THE AIR FORCE LAW REVIEW

VOL. 81 **2020**

Authority to publish automatically expires unless otherwise authorized by the approving authority. Distribution: members of The Judge Advocate General's Corps, USAF; judge advocates of the Army, Navy, Marine Corps, and Coast Guard; law schools; and professional bar association libraries.

THE AIR FORCE LAW REVIEW

The Air Force Law Review is a publication of The Judge Advocate General, United States Air Force. It is published semiannually by The Judge Advocate General's School as a professional legal forum for articles of interest to military and civilian lawyers. *The Air Force Law Review* encourages frank discussion of relevant legislative, administrative, and judicial developments.

The Air Force Law Review does not promulgate Department of the Air Force policy. The opinions and conclusions expressed in this publication are solely those of the author and do not necessarily reflect the opinion of The Judge Advocate General, The Judge Advocate General's Corps, or any other department or agency of the U.S. Government.

The Air Force Law Review solicits contributions from its readers. Additionally, readers who desire reprint permission or further information should contact the Editor, *The Air Force Law Review*, The Judge Advocate General's School, 150 Chennault Circle, Maxwell Air Force Base, Alabama, 36112-6418, or e-mail at afloa.afjags@us.af.mil. Official governmental requests for free copies, not under the depository program, should also be sent to the above address.

Cite this law review as 81 A.F. L. Rev. (page number) (2020)

The Air Force Law Review is available online at http://www.afjag.af.mil/library.

INFORMATION FOR CONTRIBUTORS

The Air Force Law Review publishes articles, notes, comments, and book reviews. The Editorial Board encourages readers to submit manuscripts on any area of law or legal practice that may be of interest to judge advocates and military lawyers. Because *The Air Force Law Review* is a publication of The Judge Advocate General's Corps, USAF, Air Force judge advocates and civilian attorneys are particularly encouraged to contribute. Authors are invited to submit scholarly, timely, and well-written articles for consideration by the Editorial Board. *The Air Force Law Review* does not pay authors any compensation for items selected for publication.

Manuscript Review. Members of the Editorial Board review all manuscripts to determine suitability for publication in light of space and editorial limitations. Manuscripts selected for publication undergo an editorial and technical review, as well as a policy and security clearance as required. The Editor will make necessary revisions or deletions without prior permission of, or coordination with the author. Authors are responsible for the accuracy of all material submitted, including citations and other references. *The Air Force Law Review* generally does not publish material committed for publication in other journals.

Manuscript Form. Manuscripts may be submitted by disc or electronic mail in Microsoft Word format. Please contact the Editor at (334) 953-2802 for submission guidelines or contact the Editor at afloa.afjags@us.af.mil and provide your electronic contact information. Authors should retain backup copies of all submissions. Footnotes must follow the format prescribed by THE BLUEBOOK, A UNIFORM SYSTEM OF CITATION (20th ed. 2015). Include appropriate biographical data concerning the author(s), such as rank, position, duty assignment, educational background, and bar affiliations. The Editorial Board will consider manuscripts of any length, but articles selected for publication are generally less than 60 pages of text. *The Air Force Law Review* does not return unpublished manuscripts.

Distribution. *The Air Force Law Review* is distributed to Air Force judge advocates. In addition, it reaches other military services, law schools, bar associations, international organizations, foreign governments, federal and state agencies, and civilian lawyers.

OVER YOUR DEAD BODY: AN ANALYSIS ON REQUESTS FOR RELIGIOUS ACCOMMODATIONS FOR IMMUNIZATIONS AND VACCINATIONS IN THE UNITED STATES AIR FORCE

*Lieutenant Colonel Christopher J. Baker**

* Lieutenant Colonel Christopher J. Baker, USAF, (M.A., Military Operational Art and Science, Air Command and Staff College (2015); J.D., Valparaiso University School of Law, cum laude (2004); B.A., Political Science, Western Michigan University, summa cum laude (2001)) is the Staff Judge Advocate, 82d Training Wing, Sheppard Air Force Base, Texas. He is a member of the Indiana bar.

I. Introduction

The commander of an operational squadron is sitting in her office. Her unit's mission is to maintain quality aircrew and aircraft to mobilize, deploy, and provide intra-theater capabilities worldwide for Department of Defense customers. The unit supports theater commanders' requirements with combat-delivery capability.

An enlisted member who recently reported to the squadron knocks on her door and asks if he can speak with the commander about an issue. The Airman says he would like to request a religious exemption for all vaccinations and immunizations. He says he feels it is up to God whether he lives or dies, and whether he is sick or healthy. He believes receiving vaccinations goes against God's will for him. He says his body is a temple of the Holy Spirit, and vaccinations corrupt the sanctity of the temple.

Naturally, the commander is concerned. She has no reason to think the Airman is insincere, but she has a worldwide mission to accomplish and readiness requirements to meet. She has been watching the news, and the outbreaks of measles across the country alarms her. The Airman is not currently tasked to deploy, but the unit deploys frequently to austere locations and with little notice. With all the stories in the news about measles outbreaks, she wants to make sure every member of the unit is safe and healthy. Her gut instinct is to deny the request — this is, after all, an issue about safety, readiness, and mission accomplishment. In her mind, this must certainly be the ultimate concern. But she is unsure what to do and what authorities she has, so she tells the Airman she understands his concern and will look into it. Then she calls her judge advocate.

Unfortunately, the current publications governing religious accommodations to the immunization requirement fail to provide adequate guidance for practitioners to navigate the intricacies between the command's need to accomplish the mission and the member's First Amendment rights. In these and similar situations, particularly now that a vaccine for the novel coronavirus 2019 (COVID-19) has been developed, the Air Force must find a way to accomplish its missions while working within the law to accommodate religious accommodation requests. The Air Force must ensure commanders are armed to address the process of religious accommodation requests. Airmen do not surrender all First Amendment rights when joining the military, but the Air Force has a mission to accomplish and must be able to use all assigned personnel to further that end.

The current process simply directs the medical community and the unit commander to counsel the applicant on the implications of the accommodation request and send the request to the commander with approval authority, who should receive input from medical, legal and chaplain personnel to make a determination. If the commander denies the request, the applicant then appeals to the Air Force Surgeon General, rather than a commander, for final determination. There is no guidance for those who receive the application to investigate and frame the application for the decision authority. While it is desired and generally necessary to give commanders space and flexibility to command, many difficult First Amendment issues require more guidance to navigate successfully the interplay and tension between the government's compelling interest of mission accomplishment and the Airman's rights.

A new process must be developed which incorporates advice from military physicians, chaplains, and judge advocates as to the merits of the application and less restrictive means to both maintain the member's health and accomplish the mission. The approval authority should be moved down the chain of command, and a commander, who is ultimately responsible for ordering men and women into harm's way, should be the appeal authority (after receiving input from the subject matter experts).

Even with an improved process, the Air Force will not sacrifice lethality while accommodating requests for religious accommodations from vaccination requirements. Commanders must have discretion to determine what is necessary to ensure lethality, readiness, and health of their respective units. There are many options commanders can utilize to ensure a lethal force while respecting an Airman's individual religious beliefs. The right option to meet both goals requires a case-by-case analysis that commanders are best positioned to make. However, if a commander decides no accommodation can be made, Airmen refusing to receive required vaccines for religious reasons should be allowed to separate honorably. Creating the option for Airmen to do so requires necessary changes in regulations and the law.

Part II will briefly explain the origins of the Religious Freedom Restoration Act and the act itself. It then discusses current regulations governing religious accommodation requests in the Air Force.

Part III will walk through the analysis of such a request as required by the Religious Freedom Restoration Act, thereby providing a framework for a procedural guide for practitioners to use when wading through the delicate nuances of religious accommodation requests to the vaccination requirement.

It will discuss courts' traditional deference to military authorities and whether the District Court for the District of Columbia's decision in *United States v. Singh* has limited the military's ability to deny such a request. While deference must continue to be granted to military authorities, that deference will be framed against the Air Force's assessment of the least restrictive means available to further its compelling interests of mission accomplishment and health and safety of the force. Part III will also provide considerations for requests likely to arise once the COVID-19 vaccine is issued to military members.

Part IV will briefly provide a proposed new procedural process for vaccination accommodation requests. It will then propose legislation to provide a basis for discharge if the Air Force determines it is unable to accommodate the request.

The Religious Freedom Restoration Act provides an essential framework to balance military necessity with the First Amendment. Diversity contributes to lethality. Without the Religious Freedom Restoration Act's protections, many commanders will choose not to permit accommodations which have no impact on readiness, lethality, and good order and discipline. If the military were free to stifle religious expressions, many people of faith will choose not to join.[1]

II. From *Smith* to Service Regulations: an Evaluation of the Rules of the Road for Vaccination Accommodation Requests

A. *Employment Division v. Smith* and the Religious Freedom Restoration Act

All discussions on religious accommodations begin with the 1990 Supreme Court decision of *Employment Division v. Smith*.[2] The case addressed an Oregon law prohibiting the knowing or intentional possession of a "controlled substance" unless a medical practitioner prescribed the substance.[3] The respondents in the case, both members of a Native American

---

[1] This article will not delve into the efficacy of vaccinations or explore deeply the fact that the Department of Defense does not engage in titer testing to determine whether the vaccinations it provides actually provide immunity for its service members, as these topics could be the subject of an entire article.

[2] Employment Div. v. Smith, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Tanzin v. Tanvir, No. 19-71, 2020 U.S. Dist. LEXIS 5987 (Dec. 10, 2020).

[3] *Smith*, 494 U.S. at 874.

Church, were fired from their jobs with a private drug rehabilitation organization for ingesting peyote for sacramental reasons while off duty as part of a Native American Church ceremony.[4] The respondents then applied to the Oregon Employment Division for unemployment benefits, and their requests were denied because their use of peyote was considered work-related "misconduct."[5]

The Oregon Court of Appeals and Oregon Supreme Court both determined the denial of benefits violated the respondents' free exercise rights under the First Amendment.[6] On remand, the Oregon Supreme Court clarified that Oregon's controlled substance law did not excuse the sacramental use of peyote, yet maintained that prohibiting its use for sacramental purposes violated the Free Exercise Clause.[7] The United States Supreme Court granted certiorari.[8]

The U.S. Supreme Court ultimately disagreed that the Free Exercise Clause was violated by punishing the sacramental use of peyote. Justice Scalia, writing for the majority, explained, "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."[9] Since the law was neutral toward religion, the Court declined the respondents' request to apply the compelling interest test.[10] Justice Scalia warned:

> Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld v. Brown*, 366 U.S. [599, 606 (1961)], and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order.[11]

---

[4] *Id.*

[5] *Id.*

[6] *Id.* at 874-75.

[7] *Id.* at 876 (internal quotations and citations omitted).

[8] *Id.* (citing Employment Div. v. Smith, 489 U.S. 1077 (1989)).

[9] *Smith*, 494 U.S. at 878-79.

[10] *Id.* at 888.

[11] *Id*. (emphasis in original).

Although the Court did not apply strict scrutiny and the compelling interest standard to a neutral law, it invited the federal and state legislatures to use their power to do so:

> But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[12]

In upholding the Oregon law, the Court determined the free exercise of religion does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability.[13]

Congress accepted the Court's invitation to legislate the appropriate standard for "neutral" laws toward religion by passing the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA).[14] Finding that "the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution," and "laws 'neutral' toward religion may burden religious exercise as surely as laws intended

---

[12] *Id.* at 890.

[13] *Id.*

[14] Religious Freedom Restoration Act (RFRA) 42 U.S.C.S. § 2000bb (1993); Religious Land Use and Institutionalized Persons Act (RLUIPA) 42 U.S.C.S. § 2000cc (2000). The provisions of RLUIPA are nearly identical to RFRA in that they both prohibit the imposition of a substantial burden on religious exercise unless the government demonstrates the imposition of the burden on that person is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. RLUIPA applies to religious freedoms of institutionalized persons. While both acts ensure religious freedoms, this article only discusses RFRA because this statute, rather than RLUIPA, applies to the Department of Defense. However, since the government has an interest in maintaining the health and safety of both institutionalized persons and those charged with guarding them, challenges under this statute are informative when reviewing the military's interests in maintaining a healthy, lethal force.

to interfere with religious exercise," Congress determined "governments should not substantially burden religious exercise without compelling justification."[15] Congress stated its purpose in passing the RFRA was "to restore the compelling interest test" and "to guarantee its application in all cases where free exercise of religion is substantially burdened."[16]

The RFRA provides individuals better ability to practice their religion when the federal government's neutral laws prevent them from doing so. Under RFRA, the individual challenging a statute has the burden of showing the government's policy "implicates his religious exercise" — i.e., that "the relevant exercise of religion is grounded in a sincerely held religious belief" — and the government's policy substantially burdens that exercise of religion.[17] The burden then shifts to the government to show the policy "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[18] RFRA provides both broad protection of the free exercise right and a broad right of action for judicial relief.[19]

When enacting the RFRA, Congress specifically acknowledged the importance of maintaining order and discipline within the military ranks, and it noted the expectation that courts would adhere to the tradition of judicial deference in matters involving both prisons and the military.[20] However,

---

[15] 42 U.S.C.S. § 2000bb (a) (1) – (3).

[16] 42 U.S.C.S. § 2000bb (b) (1) and (2).

[17] Holt v. Hobbs, 574 U.S. 352, 360-61 (2015). *See also* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 428 (2006) (noting the plaintiff's *prima facie* case under RFRA is to show the application of the government's policy "would (1) substantially burden (2) a sincere (3) religious exercise") (citing O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft, 282 F. Supp. 2d 1236, 1252 (D.N.M. 2002)).

[18] 42 U.S.C.S. § 2000cc-1(a); *see also Holt*, 574 U.S. at 362; *see* 42 U.S.C.S. § 2000bb-2(3) ("[T]he term 'demonstrates' means meets the burdens of going forward with the evidence and of persuasion.").

[19] *See* 42 U.S.C.S. § 2000bb-1(c) ("A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.")

[20] 139 Cong. Rec. S14461 (daily ed. Oct. 27, 1993). On May 6, 1993, Senator Chuck Grassley asked Senator Orrin Hatch how the bill would apply to the military and prisons where "the court has stated-the government has a very strong interest in order and discipline." Senator Hatch replied:

> I believe the United States military will certainly be able to maintain good order, discipline, and security under this bill. The courts have always recognized the compelling nature of our military's interest in

it also expressed its clear understanding that RFRA's heightened standard of review of religious accommodation determinations would also apply to the military.[21]

B. Department of Defense Directive Publications

Regulations in place address both religious accommodations and immunizations. Department of Defense Instruction (DoDI) 1300.17, *Religious Liberty in the Military Services*, provides that the Services will accommodate a member's sincerely held religious beliefs if the accommodation does not have an adverse impact on military readiness, unit cohesion, and good order and discipline.[22] The DoDI recognizes that some requests, such as requests for religious exemptions for immunizations, may have an impact on military readiness, unit cohesion, and good order and discipline.[23] In such cases, the DoDI instructs that the RFRA is the appropriate framework for analysis.[24] That is, a request for an accommodation from a military practice, duty, or policy that substantially burdens an Airman's exercise of religion may only

---

> order, discipline, and security in the regulation of our armed forces and have always extended to them significant deference. I would expect this deference to continue under the bill.

[21] H.R. 103-88, 103d Cong. (1st Sess. 1993).

> Pursuant to [RFRA], the courts must review the claims of prisoners and military personnel under the compelling governmental interest test. Seemingly reasonable regulations based upon speculation, exaggerated fears of thoughtless policies cannot stand. Officials must show that the relevant regulations are the least restrictive means of protecting a compelling governmental interest. However, examination of such regulations in light of a higher standard does not mean the expertise and authority of military and prison officials will be necessarily undermined. The Committee recognizes that religious liberty claims in the context of prisons and the military present far different problems for the operation of those institutions than they do in civilian settings. Ensuring the safety and orderliness of penological institutions, as well as maintaining discipline in our armed forces, have been recognized as governmental interests of the highest order.

[22] U.S. Dep't of Def., Instr. 1300.17, Religious Liberty in the Military Service, ¶ 1.2.b (Sept. 1, 2020) [hereinafter DoDI 1300.17].

[23] Although DoDI 1300.17 is silent on processes for immunizations and vaccinations specifically, it directs the Services to consider religious beliefs as a factor for the waiver of required medical practices, and the request "must be consistent with mission accomplishment, including consideration of potential medical risks to other persons comprising the unit or organization." *Id.* at ¶ 3.3.c.

[24] *Id.* at ¶ 1.2.e.

be denied when the practice, duty, or policy furthers a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest.[25] Significantly, in addition to utilizing the RFRA framework, the DoDI also states, "[a] Service member's expression of such beliefs may not, in so far as practicable, be used as the basis of any adverse personnel action, discrimination, or denial of promotion, schooling, training, or assignment."[26]

The Air Force Instruction for immunizations is a combined instruction: Army Regulation 40-562/BUMEDINST 6230.15B/AFI 48-110_IP/CG COMDINST M6230.4G, *Immunizations and Chemoprophylaxis for the Prevention of Infection Diseases*,[27] (hereinafter AFI 48-110_IP). The Instruction explains that the Air Force does not grant "permanent exemptions for religious reasons" and MAJCOM commanders are the approval authority for temporary (up to 365 days) exemptions. AFI 48-110_IP states that while medical exemptions may be temporary (up to 365 days) or permanent, it is currently Air Force policy not to grant permanent exemptions for religious reasons.[28] The Instruction later seemingly contradicts itself in Table C-2 in which it classifies religious waivers as administrative refusals, and states these waivers, which may not be permanent, are "indefinite and revocable," and "[m]ay be revoked at any time."[29] When an individual requests a religious accommodation, the Instruction requires a military physician to counsel the applicant to enable him or her to make an informed decision about the benefits and risks of an exemption.[30] Commanders are directed to counsel the member that noncompliance with immunization requirements may adversely impact deployability, assignment, or international travel.[31] While the Instruction only requires certain actions from military physicians and commanders, it recognizes that religious exceptions to immunizations is "a command decision made with medical, judge advocate, and chaplain

---

[25] *Id. See also* 42 U.S.C.S. § 2000bb-1.

[26] DoDI 1300.17 at ¶ 1.2.b.

[27] Army Regulation 40-562/BUMEDINST 6230.15B/AFI 48-110_IP/CG COMDTINST M6230.4G, *Immunizations and Chemoprophylaxis for the Prevention of Infection Diseases* (Oct. 7, 2013, certified current Feb. 16, 2018).

[28] U.S. Dep't of Air Force, Instr. 48-110_IP, Immunizations and Chemoprophylaxis for the Prevention of Infection Diseases, ¶¶ 2-6.a and 2-6.b(3)(a)1 (Feb. 16, 2018) [hereinafter AFI 48-110_IP].

[29] *Id*. at Table C-2.

[30] *Id.* at ¶ 2-6.b(3)(a)2.

[31] *Id.* at ¶ 2-6.b(3)(a)3.

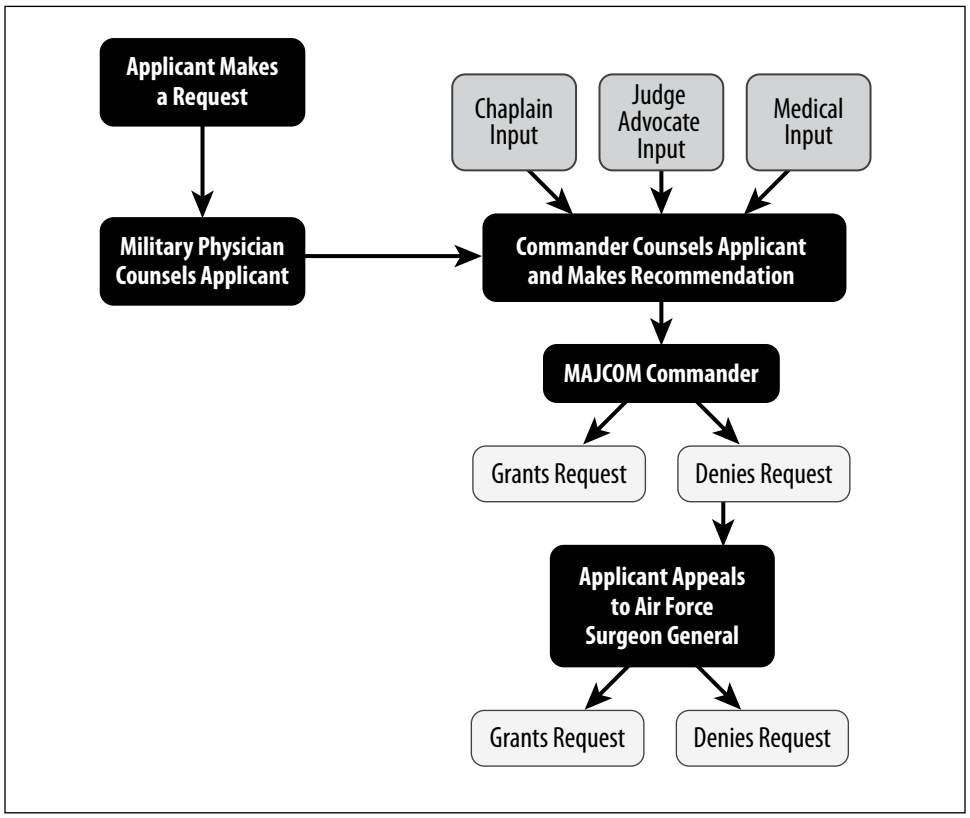
input." Figure 1 depicts the process explained in the instruction for granting religious accommodations.

Commanders must process religious accommodation requests when they arise. As AFI 48110_IP explains, in the Air Force, after receiving input from the medical, chaplain, and legal communities, the unit commander will draft a recommendation memorandum to the commander of the unit's Major Command (MAJCOM/CC).[32] If the MAJCOM/CC denies the request, the Air Force Surgeon General serves as the final appeal authority for all denials of requests for accommodation for religious practices pertaining to medical practices.[33] The author drafted Figure 1 to provide a visual depiction on how the process is currently designed to operate.

[32] *Id.* at ¶ 2-6.b(a).

[33] U.S. Dep't of Air Force., Pers. Dir. 52-2, Accommodation of Religious Practices in the Air Force, ¶ 2.3.1 (Feb. 17, 2016) [hereinafter AFPD 52-2].

