill Switch?*, 65 FED. COMM. L.J. 1, 17 (2013).

⁶³ *Id.*

the interests of the country require that he be invested with such power, I respectfully submit that Congress should not thrust it upon him. Especially is this [sic] so in view of the President's special message in which he expressly excludes conferring new powers incident to the creation of a Federal Communications Commission.⁶⁴

The inference from the above statement from Mr. Gifford is that while the authority over *stations* is given to the President, the authority over the overall *system(s)* is deliberately withheld and excluded. Some think this distinction makes Section 606 something far less than a “kill-switch,” not authorizing the president to intervene upon the whole *system* of communications.⁶⁵ However, President Roosevelt's message does not appear so limiting. The President states that the “new Commission such as I suggest might well be organized this year by transferring the present authority of the Radio Commission and the Interstate Commerce Commission for the *control of communications*.”⁶⁶ One legal scholar argues that while the earlier law on the subject granted fairly broad authorities to the government to regulate telecommunications, later developments and executive orders specifically narrowed this authority to the “priority” communications, and does not grant authority for a “shut down.”⁶⁷ In light of the explosion of telecommunications since, and subsequent developments, such as Executive Order 13618 and Standard Operating Procedure 303 (both discussed below), section 606 likely does equate to just such a kill-switch.

Another rather confusing issue is the distinction between a “telecommunications service” and an “information service” as specified under the

⁶⁴ *Id.* at 18; *Hearing on S. 2910 Before the S. Comm. on Interstate Commerce*, 73rd Cong. (1934) (testimony of AT&T President Walter Gifford) (emphasis added); MAX D. PAGLIN ET AL., *A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934*, at 220 (Max D. Paglin ed., 1989). At the time, AT&T and its associated companies under the Bell System controlled 85% of telephone service in the U.S. *Id.* The “President's special message” seems to refer to President Roosevelt's February 26, 1934 message to Congress recommending the creation of the FCC. See President Franklin D. Roosevelt, Message to Congress Recommending Creation of the Federal Communications Commission (Feb. 26, 1934), in *Papers of Franklin D. Roosevelt, February 26, 1934, Message to Congress*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=14814> (last visited Aug. 3, 2018) [hereinafter *Roosevelt Papers*].

⁶⁵ Opderbeck, *supra* note 62.

⁶⁶ *Roosevelt Papers*, *supra* note 64 (emphasis added).

⁶⁷ Opderbeck, *supra* note 62, at 27.

Telecommunications Act of 1996.⁶⁸ This is an extension of and reflects the similar ideas of “enhanced” versus “basic” services, categorizations developed by the Federal Communications Commission (FCC) decades earlier to distinguish between computer-involved communications as opposed to normal phone calls, respectively.⁶⁹ “Telecommunications” are defined by the Act as “transmission...without change in form or content of the information...”⁷⁰ They can be thought of as an unaltered communications pipe.⁷¹ “Information service” is defined by the act as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information...”⁷² This involves some computer processing acting on the transmitted content.⁷³ “Information services” or “Enhanced services” were not subject to strict regulations like common carrier regulations, while “telecommunications services” were.⁷⁴ There is a plentitude of scholarship on this topic and distinction within the orbit of the FCC. Despite the sometimes confusing Supreme Court pizza-delivery and dog-leash analogies,⁷⁵ telecommunications technology is constantly converging into the Internet, and this distinction will increasingly not matter.

2. Intervention: New York Tunnels 2005

On July 7, 2005, four young men, Mohammad Sidique Kahn, Shehzad Tanweer, Hasib Hussain, and Germaine Lindsay, executed suicide bombings in London.⁷⁶ Three devices were detonated in underground transit, and one on a double decker bus.⁷⁷ No evidence indicates any wireless signals were used in these bombings.

After the London bombings of July 7, The Department of Homeland Security (DHS) raised the threat level for transit systems from Yellow

⁶⁸ *Id.* at 30.

⁶⁹ *Id.*

⁷⁰ 47 U.S.C. § 153 (2018).

⁷¹ Opderbeck, *supra* note 62, at 27.

⁷² 47 U.S.C. § 153 (2018).

⁷³ Opderbeck, *supra* note 62, at 27.

⁷⁴ *Id.*

⁷⁵ Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 991–92, 1007–11 (2005).

⁷⁶ Lucy Rodger et al., *7 July London Bombings: What Happened that Day?*, BBC (July 3, 2015), <http://www.bbc.com/news/uk-33253598>.

⁷⁷ *Id.*

(elevated) to Orange (high), and as a result the Port Authority of New York and New Jersey cut off all cellular phone service in the Lincoln and Holland Tunnels. Port Authority Police feared that terrorists would use cellular phone activated explosives in the tunnels. Similarly, the Metropolitan Transportation Authority (MTA) turned off cellular service in the East River, Brooklyn Battery, and Mid-Town Tunnels. Mayor Bloomberg questioned the wisdom of turning off cellular service where commuters may have a need to place calls for assistance or to report suspicious behavior. Some in the cell phone industry and the security industry questioned the move due to the fact that the Madrid train bombs from a year prior were detonated utilizing the alarm clock function on cell phones, not the function of receiving call signals from another location. MTA then restored service after about a week.⁷⁸

Transit officials originally said that the order came down from the New York Police Department. But the Police Commissioner, Raymond W. Kelley, disputed that assertion and cited the benefits of cellular service in the event of an emergency. After labelling it a misunderstanding, the Transportation Authority promptly instructed cellular providers to re-activate their antennas. The Port Authority, however, maintained it would still not allow service in the Hudson River tunnels until the heightened DHS alert for transit systems were lowered. The Port Authority controls the switch for the antennas it installed in the tunnels for cellular service. By July 20, 2005, cellular providers Cingular and Verizon were informed by the Port Authority that service would be shortly restored. The DHS threat level was finally lowered from high to elevated on August 12, 2005.⁷⁹

New York's subway system at the time did not have any cellular service. Note that Washington, D.C.'s transit system did not react in the same manner, and did not turn off any service in the D.C. Metro subway system.⁸⁰

There was no serious criticism or backlash from consumers from these shutdowns. There may be a number of reasons why. Perhaps this was due to the proximity of the attacks on 9/11. Or perhaps it may be due to the fact

⁷⁸ Patrick McGeehan, *Cellphones Chime Again in Tunnels Under Hudson*, N.Y. TIMES, (July 20, 2005), http://www.nytimes.com/2005/07/20/nyregion/cellphones-chime-again-in-tunnels-under-hudson.html?_r=0.

⁷⁹ *Chronology of Changes to the Homeland Security Advisory System*, U.S. DEP'T OF HOMELAND SEC. (Sept. 13, 2017), <https://www.dhs.gov/homeland-security-advisory-system>.

⁸⁰ Leslie Cauley, *NYC River Tunnels Lose Service*, USA TODAY (Jul. 11, 2005, 12:03 AM), http://usatoday30.usatoday.com/news/nation/2005-07-10-nyc-cell_x.htm

that it was obviously a move to enhance security as a reaction to the London bombings. Most likely it was due to the fact that in 2005, there were no such things as smartphones in the hands of everyday consumers, and thereby no enhanced uses like Tweeting, Facebooking, blogging, and engaging in social media. By most accounts, there was not one complaint that anyone's right to free speech was violated as a result of terminating cellular service for more than a week.

From the 2005 New York tunnel cellular telephone shutdown, we observe that U.S. authorities won't hesitate to turn off communications connectivity in the face of a perceived threat. This service shutdown lasted for weeks, and occurred even though the actual threat occurred an entire ocean away in London. This event sparked the President's telecommunications committee to develop a standard operating procedure in similar circumstances, detailed in the next section.

3. Standard Operation Procedure 303

After the 2005 cellular shutdown in New York City area tunnels in response to the London subway bombings, the DHS's National Coordinating Center for Communications (NCC), which continuously monitors incidents that impact emergency communications, discussed the need to have a process to determine when and if cellular service shutdown should be initiated.⁸¹ The President's National Security Telecommunications Advisory Committee (NSTAC) agreed and sought to develop a process.⁸² On August 18, 2005, NSTAC established a task force to expedite formulating recommendations for efficient coordinated action between government and industry during a national emergency.⁸³ The recommendations included coordinating between DHS and the National Communications System (NCS) and rapidly implementing decisions down through local governments.⁸⁴ NSTAC approved the recommendations in January 2006. Supporting these recommendations,

⁸¹ PRESIDENT'S NAT'L SEC. TELECOMMS. ADVISORY COMM., 2008–2009 NSTAC ISSUE REVIEW 159 (2009), <https://www.dhs.gov/sites/default/files/publications/2008-2009%20NSTAC%20Issue%20Review.pdf> [hereinafter NSTAC REVIEW]; NAT'L COORDINATING CTR. FOR COMMS., U.S. DEP'T OF HOMELAND SEC. (Feb. 14, 2018), <https://www.dhs.gov/national-coordinating-center-communications>.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

the NCS approved Standard Operating Procedure 303, titled “Emergency Wireless Protocols” (EWP) on March 9, 2006.⁸⁵

Under this process, the decision to shut down service would be initiated by State Homeland Security Advisors, their designees, or representatives of the DHS Homeland Security Operations Center.⁸⁶ The request would go to the NCC, who would ask the requestor questions to determine if a shutdown were the appropriate action. The NCC also authenticates, and functions as the focal point to coordinate termination of service that is either localized, such as with a bridge or tunnel, or in a general area, such as an entire metropolitan area.⁸⁷ After the NCC determines the shutdown no longer necessary, it reverses the process to reestablish service.⁸⁸

SOP 303 was not released to the public, and the government was/is reluctant to provide details of the procedure. After a later Internet shutdown of the Bay Area Rapid Transit Authority (BART)⁸⁹, the Electronic Privacy Information Center (EPIC) submitted a Freedom of Information Act (FOIA) request to DHS, seeking the full text of SOP 303.⁹⁰ DHS withheld essentially all of SOP 303, citing FOIA exemptions for law-enforcement information “that could reasonably be expected to endanger the life or physical safety of any individual” or “would disclose techniques and procedures for law enforcement investigations or prosecutions.”⁹¹ EPIC filed suit to obtain the full text. In support for its request for summary judgment, DHS submitted the Holzer declaration, which states:

Making SOP 303 public would, e.g., enable bad actors to insert themselves into the process of shutting down or reactivating wireless networks by appropriating verification methods and then impersonating officials designated for involvement in the verification process.⁹²

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *See infra* Part II.B.4.

⁹⁰ *Elec. Privacy Info. Ctr. v. United States Dep’t of Homeland Sec.*, 777 F.3d 518, 520 (D.C. Cir. 2015).

⁹¹ 5 U.S.C. § 552(b)(7)(F) & (E) (2018).

⁹² *Elec. Privacy Info. Ctr.*, 777 F.3d at 521.

This declaration accurately summarizes the government’s viewpoint for the overall justification for SOP 303, and its being withheld from public knowledge. While the district court granted summary judgment in favor of EPIC, the D.C. Circuit Court of Appeals reversed and decided in favor of DHS.⁹³ There are no known events when SOP 303 has ever been invoked, not even during the Boston Marathon bombings of April 15, 2015.⁹⁴ But SOP 303 is still ready for use, with its power to terminate service even to an “entire metropolitan area.”⁹⁵

4. Intervention: Bay Area Rapid Transit Authority 2011

The group “No Justice No BART” (NJNB) was formed in the San Francisco Bay area of California in January of 2009 after a Bay Area Rapid Transit Authority (BART) Police officer fatally shot Oscar Grant, III, in the back.⁹⁶ NJNB has organized several demonstrations at BART stations since 2009⁹⁷ and has described its protest strategy to “disrupt business as usual.”⁹⁸ Another BART officer shot and killed a transient man on July 3, 2011.⁹⁹ In response, on July 11, 2011, about a hundred NJNB demonstrators protested at

⁹³ *Id.* at 528.

⁹⁴ Nick Baumann & Adam Serwer, *The Government Didn’t Shut Down Cell Service in Boston. But With SOP 303, it Could Have*, MOTHER JONES (Apr. 17, 2013, 10:00 AM), <http://www.motherjones.com/politics/2013/04/boston-maraton-cell-phone-standard-operating-procedure-303>.

⁹⁵ NSTAC REVIEW, *supra* note 81, at 159.

⁹⁶ *What is “No Justice No BART”?*, NO JUSTICE NO BART, <http://nojusticenobart.blogspot.com/2009/01/what-is-no-justice-no-bart.html> (last visited June 27, 2018).

⁹⁷ *Id.*

⁹⁸ *Our Strategy*, NO JUSTICE NO BART, <http://nojusticenobart.blogspot.com/2009/01/our-strategy.html> (last visited Feb. 4, 2013).

⁹⁹ *See BART Officer Suffers Cuts, Bruises Following Officer Involved Shooting*, BAY AREA RAPID TRANSIT (July 4, 2011), <http://www.bart.gov/news/articles/2011/news20110704.aspx>; Kristin J. Bender, *Rowdy Protest Shuts Down Three BART Stations and Causes Major Delays Throughout System*, THE MERCURY NEWS (July 11, 2011, 4:43 PM), <http://www.mercurynews.com/2011/07/11/rowdy-protest-shuts-down-three-bart-stations-and-causes-major-delays-throughout-system/>; Bob Franklin & Sherwood Wakeman, *A Letter from BART to Our Customers*, BAY AREA RAPID TRANSIT (Aug. 20, 2011), <http://www.bart.gov/news/articles/2011/news20110820.aspx> (detailing BART’s interpretation of the August 11, 2011 event); Vivian Ho, *BART: Next Time, ‘Zero Tolerance’ for Disruptions*, SF GATE (July 13, 2011, 6:30 PM), <http://www.sfgate.com/bayarea/article/BART-Next-time-zero-tolerance-for-disruptions-2354901.php>, (discussing the genesis of July 11, 2011 protest at BART stations).

three BART stations.¹⁰⁰ The protest started calmly, but escalated into shutting down some stations for hours due to disruptive protestors.¹⁰¹ Despite this disruption, there were no injuries or arrests made by BART.¹⁰² BART officials stated that there would be “zero tolerance” for these kinds of protests in the future and were obviously frustrated by the delays and hazards caused by NJNB amongst the crowds and high-speed trains.¹⁰³

NJNB planned another protest for August 11, 2011 during the evening rush hour.¹⁰⁴ BART personnel learned of the planned protest on NJNB’s website, which openly posted their plans to assemble at one of the stations beginning at 4:30 p.m.¹⁰⁵ The day prior, BART learned that “color-coded” teams planned to coordinate once on BART property to work out the details.¹⁰⁶ To prevent this, BART decided to shut off cell phone and Wi-Fi service starting at 4:00 p.m.¹⁰⁷ BART’s official justification for this was “out of our overriding concern for our passengers’ safety.”¹⁰⁸ However, internal e-mail suggest this decision wasn’t thoroughly thought through, with officials only discussing it between fifteen and thirty minutes, with little discussion about the consequences.¹⁰⁹ Lynette Sweet, a BART board member said, “My problem with that entire episode is that we didn’t have enough leadership at the top to realize that the decision to turn off the cell phones was going to

¹⁰⁰ The protest began at the Civic Center station (located near some of San Francisco’s major tourist attractions) and then spread to the nearby Powell Street station and the 16th Street station (located near the San Francisco Mission). See Bender, *supra* note 99 (discussing the July 11, 2011 No Justice No BART protest).

¹⁰¹ *Id.*

¹⁰² Bender, *supra* note 99.

¹⁰³ *Id.*

¹⁰⁴ See Patrik Jonsson, *To Defuse ‘Flash’ Protest, BART Cuts Riders’ Cell Service. Is that Legal?*, CHRISTIAN SCI. MONITOR (Aug. 12, 2011), <http://www.csmonitor.com/USA/Justice/2011/0812/To-defuse-flash-protest-BART-cuts-riders-cell-service.-Is-that-legal> (citing a television interview discussing the lack of prior incidents of this nature).

¹⁰⁵ *BART Protest Could Impact Evening Commute*, NBC BAY AREA (Aug. 11, 2011, 3:18 PM), <http://www.nbcbayarea.com/news/local/BART-Protest-Could-Impact-Evening-Commute-127554708.html>; See Franklin & Wakeman, *supra* note 99.

¹⁰⁶ Franklin & Wakeman, *supra* note 99.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Zusha Elinson, *BART Cut Cell Service on Spur of the Moment, Emails Show*, BAY CITIZEN (Oct. 11, 2011), <http://www.baycitizen.org/bart-protests/story/bart-cut-cell-service-spur-moment-emails/>.

bite BART in the butt, which it did.”¹¹⁰ She also suggested that the timeline indicates that “not a whole lot of thought went into it.”¹¹¹ While this was true for thoughts regarding the First Amendment, at least one BART official was giving the matter considerable thought, having nothing to do with rights and civil liberties. BART spokesman, Mr. Linton Johnson, proposed to hold a press-conference at the same time as the shutdown of service, with “loyal riders” speaking out against the protestors and blaming them for unfortunate personal consequences of inefficient travel.¹¹² This suggests that BART’s efforts were more of a propaganda campaign than a safety exercise.¹¹³ Mr. Johnson is also the one who apparently initially thought of the idea to shut down wireless service, saying in an e-mail:

A whole heck of a lot their ability to carry out this exercise is predicated on being able to communicate with each other. Can’t we just shut off wireless mobile phone and Wifi communication in the downtown stations? It’s not like it’s a constitutional right for BART to provide mobile phone and Wifi service.¹¹⁴

In accordance with their plan, BART shut off wireless and Wi-Fi service at 4:00 p.m. This action made it impossible for NJNB to communicate via phone, and they could not assemble or protest.¹¹⁵ BART restored cell service by 7:00 p.m.¹¹⁶

NJNB thought BART’s tactics were not aimed at safety but at disagreeing with their message.¹¹⁷ On August 24, there was a public hearing where Ms. Sweet put the General Manager Sherwood Wakeman on the spot,

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² E-mail from Linton Johnson, BART spokesperson, to Gina DeLorenzo, member of BART’s marketing department (Aug. 11, 2011, 3:22 PM), available at <http://www.baycitizen.org/documents/bart-email>.

¹¹³ The car service, which was not used, cost \$872 for BART. Zusha Elinson, *BART’s Media Manipulation Strategy*, BAY CITIZEN (last updated Sept. 13, 2011, 6:40 PM), <http://www.baycitizen.org/bart-protests/story/inside-barts-protest-propaganda-campaign>.

¹¹⁴ Elinson, *supra* note 109.

¹¹⁵ *Id.*; Julie J. Geng, *When Forums Collide: the San Francisco BART as a Battleground for the First Amendment in the Internet Era*, 10 I/S J.L. & POL’Y FOR INFO SOC’Y 127 (2014).

¹¹⁶ Elinson, *supra* note 109.

¹¹⁷ *Id.*

and asked if BART's legal department had been consulted or given counsel regarding the decision.¹¹⁸ He responded:

Well, um, the discussion took place with counsel in the room. This is an issue which, from my own experience, when there is an imminent danger or threat of violation of law, there is legal authority, um, to curtail free speech.¹¹⁹

As opposed to most wireless scenarios, BART owns the underground nodes, and licenses them to wireless providers.¹²⁰ It shut down service by cutting power to the station's underground nodes that relay cell service to above-ground transmitters.¹²¹ BART notified the providers before shutting off service, although done with less notice than typically expected in the industry.¹²²

BART cut power to the nodes rather than jamming the signal.¹²³ Jamming cell phone signals is illegal under the Telecommunications Act of 1996 because it transmits radio waves that interfere with authorized radio communications, even their own.¹²⁴

¹¹⁸ Elinson, *supra* note 109.

¹¹⁹ *Id.*

¹²⁰ Robert Barnes, *Public Safety, Technology and the First Amendment Collide in San Francisco's Subway*, WASH. POST (Aug. 28, 2011), https://www.washingtonpost.com/politics/public-safety-technology-and-the-first-amendment-collide-in-san-franciscos-subway/2011/08/26/gIQAfTlBJ_story.html?noredirect=on&utm_term=.8ad33884ad60; *See generally* Michael Cabanatuan, *Underground, but Not Unconnected—BART Offers Wireless Service to Riders*, SF GATE (Nov. 19, 2005, 4:00 AM), <http://www.sfgate.com/bayarea/article/Underground-but-not-unconnected-BART-offers-2594271.php> (discussing BART's wireless coverage).

¹²¹ Barnes, *supra* note 120.

¹²² Elinson, *supra* note 109.

¹²³ Jonsson, *supra* note 104.

¹²⁴ 47 U.S.C. § 333 (2006) ("No person shall willfully or maliciously interfere with or cause interference to any radio communications of any station licensed or authorized by or under this chapter or operated by the United States Government."); *see also* *Johnson v. Am. Towers, LLC*, 781 F.3d 693, 708 (4th Cir. 2015) (holding that using the phrase "any radio communication" includes one's own communications). In *Johnson*, a state law obligated a prison to block signals inside its walls, which conflicted with the court's interpretation of the federal law prohibiting "any," to include one's own, interference. In light of such interpretation, even if BART were only interfering with their own authorized radio communications, such interference would still be violating the Telecommunications Act.

Despite the many criticisms of BART's shutdown, Mr. Johnson, the BART spokesperson who initially suggested the shutdown, reacted by saying that cell phone service "is an amenity. We survived for years without [it].... Now they're bitching and complaining that we turned it off for three hours?"¹²⁵

Even the hacktivist group Anonymous jumped into the issue. After BART's shutdown actions of August 11, 2011, Anonymous was angry at the perceived attack on free speech. They responded by hacking BART's websites and released BART data in retaliation.¹²⁶ The group posted names, phone numbers, and street and e-mail addresses of many riders on its own website, while also calling for a BART disruption during Monday's evening commute.¹²⁷ This behavior was criminal in and of itself by accessing another network without authorization, in violation of the Computer Fraud and Abuse Act.¹²⁸

In December 2011, the BART Board of Directors approved a new policy regarding wireless service specifying the circumstances when they could shut it off.¹²⁹ The policy requires "strong evidence of imminent unlawful activity" to justify shutting it down.¹³⁰ Examples include using cell phones

¹²⁵ According to a BART director, although the chief of police briefed the Board prior to the protests, the decision did not make it through the proper channels because it "wasn't brought to [them] for discussion [even though they were] the policymakers." Zusha Elinson, *BART Director: Cell Phone Shutdown Didn't Go Through Proper Channels*, BAY CITIZEN (Aug. 13, 2011, 3:03 PM), <https://www.baycitizen.org/news/bart-police-shooting/bart-director-cell-phone-shutdown-didnt>.

¹²⁶ Jonathon M. Seidl, '*Anonymous*' Hacks SF B.A.R.T Site After Decision to Jam Protesters' Phones, THE BLAZE (Aug. 15, 2011), <http://www.theblaze.com/news/2011/08/15/anonymous-hacks-sf-b-a-r-t-site-after-decision-to-jam-protesters-phones/>.

¹²⁷ *Id.*

¹²⁸ 18 U.S.C. § 1030 (2018).

¹²⁹ *FCC to Review BART Cell Service Shutdown Policy*, CBS NEWS (Dec. 2, 2011, 10:40 PM), <http://www.cbsnews.com/news/fcc-to-review-bart-cell-service-shutdown-policy>.

¹³⁰ *Cell Service Interruption Policy*, BAY AREA RAPID TRANSIT, http://www.bart.gov/sites/default/files/docs/final_CSIP.pdf (last visited Aug 3, 2018). The policy states in relevant part:

[I]t shall be the policy of the District that the District may implement a temporary interruption of operation of the System Cellular Equipment only when it determines that there is strong evidence of imminent unlawful activity that threatens the safety of District passengers, employees and other members of the public, the destruction of District property, or the substantial disruption of public transit services; that the interruption will substantially reduce the likelihood of such unlawful activity; that such interruption is essential to protect the safety of

“(i) as instrumentalities in explosives; (ii) to facilitate violent criminal activity or endanger District passengers, employees or other members of the public...and (iii) to facilitate specific plans or attempts to destroy...property or substantially disrupt public transit services.”¹³¹

When this new policy was promulgated, BART’s president Bob Franklin said,

This policy, with input from the Federal Communications Commission, and the American Civil Liberties Union, will serve as a pioneering model for our nation, as a reference to other public agencies that will inevitably face similar dilemmas in the future.¹³²

One of the more interesting facts from the BART Internet shutdown, is that not only did BART cut off all traffic, but it was also engaging in a propaganda war with NJNB. Rather than a neutral decision to cut off all traffic, both good and bad, to protect safety and transit efficiency, BART was jumping in with both feet to smear the protestors and get good press out of it. So not only did BART eliminate protestors’ capabilities, it was launching its own pro-BART propaganda. In this way, BART was publishing “true facts” from the government, much like we could imagine coming from the GEC. If the BART account were to serve as an example, we could expect that any GEC pronounced “fake news” that appears self-serving to the United States, or suspect in any way, will invite the angst of protestors and hacktivists (who may commit additional crimes) as occurred with BART in 2011.