Figure 1. Current Religious Accommodation Request Process as Provided in AFI 48-110_IP



The AFI clearly envisions a situation in which requests are granted, as it explains the accommodation may be revoked "in accordance with Service-specific policies and procedures, if the individual and/or unit are at imminent risk of exposure to a disease for which an immunization is available."[34] Notably, the Air Force does not offer guidance on how to properly analyze such a request to both ensure lethality of the force and uphold service members' First Amendment rights. The absence of this guidance could lead to disparate treatment of Airmen across the fields as well as failing to protect commanders from unnecessarily violating a member's rights.

[34] AFI 48-110_IP at ¶ 2-6.b(a)(3)(a)5.

In 2018, the Department of Defense changed its policies to require service members who have been non-deployable for the past 12 months or more to be separated from the military.[35] This is important because an accommodation could render a military member non-deployable. The Department "intend[ed] to emphasize the expectation that all service members are worldwide deployable and to establish standardized criteria for retraining non-deployable service members."[36] One goal of the policy is to "further reduce the number of non-deployable service members and improve personnel readiness across the force."[37] Secretary Mattis commented his intent is to build "a more lethal joint force that is capable of operating anywhere in the world."[38] On 14 February 2018, the Undersecretary of Defense signed the DoD Retention Policy for Non-Deployable Service Members memorandum. Now, service members who have been non-deployable for more than 12 consecutive months, for any reason, will be processed for discharge; however the Service Secretary may grant a waiver to this rule.[39] However, if an applicant has an approved accommodation, he or she would be coded as having an administrative exemption to the requirement and would not be considered "non-deployable."[40]

III. An Analysis of Vaccination and Immunization Requests under RFRA

A. Religious Belief

For purposes of the RFRA, it does not matter whether a religious belief itself is central to the religion, but only that "the adherent have an honest belief that the practice is important to his free exercise of religion."[41] The

[35] Tara Copp, *Deploy or get out: New Pentagon plan could boot thousands of non-deployable troops*, Air Force Times (Feb. 5, 2018) https://www.airforcetimes.com/news/your-military/2018/02/05/deploy-or-get-out-new-pentagon-plan-could-boot-thousands-of-non-deployable-troops/.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *See* Memorandum from Robert L. Wilkie, Under Secretary of Defense, *DoD Retention Policy for Non-Deployable Service Members* (Feb. 14, 2018).

[40] Email from Lt Col Ruther Brenner, Public Health Branch, Air Force Medical Support Agency, to Lt Col Chris Baker, Air Staff Counsel, Administrative Law Directorate (Jan. 30, 2018, 19:29 EST) (on file with author).

[41] Sossamon v. Lone Star State of Texas, 560 F.3d 316, 332 (5th Cir. 2009), *aff'd,* Sossamon v. Texas, 563 U.S. 277 (2011). *See also* Sample v. Lappin, 424 F. Supp. 2d 187

RFRA defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[42] A "religious exercise" under RFRA "involves 'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons.'"[43] However, conduct that is claimed to be an "exercise of religion" must be based on a religious belief rather than a philosophy or way of life, and the belief must be sincerely held by the applicant.[44]

1. Meyers *Discussion on Religious Belief*

Conduct that is claimed to be an "exercise of religion" within the meaning of RFRA must be based on a religious belief rather than a philosophy or way of life.[45] In *United States v. Meyers*, the 10th Circuit listed several factors available to examine a belief and whether it can be sufficiently included in the realm of "religious beliefs." In *Meyers*, the defendant, facing charges related to marijuana distribution, claimed he was the founder and Reverend of the Church of Marijuana and it was his sincere belief that his religion commanded him to use, possess, grow, and distribute marijuana for the good of mankind and the planet earth.[46]

The court emphasized "it cannot rely solely on established or recognized religions to guide it in determining whether a new and unique set of beliefs warrants inclusion" and "no one of these factors is dispositive, and that the factors should be seen as criteria that, if minimally satisfied, counsel the inclusion of beliefs within the term 'religion.'"[47] The court noted, however,

---

(D.D.C. 2006) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of a particular inmate's interpretation of those creeds.") (quoting Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 699 (1989)). ("The court's inquiry is limited to whether an inmate sincerely holds a particular belief and whether the belief is religious in nature.") (quoting Jolly v. Coughlin, 76 F.3d 468, 476 (2d Cir. 1996)).

[42] 42 U.S.C. § 2000bb-2(4) (emphasis added) (cross-referencing 42 U.S.C. § 2000cc-5(7)(A)).

[43] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 710 (2014) (quoting Employment Div. v. Smith, 494 U.S. 872, 877 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Tanzin v. Tanvir, No. 19-71, 2020 U.S. Dist. LEXIS 5987 (Dec. 10, 2020).

[44] United States v. Meyers, 95 F.3d 1475, 1482 (10th Cir. 1996).

[45] *Id.*

[46] *Id.* at 1475.

[47] *Id.* at 1484 (quoting United States v. Meyers, 906 F. Supp. 1494, 1504 (D. Wyo.

in accord with *Wisconsin v. Yoder*, "purely personal, political, ideological, or secular beliefs probably would not satisfy enough criteria for inclusion."[48] Keeping in mind the threshold for establishing the religious nature of one's beliefs is low, the circuit court adopted the following factors considered by the district court:

1. *Ultimate Ideas*: Religious beliefs often address fundamental questions about life, purpose, and death. As one court has put it, "a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters."[49] These matters may include existential matters, such as man's sense of being; teleological matters, such as man's purpose in life; and cosmological matters, such as man's place in the universe.

2. *Metaphysical Beliefs*: Religious beliefs often are "metaphysical," that is, they address a reality which transcends the physical and immediately apparent world. Adherents to many religions believe that there is another dimension, place, mode, or temporality, and they often believe that these places are inhabited by spirits, souls, forces, deities, and other sorts of inchoate or intangible entities.

3. *Moral or Ethical System*: Religious beliefs often prescribe a particular manner of acting, or way of life, that is "moral" or "ethical." In other words, these beliefs often describe certain acts in normative terms, such as "right and wrong," "good and evil," or "unjust." A moral or ethical belief structure also may create duties — duties often imposed by some higher power, force, or spirit — that require the believer to abnegate elemental self-interest.

1995)) (philosophical and personal beliefs are secular beliefs); *see also* Africa v. Pennsylvania, 662 F.2d 1025, 1036 (3d Cir. 1981) (finding beliefs are secular not religious); Berman v. United States., 156 F.2d. 377, 381 (9th Cir. 1946) ("There are those who have a philosophy of life, and who live up to it. There is evidence that this is so in regard to appellant. However, no matter how pure and admirable his standard may be, and no matter how devotedly he adheres to it, his philosophy and morals and social policy without the concept of deity cannot be said to be religion in the sense of that term as it is used in the statute."); Church of the Chosen People v. United States, 548 F. Supp. 1247, 1253 (D. Minn. 1982) (beliefs which are sexual and secular are not religions).

[48] *Meyers*, 95 F.3d at 1484 (quoting *Meyers*, 906 F. Supp. at 1504) (citing Wisconsin v. Yoder, 406 U.S. 205, 216 (1972)).

[49] *Africa*, 662 F.2d at 1032.

4. *Comprehensiveness of Beliefs*: Another hallmark of "religious" ideas is that they are comprehensive. More often than not, such beliefs provide a telos, an overreaching array of beliefs that coalesce to provide the believer with answers to many, if not most, of the problems and concerns that confront humans. In other words, religious beliefs generally are not confined to one question or a single teaching.

5. *Accoutrements of Religion*: By analogy to many of the established or recognized religions, the presence of the following external signs may indicate that a particular set of beliefs is "religious": (a) founder, prophet, or teacher; (b) important writings; (c) gathering places; (d) keepers of knowledge; (e) ceremonies and rituals; (f) structure or organization; (g) holidays; (h) diet or fasting; (i) appearance and clothing; (j) propagation.[50]

Utilizing these factors, the district court analyzed Meyers' claim in this manner:

1. *Founder, Prophet, or Teacher*. Meyers founded the church in 1973, but did not claim he possessed the "kind of spiritual wisdom, ethereal knowledge, or divine insight that often leads to the founding of a religion …. The Church of Marijuana apparently has no founder or teacher similar to an Abraham, Jesus, Mohammed, Buddha, Confucius, Krishna, Smith, or Black Elk."[51]

2. *Important Writings*. Meyers testified the church's "bible" is the book, *Hemp*, written by Jack Herer.[52] The book does not purport to be a "sacred or seminal book, containing tenets, precepts, rites, creeds, or parables. While it is an interesting book full of information … it does not touch upon the lofty or fundamental issues associated with religious works …. More importantly, Meyers did not claim that the Church of Marijuana uses or relies on *Hemp* in any way, and he did not claim that the book provides him with any sort of inspiration or guidance."[53]

---

[50] *Meyers*, 95 F.3d at 1483-84 (italics in original) (citing *Meyers*, 906 F. Supp. at 1502-03) (internal citations omitted).

[51] *Meyers*, 906 F. Supp. at 1506.

[52] *Id.*

[53] *Id.* at 1507.

3. *Gathering Places*. The Church had a building where some members gathered to smoke marijuana, but Meyers did not claim the building was in any way holy, sacred, or significant, or held significance to the members, as a synagogue, mosque, temple, shrine, or cathedral might to an adherent of another religion.[54]

4. *Keepers of Knowledge*. Meyers claimed he was a "Reverend" of the "Church of Marijuana," but he was the only "clergy" member of the church and did not claim any "special training, experience, or education that qualified him for this position."[55]

5. *Accoutrements of Religion*. As to ceremonies, the only ceremony the church had was "to smoke and pass joints."[56] In addition to Meyers as the "Reverend," the organization or structure of the church included 20 members who are "teachers;" Meyers did not mention any holidays, special days, or holy days; the church does not observe a particular diet and does not have any required days of fasting; there are no central beliefs regarding one's appearance or clothing; and finally, the Church of Marijuana does not engage in any type of mission work or witnessing to convert non-believers.[57]

The circuit court upheld the district court's determination Meyers' beliefs were secular, and, thus, did not constitute a "religion" for RFRA purposes.[58] The district court concluded:

> Marijuana's medical, therapeutic, and social effects are secular, not religious …. Here, the Court cannot give Meyers' "religious" beliefs much weight because those beliefs appear to be derived entirely from his secular beliefs. In other words, Meyers' secular and religious beliefs overlap only in the sense that Meyers holds secular beliefs which he believes so deeply that he has transformed them into a "religion."

---

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] United States v. Meyers, 95 F.3d 1475, 1484 (10th Cir. 1996).

> While Meyers may sincerely believe that his beliefs are religious, this Court cannot rely on his sincerity to conclude his beliefs rise to the level of a "religion" and therefore trigger RFRA's protections. Meyers is, of course, absolutely free to think or believe what he wants. If he thinks that his beliefs are a religion, then so be it. No one can restrict his beliefs, and no one should begrudge him those beliefs. None of this, however, changes the fact that his beliefs do not constitute a "religion" as that term is uneasily defined by law. Were the Court to recognize Meyers' beliefs as religious, it might soon find itself on a slippery slope where anyone who was cured of an ailment by a "medicine" that had pleasant side-effects could claim that they had founded a constitutionally or statutorily protected religion based on the beneficial "medicine."[59]

As such, the Court demonstrated protections of the RFRA are premised on a religious belief, and Courts do not allow anyone to just make up a religion to claim the RFRA's protections. As a religious belief, there are objective observations that demonstrate a defendant's belief is a religious one. While an applicant may sincerely hold what he or she professes to be religious, "[n]either the government nor the court has to accept the defendant's mere say-so."[60]

2. Friedman *and Distinguishing between Religion and Philosophy*

An Airman's belief may be very sincere, easily understood, and logical. But if the belief is based in a philosophical point of view or lifestyle choice, rather than in religion, it should not be the basis for an accommodation. In *Friedman v. Southern California Permanente Medical Group*,[61] the Court of

---

[59] *Meyers*, 906 F. Supp. at 1508 (internal citations omitted).

[60] United States v. Bauer, 84 F.3d 1549, 1559 (9th Cir. 1996); *see also* International Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1981) ("[A]n adherent's belief would not be 'sincere' if he acts in a manner inconsistent with that belief … or if there is evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine.") (internal citations omitted); United States v. Messinger, 413 F.2d 927, 928-30 (2d Cir. 1969) (referencing a Justice Department recommendation that a defendant-draftee's "long delay in asserting his conscientious objector claim" was evidence of religious insincerity where his claim came two years after his Selective Service registration).

[61] Friedman v. S. California Permanente Med. Grp., 125 Cal. Rptr. 2d 663 (Cal. Ct. App. 2002).

Appeal of California addressed this issue when a medical group's temporary employee refused to be vaccinated with the mumps vaccine because he was vegan. The plaintiff alleged that as a "strict vegan,"[62] he

> fervently believes that all living beings must be valued equally and that it is immoral and unethical for humans to kill and exploit animals, even for food, clothing and the testing of product safety for humans, and that such use is a violation of natural law and the personal religious tenets on which [plaintiff] bases his foundational creeds. He lives each aspect of his life in accordance with this system of spiritual beliefs. As a Vegan, and his beliefs [*sic*], [plaintiff] cannot eat meat, dairy, eggs, honey or any other food which contains ingredients derived from animals. Additionally, [plaintiff] cannot wear leather, silk or any other material which comes from animals, and cannot use any products such as household cleansers, soap or toothpaste which have been tested for human safety on animals or derive any of their ingredients from animals. This belief system[] guides the way that he lives his life. [Plaintiff's] beliefs are spiritual in nature and set a course for his entire way of life; he would disregard elementary self-interest in preference to transgressing these tenets. [Plaintiff] holds these beliefs with the strength of traditional religious views, and has lived in accordance with his beliefs for over nine (9) years. As an example of the religious conviction that [plaintiff] holds in his Vegan beliefs, [plaintiff] has even been arrested for civil disobedience actions at animal rights demonstrations. This Vegan belief system guides the way that [plaintiff] lives his life. These are sincere and meaningful beliefs which occupy a place in [plaintiff's] life parallel to that filled by God in traditionally religious individuals adhering to the Christian, Jewish or Muslim Faiths.[63]

When offered a contract for a full-time position, the Plaintiff was told "that to finish the process of becoming an employee he would need [a] mumps vaccine."[64] Plaintiff refused to be vaccinated with the mumps vaccine because it is grown in chicken embryos, which would "violate [plaintiff's]

---

[62] *Id.* at 665.

[63] *Id.* at 665-66.

[64] *Id.* at 666.

system of beliefs and would be considered immoral by [him]," and the defendants withdrew the employment offer.[65]

Although the California Appellate Court analyzed the request under the California Fair Employment and Housing Act (FEHA), rather than RFRA, it nonetheless needed to determine whether the employer discriminated based on the "religious creed" of any person.[66] The court adopted guidelines providing: "First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs."[67]

The court found veganism does not address "the meaning of human existence; the purpose of life; theories of humankind's nature or place in the universe; matters of human life and death; or the exercise of faith."[68] First, the plaintiff espoused a moral and ethical creed dedicated solely to "highly valuing animal life and ordering one's life on that perspective."[69] The strict diet and lifestyle reflected a "moral and secular, rather than religious, philosophy."[70] Second, the belief system does not derive from "a power or being or faith to which all else is subordinate or upon which all else depends."[71] Third, there was no presence of formal or external signs, such as "teachers or leaders; services or ceremonies; structure or organization; orders of worship or articles of faith; or holidays."[72] While the *Friedman* court determined the plaintiff's beliefs were sincerely held,[73] plaintiff's veganism was "a personal philosophy, albeit shared by many others, and a way of life."[74] A religious belief is other than "a philosophy or way of

---

[65] *Id.*

[66] *Id.* at 666-67.

[67] *Id*. at 685 (internal citation omitted).

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.* at 685-86.

[73] *Id.* at 686.

[74] *Id.*

life," and veganism was therefore not a religious creed within the meaning of the FEHA.[75]

Similarly, in *Galinsky v. Board of Education of New York,* the Second Circuit upheld an order to vaccinate children despite the parents' objection.[76] The parents testified they had personal religious views opposing immunization which stemmed from their belief that children are gifts from God and their natural immune system should not be defiled through vaccination.[77] Nevertheless, the record demonstrated the parents were not credible, leading the court to conclude that the opposition to immunization, while sincere, was more motivated by their personal fears for their daughters' wellbeing than by religious beliefs.[78]

In the military context, the United States Army Court of Criminal Appeals found Major Nidal Hasan did not meet the burden of establishing a religious belief in *Hasan v. United States*. Hasan appeared at a pretrial hearing on June 8, 2012 wearing a full beard, claiming he was wearing it as an exercise of his religious beliefs.[79] To support his claim, Hasan submitted an affidavit that stated, inter alia, "I believe that for me to shave my beard will cause me religious harm."[80] The only other evidence submitted on the sincerity of this belief was a written statement from an Imam, who was also a chaplain and member of Hasan's defense team, which stated his desire to wear a beard "is a matter of sincere, personal religious conviction."[81]

The government filed a separate motion highlighting Hasan was clean shaven when he committed the crimes of which he was charged, when he appeared at his Article 32, UCMJ, hearing, and when he appeared at several

---

[75] *Id.* (internal citations omitted).

[76] Galinsky v. Board of Educ. of New York, No. 99-9027, 2000 U.S. App. LEXIS 9529 (2d Cir. May 2, 2000). It is important to note, however, *Galinsky* was not analyzed under RFRA. In 1997, the Supreme Court struck down RFRA as it relates to States as exceeding Congress' enforcement powers under section 5 of the Fourteenth Amendment. *See* City of Boerne v. Flores, 521 U.S. 507, 516 (1997).

[77] *Galinsky*, 2000 U.S. App. LEXIS 9529 at *2-*3.

[78] *Id.* at *3.

[79] Hasan v. United States, ARMY MISC 20120876, 2012 CCA LEXIS 399, *2-*3 (A. Ct. Crim. App. Oct. 18, 2012).

[80] *Id.* at *4.

[81] *Id.*

pretrial hearings prior to June 8, 2012.[82] More importantly, the government submitted the transcript of a telephone interview petitioner initiated with a reporter from Al-Jazeera, during which Hasan contacted the reporter to "convey a message to the world" and apologized to the mujahedeen "for participating in the illegal and immoral aggression against Muslims."[83] The government argued Hasan's motive for appearing in court with a beard was "to further defy the authority of his military superiors and … to serve as a manifestation of his allegiance to the Mujahedeen."[84] Based on the evidence presented, the military judge ruled Hasan had *not* demonstrated he was growing his beard at that time because of a religious belief, and made a finding it was "equally likely [Hasan was] growing the beard at this time for purely secular reasons and is using his religious beliefs as a cover."[85]

3. Religious Objection to Vaccination Ingredients

Religious practices may present several bases for objecting to vaccines. Followers of Christian Science, for example, do not officially object to vaccines but do believe in spiritual healing that includes physical cure of diseases.[86] Additionally, there are numerous references in the Christian Bible discussing how the human body is a temple of the Holy Spirit.[87] Similarly, there are references from the Old Testament and the Qur'an that discuss trusting in God to cure disease and control what happens to people's health.[88] The manner that vaccines are produced can present problems for practitioners following these tenants.

---

[82] *Id.*

[83] *Id.* at *4-*5.

[84] *Id.* at *5.

[85] *Id.*

[86] Christian Science, *How can I be healed?*, https://www.christianscience.com/christian-healing-today/how-can-i-be-healed (last visited Dec. 2010, 2020).

[87] *See, e.g.*, 1 *Corinthians* 6:19-20 (New International Version) ("Do you not know that your bodies are temples of the Holy Spirit, who is in you, whom you have received from God? You are not your own; you were bought at a price. Therefore honor God with your bodies."); 1 *Corinthians* 6:16-17 (New International Version) ("Don't you know that you yourselves are God's temple and that God's Spirit dwells in your midst? If anyone destroys God's temple, God will destroy that person; for God's temple is sacred, and you together are that temple."); 1 *Corinthians* 10:31 (New International Version) ("So whether you eat or drink or whatever you do, do it all for the glory of God.").

[88] *See, e.g.*, *Leviticus* 17:11 (New International Version) ("The Lord said, 'For the life of the flesh is in the blood …'"); *Leviticus* 17:14 (New International Version) ("For the life of every creature is its blood: its blood is its life …"); *Psalms* 91:1-3 (New

For instance, some vaccines are produced with animal cells, including dogs, chickens and cows, and others are developed with the use of aborted fetuses.[89] Similarly, FluLaval Quadrivalent's influenza vaccine contains a variety of chemicals to include formaldehyde.[90] Exposure to formaldehyde may cause adverse health effects.[91] Introducing chemicals such as formaldehyde could be considered harmful to the body and, by extension, to the temple of the Holy Spirit. Accordingly, some Christians could find them to be objectionable on religious grounds.

Likewise, the combined measles, mumps, and rubella virus vaccine live, M-M-R® II, contains cell strains developed in chicken embryos[92]

International Version) ("Whoever dwells in the shelter of the Most High will rest in the shadow of the Almighty. I will say of the Lord, 'He is my refuge and my fortress, my God in whom I trust.' Surely he will save you from the fowler's snare and from the deadly pestilence."); *Psalms* 103:2-3 (New International Version) ("Bless the Lord, O my soul, and forget none of His benefits; Who pardons all your iniquities, Who heals all your diseases."). *See also Qur'an* 6:17 (translation ed) ("And if Allah touches thee with affliction, none can remove it but He: if He touches thee with happiness, He has power over all things."); *Qur'an* 95:4 ("We have indeed created humankind in the best of molds."). For additional Biblical references linked to vaccines, *see generally*, *Biblical Wisdom, Health Science and Vaccination*, Vaccination Liberation (2013) http://www.vaclib.org/docs/BibleFlyer.pdf.

[89] U.S. Food and Drug Administration, *US Package Insert – Flucelvax Quadrivalent, 03/2020 (Revision 7),* 7, https://www.fda.gov/media/115862/download (last visited Dec. 20, 2020) (According to the Food and Drug Administration, Flucelvax Quadrivalent, a vaccine for the prevention of influenza disease caused by influenza virus subtypes A and type B, "may contain residual amounts of Madin-Darby Canine Kidney (MDCK) cell protein (≤ 25.2 mcg), protein other than HA (≤ 240 mcg), MDCK cell DNA (≤ 10 ng), polysorbate 80 (≤ 1500 mcg), cetyltrimethlyammonium bromide (≤ 18 mcg), and β-propiolactone (< 0.5 mcg), which are used in the manufacturing process." The 0.5 mL pre-filled syringes contain no preservative or antibiotics, but the multi-dose vial formulation contains "thimerosal, a mercury derivative, added as a preservative. Each 0.5 mL dose from the multi-dose vial contains 25 mcg mercury.").

[90] U.S. Food and Drug Administration, *Package Insert – FluLaval Quadrivalent*, 15, https://www.fda.gov/media/115785/download (last visited Dec. 20, 2020) ("Each 0.5-mL dose may also contain residual amounts of ovalbumin (≤ 0.3 mcg), formaldehyde (≤ 25 mcg), sodium deoxycholate (≤ 50 mcg), α-tocopheryl hydrogen succinate (≤ 320 mcg), and polysorbate 80 (≤ 887 mcg) from the manufacturing process.").

[91] U. S. Environmental Protection Agency, *Facts About Formaldehyde*, https://www.epa.gov/formaldehyde/facts-about-formaldehyde (last visited Dec. 20, 2020).

[92] U.S. Food and Drug Administration, *Package Insert – Measles, Mumps, and Rubella Virus Vaccine Live*, 5, https://www.fda.gov/media/75191/download (last visited Dec. 20, 2020) (ATTENUVAX® (Measles Virus Vaccine Live), a more "attenuated line of measles virus, derived from Enders' attenuated Edmonston strain and propagated in

and fetus tissue[93]. Cell lines from aborted fetuses are also used in vaccines against hepatitis A, chicken pox, poliomyelitis, rabies, and smallpox.[94] Similarly, varicella, the vaccine for chicken pox, contains hydrolyzed gelatin and fetal bovine serum,[95] both of which are non-halal animal byproducts which, if ingested or injected, could have negative religious implications for Muslims.

As such, use of these vaccines requires ingesting parts from animals or chemicals or are developed from aborted fetuses. Some religious practices could also restrict its followers from introducing anything into the body that is unclean or an abomination, such as canine kidney cells or formaldehyde. Likewise, other religious practices could object to receiving a vaccine developed with the use of aborted fetuses because the applicant is religiously opposed to abortion and use of the vaccine would make the recipient complicit in abortion.

While some religious beliefs opposing vaccinations may not be mainstream, they nonetheless warrant RFRA protections all the same. As Congress noted, "the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution."[96] Congress defined "religious exercise" broadly, "includ[ing] any exercise of religion, whether or not compelled by, or central

---

chick embryo cell culture." MUMPSVAX® (Mumps Virus Vaccine Live), "the Jeryl Lynn™ (B level) strain of mumps virus propagated in chick embryo cell culture.").

[93] *See* Stanley A. Plotkin, MD, David Cornfeld, MD, Theodore H. Ingalls, MD, MPH, *Studies of Immunization With Living Rubella Virus: Trials in Children with a Strain Cultured From and Aborted Fetus*, 110 Am. J. Diseases Child. 381-89 (1965). *See also* Pontifical Academy for Life Statement, *Moral Reflections on Vaccines Prepared From Cells Derived From Aborted Human Foetuses*, http://www.immunize.org/talking-about-vaccines/vaticandocument.htm (last visited Dec. 20, 2020).

[94] Pontifical Academy for Life Statement, *Moral Reflections on Vaccines Prepared From Cells Derived From Aborted Human Foetuses*, http://www.immunize.org/talking-about-vaccines/vaticandocument.htm (last visited Dec. 20, 2020) (Medical Research Council 5 (MRC-5), which was developed with human lung fibroblasts from a 14-week male aborted fetus.).

[95] Center for Disease Control, Epidemiology and Prevention of Vaccine-Preventable Diseases, Appendix B-8 (Jennifer Hamborsky, et al. eds., 13th ed. 2015) (available at https://www.cdc.gov/vaccines/pubs/pinkbook/downloads/appendices/B/excipient-table-2.pdf).

[96] Religious Freedom Restoration Act (RFRA) 42 U.S.C.S. § 2000bb(a)(1) (1993).

to, a system of belief."[97] Both the framers in writing the Free Exercise Clause and Congress in drafting the RFRA could have offered protection only to central tenets of "main stream" religions, but decided not to. If a chaplain determines the request is based on a religious belief, commanders need to accept such a determination. This does not mean the request must therefore be accommodated, as the Airman still has the burden to demonstrate the belief is sincerely held and being substantially burdened.

B. Sincerely Held Beliefs

Questions of religious sincerity are an "intensely fact-based inquiry."[98] It is not for courts to say one's religious beliefs are mistaken or insubstantial.[99] However, "[n]either the government nor the court has to accept the defendant's mere say-so."[100] Determining sincerity is a factual inquiry within a trial court's authority and competence, and "the [claimant's] 'sincerity' in espousing that practice is largely a matter of individual credibility."[101] "Repeatedly and in many different contexts, [the Supreme Court has] warned that courts must not presume to determine … the plausibility of a religious claim."[102] "To be certain, in evaluating sincerity a court may not question 'whether the petitioner … correctly perceived the commands of [his or her] faith.'"[103] Nor does a court "differentiate among bona fide faiths."[104] Instead, the "'narrow function … in this context is to determine' whether the line drawn reflects 'an honest conviction.'"[105]

---

[97] Religious Land Use and Institutionalized Persons Act (RLUIPA) 42 U.S.C.S. § 2000cc-5.

[98] *See* United States v. Sterling, 75 M.J. 407, 416 (C.A.A.F. 2016).

[99] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 725 (2014).

[100] United States v. Bauer, 84 F.3d 1549, 1559 (9th Cir. 1996); *see also* International Soc'y for Krishna Consciousness, Inc. v. Barber, 650 F.2d 430, 441 (2d Cir. 1981) ("[A]n adherent's belief would not be 'sincere' if he acts in a manner inconsistent with that belief … or if there is evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine.") (internal citations omitted).

[101] *Sterling*, 75 M.J. at 461 (citing Tagore v. United States, 735 F.3d 324, 328 (5th Cir. 2013)).

[102] *Hobby Lobby*, 573 U.S. at 724 (quoting *Employment Div. v. Smith*, 494 U.S. at 887); *see also* Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680, 699 (1989); *see also* Presbyterian Church in United States v. Mary Elizabeth Hull Memorial Presbyterian Church, 393 U.S. 440, 450 (1969).

[103] *Sterling*, 75 M.J. at 416 (citing Thomas v. Review Bd., 450 U.S. 707, 716 (1981)).

[104] *See* Cutter v. Wilkinson, 544 U.S. 709, 723 (2005).

[105] *Hobby Lobby*, 573 U.S. at 725 (citing *Thomas*, 450 U.S. at 716).

Significantly, an applicant can have sincere beliefs even when they previously participated in an act they later seek an accommodation to avoid. Courts have held prisons may not conclude a prisoner's beard is not the result of a sincere religious belief solely from the fact that the beard was not worn at the time of initial confinement.[106] Likewise, the Seventh Circuit upheld a district court opinion that a former employee sincerely believed she should refrain from work on Yom Kippur, even though she had not observed every Jewish holiday.[107]

Similarly, in *Moussazadeh v. Texas Department of Criminal Justice*,[108] a prisoner filed an administrative grievance complaining he was "forced to eat non kosher [*sic*] foods" and requesting that he "be allowed to receive kosher meals because it was part of [his] religious duty."[109] He asserted he was Jewish, and that his faith requires him to "eat kosher foods;" not being able to do so forces him to "go [] against [his] religious beliefs," for which he believed God would punish him.[110] The district court decided his belief was insincere based on a combination of three findings. First, it found he purchased "nonkosher" food items — including cookies, soft drinks, coffee, tuna, and candy — while at one facility, despite being served kosher food in the dining hall.[111] Second, the court found, while at a different facility, he purchased the same types of "nonkosher" food from the commissary.[112] Finally, the court noted Moussazadeh had not filed a grievance requesting

---

[106] *See, e.g.*, Beerheide v. Suthers, 82 F. Supp. 2d 1190, 1194-95 (D. Colo. 2000)*, aff'd,* 286 F.3d 1179 (10th Cir. 2002*)* (Prisoner born of Jewish father and non-Jewish mother, who was not raised in Jewish faith and had not undergone all requirements for conversion, but had studied Judaism during his six years of incarceration, was sincere in his religious belief.); Maguire v. Wilkinson, 405 F. Supp. 637, 640 (D. Conn. 1975) (The fact that the claimed religious belief was not held prior to incarceration cannot automatically lead to the conclusion that the religious belief is not genuine.).

[107] *See* E.E.O.C. v. Ilona of Hungary, Inc., 108 F.3d 1569, 1575 (7th Cir. 1997) (en banc) (Although she did not observe every Jewish holiday, recent family events, including her mother-in-law's death, her husband's growing faith, the birth of her son, and her father's death, caused religion to become more important to her. In fact, since her father's death in 1985, the employee had attended services on Yom Kippur in every year except 1987 when her work schedule would not permit it.).

[108] 703 F.3d 781 (5th Cir. 2012).

[109] *Id.* at 785.

[110] *Id.*

[111] *Id.* at 791.

[112] *Id.*

transfer back to the first facility when he became eligible.[113] The Fifth Circuit held these findings alone do not indicate Moussazadeh was insincere.

The court first discussed the distinction between certain adherents of Judaism who consume only certified kosher food, while others will consume food that is not per se nonkosher. Even assuming the food Moussazadeh purchased was nonkosher, that did not necessarily establish insincerity.[114] The court stated:

> A finding of sincerity does not require perfect adherence to beliefs expressed by the inmate, and even the most sincere practitioner may stray from time to time. "[A] sincere religious believer doesn't forfeit his religious rights merely because he is not scrupulous in his observance; for where would religion be without its backsliders, penitents, and prodigal sons?" Though Moussazadeh may have erred in his food purchases and strayed from the path of perfect adherence that alone does not eviscerate his claim of sincerity.[115]

In support of his sincerity, Moussazadeh offered statements that he was born and raised Jewish and always kept a kosher household; he requested kosher meals from the chaplain and kitchen staff; he was harassed for his adherence to his religious beliefs for his demands for kosher food; and he ate the kosher meals provided from the dining hall, even though he found them to be "distasteful" compared to the standard prison fare.[116]

The court stated, "[t]hough the sincerity inquiry is important, it must be handled with a light touch, or 'judicial shyness.'"[117] Courts must limit themselves to "almost exclusively a credibility assessment" when determining sincerity.[118] "To examine religious convictions any more deeply would

---

[113] *Id.*

[114] *Id*.

[115] *Id.* at 791-92.

[116] *Id.* at 792.

[117] *Id.* (quoting A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist., 611 F.3d 248, 262 (5th Cir. 2010).

[118] *Moussazadeh*, 703 F.3d at 792 (quoting Kay v. Bemis, 500 F.3d 1214, 1219 (10th Cir. 2007).

stray into the realm of religious inquiry, an area into which we are forbidden to tread." [119]

In a pre-RFRA case, the New York Southern District Court upheld the sincerity of a Jewish inmate's request not to shave his beard based on his religious belief.[120] The court noted although the inmate "at times departed from the tenets of his faith," the court was persuaded his "commitment to Orthodox Jewish observance has intensified as a result of his religious studies and reflection while in prison. Furthermore, … [the inmate] has been consistent in his refusal to trim his beard … even though repeatedly threatened with disciplinary action."[121] This last factor — steadfastness in the face of discipline — is a factor likely to come into play in the military, particularly if the member is aware he or she is potentially subject to discipline for failing to obey a lawful order to be vaccinated.

In making a sincerity determination, commanders should focus on the applicant's explanation for why the applicant opposes a vaccine for religious reasons and whether the applicant is credible. The central inquiry should be whether the applicant is using religion as a ploy to dress up a frivolous request. Outside sources could also be consulted to verify the applicant's sincerity. As discussed above, a sincerity analysis involves a judgment about the credibility and honesty of the applicant. Nonetheless, courts have looked at particular actions of an applicant to determine sincerity. An applicant receiving immunizations in the past might be an indicator of the applicant's insincerity, but that indicator is not dispositive as courts have recognized humans are fallible and do not always remain fully committed to their sincerely held beliefs. Still following tenants of a religion helps clarify sincerity; for instance, if the applicant reads religious texts daily and follows other fundamental tenets, such as fasting and prayer,[122] these factors weigh in favor of a credible claim. Other considerations include how long the applicant has refused vaccinations[123] as well as whether the applicant

---

[119] *Moussazadeh*, 703 F.3d at 792; *see also* United States v. Ballard, 322 U.S. 78, 86 (1944) ("Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs.").

[120] Fromer v. Scully, 649 F. Supp. 512, 516 (S.D.N.Y. 1986).

[121] *Id.* at 517.

[122] *See* Furqan v. Georgia State Bd. of Offender Rehabilitation, 554 F. Supp. 873, 876 (N.D. Ga. 1982).

[123] *See, e.g.*, Smith v. Sears, 1-03-cv-189, 2005 U.S. Dist. LEXIS 18017 (S.D. Ohio July 11, 2005).

has remained steadfast in the face of disciplinary action.[124] Furthermore, if the applicant has made recent statements to friends or family contrary to his asserted claim, this can undermine the credibility of his asserted sincerity.[125]

C. Substantial Burden

Generally, "[a] substantial burden exists when government action puts substantial pressure on an adherent to modify his behavior and to violate his beliefs."[126] In considering whether the procedures for obtaining a religious accommodation are themselves burdens on free exercise rights, courts have looked to the precise nature of the procedures imposed. Mere inconveniences, inconsequential or *de minimis* government actions that burden religious exercise do not suffice to qualify as a "substantial burden."[127] However, substantial burdens on religious exercises, such as clergy verification requirements, have been struck down by courts.[128]

In *Holt v. Hobbs*, a Muslim inmate asserted the prison grooming policy substantially burdened his religious exercise because it prohibited him from growing a beard, which his religion required. The Supreme Court explained that because the "grooming policy require[d] petitioner to shave his beard," the policy presented the choice of violating his religious beliefs or facing serious disciplinary action.[129]

---

[124] *Id.*; *see also Fromer*, 649 F. Supp. at 517.

[125] *See, e.g.*, Hasan v. United States, ARMY MISC 20120876, 2012 CCA LEXIS 399, *4-5 (A. Ct. Crim. App. Oct. 18, 2012).

[126] Priests for Life v. U.S. Dep't of Health & Human Servs., 772 F.3d 229, 246 (D.C. Cir. 2014) (quoting Kaemmerling v. Lappin, 553 F.3d 669, 678 (D.C. Cir. 2008)); *see also* Eternal Word TV Network, Inc. v. Secretary of the United States HHS, 818 F.3d 1122, 1144 (11th Cir. 2016) ("A law is substantially burdensome when it places 'significant pressure' on an adherent to act contrary to her religious beliefs, meaning that it "directly coerces the religious adherent to conform … her behavior. Thus, the government imposes a substantial burden when it places 'pressure that tends to force adherents to forego religious precepts.'") (quoting Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004)).

[127] *See Priests for Life*, 772 F.3d at 246 ("A burden does not rise to the level of being substantial when it places '[a]n inconsequential or *de minimis* burden' on an adherent's religious exercise.") (quoting *Kaemmerling*, 553 F.3d at 678).

[128] *See* Koger v. Bryan, 523 F.3d 789 (7th Cir. 2008).

[129] Holt v. Hobbs, 574 U.S. 352, 361 (2015).

The Court of Appeals for the Armed Forces focused on a substantial burden when addressing one of the only military cases where a military member refused to obey a lawful order on religious grounds. In *United States v. Sterling*,[130] an appellant had been ordered to remove three signs which stated, "No weapon formed against me shall prosper,"[131] despite claiming the signs were religiously motivated. Sterling put up the signs two months after a counseling session for failing to secure a promotion, and on the heels of a confrontation with one of her superiors about turning in a completed Marine Corps Institute course.[132] Sterling was ordered to remove the signs; an order which she disobeyed.

The Court upheld the order to remove the signs, reasoning appellant failed to establish a prima facia defense under the RFRA because she did not establish a substantial burden.[133] Specifically, the Court determined she did not present any evidence the signs were important to her exercise of religion, or that removing the signs would prevent her from "engaging in conduct [her] religion requires" or cause her to "abandon[] one of the precepts of her religion."[134] While not required to prove the signs were central to her belief system, she did have to provide evidence of an honest belief this practice was important for her free exercise of religion.[135] The evidence at trial did "not even begin to establish how the orders to take down the signs interfered with any precept of her religion let alone forced her to choose between a practice or principle important to her faith and disciplinary action."[136]

Procedures that render a requested religious accommodation virtually impossible to achieve are typically substantially burdensome.[137] Unlike in

---

[130] United States v. Sterling, 75 M.J. 407 (C.A.A.F. 2016).

[131] *Id.* at 411.

[132] *Id.*

[133] *Id.* at 420.

[134] *Id.* at 418 (internal citations omitted).

[135] *Id.* at 418-19.

[136] *Id.* at 419.

[137] *See, e.g.*, Nelson v. Miller, 570 F.3d 868, 878-79 (7th Cir. 2009) (requiring prisoner to show that religion compelled the practice in question and verify compelled practice with documentation imposed substantial burden by making desired religious exercise "effectively impracticable"); *see also* Koger v. Bryan, 523 F.3d 789, 797 (7th Cir. 2008) (requiring prisoner to show preferred diet was compelled by religion and religious belief to be verified by clergy for entitlement to religious accommodation was substantial burden and contrary to RLUIPA).

Sterling, when analyzing requests for religious exemptions for immunizations, there is a similar choice to the one presented in *Holt*. An Airman asking to not receive vaccines for religious reasons have two options: (1) submit to the vaccination, in contradiction to his or her religious beliefs; or (2) request a temporary exemption. If the request is denied, that Airman is then in an even more precarious situation to choose between (1) submitting to the vaccination, again in contradiction to his or her religious beliefs; or (2) disobeying an order and rendering himself or herself susceptible to administrative actions, discipline, and separation. In such cases, the government will be placing a substantial burden on such an Airman to receive a vaccine in violation of his or her religious beliefs.

D. Compelling Governmental Interest

1. Compelling Interests

If the applicant meets the requirements to show there is a substantial burden on his or her sincerely held religious belief, this burden must pass the compelling interest test. To satisfy the compelling-interest requirement, the government must do more than identify "broadly formulated interests justifying the general applicability of government mandates."[138]

In laying out the command's compelling interest, it is helpful to review the squadron, group, and wing's mission statements. A unit that deploys frequently with little notice will have a stronger interest in ensuring its personnel are always prepared to deploy than a support unit that deploys with less regularity and more notice, or a unit that is deployed in place. The considered professional judgment of the Air Force, as expressed by MAJCOM/CCs and the Air Force preventive health office, is the Air Force has a compelling interest in ensuring its members are protected from contracting or spreading infectious diseases. The Secretary of Defense has expressed his desire to have a lethal, deployable force prepared for an increasingly complex global security situation. Vaccinations and immunizations are a vital part of force health protection measures, helping ensure the Air Force has medically ready forces to deploy. Staying current on required vaccines also helps preserve the daily operations and mission support activities even when not deployed by

[138] Sharpe Holdings, Inc. v. United States HHS, 801 F.3d 927, 937 (8th Cir. 2015) (citing Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 431 (2006)).

reducing illnesses/absenteeism. Commanders need to be able to ensure their Airmen are ready to perform their mission when asked to do so.

The military's power is broad with respect to protecting the health of military and civilian personnel.[139] On 5 October 2017, then-Secretary of Defense James Mattis provided a guidance memorandum reiterating to the Department of Defense: "[w]e are a Department of war. We must be prepared to deal with an increasingly complex global security situation …."[140] He also outlined three lines of effort for the Department, the first of which was to "restore military readiness as we build a more lethal force."[141] The military accordingly has a compelling interest to require immunizations to protect the health and overall effectiveness of the command, as well as the health of the individual Airmen. Service members have a responsibility "to maintain their health and fitness [and] meet individual medical readiness requirements …."[142] The Public Health Branch of the Air Force Medical Support Agency (AFMSA) stated vaccines are an integral part of force health protection measures, helping ensure the Air Force has medically ready forces to deploy.[143] Vaccines also help preserve the daily operations and

---

[139] *See* Kathleen S. Swendiman, Cong. Research Serv., RS21414 at 11, Mandatory Vaccinations: Precedent and Current Laws (2011). Congress' war powers include the power to "raise and support Armies," to "provide and maintain a Navy," and to "make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. 1, § 8, cls. 12-14. The Supreme Court has called these powers "broad and sweeping," United States v. O'Brian, 391 U.S. 367, 377 (1968), and the Court gives its highest level of deference to legislation made under Congress' authority to raise and support armies and make rules and regulations for their governance. *See* Rostker v. Goldberg, 453 U.S. 47 (1981).

[140] Memorandum from Jim Mattis, Secretary of Defense, *Guidance from Secretary Jim Mattis* (Oct. 5, 2017) https://www.safgc.hq.af.mil/Portals/80/documents/gca/ethics/GUIDANCE-FROM-SECRETARY-JIM-MATTIS%205_Oct_2017.pdf?ver=2017-11-14-143501-690 (last visited Jan. 3, 2021).

[141] *Id. "First, restore military readiness as we build a more lethal force*. We will execute a multi-year plan to rapidly rebuild the warfighting readiness of the Joint Force, filling holes in capacity and lethality while preparing for sustained future investment. This line of effort prioritizes a safe and secure nuclear deterrent, the fielding of a decisive conventional force, and retains irregular warfare as a core competency." *Id.* (emphasis in original).

[142] U.S. Dep't of Def., Instr. 6025.19, Individual Medical Readiness (IMR), ¶ 3.d (June 9, 2014).