The 2011 BART Internet shutdown is highly instructive. Evidence also shows that the spur of the moment decision to shut down service involved little, if any, thought given to civil liberties such as those under the First Amendment. Ms. Sweet’s statement that “not a whole lot of thought went into it” proves NJNB’s point that BART would make this kind of decision not

District passengers, employees and other members of the public, to protect District property or to avoid substantial disruption of public transit services; and that such interruption is narrowly tailored to those areas and time periods necessary to protect against the unlawful activity.

¹³¹ *Id.*

¹³² Press Release, Bay Area Rapid Transit, Extraordinary Circumstances Only for Cell Phone Interruptions (Dec. 1, 2011, 1:18 PM), [http:// www.bart.gov/news/articles/2011/news20111201](http://www.bart.gov/news/articles/2011/news20111201).

realizing that what they were doing had any real or serious legal implications. In light of the negative attention BART received as a result of its actions, perhaps other U.S. government entities can learn a thing or two.

5. Executive Order 13618.

While dated telecommunications statutes may be on the books, are executive branch heads aware and paying attention to these authorities, and making plans on how to apply them should the need arise? Absolutely. On July 6, 2012 President Obama issued Executive Order (EO) 13618 regarding “Assignment of National Security and Emergency Preparedness Communications Functions.”¹³³ Generally, executive orders are how the President, the Chief Executive, manages the operations of the federal government. Under Section 1, it states: “The Federal Government must have the ability to communicate at all times and under all circumstances to carry out its most critical and time sensitive missions.”¹³⁴ It then invokes some of the previously mentioned authority Congress gave to the President over nationwide telecommunications. Paragraph 2.3 states:

The Assistant to the President for Homeland Security and Counterterrorism and the Director of OSTP shall make recommendations to the President, informed by the interagency policy process established in PPD-1, with respect to the exercise of authorities assigned to the President under section 706 of the Communications Act of 1934, as amended (47 U.S.C. 606). The Assistant to the President for Homeland Security and Counterterrorism and the Director of OSTP shall also jointly monitor the exercise of these authorities, in the event of any delegation, through the process established in PPD-1 or as the President otherwise may direct.¹³⁵

This EO indicates that the authorities previously established by 47 U.S.C § 606, regarding the President directing communications, are already developed into procedures, and firmly in place in government plans should the need arise to use these authorities. The government is ready to act, and won’t hesitate in the face of a serious threat.

¹³³ Exec. Order No. 13618, 77 Fed. Reg. 40,779 (July 11, 2012).

¹³⁴ *Id.*

¹³⁵ *Id.*

In sum, the federal government has fairly well-developed statutory legal precedent, standard operating procedures, and executive orders in place to intervene and manage wireless and other communications systems. In the face of a perceived threat, the government will act to preserve security, safety, and order, despite the legal fallout.

IV. PRIOR RESTRAINT AND EXECUTIVE AUTHORITY

A. Prior Restraint

State action completely preventing speech from occurring is “prior restraint.” This is what the government would be doing in the introductory hypothetical. The first justification for prior restraint we examine comes from concerns for national security. Since *Near v. Minnesota*,¹³⁶ the Court has reaffirmed that any system of prior restraints of expression comes to the Court bearing a heavy presumption against its constitutional validity.¹³⁷ Some prior restraints have been held to be legally permissible if narrowly tailored and the speech is obscene,¹³⁸ or when the speech poses a risk to national

¹³⁶ 283 U.S. 697, 709–23 (1931).

¹³⁷ Prior restraints can be traced back to “administrative preclearances” in England. See Richard Favata, *Filling the Void in First Amendment Jurisprudence: Is There A Solution for Replacing the Impotent System of Prior Restraints?*, 72 Fordham L. Rev. 169, 169–70 (2003). This history was influential to the Court’s reasoning in *Near*. Speaking for the majority, Chief Justice Hughes explained:

The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: “The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.”

Near, 283 U.S. at 713–14 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *151–52).

¹³⁸ See *Times Film Corp. v. Chicago*, 365 U.S. 43, 47–50 (1961); *Kingsley v. Brown*, 354 U.S. 436, 440 (1957).

security.¹³⁹ Specifically, the Court noted that in regard to national security, “No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.”¹⁴⁰ In *United States v. Progressive, Inc.*, *The Progressive* magazine was planning to publish a piece regarding the details of the United States’ development of the hydrogen bomb, titled “The H-Bomb Secret: How We Got It, Why We’re Telling It.”¹⁴¹ The court granted the government’s preliminary injunction to prevent publication, and the court examined the doctrine of prior restraint with respect to national security.¹⁴² The court evaluated *Near*, and focused on its mention of troop movements during wartime justifying prior restraint.¹⁴³ The court held:

In light of these factors, this Court concludes that publication of the technical information on the hydrogen bomb contained in the article is analogous to publication of troop movements or locations in time of war and falls within the extremely narrow exception to the rule against prior restraint.¹⁴⁴

From the *Progressive* case, we learn that while prior restraint is a high hurdle to clear, it is clearable, and has been for serious potential threats to national security, such as operational details regarding movement of troops, and the details surrounding the development of technological advances producing the hydrogen bomb.

In *New York Times Co. v. United States*,¹⁴⁵ the U.S. government was attempting to enjoin both the *Washington Post* and the *New York Times* from publishing the Pentagon Papers, a DoD study of U.S./Viet Nam relations between 1945 and 1967.¹⁴⁶ Justice Black’s opinion contains many prescient

¹³⁹ See *Near*, 283 U.S. at 716; Robert F. Flinn, *The National Security Exception to the Doctrine of Prior Restraint*, 13 WM. & MARY L. REV. 214, 218–21 (1971). But see *N.Y. Times Co. v. United States*, 403 U.S. 713 *passim* (1971) (discussing and rejecting the applicability of the national security exception).

¹⁴⁰ *Near*, 283 U.S. at 716.

¹⁴¹ 467 F. Supp. 990, 991 (W.D. Wis. 1979).

¹⁴² *Id.* at 992.

¹⁴³ *Id.* at 996.

¹⁴⁴ *Id.*

¹⁴⁵ 403 U.S. 713 (1971).

¹⁴⁶ *Id.*; 1971 Year in Review: *The Pentagon Papers*, UNITED PRESS INT’L (1971), [HTTP://WWW.UPI.COM/ARCHIVES/AUDIO/EVENTS-OF-1971/THE-PENTAGON-PAPERS](http://www.upi.com/archives/audio/events-of-1971/the-pentagon-papers).

passages regarding the tension that still exists between the power of the press and the power of the executive to ensure national security. The Solicitor General, on behalf of the U.S. government, argued that this tension should be resolved in favor of the President, stating, “[T]he First Amendment was not intended to make it impossible for the Executive to function or to protect the security of the United States.”¹⁴⁷ The government further argued that the Executive Department’s authority to prevent the publication of information that would endanger national security derived from both the President’s power to conduct foreign affairs and his authority as Commander-in-Chief.¹⁴⁸ Justice Black was wholly unconvinced. His response was an unequivocal statement supporting the rights of the press under the First Amendment:

To find that the President has “inherent power” to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make “secure.” No one can read the history of the adoption of the First Amendment without being convinced beyond any doubt that it was injunctions like those sought here that Madison and his collaborators intended to outlaw in this Nation for all time.¹⁴⁹

So what would Justice Black have thought of the real-time (live-streaming) publication of news and signals themselves being used as capabilities to enable threats to national security? It is difficult to imagine that Justice Black was considering the *weaponization* of live-news broadcasting and the American people being the targets of foreign-sponsored disinformation operations. Arguably, in light of the concluding paragraph to his opinion, his reasoning would remain unchanged:

The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be

¹⁴⁷ *N.Y. Times*, 403 U.S. at 718.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 719.

obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.¹⁵⁰

While this indicates his fervent commitment to First Amendment principles, there is an important distinction in the present case. One of the points against the executive branch made by Justice Black had to do with the lack of legislation¹⁵¹ authorizing such action:

The Government does not even attempt to rely on any act of Congress. Instead it makes the bold and dangerously far-reaching contention that the courts should take it upon themselves to “make” a law abridging freedom of the press in the name of equity, presidential power and national security, even when the representatives of the people in Congress have adhered to the command of the First Amendment and refused to make such a law.¹⁵²

As explained above, this is certainly *not* the case today. Congress created specific legislative delegations to the President over telecommunications, and recently passed law to create the GEC, focused on countering anti-U.S. propaganda and disinformation operations. Should such a legal argument take place today, Justice Black-minded individuals would find it much more difficult to argue that the people (via Congress) have not delegated power to the Executive to not only control telecommunications, but also openly intervene in propaganda wars and disinformation operations.

This delegation of authority over the veracity of news and the control of telecommunications more accurately reflects the reasoning of Justice Burger’s dissenting reply to Justice Black:

In these cases, the imperative of a free and unfettered press comes into collision with another imperative, the effective functioning of a complex modern government and specifically the effective exercise of certain constitutional powers of the Executive. Only those who view the First Amendment

¹⁵⁰ *Id.* at 719–20 (quoting *De Jonge v. Oregon*, 299 U.S. 353 (1937)).

¹⁵¹ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), discussed *infra*. Part IV.B.

¹⁵² *N.Y. Times*, 403 U.S. at 718.

as an absolute in all circumstances—a view I respect, but reject—can find such cases as these to be simple or easy.¹⁵³

Justice Berger thus argues that the First Amendment is not absolute in all circumstances, to the detriment to the effective functioning of our complex modern government by the Executive. He continues:

[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.¹⁵⁴

Justice Berger's argument is fitting to the introductory hypothetical. If a President, or other executive authority, perceives a threat using disinformation (fake news), such decisions are by nature political, not judicial. Additionally, such decisions would be highly complex, and could only be undertaken by those responsible, such as the GEC and national security organizations. 47 U.S.C. § 606 and SOP 303 reflect this overarching sentiment, that the First Amendment is not an absolute in all circumstances, and Congress specifically delegated power to the President to make certain exceptions.

Another distinction between the Pentagon Papers and the situation today would be the fact that in 1971, the government felt the need to use the courts to enjoin the publication of the Pentagon Papers. This was the only practical option for the government at the time. As mentioned in the introduction, in some scenarios, today the government could simply contact the ISPs and shut off all traffic for certain live-streaming news (e.g., Facebook). This technological ecosystem wasn't the same in 1971.

¹⁵³ *Id.* at 748.

¹⁵⁴ *Id.* at 757–58 (quoting *Chicago & S. Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948)).

How does fake news threaten national security? It doesn't analogize well to either information regarding troop movements, or details regarding the construction of the hydrogen bomb. One large difference with fake news is that while troop movements and technical data are separate from the contemplated publications *about* those topics, the publication of the fake news itself *is* the issue. Fake news is itself the threat, having been weaponized against U.S. interests. Should the facts be as serious as those at the start of this article, a court would most likely hold that a prior restraint would be justified, and not violate free speech.

Another related reason prior restraint may be justified for national security is if the speech qualifies as incitement. Certain types of speech are not protected by the First Amendment. These include: incitement,¹⁵⁵ fighting words,¹⁵⁶ obscenity,¹⁵⁷ child pornography,¹⁵⁸ and defamation.¹⁵⁹ In the 2005 New York shutdowns, the specific thing that concerned the authorities wasn't speech *per se*, but rather an electronic cellular phone signal that could trigger an explosive. What the Port Authority and the MTA did was eliminate all cellular signals, which included all speech over those signals. In the BART case, the specific kind of speech being targeted wasn't obscene or defamatory, but inciting. BART didn't want NJNB to incite violent or even inconvenient demonstrations. Importantly, the Court in *Near* specified that "the security of the community life may be protected against incitements of violence and the overthrow by force of orderly government."¹⁶⁰

The Supreme Court's analysis of inciting speech comes from the case of *Brandenburg v. Ohio*.¹⁶¹ Under *Brandenburg*, in order to qualify as incitement, and thus be unprotected speech, there must be (1) advocacy of "imminent lawless action" that is (2) "likely to incite or produce such action."¹⁶² That case focused on the allegedly inciting words of a Ku Klux Klan leader's words "that there might have to be some revengeance [sic] taken" for "continue[d] suppress[ion] of the white, Caucasian race."¹⁶³ The

¹⁵⁵ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

¹⁵⁶ See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

¹⁵⁷ See, e.g., *Miller v. California*, 413 U.S. 15 (1973).

¹⁵⁸ See, e.g., *New York v. Ferber*, 458 U.S. 747 (1982).

¹⁵⁹ See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

¹⁶⁰ *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

¹⁶¹ 395 U.S. 444 (1969).

¹⁶² *Id.* at 447.

¹⁶³ *Id.* at 445–48.

Court found those words did not meet the test—specifically that such language was not advocacy of imminent lawless action, and that such language was not likely incite or produce such action.¹⁶⁴

BART’s speech restriction was not in response to speech, but rather in anticipation that some of the electronic speech would incite imminent lawless action. It took this action without knowing even what that speech would be. Analyzing BART’s actions under *Near* and *Brandenburg* leads to the conclusion that its restriction on speech was unconstitutional. *Near* establishes that prior restraints bear a heavy presumption against constitutional validity, with only a few exceptions that must be narrowly tailored, namely, speech that is obscene or poses a risk to national security.¹⁶⁵ This heavy presumption means analyzing prior restraints under strict scrutiny.¹⁶⁶ BART had no knowledge that any of the speech would be obscene. In BART’s case, no speech was made at all as it was prevented from occurring in the first place. Mere suspicion that the speech may be incitement does not rise to the level of imminence and likelihood to qualify as incitement under *Brandenburg*. Detailed intelligence indicating fake news that will inflame hostility at a national event and result in violence likely qualifies as incitement, and justifies prior restraint.

In which forum does online speech occur? Speech forums are generally divided into the following categories: traditional public forums,¹⁶⁷ designated public forums,¹⁶⁸ limited public forums,¹⁶⁹ and non-public forums.¹⁷⁰ The government’s intent at the creation of the forum appears to be the most important factor to determine what kind of forum it is.¹⁷¹ As a result, unless

¹⁶⁴ *Id.*

¹⁶⁵ *Near*, 283 U.S. at 716.

¹⁶⁶ *Bantam Books v. Sullivan*, 372 U.S. 58, 70 (1963).

¹⁶⁷ *Christian Legal Soc’y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 679 n.11 (2010).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 49 (1983).

¹⁷¹ *Int’l Soc. for Krishna Consciousness v. Lee*, 505 U.S. 672, 695 (1992) [hereinafter *ISKCON*] (Kennedy, J., concurring) (“The First Amendment is a limitation on government, not a grant of power. Its design is to prevent the government from controlling speech. Yet under the Court’s view the authority of the government to control speech on its property is paramount, for in almost all cases the critical step in the Court’s analysis is a classification of the property that turns on the government’s own definition or decision, unconstrained by an independent duty to respect the speech its citizens can voice there.”).

there is clear intent to create a public forum that inherently includes expressive activity, the presumption is against the creation of an open forum.¹⁷²

The traditional public forum is generally limited to three forms of public property: public streets, sidewalks, and parks.¹⁷³ Traditional public forums are “open for expressive activity regardless of the government’s intent.”¹⁷⁴ At least two kinds of non-traditional public forums can be intentionally opened for expression: the designated public forum and the limited public forum.¹⁷⁵ They differ only in whether the government originally restricted the forum at its inception.¹⁷⁶ A designated public forum exists when the government opens the forum through a purposeful governmental action.¹⁷⁷ With a “clear indication of government intent” the government can intentionally create a designated open public forum for public discourse.¹⁷⁸ To suffice for “intent” the Court looks to the “policy and practice” considering the nature and function of the forum in question.¹⁷⁹ What does not suffice for intent is government inaction or a limited (as opposed to *unlimited*) form of discourse.¹⁸⁰ For example, if the government opens up a theater for public meetings allowing general access, this intent meets the threshold for a designated public forum.¹⁸¹ In contrast, a school district’s granting of selective access to its internal mail system rather than “general access” did not create a designated public forum.¹⁸²

A relevant case here is *International Society for Krishna Consciousness v. Lee (ISKCON)*, where a religious organization sought to solicit donations in airport terminals.¹⁸³ The Court said that the primary purpose of the airport terminal is for efficient travel, not the free exchange of ideas, and

¹⁷² *Cornelius v. NAACP Legal Def. Fund*, 473 U.S. 788, 803 (1985).

¹⁷³ *Hague v. Comm. For Indus. Orgs.*, 307 U.S. 496, 515 (1939).

¹⁷⁴ *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 678 (1998).

¹⁷⁵ *See Christian Legal Soc’y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 679 n.11 (2010).

¹⁷⁶ *Id.*

¹⁷⁷ *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666 (1998).

¹⁷⁸ *Cornelius v. NAACP Legal Def. Fund*, 473 U.S. 788, 802 (1985).

¹⁷⁹ *ISKCON*, 505 U.S. 672, 680 (1992).

¹⁸⁰ *Cornelius*, 473 U.S. at 802.

¹⁸¹ *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 678–80 (1998).

¹⁸² *Id.* (citing *Perry Educ. Assoc. v. Perry Local Educators’ Assoc.*, 460 U.S. 37 (1983)).

¹⁸³ *ISKCON*, 505 U.S. 672, 680–81 (1992).

declined to conclude that the government intended to create a designated or limited public forum within the airport terminals.¹⁸⁴

Speaking online brings us to consider two simultaneous forums: the physical location and the online medium. In BART's case, the physical train platforms were most analogous to *ISKCON's* airport terminals, where the primary purpose is efficient travel, not the free exchange of ideas, making it *not* a designated open forum.¹⁸⁵ This would ordinarily end the inquiry about the kind of forum. However, the speech not only was occurring on train platforms, but also occurring via the Internet provided by BART. Regarding the original intent of the forum at its creation, BART's press release stated in 2010 that its expanded wireless service was for "work or play" and that BART hopes to help customers make the best of their time as they "catch up on work or socialize."¹⁸⁶ This could be interpreted as intending to open the forum as a designated open forum. The only other data point to indicate whether this was intended as a designated open forum was when BART shut it off in anticipation of the August 11, 2011 protest. Such action clearly shows what they thought about the forum a year after specifying it was for "work or play" and to "catch up on work or socialize." In the case of the introductory hypothetical, online streaming of Facebook is clearly intended to be a forum for free speech.

In Summary, prior restraint is legally justified when the publication would threaten national security, as analyzed in *Near* and *Progressive*. The threat of fake news to national security would depend on the gravity of the threat. Should the threat be like the introductory hypothetical, reasoning from prior cases would justify restraining the speech at issue, particularly since the speech *is* the actual threat, having been weaponized. It is highly likely courts would agree that foreign fake news intent on the worst possible motives pose a threat to national security, and such a prior restraint would not violate free speech. What about the inciting nature of the speech? For something to qualify as incitement in a prior restraint of Internet communications scenario, there must be solid intelligence of what is going to be said, not

¹⁸⁴ *Id.* at 681–83.

¹⁸⁵ *Id.*

¹⁸⁶ Press Release, Bay Area Rapid Transit, Underground Cellphone Coverage on BART Expands (July 21, 2008), <http://www.bart.gov/news/articles/2008/news20080721b>. In August 2010, BART continued to expand its cell phone service underground, adding more access points to trains in downtown Oakland. Press Release, Bay Area Rapid Transit, BART Expands Wireless Network to Underground Stations in Downtown Oakland (Aug. 27, 2010), <http://www.bart.gov/news/articles/2010/news20100827>.

mere suspicion. To pass the strict scrutiny standard, the regulation must be narrowly tailored, serve a compelling government interest, and the restriction must be the least restrictive means to serve that interest. One could argue that if strict scrutiny were applied to this situation, shutting off Facebook at the hypothetical protest could qualify as narrowly limiting speech as there are other news organizations present, and the rest of the Internet would function as normal. It would serve the compelling interest of preventing a successful foreign disinformation/propaganda operation, as well as preventing violent outbursts. One would be hard-pressed to find a less restrictive means to protect those interests. However, one could also argue it would fail strict scrutiny analysis, depending on the legitimacy of the threat, and fact-based options. The First Amendment is not absolute in all circumstances, as Congress has specifically delegated authority to the President over telecommunications and anti-U.S. disinformation operations.

B. Executive Authority

Through the years, presidents have invoked Article II of the Constitution to justify executive actions. If the Supreme Court were evaluating an executive action that invoked these authorities to shut down a portion of the Internet for a period of time, what would the Court determine when applying the Jackson test from the case of *Youngstown Sheet & Tube Co. v. Sawyer*?¹⁸⁷ In that case, President Truman ordered the Secretary of Commerce to take possession of and operate most U.S. steel mills in the midst of the conflict in Korea.¹⁸⁸ In Justice Robert Jackson's concurring opinion, he put Presidential action into one of three categories from the most legitimate exercise of Executive power to the least: (1) where the President is acting with express or implied authority from Congress; (2) where Congress was silent as to the issue; and (3) where the President was in a state opposing Congressional action concerning the matter.¹⁸⁹ In President Truman's case, his action fell into the third category and was thus determined to be an unconstitutional exercise of his executive power.¹⁹⁰ Jackson's concurring opinion, with its three categories was subsequently established as firm Supreme Court jurisprudence in *Dames & Moore v. Regan*.¹⁹¹ The Court in that case stated: "we have in the past found and do today find Justice Jackson's classification of executive

¹⁸⁷ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹⁸⁸ *Id.* at 582.

¹⁸⁹ *Id.* at 635–38.

¹⁹⁰ *Id.* at 638–55.

¹⁹¹ 453 U.S. 654, 668 (1981).

actions into three general categories analytically useful....¹⁹² In contrast to *Youngstown*, the Court found in *Dames* that Congress had granted specific authorization to the president to order transfer of Iranian assets under the International Emergency Economic Powers Act (IEEPA).¹⁹³

Before directly addressing the constitutionality of these telecommunications authorities, it is useful to look at how the Court has analyzed other exercises of executive power. The legal history of Presidents' military adventures over time highlights the tension between executive authority under Article II of the Constitution and that of the Legislature under Article I. Regarding the question of whether Congress has "declare[d] war" under Article I, Section 8, Clause 11 of the U.S. Constitution, the judicial branch has weighed in many times as presidents over the years have sent U.S. forces into various engagements.¹⁹⁴ During the Viet Nam military action, a draftee objected to being drafted and challenged the President's order as Congress had not "declared war" in accordance with the above clause.¹⁹⁵ The court held that even without an express declaration of war:

Congress has ratified the executive's initiatives by appropriating billions of dollars to carry out military operations in Southeast Asia and by extending the Military Selective Service Act with full knowledge that persons conscripted under that Act had been, and would continue to be, sent to Vietnam. Moreover, it specifically conscripted manpower to fill "the substantial induction calls necessitated by the current Vietnam buildup." There is, therefore, no lack of clear evidence to support a conclusion that there was an abundance of continuing mutual participation in the prosecution of the war.¹⁹⁶

As a result, such "mutual participation" equated with Congress legally approving the war, and the President's military actions were held constitutional.¹⁹⁷ Likewise, during the conflict in Kosovo, Congress voted down a

¹⁹² *Id.* at 669.

¹⁹³ *Id.* at 674.

¹⁹⁴ *See, e.g.*, *Dooley v. United States*, 182 U.S. 222 (1901); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (The President operates "as the sole organ of the federal government in the field of international relations."); *Youngstown*, 343 U.S. 579.

¹⁹⁵ *Orlando v. Laird*, 443 F.2d 1039 (2d Cir. 1980).

¹⁹⁶ *Id.* at 1041.

¹⁹⁷ *Id.*

declaration of war by 427 to 2, and an authorization of airstrikes with votes of 213 to 213, but at the same time declined to vote requiring the President to end the conflict, and also voted to fund U.S. involvement.¹⁹⁸ This case was ultimately decided based on grounds of standing.¹⁹⁹ However, this and other similar cases of executive war-making powers suggest that despite Congressional disapproval of a declaration of war, Congress's voting to fund the conflict, and sometimes voting against requiring the President to end the conflict, ultimately equates to Congressional approval and a constitutional exercise of executive authority. Although there are valid and significant war-making powers of the Legislature, legal history has shown that the President's exercise of executive power for the cause of national security is generally given deference, and without Congress's strict and explicit refusal to fund it, the President's actions are not only carried out but ruled as constitutionally legitimate.

A useful example to examine is the 2011 NATO engagement with Libya. According to the Office of Legal Counsel (OLC) opinion, titled "Authority of Use Military Force in Libya":

[T]he combination of at least two national interests that the President reasonably determined were at stake here—preserving regional stability and supporting the [United Nations Security Council] UNSC's credibility and effectiveness—provided a sufficient basis for the President's exercise of his constitutional authority to order the use of military force.²⁰⁰

"Left unaddressed," the President noted in his report to Congress, "the growing instability in Libya could ignite wider instability in the Middle East, with dangerous consequences to the national security interests of the United States."²⁰¹ The President continued by stating that Qadhafi's campaign of violence against his own country's citizens thus might have set an example for others in the region, causing democratic impulses that are dawning across the region to be eclipsed by dark forms of dictatorship, as repressive leaders conclude that violence is the best strategy to cling to power.²⁰² The second justification for intervening was to preserve the credibility of UNSC resolutions.