[143] Email from Colonel James A. Mullins, Chief, Public Health Branch, Public Health Associate Corps Chief, Air Force Medical Support Agency, to Lt Col Chris Baker, Air Staff Council, Administrative Law Directorate (Apr. 13, 2018, 13:25 EDT) (on file with author).

mission support activities even when not deployed by reducing illnesses and absenteeism.[144] Moreover, a population that is vaccinated provides a "herd immunity" protective effect for those individuals who are unable to receive vaccines.[145]

Herd immunity references how effective vaccines protect both the immunized and unimmunized individuals in the community.[146] Herd protection occurs when a sufficient proportion of the group is immune.[147] The World Health Organization explains the "decline of disease incidence is greater than the proportion of individuals immunized because vaccination reduces the spread of an infectious agent by reducing the amount and/or duration of pathogen shedding by vaccines, retarding transmission."[148] What this practically means is if enough people are vaccinated against a certain disease, it is more difficult for germs to travel from person to person, and the entire community is less likely to get sick — even people who cannot get vaccinated (think of those with serious allergies and those with weakened or failing immune systems).[149] Moreover, if someone does become ill, there is less risk of an outbreak because it is harder for the disease to spread.[150]

A concept closely related to herd immunity is that of source drying.[151] Under source drying, if a particular subgroup is identified as the reservoir of infection, targeted vaccination will decrease disease in the whole population.[152] The success of source drying justifies vaccination of special occupational groups, such as food handlers, to control typhoid and hepatitis A.[153]

---

[144] *Id.*

[145] *Id.*

[146] FE Andre, et al., *Vaccination greatly reduces disease, disability, death and inequity worldwide*, 86 Bulletin of the World Health Organization 81-160 (February 2008) available at https://www.who.int/bulletin/volumes/86/2/07-040089/en/.

[147] *Id.*

[148] *Id.*

[149] U.S. Department of Health & Human Services, *Vaccines Protect Your Community* https://www.vaccines.gov/basics/work/protection (last visited Dec. 21, 2020).

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

Military courts have held the military, and society at large, have a compelling interest in having those who defend the nation remain healthy and capable of performing their duty.[154] In *United States v. Schwartz*, the only military case analyzing requiring vaccinations over a religious objection, the Navy-Marine Court of Criminal Appeals reinforced the lawfulness of an order to receive the anthrax vaccine. Appellant contended the order violated his constitutional right to refuse unwanted medical treatment.[155] The court held the military could order service members to receive vaccinations, even over religious objection, because "the military, and society at large, have a compelling interest in having those who defend the nation remain healthy and capable of performing their duty."[156] Since vaccinations are a means to maintain an applicant's readiness capability, the military purpose of a vaccine is self-evident.[157]

---

[154] United States v. Schwartz, 61 M.J. 567, 569 (Navy-Marine Crim. App. 2005) (quoting United States v. Womack, 29 M.J. 88, 90 (C.M.A. 1989)) (citing National Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989)). *See also* United States v. Chadwell, 36 C.M.R. 741, 749-50 (N.B.R. 1965):

> If we may attach any value whatever to medical knowledge which is common to all civilized peoples, we must conclude on the basis of common knowledge that an order to take immunization shots is legal and necessary in order to protect the health and welfare of the military community and that failure to take such shots would represent a substantial threat to public health and safety in the military. This conclusion is inescapable when it is considered the requirement that shots be taken is determined at departmental level and applies to all military personnel.

Note, however, the *Chadwell* decision predates RFRA.

[155] *Schwartz*, 61 M.J. at 571.

[156] *Id.* at 569 (citing *Womack*, 29 M.J. at 90) (citing *National Treasury Emps. Union*, 489 U.S. at 656). *See also Chadwell*, 36 C.M.R. at 749-50:

> If we may attach any value whatever to medical knowledge which is common to all civilized peoples, we must conclude on the basis of common knowledge that an order to take immunization shots is legal and necessary in order to protect the health and welfare of the military community and that failure to take such shots would represent a substantial threat to public health and safety in the military. This conclusion is inescapable when it is considered the requirement that shots be taken is determined at departmental level and applies to all military personnel.

It is worth repeating, however, the *Chadwell* decision predates RFRA.

[157] *Schwartz*, 61 M.J. at 571.

While the court correctly addressed case law regarding lawful orders and potential consequences of refusing an order to be vaccinated, judge advocates must exercise caution when relying on *Schwartz* as a Black Letter rule that requiring an applicant to receive a vaccine does not violate her constitutional rights. For instance, the court relied in part on *Goldman v. Weinbarger's*[158] holding that the right to wear religious headgear did not provide exceptions to military uniform regulations.[159] But in response to the *Goldman* decision, Congress passed legislation prohibiting Service secretaries from prohibiting the wear of items of religious apparel while wearing the uniform.[160] Certainly, if one's religious beliefs impact good order and discipline, as they did in *Parker v. Levy,*[161] the military can and should regulate it and punish violations thereof.[162]

The Air Force clearly has a compelling interest in requiring Airmen to be ready to deploy with their units. As the Supreme Court has said, "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation."[163] The Air Force's primary functions

---

[158] Goldman v. Weinberger, 475 U.S. 503 (1986).

[159] *Schwartz*, 61 M.J. at 572.

[160] *See* 10 U.S.C. § 774 (1987).

[161] Parker v. Levy, 417 U.S. 733 (1974). In *Parker*, appellee, a physician and captain in the Army, made several public statements to enlisted personnel at the post, such as:

> The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam: they should refuse to go to Viet Nam if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children.

Parker, 417 U.S. at 736-37. These comments clearly had an impact on good order and discipline and military effectiveness and, appropriately, subjected Levy to criminal prosecution.

[162] It should be further noted the court did not discuss whether ordering appellant to be vaccinated was the least restrictive means of furthering that compelling government interest with respect to appellant. In fact, the court did not discuss or even mention the RFRA at all.

[163] United States v. Webster, 65 M.J. 936, 947 (A. Ct. Crim. App. 2008) (quoting Haig v. Agee, 453 U.S. 280, 307 (1981)) (quoting Aptheker v. Secretary of State, 378 U.S. 500,

include "organizing, training, equipping, and providing forces for prompt and sustained combat operations in the air and space; strategic air and missile warfare; joint amphibious, space, and airborne operations; [and] close air support and air logistic support to the other branches of service."[164] The Air Force cannot accomplish this primary mission if it cannot deploy, in a state of military readiness, the various units into which it is organized. Giving Airmen the option to selectively decide whether they wish to ensure their readiness to participate in particular military operations would undermine the readiness of all units to deploy, and this compromises the Air Force's mission and the nation's security.[165],[166]

2. Deference to the Military's Judgment

The Supreme Court's review of military regulations challenged on First Amendment grounds "is far more deferential than constitutional review of similar laws or regulations designed for civilian society."[167] In *Goldman v. Weinberger*, the Supreme Court held the military may limit a military member's First Amendment Freedom of Speech, as "[t]he military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state …; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps."[168] The military must be able to "insist upon a respect for duty and discipline without counterpart in civilian life," to prepare for and perform its vital role.[169] The

509 (1964)).

[164] Dep't of the Air Force, Air Force Handbook 1, Airman, para. 4.14 (Oct. 1, 2019).

[165] *See* Wickham v. Hall, 12 M.J. 145, 151 (C.M.A. 1981) (reasoning that absent soldiers necessarily "diminish the unit's readiness and capability to perform its mission."). It is worth noting most applicants are not trying to take themselves out of the fight. On the contrary, they generally want to continue to serve with the Air Force.

[166] Anecdotally, the author has twice been tasked to deploy: once to Iraq and once to Joint Task Force Guantanamo. The latter had no immunization requirements. The former had several including smallpox and anthrax. Anthrax requires a series of shots. The author received three parts of the series before deploying and did not receive the small pox vaccine because of new-born child in the home. This did not prevent the author from deploying. Once in theatre, no one performed a medical records check to see what shots to administer at that time. Yet the author was able to complete the mission with no impact to good order and discipline, and even earned a medal for service during the tour. It is therefore possible (on a case-by-case basis) to serve effectively and assist in the lethality of the force without all required immunizations.

[167] Goldman v. Weinberger, 475 U.S. 503, 507 (1986).

[168] *Id.* (citing Chappell v. Wallace, 462 U.S. 296, 300 (1983)).

[169] *Goldman*, 475 U.S. at 507 (quoting Schlesinger v. Councilman, 420 U.S. 738, 757

essence of military service "is the subordination of the desires and interests of the individual to the needs of the service."[170]

When addressing First Amendment concerns in the military, the Supreme Court has recognized that the military warrants deference. "While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections."[171] In *Parker*, the Supreme Court stated it has "long recognized that the military is, by necessity, a specialized society separate from civilian society."[172] The Court continued stating unlike civil society, the military "is not a deliberative body. It is the executive arm. Its law is that of obedience."[173] Such obedience, order, and discipline "cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection."[174] The Supreme Court has further observed that "the established relationship between enlisted military personnel and their superior officers … is at the heart of the necessarily unique structure of the military establishment."[175] "The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."[176] In line with these observations, the Supreme Court stated, "when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."[177] The Supreme Court also stated courts are "ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have."[178]

(1975)); *see also* Brown v. Giles, 444 U.S. 348, 354 (1980).

[170] *Goldman*, 475 U.S. at 507 (quoting Orloff v. Willoughby, 345 U.S. 83, 92 (1953)).

[171] Parker v. Levy, 417 U.S. 733, 758 (1974).

[172] *Id*. at 743. *See also Orloff*, 345 U.S. at 94 ("the military constitutes a specialized community governed by a separate discipline from that of the civilian.").

[173] *Parker*, 417 U.S. at 744 (quoting *In re* Grimley, 137 U.S. 147, 153 (1890)).

[174] Chappell v. Wallace, 462 U.S. 296, 300 (1983).

[175] *Id.*

[176] *Parker*, 417 U.S. at 758.

[177] *Id. See Chappell*, 462 U.S. at 305; *see also Orloff*, 345 U.S. at 93-94.

[178] *Id.* (quoting *Chappell*, 462 U.S. at 305).

In *United States v. Webster*, the Army Court of Criminal Appeals upheld the conviction of a Muslim who refused to deploy to Iraq because, as a Muslim, he "was not allowed to place [himself] in a situation where [he] would have to fight another Muslim."[179] Although the court determined the Army did not substantially burden the appellant's sincerely held religious beliefs, it nevertheless determined the Army "has a compelling interest in requiring soldiers to deploy with their units."[180] Quoting the Supreme Court, the Army court found "[i]t is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation."[181] The court determined the Army could not accomplish its mission of fighting and winning the Nation's wars "if it cannot deploy, in a state of military readiness, the various units into which it is organized. Giving soldiers the option to decide selectively whether they wish to participate in particular military operations would undermine the readiness of all units to deploy, and thus compromise the Army's mission and national security."[182] The court also determined the Army furthered its compelling interest in the least restrictive means possible.[183]

In *Alex v. Mabus*, an unpublished opinion, the United States District Court for the Eastern District of Virginia upheld a Navy cease and desist order to a Navy contractor prohibiting him from proselytizing in Greece.[184] The court determined the Navy's proffered interest to ensure military and civilian personnel abide by the laws of Greece was "a real and serious concern."[185] Further, the court held "[w]hether plaintiff's conduct does or does not definitively qualify as 'proselytism' under Greek law is ultimately beside the point. The Navy is entitled to err on the side of caution so as to ensure a successful mission in Greece."[186] Further, it reasoned a "commanding officer must

---

[179] United States v. Webster, 65 M.J. 936, 938 (A. Ct. Crim. App. 2008).

[180] *Id.* at 947.

[181] *Id.* (quoting Haig v. Agee, 453 U.S. 280, 307 (1981) (further quoting Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964)).

[182] *Webster*, 65 M.J. at 947.

[183] *Id.* The Army gave appellant the right to request reasonable accommodation of his religious practices. It provided him the opportunity to apply as a conscientious objector. It also allowed him the option to deploy in a non-combatant role. The court determined the First Amendment required nothing more.

[184] Alex v. Mabus, 1:11cv1207, 2012 U.S. Dist. LEXIS 85745, at *22-23 (E.D. Va. June 20, 2012).

[185] *Id.* at 18-19.

[186] *Id.* at 19.

be afforded substantial latitude in balancing competing military needs and first amendment rights."[187] Although the court did not discuss RFRA, it did note the Navy's order did not prohibit the plaintiff from private worship, nor did it prohibit all public religious activities; rather, it "merely require[d] pre-clearance from the command."[188]

In *Hasan*, the Army Court of Criminal Appeals has also addressed the military's compelling interest on First Amendment grounds. When upholding the Army's order for Hasan to shave, the court not only noted Hasan did not have a sincerely held belief, but also that the Army had a compelling interest to require Hasan to shave.[189] The court concluded the government had a compelling interest to ensure uniformity, good order, and discipline,[190] recognizing the Army:

> is a uniformed service where discipline is judged, in part, by the manner in which a soldier wears a prescribed uniform, as well as by the individual's personal appearance. Therefore, a neat and well-groomed appearance by all soldiers is fundamental to the Army and contributes to building the pride and esprit essential to an effective military force.[191]

Moreover, the court concluded the Army's interest in the fair and proper administrative of military justice justified the military judge's conclusion that wearing the beard "denigrates the dignity, order, and decorum of the court-martial and is disruptive under the current posture of the case."[192] The court rejected Hasan's argument that less restrictive means, such as an instruction to the panel, would have been sufficient to further the government's compelling interest.[193]

---

[187] *Id.* at 20 (citing Carlson v. Schlesinger, 511 F.2d 1327, 1332 (D.C. Cir. 1975).

[188] *Alex,* 2012 U.S. Dist. LEXIS 85745 at *22.

[189] Hasan v. United States, ARMY MISC 20120876, 2012 CCA LEXIS 399, at *11-12 (A. Ct. Crim. App Oct. 18, 2012).

[190] *Id.* at *12.

[191] *Id.* (internal citations omitted).

[192] *Id.* at *13.

[193] *Id.*

3. Singh v. McHugh

In *Singh v. McHugh*, the District Court for the District of Columbia addressed the religious accommodation request of an observant Sikh who sought to join the Hofstra University Army Reserve Officer's Training Corps (ROTC) program.[194] In accordance with his religion, Singh did not "cut his beard or hair, and he tuck[ed] his unshorn hair under a turban."[195] He sincerely believed "if he cut his hair, shaved his beard, or abandoned his turban, he would be 'dishonoring and offending God.'"[196] The Army filed a motion to dismiss the suit arguing Singh, as a civilian, could not establish the Army's decision to deny his request substantially burdened his sincerely held religious belief, and because requests for judicially-ordered enlistments are nonjusticiable.[197]

The court reviewed the Army uniform and grooming regulations starting with religious headgear which, at the time, would not have permitted turbans.[198] Soldiers were not authorized to wear religious headgear while in uniform if the requirements were not met.[199] The court next reviewed the Army's hair policy, which directed that men's hair "must present a tapered appearance, and, when combed, may not fall over the ears or eyebrows, or

---

[194] Singh v. McHugh, 109 F. Supp. 3d 72 (D.C. Dist. Ct. 2015).

[195] *Id.* at 75.

[196] *Id.* at 75-76.

[197] *Id.* at 76.

[198] *Id.* at 77. The court cited Army Regulation (AR) 600-20, *Army Command Policy*, Nov. 6, 2014, which stated in pertinent part:

Soldiers in uniform may wear religious headgear if:

1. The religious headgear is subdued in color …
2. The religious headgear is of a style and size that can be completely covered by standard military headgear.
3. The religious headgear bears no writing, symbols, or pictures.
4. Wear of religious headgear does not interfere with the wear or proper functioning of protective clothing or equipment.

…

6. Religious headgear will not be worn in place of military headgear under circumstances when the wear of military headgear is required (for example, when the Soldier is outside or required to wear headgear indoors for a special purpose).

[199] *Singh*, 109 F. Supp. 3d at 77.

touch the collar, except for the closely cut hair at the back of the neck."[200] Men generally were required to keep their faces clean-shaven while on duty or in uniform, although the Army made exceptions for operational necessity and medical reasons, such as pseudofolliculitis barbae and acne keloidalis nuchae.[201] The court also noted Army records indicated that "at least 49,690 permanent shaving profiles and 57,616 temporary shaving profiles have been authorized since 2007."[202]

The court next discussed the Army's ROTC program, whose mission "is to produce commissioned officers in the quality, quantity, and academic disciplines necessary to meet active Army and reserve component requirements."[203] At Hofstra specifically, the ROTC program "seeks to 'recruit, retain, and ultimately commission Second Lieutenants in the US Army who are mentally, physically, and emotionally prepared to lead American Soldiers in order to deter our enemies and, when necessary, fight and win our Nation['s] wars.'"[204]

The Army claimed granting Singh an accommodation would undermine the following critical interests: unit cohesion and morale;[205] good

---

[200] *Id.* at 78. (internal quotations omitted) (citing AR 670-1, *Wear and Appearance of Army Uniforms and Insignia*, Sept. 15, 2015, revised Sept. 24, 2015).

[201] *Id.* at 78.

[202] *Id.*

[203] *Id.* at 79 (internal quotations and citations omitted).

[204] *Id.*

[205] The Deputy Chief of Staff, G1, stated:

> [A]ccommodating plaintiff's religious practices "will have an adverse impact on unit cohesion and morale because uniformity is central to the development of a bonded and effective fighting force that is capable of meeting the Nation's ever-changing needs." He explained "[u]niformity is a primary means by which we convert individuals into members of the Army," especially in ROTC. … [He] concluded that granting an accommodation to plaintiff "would undermine the common Army identity we are attempting to develop in ROTC, and adversely impact efforts to develop in cohesive teams," and would also "detract from the heritage that [the G1] view[s] as a vital component of soldierly strength."

Id. at 82-83 (internal citations omitted).

order and discipline;[206] individual and unit readiness;[207] and health and safety.[208] The Army further stated it did "not view the issuance of temporary medical exceptions to grooming standards as undercutting the Army's wholesale ability to enforce grooming and appearance policies," noting the exceptions are "subject to approval by military commanders," were generally limited in duration, and the soldier was still "required to trim his beard as close to his face as possible."[209]

The Army also urged the court to follow the Supreme Court's precedent in *Goldman*, in which the Supreme Court declined to apply strict scrutiny to the Army's dress and appearance policy as it related to wearing "headgear," including yarmulkes, while in uniform. The district court, however, declined, stating *Goldman* predated the RFRA, and the court had to follow the guidance from *Holt* when harmonizing the necessary respect for military judgment with the dictates of the statutory regime.[210] "[W]hile the Court must credit the Army's assertions and give due respect to its articulation of important military interests, the Court may not rely on [the Army's] 'mere say-so.'"[211]

---

[206] *Id.* at 83 (The G1 asserted: "One of the key ways the Army develops leaders is through ritualistic enforcement of uniform grooming standards …. Discipline is the backbone of an efficient, cohesive, and efficient fighting force …").

[207] *Id.* (According to the G1, "allowing [plaintiff] to continue in officer training without any emphasis on uniformity would leave [him] generally unprepared to lead Soldiers, viewed as an outsider by [his] peers, and trained in a manner that is wholly inconsistent with how we develop strong military officers.")

[208] *Id.* at 83-84 (The G1 referred to research that "shows that facial hair significantly degrades the protection factor of all approved protective masks," and the plaintiff's degraded ability to seal his mask in training "would not only subject [him] to risk during training, but, were [he] to enter the military service, leave [him] untrained in the proper wear and function of these potentially life saving [*sic*] measures.").

[209] *Id.* at 84.

[210] *Id.* at 92. The Army could not cite any actual effect on unit cohesion and morale; good order and discipline; individual and unit readiness; and health and safety, especially in light of the fact it had allowed other Sikhs to serve and they were serving honorably. Additionally, the Army made other shaving accommodations for medical reasons without an articulable impact on unit cohesion and morale; good order and discipline; individual and unit readiness; and health and safety.

[211] *Id.* at 93 (quoting Holt v. Hobbs, 574 U.S. 352, 369 (2015)).

The district court conceded that military readiness, unit cohesion and discipline of the Army officer corps "constitute highly compelling government interests."[212] But the court acknowledged it must "determine whether defendants have proved that the decision to deny *this plaintiff* a religious accommodation that would enable him to enroll in ROTC actually furthers the compelling interests defendants have identified."[213] Further, "[w]here a regulation already provides an exception from the law for a particular group, the government will have a higher burden in showing that the law, as applied, furthers the compelling interest."[214]

The court noted the Army permits soldiers to wear beards and religious headgear while in uniform, and was already allowing Sikhs to serve with accommodations for turbans, beards, and unshorn hair.[215] Accordingly, the Army was required to make "the necessary heightened showing to justify the specific refusal" to grant plaintiff's exception.[216] The Army's compelling interest was undermined by the fact that the Army "routinely grants soldiers exceptions to its grooming and uniform regulations.'[217] The court noted "the fact that other shaving exceptions may be revocable does not support the outright denial of the accommodation sought here: as an ROTC enrollee, or even as a contracted cadet, plaintiff would never encounter the 'real tactical operation' that would permit a commander to require a soldier with a medically-necessary beard to shave."[218] The court, without further analysis, concluded: "For the same reason, the concern about plaintiff's health and safety is misplaced, at least for the duration of his participation in ROTC."[219] Accordingly, the court found the Army had not shown it considered the least restrictive means of achieving its interest with respect

---

[212] *Singh*, 109 F. Supp. 3d at 93.

[213] *Id.* at 93-94 (emphasis in original).

[214] *Id.* at 94 (quoting McAllen Grace Brethren Church v. Salazar, 764 F.3d 465, 472-73 (5th Cir. 2014) (citing Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 729-30 (2014)).

[215] *Singh*, 109 F. Supp. 3d at 93, 100. Additionally, the court noted the Army had already granted religious accommodations to other Sikh soldiers, and the "undisputed evidence in the record indicates each [Soldier who was granted similar religious accommodations] served — or are serving — with their articles of faith intact without any of the negative consequences that defendants predict would flow from granting a similar exception in this case." *Id.* at 100.

[216] *Id.* at 94.

[217] *Id.* at 95.

[218] *Id.* at 96.

[219] *Id.*

to Singh specifically, and determined a temporary accommodation of the Army's grooming standards was appropriate. [220],[221]

4. Deference Post-Singh

As recently as June 2018, the Supreme Court nonetheless reinforced deference owed to the military. The Court opined, "'Any rule of constitutional law that would inhibit the flexibility' of the President 'to respond to changing world conditions should be adopted only with the greatest caution,' and our inquiry into matters of … national security is highly constrained."[222] Accordingly, judicial deference "is at its apogee when *legislative action* under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."[223]

When an applicant requests a religious accommodation for all vaccinations and immunizations she may still desire to serve, but she would possibly be eliminating herself from positions requiring worldwide deployability. Unlike *Singh*, which addressed hypothetical concerns that failing to adhere to grooming standards could impact readiness, unit cohesion, morale, and health and safety, refusing vaccinations is different because: (1) vaccinations improve the readiness of the force; (2) the Air Force has not granted permanent vaccination or immunization exemptions for religious reasons in the past; and (3) the Air Force is not simply relying on one person's assertion but scientific data that vaccinations and immunizations are essential to ensure those who defend the nation remain healthy and capable of performing their duties.

Many operational Air Force units deploy throughout the world in support of contingencies or natural disasters. During such events, displaced people from various countries who could be contagious require assistance. These events occur in locations such as South America and Africa. As described above, some of the diseases for which Airmen need to be vaccinated are prevalent in these locations.

---

[220] *Id.* at 101.

[221] *Id.* at 103.

[222] Trump v. Hawaii, 138 S. Ct. 2392, 2419-2420 (2018).

[223] Goldman v. Weinberger, 475 U.S. 503, 508 (1986) (quoting Rostker v. Goldberg, 453 U.S. 57, 70 (1981)) (emphasis added).

Unlike the dress and appearance standards at issue in *Singh*, disease outbreaks can be difficult, if not impossible, to detect before the outbreak occurs. For instance, initial symptoms of yellow fever include sudden onset of fever, chills, severe headache, back pain, general body aches, nausea and vomiting, fatigue, and weakness. Most people improve after these initial symptoms. However, roughly 15% of people will have a brief period of hours to a day without symptoms and will then develop a more severe form of yellow fever disease. In severe cases, a person may develop high fever, jaundice (a condition that involves yellow discoloration of the skin and the whites of the eyes), bleeding (especially from the gastrointestinal tract), and eventually shock and failure of many organs. Approximately 20-50% of people who develop severe illness may die.[224] Accordingly, the argument that a less restrictive means includes only requiring the member to be vaccinated when an outbreak occurs would be ineffective.

The Air Force and prior court decisions support the need to ensure a healthy and ready military force. To conclude the Air Force cannot require immunizations and vaccinations because it is *possible* a member *might not* be infected, *might* be able to avoid infection through some prophylactic measures, or *might not* be tasked to deploy undermines the Air Force's need to ensure its personnel, especially members in Air Force specialty codes (AFSCs) or billets that deploy frequently and with little notice, are ready to perform their duty. The Air Force cannot accomplish its primary mission to defend the United States against air and space attack, gain and maintain air and space supremacy, defeat enemy air and space forces, and conduct space operations "if it cannot deploy, in a state of military readiness, the various units into which it is organized."[225]

Although Congress did not carve out a military exception to RFRA, the drafters did expect the courts to continue granting deference to "the compelling nature of our military's interest in order, discipline, and security."[226] Secretary Mattis directed the military departments to "restore military readiness" and "build a more lethal force."[227] A military that cannot project power through the deployment of its resources (including personnel) is not lethal.

---

[224] Centers for Disease Control and Prevention, https://www.cdc.gov/yellowfever/qa/index.html (last visited Dec. 5, 2020).

[225] United States v. Webster, 65 M.J. 936, 947 (A. Ct. Crim. App. 2008).

[226] 103rd Cong., 139 Cong. Rec. S14461 (daily ed. Oct. 29, 1993).

[227] Memorandum from Jim Mattis, Secretary of Defense, *Guidance from Secretary Jim Mattis* (Oct. 5, 2017) https://www.safgc.hq.af.mil/Portals/80/documents/

E. Least Restrictive Means

The government can only deny an RFRA accommodation if there are no less restrictive means to accomplish the compelling governmental interest. The government also bears the burden of showing that "application of the burden to the person … is the least restrictive means of furthering" its compelling interest.[228]

1. Less Restrictive Means

The least restrictive means needs to be tailored to the applicant. As the Supreme Court explained in *Hobby Lobby*,

> RFRA … contemplates a 'more focused' inquiry: It requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' — the particular claimant whose sincere exercise of religion is being burdened. This requires us to look beyond broadly formulated interests and to scrutinize the asserted harm of granting specific exemptions to particular religious claimants[229]

Additionally, "broadly formulated"[230] or "sweeping"[231] governmental interests are inadequate. "Rather, the government must show with 'particularity how [even] admittedly strong interest[s] … would be adversely affected by granting an exemption' to a particular claimant."[232] Under the "exceptionally demanding" least-restrictive-means test,[233] "if there are other, reasonable ways to achieve those [interests] with a lesser burden on … protected activity, [the government] may not choose the way of greater interference."[234] Accordingly, a decision or action may constitute the least

---

gca/ethics/GUIDANCE-FROM-SECRETARY-JIM-MATTIS%205_Oct_2017.pdf?ver=2017-11-14-143501-690 (last visited Jan. 3, 2021).

[228] Sharpe Holdings v. United States HHS, 801 F.3d 927, 937 (8th Cir. 2015) (citing Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006)).

[229] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 727 (2014).

[230] *Gonzalez*, 546 U.S. at 431.

[231] Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).

[232] *Sharpe Holdings*, 801 F.3d at 943 (quoting *Yoder*, 406 U.S. at 236).

[233] *Hobby Lobby*, 573 U.S. at 728.

[234] Dunn v. Blumstein, 405 U.S. 330, 343 (1972).

restrictive means of furthering the government's compelling interests if "no alternative forms of regulation" would accomplish these interests without infringing on a claimant's religious-exercise rights.[235] The AFI recognizes religious exceptions to vaccines, and the RFRA ensures the Air Force must give credibility to that exception when crafting specific less restrictive means to that Airmen, or demonstrating specifically considered less restrictive means and showing they would not accomplish the interest in vaccinating Airmen.

Many cases have addressed the least restrictive means analysis, and most circuits take a very strict view of this prong of RFRA. For instance, the Fifth Circuit held the least-restrictive means standard used in RLUIPA cases is exceptionally demanding, as it "requires the government to show [ ] it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion" by an institutionalized person.[236] The Eighth Circuit as well has held under the exceptionally demanding RFRA least-restrictive means test that if there are other, reasonable ways to achieve a compelling government interest with a lesser burden on protected activity, the government may not choose the way of greater interference.[237] Likewise, the Eleventh Circuit held for a law to survive strict scrutiny under RFRA, the government must show it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the plaintiffs; when a less restrictive alternative serves the government's compelling interest equally well, the government must use that alternative.[238]

The case of *Jolly v. Coughlin* is instructive of how strict the least restrictive means test is analyzed. In *Jolly*, the Southern District of New York addressed an inmate's refusal to submit to a tuberculosis-screening test because it violated his religious beliefs. In response to a resurgence of tuberculosis (TB), the New York State Department of Correctional Services (DOCS) developed a comprehensive TB control program (Program) based on recommendations from the Department of Health and the CDC.[239] Jolly refused to submit to the required TB test because it violated his Rastafar-

---

[235] *Sharpe Holdings*, 801 F.3d at 943 (quoting Sherbert v. Verner, 374 U.S. 398, 407 (1963)).

[236] Davis v. Davis, 826 F.3d 258, 265 (5th Cir. 2016).

[237] *Sharpe Holdings*, 801 F.3d at 927.

[238] Eternal Word TV Network, Inc. v. Secretary of the United States HHS, 818 F.3d 1122, 1122 (11th Cir. 2016).

[239] Jolly v. Coughlin, 894 F. Supp. 734, 737 (S. D. N.Y. 1995).

ian[240] beliefs that "accepting artificial substances into the body constitutes a sin and shows profound disrespect to our Creator."[241] In line with the program, he was moved to a keep lock with limited contact with others.[242] He remained there for the next three years despite never getting TB.[243]

When Jolly challenged the correctional services, the government argued it had a compelling interest to protect staff and inmates from TB.[244] As the test was the only means for screening for TB, it had to be enforced or else it undermined the system.[245] However, Jolly suggested he be treated in the same way as inmates who test positive on the test but refuse therapy. That is, he be allowed to remain in general population, provide a sputum sample to determine conclusively whether he has TB, and submit to periodic x-rays and checks for clinical symptoms of TB.[246] The government argued it "would not be feasible or reasonable for them to 'divert' prison resources to monitor [Jolly] in the way they monitor inmates who have tested positive, and that a chest x-ray would not serve their interest in acquiring information."[247] The court disagreed, holding "such an accommodation of a sincere free exercise claim maintained for over three-and-a-half years represents a less restrictive alternative by which the defendants can advance their interests in health; therefore, the defendants are required to use this alternative under RFRA."[248]

There have been cases in which courts held the government's proposed least restrictive means did not violate the RFRA. For instance, in *Armstrong v. Jewell*, the court held the government's decision to allow church members to conduct their religious service on the grounds of a national memorial without the use or distribution of marijuana constituted the least restrictive means of advancing the government's compelling interest in regulating the threat

---

[240] Courts have long held Rastafari to be a "religion". *See* Multi Denominational Ministry of Cannabis and Rastafari, Inc., v. Gonzales, 474 F. Supp. 2d 1133, 1146 (N.D. Cal. 2007); Guam v. Guerrero, 290 F.3d 1210, 1213 (9th Cir. 2002); United States v. Bauer, 84 F.3d 1549, 1556 (9th Cir. 1996).

[241] *Jolly*, 894 F. Supp. at 738.

[242] *Id.*

[243] *Id.*

[244] *Id.* at 743.

[245] *Id.*

[246] *Id.* at 745.

[247] *Id.*

[248] *Id.*

to individual health and social welfare caused by marijuana.[249] Likewise, the Third Circuit held the federal government's failure to accommodate a taxpayer's religious beliefs by ensuring her tax payments did not fund the military did not violate RFRA because implementing the tax system in a uniform, mandatory way was the least restrictive means of furthering the government's compelling interest in the collection of taxes.[250] As stated, analysis under the RFRA is extremely fact-sensitive, and it is difficult to establish a bright line rule applicable to all requests. In *Adams*, the Third Circuit looked to pre-*Smith* case law on religious accommodation requests to income taxes and determined the least restrictive means of furthering a compelling interest of collecting taxes is "to implement that system in a uniform, mandatory way, with Congress determining in the first instance if exemptions are to built [*sic*] into the legislative scheme."[251]

2. Hygiene and Prophylactic Measures

In determining whether there are less restrictive means to immunizations, there is a significant distinction between vaccination status and immune status. The two do not have a one-to-one correlation. According to the Centers for Disease Control and Prevention (CDC), vaccine effectiveness varies.[252] There is, therefore, some undetected amount of the Air Force population for whom the vaccination will not guarantee immunity. Without testing every

---

[249] Armstrong v. Jewell, 151 F. Supp. 3d 242, 252 (D. R.I. 2015).

[250] Adams v. Commissioner of Internal Revenue, 170 F.3d 173 (3d Cir. 1999).

[251] *Id.* at 179.

[252] Centers for Disease Control and Prevention, *Vaccines and Preventable Diseases: Chickenpox (Varicella)*, https://www.cdc.gov/vaccines/vpd/varicella/index.html (last visited Dec. 6, 2020) (The chickenpox vaccine is about 90% effective at preventing chickenpox. Two doses of MMR are about 97% effective at preventing measles; one dose is about 93% effective.); Centers for Disease Control and Prevention, *Vaccines and Preventable Diseases: Measles Vaccination*, https://www.cdc.gov/vaccines/vpd/measles/index.html (last visited Dec. 6, 2020); Center for Disease Control and Prevention, *Typhoid Fever and Paratyphoid Fever: Vaccination*, https://www.cdc.gov/typhoid-fever/typhoid-vaccination.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fvaccines%2Fvpd%2Ftyphoid%2Fpublic%2Findex.html (last visited Dec. 6, 2020) (Typhoid vaccines are not 100% effective. The Yellow Fever vaccine provides effective immunity within 10 days for 80-100% of people vaccinated, and within 30 days for more than 99% of people vaccinated.); World Health Organization, https://www.who.int/news-room/fact-sheets/detail/yellow-fever (last visited Dec. 6, 2020); Meningitis Research Foundation, *Meningococcal Group B (MenB) vaccine*, https://www.meningitis.org/meningitis/vaccine-information/meningococcal-group-b-vaccine (last visited Dec. 6, 2020) (Some strains of the meningococcal vaccine vary between 83% and 94% effectiveness.).

member, this number is impossible to determine. But statistically there are members serving who are not immune to these diseases, yet they are allowed to deploy and serve.

Three common vaccinations service members receive include Typhoid,[253] Yellow Fever,[254] and Meningococcal[255]. Arguably Typhoid can be prevented by safe food and water preparation/precautions and frequent hand washing; Yellow Fever can be prevented through mosquito bite avoidance, since the disease is transmitted by mosquitos; and the meningococcal virus, spread by contact with infected respiratory and throat secretions, coughing, sneezing, or kissing, is routinely recommended for patients 11–18 years of age. Additionally, for those in other age groups, vaccination is recommended if a person is at increased risk for the disease (people with certain medical conditions or travelers to countries where the disease is hyperendemic or epidemic).[256] Meningococcal disease can refer to any

---

[253] Centers for Disease Control and Prevention, *Typhoid Fever and Paratyphoid Fever: Symptoms & Treatment*, https://www.cdc.gov/typhoid-fever/symptoms.html (last visited Dec. 6, 2020) (People with typhoid fever usually have a sustained fever as high as 103° to 104° F (39° to 40° C). They may also feel weak, or have stomach pains, headache, or loss of appetite. In some cases, patients have a rash of flat, rose-colored spots. Even if the symptoms seem to disappear, one may still be carrying *Salmonella Typhi*. If so, the illness could return, or the carrier could pass the disease to other people.).

[254] Centers for Disease Control and Prevention, *Yellow Fever: Symptoms, Diagnosis, & Treatment*, https://www.cdc.gov/yellowfever/symptoms/index.html (last visited Dec 6, 2020) (The majority of people infected with yellow fever virus will either not have symptoms, or have mild symptoms and completely recover. However, because there is a risk of severe disease, all people who develop symptoms of yellow fever after traveling to or living in an area at risk for the virus should see their healthcare provider. Some people will develop yellow fever illness with initial symptoms including sudden onset of fever, chills, severe headache, back pain, general body aches, nausea, vomiting, fatigue, and weakness. Most people with the initial symptoms improve within one week. For some people who recover, weakness and fatigue might last several months. Some people who develop more severe forms of the disease, such as high fever, yellow skin, bleeding, shock, and organ failure. Some yellow fever disease can be fatal. Among those who develop severe disease, 30-60% die.).

[255] Centers for Disease Control and Preventions, *Meningococcal Disease: Signs and Symptoms*, https://www.cdc.gov/meningococcal/about/symptoms.html (last visited Dec. 6, 2020) (Symptoms of meningococcal disease can first appear as a flu-like illness and rapidly worsen. The two most common types of meningococcal infections are meningitis and septicemia. Both of these types of infections are very serious and can be deadly in a matter of hours. The most common symptoms include fever, headache, and a stiff neck. There are often additional symptoms, such as nausea, vomiting, sensitivity to light, and confusion.).

[256] Centers for Disease Control and Preventions, *Meningococcal Disease:*

illness caused by the type of bacteria called Neisseria meningitides, also known as meningococcus.[257] These illnesses are often severe and can be deadly. They include infections of the lining of the brain and spinal cord (meningitis) and bloodstream infections (bacteremia or septicemia).[258] Neisseria meningitides is found worldwide, but is most common in sub-Saharan Africa.[259] Keeping current with recommended vaccines is the best defense against meningococcal disease, but getting plenty of rest and avoiding close contact with those who are sick also helps.[260]

Accordingly, prophylactic measures can be considered as a less restrictive means to vaccines for these diseases. These measures *could* reduce the *likelihood* of contracting the disease. For example, two common deployment-driven vaccines service members receive are for Typhoid and Yellow Fever. Typhoid can be prevented by avoiding risky food and drinks.[261] The CDC warns "carefully selecting what you eat and drink when you travel is important."[262] This is because the "typhoid fever vaccines do not work 100% of the time, and there is no paratyphoid fever[263] vaccine."[264] The CDC website further advises the reader to buy bottled water or drink water that has been boiled; eat foods that have been thoroughly cooked and still hot and steaming; avoid raw vegetables and fruits that cannot be peeled;

Meningococcal Vaccination, https://www.cdc.gov/meningococcal/vaccine-info.html (last visited Dec. 6, 2020).

[257] Centers for Disease Control and Preventions, *Meningococcal Disease: Causes & Transmission*, https://www.cdc.gov/meningococcal/about/causes-transmission.html (last visited Dec. 6, 2020).

[258] Centers for Disease Control and Preventions, *Meningococcal Disease: Meningococcal Disease*, https://www.cdc.gov/meningococcal/ (last visited Dec. 6, 2020).

[259] Centers for Disease Control and Preventions, *Meningococcal Disease: Risk Factors*, https://www.cdc.gov/meningococcal/about/risk-factors.html (last visited Dec. 6, 2020).

[260] Centers for Disease Control and Preventions, *Meningococcal Disease: Prevention*, https://www.cdc.gov/meningococcal/about/prevention.html (last visited Dec. 6, 2020).

[261] Centers for Disease Control and Preventions, *Typhoid Fever and Paratyphoid Fever: Prevention*, https://www.cdc.gov/typhoid-fever/prevention.html (last visited Dec. 6, 2020).

[262] *Id.*

[263] *Id. See also* Centers for Disease Control and Prevention, *Typhoid Fever and Paratyphoid Fever*, https://www.cdc.gov/typhoid-fever/sources.html (last visited Dec. 6, 2020) (Paratyphoid fever is a life-threatening illness caused by the bacterium *Salmonella* Paratyphi. Paratyphoid fever is not common in the United States, Canada, Western Europe, Australia, or Japan, but it is common in many other countries.).

[264] *Typhoid Fever and Paratyphoid Fever: Prevention*, *supra* note 261.

avoid foods from street vendors; and wash hands with soap.[265] Similarly Yellow Fever can be prevented with insect repellent, wearing proper clothing to reduce mosquito bites, and staying in accommodations with screened or air-conditioned rooms, particularly during peak biting times.[266]

Herd immunity could also make the use of prophylactic measures as a less restrictive means more feasible. When other military members around are immunized, it reduces the likelihood that unvaccinated members will contract the disease. Said another way, if enough of the herd is vaccinated, the likelihood of an applicant contracting the disease is greatly diminished. For some diseases, this may have minimal impact. Military members do sometimes become ill and generally are encouraged not to report to work when that occurs. When this happens, the mission continues. The jets still fly.

However, relying on herd immunity has significant detriments. Initially, it assumes most if not all of the personnel at any given installation or deployment are vaccinated. Moreover, herd immunity also requires a sufficient number of the population — not just the military members — to have received the vaccinations. Relying on herd immunity also fails to consider others who have a medical reason why they cannot be vaccinated. Any unvaccinated members make it more likely others will be exposed to the disease, though to a statistically small degree.[267] The Air Force has a compelling interest in protecting these members as well. The argument also ignores the scenario of the applicant contracting the disease while deployed.

One could argue, therefore, the government has a stronger compelling interest in ensuring everyone else is vaccinated against the flu to increase the herd's immunity and to protect those who have a medical reason not to receive the vaccine. Admittedly, not all 3,700 Airmen with exceptions are located on the same installation. Commanders can ask the medical community on their installation how many people in the unit or on the base have an exception and request a risk analysis from the medical providers to the applicant and

---

[265] *Id.*

[266] Centers for Disease Control and Prevention, *Yellow Fever: Prevention*, https://www.cdc.gov/yellowfever/prevention/index.html (last visited Dec. 6, 2020).

[267] As demonstrated below, on June 4, 2019, there were 3,718 Regular Air Force Airmen with immunization exemptions for medical reasons, 3,644 of which are due to pregnancy. The odds that one of these 3,644 would encounter the applicant out of the 320,083 Regular Air Force Airmen then serving is small.

the unit. This can help inform the commander's recommendation as well as the MAJCOM/CC in making the ultimate decision.

Notably, relying on prophylactic measures could lead to poor outcomes. Despite a member's best efforts, he or she could still become ill and unable to perform the mission. The illness would be an additional strain on the other deployed members. Moreover, the medical facilities down range may be less able to treat these diseases, which would necessitate medical evacuation out of theatre. All of these efforts divert assets that could be used elsewhere for other medical emergencies.

3. Temporary Exemption Subject to Review when Circumstances Change

Another possible less restrictive means could be to simply grant a temporary exemption until the Airman deploys, changes stations or the Airman's contract expires. As noted above, the Air Force does not check to ensure each vaccinated Airman actually develops the immunity to the diseases. Accordingly, an Airman with a religious exemption to a vaccine is similarly situated to any Airmen who did not develop an immunization. Perhaps this is a tolerable risk to merit a temporary exemption, until his or her contract expires for enlisted members, or until the applicant is tasked to deploy. The Airman could then reapply for an exemption for the command to reconsider when his or her situation changes, i.e., a deployment tasking, contract expires, or permanent change of station.

One person's absence *does* have an impact on the tempo of the unit, but the same is true when a member takes leave, becomes injured in a vehicle accident, or goes to a temporary duty training course at another installation. The military is used to these short-term vacancies and is able to adapt.

Other exceptions to the Air Force's immunization policy highlight that there are less restrictive means to accommodate an Airman's objection to vaccines for religious reasons. AFI 48-110_IP provides several categories of exemptions to immunizations: medical exemptions,[268] assignment reasons,[269] religious reasons, and "other exemption categories."[270] Within the Air Force, there are likely thousands of people who have received exemptions of one kind or another for immunizations. The Defense Health Agency, Solution Delivery Division, Chief Information Officer provided the following data regarding immunization exemptions in the Air Force[271]:

---

[268] AFI 48-110_IP, ¶ 2-6.a.

[269] AFI 48-110_IP, ¶ 2-6.b(1) ("Within 180 days before separation or retirement, Service personnel may be exempt from deployment (mobility) immunizations, if one of the following conditions are met: (a) They are not currently assigned, deployed, or scheduled to perform duties in a geographical area where an immunization is located. (b) The commander has not directed immunization because of overriding mission requirements. Personnel who meet separation or retirement requirements and desire an immunization exemption must identify themselves to their commander. The member must have approved retirement or separation orders. Active duty personnel continuing duty in the reserve component are not exempted on this basis."); *see also* AFI 48-110_IP, ¶ 2-6.b(2) ("Thirty days or fewer of service remaining. Applies to civilian employees and contractor personnel who will leave a permanent (other than OCONUS deployments) assignment subject to immunization within 30 days or fewer.").