¹⁹⁸ *Campbell v. Clinton*, 203 F.3d 19, 20 (D.C. Cir. 2000).

¹⁹⁹ *Id.*

²⁰⁰ Authority to Use Military Force in Libya, 2011 OLC LEXIS *1, *30 (2011).

²⁰¹ *Id.* at *11.

²⁰² *Id.*

Regarding the threat of fake news, both justifications from the OLC opinion on Libya would support executive action to shut off the news channel. Allowing publication at the hypothetical event would surely destabilize and confuse the audience, and potentially whip up a frenzy that could result in violence. Preventing the publication of this fake news would prevent that. Additionally, the government has an interest in preserving the credibility and accuracy of the news itself, as the American people have come to expect a certain level of authenticity regarding news media. Should the fake news be broadcast, news media credibility would suffer as a result, and the American people would view more and more news media as lacking credibility. The reasons justifying military intervention in Libya appropriately apply to government action shutting down a specific fake news broadcast as contemplated in the introductory hypothetical.

If a president were to exercise his or her executive power by invoking 47 U.S.C. § 606 via EO 13618 and implementing SOP 303, and thereby shut off or take control of Internet and/or wireless communications, where would that action fall in Justice Jackson's categories? As stated above, Congress hasn't been silent on the matter, nor has it limited the President from taking such action, but rather, Congress has specifically authorized the President to take just such an action. And historically, the President has invoked those authorities and taken control of various communications systems during both WWI and WWII. The President would clearly be acting within the first category, with full executive authority under Article II of the Constitution, and added Legislative authority under Article I of the Constitution.

If we look at this type of executive action through the lens of the President's Article II powers, preserving national security for reasons similar to Libya, it would likely be ruled as justified. In the category of telecommunications, where Congress has explicitly granted such authority, the President would be even more legally justified. While the John Perry Barlow-styled libertarians²⁰³ of the world would be horrified to think there exists such an "internet kill-switch," just such a capability already exists by law and most likely would be held constitutional.

²⁰³ John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELECTRONIC FRONTIER FOUND., <https://www.eff.org/cyberspace-independence> (last visited Aug. 3, 2018).

V. CONCLUSION

The problem of fake news in the U.S. can be addressed in future years in two central ways. The new GEC will expose and directly respond to foreign hostile propaganda and disinformation operations and also publish “fact-based narratives” to counter such efforts.²⁰⁴ But such GEC pronouncements will raise new questions, such as how such narratives may be challenged, how would such a dispute be settled, and what is the threshold for labelling something “fake news.” One could argue that now that the government is in the business of labelling what is and what is not “legitimate” news, news organizations now operate under a presumptive license until such a time as the government decides to delegitimize them and effectively cancel their license. Or perhaps “[t]he citizenry, not the government, should be the monitor of falseness in the political arena.”²⁰⁵ In light of Veles, Macedonia, policy and industry practices will need to adjust and address this additional vector of fake news flooding the U.S. news space.

Another way the government could respond to fake news is to shut it off before it is broadcast. Presidents can exercise executive power by invoking 47 U.S.C. § 606²⁰⁶ via EO 13618²⁰⁷ and implementing SOP 303, and thereby shut off or take control of Internet and/or wireless communications. Congress has specifically authorized the President to take just such an action. The President has already invoked similar authorities during both WWI²⁰⁸ and WWII.²⁰⁹ Specifically, 47 U.S.C. § 606 not only gives the government “priority” but also authorizes the ability to “shut down” or control stations. Statutory and procedural (SOP 303) mechanisms are in place to effect just such control over telecommunications.

Such a prior restraint would most likely be held to be constitutional, following the reasoning from cases such as *Near*²¹⁰ and *Progressive*,²¹¹ where protecting national security justified the prevention of speech. Particularly since the speech in this case *is* the actual threat. It is likely courts would agree

²⁰⁴ NDAA 2017, *supra* note 8.

²⁰⁵ 281 Care Comm. v. Arneson, 766 F.3d 774 (8th Cir 2014).

²⁰⁶ 47 U.S.C. § 606, 48 Stat. 1104 (1934).

²⁰⁷ Exec. Order No. 13618, 77 Fed. Reg. 40,779 (July 11, 2012).

²⁰⁸ Proclamation of July 22, 1918, 40 Stat. 1807, 1808 (1918).

²⁰⁹ Exec. Order No. 8964, 6 Fed. Reg. 6367 (Dec. 12, 1941).

²¹⁰ *Near v. Minnesota*, 283 U.S. 697 (1931).

²¹¹ *United States v. Progressive*, 467 F. Supp. 990 (W.D. Wis. 1979).

that fake news intent on the worst possible motives pose a threat to national security, and such a prior restraint would not violate free speech. In contrast to the 2011 BART shutdown, where BART acted thoughtlessly, without relying on pre-existing policies, legislative delegations of authority, or rules in place to carry it out, the Federal Executive's actions to do so are already pre-authorized with appropriate mechanisms to carry them out. Applying Justice Jackson's categories from *Youngstown*²¹² would put the President's executive authority at least in the zone of twilight, if not directly within the category where Congress has specifically delegated authority to intervene into the realm of telecommunications. The two reasons justifying the use of military in Libya,²¹³ stability, and credibility, only further justify executive action for national security.

²¹² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

²¹³ Authority to Use Military Force in Libya, 2011 OLC LEXIS *1 (2011).

EMPLOYMENT DISCRIMINATION AGAINST MILITARY
SPOUSES: A CASE FOR ILLEGALITY CONTRARY TO
POPULAR BELIEF AND PRACTICE

*MAJOR TAREN E. WELLMAN**

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I. INTRODUCTION

In the past half century, American society made tremendous strides in combatting overt discrimination in employment. In the United States, we have outlawed treating people differently in employment based on innate characteristics such as race,¹ color,² gender,³ national origin,⁴ and ancestry.⁵ We have outlawed adverse employment actions because of circumstance such as age,⁶ disability,⁷ religion,⁸ pregnancy,⁹ marital status,¹⁰ and military service.¹¹ These protections apply whether those circumstances arise by choice or otherwise and whether they are temporary or immutable. Although not illegal on a national scale,¹² we have made significant movement toward prohibiting employment discrimination based on sexual orientation and

¹ Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2016).

² *Id.*

³ *Id.* Gender is referred to as “sex” in Title VII. *See, e.g.*, 42 U.S.C. § 2000e(k).

⁴ 42 U.S.C. § 2000e-2.

⁵ 42 U.S.C. § 1981 prohibits discrimination based on race in the making and enforcement of private contracts, including “the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.” 42 U.S.C. § 1981(b) (2016).

⁶ Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2016). As discussed in Part II(A)(2)(c), *infra*, prevailing in a claim of age discrimination can be more difficult than other protected classes because an employer need only show the differentiation is based on any “reasonable factor other than age.” 29 U.S.C. § 623(f)(1).

⁷ Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2016).

⁸ 42 U.S.C. § 2000e-2(a). The definition of religion under the Act “includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.” 42 U.S.C. § 2000e(j).

⁹ 42 U.S.C. § 2000e(k) (“The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes...”).

¹⁰ Discrimination based on marital status is not illegal under federal law but is in many states. *See, e.g.*, CAL. GOV’T CODE § 12940 (West 2016); FLA. STAT. § 760.10 (2016); WASH. REV. CODE § 49.60.180 (2016).

¹¹ Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301–4334 (2016). The specific protection cited is found at 38 U.S.C. § 4311.

¹² Exec. Order No. 11,246 prohibits discrimination based on sexual orientation and gender identity for federal contractors and subcontractors. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965), as amended by Exec. Order 13,672, 79 Fed. Reg. 42971 (July 21, 2014).

gender identity.¹³ The preceding characteristics and circumstances have been deemed by society to be worthy of protection.¹⁴ The gauge of worthiness is reflected by Congressional, executive, judicial, and state action.

Military spouses¹⁵ are a class of people not explicitly protected from employment discrimination. This means that a prospective employer can decline to hire someone purely on the basis that he or she is married to a person serving in the military.¹⁶ This class of people currently encompasses more than 707,000 working-age people.¹⁷ That figure does not fully capture the state of the problem. New military spouses are continually rotating through the status as people constantly join and exit the military, thus magnifying the number of lives affected. Unfortunately, the effects to military spouses' careers remain for the rest of their lives.

¹³ “By the close of 2016, 20 states plus [the District of Columbia] banned discrimination based on sexual orientation and gender identity or expression in employment, housing, and public accommodations, and an additional three states provided incomplete statewide nondiscrimination protections.” *Past LGBT Nondiscrimination and Anti-LGBT Bills Across the Country*, AM. C.L. UNION, <http://aclu.org/map/non-discrimination-laws-state-state-information-map> (last visited July 5, 2018).

¹⁴ “Legal rules generally reflect widely-held beliefs and practices.” Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical View and Critical Assessment*, 43 B.C. L. REV. 351, 389 (2002) (citing Stewart J. Schwab, *Predicting the Future of Employment Law: Reflecting or Refracting Market Forces?*, 76 IND. L.J. 29, 33 (2001)).

¹⁵ Within the military community, non-military members married to persons serving in the military are often referred to as “civilian spouses.” For clarity, and because this article is written with a broader non-military audience in mind, I will be referring to non-military spouses of military members as “military spouses.” Military members who are married to other military members are referred to as military-to-military spouses, or colloquially within military circles, “mil-to-mil.” This article will clearly identify when referring to military-to-military spouses, and thus the assumption should be made that “military spouses” when used in this article is not referring to military-to-military spouses.

¹⁶ Looking at the careers of attorneys alone, sixty-one percent of military spouse attorneys reported being asked by a prospective employer whether they were a military spouse. These “[r]esponses indicate their military affiliation is frequently a reason employers choose not to hire military spouse attorneys.” *2015 Annual Military Spouse Attorney Survey Report of Findings*, MILITARY SPOUSE J.D. NETWORK (2015), <http://msjdn.org/wp-content/uploads/2012/12/MSJDN-2015-Survey-Report.pdf>.

¹⁷ *2015 Demographics: A Profile of the Military Community*, DEP’T OF DEF. OFF. OF THE DEPUTY ASSIST SEC’Y OF DEF. FOR MIL. COMTY. AND FAM. POL’Y, 42 (2016), <http://download.militaryonesource.mil/12038/MOS/Reports/2015-Demographics-Report.pdf> [hereinafter DoD REPORT].

The lack of discrimination protection for military spouses may come as a surprise to some readers, including even some labor and employment law practitioners. Why do employment protections exist for military members¹⁸ but not for military spouses? Why do we extend protections to so many categories (such as active-duty military members who are already employed and arguably not in need of protection) but not protect their marital partners who are most affected by their service? Over 1.3 million people currently serve in the U.S. Armed Forces,¹⁹ yet no protections exist for their civilian husbands and wives who endure the same or even greater effects and stigmas. Surely the progressive gains made by society regarding anti-discrimination efforts over the past half century should encompass this population deserving of protection.

Military spouses often make sacrifices similar to those of their military member husbands or wives. Spouses are expected to take care of the family when the military member deploys or has an extended period of absence due to temporary duty. Military spouses largely give up any control of where they may live. Military spouses shoulder the stress and impact of their military member/spouse becoming wounded or killed in action. Military members have the luxury not to think about hiring discrimination while they are serving on active duty.²⁰ Meanwhile, their spouses must confront it with virtually every application in the civilian sector.

Despite rapid progress in the many other areas, we are still in the dark ages regarding overt discrimination directed toward military spouses. Employers can refuse to hire, promote, or provide equal advancement opportunities to military spouses. This discrimination often occurs overtly, without any second thought by the employer.

¹⁸ 38 U.S.C. §§ 4301–4334.

¹⁹ *Armed Forces Strength Figures*, DoD DEF. MANPOWER DATA CTR. (Sept. 30, 2016), https://dmdc.osd.mil/appj/dwp/dwp_reports.jsp.

²⁰ Other forms of employment discrimination may surface, however, in the form of disciplinary action, withheld advancement opportunities, and denial of promotion or reenlistment. These outcomes, as in any other employment situation, can be the result of discrimination based on a protected status such as race, color, national origin, religion, or gender. The military has particular organizations to address service members' concerns about on-the-job discrimination, namely the Equal Opportunity Office, Inspector General, the Congressional complaint process, and Article 138, UCMJ. *See, e.g., Grievances and Filing Complaints*, GI RTS. HOTLINE.ORG (Sept. 2016), <http://girightshotline.org/en/military-knowledge-base/topic/grievances-and-filing-complaints#topic-types-of-grievances>.

As an active-duty military member, I have heard countless anecdotes of such discrimination from active-duty friends with civilian spouses. College-educated men and women are unable to obtain interviews despite hundreds of applications. License-holding professionals are unable to obtain licensure in their new states quickly enough to compete in their particular job marketplace. The demands and expense of childcare often thwart job seeking efforts before they begin. Separation from extended family that could help often exacerbates the problem for military spouses. These are stories heard far too often from peers who never dreamed their service would cause such detriment to the persons they love.

Employers may often simply tell applicants that they will not consider them because they are military spouses. Because no law expressly prohibits such discrimination, the employer may feel free to inform the military spouse without fear of liability. Based on anecdotal accounts, it appears to be common to hear employers say such things as, "I'd love to hire you but I can tell from your resume that you are a military spouse." Statements like this are often accompanied with an express or implied sentiment that the employer cannot justify the cost of training if the applicant is likely going to move in a couple years. This overt expression of the employer's reasoning is rare; typically employers are not so candid about bias toward a group of people. But absent an express prohibition, it seems encouraged.

Those discriminating against military spouses may feel justified on the premise that military members are too often transferred, and their spouses must therefore move too. This belief leads to the secondary assumption that hiring military spouses will result in high rates of turnover, a cost that many employers strive to minimize. The perception, when closely examined, is thus based on two distinct assumptions: (1) military members move more often than their civilian counterparts, and (2) civilian spouses always move along with their military spouses. As will be further discussed in this article, making employment decisions based on stereotypes regarding a particular class of people is usually problematic; making employment decisions based on stereotypes about a protected class is often illegal.²¹

Military spouse employment discrimination also functions as a safe haven in which more invidious discrimination is harbored. It can unabashedly be used to hide discrimination based on innate characteristics such as gender,

²¹ See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded by statute on other grounds*, 42 U.S.C. § 2000E-2(m).

race, marital status, or sexual orientation. In these cases, the employer may not actually want to hire a woman, or minority, or married person, or homosexual for the job. But military spouse status may be used as a subterfuge to hide the true basis for the decision. The employer rests his justification for not hiring that particular applicant entirely on the military spousal status without acknowledging the true anti-protected class animus. Military spouse status is thus used to mask an impermissible motivating factor²² for the decision, or is offered as a “legitimate” justification for the decision. Explicitly adding military spouses as a protected class would help dismantle this safe haven for such invidious discrimination.

This article examines the current anti-discrimination legal landscape. It then lays out how military spouses as a class actually are protected under current law, contrary to common belief and practice. This argument covers military spouses in two ways: (1) discriminatory treatment with military spousal status as a scapegoat for intentional discrimination against another protected class or classes, and (2) discrimination that creates an illegal disparate impact on other protected classes. This argument can be used by a military spouse or practitioner to challenge an explicit denial of employment or employment opportunities based on one’s status as a military spouse.

To be clear, the protections for which I advocate currently exist in theory but are not explicit or utilized in practice. This article argues that military spouses are essentially protected by association under the current legal construct due to the characteristic makeup of military spouses as a group. After making the case for such current protection, I then argue why military spouses should be expressly protected. This protection should emerge not just because the group is an amalgamation of many of the other protected classes, but because military spouses are deserving of their own protection under the law. To that end, I explain how military spouses should be protected by amending the Uniformed Services Employment and Reemployment Rights Act²³ (USERRA) to explicitly protect active-duty spouses in order to combat the discrimination regularly encountered by our nation’s military marital partners.

This article does not specifically deal with discrimination based on gender identity, transgenderism, or transsexualism within the military or among military spouses. Military service was initially opened to transgender

²² See 42 U.S.C. § 2000e-2(m).

²³ 38 U.S.C. §§ 4301–4335.

members in 2016²⁴ and remains in a state of flux at the time of publication of this article.²⁵ Thus, this article does not provide a comprehensive examination of the legal arguments involved. Additionally, in states where employment protections exist for transgender people, the arguments contained in this article may apply by analogy to assist those married to transgender or transsexual service members.

On a personal note, and in the interest of full disclosure, I became aware of this issue through the experiences of my own civilian spouse. He encountered much difficulty securing employment commensurate with his education and experience after becoming a military spouse. I did not realize how widespread and pervasive the problem is until I began inquiring among military friends about their own experiences with their civilian spouses. I discussed the issue with at least twenty-five or thirty military spouses in the past few years and all encountered difficulties and had experiences similar to those of my husband. Since beginning my research for this article, I discovered that frustrations in dealing with this topic are widespread. Though formal structural solutions are few and far between, internal support within the military spouse community exists. It is most apparent in online networks,²⁶ blogs, and other social media.²⁷ These support networks, however, with a few notable exceptions for particular professions discussed herein, have not led to universally better outcomes. The more research I conducted, the more the necessity for lasting reform became apparent.

Military spouse employment discrimination is not a new problem. Advocates devote much effort to bring attention to the problem and attempt to create employment opportunities for military spouses.²⁸ These piecemeal efforts, however, essentially address the symptoms rather than the root cause. At its core, the problem is discrimination based on unfair assumptions

²⁴ OFF. OF THE SEC'Y OF DEF., MILITARY SERVICE OF TRANSGENDER SERVICE MEMBERS, DIRECTIVE TYPE MEMORANDUM (DTM) 16-005 (June 30, 2016), *available at* http://defense.gov/Portals/1/features/2016/0616_policy/DTM-16-005.pdf.

²⁵ See, e.g., 'I Want To Serve': Air Force Applicant Takes On President Trump's Transgender Ban, NAT'L PUB. RADIO (Apr. 24, 2018), <http://npr.org/2018/04/24/605282521/i-want-to-serve-air-force-applicant-takes-on-president-trump-s-transgender-ban>.

²⁶ See, e.g., NAT'L MIL. FAM. ASS'N, (last visited July 5, 2018), <http://militaryfamily.org/>.

²⁷ See, e.g., Michelle S. Mehta, WHOLE SPOUSE BLOG (last visited Apr. 24, 2018), <http://blog.stillmehta.com/>.

²⁸ See, e.g., DoD, MIL. SPOUSE EMP'T P'SHIP, *Career Portal* (last visited July 5, 2018), <http://msejobs.militaryonesource.mil/msep/>.

and stereotypes. Society will be unable to effectively address the problem until acting on these assumptions is made illegal. Notwithstanding a radical intervention by the judicial system, it is essential to send a clear message to employers and begin to effectuate change by adding military spouses as a “protected class.”²⁹

A. Discrimination Against the Spouse is Discrimination Against the Member

Before we consider changing the status quo of how we evaluate employment discrimination against military spouses, we must examine why change is necessary. Why is discrimination against this particular group so problematic that the current laws should be interpreted, or outright amended, to provide protection? Quite simply, our national security depends on it.

Discrimination against military spouses discourages voluntary military service. We are defended by an all-volunteer force that protects our citizens from foreign threats. Refusing to hire military spouses discourages qualified service members from joining or remaining in the military. At a time when the military is increasingly struggling to recruit qualified volunteers from the “less than 1% of Americans [...] willing and able to serve,”³⁰ having a pervasive practice that discourages military service is devastating.

The efficacy of the United States military, arguably at this juncture in history more than any other,³¹ depends on the continued voluntary service of qualified individuals. Our ability to recruit and retain such individuals is closely tied to the value our citizens attach to military service. When people place a high value on military service, it becomes much easier to recruit and retain qualified service members. While trust in the military and regard for military service remain high when compared to other American institutions, research suggests that both trust and regard are in decline.³² If trust and regard

²⁹ The term “protected class” refers to a category of people protected by anti-discriminatory laws by virtue of membership in the category.

³⁰ *Who will fight the next war?*, THE ECONOMIST (Oct. 24, 2015) [hereinafter *Next War*], <http://economist.com/news/united-states/21676778-failures-iraq-and-afghanistan-have-widened-gulf-between-most-americans-and-armed>.

³¹ The nature of warfare is changing to one that integrates cyber warfare and blurs lines between civilian and military assets and operations. See, e.g., David E. Sanger, *U.S. Cyber Attacks Target ISIS in a New Line of Combat*, N.Y. TIMES, (Apr. 24, 2016) <http://nytimes.com/2016/04/25/us/politics/us-directs-cyberweapons-at-isis-for-first-time.html>.

³² See e.g., *Public Esteem for Military Still High*, PEW RES. CTR. (July 11, 2013), <http://>

for military service decline too far, our ability to fill military jobs could be jeopardized.

The ability to maintain a qualified volunteer force is relatively fragile due to the small size of the available pool. As a proportion of American society, few have volunteered to serve in the military since the end of conscription in 1975.³³ Currently, only 9 percent of the adult noninstitutionalized population of the United States has ever served in the military.³⁴ Among these 21.2 million veterans, nearly half (42 percent) are veterans from World War II, the Korean War, and the Vietnam War.³⁵ Many of these veterans were drafted into service involuntarily.³⁶ Although the standards for military service have remained relatively unchanged, the proportion of society eligible to fulfill military jobs has sharply declined.³⁷ Interest in and respect for military service should not be taken for granted or assumed to continue indefinitely.³⁸

Any efforts toward improving recruitment should incorporate military spouse employment concerns. Because the pool of service members is relatively small, serious disincentives and barriers to service can have a grave effect. As an example, military rules prohibiting face and neck tattoos have

pewforum.org/2013/07/11/public-esteem-for-military-still-high/ (“[M]ore than three-quarters of U.S. adults (78%) saying that members of the armed services contribute ‘a lot’ to society’s well-being...a modest decline from 84% four years ago...”); *See also, Confidence in Institutions*, GALLUP (June 1-5, 2016), <http://gallup.com/poll/1597/Confidence-Institutions.aspx>.

³³ *News Release: Selective Service System*, WHITE HOUSE PRESS RELEASE NO. 75-3, PRESIDENT GERALD FORD (Apr. 1, 1975), <http://catalog.archives.gov/id/7338571>.

³⁴ *Employment Statistics of Veterans—2015*, U.S. BUREAU OF LAB. STATS. RELEASE 16-0611 (Mar. 22, 2016), <http://www.bls.gov/news.release/pdf/vet.pdf>.

³⁵ *Id.* These older veterans are less likely to still be in the labor force than younger veterans of Gulf War I era (August 1990 through August 2001 service) or Gulf War II era (post-September 2001 service).

³⁶ “During the Korean war, around 70% of draft-age American men served in the armed forces; during Vietnam, the unpopularity of the conflict and ease of draft-dodging ensured that only 43% did.” *Next War*, *supra* note 30.

³⁷ “These days, even if every young American wanted to join up, less than 30% would be eligible to.” *Id.*

³⁸ *See, e.g., Military Recruiting: DOD and Services Need Better Data to Enhance Visibility over Recruiter Irregularities*, U.S. GOV’T ACCOUNTABILITY OFF. (GAO) REPORT TO CONGRESSIONAL REQUESTERS, GAO-06-846 (Aug. 2006), <http://gao.gov/new.items/d06846.pdf> (“The viability of the All Volunteer Force depends, in large measure, on the Department of Defense’s (DOD) ability to recruit several hundred thousand individuals each year. Since the involvement of U.S. military forces in Iraq in March 2003, several DOD components have been challenged in meeting their recruiting goals.”).

a devastating effect on recruitment.³⁹ Rules regarding body fat composition among recruits have been similarly limiting.⁴⁰ In the fight against global terrorism, the United States faces one of the most daunting challenges in its history, which demands highly-skilled and technically savvy recruits.⁴¹ Beyond mere recruiting concerns, retaining qualified leaders within the military is critical. As leaders grow and develop within the military, they often marry and have children, as is the case generally with people as they age.⁴² The decision whether to remain or separate from the military is firmly tied to familial considerations.⁴³ For these reasons, recruitment and retention strategies should address spousal employment challenges.

B. How Big is the Problem?

According to recent data, the statistics for unemployment and under-employment of military spouses are alarmingly high. Nearly half (46 percent) of all military spouses are considered unemployed or not seeking work.⁴⁴ When one removes from this figure the pool of spouses who are military members themselves (13 percent), this proportion climbs to a majority (52.8 percent) of civilian spouses are unemployed or not seeking work.⁴⁵ The

³⁹ *Next War*, *supra* note 30.