[270] AFI 48-110_IP, ¶ 2-6(d).

[271] Email from Rebecca Hall, ASIMS Project Manager, Solution Delivery Division, Defense Health Agency, Solution Delivery Division, Chief Information Officer/Deputy Assistant Director, Information Operations, to Lt Col Chris Baker, Air Staff Counsel, Administrative Law Division (June 4, 2019, 11:00 EDT) (on file with author). This data is based on the number of Air Force personnel who have documented exemptions to all immunizations. The data source is the ASIMS immunization module as of June 4, 2019. In accordance with AFI 48-110_IP, religious exemptions should be documented as "administrative (refusal)." However, according to the Def. Health Agency, these exemptions could have been mislabeled as "administrative (missing)" or "administrative (temporary)."

Figure 2. Air Force Immunization Exemptions by Type
(Total Number of Air Force Personnel = 320,083)

Immunization Exemption Type	Total Number
Medical (permanent)	2
Medical (temporary)	1
Administrative (permanent change of station)	6
Administrative (temporary)	1
Administrative (separations/retirement)	55
Administrative (deceased)	5
Administrative (data missing)	4
Assignment availability code 81[272]	3,644
Total Immunization Exemptions	**3,718**

The data shows roughly 2% of the Regular Air Force has received an immunization exemption. Even when excluding exemptions for pregnancy, still 1% of Airmen in the Regular Air Force receive exemptions. As discussed, AFI 48-110_IP states, "For the Air Force, permanent [vaccination] exemptions for religious reasons are not granted …."[273] The AFI does not contain such conclusive language for the other services, and DoDI 1300.17 contains no similar prohibitive language. But Table C-2 of the AFI states administrative exemptions for religious reasons are "indefinite and revocable."[274] Based on this language, a MAJCOM/CC could grant an exemption request for multiple or all vaccine requirements until the member is tasked to deploy. Most religious accommodation requests for beards are granted; but should the member be tasked to deploy to an environment with a chemical, biological, radiological, or nuclear threat, the accommodation will be reevaluated and the member will likely be required to shave during the deployment. A similar less restrictive means could be pursued for vaccination requests for members who are likely to be tasked to deploy in the near future.

---

[272] Assignment availability code 81 refers to members who are pregnant. U.S. Dep't of Air Force, Instr. 36-2110, Total Force Assignments, Table 2.1 Assignment Availability Codes (July 28, 2020).

[273] AFI 48-110_IP, ¶ 2.6.b(3)(a)(1).

[274] *Id.* at Appendix C, Table C-2.

A vaccine exemption for any reason creates the same risk for unimmunized Airmen as does a vaccine exemption for religious accommodation. Since the Air Force accommodates exemptions for non-religious reasons, it is difficult to argue the Air Force cannot accommodate exemptions for religious reasons, or to claim there are no less restrictive means to accommodate religious requests. The answer may be the majority of the exemptions are due to pregnancy, which is a temporary condition. The next highest category of exemptions in 2019 was for those pending separation — again, a temporary condition. But the AFI does not define "temporary," which could mean months, as is the case for pregnancy, or weeks or years, depending on the needs of the Air Force. Any temporary accommodation, even extended until the member separates, could be a less restrictive means to further the Air Force's compelling interest.

If the applicant has not actually been tasked to deploy, there would be no *immediate* need for him or her to be vaccinated for deployment-related vaccinations. While in the continental United States, the risk for exposure to diseases like yellow fever, typhoid, and meningococcal virus is low. Accordingly, tours in the continental United States undercuts the government's compelling interest. Obviously, the government's compelling interest is stronger for members assigned to a unit in which he or she needs to be prepared for any deployment directive that could include mere hours to deploy. Yet commanders may have a compelling interest for all members to be vaccinated, even those on tours in the continental United States and not assigned to short deployment units. Not all communicable diseases manifest symptoms immediately, and the affected individual might be infected with or be carrying the disease without showing symptoms. Accordingly, the assertion that command could grant a temporary exemption until the member is tasked to deploy rests on an invalid assumption that there will always be adequate lead time to secure a vaccine and disseminate it to non-vaccinated members in cases of emergency.

4. Reassignment

It is important for commanders and advisors to keep in mind it is whether the Air Force, not the Airman's unit, is using the least restrictive means. Where a temporary exemption is not available, reassignment may be a less restrictive means to accommodate a religious belief. Deployability and lethality are not necessarily synonyms. While an Airman may not be able to serve in a current role, there may be other assignments and locations where the Airman can still serve. While this may be an expensive option,

expense alone does not mean it is an unavailable less restrictive means.[275] The Air Force includes a variety of supporting agencies to assist commanders to determine whether there are funds for training or billets for permanent changes of station or assignment. The fact that it might cost thousands of dollars or be inconvenient to accommodate a request does not mean there are no less restrictive means.

Additionally, not every member of the Air Force is an operator. But unless an Airman serves in a non-deployable billet, each Airman needs to be ready to deploy. From an Air Force enterprise standpoint, readiness includes ensuring all immunizations are current.[276] If the requestor is an operator, and the geographic combatant commanders are unwilling to permit Airmen to enter their respective Area of Responsibility (AOR) without the required vaccinations, the Air Force should determine if any other AFSC will accept the Airman. If so, the applicant should be retained and permitted to serve in that capacity.

There are other viable alternatives that could achieve the goal of ensuring the health of everyone who deploys on short notice to areas where such diseases are prevalent. One MAJCOM might not be willing to accept the risk of sending an applicant to a deployed location due to his or her religious objection to vaccines, but there are likely some training missions within the continental United States or staff positions for which deployment-related vaccinations would be unnecessary.

There are Airmen in the Regular Air Force who are not worldwide qualified to deploy, yet are not administratively separated. While the Air Force has a compelling interest in ensuring a ready force, it also has a compelling need to address its accession and retention issues. There is the potential to re-classify or cross-flow an applicant to another career field.

---

[275] *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 730 (2014) ("We do not doubt that cost may be an important factor in the least-restrictive means analysis, but both RFRA and its sister statute, RLUIPA, may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs."). *See also* memorandum from the Office of the Attorney General, *Federal Law Protections for Religious Liberty*, 15 (Oct. 6, 2017).

[276] U.S. Dep't of Air Force, Instr. 10-250, Individual Medical Readiness, ¶ 2.1.3 (July 22, 2020).

Accommodating an exemption request for one vaccine, such as the flu vaccine, will have a smaller impact on unit readiness and health than a requestor seeking accommodations for multiple vaccines or to all vaccines. If the member is requesting accommodation to multiple or all vaccines, the analysis will change. Generally, members who are not tasked to deploy or are not assigned overseas will have fewer vaccination requirements, so even if a member requests an accommodation to all vaccinations, the impact will be smaller for some Airmen than for others. The command must analyze how frequently the member deploys. If the member currently works in a non-deployable billet (for instance, test pilots, missiliers or security forces members who guard the missile fields), a less restrictive means analysis will be similar to a request for an exemption from one vaccine.[277] If the member will be tasked to deploy, or is assigned to an Air Force Specialty Code (AFSC) that deploys often or frequently and with little notice, the command will have to determine whether a temporary accommodation would be the least restrictive means to further the Air Force's compelling interest in readiness and health of the unit.

Take, for instance, a member of a stateside security forces squadron. These Airmen are responsible for providing security to an installation. They also act as force providers for combatant commanders. It is a career field that deploys frequently. Accordingly, it is important for these Airmen to maintain a state of readiness to deploy. If the lack of an immunization renders an Airman unable to deploy, the commander arguably cannot fully utilize this Airman. However, certain strategic weapon systems cannot be deployed to a forward-deployed area of operations; specifically, nuclear missiles. The security forces members who guard these missile fields do not forward deploy. Therefore, while a security forces member might not be able to serve in Southwest Asia, he or she could serve at Malmstrom Air Force Base, Montana

---

[277] It is also worth noting that some weapon systems have the capability to project power from the United States without ever landing the aircraft on foreign soil. For instance, the B-2 Spirit has an unrefueled range of approximately 6,000 nautical miles. During Operation Allied Force, it flew nonstop to Kosovo from Whiteman Air Force Base, Missouri, to Kosovo, and back. *See* U.S. Air Force, *B-2 Spirit* (Dec. 16, 2015) https://www.af.mil/About-Us/Fact-Sheets/Display/Article/104482/b-2-spirit/. The B-1B Lancer similarly flew from Ellsworth Air Force Base, South Dakota, to Libya, and back during the NATO-led campaign against Moammar Gadhafi. *See* Nick Penzenstadler, *Air Force releases details of 24-hour Libya mission from Ellsworth*, Rapid City Journal (Aug. 8, 2011) https://rapidcityjournal.com/news/local/communities/ellsworth/air-force-releases-details-of%e2%80%94hour-libya-mission-from/article_830a4cec-bf15-11e0-8f60-001cc4c002e0.html (last updated Nov. 8, 2011). However, although these long-range capabilities exist, the weapons do also forward deploy to foreign countries.

guarding nuclear missiles. This Airman would not be stranded in one state for the rest of her career, as there are two other locations (F.E. Warren Air Force Base, Wyoming, and Minot Air Force Base, North Dakota) responsible for this leg of the nuclear triad. F.E. Warren Air Force Base is also home to 20th Air Force, the numbered Air Force responsible for oversight of the nuclear missile wings. This Airman could therefore also experience breadth and depth of experience throughout her career and still contribute directly to the lethality of the Air Force — without ever receiving a vaccination.

One might think a pilot is a career field for which an Airman must receive all applicable vaccinations. In most situations, this is true. Many pilots deploy to remote locations with little notice, suggesting all pilots must be required to be immunized. However, there are a number of flying training wings in the Air Force, some of which employ first assignment instructor pilots (FAIPs) — pilots who train new pilots, without the benefit of an operational assignment first. The Air Force need not lower its standards for FAIPs to permit a pilot seeking an accommodation to fill such an assignment if he or she is not qualified. But if qualified, such an assignment provides an opportunity to employ the applicant. As well, there are also test pilots at Edwards Air Force Base, California. Similar to security forces members at the missile fields of the northern tier, these pilots do not deploy. Both instructor pilots and test pilots are essential to Air Force operations. If a large-scale conflict were to occur, the Air Force would continue to need pilots to fill both categories. It would therefore *increase* lethality by permitting someone who can still fly, but cannot deploy, to remain in the United States to perform these vital missions. Additionally, consider cyber warfare professionals who can employ their weapons from anywhere in the world. Their lethality is not decreased simply because they have not received a vaccination.

It may not appear fair that most Airmen will be required to deploy to dangerous locations, while Airmen with exemptions can stay home with their families. While true from a very myopic standpoint, such an argument ignores many realities of the assignment and deployment systems. Not all deployed locations are dangerous. Some Airmen are tasked to deploy to MacDill Air Force Base in Tampa, Florida, to support United States Central Command. Others are tasked to Joint Task Force-Guantanamo, in Guantanamo Bay, Cuba. Even for those who deploy outside the United States, not all deployments are as harsh as others. Some deployed locations have swimming pools and permit those assigned to consume alcohol. Some Airmen are fortunate enough to be deployed to such locations. Others are tasked to deploy to more austere locations such as Iraq and Afghanistan and spend their whole time in

harm's way. Some Airmen are able to secure several consecutive assignments to billets that are not coded to deploy.

Frankly, under some world conditions, it is possible for one person in a certain career field to deploy multiple times over a 20-year career, while someone else in the same career field might only deploy once, if at all. Similarly, sometimes people who deploy frequently are rewarded with promotions. Sometimes those who do not deploy as regularly are selected for promotion over those with deployments under their belts. Given enough time, one can find a lack of fairness in most aspects of the military. This should not stop the Air Force from accommodating a religious accommodation when it has the means to do so. But world conditions can and will change, whether that means a change in operations tempo, changes in the types of conflict in which the country engages, or changes in the types of diseases Airmen will encounter.

For an enlisted member assigned to an AFSC that does not deploy frequently or with little notice, a temporary accommodation request could be granted up to the expiration of the member's term of service. The military currently allows enlisted members who request and receive conscientious objector designation to serve in non-combat duties for the remainder of their respective terms of service, and are then ineligible for voluntary enlistment, reenlistment, or extension or amendment of the current enlistment.[278] This is a policy option available to the Air Force.

If the member is assigned to an AFSC that deploys frequently and with little notice, it is impractical to wait until the member is tasked to deploy to administer the required vaccines, as it is possible the base would not have an adequate supply on hand, or the vaccines might be of a nature that the member must take a series of shots, such as the anthrax vaccine.[279] In these cases, if the Combatant Commander of the AOR to which the member is tasked to deploy is unwilling to accept the risk of having an unvaccinated mem-

---

[278] U.S. Dep't of Def., Instr. 1300.06, Conscientious Objectors, Figure 3 (July 12, 2017); *see also* U.S. Dep't of Air Force, Instr. 36-3204, Procedures for Applying as a Conscientious Objector, ¶ 6.2.2 (Apr. 6, 2017). The same paragraph states noncombatant duty will only be performed for the "remainder of the furthest [Active Duty Service Commitment] date at the time the [conscientious objector] application is submitted (for officers)." *Id.*

[279] Centers for Disease Control and Prevention, *Anthrax: Prevention*, https://www.cdc.gov/anthrax/medical-care/prevention.html (last visited Dec. 6, 2020) (According to the CDC, to build up protection against anthrax, members of the military "should get 5 shots of anthrax vaccine over 18 months. To stay protected, they should get annual boosters.").

ber enter the AOR, there are no less restrictive means to accommodate the member's request unless the member is willing to perform a non-deployable role in the unit or is willing to transfer to another AFSC and that functional community is willing to accept a member who is unable to deploy into its career field. Not all AFSCs deploy, and those that do deploy do not deploy with the same frequency. Although one MAJCOM/CC might not be able to accommodate a member's request for exemption from all vaccines, the Air Force might be able to accommodate the request through an AFSC change. Then, as discussed above, the Airman could be permitted to serve until the expiration of the term of service, or the request could be reevaluated when the member's expiration of the term of service is approaching.

If another career field is unwilling to accept the Airman into the AFSC, courts should not require the Air Force to retain this member until she or he becomes eligible for retirement. If such a determination is made, commanders should be able to treat applicants in the same manner as conscientious objectors: if the member is enlisted, she or he should be permitted to continue serving until the expiration of the term of enlistment, at which time the Airman should not be permitted to reenlist and will be discharged with an honorable service characterization. Officers should be permitted to serve through the end of their active duty service commitments. Courts should not direct the military departments to retain members it cannot use. If the Air Force determines there are no AFSCs which can use this Airman, courts must grant deference to these decisions, for it is beyond judicial ken to determine whether a member meets the requirements for service in a particular career field.

5. Vaccines without Objectionable Ingredients

Another less restrictive means could be for the Air Force to secure vaccines that do not have objectionable ingredients. Perhaps an Airman might have a religious objection to the flu vaccine the military uses because of the material used to make the vaccine. Having alternative vaccines without the objectionable ingredient would satisfy the Air Force's interest in a vaccinated force while also accommodating the Airman's religious objection to ingesting specific ingredients. Unfortunately, due to how costly it can be for manufacturers to produce vaccines, this option will only be feasible for a small number of vaccines. If only one vaccine is produced, another accommodation could be to provide a pass to the requestor for this particular flu season, but to direct the member to take prophylactic measures such as frequent hand washing and/or use of hand sanitizer. If the member works in a confined

work space (for instance, missiliers or remotely piloted aircraft operators), it might be prudent to require the member to wear a surgical mask during the flu season, assuming the military would require other exempt Airmen working in the same career fields to take the same measures.

F. COVID-19

Pandemics are different than regional diseases that can reasonably only be contracted if the member forward deploys. On February 11, 2020, the World Health Organization announced an official name for the disease causing the 2019 novel coronavirus outbreak, first identified in Wuhan, China.[280] The new name of the disease was coronavirus disease 2019, abbreviated as COVID-19.[281] As the virus began to spread across the globe, the World Health Organization first declared it a public health emergency of international concern on January 20, 2020, and then declared the disease a global pandemic on March 11, 2020.[282] The disease spreads mainly through person-to-person contact, primarily between people who are in close contact with one another (within about six feet).[283] It transfers through respiratory droplets produced when an infected person coughs, sneezes, or talks.[284] These droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs, and studies suggest COVID-19 may be spread by people who are not showing symptoms.[285] Symptoms may appear two to fourteen days after exposure to the virus, and include fever or chills, cough, shortness of breath or difficulty breathing, fatigue, muscle or body aches, headache, new loss of taste or smell, sore throat, congestion or runny nose, nausea or vomiting, and diarrhea.[286]

---

[280] Centers for Disease Control and Prevention, *Coronavirus Disease*, https://www.cdc.gov/coronavirus/2019-ncov/faq.html#Coronavirus-Disease-2019-Basics (last visited Dec. 2, 2020).

[281] *Id.*

[282] World Health Organization, *Rolling updates on coronavirus disease (*COVID-*19)*, https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen (last visited July 31, 2020).

[283] Centers for Disease Control and Prevention, *Coronavirus Disease: Protect Yourself*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (last visited Nov. 27, 2020).

[284] *Id.*

[285] *Id.*

[286] Centers for Disease Control and Prevention, *Coronavirus Disease: Symptoms*, https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html (last visited Dec. 30, 2020).

This mode of transmission and latent manifestation makes the disease particularly difficult to prevent. As of the writing of this article, several vaccines are in the development process. During the pandemic, the CDC has recommended several prophylactic measures. People should wash their hands with soap and water for at least 20 seconds, especially after being in a public place, or after blowing one's nose, coughing, or sneezing.[287] If soap and water are not readily available, people should use a hand sanitizer containing at least 60% alcohol, and cover all surfaces of the hands and rub them together until they feel dry.[288] People should also avoid touching their eyes, nose, and mouth with unwashed hands.[289] Additionally, people should avoid close contact with those who are sick, staying at least six feet from them.[290] Further, people should distance themselves from people outside of their home by staying at least six feet from others, avoid gathering in groups, stay out of crowded places, and avoid mass gatherings.[291] Recommended measures also include covering one's mouth and nose when coughing or sneezing, cleaning and disinfecting frequently touched surfaces on a daily basis, and monitoring for symptoms.[292]

As vaccines continue to be produced and distributed, it is very likely the military will eventually direct all military members to receive a vaccine. Like other vaccines, a service member may request an accommodation to refuse the vaccine based on religious grounds. Such a request, should it arise, highlights the fact-based analysis needed for determining whether less restrictive means are available.

Once infected, if the person had symptoms, the CDC provides it is safe to be around others after three days with no fever and symptoms have improved, and ten days have elapsed since symptoms first appeared.[293] If the patient tested positive but had no symptoms, and continues to have no

---

[287] *See Coronavirus Disease: Protect Yourself*, *supra* note 283.

[288] *Id.*

[289] *Id.*

[290] *Id.*

[291] *Id.*

[292] *Id.*

[293] Centers for Disease Control and Prevention, *Coronavirus Disease: When You Can be Around Others*, https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/end-home-isolation.html (last visited Dec. 1, 2020).

symptoms, they are safe to be around others after ten days have passed since testing positive.[294]

An Airman seeking an exemption could argue current hygiene and prophylactic measures are sufficient, including physical distancing, telework, increased hand washing, wearing face masks, and disinfecting surfaces. There are many considerations involved in determining whether less restrictive means are available. The medical community would have to provide information on the efficacy of the vaccine compared with these measures. For instance, wearing a cloth face covering provides *some protection* from the disease,[295] but an N-95 mask may be *more* effective (although these masks are not as readily available and are generally intended for healthcare workers). However, it is unlikely either method would provide the same level of protection as the vaccines.[296]

Complacency presents a related concern, as there is no guarantee the applicant will always remember to wash his or her hands or wear a mask. The Airman's job also presents a significant consideration. While many military members have been teleworking during the pandemic, not all members are able to do so, such as pilots, defenders, or jobs requiring interacting with customers. While telework appears to have been an effective, temporary measure to help reduce and slow the spread of the disease, it is simply not practical for a military member to telework indefinitely or permanently. Lastly, whether the Airman will be deploying is another consideration given the efficacy of less restrictive means in maintaining readiness.

Accordingly, less restrictive means could include similar measures to those currently used to slow and prevent the spread of COVID-19. Airmen could be restricted to the base, directed to quarantine, required to socially-

---

[294] *Id.*

[295] Centers for Disease Control and Prevention, *Coronavirus Disease: How to Select Masks*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html (last visited Nov. 27, 2020).

[296] Clinical trials indicated the Pfizer vaccine was 95% effective, and the Moderna vaccine was 94.1% effective, at preventing laboratory-confirmed COVID-19 illness in people without previous infection. *See* Centers for Disease Control and Prevention, *Information about the Pfizer-BioNTech* COVID-*19 Vaccine*, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/Pfizer-BioNTech.html (last visited Jan. 6, 2021); Centers for Disease Control and Prevention, *Information about the Moderna* COVID-*19 Vaccine*, https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/Moderna.html (last visited Jan. 6, 2021).

distance themselves from others, and to maintain hygiene and prophylactic measures. While such measures may be effective for some Airmen, it will not be effective for others. An Airman on a base that can telework may be able to sufficiently socially distance, maintain hygiene and prophylactic measures and quarantine as needed. Others, such as deployers, may not be able to quarantine for two weeks prior to deploying or arriving at the deployed location without compromising the deployment.