⁴⁰ *Id.*

⁴¹ See, e.g., David Alexander, *U.S. Defense Chief Sees Military Recruitment Challenges Ahead*, REUTERS (Mar. 30, 2015, 9:45 AM), <http://reuters.com/article/us-usa-defense-recruiting-idUSKBN0MQ1LI20150330>; William Matthews, *Military Battles to Manage its Developing Cyber Force*, GOVTECHWORKS.COM, GENERAL DYNAMICS INFO. TECH. (last visited July 5, 2018), <http://govtechworks.com/military-battles-to-man-its-growing-cyber-force/#gs.pk3HbA>.

⁴² 45.6 percent of the DoD total force (comprised of approximately 2.12 million members) is married to a civilian spouse and 32.7 percent of the DoD total force is married to a civilian spouse and has children under the age of twenty. DoD REPORT, *supra* note 17, at 120.

⁴³ “Successful recruiting and retention of the active duty force depends in large part on the extent to which service members and their spouses are satisfied with the military lifestyle. Prior research suggests both that the most satisfied military families are those with an employed spouse and that the influence of military spouses on service member retention decisions has increased with the proportion of military spouses working outside the home.” *Working Around the Military: Challenges of Military Spouse Employment*, RAND CORP. RES. BRIEF RB-9056-OSD (2005), http://rand.org/pubs/research_briefs/RB9056/index1.html; see also *infra* note 95.

⁴⁴ Twelve percent of civilian spouses are considered seeking work but unemployed. Thirty-four percent of civilian spouses are considered not in the labor force (i.e., not seeking work). DoD REPORT, *supra* note 17, at 135.

⁴⁵ *Id.*

civilian spouse unemployment rate, not counting those who are not actively seeking work, is 13.8 percent.⁴⁶ One Department of Defense survey cites the unemployment rate as high as 25 percent.⁴⁷ Even the most conservative estimates are nearly three times the unemployment rate of the general population of the United States, which has remained relatively steady at 4.7 percent in recent months.⁴⁸ While the level of unemployment in the United States has fallen since the recession of 2008 and stayed at a level that many economists view as sustainable,⁴⁹ the unemployment rate for military spouses has remained high.⁵⁰

These figures do not address underemployment, a perhaps more difficult and pervasive problem plaguing military spouses.⁵¹ Just as military spouses are frequently rejected in hiring decisions, they are also frequently deprived promotion opportunities. Data on this trend is not easily measured or available. It is not difficult to imagine that employers, whether consciously or subconsciously, favor employees they perceive to be more loyal and less likely to move or change employment. Unfortunately, these are characteristics associated with the military spouse stereotype. The stereotype affects such decisions as whether one is considered for promotion or training, given the most competitive performance evaluations, and even whether one is permitted to work preferred shifts. Similarly, the spouses who do choose to move locations with their military spouse are more likely to start anew in entry-level positions each time they move. All of these lost opportunities greatly contribute to dramatic underemployment for military spouses.

⁴⁶ *Id.*

⁴⁷ *Annual Report to the Congressional Defense Committees on Plans for the Department of Defense for the Support of Military Family Readiness: Fiscal Year 2013*, DEF. MANPOWER DATA CTR., MILITARY ONE SOURCE, 17 (2013) <https://militaryonesource.mil/12038/MOS/Reports/FY2013-Report-MilitaryFamilyReadinessPrograms.pdf>.

⁴⁸ *The Employment Situation—December 2016*, U.S. BUREAU OF LAB. STATS. NEWS RELEASE (USD L-17-0004) (Jan. 6, 2017), <https://www.bls.gov/news.release/pdf/emp sit.pdf>, accessed Jan. 20, 2017.

⁴⁹ *FAQs: What is the Lowest Level of Unemployment that the U.S. Economy Can Sustain?* BD. OF GOVERNORS OF THE FED. RES. SYS. (Mar. 15, 2017), http://federalreserve.gov/faqs/economy_14424.htm.

⁵⁰ The civilian spouse unemployment rate has declined slightly from twenty-six percent in 2010 to twenty-three percent in 2015. DoD REPORT, *supra* note 17, at 134.

⁵¹ See Nelson Lim, Daniela Golinelli, *Monitoring Employment Conditions of Military Spouses*, RAND NAT'L DEF. RES. INST., xii, 12 (2006), http://rand.org/pubs/technical_reports/TR324.html (follow "Full Report" hyperlink).

The problem of underemployment is further compounded by the wage gap between men and women. A full 93.2 percent of military spouses are female.⁵² It is widely believed that women in the United States earn on average 22 cents less per dollar than their male counterparts.⁵³ Military wives face an even steeper 25 cent wage gap.⁵⁴ As a result, military spouses face a double blow when it comes to employment. They often earn less than their counterparts and receive fewer opportunities necessary to climb the employment ladder.

Unemployment and underemployment of military spouses is not isolated to private concerns. While the problem may appear private in nature, the effects actually shift in many ways to the public coffers. Families in the military are less likely to have civilian employer-sponsored health insurance coverage. They rely primarily or exclusively on the Defense Health Program, or TRICARE, the health insurance provided to the military. This results in more families primarily relying on the Veterans' Administration for healthcare post-military service as opposed to a civilian spouse's health care coverage.⁵⁵ This adds to the ever-growing cost of providing veterans' healthcare through the Veterans' Health Administration.⁵⁶ Civilian spouses are also less likely to have employer-sponsored retirement plans, resulting in a greater reliance on Social Security and other societal safety nets. These issues tend to shift

⁵² DoD REPORT, *supra* note 17, at 132.

⁵³ *Gender Pay Gap: Recent Trends and Explanations*, COUNCIL OF ECON. ADVISORS ISSUE BRIEF, WHITE HOUSE, PRESIDENT BARACK OBAMA (Apr. 2015), http://obamawhitehouse.archives.gov/sites/default/files/docs/equal_pay_issue_brief_final.pdf.

⁵⁴ *Annual Report to the Congressional Defense Committees on Plans for the Department of Defense for the Support of Military Family Readiness Fiscal Year 2012*, DoD (2012) [hereinafter *Annual Report*], http://militaryonesource.mil/12038/MOS/Reports/FY2012_Report_MilitaryFamilyReadinessPrograms.pdf.

⁵⁵ Military families have been increasingly reliant on the military for health care coverage in recent years. *United States Department of Defense Fiscal Year 2016 Budget Request: Overview February 2016*, OFF. OF THE UNDER SEC'Y OF DEF. (COMPTROLLER) CHIEF FIN. OFFICER (Feb. 2015), http://comptroller.defense.gov/Portals/45/documents/defbudget/fy2016/fy2016_Budget_Request_Overview_Book.pdf (“[W]hen TRICARE was fully implemented in 1996, a working age retiree’s family of three who used civilian healthcare contributed on average roughly 27 percent of the total cost of their health care. Today that percentage has dropped to less than 9 percent.”).

⁵⁶ See, e.g., Alan Zarembo, *The Rising Cost of Veterans' Healthcare and Benefits*, L.A. TIMES (July 28, 2014, 5:59 PM), <http://www.latimes.com/nation/nationnow/la-na-veteran-health-care-and-benefits-cost-20140728-story.html>; Roy Avik, *How Health-care Spending Strains the U.S. Military*, FORBES (Mar. 12, 2012, 11:32 PM), <http://forbes.com/sites/aroy/2012/03/12/how-health-care-spending-strains-the-u-s-military/#62bf31005c43>.

the focus away from military spouse employment as an individual problem to a societal problem worthy of attention.

II. STATE OF CURRENT LAW

A. The Statutory Legal Framework

Currently, there is no express protection for military spouses against employment discrimination. Military spouses actually have some protection under current law, but this protection is not being utilized in practice. In order to understand how military spouses are protected under the law, one must start with an examination of the current legal framework. This framework begins with a number of important statutes. Beginning in the 1960s, the United States saw a sharp increase in the amount of legislation and regulation of the public and private employment relationship. Some experts attribute the rise in regulation of the employer-employee relationship to the decline of participation in labor unions in the private sector workplace from its peak in 1954.⁵⁷ The decline of “collective governance” is due in part to the changing nature of the work force to include more women and minorities.⁵⁸ Whatever the reason for the wave of anti-discrimination legislation, its existence is vital to protect vulnerable groups such as military spouses.

1. Title VII of the Civil Rights Act of 1964

The foundation of current anti-discrimination law starts with the broad protections provided by Title VII of the Civil Rights Act of 1964.⁵⁹ This monumental legislation prohibits discrimination by private individuals in certain settings, including all aspects of employment, based on “race, color, religion, sex or national origin.”⁶⁰ The landmark Act paved the way for future legislation to protect other designated classes of people from employment discrimination, including, potentially, military spouses.

⁵⁷ See, e.g., Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical View and Critical Assessment*, 43 B.C. L. REV. 351, 391–92 (2002).

⁵⁸ *Id.* at 365–66.

⁵⁹ 42 U.S.C. §§ 2000e–00e-17 (1964) (amended 1991).

⁶⁰ *Id.* at § 2000e-2.

Title VII did not appear out of thin air. A series of executive orders designed to discourage race discrimination and promote labor stability during and after World War II laid the foundation for Title VII.⁶¹ For example, Executive Order 8802, promulgated in 1941, prohibited discrimination by government contractors on the basis of race, color, or national origin, but contained no enforcement mechanism.⁶²

The Civil Rights Act of 1964 was signed into law on July 2 of that year.⁶³ Containing multiple titles, the Act was aimed at prohibiting discrimination in such areas as employment, voting rights, education, and public accommodation.⁶⁴ Title VII of the Act specifically prohibits employment discrimination based on race, color, religion, sex, or national origin⁶⁵ and applies to nearly all aspects of employment, including recruitment, hiring, firing, wages, benefits, assignment, and discipline.⁶⁶ Since its enactment, the Act has been amended hundreds of times⁶⁷ and its reach has both expanded and contracted based on judicial interpretations and legislative amendments.

Relief under Title VII is based on two theories: (1) intentional discrimination referred to as “discriminatory treatment,” and (2) facially neutral practices that have a disproportionate effect on protected classes, referred to as “disparate impact.”⁶⁸ Both theories as they apply to military spouses will be discussed at length in Part III.

⁶¹ *The Law*, EEOC 35TH ANNIVERSARY (last visited July 6, 2018), <http://eeoc.gov/eeoc/history/35th/thelaw>.

⁶² Exec. Order No. 8,802, 6 Fed. Reg. 3109 (June 25, 1941). Additionally, Executive Order 9,981, 13 Fed. Reg. 4313 (July 26, 1948), desegregated the Armed Forces and Executive Order 10,925, 26 Fed. Reg. 1,977 (Mar. 6, 1961), established the President’s Committee on Equal Employment Opportunity, the precursor to the Equal Employment Opportunity Commission (EEOC), in order to enforce the prohibition on race discrimination by government contractors. *The Law*, EEOC 35TH ANNIVERSARY, *supra* note 61. These executive orders were different in kind from the Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. §§ 201–219, which addressed wages, hours, and overtime compensation, not discrimination.

⁶³ *The Law*, EEOC 35TH ANNIVERSARY, *supra* note 61.

⁶⁴ Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical View and Critical Assessment*, 43 B.C. L. REV. 351, 392 n.277.

⁶⁵ 42 U.S.C. § 2000e-2(a) (1964).

⁶⁶ *The Law*, EEOC 35TH ANNIVERSARY, *supra* note 61.

⁶⁷ *Id.*

⁶⁸ See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Wash. v. Davis*, 426 U.S. 229 (1976). The “disparate impact” theory and its varied judicial interpretations were settled in the Civil Rights Act of 1991 in response to the Supreme Court decision in *Wards*

2. Non-Title VII Antidiscrimination Sources of Protection

The fundamental reach and structure of Title VII, governing private employment and protecting certain groups of people based on common traits, largely paved the way for other groups to be similarly protected under the law. In this section, we will look briefly at a number of laws which may affect military spouses in a way that enables a claim of employment discrimination. Specifically, we examine the Equal Pay Act (EPA), Executive Order 11246, the Age Discrimination in Employment Act (ADEA), the Pregnancy Discrimination Act (PDA), race discrimination claims under 42 U.S.C. 1981 (“Section 1981”), the Americans with Disabilities Act (ADA), the Uniformed Services Employment and Reemployment Rights Act (USERRA), Executive Order 13152, and the not-discrimination-related-but-relevant Military Spousal Residency Relief Act (MSRRA).

a. Equal Pay Act

The Equal Pay Act of 1963 preceded the Civil Rights Act of 1964. It was the first groundbreaking federal legislation aimed at addressing employment discrimination, albeit more narrowly than Title VII. The Act made illegal wage discrimination based on gender.⁶⁹ It prohibits employers from paying different wages to men and women for “substantially equal”⁷⁰ work performed under “similar working conditions.”⁷¹ A claim of discrimination under the Equal Pay Act requires a showing of different pay for two workers of opposite genders who perform work substantially equal in skill, effort, and responsibility, performed under similar working conditions.⁷² There is no requirement to prove the employer’s motive.

A claim of discrimination can be defeated if the employer shows a legitimate reason for the difference. The statute specifically lists four reasons which can comprise a lawful justification for the pay difference, with the fourth reason operating as a catch-all for any legitimate reason. The excep-

Cove Packing Co. v. Antonio, 490 U.S. 642 (1989). C. Boyden Gray, *Disparate Impact: History and Consequences*, 54 LA. L. REV. 1487 (1994).

⁶⁹ Equal Pay Act of 1963, Pub. L. No. 88-38 (codified at 29 U.S.C. § 206(d) (2016)).

⁷⁰ Gunther v. Wash. Cty., 623 F.2d 1303, 1309 (9th Cir. 1979) (citing *Usery v. Columbia Univ.*, 568 F.2d 953, 958 (2d Cir. 1977); *Ridgeway v. United Hosps. Miller Div.*, 563 F.2d 923, 926 (8th Cir. 1977)).

⁷¹ 29 U.S.C. § 206(d)(1).

⁷² *Id.*

tions include wage differences (1) required by a bona fide seniority system, (2) pursuant to a bona fide merit system, (3) pursuant to a system that measures earnings based on quality or quantity of production, or (4) a difference based on any other factor other than sex.⁷³

While the Equal Pay Act does offer some anti-discrimination protection based on gender, such protection was greatly broadened by Title VII. Title VII extended gender-based protection to nearly all aspects of employment, not merely wages. Additionally, Title VII does not require a showing of the specific criteria of substantially equal work between two employees of opposite genders in order to make a claim.

b. Executive Order 11246

Originally signed in 1965 by President Lyndon B. Johnson, Executive Order 11246⁷⁴ created non-discrimination obligations for government contractors as a condition of entering into a contract with the federal government.⁷⁵ It also provided for Department of Labor enforcement of cases referred by the Equal Employment Opportunity Commission (EEOC),⁷⁶ an agency created by Title VII but without litigation enforcement authority until the Equal Employment Opportunity Act of 1972.⁷⁷

E.O. 11246 has been amended numerous times since its promulgation. Currently, E.O. 11246 prohibits discrimination on the basis of “sex, sexual orientation, gender identity, or national origin.”⁷⁸ It is the only federal

⁷³ *Id.*

⁷⁴ Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 28, 1965), requires federal contractors to adhere to the provision that the “contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin.” The contractor must also “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. *Id.* § 202(1).

⁷⁵ *Id.* § 202.

⁷⁶ *Id.* §§ 205–212.

⁷⁷ *The Law*, EEOC 35TH ANNIVERSARY, *supra* note 61.

⁷⁸ Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014).

antidiscrimination provision that offers protection on the basis of sexual orientation and gender identity for some private industry employees.⁷⁹

Many states offer protection in private employment to individuals based on sexual orientation and gender identity.⁸⁰ In these states, it is possible to envision LGBT-based⁸¹ and military spouse-based discrimination claims because homosexual, bisexual, and transgender status constitute protected classes on their own. In states without this protection, a plaintiff would be unable to bring a case based exclusively on military spouse combined with LGBT status. A claim would have to be grounded in some other protected status such as gender.

c. ADEA

The Age Discrimination in Employment Act (ADEA)⁸² was enacted in 1967, three years after Congress decided to exclude age as a class protected by Title VII.⁸³ The ADEA prohibits discrimination against employees age 40 and older.⁸⁴ Although modeled after the original language of Title VII, interpretation of the Act makes it much more difficult for a plaintiff to prevail under the ADEA than Title VII.⁸⁵ Congress amended Title VII to counteract a 1989 Supreme Court case restricting the breadth of Title VII.⁸⁶ The same

⁷⁹ The EEOC has taken the position that discrimination against an employee based on sexual orientation is discrimination based on sex. However, this interpretation has not yet been widely adopted by federal courts. See *EEOC Files First Suits Challenging Sexual Orientation Discrimination as Sex Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N NEWS RELEASE (Mar. 1, 2016), <http://eoc.gov/eoc/newsroom/release/3-1-16.cfm>.

⁸⁰ By the close of 2016, sexual orientation employment discrimination in the private sector was prohibited in twenty-two states and the District of Columbia. Nineteen of those states and D.C. also prohibit employment discrimination based on gender identity. *Past LGBT Nondiscrimination and Anti-LGBT Bills Across the Country*, AM. C.L. UNION (last visited July 6, 2018), <http://aclu.org/other/past-lgbt-nondiscrimination-and-anti-lgbt-bills-across-country>.

⁸¹ "LGBT" refers to lesbian, gay, bisexual, or transgender. *Id.*

⁸² Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202 (codified as amended at 29 U.S.C. §§ 621-634 (2016)).

⁸³ *The Law*, EEOC 35TH ANNIVERSARY, *supra* note 61.

⁸⁴ 29 U.S.C. § 631 (2016).

⁸⁵ See Michael C. Harper, *The Causation Standard in Federal Employment Law: Gross v. FBL Financial Services, Inc., and the Unfulfilled Promise of the Civil Rights Act of 1991*, 58 BUFF. L. REV. 69 (2010).

⁸⁶ *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989), superseded by statute, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. §

amendments were not made to the ADEA. Under the ADEA, a plaintiff must not merely prove that age discrimination was a motivating factor, as claimants must now do under Title VII, but rather must show that age was a “but for” factor in the employment decision.⁸⁷ In other words, the employer would not have made the decision but for the employee or applicant’s age. An employer can defeat a claim by showing any reasonable factor other than age led to the employment decision.⁸⁸

A disparate impact claim under the ADEA is theoretically possible based on the statutory text’s similarities between the ADEA and Title VII.⁸⁹ However, a showing of any reasonable factor other than age makes defeating such a claim relatively easy for employers.⁹⁰ As a result, there are no “mixed motive” cases under the ADEA—cases in which the plaintiff advances multiple theories of discrimination as motivating factors.⁹¹ As will be discussed herein, this standard of proof has important implications for military spouses facing both military spousal status and age discrimination.

1981 (2016)).

⁸⁷ 29 U.S.C. § 623(a)(1); *see also* Gross v. FBL Fin. Servs. Inc., 557 U.S. 167, 176 (2009).

⁸⁸ 29 U.S.C. § 623(f)(1).

⁸⁹ *See* Smith v. City of Jackson, 544 U.S. 228, 234–37 (2005); *see also* Rabin v. PricewaterhouseCoopers LLP, 2017 BL 49868 (N.D. Cal. Feb. 17, 2017); Villareal v. R.J. Reynolds Tobacco Co., 806 F.3d 1288 (11th Cir. 2015).

⁹⁰ For a good discussion of *Smith v. City of Jackson* by a number of experts in the field (Charles B. Craver, Henry H. Drummonds, and Laurie McCann), *see The U.S. Supreme Court’s 2004 Term: Disparate Impact Claims under the Age Discrimination in Employment Act*, LAB. L. J. 7982320(CCH), 2005 WL 7982320 (Dec. 1, 2005).

⁹¹ An ADEA claimant can attempt to advance multiple determinative factors. 29 U.S.C.A. § 623 (2016) (citing Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 994 (5th Cir. 1996), *abrogated by* Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133 (2000) (To establish an ADEA violation, “age need not be the sole reason for the adverse decision; however, ‘a disparate treatment claim cannot succeed unless employee’s protected trait actually played a role’ . . . and had a determinative influence on the outcome.”) (citing Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993))); Cooley v. Carmike Cinemas, Inc., 25 F.3d 1325, 1333–34 (6th Cir. 1994) (holding that age can be “a”—not “the”—determining factor); Kralman v. Ill. Dep’t of Veterans’ Affairs, 23 F.3d 150, 153 (7th Cir. 1994) (citing Oxman v. WLS–TV, 846 F.2d 448, 452 (7th Cir. 1988)) (“The plaintiff need not prove that age was the sole factor motivating the employer’s decision, only that age was a determining factor in the sense that [the employment decision would not have been made] but for the employer’s motive to discriminate on the basis of age.”).

d. Pregnancy Discrimination Act

In 1978, Congress amended Title VII to make it clear that discrimination based on “pregnancy, childbirth, or related medical conditions” constitutes discrimination based on sex.⁹² The amendment, named the Pregnancy Discrimination Act (PDA), was passed in response to the Supreme Court case *General Electric Co. v. Gilbert*.⁹³ In *Gilbert*, the Supreme Court held that an employer was free to exclude pregnancy from its disability benefits as long as there was no evidence that the exclusion was a pretext for invidious discrimination against women.⁹⁴ The PDA provides important protection for military spouses because as a whole they tend to be women of child-bearing age.⁹⁵

e. Section 1981

Section 1981⁹⁶ of the Reconstruction Era Civil Rights Act (the Civil Rights Act of 1866)⁹⁷ is an additional means of protection against racial discrimination in employment. Utilization of Section 1981 did not gain traction as a cause of action and means of relief until the late 1970s and 1980s. This is because it was not until the Supreme Court “firmly established, seemingly once and for all,”⁹⁸ in *Runyon v. McCrary*,⁹⁹ that section 1981 prohibited racial discrimination in enforcing private contracts¹⁰⁰ such as those both express and implied in an employment relationship.

⁹² Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (current version at 42 U.S.C. §§ 2000e(k), 2000e-2(a) (2016)).

⁹³ 429 U.S. 125 (1976).

⁹⁴ *Id.* at 134–36.

⁹⁵ MARGARET C. HARRELL, NELSON LIM, LAURA WERBER & DANIELA GOLINELLI, RAND CORPORATION, WORKING AROUND THE MILITARY: CHALLENGES OF MILITARY SPOUSE EMPLOYMENT 16, RAND CORP. (2004) [hereinafter WORKING AROUND THE MILITARY], available at <http://rand.org/pubs/monographs/MG196>.

⁹⁶ 42 U.S.C. § 1981 (2016).

⁹⁷ Civil Rights Act of 1866, Ch. 31, 14 Stat. 825 (1866); Donald R. Livingston & Samuel A. Marcossou, *The Court at the Cross Roads: Runyon, Section 1981 and the Meaning of Precedent*, 37 EMORY L.J. 949, 954 n.23 (1988).

⁹⁸ Livingston & Marcossou, *supra* note 97, at 950 n.6 (citing *Runyon v. McCrary*, 427 U.S. 160, 168 (1976)).

⁹⁹ 427 U.S. 160 (1976).

¹⁰⁰ Livingston & Marcossou, *supra* note 97, at 950 n.6 (citing *Runyon*, 427 U.S. at 168).

Under section 1981, “race” is interpreted broadly due to the earlier era in which the legislation was passed.¹⁰¹ It is interpreted by the courts to include characteristics of color, ancestry, and, to a limited degree, religion.¹⁰² Additionally, Section 1981 does not limit the amount of compensatory damages that are recoverable.¹⁰³ Furthermore, Section 1981 offers fewer procedural hurdles to bringing suit than does Title VII.¹⁰⁴

The protection of Section 1981 is narrower, however, in a few respects. It does not apply to federal government employees, unlike Title VII.¹⁰⁵ Importantly, the disparate impact theory and its proof construct is not available under Section 1981; discriminatory motive must be proven.¹⁰⁶

f. ADA

The Americans with Disabilities Act (ADA) of 1990¹⁰⁷ makes it illegal to discriminate against people with disabilities in public and private employment.¹⁰⁸ The law protects individuals with a mental or physical impairment that substantially limits him or her in a major life activity.¹⁰⁹ To prevail, a plaintiff must be able to prove that he or she is disabled under the statutory definition and is qualified to perform the essential function of the job with or without reasonable accommodation.¹¹⁰ If the plaintiff can show these elements, then the employer has a duty to provide reasonable accommodation unless such accommodation would pose an undue hardship to the employer.¹¹¹

¹⁰¹ See *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610–611 (1987).

¹⁰² *Id.* at 613. See also *Fonseca v. Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840, 850 (9th Cir. 2004)); *Village of Freeport v. Barrella*, 814 F.3d 594 (2d Cir. 2016).

¹⁰³ Compare 42 U.S.C. § 1981 (containing no statutory damages cap), with 42 U.S.C. §§ 1981a(b)(3), 2000e-5 (providing limitations on damages for Title VII claims).

¹⁰⁴ For an in-depth examination of the procedural differences between section 1981 and Title VII, see Livingston & Marcossan, *supra* note 97, at 951, 986–91.

¹⁰⁵ See *Brown v. Gen. Services Admin.*, 425 U.S. 820, 835 (1976).

¹⁰⁶ See, e.g., *Gen. Bldg. Contractors Ass’n. v. Pa.*, 458 U.S. 375, 389 (1982).

¹⁰⁷ 42 U.S.C. §§ 12101–12213.

¹⁰⁸ Title I of the Act deals with employment. The ADA also prohibits disability discrimination in transportation, public accommodation, communications, and governmental activities. *Americans with Disabilities Act*, U.S. DEP’T OF LAB. (last visited July 5, 2018), <http://dol.gov/general/topic/disability/ada>.

¹⁰⁹ 42 U.S.C. §§ 12102(1), 12112.

¹¹⁰ 42 U.S.C. § 12111(8).

¹¹¹ 42 U.S.C. § 12112(b)(5)(A). “Undue hardship” is statutorily defined at 42 U.S.C. § 12111(10). See also *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002).

g. USERRA

The Uniformed Services Employment and Reemployment Rights Act¹¹² (USERRA) is perhaps the most applicable and well-known provision applying to military families pertaining to employment discrimination.¹¹³ It purports to protect all current or former service members from facing adverse employment actions by virtue of their voluntary or involuntary military service.¹¹⁴ It also “provides that returning service-members are reemployed in the job that they would have attained had they not been absent for military service (the long-standing ‘escalator’ principle), with the same seniority, status and pay, as well as other rights and benefits determined by seniority.”¹¹⁵

While the Act’s protections technically extend to active duty members and veterans,¹¹⁶ as a practical matter the statute primarily assists only Guard and Reserve military members during their civilian employment. The Act’s first stated purpose is “to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service.”¹¹⁷ As a practical matter, however, it does not have wide applicability to active-duty members because active-duty members are employed full-time by the military. Additionally, active-duty members are prohibited from engaging in “outside” or private

¹¹² 38 U.S.C. §§ 4301–4334.

¹¹³ In addition to USERRA, the Employment and Training of Veterans Act, 38 U.S.C. §§ 4211–4215 (1994), prohibits government contractors from discriminating against “covered veterans” which includes disabled veterans, those who served on active duty during a war or in a campaign for which a campaign badge is authorized, those who participated in a U.S. military operation for which an armed forces service medal was awarded, or someone who is recently separated from active duty within the past three years. 38 U.S.C. § 4211.

¹¹⁴ 38 U.S.C. § 4311.

¹¹⁵ *Job Rights for Veterans and Reserve Component Members: The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA 38 U.S.C. 4301–4335)*, U.S. DEP’T OF LAB., FACT SHEET (last visited July 6, 2018), http://dol.gov/vets/programs/userra/userra_fs.htm.

¹¹⁶ 38 U.S.C. §§ 4303(13), 4311(a). “A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.” 38 U.S.C. § 4311(a).

¹¹⁷ 38 U.S.C. § 4301(a)(1).

employment unless they obtain special permission and it does not interfere with their military duties.¹¹⁸

USERRA does not offer any protection for military spouses. Examining the legislative history reveals that military spouses were not even considered for employment discrimination protection when the law was initially passed.¹¹⁹ Thus, while the stated purpose of the law¹²⁰ seems to speak volumes about the importance of not punishing military service,¹²¹

¹¹⁸ Conflicting Outside Employment and Activities, 5 C.F.R. § 2635.802 (1992); *see also* JOINT ETHICS REGULATION (JER), DoD REGULATION 5500.07-R § 2-206 (2011).

¹¹⁹ Military members' spouses are mentioned only a few times in the legislative history, and none of these mentions deal with discrimination protection. Spouses are discussed, for example, in the context of surviving spouses who are co-obligors of veterans' loans (103 H.R. 949, § 3715(a)(3), (Aug. 6, 1993)) and as applying "spouse pressure" causing National Guard members to leave the National Guard (*Legislative Hearing on a Discussion Draft To Amend Chapter 43, Title 38, U.S.C.: Veterans Reemployment Rights*, COMMITTEE ON VETERANS' AFFAIRS SERIAL NO. 102-2 (Mar. 7, 1991)). In the Department of Labor's recent interim final rule to implement a 2005 Amendment to USERRA (The Veterans Benefits Improvement Act (VBIA) of 2004 requiring the posting of notices explaining the rights, benefits, and obligations of USERRA, Pub. L. No. 108-454 (Dec. 10, 2004)), spousal discrimination protection is briefly discussed and quickly dismissed:

The final comment received requests that the text of the notice advise that 'spouses and dependents' [*sic*] of service members are protected against discrimination and retaliation. USERRA's anti-discrimination provisions protect those individuals that are a past or present member of the uniformed service, have applied for membership in the uniformed service, or are obligated to serve in the uniformed service. USERRA's anti-retaliation provisions protect those individuals that assist in the enforcement of USERRA rights, including testifying or making a statement in connection with a proceeding under USERRA, even if that person has no service connection. In those cases in which spouses and dependents of individuals serving in the uniformed service themselves meet these requirements, USERRA's protections would apply, and the text of the notice makes clear these prerequisites. To the extent that the comment seeks an affirmative statement that spouses and dependents are protected from discrimination by their own employers because they are related to an individual covered by USERRA, such a request exceeds the coverage of the statute.

Notice of Rights and Duties Under the Uniformed Services Employment and Reemployment Rights Act, 70 Fed. Reg. 75313-01 (Dec. 19, 2015). The Department of Labor has seemingly foreclosed military spouses from bringing a claim under USERRA for adverse employment actions suffered due to their military member spouse's service.

¹²⁰ 38 U.S.C. § 4301(a).

¹²¹ The three stated purposes of the law include "encourage noncareer service" in the military, "minimize disruption" to employees and employers as military members

the drafters did not seem to consider the equivalent punishment shouldered by military spouses. In this sense, it seems that USERRA was drafted with a single-income family in mind, with the military member as the primary wage earner and the military member's spouse as the primary child caregiver.¹²² Astonishingly, this single-income model existed despite the acknowledgment that many military members are "noncareer."¹²³ Without this assumption, the stated purpose of the law would ring hollow.

h. Executive Order 13152

Signed by President Clinton in 2000, Executive Order 13152 made it illegal for the federal government to discriminate in employment against a person based on their status as a parent.¹²⁴ Status as a parent includes natural, adopted, foster, and step-parents; custodians; those acting *in loco parentis*; guardians; and those actively seeking such status.¹²⁵

The executive order only protects current or prospective employees in federal public sector jobs.¹²⁶ As a result, it does little to help military spouses. One of the ways the federal government has attempted to alleviate the employment struggles of military spouses is to offer a hiring preference for federal jobs.¹²⁷ The preference applies if the spouse has recently moved

transition in and out of military service, and to "prohibit discrimination against persons because of their service in the uniformed services." *Id.*

¹²² Developed further, the image of the military family in 1994 seems to be comprised of an image of the military member as the male breadwinner in a nuclear family with the wife as the primary child caregiver. Of course, the stereotype could be reversed for female military members. But, due to the rarity of men comprising primary child caregivers in 1994 (*see* Naomi C. Earp, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* n.22, U.S. EQUAL EMP. OPPORTUNITY COMM'N (EEOC) NOTICE No. 915.002 (2007) [hereinafter Earp (EEOC notice)], <http://eoc.gov/policy/docs/caregiving.html>), as well as the overwhelming proportion of males compared to females in the military, the logical conclusion is that the single income family model at the time envisioned the male as the military member and head of household.

¹²³ 38 U.S.C. § 4301(a)(1).

¹²⁴ Exec. Order No. 13,152, 65 Fed. Reg. 26115 (May 2, 2000).

¹²⁵ *Id.* § 6.

¹²⁶ Exec. Order No. 11,478, 34 Fed. Reg. 12985 (Aug. 8, 1969), *as amended by* Exec. Order No. 13,152, 65 Fed. Reg. 26115 (May 2, 2000).

¹²⁷ *Military Spouse Preference in Employment*, MILITARY ONE SOURCE (Mar. 15, 2018, 10:40 AM), <https://militaryonesource.mil/-/military-spouse-preference-in-employment>; *see also* Pub. L. No. 99-145, 99 Stat. 583 (Nov. 8, 1985); *Employment of Spouses of*

with their military counterpart. Executive Order 13152, protecting parental status for these same federal jobs, offers an extra layer of protection but in a somewhat narrow field of job opportunities, as private sector jobs are not covered by this hiring preference.

i. Spousal Residency Relief Act

Though not specifically dealing with employment, the Military Spouses Residency Relief Act¹²⁸ (MSRRA) is federal legislation that addresses one of the inherent difficulties faced by military spouses by virtue of their status. This amendment to the Servicemember Civil Relief Act (SCRA) allows military spouses to retain their state of residence for taxation and voting purposes if certain criteria are met. The spouse must have established a state of residency the same as that of his or her military spouse and then moved by virtue of the spouse's service. While the effect on military spouse discrimination may be negligible, the Act marks an important recognition by the legislative and executive branches of some the difficulties inherent in being a military spouse. The Act paves the way for additional legislation to address other problems such as employment.

B. Case Law Legal Framework

Now that the basic statutory framework pertaining to military spouses has been examined, it is important to set forth the basic judicial framework interpreting these statutes. Judicial treatment of the statutes establishes the breadth of coverage for each law and their corresponding constructs of proof. Military spousal discrimination can be viewed as illegal under two separate but related theories—discriminatory treatment and disparate impact.¹²⁹

Active Duty Military Members Stationed Worldwide, DEPARTMENT OF DEFENSE INSTRUCTION (DoDI) 1400.25 Vol. 315 (Mar. 19, 2012), <http://dtic.mil/whs/directives/corres/pdf/140025v315.pdf>.

¹²⁸ Pub. L. No. 111-97, 123 Stat. 3007 (2009) (codified at 50 U.S.C. § 4001 (2016)). The Act prevents spouses of active duty military members from owing income taxes to the state in which they reside if they moved there due to their spouse's military duties as long as they file income taxes in their state of legal residency.

¹²⁹ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) ("The [Civil Rights] Act [of 1964] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation"); see also *Int'l Bhd. of Teamsters v. United States*:

'Disparate treatment' [...] is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin.

1. Discriminatory Treatment Cases

“Discriminatory Treatment,” or “disparate treatment,” is employment discrimination in which an employer intentionally discriminates against a person based on a trait or traits that fall within in one or more protected classes.¹³⁰ Discriminatory treatment cases are “the most easily understood type of discrimination,”¹³¹ and “occur where an employer has ‘treated [a] particular person less favorably than others because of’ a protected trait.”¹³² Discriminatory treatment occurs where the employment decision is “premised on” an impermissible basis.¹³³ In a discriminatory treatment case, the plaintiff must prove that the employer-defendant “had a discriminatory intent or motive” for taking a particular action against the plaintiff.¹³⁴

A plaintiff can establish a prima facie case of discriminatory treatment by showing by a preponderance of the evidence that the plaintiff was a member of a class protected by Title VII (or potentially another applicable antidiscrimination statute), the plaintiff met the qualifications for the job

Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. *See, e. g.,* *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–266, 97 S. Ct. 555, 563–565, 50 L. Ed. 2d 450 (1977). Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII. *See, e. g.,* 110 Cong. Rec. 13088 (1964) (remarks of Sen. Humphrey) (“What the bill does... is simply to make it an illegal practice to use race as a factor in denying employment. It provides that men and women shall be employed on the basis of their qualifications, not as Catholic citizens, not as Protestant citizens, not as Jewish citizens, not as colored citizens, but as citizens of the United States.”) Claims of disparate treatment may be distinguished from claims that stress ‘disparate impact.’ The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Either theory may, of course, be applied to a particular set of facts.

431 U.S. 324, 335 n.15 (1977).

¹³⁰ *See Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) (citing *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 985–986 (1988)) (Disparate treatment cases occur where an employer treats others “‘less favorably...because of’ a protected trait.”).

¹³¹ *Ricci*, 557 U.S. at 577 (citing *Teamsters*, 431 U.S. at 335 n.15, 9 (1977)).

¹³² *Id.* (citing *Watson*, 487 U.S. at 985–986).

¹³³ *Teamsters*, 431 U.S. at 335 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 n.18 (1973)).

¹³⁴ *Watson*, 487 U.S. at 986.

and was rejected, and the employer continued seeking applicants of similar qualifications.¹³⁵ Once the prima facie case is established—a burden which is “not onerous”¹³⁶—it raises a rebuttable inference of discrimination.¹³⁷ Put another way, unless the employer offers some legitimate reason for their employment decision, the factfinder may assume the employer acted on an illegitimate basis.

The employer’s offering of legitimate, nondiscriminatory reasons for the decision thus marks the second step in a series of burden shifting maneuvers. The ultimate goal of the burden shifting is to flush out proper and improper employment decision justifications.¹³⁸ The burden of persuasion never shifts to the defendant, but the burden of production does at this stage.¹³⁹ The defendant’s articulated reason must merely be sufficient to raise a genuine issue of material fact as to whether it discriminated against the plaintiff.¹⁴⁰

Assuming the employer offers some minimally credible nondiscriminatory justification for its decision, the third step in the burden-shifting proof process is the plaintiff’s opportunity to rebut the employer’s stated justification by offering evidence that the stated reason is a pretext for a discriminatory motive.¹⁴¹ The plaintiff can either attempt to prove that the stated reason is false or can show that the employer was at least motivated by improper reasons.¹⁴²

¹³⁵ *McDonnell Douglas*, 411 U.S. at 802; see also *Watson*, 487 U.S. at 986, (citing *Tex. Dep’t of Cty. Affairs v. Burdine*, 450 U.S. 248, 253, 253 n.6 (1981)).

¹³⁶ *Burdine*, 450 U.S. at 253.

¹³⁷ *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, (1978).

¹³⁸ *Watson*, 487 U.S. at 986 (citing *Burdine*, 450 U.S. at 255 n.8) (“In order to facilitate the orderly consideration of relevant evidence, we have devised a series of shifting evidentiary burdens that are ‘intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.’”).

¹³⁹ See *McDonnell Douglas*, 411 U.S. at 802 (“The burden then must shift to the employer to *articulate* some legitimate, nondiscriminatory reason for the employee’s rejection.” (emphasis added)); see also *Burdine*, 450 U.S. at 253 (citing *Board of Trustees of Keene St. Coll. v. Sweeney*, 439 U.S. 24, 25 n.2 (1978)).

¹⁴⁰ *Burdine*, 450 U.S. at 254.

¹⁴¹ *Id.* at 256 (citing *McDonnell Douglas*, 411 U.S. at 804–805).

¹⁴² *Id.* at 256 (citing *McDonnell Douglas*, 411 U.S. at 804–805) (“[The plaintiff] may succeed...either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.”).

Proving the latter effectively concedes some legitimacy to the employer's stated reasons and thus proceeds on a theory of "mixed motives."¹⁴³

2. Mixed Motive Discriminatory Treatment Cases

Employers can and often do have multiple reasons to not hire, fail to promote, or fire a person. When multiple reasons exist and at least one of those reasons is impermissible, a "mixed motive" case results. Mixed motive cases reduce the plaintiff's burden of proof with respect to how reliant the employer was on the improper basis. Otherwise, a legitimate justification could always explain away and defeat a discrimination claim.

When multiple reasons for the employment decision exist, the plaintiff must only prove that the impermissible reason was a motivating factor in the decision.¹⁴⁴ The plaintiff does so by demonstrating through direct or circumstantial evidence that the impermissible factor was "used" in the employment practice or decision.¹⁴⁵ The plaintiff can then seek a "mixed motive" jury instruction.

A substantial drawback to mixed motive cases, however, is that the employer can avoid monetary liability if he or she can demonstrate that he or she would have made the same decision notwithstanding the impermissible basis.¹⁴⁶ Often the employer conducts substantial investigation to establish such a rebuttal, such as discovering a falsity on the applicant's resume. As a practical matter, this means that the remedies available to the plaintiff in mixed motive cases are dramatically reduced.¹⁴⁷ The plaintiff can only recover declaratory relief, injunctive relief and attorney fees.¹⁴⁸ A plaintiff cannot

¹⁴³ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 246–47 (1989) (ability of defendant to avoid liability by proving it would have made the same decision absent discrimination was superseded by statute in the Civil Rights Act Amendments of 1991); *see also* *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98–99 (2003) (abrogating *Price Waterhouse's* heightened proof requirement that the plaintiff prove discrimination by direct evidence in mixed motive cases).

¹⁴⁴ 42 U.S.C. 2000e-2(m) mandates "[e]xcept as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."

¹⁴⁵ *Desert Palace, Inc.*, 539 U.S. at 98.

¹⁴⁶ 42 U.S.C. § 2000e-5(g)(2)(B).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

recover back pay, damages, or be reinstated.¹⁴⁹ Thus, the lower burden of proof for mixed motive cases comes at a hefty price tag for discriminatees.

Some non-Title VII antidiscrimination laws do not permit mixed motive cases. As previously mentioned, a mixed motive theory of proof and jury instruction is not available in age discrimination cases.¹⁵⁰ A mixed motive theory is also not available in a claim of racial discrimination under Section 1981¹⁵¹ or a claim of discrimination based on disability under the ADA.¹⁵² Where discrimination is based on age, “race” under Section 1981, or disability, the military spouse claimant will have to prove “but for” discrimination on one of these bases.¹⁵³ Thus, proving the employer’s intent can be a substantial evidentiary hurdle.

3. Disparate Impact Cases

One type of claim does not require proving the employer’s intent at all. In *Griggs v. Duke Power Co.*, the Supreme Court established an entirely different theory of discrimination called disparate impact.¹⁵⁴ In *Griggs*, the Supreme Court declared relatively shortly after the passage of Title VII that antidiscrimination protections extend to unintentional discrimination by employers

¹⁴⁹ *Id.*

¹⁵⁰ *Gross v. FBL Financial Services Inc.*, 557 U.S. 167 (2009). The Court’s holding was based on the idea that Congress amended the language of Title VII without similarly amending the language of the ADEA, where it remained that the employer must take the adverse employment action “because of” age. *Id.* at 174–175.

¹⁵¹ *Gen. Bldg. Contractors Ass’n v. Pa.*, 458 U.S. 375, 389 (1982).

¹⁵² The Court has not yet held since *Gross*, 557 U.S. 167, whether mixed motive cases are permitted under the ADA. Some lower courts have found the ADA does not permit mixed motive cases. *See, e.g.*, *Gentry v. E. W. Partners Club Mgmt. Co. Inc.*, 816 F.3d 228 (4th Cir. 2016), *Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312 (6th Cir. 2012), *Serwatka v. Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010).

¹⁵³ Multiple “but for” or dispositive factors may exist, but the level of proof required is much higher than proving a mere motivating factor. *See* 29 U.S.C.A. § 623 (2016); *see also* *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir. 1996); *Cooley v. Carmike Cinemas, Inc.*, 25 F.3d 1325, 1333–34 (6th Cir. 1994); *Kralman v. Ill. Dep’t of Veterans’ Affairs*, 23 F.3d 150, 153 (7th Cir. 1994) (citing *Oxman v. WLS–TV*, 846 F.2d 448, 452 (7th Cir. 1988)) (“The plaintiff need not prove that age was the sole factor motivating the employer’s decision, only that age was a determining factor in the sense that [the employment decision would not have been made] but for the employer’s motive to discriminate on the basis of age.”); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

¹⁵⁴ 401 U.S. 424 (1971).

when it has an adverse impact on a protected class of people.¹⁵⁵ These cases are referred to as “disparate impact” or “discriminatory effect” cases.

The heart of the disparate impact theory is to “achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group...over other[s].”¹⁵⁶ It works to prohibit circumstances when the “employer uses a non-job-related barrier in order to deny a minority or woman [or other protected class...] an employment opportunity.”¹⁵⁷ When an “‘identifiable pass-fail barrier denies a disproportionately large number of [members of a protected class] and prevents them from proceeding to the next step of the selection process,’ that barrier must be shown to be job related.”¹⁵⁸ In other words, even when the employment test or process appears neutral on its face, if it unfairly affects more people in protected classes without valid business justification, it is still illegal.

The disparate impact theory requires the plaintiff to prove that the employment barrier, “not justified by business necessity,” “has a disproportionately adverse impact upon members of a group protected under Title VII”¹⁵⁹ or other anti-discrimination legislation.¹⁶⁰ “[T]he issue is whether a neutral selection device...screens out disproportionate numbers” of a group of people protected by law.¹⁶¹

Proof of discrimination under a disparate impact theory does not require discriminatory intent or motive.¹⁶² As the Ninth Circuit explains, “The

¹⁵⁵ *Id.*

¹⁵⁶ *Griggs*, 401 U.S. at 429–430.

¹⁵⁷ *Conn. v. Teal*, 457 U.S. 440, 448 (1982).

¹⁵⁸ *Id.* at 445 (citing *Teal v. St. of Conn.*, 645 F.2d 133, 138 (2d Cir. 1981)).

¹⁵⁹ *Am. Fed’n of St., Cty., and Mun. Emps., AFL-CIO (AFSCME) v. Wash.*, 770 F.2d 1401, 1405 (9th Cir. 1985) (citing *Dothard v. Rawlinson*, 433 U.S. 321, 328–29 (1977)); *Griggs*, 401 U.S. at 430–31.

¹⁶⁰ Anti-discrimination jurisprudence has extended the disparate impact theory to classes protected by other federal legislation outside of Title VII. *Smith v. City of Jackson*, 544 U.S. 228 (2005), for example, extended the disparate impact theory to age discrimination under the ADEA.

¹⁶¹ *Grano v. Dep’t of Dev. of Columbus*, 637 F.2d 1073, 1081 (6th Cir. 1980).

¹⁶² *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (“Proof of discriminatory motive, we have held, is not required under a disparate-impact theory). Compare, e. g., *Griggs*, 401 U.S. at 430–432, with *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–806 (1973). See generally B. Schlei & P. Grossman, *EMPLOYMENT DISCRIMINATION LAW* 1-12 (1976); Blumrosen, *Strangers in Paradise: Griggs v. Duke*

theory is based in part on the rationale that where a practice is specific and focused [the court] can address whether it is a pretext for discrimination in light of the employer's explanation for the practice."¹⁶³ However, establishing a prima facie case of disparate impact discrimination can prove to be much more difficult than discriminatory treatment, especially when hiring or promotion data is not readily available or reliable.

Proof of disproportionate adverse impact typically requires showing that members of a protected class fail to meet the standard or get selected at a rate higher than all others. But how much differential is allowed before the selection process constitutes discrimination? This question has forced a rule to evolve. The so-called "4/5ths Rule" constitutes a rough yard stick against which courts can evaluate the significance of the disparity.¹⁶⁴ The 4/5ths Rule stems from the Equal Employment Opportunity Commission's (EEOC) Guidelines (1978). It provides that discrimination is presumed where a selection rate for a protected class is less than 4/5ths (or 80 percent) of the highest selection rate of any group.¹⁶⁵ The Supreme Court cautions that the "rule" is more of a permissive guideline than a rule¹⁶⁶ and the text of the "rule" itself indicates that the 4/5ths line is not set in stone.¹⁶⁷

Power Co. and the Concept of Employment Discrimination, 71 MICH. L. REV. 59 (1972).

¹⁶³ *AFSCME*, 770 F.2d at 1405.

¹⁶⁴ The weight of the four-fifths rule differs by federal circuit. The First Circuit, for example, interpreted the rule as persuasive rather than binding, instead applying a standard of statistical and practical significance. *See, e.g., Jones v. City of Bos.*, 752 F.3d 38, 50 (1st Cir. 2014). The Tenth Circuit endorsed a "case-by-case" approach as well as a "significantly substantial disparity" standard. *Waisome v. Port Auth. of N.Y. and N.J.*, 948 F.2d 1370, 1376 (10th Cir. 1991). The Tenth Circuit later described such a disparity as "two or three standard deviations." *Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1223 (10th Cir. 2013). The Third and Seventh Circuits use a statistical significance of five percent. *See Jones*, 752 F.3d at 47 n.9.

¹⁶⁵ 29 C.F.R. § 1607.4(D) ("A selection rate for any [protected group] which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.").

¹⁶⁶ *Bradley v. City of Lynn*, 443 F. Supp. 2d 145, 160 (D. Mass. 2006) (citing *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 995 (1988) (plurality opinion)).