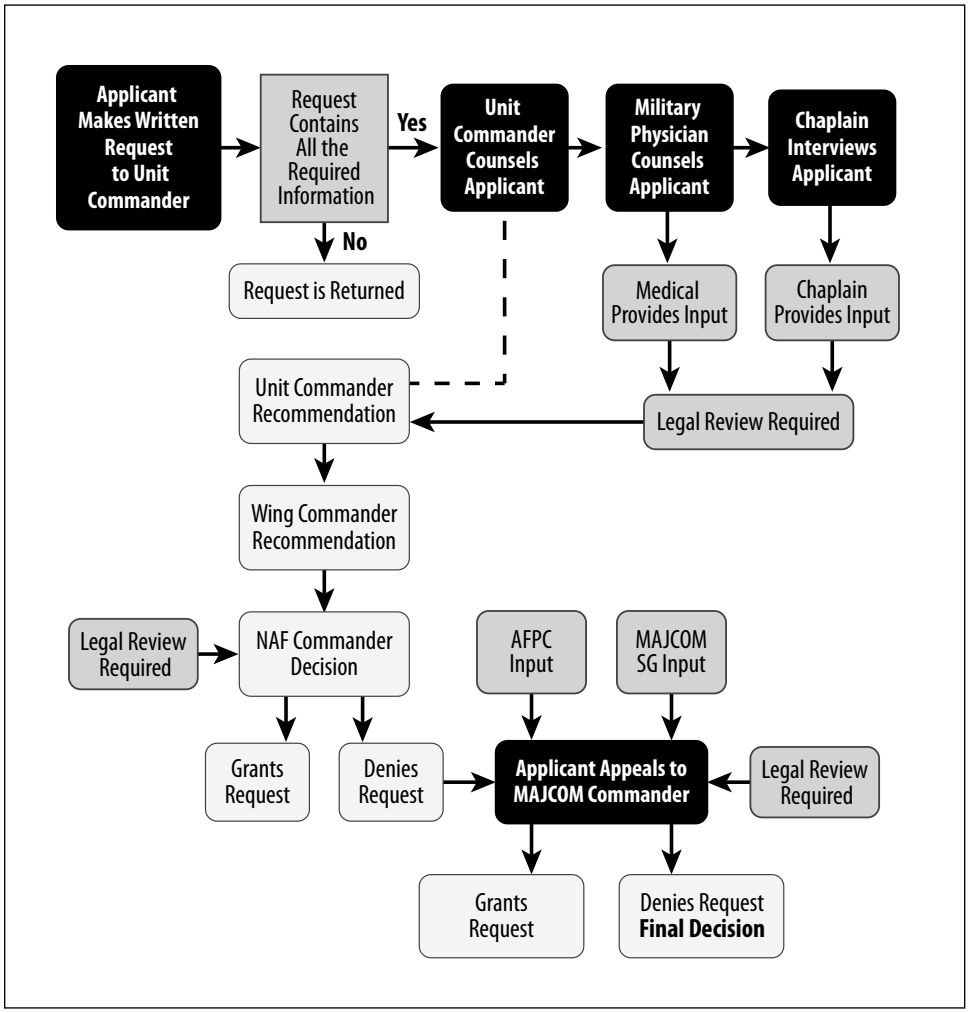
With pandemics such as COVID-19, the fact that it is easy to spread and slow to identify weighs against these less restrictive means which might be available for maladies such as the flu, yellow fever, or malaria. Without a vaccination, it appears avoiding others is likely the most effective means of avoiding the disease. Teleworking has provided short-term measures to reduce risk, but once a vaccine is available the Air Force needs to be able to get back to normal operations. Once a vaccine is readily available, it is very likely indefinite or permanent cloistering of Airmen who do not want to be immunized is unfeasible for an organization designed to prevent conflict or project power when conflict cannot be prevented. If the Air Force determines it cannot permanently or indefinitely accommodate exemptions to the immunization requirement for COVID-19, the courts need to defer to the Air Force's judgement and not direct the Service to maintain such a posture indefinitely.

IV. A Proposed New Procedural Approach

A. Over Your Dead Body: Getting the Steps Right

The current approach to accommodation requests provides no consistent guidance to the field. As demonstrated above, there are not many "administrative" reasons for vaccination exemptions. The situation does not arise frequently, although it likely will become more prevalent once the COVID-19 vaccine is widely available. This begs the question why a little used process needs to be changed. Given the preeminent importance of the Free Exercise Clause and the Air Force's need to complete its mission, it is essential to standardize processes and provide more clarity to commanders and the field for how to address these challenging situations. While all First Amendment requests must be analyzed on their own merits on a case-by-case basis, the manner in which they are analyzed must be consistent across the field. The process must start with a request. For a visual representation of the proposed process, see Figure 3.

Figure 3. Proposed Religious Accommodation Request Process



Under the proposed process, the applicant must first submit a request in writing to her commander. In her request, she must explain what she is requesting and provide the following four pieces of information: (1) She must explain whether the request is temporary or permanent. (2) She must list the vaccinations for which she is requesting an accommodation. (3) She must also list the religious basis for the request. (4) She must explain the prophylactic measures she will use to mitigate the likelihood of infection. A commander will return any request that is missing any one of the four categories above. The commander must counsel the applicant that noncompliance with immunization requirements may adversely impact deployability, assignment, or international travel.

If the applicant still wants to proceed with her request, she must report to her health care provider. The health care provider will counsel the applicant. The physician should ensure that the applicant is making an informed decision and should address, at a minimum, specific information about the diseases concerned; specific vaccine information including product constituents, benefits, and risks; and potential risks of infection incurred by unimmunized individuals. The health care provider must provide the same facts to the unit commander to assist in making a recommendation.

After meeting with the health care provider, the applicant must meet with a military chaplain. Most requests will likely arise from applicants assigned to operational units. Most military chaplains assigned to Air Force installations are junior officers, many of whom are new to the Air Force Chaplain's Corps. These chaplains might not have the breadth and depth of experience to perform an adequate inspection into the applicant's request. The Air Force Chaplain's Corps should consider identifying a cadre of more seasoned and experienced chaplains to receive specific training to address these requests and thereafter be on call to assist base chaplains with analyzing requests. The Air Force Chaplain's School and the Air Force Judge Advocate General's School are both located on Maxwell Air Force Base in Montgomery, Alabama. This co-location provides the perfect opportunity for synergy in developing expertise for both chaplains and judge advocates.

Neither the DoDI nor the AFI provide guidance on how the chaplain gathers or provides input to the commander. In fact, the AFI does not even require the chaplain to interview the applicant. The Air Force Chaplain's Corps must implement guidance to chaplains on how to process a request. Most requests will originate at the installation level, and most chaplains assigned at the installation level are new to the military. A directive publication, such as an Air Force Instruction or Air Force Manual, should be published outlining new procedures.

There are a number of procedures that must be implemented to ensure chaplains produce a memorandum that will assist all reviewing authorities. First, there must be a requirement (rather than a suggestion or implication) for the applicant to meet with a chaplain after making the request and before the commander makes a recommendation. The meeting must be guided in such a way that the resulting recommendation is not just a rubber stamp, be it over the applicant's assertions or of the chaplain's own predetermined notions of what constitutes a religious belief.

Second, in such a meeting, it is essential for the applicant to waive confidentiality to discuss the request with a chaplain. Accordingly, a confidentiality waiver would therefor accompany the application.

Third, the chaplain would incorporate the *Meyers* criteria into his or her review of the request. It is possible, as in *Meyers*, the applicant could satisfy some of the criteria yet his or her objection still be found not to be based in religion. Similarly, it is possible most of the criteria would not be satisfied, yet the objection could be found to be based in religion.[297] It should not be enough that the applicant's morale would improve if she or he were to receive the requested accommodation. Rather, the chaplains should ultimately determine how a denial of this request would affect the applicant's relationship with the Divine.

Finally, there must be a requirement for the chaplain to provide a memorandum enumerating which *Meyers* factors are present, along with a determination of whether the request is based on a religious belief, in order

---

[297] *See, e.g.*, Roseborough v. Scott, 875 P.2d 1160 (Okla. Civ. App. 1994) (Genuine issues of material fact as to the sincerity of an inmate's religious beliefs precluded summary judgment in favor of a prison warden in the inmate's claim that his First Amendment rights were violated by the warden's denial of the inmate's request for an exemption from the prison's grooming policy on facial hair and hair length based on the inmate's taking of the Nazarite vow, a recognized tenet of Judaism. In his essay supporting his application for an exemption, the inmate did not expressly declare any religion, but professed belief in God. The exemption was denied based on findings that the inmate's request was for a personal preference and of a secular nature, and the inmate did not meet the requirements of the grooming code dealing with "sincerity." Noting the sincerity of the inmate's religious belief is a question of fact, subject to judicial scrutiny for reasonableness, the court stated that a religious belief which is not sincerely held, or a belief which is purely secular, does not require the prison to consider accommodation of the inmate. While the record was replete with conclusive statements that the inmate's request for religious exemption was insincere, the court found that the record did not support that conclusion. The inmate's only statement in the record was his essay accompanying the application for exemption, which essentially contained background on the Nazarite vow and was, at most, neutral on the question of sincerity, stated the court. The warden contended that the inmate claimed to be a Christian who believed in the Nazarite vow, but that the Nazarite vow was considered a tenet of Judaism. Additionally, the warden asserted that the inmate had not taken the Nazarite vow, and had stated to the exemption committee that the only way he would be allowed facial hair was through a religious exemption. Though these assertions would be relevant to the question of the inmate's sincerity, the court stated that they were not supported by the record. Inasmuch as the question of sincerity remained a genuine issue of material fact which had to be resolved after sufficient factual development, the court ruled that summary judgment was not proper.)

to help the approval authority make an informed decision. This determination and use of the *Meyers* factors must not be confused with a religious "test."[298] A military member can continue to serve if the religious accommodation request is denied. Since an accommodation to the immunization requirements will limit how the Air Force can utilize the applicant, and since serving in the military is not a constitutional right,[299] the Air Force needs specific and articulable factors to consider when determining whether and how to accommodate such a request. The commander will have the discretion to ask the chaplain to also explore the sincerity of the request. For instance, if the applicant states only the Divine can ensure her health, but takes multiple multi-vitamins each day and uses pain relievers or cold medicine when feeling ill, those facts might undermine the professed sincerity in the proffered belief. Likewise, the commander may ask the first sergeant or appoint an investigating officer to interview the applicant's friends and co-workers to see if she made any statements that contradict her proffered belief (e.g., did she tell her friends she would do anything to avoid getting a shot?).

The commander would then provide the written request, input from the health care provider, and the chaplain's recommendation to the servicing legal office for a legal review. The legal review must analyze the request under the RFRA. The servicing legal office provides the written legal review to the commander, who makes a written recommendation. The wing commander will also provide a written recommendation but has no authority to grant or deny the request.

The approving authority must be moved from the MAJCOM to the Numbered Air Force (NAF) Commander (either a two- or three-star general officer). This will ensure a faster determination for the applicant. Moreover, the NAF Commander is charged with ensuring the readiness of assigned forces.[300] The NAF Commander's servicing legal office must provide a legal review. If the NAF Commander grants the request, she signs a memorandum stating the request is granted and explains any limitations to the accommodation. The memorandum includes a provision advising the applicant the religious exemptions may be revoked if the applicant and/or unit are at imminent risk of exposure to a disease for which an immunization is avail-

---

[298] The Constitution prohibits any religious test as a requirement for any office or public trust under the United States. U.S. CONST., art. VI, cl. 3.

[299] *See* Brown v. Gamage, 377 F.2d 154, 155 (D.C. Cir. 1967).

[300] U.S Dep't of Air Force, Instr. 38-101, Manpower and Organization, ¶ 26.2 (Aug. 28, 2019).

able as determined by the servicing medical unit. This memorandum is then placed in the applicant's medical records and personnel file.

If the NAF Commander denies the request, the applicant may appeal to the MAJCOM commander, rather than the Air Force Surgeon General (SG). A determination of whether an applicant is ready and able to perform the mission is one for the commander, based on advice from subject matter experts such as the SG. One may argue since this is a medical issue, the SG should remain as the final appeal authority. By law, the SG is not a commander; rather, he or she is an *advisor* to the Secretary of the Air Force and Chief of Staff of the Air Force on health and medical matters, and serves as the chief medical advisor of the Air Force to the Director of the Defense Health Agency on matters pertaining to military health and readiness requirements and safety of Air Force members.[301]

The MAJCOM SG will provide advice on the medical implications of granting the request as well as prophylactic measures the applicant can take. Additionally, the MAJCOM Staff Judge Advocate will provide a legal review to the commander. If the applicant occupies a position or possesses an AFSC that requires the member to be prepared to deploy to an area of operations that requires the vaccination(s) from which the applicant requests an accommodation, the Air Force Personnel Center (AFPC) will provide input as to whether there is another career field that is willing to accept the member. If a least restrictive means is available to further the government's compelling interest, the MAJCOM Commander must grant the request.

If there is not a less restrictive means, the MAJCOM commander may grant or deny the request. A decision denying the request is final. This begs the question: what happens to the member now?

B. Over My Dead Body: A Recommended Statutory Change

If the approving authority denies the request because it is not based on a sincerely held religious belief, the unit commander may order the applicant to receive the required vaccinations. At this point, if the applicant refuses this order, the commander may take appropriate disciplinary action against the applicant. If noncompliance continues, the commander could initiate discharge based on misconduct or potentially pursue court-martial charges.

[301] 10 U.S.C. § 9036 (2020).

If the approving authority determines the request is based on a sincerely held religious belief, but there are no less restrictive means available to further the government's compelling interests, then the Air Force must be permitted to either deny reenlistment to the applicant or to separate the applicant.

Ultimately, service members may need to leave the Air Force if an accommodation cannot be found. Airmen leaving the Air Force for a sincerely held religious belief should not be penalized. Accordingly, they should receive an honorable service characterization. As demonstrated in *Parker*, there are situations in which an Airman's First Amendment rights can give rise to court-martial charges. For instance, as a COVID-19 vaccine is produced and vaccination becomes required for military members, if an applicant publicly refuses to be vaccinated and calls upon others to do the same, such actions are punishable as they would have a negative impact on good order and discipline, mission effectiveness, and the health and safety of the force. But if the Airman is not having a negative impact on good order and discipline, the Airman should not be punished based on his or her religious beliefs.

Currently, the means are not available for Airmen to leave with an honorable service characterization for their objection based on religious reasons. There is not, for instance, a basis for discharge for religious refusal to the vaccination requirement. Accordingly, for enlisted members the Air Force Deputy Chief of Staff for Manpower, Personnel and Services (AF/A1) would have to update the administrative discharge regulation to add a basis for discharge to AFI 363208.[302]

Officers should be permitted to serve until the end of the current active duty service commitment, at which time the officer would be separated with an honorable service characterization. Unlike enlisted members, officer involuntary separations are governed more strictly by statute and implementing instructions. By statute, the Secretary of Defense may prescribe the procedures to separate an officer when his or her performance of duty has fallen below prescribed standards, for misconduct, moral or professional dereliction, or because his retention is not clearly consistent with the interests

---

[302] U.S Dep't of Air Force, Instr. 36-3208, Administrative Separation of Airman, (July 8, 2004) (incorporating through Interim Change 7, July 2, 2013, as amended through Air Force Guidance Memorandum 2020-01, July 1, 2020) is the current Air Force directive governing procedures for how to separate enlisted Airmen administratively [hereinafter AFI 36-3208].

of national security.[303] There is not currently an avenue to involuntarily separate an officer if the command believes the accommodation request is based on a sincerely held religious belief but there are no less restrictive means to further the Service's compelling interest.

However, statutory provisions addressing conscientious objection provide a good framework for addressing this issue.[304] Conscientious objectors are those who, "by reason of religious training and belief, [are] conscientiously opposed to participation in war in any form."[305] A conscientious objector may apply for noncombat service, and therefore continue to serve and support the mission.[306] Congress should amend the statute addressing conscientious objection, Section 3806 of Title 50, to add a provision directing the Secretary of Defense to promulgate rules permitting involuntary separation of officers in this limited situation. Adding a subparagraph (p) to the Section, the language would read as follows:

> (p) Inability to accommodate religious accommodations for the military vaccination requirements. In the case of any commissioned officer who, based on his sincerely held religious beliefs, requested a religious accommodation under Section 2000bb of Title 42, and was denied said accommodation

---

[303] 10 U.S.C. § 1181 (2020). The Secretary of Defense prescribed the procedures for separating commissioned officers in U.S. Dep't of Def., Instr. 1332.30, Commissioned Officer Administrative Separations (May 11, 2018) (incorporating change 2, effective May 22, 2020) [hereinafter DoDI 1332.30]. The Air Force implements DoDI 1332.30 in U.S. Dep't of Air Force, Instr. 36-3206, Administrative Discharge Procedures for Commissioned Officers (June 8, 2004) (incorporating through Interim Change 7, July 2, 2013, as amended through Air Force Guidance Memorandum 2020-01, June 18, 2020) which is the current Air Force directive governing procedures for how to separate Air Force commissioned officers administratively. As noted in the statute, these directives provide for separating officers for substandard conduct, misconduct, and in the interests of national security. For substandard performance, the officer's service may be characterized as honorable or under honorable conditions; whereas with misconduct and separation in the interests of national security, the officer's service could be characterized as honorable, under honorable conditions, or under other than honorable conditions. Separation because of a religious belief (without additional misconduct) should not be considered substandard performance, misconduct, or being in the interests of national security, and the officer's service should not be categorized as anything less than honorable.

[304] 50 U.S.C. § 3806(j) (2020).

[305] *Id.*

[306] *See* AFI 36-3204, at ¶¶ 2.1.2, 2.4, 6.2.

> because the Service determined there were no less restrictive means available to further its compelling interest, shall, subject to such regulations as the Secretary of Defense will prescribe, be permitted to complete his active duty service commitment. At the completion of his active duty service commitment, he shall be separated with an honorable service characterization. As used in this subsection, the term "religious belief" does not include essentially political, sociological, or philosophical views, or merely a personal moral code.

Such an amendment would allow the Department of Defense and Air Force to update their regulations to allow Airmen to separate with an honorable service characterization when their religious convictions that prevent them from receiving vaccines cannot be accommodated.

Just as it is unfair to separate a member based on her religious beliefs with less than an honorable service characterization, it is likewise unfair to recoup any special pay, bonus, or education benefits from the same member. Accordingly, Chapter 2 of Volume 7A of the Financial Management Regulation[307] must likewise be updated to create a presumption against recoupment in such cases. The recoupment rule would be similar to that of a service member separated for an injury or illness precluding the member from fulfilling the service conditions specified in the written agreement. The provision would read:

> Recoupment will not be sought unless the Secretary of the Military Department concerned determines that repayment of the unearned portion is appropriate due to a personnel policy or management objective, equity or good conscience, or it is in the best interest of the United States.

Under these provisions, there could still be scenarios in which recoupment is appropriate, but it would not be incumbent on the member to demonstrate why she should not be subject to recoupment.

---

[307] *See* Dep't of Def., Financial Management Regulation, vol 2A 7000.14-R, Budget Formulation and Presentation at chs. 1-3 (Jan. 2011).

V. Conclusion

Requests for religious accommodation are extremely fact-based and must be assessed on a case-by-case basis. The decision of one MAJCOM does not bind all, nor does it automatically lead to the same result based on a different applicant with different facts. Commanders and their servicing legal offices, after receiving input from a chaplain as required by the AFI, must utilize the factors from *Meyers* to determine whether the professed belief is religious in nature. When determining sincerity, commanders must weigh the applicant's credibility in his or her assertion of a sincere belief. But as the cases warn, the government must tread lightly when assessing sincerity, as great deference to the requestor has been given to this prong of the analysis. If the applicant has a sincerely held religious belief, the applicant has likely met his or her burden if the only choice presented is to be vaccinated or risk administrative or punitive actions for violating a lawful order.

It is likewise important to note the Court in *Holt* rejected the state prison's argument that if an exemption were made for one inmate, the exemption would have to be made for all inmates. The Court stressed it has never accepted this argument and rejected it once again in *Holt*.[308] The government has a compelling interest in ensuring a ready and lethal force, but it must use the least restrictive means available to further this interest. In short, if the government can achieve its compelling governmental interest in a manner that impacts the religious practice at issue to a lesser degree, it must pursue those lesser means, even if it could cost extra money, such as re-training the member.

No commander wants to violate a member's religious rights. Since there is no military exemption to RFRA's application, commanders will have to work with the personnel community, in addition to receiving input from the legal, chaplain, and medical communities, to address these requests. But commanders must have discretion to determine what is necessary to ensure the lethality, readiness, and health of their respective units. If the determination is made that there are no less restrictive means to further the Air Force's compelling interest, this decision warrants great judicial deference.

---

[308] *See* Holt v. Hobbs, 574 U.S 352, 368 (2015) (citing Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 436 (2006)); *see also* Sherbert v. Verner, 374 U.S. 398, 407 (1963).

GROUNDING THE HUMĀ: THE LEGALITY OF SPACE DENIAL AND (POTENTIAL) AMERICAN INTERFERENCE IN THE IRANIAN SPACE PROGRAM

*Major Jeremy J. Grunert**

* Major Jeremy J. Grunert, USAF, (LL.M., Air & Space Law, University of Mississippi School of Law (2020); J.D., Pepperdine University School of Law, Magna Cum Laude (2013); M.A., Pepperdine University School of Public Policy (2013); B.A., Government and Literature, Claremont McKenna College, Magna Cum Laude (2009)) is an assistant professor in the Department of Law at the United States Air Force Academy. Major Grunert has previously served as an Assistant Staff Judge Advocate at RAF Lakenheath, United Kingdom, and Incirlik Air Base, Turkey. He is a member of the Virginia Bar. Major Grunert would like to thank his wife and children, and his professors, Dr. P.J. Blount, Charles Stotler, and Michelle Hanlon for their invaluable assistance in the writing and development of this article.

"How can men turn their head away from him whose shadow creates kings?"[1]

I. Introduction

In the legends of ancient Persia, one can find tales of a curious mythological beast: the Humā bird. Traditionally viewed as bird of good-omen, the Humā — like a satellite locked in orbit around the Earth — flew perpetually, "never alighting on land."[2] Its true power, however, came from its shadow, which held a strange and mystic power: the ability to create kings.[3] The Humā's shadow "herald[ed] a royal destiny" for any person on whom it fell.[4] In modern Persia, now known as the Islamic Republic of Iran (hereinafter, "Iran" or "the Islamic Republic"), the legend of the Humā bird serves as an excellent stand-in for a very different heavenly phenomenon: a State's successful national outer space program and the benefits that can be derived from space-based activities. In the shadow of a successful space program, a State can stoke its national pride, bask in global prestige, and even, potentially, partake in cosmic riches. The Iranian government certainly views a successful space program as a means of "attain[ing] the position that it deserves in the global arena," and, as we shall see, has devoted significant resources over the past two decades toward creating an independent space launch capability.[5] But recent events indicate that not all are pleased that the shadow of this new, modern Humā may be falling on Iran. Indeed, some members of the international community may be taking measures to keep the Iranian space Humā firmly on the ground.