¹⁶⁷ 29 C.F.R. § 1607.4(D) ("Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or

Therefore, in order to prevail in a disparate impact suit, the plaintiff must first establish the following prima facie case—he or she is a member of a protected class and that the selection rate for his or her protected class violates some semblance of the 4/5ths Rule.¹⁶⁸ This prima facie proof establishes a rebuttable presumption of discrimination.¹⁶⁹ The burden of production and persuasion then shifts to the respondent employer to defend the practice by proving that it is job related and required by business necessity.¹⁷⁰ The plaintiff then has the opportunity to prove that an equally predictive but less discriminatory alternative practice exists.¹⁷¹ The employer’s failure to adopt this practice provides an inference of discrimination.¹⁷² The 1991 amendments to the Civil Rights Act codified the burdens that rest with the plaintiff in a disparate impact case.¹⁷³

The disparate impact theory has strong theoretical applicability to military spouses due to the high percentage of women and minorities¹⁷⁴ that comprise this group. Both the theoretical and practical application of this theory as it pertains to military spouses is further developed in Part III, section C.

female candidates to be atypical of the normal pool of applicants from that group.”)

¹⁶⁸ See 29 C.F.R. § 1607.4(D); see also *Griggs*, 401 U.S. at 431; *Malave v. Potter*, 320 F.3d 321, 325–26 (2d Cir. 2003).

¹⁶⁹ See 42 U.S.C. § 2000e-2(k)(1)(A); see also *Watson*, 487 U.S. at 994–95.

¹⁷⁰ 42 U.S.C. § 2000e-2(k)(1)(A)(i).

¹⁷¹ 42 U.S.C. § 2000e-2(k)(1)(A)(ii).

¹⁷² See *Bryant v. City of Chi.*, 200 F.3d 1092, 1094 (7th Cir. 2000) (citing 42 U.S.C. § 2000e-2(k)(1)(A)(ii); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975)).

¹⁷³ Pub. L. No. 102-166, 105 Stat. 1071 (Nov. 21, 1991) (amending 42 U.S.C. § 2000e-2 (1990)).

¹⁷⁴ As developed further *infra*, Part III(C)(2), the proportion of military spouses that belong to most ethnic minority groups is higher than found in the general population and work force. This trend is even more pronounced in communities whose ethnic diversity is less than the general United States population.

III. THE CASE FOR MILITARY SPOUSES

How does the body of statutory law and case law combine to create an antidiscrimination protection where one does not seem to exist? Quite simply, military spouses can be protected because of their unique characteristics and circumstances. They are a group of mostly women¹⁷⁵ who tend to be comparatively more qualified for the positions for which they apply¹⁷⁶ and ethnically more diverse than the work force in their surrounding communities.¹⁷⁷ They tend to move between different states,¹⁷⁸ creating a resume that makes their military status easily identifiable. They are also conveniently packaged into a label (“military spouse”) fraught with assumptions. The label makes it easy for employers to categorically exclude them from consideration. On the other hand, it is precisely this label and these characteristics that may enable a military spouse to bring a discrimination claim.

¹⁷⁵ About 93.2 percent of civilian spouses are women. DoD REPORT, *supra* note 17, at 132. This disproportionately high percentage of women who make up military spouses may be due to a reluctance of civilian males to make their own career aspirations secondary to a female in the military, in line with the stereotype that the civilian spouse’s career come secondary to military careers.

¹⁷⁶ “[C]ivilian wives are twice as likely as military wives to be high school dropouts—one out of five civilian spouses are high school dropouts. In addition, military wives are more likely to acquire college education compared with their civilian counterparts. In all services, more than half of military wives had some form of college education. This finding contradicts the popular preconception that military wives have less education but is consistent with what demographic research has shown about the high level of ‘educational assortive’ marriages among Americans: individuals tend to marry to those with similar educational attainment, and since military men are more likely to be educated than their civilian counterparts, so are their wives.” WORKING AROUND THE MILITARY, *supra* note 95, at 15–16” (citation omitted). See also *Annual Report*, *supra* note 54 (“84 percent have some college...25 percent have a bachelor’s degree...10 percent have an advanced degree.”).

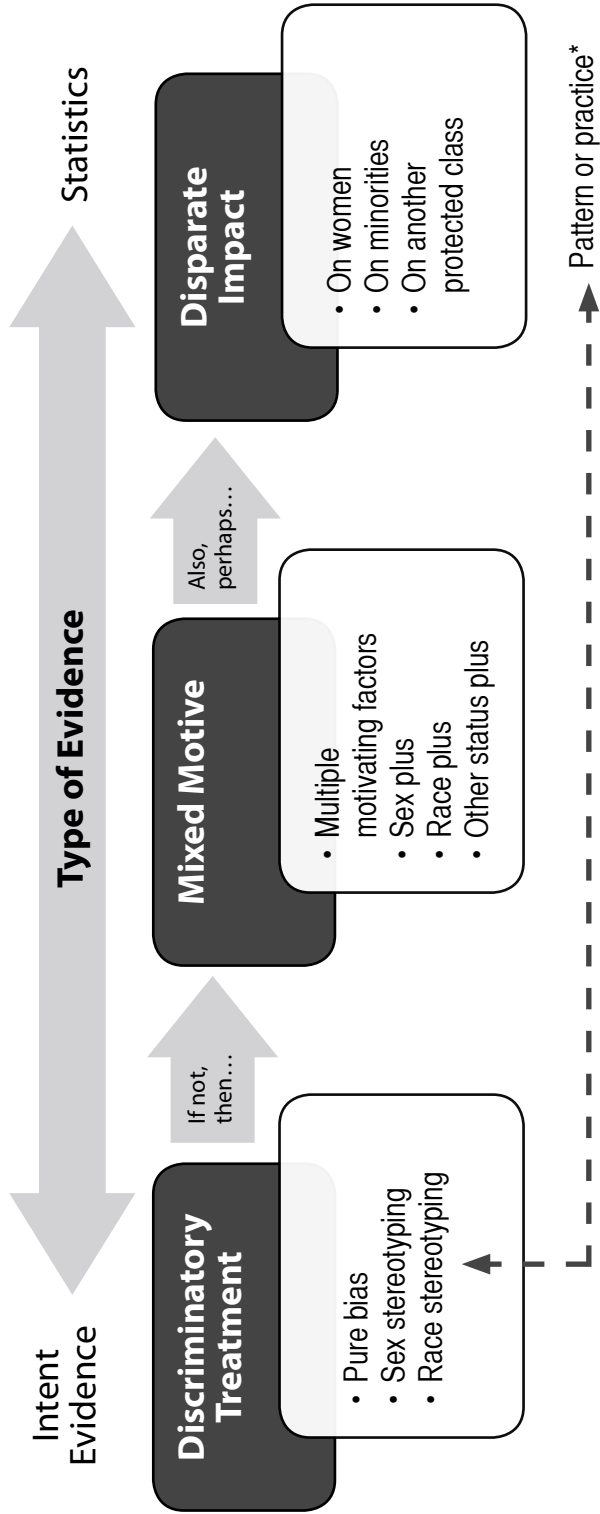
¹⁷⁷ “[M]ilitary wives are more likely to be racial and ethnic minorities.... This likelihood is especially true for those married to service members in the Army and the Marine Corps: About three out of ten Army and Marine Corps wives were minorities.” WORKING AROUND THE MILITARY, *supra* note 95, at 13.

¹⁷⁸ “1990 Census data confirm that military wives are more likely to move and tend to move longer distances, compared with civilian wives.” WORKING AROUND THE MILITARY, *supra* note 95, at 18. Also, “military wives relocate more frequently than do civilian wives, and the majority of military moves are across states.” *Id.* at 31. “Military families relocate 14 percent more frequently than civilian families.” *Spouse Education and Career Opportunities Program*, MILITARY ONE SOURCE (Jan. 24, 2014), http://download.militaryonesource.mil/12038/MOS/MOS_PDFs/SECO_JFSAP_Full_Brief.pdf.

This section discusses at length three types of claims military spouses could bring, each with their own subtypes. They are (1) discriminatory treatment, (2) mixed motive, and (3) disparate impact. The three types and their subtypes are not mutually exclusive. Depending on the nature of the case, they may be utilized *a la carte* or in combination. They can and should be pled to specifically address and defeat an employer's anticipated defenses. The evidence largely will determine which type of claim or claims may be brought.

The following graphic explains how the legal theories relate to the type of evidence available in a particular case. The two main categories of evidence include intent evidence specific to the individual or statistical evidence derived from examining the employer's work force and the labor market. While the type of claim is certainly informed by the evidence, the existence or absence of any particular type of evidence is not necessarily dispositive.

Fig. 1 – Military Spouse Status Discrimination Theories Based on Evidence



*Pattern or practice suits are discriminatory treatment claims which utilize statistical evidence.

A military spouse plaintiff who possesses strong evidence of sex stereotyping will want to make a claim of purposeful discrimination based on sex. Consider the following examples utilizing the graphic above in Figure 1. Where there is no evidence directly relating to gender but there is evidence related to military spouse stereotyping, a plaintiff may want to make a claim based on sex stereotyping and multiple motivating factors. Where the employer has few or no female military spouse employees but does have male military spouse employees, a claim of “sex plus military spouse status” may be appropriate for a female claimant. Where there is weak evidence relating to stereotyping but the employer categorically excludes military spouses as a policy matter, a disparate impact claim or pattern or practice claim may be appropriate. Each of these theories are discussed in the following section.

A. Military Spouses: Easy Targets for Stereotyping

1. Sex-Based Stereotyping of Military Spouses

Discrimination against military spouses, whether male or female, is discrimination against a person because of sex. This can be as straightforward as an employer being biased against women. Or, it could be because of sex-based stereotyping. By virtue of a military spouse applying for new work, the employer must assume that the applicant’s career yields to that of his or her service member spouse’s career. If the civilian spouse’s career took priority, the stereotype goes, the applicant would not be applying for the present position. If the applicant is a woman, the employer is projecting onto the applicant the stereotype that a woman’s career is secondary to her male husband’s career. If the applicant is male, the employer is projecting onto the applicant the stereotype that he is not conforming to typical gender roles and norms. Thus, by the mere application for work, the military spouse is subjected to a damaging stereotype.

The Supreme Court made sex stereotyping a legitimate cause of action in the landmark case *Price Waterhouse v. Hopkins*.¹⁷⁹ In *Price Waterhouse*, the Court held that an employer discriminated against a female partnership candidate when the company failed to promote her to partner because she did not behave in a way the employer believed women should behave.¹⁸⁰

¹⁷⁹ 490 U.S. 228.

¹⁸⁰ *Id.* “In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender” *Id.* at 250.

Price Waterhouse firmly established that sex stereotyping is discrimination because of sex, covered by Title VII.¹⁸¹

Sex stereotyping has wide applicability and can take on many forms. As articulated in *Price Waterhouse*, “stereotyped remarks can certainly be evidence that gender played a part.”¹⁸² The Court made clear that it does “not suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision.”¹⁸³ Commentary by employers is often invaluable in showing discriminatory intent. For military spouses, any comment regarding one’s status as a military spouse is revealing. This includes comments about frequent moves, deployments, or childcare responsibilities when the military spouse is away on duty. Data concerning the discriminated class at the particular company or workplace is also essential. For example, it may be probative that the employer has female employees but no military spouse employees. At first blush, such a situation may seem exculpating for the employer. But, it could actually be evidence that the employer is making sex-based stereotypes about the role of female military spouses in the marital relationship and their career commitment.

Sex stereotyping applies equally to preconceptions about how men should behave as it does to women.¹⁸⁴ In the eyes of the employer, the appli-

¹⁸¹ In addressing the sex stereotyping cause of action, the Court stated, “As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for ‘[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.’” *Id.* at 251 (1989) (quoting *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

¹⁸² *Id.* at 251–52.

¹⁸³ *Id.*

¹⁸⁴ See *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (“Title VII’s prohibition of discrimination ‘because of ... sex’ protects men as well as women.”); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (Title VII forbids “[d]iscrimination because one fails to act in the way expected of a man or woman.”); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n. 4 (1st Cir.1999) (citing *Price Waterhouse*, 490 U.S. at 250–51) (“[J]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.”); *Than v. Radio Free Asia*, 496 F. Supp. 2d 38, 46 (D.D.C. 2007) (“As a male, the plaintiff may still establish a prima facie case if he presents evidence of background circumstances that

cant or employee is not being “masculine” enough¹⁸⁵ or fulfilling his duties as the male in the relationship. A male military spouse could encounter the situation where the employer assumes that the male employee should be the breadwinner in the relationship. The stereotype further assumes that no male military spouse could possibly be the breadwinner if he must move locations frequently for his wife’s career. A male applicant might also be punished for seeking part-time work in order to fulfill childcare or domestic responsibilities—duties which the employer assumes are more properly for his wife.¹⁸⁶ When a male military spouse encounters such assumptions, he is discriminated against because of sex.

In military spouse discrimination, there will usually be a purported legitimate basis for the employment action. But, the justification will probably be flawed because it is based entirely on inaccurate stereotypes. The justification for not hiring a military spouse is that regardless of sex, military spouses will move to another location, thus increasing turnover. Not hiring military spouses, the assumption goes, therefore decreases turnover. However, peeling back the onion on this justification exposes its flawed reasoning. It is always based on a gender-based assumption that the civilian spouse will sacrifice his or her career for that of the military spouse. It assumes certain generalities about military spouses’ careers and work-life balance choices which are not true for every spouse.

Many other outcomes are possible in a military-civilian relationship other than the civilian spouse sacrificing his or her career. The civilian spouse does not always leave his or her job after two or three years when the military member receives orders to move. The civilian spouse may stay in the location where his or her job is located. The military member may receive reassignments at or near the same geographic location, allowing him or her to remain in the same location for multiple assignments. The military member may ask for special consideration either not to move or to move to a nearby location. The military member may choose to separate from the military in order for the civilian spouse to remain at his or her job. The civilian spouse may choose to commute longer distances or remain near his

support an inference of discrimination.”).

¹⁸⁵ See *Nichols*, 256 F.3d 864; *Oncale*, 523 U.S. 75.

¹⁸⁶ “Stereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men... These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination....” *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 736 (2003).

or her workplace during the week and travel home on the weekends. The civilian spouse may be able to continue his or her job working from home or with a flex schedule. The military member and civilian spouse may choose to live separately for a period of time. Unfortunately, even divorce is a real possibility. Assuming all military spouses will move robs the individual of their freedom to choose any number of options to best fit their individual situation. It makes overgeneralizations about all members of the group.

The overgeneralizations are multi-layered. Assumptions made about military spouses' work-life balance and family choices are stereotypes. Military spouses are more likely than their civilian counterparts to have young children.¹⁸⁷ As described by the Supreme Court, "the faultline between work and family—precisely where sex-based overgeneralization has been and remains strongest"¹⁸⁸ is an area ripe for gender-based stereotypes. When children are involved, particularly young children, women are often assumed to be the primary child caregiver and thus not as dedicated to their work.¹⁸⁹ As articulated in Justice Marshall's concurrence in *Phillips v. Martin Marietta*, Title VII was enacted to protect against employers' assumptions concerning "ancient canards about the proper role of women [as] a basis for discrimination."¹⁹⁰ These assumptions are often found in relation to caregiving responsibilities.

Discrimination based on assumptions about child caregiving apply equally to caregiving for a child or adult with disabilities. Roughly one-third of families have at least one member with a disability; one in ten families have a child with a disability under the age of 18.¹⁹¹ Caregiving responsibilities for the disabled fall disproportionately on women.¹⁹² Where an employer makes assumptions about the caregiver's responsibilities, the employee or applicant is protected. The protections are provided not just by Title VII's sex-based

¹⁸⁷ WORKING AROUND THE MILITARY, *supra* note 95, at 17.

¹⁸⁸ *Nev. Dep't of Hum. Res.*, 538 U.S. at 738.

¹⁸⁹ See *Back v. Hastings on Hudson Union Free Sch. Dist*, 365 F.3d 107, 121 (2d Cir. 2004) ("[W]here stereotypes are considered, the notions that mothers are insufficiently devoted to work, and that work and motherhood are incompatible, are properly considered to be, themselves, gender-based."); see also Earp (EEOC Notice), *supra* note 122.

¹⁹⁰ *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971).

¹⁹¹ Earp (EEOC Notice), *supra* note 122.

¹⁹² *Id.*

discrimination provisions but also under the Americans with Disabilities Act (ADA).¹⁹³

The problem with assumptions about caregiving responsibilities is compounded for military spouses, whether male or female. By virtue of a man or woman applying for a job as a military spouse, the employer must assume that they are the primary caregivers because they are applying for new work after moving. If they were not the primary caregiver, the assumption goes, they would not need to apply for new work. For spouses already employed, assumptions about caregiving responsibilities can cause a lost promotion or another advancement opportunity. The employer might think of potential deployments and the civilian being forced to act as a single parent in those circumstances. The employer would assume the employee will be further distracted from their work duties. The evidence would be stronger if the employer mentioned military spouse status or caregiving responsibilities from which stereotypes can be inferred.

It is problematic when employers make decisions about employees based on stereotypes. Stereotyping is treating individuals as simply components of a class.¹⁹⁴ Title VII's "focus [is] on the individual [and] is unambiguous."¹⁹⁵ Stereotypes about military spouses are so intertwined with gender as to be inseparable. Thus, a stereotype about a military spouse is necessarily based on gender. Military spouses are often dedicated to their spouse's military service and careers, so despite the stereotype of frequent turnover having some basis in truth, this fact does not allow employers to freely discriminate against them. The Supreme Court has stated, Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.¹⁹⁶ It follows that unless a spouse at the point of application indicates their intention to move along with their spouse to the next assignment, employers cannot punish the individual because of their membership in this group. As articulated by the Seventh Circuit Court of Appeals, "[T]he antidiscrimination laws entitle

¹⁹³ "In addition to prohibiting discrimination against a qualified worker because of his or her own disability, the Americans with Disabilities Act (ADA) prohibits discrimination because of the disability of an individual with whom the worker has a relationship or association, such as a child, spouse, or parent." Earp (EEOC Notice), *supra* note 122 (citing 29 U.S.C. § 1630.8; *Abdel-Khalke v. Ernst & Young, LLP*, No. 97 CIV 4514 JGK, 1999 WL 190790 (S.D.N.Y. Apr. 7, 1999)).

¹⁹⁴ *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

individuals to be evaluated as individuals rather than as members of groups having certain average characteristics.”¹⁹⁷ Evaluating military spouses “on the average” inevitably results in stereotyped judgments about a particular gender and their role in the workplace in relation to their spouse’s role in the military.

2. Race-Based Stereotyping of Military Spouses

Employers may also discriminate against military spouses because of stereotypes based on race. Though not as common as stereotypes based on gender, any presumptions about an applicant based on their racial or ethnic background can constitute evidence of racial animus. Military spouses are especially vulnerable to such stereotypes because of their unique circumstances. This section is not meant to provide a catalog of all possible racial stereotypes, but rather a few examples of how racial stereotyping can particularly affect military spouses.¹⁹⁸

One form of racial stereotyping particularly affects military spouses because of their increased mobility. A newly-transferred military family is unlikely to have established social connections, which help secure employment.¹⁹⁹ An employer may fail to hire a minority applicant because he assumes the applicant has connections in the community and will “fit in” better elsewhere.²⁰⁰ For military spouses, no such connections may exist and the applicant may have been discriminated against because of race.

Military spouses may also be discriminated against because of race due to the stereotyped belief that minority spouses assume greater caregiving

¹⁹⁷ *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004).

¹⁹⁸ For a survey of various racial stereotypes amounting to employment discrimination, see *Race Discrimination*, EEOC COMPL. MAN. NO. 915.003, Vol. II, § 15-IV, C (2006), <http://eoc.gov/policy/docs/race-color.html#IVC>.

¹⁹⁹ “[S]ocial science studies... have shown consistently that people get jobs through social networks. Frequent long-distance moves make it difficult for military wives to develop the kinds of networks that can help them in the labor market.” *WORKING AROUND THE MILITARY*, *supra* note 95, at 19 (citing MARK GRANOVETTER, *GETTING A JOB: A STUDY OF CONTACTS AND CAREERS* (2nd ed., 1995)).

²⁰⁰ The employer’s decision may be motivated by “threats to one’s self-esteem,” “a desire to rationalize inequality,” or “a conscious or unconscious desire to maintain the social hierarchy”. Uhlmann, Brescoll, Machery, *The Motives Underlying Stereotype-Based Discrimination Against Members of Stigmatized Groups*, *SOC. JUST. RES.* 23:1–16, 3–4 (2010), http://socialjudgments.com/docs/Uhlmann_Brescoll_Machery_2010.pdf.

responsibilities.²⁰¹ Stereotypes about race are particularly strong in relation to caregiving responsibilities.²⁰² Additionally, the stereotype exists that military spouses are even more bound by childcare responsibilities.²⁰³ In combination, a minority military spouse faces the stereotype that she is less devoted to her career because of caring for existing or potential future children.

These examples of potential discrimination based on racial stereotypes are more likely to affect military spouses due to their unique circumstances. If the employer makes any comments related to military spousal status, racial or ethnic background, and caregiving responsibilities, an applicant or employee may have a strong case of discrimination based on race.

3. Pattern or Practice Cases Involving Military Spouses

“Pattern or practice” cases are a subtype of discriminatory treatment. Rather than using evidence of discriminatory intent related to the individual employee, pattern or practice cases are proven using statistics to show systemic discrimination against a particular gender, race, or other protected group.²⁰⁴ The plaintiff’s goal is to prove that discrimination against the particular group is standard operating procedure of the employer, as opposed to the exception to the rule.²⁰⁵

A pattern or practice case as a matter of proof looks much like a disparate impact claim. “A prima facie case... usually consists of showing a significant statistical disparity between the composition of the workforce at a particular time and the qualified, interested, and available members of the

²⁰¹ See, e.g., Statement of Anika K. Warren, Ph.D[.], Director, Catalyst, Inc., Meeting of May 23, 2007, Achieving Work/Family Balance: Employer Best Practices for Workers with Caregiving Responsibilities, (unpublished manuscript) (available at <http://eeoc.gov/eeoc/meetings/archive/5-23-07/warren.htm>) (stating that women of minority groups often have greater caregiving responsibilities due to a broader cultural definition of “family” and collectivist cultural norms).

²⁰² Earp (EEOC Notice), *supra* note 122.

²⁰³ “The vast majority of spouses out of the labor force cited parenting reasons for not working... Approximately three-quarters of spouses explained that they did not work outside the home because of parenting responsibilities.” WORKING AROUND THE MILITARY, *supra* note 95, at 103. Military spouses are more likely to be members of racial minority groups. *Id.* at 13. These statistics are likely noticed by employers and form the basis of the stereotype.

²⁰⁴ U.S. v. City of N.Y., 717 F.3d 72, 83 (2d Cir. 2013).

²⁰⁵ Charles R. Richey, *Manual on Employment Discrimination and Civil Rights Actions in the Federal Courts*, 1 Man. on Emp’t Discrimination § 1:30 (Feb. 2017).

protected group within the relevant labor market.”²⁰⁶ Thus, a plaintiff may prove a prima facie case of pattern or practice discrimination by showing that far fewer members of the protected class are selected than apply for the job. Proving the practice by statistics creates a permissible inference of discriminatory intent.²⁰⁷ The employer can rebut a prima facie case by attacking the statistics themselves or by presenting non-statistical evidence to show the employer lacked discriminatory intent.²⁰⁸

Pattern or practice cases may benefit a particular subset of military spouses who lack any evidence of discrimination related to the individual. A pattern or practice case is ripe where a military spouse lives in an area with a relatively large military population, but an employer hires relatively few military spouses. The employer should be large enough in size to produce meaningful and reliable statistics about its hiring practices in order to survive the employer’s rebuttal. As an example, the city of San Antonio, Texas, is widely regarded as “Military City USA” due to its unusually dense military population.²⁰⁹ It also is home to many large-scale non-military employers.²¹⁰ If any of these employers excluded military spouses as a class but were careful not to make discriminatory comments to applicants, the employer would be particularly susceptible to a pattern or practice claim.

Not every case of discrimination against military spouses will fit neatly and exclusively into a gender stereotype, race stereotype, or pattern or practice theory. And not all military spouse discrimination can be neatly and exclusively attributed to gender or race animus. It is necessary, therefore, to examine mixed motive cases in which employers truly are motivated, at least in part, by military spouse turnover in making employment decisions.

²⁰⁶ *Id.* (citing *Hazelwood Sch. Dist. v. U.S.*, 433 U.S. 299 (1977)).

²⁰⁷ *U.S. v. City of N.Y.*, 717 F.3d at 85.

²⁰⁸ *Id.*

²⁰⁹ *San Antonio Military Economic Impact Study 2015*, CITY OF SAN ANTONIO DEP’T OF GOV’T & PUB. AFFAIRS (July 5, 2018, 3:00 PM) <http://sanantonio.gov/Portals/0/Files/OMA/EconImpact/2015SanAntonioMilitaryEconomicImpact.pdf>.

²¹⁰ *See, e.g., Data: Largest Employers*, SAN ANTONIO ECON. DEV. FOUND. (last visited July 5, 2018), <http://sanantonioedf.com/why-san-antonio/data>; *Profiles of Top Large Employers in S.A. for 2014*, MY SAN ANTONIO (last updated Oct. 27, 2014, 11:26 AM), <http://mysanantonio.com/business/local/article/Profiles-of-top-employers-in-S-A-5822814.php>.

B. Mixed Motives and Protected Status “Plus” Discrimination

1. Mixed Motive Cases Involving Military Spouses

Military spouses have an inherent quality that provides employers a built-in business justification for any employment action. The employer might offer increased turnover, or some variation of it, as an explanation for not selecting a military spouse. In fairness, there is data to support this justification.²¹¹ When well-presented, it will be difficult for any military spouse to prove the justification is patently false or a pretext for true protected class animus. Where a discriminatee lacks evidence to prove the justification is a pretext, he can still prevail if he can show that the protected status was at least a motivating factor in the decision.

In the hierarchy of available theories, mixed motive cases are less preferred. This is because remedies are restricted if the employer shows he would have made the decision regardless of the impermissible motivating factor.²¹² While a plaintiff could not obtain reinstatement or an affirmative injunction to get the job, the employer would still be declared in violation of Title VII. Additionally, the plaintiff can recover attorney fees and costs. Furthermore, claims are brought by the Equal Employment Opportunity Commission (EEOC), thus removing cost as a substantial barrier, which might otherwise preclude a claim with no chance of monetary relief. While less preferred, a mixed motive theory may be the best or only option for a plaintiff or the EEOC to pursue.

As much as the EEOC or plaintiff frames the issue in the initial complaint, it is really the employer who chooses whether the claim advances as a “pretext”-type claim²¹³ or a mixed motive claim. The plaintiff initially

²¹¹ “[M]ilitary wives are more likely to move and tend to move longer distances, compared with civilian wives. For instance, . . . half of civilian wives did not move in the five years prior. . . while only 10 percent of military wives had stayed in one location in the same period. To make matters more difficult, the majority of military moves are either across states or abroad.” WORKING AROUND THE MILITARY, *supra* note 95, at 18–19; *cf. Spouse Education and Career Opportunities Program*, MILITARY ONESOURCE (Jan. 24, 2014), http://download.militaryonesource.mil/12038/MOS/MOS_PDFs/SECO_JFSAP_Full_Brief.pdf. (stating that military spouses are fourteen percent more mobile than civilian spouses).

²¹² 42 U.S.C. § 2000e–5(g)(2)(B).

²¹³ A “pretext case” is a claim under 42 U.S.C. § 2000e-2(a) rather than a mixed motive claim under 42 U.S.C. § 2000e-2(m). Matthew R. Scott & Russell D. Chapman, *Much*

alleges an illegal basis for the employment decision and the employer decides whether it will deny the basis entirely or admit to the basis in order to limit financial liability.²¹⁴ If the employer completely denies the improper motive, the plaintiff has a higher burden of proving the protected status was a determinative factor.²¹⁵ But, there is a much higher payoff if successful. In the case of military spouse discrimination, the battle will take place in the third step²¹⁶ of the *McDonnell Douglas*²¹⁷ burden-shifting paradigm.²¹⁸ At this step, the plaintiff's case will take one of two paths depending on the strength of the evidence: (1) either the employer's justification is asserted to be false or a pretext, or (2) the employer's justification is not contested but the improper basis is asserted as a motivator in the decision.²¹⁹ Military spouses will find themselves in the latter path if they do not contest the stereotyped assertion that military spouses have increased turnover.

2. Protected Status Plus Military Spouse Discrimination

One novel way to attack a case of military spouse discrimination is to frame it as a protected status “plus” military spouse status discrimination. If an employer discriminates against military spouses, they are necessarily discriminating against a portion of a protected class. “The effect of the statute is not to be diluted because discrimination adversely affects only a portion of the protected class.”²²⁰ Discrimination that affects a subgroup of a protected class is referred to as a protected status “plus” discrimination.

Ado About Nothing—Why Desert Palace Neither Murdered McDonnell Douglas Nor Transformed All Employment Discrimination Cases to Mixed-Motive, 36 ST. MARY'S L.J. 395, 405 (2005).

²¹⁴ *Id.* at 404–405.

²¹⁵ *Id.* at 405.

²¹⁶ The first step is the plaintiff's prima facie case of discrimination. The second step is the employer's articulation of a legitimate, non-discriminatory reason for the decision. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

²¹⁷ 411 U.S. 792.

²¹⁸ *See Scott & Chapman, supra* note 213, at 406–408.

²¹⁹ *Id.* at 407–408.

²²⁰ *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971).

a. Sex Plus Military Spouse Discrimination

“Sex plus” discrimination is closely related to sex-based stereotyping, which is discrimination based on sex.²²¹ Where sex-based stereotyping is making assumptions about all members of a particular gender, sex plus discrimination is intentional discrimination against a subset of a particular gender.²²² The difference between the two concepts is nuanced but important.²²³ The same woman might be a victim of gender discrimination under both sex plus and sex stereotyping, but the evidence and strategy of proof can be very different. We will look to the example of women with young children in order to explain and analogize the concept of discriminating against military spouses of a particular gender.

Sex stereotyping focuses on the assumption that all women should be or will be less focused on their jobs if they have young children because of the “proper” role of women in the family. Sex plus discrimination focuses on the

²²¹ “In short, ‘sex-plus claims’ are a flavor of gender discrimination claims where ‘an employer classifies employees on the basis of sex plus another characteristic.’” *Franchina v. City of Providence*, 881 F.3d 32, 38 (1st Cir. 2018) (citing *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 43 (1st Cir. 2009) (quoting *EMPLOYMENT DISCRIMINATION LAW* 456 (Barbara T. Lindemann & Paul Grossman eds., 3rd ed., vol. 1, 1996) (emphasis in original))).

²²² *Earp* (EEOC Notice), *supra* note 122 (citing *Philipsen v. Univ. of Mich. Bd. of Regents*, No. 06-CV-11977-DT, 2007 WL 907822, at *4 (E.D. Mich. Mar. 22, 2007); *Gee-Thomas v. Cingular Wireless*, 324 F. Supp. 2d 875 (M.D. Tenn. 2004); *Regina E. Gray*, Comment, *The Rise and Fall of the “Sex Plus” Discrimination Theory: An Analysis of Fisher v. Vassar College*, 42 *How. L. J.* 71 (1998)).

²²³ The following is one district court’s perspective on the difference between the two theories and why sex plus discrimination is important:

The point behind the establishment of the sex-plus discrimination theory is to allow Title VII plaintiffs to survive summary judgment when the defendant employer does not discriminate against *all* members of the sex. Thus, the above-cited cases have not created a new remedy, but instead have closed a loophole through which defendant employers could escape Title VII liability. As the Court stated in *Jefferies [v. Harris Cty Comty. Action Ass’n]*, 615 F.2d 1025 (5th Cir.1980)], an employer could discriminate against a discrete group of women—large women, black women, women with children, married women, pregnant women, older women—and be granted summary judgment in their favor because they had indeed filled these positions with other women not in the group. Such a result cannot be condoned. This is true whether or not the ‘plus’ classification is also one afforded protection on its own, such as age under the ADEA.

Arnett v. Aspin, 846 F. Supp. 1234, 1240 (E.D. Pa. 1994).

status of being a mother with young children; such a person, the assumption goes, could not possibly have the same level of job commitment as those without young children. As a result, sex plus discrimination can appear more benevolent (after all, the employer is not excluding all women). However, sex plus discrimination is just as harmful to the employee; she still does not get the job.

As a matter of evidence in sex plus discrimination, the strongest case is one in which the discriminatee can prove that the employer discriminates against a particular subset of one gender but not the same subset of the opposite gender. However, such evidence is not required.²²⁴ The “plus” in sex plus discrimination serves as a vehicle to prove sex-based discrimination without having to show discrimination against all members of the particular gender. As stated by the Seventh Circuit in recognizing sex-plus-marital-status discrimination, “It does not seem . . . relevant that the rule is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based

²²⁴ *Franchina*, 881 F.3d at 38–42 (1st Cir. 2018):

The City contends, as best we can tell, that for a plaintiff to be successful under a sex-plus theory, a separate, more stringent evidentiary standard exists than for straight claims of sex discrimination. The City, it seems, believes that under a sex-plus theory, plaintiffs are required to identify a corresponding sub-class of the opposite gender and show that the corresponding class was not subject to similar harassment or discrimination. Thus, for *Franchina* to succeed, the City tells us she is required to have presented evidence at trial of a comparative class of gay male firefighters who were not discriminated against. Without such a showing, the City contends, it would not be possible to prove that any sort of differential treatment a plaintiff experiences is necessarily predicated on his or her gender. This approach—one that we have never endorsed—has some rather obvious flaws . . . [S]uch a standard would permit employers to discriminate free from Title VII recourse so long as they do not employ any subclass member of the opposite gender . . . [T]he effect of Title VII is not to be diluted because discrimination adversely affects a plaintiff who is unlucky enough to lack a comparator in his or her workplace. The City’s position conflicts also with Title VII’s text and jurisprudence. Requiring a plaintiff to point to a comparator of the opposite gender implies the inquiry is that of ‘but-for’ causation. That is to say, the City’s approach requires *Franchina* to make a showing that, all else being equal (the ‘plus’ factors being the same), the discrimination would not have occurred but for her gender. Title VII requires no such proof.

on sex.”²²⁵ A sex plus discriminatee may still survive a motion for summary judgment despite the employer’s evidence that he has not discriminated against women or men as a whole.²²⁶

In the present example of mothers with young children, the plaintiff must show that the employer discriminates against women with young children but not against men with young children. As a result, the type of evidence sought is not nearly as focused on proving the employer’s intent. Although proof of intent is still required, it may be based entirely on inference from the circumstances. The sex stereotype discriminatee, on the other hand, will likely need to rely on some evidence that shows stereotyped belief. In the present example, that would classically involve comments regarding women with young children or assumptions about women with young children.

The practitioner and client choose their theory of proof based on the nature of the evidence available in each case. In the woman with young children example, the plaintiff should have evidence that the numbers of women with young children hired or selected for promotion or other opportunities is much lower than the number of men with young children, factoring for the proportion of eligible men and women working for the company.²²⁷

At the end of the day, whether a claim is labeled sex stereotyping or sex plus discrimination is largely non-determinative. The strength of a

²²⁵ *Sprogis*, 444 F.2d at 1197–98 (citing 29 C.F.R. § 1604.3(a)).

²²⁶ *Arnett*, 846 F. Supp. at 1241 (E.D. Penn. 1994) (“The ‘sex-plus’ line of cases... merely provide a means for those Title VII plaintiffs who claim that their employers have discriminated against them on the basis of their sex to survive summary judgment under the *McDonnell Douglas* framework when their employers have not discriminated against all members of their sex”).

²²⁷ This kind of theory of proof presumes an employer large enough to have meaningful data. It would be difficult to infer discrimination if one woman with young children is not selected but she is the only woman eligible among many eligible men, in the absence of other clear gender-based commentary. If, on the other hand, no woman with young children has ever been selected for promotion over time, but men with young children have, the plaintiff may have a claim for sex plus discrimination. The evidence will be far better of course if the employer has made any comments about young children related to employment. In *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 115 (2d Cir. 2004), an employer school district discriminated against a mother with young children in not selecting her for a permanent position coupled with comments about her having young children, their demand on her time, and how she should plan the timing of having another child. On the other hand, for an example of the types of child care-giving comments one District Court found insufficient to establish a sex plus discrimination claim, see *Chadwick v. Wellpoint, Inc.*, 550 F.Supp.2d 140, 145–46 (D. Me. 2008).

given case will depend on the strength of the evidence. The practitioner may ultimately allege both theories for the same conduct. As the Court of Appeals for the Second Circuit stated in *Back v. Hastings*, “The relevant issue is not whether a claim is characterized as ‘sex plus’ or ‘gender plus,’ but rather, whether the plaintiff provides evidence of purposefully sex-discriminatory acts.”²²⁸ The Court rejected the idea that one must rigidly fit into one category or the other.

In the case of a military spouse, it would be rare to assert purely sex plus discrimination. The required proof would consist of showing that the employer hires male military spouses but not female military spouses. This type of proof may only be available for very large employers in areas rich with military members.²²⁹ Where the employer is sufficiently large, such a claim could be made based on statistics in order to infer discriminatory intent. It would be wise in most cases to allege both theories of sex plus and sex stereotyping in order to fully anticipate the employer’s defenses. Doing so is not analogous to alternative pleading. Due to the overlap of the evidence involved with both theories, and the near impossibility of knowing the employer’s exact motivations, pleading both theories does not reduce the strength of one’s case. Instead, it creates a stronger case by increasing the likelihood of surviving a motion for summary judgment²³⁰ and providing multiple avenues on which a claim may proceed.

b. Race Plus Military Spouse Discrimination

A military spouse for whom race may also be a factor in an adverse employment action may have a claim of race plus discrimination. A prima facie case of race plus discrimination is a showing that the plaintiff is a member of a particular race, she was qualified for the job or performed it satisfactorily, she was rejected or suffered an adverse employment action, and a similarly situated employee not of the particular race was treated more favorably.²³¹ Once established, the burden of production shifts to the employer to articulate a valid basis for the employment decision, which is likely to

²²⁸ *Back*, 365 F.3d at 119.

²²⁹ Only 7.8 percent of approximately 641,639 military spouses in 2015 were male. DoD REPORT, *supra* note 17, at 132.

^{Males} are such a small proportion of military spouses that employers are unlikely to assume a male applicant is a military spouse based on his resume.

²³⁰ *Franchina*, 881 F.3d at 38–42 (1st Cir. 2008).

²³¹ *See McDonnell Douglas*, 411 U.S. at 801.

be that military spousal status means increased turnover and cost. At this point, the plaintiff can try to prove by a preponderance of the evidence that military spouse status is a pretext and that race was a motivating factor. “[A] trier of fact [must not] decide whether a decision-maker acted purposively or based on stereotypical attitudes of which he or she was partially or entirely unaware.”²³²

Because the overwhelming proportion of military spouses are women, a military spouse’s race plus discrimination claim will often be coupled with gender—a “race plus sex plus military spouse discrimination” claim. While the label is a mouthful, it represents two distinct protected status theories coupled with a subclass that is not protected by statute and inextricably intertwined to represent a unique status against which employers discriminate. These are not separate and divisible theories of race apart from gender and apart from military spousal status. The statuses are overlapped and intertwined and constitute a separate theory altogether²³³—the plaintiff was discriminated against because of, for example, being a black female military spouse. The courts have long recognized that Title VII forbids discrimination on race and gender bases, whether separately or intertwined.²³⁴ It is important to recognize the interfused nature of the statuses because data may show that the employer does not discriminate against black males or white women but does against black women.²³⁵

²³² “[A] subjective judgment resulting in discrimination against a black plaintiff is unlawful ‘regardless of whether the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias.’” *Kimble v. Wis. Dep’t of Workforce Dev.*, 690 F. Supp. 2d 765, 768 (E.D. Wis. 2010) (citing *Thomas v. Eastman Kodak*, 183 F.3d 38, 58 (1st Cir. 1999)).

²³³ *Kimble*, 690 F. Supp. 2d at 769–70 (E.D. Wisc. 2010) (citing *Jeffers v. Thompson*, 264 F.Supp.2d 314, 326 (D. Md. 2003) and *Goodwin v. Bd. of Trs. of Univ. of Ill.*, 442 F.3d 611, 619 (7th Cir. 2006)).

²³⁴ “The Fifth Circuit originally identified this type of claim in 1980 in *Jefferies v. Harris Cty Cmty. Action Ass’n*, 615 F.2d 1025 (5th Cir. 1980). The court analogized to *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), which defined a protected ‘sex-plus’ category and found that the overlap between race and another protected classification could constitute a separate class protected by Title VII.” *Kimble*, 690 F. Supp. 2d at 769–70 (citing 1 EMPLOYMENT DISCRIMINATION LAW 286 (Barbara T. Lindemann & Paul Grossman eds., 4th ed., 2007)).

²³⁵ See *Jefferies*, 615 F.2d at 1032–33.

c. Other Protected Status Plus Military Spouse Discrimination

A claim of “plus” discrimination is not limited to gender and race. Any protected status can combine with military spousal status to comprise a claim of “plus” discrimination.²³⁶ We examined gender and race as perhaps the most common forms of “plus” discrimination, particularly for military spouses. But, Title VII provides protection equally for national origin plus and religion plus discrimination. Plus discrimination applies in theory to any non-Title VII protected status by analogy to Title VII. The standards and levels of proof in these cases depend entirely on the underlying protected status.

For example, a plaintiff may be protected under the ADEA in making an age plus military spousal status discrimination claim. This is a claim where the employer refuses to hire, or takes an adverse employment action against, someone age 40 or older because of age coupled with his or her status as a military spouse. The action may be for the purported justification of wanting only older employees who will stay with the employer long-term,²³⁷ assuming a military spouse would move away after the short-term. Unfortunately, as previously discussed, the plaintiff would have a difficult time proving his case of age discrimination because he must show age is a “but for” factor in the decision. Mixed motive theory does not exist for the underlying ADEA case. Thus, to prevail the plaintiff would have the difficult burden of proving that military spouse status was totally false or a complete pretext for the decision.

It might be possible to assert a claim on the basis of sexual orientation plus military spouse discrimination in a state which has sexual orientation anti-discrimination laws or with an employer who contracts with the federal government. For example, a same sex military spouse in a state such as California²³⁸ may assert a claim of sexual orientation plus military spouse discrimination. This is especially the case where the evidence tends to prove that military spousal status is merely a pretext or excuse.

Another area ripe for “plus” discrimination claims, because it is inexplicitly intertwined with military spousal status, is discrimination based on marital status. Twenty-one states²³⁹ prohibit discrimination based on marital

²³⁶ See *Arnett v. Aspin*, 846 F. Supp. 1234, 1240 (E.D. Pa. 1994).

²³⁷ This can be for many reasons. One of which may be that the employer does not wish to create tension associated with younger employees supervising older employees.

²³⁸ CAL. GOV. CODE §§ 12940–51 (2016).

²³⁹ The states are Alaska, California, Connecticut, Delaware, Florida, Hawaii, Illinois,

status.²⁴⁰ In one of these states, if an employer cites to military spouse status as the reason for the adverse employment action, he has necessarily attributed the decision to marital status. At its very core, military spouse discrimination is treating a person less favorably because of being married. The status of the military member makes this group merely a subclass of married people.

As with all intentional discrimination cases, whether one has a viable claim of protected status plus discrimination will depend on the protected status of the military spouse, whether a particular non-Title VII protection exists, and the nature of the evidence in the particular case.

C. Disparate Impact on Protected Classes: Women and Minorities

The foregoing theories have all addressed when an employer intentionally discriminates against military spouses of a particular gender, race, or other protected status.²⁴¹ An entirely different theory and proof construct exists—referred to as “disparate impact”—where an employer utilizes a facially neutral policy or test but which has a discriminatory effect on a protected class.²⁴² A prima facie case of disparate impact requires the plaintiff to show that the selection rate for the protected class is statistically significant, usually interpreted to mean less than 4/5ths of the highest selection rate of any group.²⁴³ The burden then shifts to the employer to prove that the rule or barrier is justified by business necessity.²⁴⁴ It remains an open question whether a court would find categorical exclusion of military spouses closely enough related to the business justification of reducing turnover. Business

Indiana, Maryland, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, Oregon, North Dakota, Virginia, Washington, and Wisconsin. *State Statutes Prohibiting Marital Status Discrimination in Employment*, UNMARRIED AM. (last visited July 6, 2018), <http://unmarriedamerica.org/ms-employment-laws.htm>.

²⁴⁰ *Id.*

²⁴¹ The employer’s intent can be purposeful or, as some courts have asserted, a result of unknowing bias. “Nor must a trier of fact decide whether a decision-maker acted purposively or based on stereotypical attitudes of which he or she was partially or entirely unaware.” *Kimble*, 690 F. Supp. 2d at 768–69 (E.D. Wis. 2010) (citing *Thomas v. Eastman Kodak*, 183 F.3d 38, 58 (1st Cir.1999)) (“unthinking stereotypes or bias”); Melissa Hart, *Subjective Decision Making & Unconscious Discrimination*, 56 ALA. L. REV. 741, 771 (2005) (“unconscious discriminatory attitudes” and “subtle bias”).

²⁴² *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (applying Title VII protection to employment practices which are “fair in form, but discriminatory in operation”).

²⁴³ 29 C.F.R. § 1607.4(D).

²⁴⁴ 42 U.S.C. 2000e-2(k)(1).

necessity has been described as a “heavy burden”; there must be a “manifest relationship,” a “compelling need,” and it must be “necessary to safe and efficient job performance.”²⁴⁵ Additionally, an employer must be able to prove business necessity for the current job for which the military spouse is applying or in which she is serving. A justification based on the effect on future positions or jobs would be inadequate.²⁴⁶ With military spouses only being fourteen percent more mobile than civilian spouses,²⁴⁷ a court may very well find this justification too attenuated to the purported business necessity.

We examined in the preceding section how discrimination against military spouses may be intentional discrimination based on gender, marital status, and possibly race. These “discriminatory treatment” cases discussed above will typically, although not always, require some evidence of discriminatory intent toward the underlying protected class.²⁴⁸ When such evidence is entirely unavailable, or when data regarding employment trends is readily available, a disparate impact theory may be the best approach.

As a separate theory of discrimination, disparate impact equates rejection of military spouses on its face as disparate impact on a protected class or classes. Under the disparate impact doctrine, the effect of overt discrimination against military spouses is illegal by having an impermissibly “significant adverse impact”²⁴⁹ on other protected classes. This section examines such an impact on women and minorities.

1. Disparate Impact on Women

When an employer maintains a policy, whether formal or informal, that causes detriment to military spouses (such as excluding military spouses from consideration for hiring, promotion, or other employment opportunities, or reserving only temporary positions for military spouses), they have

²⁴⁵ *Chambers v. Omaha Girls Club*, 834 F.2d 697, 701 (8th Cir. 1987) (citations omitted).

²⁴⁶ See *Griggs*, 401 U.S. at 431–32 (the barrier must “bear a demonstrable relationship to successful performance of the jobs for which it was used” and even long-range future promotion requirements must “fulfill a genuine business need”).

²⁴⁷ *Spouse Education and Career Opportunities Program*, MILITARY ONE SOURCE (Jan. 24, 2014), http://download.militaryonesource.mil/12038/MOS/MOS_PDFs/SECO_JFSAP_Full_Brief.pdf.

²⁴⁸ As discussed above, commentary about the military spousal status may sometimes be enough under the circumstances.

²⁴⁹ *Chambers*, 834 F.2d at 700.

implemented an arguably facially neutral rule²⁵⁰ with a discriminatory effect on women.

As previously mentioned, 93.2 percent of military spouses are female.²⁵¹ Applying the disparate impact proof construct, a plaintiff can establish a prima facie case if she can show that women are selected at a rate less than 4/5ths of the rate at which men are selected. In an area where enough military spouses live and apply for employment, a policy against hiring military spouses can have a real effect on women applicants and amount to a discriminatory disparate impact.

Of course, the employer can defend against such a claim by proving that the policy is justified by business necessity. However, discrimination will still exist if the military spouse can show a less discriminatory alternative. If the business necessity justification is a need to reduce turnover, the plaintiff may be able to rebut turnover assumptions about military spouses. Or, the employee could offer an alternative such as extending the probationary period for new hires, offering retention incentives, introducing transfer priorities, or instituting more worker-driven on-the-job training programs. Non-utilization of a less discriminatory alternative allows an inference of discrimination.

2. Disparate Impact on Minorities

A policy against hiring military spouses can also lead to a disparate impact on minorities. The racial composition of the military is more diverse than the general United States population. According to the 2010 United States Census, 78 percent of America's 308.7 million people are white, 13 percent are black or African-American, 5 percent are Asian, 1.1 percent identify as Native American, Alaskan Native, Native Hawaiian, or Pacific Islander, and 6 percent identify in an "other" minority group.²⁵² Six percent identify as belonging to more than one ethnic group.²⁵³

The United States Armed Forces is comprised of 68.7 percent white, 17.3 percent black or African-American, 4.2 percent Asian, 2.4 percent Native

²⁵⁰ The rule is "facially neutral" because on its face it does not overtly discriminate against a protected class.

²⁵¹ DoD REPORT, *supra* note 17, at 132.

²⁵² *2010 Census Shows America's Diversity*, U.S. CENSUS BUREAU NEWS RELEASE (Mar. 24, 2011), http://census.gov/newsroom/releases/archives/2010_census/cb11-cn125.html.

²⁵³ *Id.*

American, Alaskan Native, Native Hawaiian, or Pacific Islander, and 4.2 percent “other.”²⁵⁴ These differences in racial composition are not insignificant. Said another way, the active duty Armed Forces are 13 percent less white, 33 percent more black, and 118 percent more Native American than the general population.

These figures are even more impactful when examined at a micro-level for individual military locales. Many military bases are in locations which are organically less diverse. For example, Grand Forks Air Force Base in Grand Forks, North Dakota, is located in a region far less diverse than the general population of the United States. In 2017, Grand Forks County was 87.2 percent white, 4.5 percent black, and 2.8 percent Asian.²⁵⁵ A policy by a Grand Forks employer excluding military spouses from consideration may result in one of these minority groups being hired at a rate less than 4/5ths the rate of non-minority applicants. This pattern plays out in many similarly-composed communities across the United States where the military population is more diverse than the surrounding population.

3. Issues of Proof

Military spouses often hit a barrier with prospective employers who refuse to consider them as applicants simply because of their status as a military spouse. This barrier occurs despite overwhelming qualifications and education levels on average higher than the general population. It occurs despite the adverse impact on women and minorities. However, as a practical matter, proving a disparate impact case can be difficult. The difficulty arises due to a lack of pertinent statistical data as well as the complexity of analyzing the data which is available.

In the context of military spouses, the statistical analysis required by the 4/5ths Rule is inherently problematic. Because the military spouse status is not explicitly protected by law, it is not readily tracked by employers or labor organizations. Employers are unlikely to keep data about military

²⁵⁴ DOD REPORT, *supra* note 17, at 23. A reliable multi-racial percentage is not available because the Army, the largest branch of the armed services, does not report “multi-racial” figures. *Id.*

²⁵⁵ *Quick Facts: Grand Forks County, North Dakota*, U.S. CENSUS BUREAU (July 6, 2018, 11:30 AM), <http://census.gov/quickfacts/fact/table/grandforkscountynorthdakota,nd/PST045217>. The Native American population of Grand Forks County is 2.8 percent, similar to that of the general U.S. population, likely due to the location of multiple Native American reservations in the surrounding area. *Id.*

spouse applicants. Furthermore, because “military spouse” is not a protected status, the EEOC does not maintain reliable data concerning discrimination. This makes comparing ratios of acceptance rates extremely difficult. While “[t]here is no requirement...that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of actual applicants,”²⁵⁶ a claim involving military spouses demands data involving military spouses. The data, which would be useful because it tends to prove discriminatory impact, is difficult to ascertain because it is simply not kept.

Another issue of proof is that a disparate impact challenge based on an exclusion of military spouses has not yet been tested. A court could find it questionable whether disparate impact theory applies to military spouses at all due to the theory’s close relation to USERRA, the statute that protects active duty and reserve military members from employment discrimination based on military service. The Merit Systems Protection Board, the appellate level for individual federal employee claims,²⁵⁷ has recently ruled that USERRA does not permit disparate impact causes of action.²⁵⁸ However, this type of claim is wholly distinct from a military spouse’s claim. A military spouse would submit a disparate impact claim with a well-established underlying theory of discrimination based on gender or race under Title VII. The exclusion of military spouses is merely the facially neutral policy resulting in the disparate impact. A USERRA disparate impact claim, on the other hand, is based on the underlying protections afforded by USERRA only. Therefore, the *Harellson v. USPS* case,²⁵⁹ which found that USERRA does not allow for disparate impact claims, does not answer the question of military spouse disparate impact theory.

²⁵⁶ *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) (citing *Griggs*, 401 U.S. at 430).

²⁵⁷ *About MSPB*, U.S. Merit Sys. Prot. Bd., (last visited July 6, 2018), <http://mspb.gov/About/about.htm>.

²⁵⁸ See *Harellson v. U. S. Postal Serv.*, 2011 M.S.P.B. 3 (2011). *But see* Capt Samuel F. Wright (USN), *Law Review 15059: Does USERRA Provide for Disparate Impact Liability?*, RES. OFFICER ASS’N (July 2015), <http://cdn.ymaws.com/www.roa.org/resource/resmgr/LawReviews/2015/15059-LR.pdf> (citing *Tex. Dep’t of Hous. and Comty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2518–23 (2015)) (arguing that “*Harellson* is not necessarily the last word on this important question” and that after *Harellson* the “Supreme Court...upheld the use of the disparate impact theory under the Fair Housing Act, although that statute does not explicitly provide for disparate impact liability.”).

²⁵⁹ 2011 M.S.P.B. 3.

A major hurdle for the plaintiff in a disparate impact case is to prove that the employer has a policy or practice which categorically excludes or otherwise negatively impacts military spouses. While no such policy may be written or exist in a company handbook, a plaintiff may be able to prove this policy or practice based on comments made by the employer to the applicant (e.g., “I cannot hire you because you’ll move in a few years”) or based on existing employment data (e.g., no military spouses work at the company). Even where the employer has hired some military spouses, they may not work in high-level positions within the company or may not be selected for promotion or other opportunities. However, this type of data is probably not readily available without significant and costly investigation.

Additionally, issues of proof exist in disparate impact cases for non-Title VII protected groups. For example, it is difficult to obtain accurate data showing that military spouse discrimination has a disparate impact on LGBT employees, potentially protected by state law. Gay and lesbian service members were not permitted to openly serve in the military until the repeal of the “Don’t Ask, Don’t Tell” law in 2010,²⁶⁰ which has added to the difficulty in accurately estimating the proportion of homosexual members in the military as compared to the general civilian population.²⁶¹ To add to this difficulty, marriage among homosexual couples was not permitted nationwide until June 2015²⁶² and the percentage of same-sex couples who are married has rapidly increased as a result.²⁶³ Thus, at this stage it may not be possible to prove that a categorical exclusion of military spouses has a disparate impact on homosexual employees because the data is new and the trends are evolving so rapidly that they may defy reliability in a proof construct.

Because disparate impact claims do not involve proof of discriminatory intent, the proof is highly reliant on data in order to provide an inference of discrimination. As a result, without reliable data about hiring, firing, or promoting military spouses, a plaintiff may encounter extreme difficulty in

²⁶⁰ Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

²⁶¹ Some research suggests that the prevalence of lesbians in the military is much higher than in the general population (10.7 percent of women in the military versus 4.2 percent in the general population). See, e.g., Bernard D. Rostker, Susan D. Hosek, and Mary E. Vaiana, *Gays in the Military: Eventually, New Facts Conquer Old Taboos*, RAND CORP. (Spring 2011), <http://rand.org/pubs/periodicals/rand-review/issues/2011/spring/gays.html>.

²⁶² Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

²⁶³ Paola Scommegna, *Existing Data Show Increase in Married Same-Sex U.S. Couples*, POPULATION REFERENCE BUREAU (Dec. 2016), <http://prb.org/increase-in-married-same-sex-us-couples>.

proving a disparate impact claim based on military spouse status. The best practice involves examining the data and determining whether the evidence supports both a discriminatory treatment and disparate impact claim.²⁶⁴ Unlike some areas of the law,²⁶⁵ pleading both theories does not necessarily detract from either theory alone. Rather, pleading both theories may resemble more of an alloy where each claim is strengthened by the evidence supporting the other theory, creating a case even stronger than each claim on its own. Regardless, issues of proof for disparate impact claims tends to strengthen the argument that reform is necessary to increase the viability of discrimination claims based on military spousal status.

IV. FIXING THE PROBLEM

A. Movement in the Right Direction

Military spouse discrimination is a problem that potentially affects more than 707,000 military families.²⁶⁶ Because it affects so many, and because this population is relatively sympathetic, significant efforts have been made to alleviate the problem. These efforts are largely aimed at connecting more military spouses to jobs. The efforts, however, are not targeted at the root of the problem—employers disfavoring military spouses. This section provides an overview of some of the more helpful triage efforts before addressing how to target the root cause.

One example of helping spouses obtain jobs more easily is through hiring preference. Military spouses, along with veterans and certain other categories, are provided a limited hiring preference for many federal jobs.²⁶⁷

²⁶⁴ “It is not uncommon for a disparate treatment claim and disparate impact claim to arise in the same litigation from the same set of facts.” *Chambers*, 834 F.2d at 944 (citing *Jones v. International Paper Co.*, 720 F.2d 496, 499–500 (8th Cir. 1983)).

²⁶⁵ The example of alternative pleading comes to mind where pleading two separate theories of proof, particularly in the criminal context, has a tendency to detract from the prosecutor’s case and is a signal that the evidence is not sufficiently strong to prove one theory over another.

²⁶⁶ DoD REPORT, *supra* note 17, at 42.

²⁶⁷ *Military Spouse Preference in Employment*, MILITARY ONESOURCE (Mar. 15, 2018, 10:40 AM), <http://militaryonesource.mil/-/military-spouse-preference-in-employment>. See also DoD Authorization Act of 1986, Pub. L. No. 99-145, § 806, 99 Stat. 583 (1985); *Employment of Spouses of Active Duty Military Members Stationed Worldwide*, DoD INSTRUCTION 1404.12 (Jan. 12, 1989), http://biotech.law.lsu.edu/blaw/dodd/corres/pdf/i140412_011289/i140412p.pdf.

On September 25, 2008, President George W. Bush signed Executive Order 13,473, which permits agencies to provide noncompetitive appointments of military spouses to positions in the competitive service if certain conditions are met.²⁶⁸ The spouse must be authorized to relocate with the military member, actually relocate, be appointed within two years of the relocation, and work within the reasonable daily commute area of the military assignment.²⁶⁹ Some states offer their own hiring preferences for veterans,²⁷⁰ but not military spouses.

The issue of military spouse employment gained national attention through the First Lady Michelle Obama and Second Lady Dr. Jill Biden's "Joining Forces" campaign. The campaign was launched in June 2011 and aimed at helping secure greater employment opportunities for America's veterans and spouses.²⁷¹ The campaign featured the launch of the Military Spouse Employment Partnership²⁷² (MSEP), an online network of employers who have committed to hiring military spouses. The MSEP provides committed employers direct recruitment of military spouses by posting job advertisements to a central website used by military spouses seeking jobs. Since 2011, the network of employers has grown to 335 employers who have hired approximately 100,000 military spouses.²⁷³

Other efforts have been made by military spouses themselves to aid other military spouses in securing employment. One such effort, America's Career Force, grew out of a military spouse's frustration in securing long-term professional employment.²⁷⁴ America's Career Force seeks to connect

²⁶⁸ Exec. Order No. 13,473, 5 C.F.R. § 315.612 (2008).

²⁶⁹ *Special Hiring Authorities for Military Spouses and Family Members*, FEDS HIRE VETS (May 4, 2017, 12:10 PM), <http://fedshirevets.gov/job-seekers/special-hiring-authorities/family-members>.

²⁷⁰ *See, e.g., Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256 (1979) (A Massachusetts law permitting hiring preference of veterans was upheld despite disparate impact on non-veteran women.).

²⁷¹ Colonel Rich Morales, *Helping Employers Connect to Job Seeking Service Members, Veterans and Their Families*, THE WHITE HOUSE PRESIDENT BARACK OBAMA (Apr. 23, 2014, 15:54 PM), <http://obamawhitehouse.archives.gov/blog/2014/04/23/helping-employers-connect-job-seeking-service-members-veterans-and-their-families>.

²⁷² *Mil. Spouse Emp't P'ship, Career Portal* (July 5, 2018, 3:00 PM), <http://msepjobs.militaryonesource.mil/msep/>.

²⁷³ *Mil. Spouse Emp't P'ship, Career Portal, About Us*, (July 5, 2018, 3:00 PM), <http://msepjobs.militaryonesource.mil/msep/content/about-us>

²⁷⁴ *About, AMERICA'S CAREER FORCE* (last visited July 5, 2018), <http://americascareerforce>.

military spouses with businesses looking to employ qualified professionals for remote work.²⁷⁵

Other grassroots efforts have been made at easing the difficulties faced by military spouses who hold professional licensures which differ state-by-state. One example is the Military Spouse J.D.²⁷⁶ Network (MSJDN), which began as a group of attorneys who sought to have their bar admission and licensure recognized by other states.²⁷⁷ The network has grown to over 1,000 members and has achieved licensing accommodations for attorneys in 24 states and the Virgin Islands.²⁷⁸ The MSJDN is actively seeking change to the ABA's licensing rules, which could allow military spouses who are licensed attorneys to practice in all 50 states.²⁷⁹ While the MSJDN represents a success story in progress, significant hurdles still exist for many other professions which require state licensure. These include teachers, real estate agents, counselors, accountants, nurses, and other healthcare professionals.²⁸⁰ While all fifty states have eased licensure requirements in some respects for military spouses, it still remains difficult and costly for spouses to navigate the process to take advantage of rule changes.²⁸¹ Applying for and obtaining a new state license with each military move represents extremely burdensome employment barriers for many military spouses.

org/about/#howitbegan.

²⁷⁵ *Id.*

²⁷⁶ Juris Doctor.

²⁷⁷ According to the Military Spouse J.D. Network, "the...[Network] was formed in Summer 2011 by two military spouses frustrated with the challenges of maintaining a legal career that seemed incompatible with the military lifestyle. They formed MSJDN to advocate for licensing accommodations for military spouses, including bar membership without additional examination, as well as network with other military spouses with JDs." *About MSJDN*, MIL. SPOUSE J.D. NETWORK (last visited July 5, 2018), <http://msjdn.org/about>.

²⁷⁸ *State Licensing Efforts*, MIL. SPOUSE J.D. NETWORK (last visited July 5, 2018), <http://msjdn.org/rule-change>.

²⁷⁹ *About MSJDN*, MIL. SPOUSE J.D. NETWORK (last visited July 5, 2018), <http://msjdn.org/about>.

²⁸⁰ *Spouse Licensure*, MIL. COMTY. & FAM. POL'Y FACT SHEET (last visited July 5, 2018), <http://download.militaryonesource.mil/12038/MOS/Factsheets/Factsheet-Spouse-Licensure.pdf>.

²⁸¹ Amy Bushatz, *Push to Ease Licensing for Military Spouses Remains Patchwork by State* (last visited July 5, 2018), <http://military.com/daily-news/2016/07/05/push-ease-licensing-military-spouses-remains-patchwork-state.html>.

In addition to efforts aimed at easing the job application process and licensure requirements for military spouses, some systemic changes have helped military spouses incidentally. One example is the fundamental change in the military retirement system. Prior to this year, the military's retirement system²⁸² consisted of an all-or-nothing structure. If you served twenty years, you would receive a pension; if you did not serve a full twenty years, you would receive no retirement benefits.²⁸³ The pension comes in the form of an annuity which multiplies the member's average of their highest three years of basic pay by 2.5 percent of the member's years of service. Said another way, members who serve twenty years will receive 50 percent of their base pay from their last three years of service.

However, 81 percent of military members never made it to retirement and received no retirement benefits at all because they exited the military prior to attaining twenty years of service.²⁸⁴ In a situation in which a civilian spouse is either unemployed or no longer seeking work due to the frustration of employment discrimination, the vast majority of military families were left with no pension and no portable retirement savings after many years of service falling short of twenty years. This problem is further compounded by the tendency of military spouses to accumulate less work-related experience than their civilian counterparts.²⁸⁵ Employers who discriminate based on age could readily cite military spouse status as the reason for not hiring. Because the Age Discrimination in Employment Act (ADEA) does not permit mixed motive cases, a claim could be easily defeated where the employer shows any reasonable factor other than age is the basis for an adverse employment decision.

²⁸² As of January 1, 2018, for all new military members and those with less than ten years of service, the traditional retirement system was abolished and replaced by the "Blended Retirement System" which more closely resembles a portable 401(k) system commonly found in the private sector. Karen Parrish, *DoD Ramps Up Training on Blended Retirement System*, DoD NEWS, DEF. MEDIA ACTIVITY (June 1, 2016), <http://defense.gov/News/Article/Article/785732/dod-ramps-up-training-on-blended-retirement-system>.

²⁸³ A notable exception exists for members who are "medically retired," or receive a disability rating due to service-connected illness or injury causing retirement prior to reaching twenty years. See *Qualifying for a Disability Retirement*, DEFENSE FINANCE & ACCT. SERV. (last visited July 5, 2018), <http://www.dfas.mil/retiredmilitary/disability/disability.html>.

²⁸⁴ Karen Parrish, *DoD Ramps Up Training on Blended Retirement System*, DEPARTMENT OF DEFENSE (DoD) NEWS, DEFENSE MEDIA ACTIVITY (Jun. 1, 2016), <https://www.defense.gov/News/Article/Article/785732/dod-ramps-up-training-on-blended-retirement-system>.

²⁸⁵ WORKING AROUND THE MILITARY, *supra* note 95, at 17.

The Department of Defense is instituting fundamental changes to the retirement system in order to encourage individual retirement savings and provide some portable benefit to members who serve more than two years. Although the purpose of these changes is recruiting, retention, and cost-saving measures for the government,²⁸⁶ a secondary effect of the change is helping young military families who experience military spousal employment discrimination. It encourages these families to start thinking about retirement savings much earlier, especially where the family is single income due to discrimination.

Despite these positive changes for military spouses, efforts at easing the job application process represent a band-aid approach. They do not address the root cause of the issue—bias against military spouses (who happen to be women, more diverse, and married) based on unfair stereotyping. Until the underlying discrimination is outlawed, military spouses will continue to face debilitating unemployment.

B. A Call for Action: Amending USERRA to Include Military Spouses

Luckily for military spouses, the answer to the problem has a simple solution. Congress can and should amend USERRA to include military spouses within the law's discrimination protections. The most effective way to address bias against military spouses in the hiring process is to remove military spousal status as a legitimate reason not to hire. As the law currently stands, mounting a successful claim based on military spouse status would be difficult. It is entirely reliant on proving another underlying motive for the discrimination, or an illegal effect on another group of people. Proving prima facie disparate treatment is difficult without intent or pretext evidence. Disparate impact cases can lack sufficient information to be utilized or easily understood by the discriminatee. Furthermore, military spouse status operates as a legal basis for employers to discriminate when their true motive in whole or in part is bias based on gender, race, or marital status. For cases in which the employer is genuinely motivated by reducing turnover, and no illegal disparate impact can be proven, a military spouse is left without recourse.

Unluckily for military spouses, the answer requires an act of Congress, which is never a quick or simple process. The political will for such a change

²⁸⁶ The DoD projects near-term savings of \$8.1 billion over the next ten years. *DoD Blended Retirement System Proposal*, MILITARY TIMES (May 4, 2017, 12:50 PM), <http://ec.militarytimes.com/static/pdfs/Retirement-Reform-Info-Paper.pdf>.

needs to have substantial organic pressure by constituents to gain steam. It requires bipartisan support to be approved in both houses of Congress and signed by the President. Bipartisan appeal is not far-fetched for this type of issue. The issue involves two subjects—discrimination protection and the military—that historically have broad appeal for both Democrats and Republicans. On the other hand, powerful business leaders may oppose such a change due to its effects on their hiring and promotion discretion.²⁸⁷ To effectuate momentum toward amending USERRA, military spouse social groups could conduct a grassroots campaign, which may not fall on deaf ears of representatives from either political party.

Precedent exists for Congress recognizing that discrimination against the spouse is discrimination against the service member. More than thirty years ago, Congress recognized that crafty employers would attempt to circumvent the age discrimination prohibitions in the ADEA by instituting cost-saving measures against spouses of older workers. The Deficit Reduction Act of 1984 was passed amending the Age Discrimination in Employment Act “to require that employees’ spouses ages 65 through 69 receive the same treatment under group health plans as employees’ spouses under age 65.”²⁸⁸ Additionally, the ADA was drafted to include protections for those associated with individuals with a disability, including those married to disabled individuals.²⁸⁹ The ADA’s provision was designed to combat the same type

²⁸⁷ The Supreme Court has formally acknowledged this other side of the coin:

Together, *Griggs* holds and the plurality in *Smith* instructs that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose. These cases also teach that disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system. And before rejecting a business justification—or, in the case of a governmental entity, an analogous public interest—a court must determine that a plaintiff has shown that there is “an available alternative... practice that has less disparate impact and serves the [entity’s] legitimate needs.”

Tex. Dep’t. of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507, 2518 (2015)(citing *Ricci*, 557 U.S. at 578).

²⁸⁸ *The Law*, EEOC 35TH ANNIVERSARY, *supra* note 61.

²⁸⁹ “[The] ADA’s ‘association provision’ protects qualified individuals from employment discrimination based on the ‘known disability of an individual with whom the qualified individual is known to have a relationship or association.’” *Torres-Alman v. Verizon*

of discrimination by association faced by military spouses by virtue of their relationship with service members.²⁹⁰ Although the same provision does not exist under USERRA, military spouses may make an analogous argument in support of amending USERRA.

Without an outright amendment to explicitly include spouses, courts seem very unlikely to extend USERRA protections to spouses. In fact, a few federal courts have already decided that Congress did not intend USERRA to extend to spouses.²⁹¹ These cases are all in the context of successor rights for widows of service members. Unfortunately, the courts have in dicta precluded all military spouses from bringing a cause of action under the statute.

Until the time that constituents are mobilized and Congress is prompted to take action, solace could come in the form of a judge's ruling or jury's verdict. It is not outside the realm of possibility that a judge rule as a matter of law that military spouse status is an illegitimate business justification. The ruling could be grounded on the premise that military spouses are so overwhelmingly female that such justification must be discrimination based on sex. However, such a ruling is highly unlikely due to the lack of precedent. More likely is relief in the form of a jury's verdict finding substantial damages for a plaintiff where the employer's justification rested on

Wireless P.R., Inc., 522 F. Supp. 2d 367, 386 (D.P.R. 2007) (citing 42 U.S.C. § 12112(b)(4)).

²⁹⁰ “The legislative history of section 12112(b)(4) makes clear that the provision was intended to protect qualified individuals from adverse job actions based on ‘unfounded stereotypes and assumptions’ arising from the employees’ relationships with particular disabled persons.” *Torres-Alman* 522 F. Supp. 2d at 386 (citing *Oliveras-Sifre v. P.R. Dep’t of Health*, 214 F.3d 23, 26 (1st Cir. 2000)).

²⁹¹ 38 U.S.C.A. § 4311; *Harden-Williams v. Agency for Int’l Dev.*, 469 Fed. Appx. 897, 899 n.2 (Fed. Cir. 2012) (“In any event, this court has already held that a widow of a military serviceman who has not herself served in a uniformed service is not entitled to the protections of USERRA.”); *Lourens v. Merit Sys. Prot. Bd.*, 193 F.3d 1369, 1371 (Fed. Cir. 1999) (“If Congress desired [§ 4311(a)] to include spouses or widows [of those in uniformed service], an additional phrase in the statute would have done the job. That phrase is not there. [And,] because the statute clearly limits anti-discrimination coverage to claimants who are service members or applicants, Mrs. Singletary’s claim against UPS falls outside the USERRA’s scope of protection.”); *Singletary v. Prudential Ins. Co. of Am.*, 105 F. Supp. 3d 627, 635 (E.D. La. 2015) (“The statute’s text is clear and direct. This Act applies, for example, to preclude discrimination against a service member by that service member’s employer. Nowhere in the plain text of the statute does the USERRA prohibit discrimination against a spouse of a service member by the spouse’s employer.”).

military spouse status. A jury could utterly reject the justification and find it to be completely pretextual for other sex- or race-based animus. A substantial jury verdict could garner much attention from the employer community and cause employers to rethink policies against hiring military spouses. At the very least, it might cause employers to be less open about voicing distaste and bias for military spouses.

V. CONCLUSION

Military spouses are a group who encounter pervasive employment discrimination by virtue of their marital partners' military service to the United States. As shown herein, current anti-discrimination protections address military service, but offer no aid to spouses. However, because of the unique characteristics of military spouses, they are in fact indirectly protected under current law. The vast majority of military spouses are women. Their racial composition is often more diverse than their surrounding communities and the labor market. Military spouses are also on average more educated and qualified than their civilian counterparts in the labor market. This makes comparison to less qualified applicants easier. Discrimination claims often involve proving that the claimant was better qualified than the person selected. Military spouses, by virtue of their characteristics, are better able to prove this point.

Military spouses may have viable claims for employment discrimination based on both discriminatory treatment and disparate impact theories. A claim of discriminatory treatment may lie in sex- or race-based stereotyping, mixed motive claims, or protected status "plus" military spouse status claims. And, although the evidence may be more difficult to gather or ascertain, statistics may be used to prove a pattern or practice claim or disparate impact theory. These claims are most often based on the underlying protections for gender and race afforded by Title VII of the Civil Rights Act of 1964 as amended.

Efforts at alleviating military spouse unemployment and underemployment have essentially been triage on a much deeper problem. Efforts have been directed at the effects rather than the root cause of employer bias. The most effective remedy to put an end to apparent discrimination against the group is to amend USERRA and extend its protections to military spouses of active service members, supplying a cause of action specifically for military spouses. Another potential solution that may arise organically is for the courts to find that military spouse status is an illegitimate or pretextual business

justification based on the group's inherent characteristics. Either solution will achieve the outcome of preventing employers from acting upon damaging stereotypes about military spouses in making their employment decisions.

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