On August 29, 2019, an explosion rocked the launchpad at the Imam Khomeini Space Center in Semnan, Iran — the Islamic Republic's primary space rocketry and launch facility.[6] Damaging the space launch vehicle

---

[1] Farid ud-Din Attar, The Conference of the Birds (Mantiq ut-Tair): A Philosophical Religious Poem in Prose 22 (C.S. Nott trans., Shambala Berkeley 1971), http://data.nur.nu/Kutub/English/Attar_Conference-of-the-Birds_tr.C.S.Nott.pdf.

[2] Carlo Saccone, "Humā," *Encyclopedia of Islam, THREE* (Kate Fleet et al., eds.), http://dx.doi.org.umiss.idm.oclc.org/10.1163/1573-3912_ei3_COM_30551 (last visited Oct. 1, 2019).

[3] *Id.*

[4] *Id.*

[5] Parviz Tarikhi, *Iran's Space Programme: Riding High for Peace and Pride*, 25:3 Space Pol'y Int'l J. 160, 172 (2009).

[6] Jon Gambrell, *Satellite photos show burning Iran space center launch pad*, Wash.

(SLV), gantry tower, and mobile launcher on the pad at the time, the explosion was the latest in a string of failed launches for the Iranian Space Agency (ISA). With the ISA's recent track record, the failed launch might have garnered little attention. The following day, however, President Donald Trump took to Twitter to comment on Iran's misfortune. Attaching a high-resolution photograph of the damaged launch pad (a photograph that many experts believe was taken by a classified American spy satellite[7]), President Trump declared:

> The United States of America was not involved in the catastrophic accident during final launch preparations for the Safir SLV Launch at Semnan Launch Site One in Iran. I wish Iran best wishes and good luck in determining what happened at Site One.[8]

The President's comment appeared to respond to an accusation that, at least at the time, no one had made.

In the aftermath of President Trump's tweet, Iranian officials prevaricated. Mohammad Javad Azari Jahromi, Iran's Minister of Information and Communications Technology, immediately claimed that the intended payload of the failed launch, Iran's Nahid I communications satellite, was not damaged, tweeting a photograph of himself supposedly standing next to an intact Nahid I.[9] After several days of silence, the Iranian Government acknowledged the explosion, citing a technical malfunction as the underlying cause and reiterating Mr. Jahromi's claim that the damaged rocket had not contained its satellite payload.[10] The American media, meanwhile, largely

---

Post, Aug. 29, 2019, https://www.washingtonpost.com/business/technology/satellite-photos-show-burning-iran-space-center-launch-pad/2019/08/29/98ac9abe-ca74-11e9-9615-8f1a32962e04_story.html.

[7] *See* David E. Sanger & William J. Broad, *In a Tweet Taunting Iran, Trump Release an Image Thought to Be Classified*, N.Y. Times, Aug. 30, 2019, https://www.nytimes.com/2019/08/30/world/middleeast/trump-iran-missile-explosion-satellite-image.html.

[8] Donald Trump (@realDonaldTrump), Twitter (Aug. 30, 2019, 12:44 PM), https://twitter.com/realDonaldTrump/status/1167493371973255170.

[9] MJ Azari Jahromi (@azarijahromi), Twitter (Aug. 30, 2019, 10:21 PM), https://twitter.com/azarijahromi/status/1167638423240368133. *See also* Erin Cunningham, *Iran displays satellite after Trump tweet showing damaged launch site*, Wash. Post, Aug. 31, 2019, https://www.washingtonpost.com/world/iran-displays-satellite-after-trump-tweet-showing-damaged-launch-site/2019/08/31/7fac01e0-cbe5-11e9-a4f3-c081a126de70_story.html.

[10] Associated Press, *Iran admits its rocket blew up*, Politico (Sept. 2, 2019),

focused its coverage of the incident on the legality and wisdom of President Trump's release of the high-quality satellite image contained in his tweet.[11] While several stories mentioned suspicions of American sabotage, the brief media firestorm surrounding the incident mostly ignored this aspect of the story, particularly after Iran's claim that technical problems, rather than sabotage, caused the explosion.

Whether sabotage directly led to the August 2019 explosion in Semnan, that the United States may be working to hinder — or even, potentially, actively sabotaging — the Iranian space program is not beyond the realm of possibility. The United States has a history of engaging in covert operations against Iran, most notably the advanced Stuxnet cyber-attack that derailed the Islamic Republic's nuclear program in 2010.[12] Further, there have been recent reports that the Trump Administration has "accelerated" efforts to sabotage Iran's rocket and missile development — mostly through the introduction of "faulty parts and materials into Iran's aerospace supply chains."[13] While this sabotage is ostensibly directed at Iran's ballistic missile program, it is likely to affect the Iranian space program as well. If the United States is indeed sabotaging the Iranian space program, this raises a host of significant legal and policy questions. This article will examine these issues, arguing that even if American sabotage of the Iranian space program would violate the United States' treaty obligations under the 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies

---

https://www.politico.com/story/2019/09/02/iran-rocket-explosion-1479455.

[11] *See* Geoff Brumfiel, *Trump Tweets Sensitive Surveillance Image of Iran*, NPR (Aug. 30, 2019), https://www.npr.org/2019/08/30/755994591/president-trump-tweets-sensitive-surveillance-image-of-iran; Shane Harris & Anne Gearan, *Trump shares potentially revealing image of Iranian launch site on Twitter*, Wash. Post, Aug. 30, 2019, https://www.washingtonpost.com/national-security/trump-shares-potentially-revealing-image-of-iranian-missile-site-on-twitter/2019/08/30/4820db10-cb5e-11e9-a1fe-ca46e8d573c0_story.html; Sanger & Broad, *supra* note 7.

[12] *See* David E. Sanger, *Obama Order Sped Up Wave of Cyberattacks Against Iran*, N.Y. Times, Jun. 1, 2012, https://www.nytimes.com/2012/06/01/world/middleeast/obama-ordered-wave-of-cyberattacks-against-iran.html. At the time, Stuxnet was one of the most advanced cyber-weapons ever developed. *Id.*

[13] David E. Sanger & William J. Broad, *U.S. Revives Secret Program to Sabotage Iranian Missiles and Rockets*, N.Y. Times, Feb. 13, 2019, https://www.nytimes.com/2019/02/13/us/politics/iran-missile-launch-failures.html [hereinafter *U.S. Revives Secret Program*].

(more commonly known as the "Outer Space Treaty"),[14] the United States can justify such actions based upon other principles of international law.

To begin this discussion, Section II will provide a background of Iran's space program, detailing the history of Iran's pre- and post-revolution interests in outer space, and, specifically, the recent history of the ISA, Iran's official civilian space agency. This section will also examine of the motivations underlying the Iranian space endeavor, both Iran's claims that the program is for purely "peaceful purposes" and the United States' (and others') suspicions that the space program masks more threatening aims, such as the development of long-range ballistic missiles.

Section III will examine the relevant law involved in the possible sabotage of Iran's space program, specifically outer space law as framed in the Outer Space Treaty and interpretations of its provisions under international law. It will also detail the United States' current outer space policies, with a particular emphasis on the national policies promulgated by Presidents Trump, Obama, and Bush — the three most recent presidential administrations.

In Section IV, the United States' possible sabotage of the Iranian space program will be analyzed in light of the relevant law discussed in earlier sections. Do the United States' actions run afoul of the Outer Space Treaty? If so, is there another area or principle of international law under which they would be legitimate? Section V will provide a conclusion, offering policy recommendations for American decision-makers with respect to how best to confront Iranian space ambitions while still complying with international law and existing treaty obligations.

II. Background

In order to better understand possible American interference with the Iranian space program, it is essential to have a working knowledge of the program's history, as well as the possible threats — at least from an American and international perspective — that such a program may pose. This section will address these topics. First, it will provide a history of Iran's participation in outer space-related international regimes and development of its own space

[14] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty].

program. Second, it will compare Iran's portrayal of the purposes of its space program with what Americans and others perceive those purposes to be.

A. History of the Iranian Space Program

Iran has been involved with issues related to outer space at the international level almost since the beginning of the Space Age in 1957. After the Soviet Union's launch of the Sputnik I satellite on October 4, 1957, and subsequent American proposals at the United Nations (U.N.) for "an international program of space cooperation,"[15] Iran joined the United States and its allies at the U.N. in supporting the creation of an Ad Hoc Committee on the Peaceful Uses of Outer Space. The U.N. General Assembly approved the creation of this Ad Hoc Committee on December 13, 1958, in General Assembly Resolution 1348, listing Iran as a founding member.[16] The Ad Hoc Committee was formalized into the permanent Committee on the Peaceful Uses of Outer Space (COPUOS) the following year, with direction from the General Assembly (1) "[t]o review … area[s] of international co-operation, and to study practical and feasible means for giving effect to programmes in the peaceful uses of outer space," and (2) "[t]o study the nature of legal problems which may arise from the exploration of outer space."[17]

During the two decades separating the founding of COPUOS from the unrest that would lead to the Iranian Revolution, Iran expanded its Space Age bona fides by participating in the international treaty regimes that grew up around expanding American and Soviet efforts in outer space. Of the five major outer space-related treaties drafted and open for signature between 1967 and 1979, Iran signed four:[18] the Outer Space Treaty (1967);[19] the Rescue

---

[15] James Clay Moltz, The Politics of Space Security: Strategic Restraint and the Pursuit of National Interests 98 (Stanford U. Press 3d ed., 2019).

[16] G.A. Res. 1348(XIII), ¶ 1 (Dec. 13, 1958). *See also* Parviz Tarikhi, The Iranian Space Endeavor: Ambitions and Reality 26 (Springer Praxis 2015).

[17] G.A. Res. 1472(XIV), ¶ A.1.a (Dec. 12, 1959).

[18] Comm. On the Peaceful Uses of Outer Space [hereinafter COPUOS], Rep. of the Legal Subcomm., *Status of International Agreements relating to activities in outer space as at 1 January 2019*, 58th Sess., U.N. Doc. A/AC.105/C.2/2019/CRP.3 (Apr. 1, 2019). Iran signed the Outer Space Treaty on January 27, 1967, the first day it was open for signature. *See* U.N. Office for Disarmament Affairs, *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, https://disarmament.un.org/treaties/t/outer_space.

[19] *See* Outer Space Treaty, *supra* note 14.

and Return Agreement (1968);[20] the Liability Convention (1972);[21] and the Registration Convention (1975).[22] While Iran's signing of these four treaties indicates its recognition and acceptance of the legal provisions and obligations therein contained, Iranian authorities only ratified the Rescue and Return Agreement and the Liability Convention — leaving at least some question with respect to the international legal obligations modern Iran may have under the Outer Space Treaty and the Registration Convention (see Section III, below).[23] Finally, like the United States and a majority of other nations, Iran did not sign the Moon Agreement (1979).[24]

Throughout the 1960s and 1970s, in addition to its participation in COPUOS and the outer space treaties, Iran also began working to utilize outer space technology. In 1969, Iran established its first major satellite signal receiving facility in Hamadan Province, which allowed access to the INTELSAT satellite communications network.[25] Iran's interest in satellite technology led to the creation of an organization devoted to remote sensing and satellite applications in approximately 1972,[26] as well as a technological

---

[20] *See* Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, Apr. 22, 1968, 19 U.S.T. 7570, 672 U.N.T.S. 119 [hereinafter Rescue and Return Agreement].

[21] *See* Convention on International Liability for Damage Caused by Space Objects, Mar. 29, 1972, 24 U.S.T. 2389, 961 U.N.T.S. 187 [hereinafter Liability Convention].

[22] *See* Convention on Registration of Objects Launched into Outer Space, Jan. 14, 1975, 28 U.S.T. 695, 1023 U.N.T.S. 15 [hereinafter Registration Convention].

[23] *See* COPUOS Legal Subcomm., *supra* note 18.

[24] *Id*. For more information about the Moon Agreement, *see* Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, U.N.G.A. Res. 34/68, Dec. 18, 1979 [hereinafter Moon Agreement].

[25] Tarikhi, *supra* note 16, at 26.

[26] There seems to be at least some confusion among available sources as to whether this was one organization (the Iranian Remote Sensing Center (IRSC)) or two (the Plan for Satellite Data Applications *and* the IRSC), although this confusion is likely explained by the original organization (the Plan for Satellite Data Applications) being renamed later in time. Parviz Tarikhi describes Iran's space endeavors from the early 1970s through approximately 1991 as being wholly subsumed under the "Plan for Satellite Data Applications," which he describes as an "office in the Iranian Planning and Budget Organization. "*Id.* at 87, 93, and Table 4.5. According to Tarikhi, it was only the passage of a law by the Iranian Parliament in 1991 that reconstituted the remote sensing and outer space endeavors of the PSDA under the auspices of the IRSC. *Id.* at 93. Other sources, however, solely cite the IRSC. For instance, a paper by A. Eslami Rad and M. Sarpoulaki presented at the 20th Congress of the International Society for Photogrammetry and Remote Sensing (ISPRS) states that the IRSC "was established in 1972 in order to coordinate remote sensing activities in Iran. "A. Eslami Rad & M. Sarpoulaki, *Islamic*

partnership between Iran and the United States. The United States agreed to a cooperative venture with Iran to construct a new satellite receiving station near Tehran, the Mohdasht Satellite Receiving Station, for the purpose of receiving satellite transmissions from the recently launched Earth Resources Technology Satellite (ERTS).[27] While the station operated successfully for a brief period of time beginning in approximately 1978, growing domestic turmoil in Iran (which would ultimately lead to the successful Iranian Revolution) resulted in Iran's American partner, the General Electric Company, "leav[ing] the country and suspend[ing] the project['s] implementation."[28]

In the aftermath of the 1979 Iranian Revolution and Iran's transition from an autocratic monarchy led by Shah Mohammad Reza Pahlavi to an Islamic Republic ruled by Ayatollah Ruhollah Khomeini, Iranian efforts related to outer space stagnated. The unrest of the Revolution and, in its aftermath, the Islamic Republic's "suspicion" of international cooperation, resulted in the suspension of Iran's work with COPUOS for the better part of a decade.[29] Meanwhile, a long-simmering border dispute with neighboring Iraq, as well as Iranian attempts to destabilize the government of Ba'athist dictator Saddam Hussein (an Arab Nationalist and inveterate enemy of Ayatollah Khomeini), led to a dramatic deterioration in relations between Iraq and Iran from 1979 through the fall of 1980.[30] This strain exploded in September of that year, when Iraqi forces invaded Iran, triggering an eight-year war that bled the combatants dry: in what, at the time, was one of the worst conflicts since World War II where Iran and Iraq suffered enormous casualties and economic loss.[31] The Islamic Republic's focus during this brutal conflict was its very survival. It had neither the economic resources nor political impetus to pursue outer space-related efforts. In the horrors of war, however, lay the beginning of the program that would later contribute to Iran's successful space launches in the first decade of the 21st Century. As the war

---

Republic of Iran National Report for Photogrammetry and Remote Sensing 2000-2004, XXth ISPRS Congress (2004), https://www.isprs.org/proceedings/XXXV/congress/comm6/papers/714.pdf.

[27] *See* Brian Harvey, Hank Smid & Theo Pirard, Emerging Space Powers: The New Space Programs of Asia, the Middle East, and South America 260 (Chichester, UK: Springer/Praxis, 2010). *See also* Tarikhi, *supra* note 16, at 87-89.

[28] Tarikhi, *supra* note 16, at 88. *See also* Harvey, Smid & Pirard, *supra* note 27, at 260.

[29] Tarikhi, *supra* note 16, at 82, 109.

[30] Will D. Swearingen, *Geopolitical Origins of the Iran-Iraq War*, 78:4 Geographical Rev. 405, 408-13 (Oct. 1988).

[31] *See id.* at 405.

devolved into missile attacks on civilian population centers — what became known as the "war of the cities" — Iran began acquiring SCUD missiles and missile technology from Libya, Syria, and North Korea, kick-starting a ballistic missile program.[32] Decades later, as we will see below, Iran was able to apply its missile technology to the development of a "civilian" SLV.

With the end of the Iran-Iraq War in 1988, the Islamic Republic once again had the bandwidth to focus on formerly subsidiary issues like outer space. Indeed, as shortly after the war as the summer of 1989, Iranian President Akbar Hashemi Rafsanjani and Soviet Premier Mikhail Gorbachev allegedly agreed on a joint mission to send an Iranian astronaut to the Soviets' Mir space station.[33] In the early 1990s, a renewed interest in the possibilities and benefits of satellite technology, telecommunications, and remote sensing led to a number of Iranian efforts to make progress in these areas. The Iranian Parliament transferred responsibility for all remote sensing activities to the Iranian Remote Sensing Center in 1991.[34] Via international partnerships, Iranian academic and research institutions began to actively work toward the development and construction of domestically produced satellites.[35] Additionally, the Islamic Republic began engaging with the international community by participating in the global telecommunications regulatory framework. Beginning in the mid-1990s, and extending through the present day, Iran signed and either ratified or otherwise approved a number of significant international agreements in this field, including the Constitution and Convention of the International Telecommunication Union (ITU), a

---

[32] Thomas L. McNaugher, *Ballistic Missiles and Chemical Weapons: The Legacy of the Iran-Iraq War*, 15 Int'l Sec. 2, 8-11 (1990). *See also* Stephen A. Hildrith, Cong. Res. Serv., Iran's Ballistic Missile and Space Launch Programs 43-44 (2012).

[33] Reuters, *Moscow, Iran Sign Economic Pacts, Hint Future Arms Deals*, L.A. Times, June 22, 1989, https://www.latimes.com/archives/la-xpm-1989-06-22-mn-3074-story.html. *See also* Hildrith, *supra* note 32, at 42 (although Hildrith appears to have mixed up the year, citing the Soviet-Iranian summit at which the agreement was discussed as having occurred in June 1990, rather than June 1989).

[34] Tarikhi, *supra* note 16, at 93. *See supra* note 26 and accompanying text.

[35] *See* Tarikhi, *supra* note 16, at 106 ("The Iran Telecommunications Research Center (ITRC), Iranian Electronics Industries Organization, and the Iranian Research Organization for Science and Technology (IROST), in affiliation with the Ministry of Science, Research and Technology (MSRT), began to develop the Mesbah microsatellite in 1997 with the assistance of the Italian company Carlo Gavazzi Space (CGSC)"); Alexandr V. Nemets & Robert W. Kurz, *The Iranian Space Program and Russian Assistance*, 22 J. Slavic Mil. Stud. 87, 89 (2009).

number of amendments to the ITU Constitution and Convention, and other international telecommunications regulations.[36]

In 2003, Iran's growing interest in outer space led to the passage of legislation by the Iranian parliament directing the establishment of the Iranian Space Agency. The ISA was duly created in 2004 as an affiliated organization of Iran's Ministry of Communications and Information Technology, with Seyyed Hassan Shafti, an Iranian diplomat and aerospace industry specialist, as its first president.[37] During the early 2000s, cooperation between the ISA and Iran's scientific and military communities resulted in advancements toward domestic space launch technology. This partnership saw the redevelopment of the Shahab-3 missile — a medium-range ballistic missile likely derived from North Korea's No Dong missile, first acquired by Iran during the 1990s[38] — into a rocket delivery system capable of launch into low-earth orbit. This revamped Shahab-3, outfitted with a second-stage system for delivering satellite payloads, was designated the "Safir" (a transliteration of the Persian word for "Envoy" or "Ambassador") SLV and initially test-launched in 2008.[39]

In conjunction with the development of the Safir SLV, Iran continued to explore satellite and remote sensing technologies. In October 2005, the first Iranian-owned satellite, the Sina-1, was launched into orbit.[40] Both manufactured by, and launched from, the Russian Federation, the Sina-1

---

[36] *See* International Telecommunication Union, *List of Agreements for Iran (Islamic Republic of)* (2009), https://www.itu.int/online/mm/scripts/gensel26?ctryid=1000100563.

[37] Tarikhi, *supra* note 16, at 121-22. Tarikhi describes Shafti as having "served as the director general of the state-run Iran Air for a period of 12 years" and as "the Ambassador of the Islamic Republic of Iran to Spain for 5 years," as well as having been the founder of the "Iranian Aerospace Society." *Id.*

[38] Missile Defense Project, *Shahab-3*, Ctr. Strategic & Int'l Stud. (Aug. 9, 2016), https://missilethreat.csis.org/missile/shahab-3/ (last modified June 15, 2018).

[39] *See* Tarikhi, *supra* note 16, at 191-192. *See also* Missile Defense Project, *Safir*, Ctr. Strategic & Int'l Stud. (Oct. 16, 2017), https://missilethreat.csis.org/missile/safir/In (last modified June 15, 2018).

[40] COPUOS, Note verbale dated 14 August 2006 from the Permanent Mission of the Russian Federation to the United Nations (Vienna) addressed to the Secretary-General, *Information furnished in conformity with the Convention on Registration of Objects Launched into Outer Space*, U.N. Doc. ST/SG/SER.E/496 (Sept. 4, 2006). *See also* Tarikhi, *supra* note 16, at 108; Nemets & Kurz, *supra* note 35, at 87-88; William J. Broad & David E. Sanger, *Iran Joins the Space Club, but Why?*, N.Y. Times, Apr. 4, 2006, https://www.nytimes.com/2006/04/04/science/space/04rock.html [hereafter *Iran Joins the Space Club*].

was a rudimentary remote sensing satellite; its successful launch represented Iran's first major success in international space partnership.[41] Undeterred by its initial lack of success in indigenous satellite production, Iran continued domestic satellite research and development, eventually achieving success with the production of the Omid ("Hope") communications satellite. As the payload of a Safir SLV launched into low-earth orbit on February 2, 2009, Omid became the first domestically produced, domestically launched Iranian satellite, and the Islamic Republic became the ninth nation in the world to achieve an independent space launch capability.[42]

As the Islamic Republic developed its satellite and rocket technology during the 1990s and early 2000s, another, potentially even more significant, Iranian project — highly suggestive of an ulterior motive for Iran's space launch program — lurked in the background. This was Iran's pursuit of nuclear weapons, which the Islamic Republic had sought in earnest since the mid-1980s during the Iran-Iraq War.[43] By 1995, the United States believed "that Iran was 'aggressively pursuing a nuclear weapons capability …'" and could potentially produce a nuclear bomb by the year 2000.[44] That was not to be, and in the aftermath of 9/11 and the United States' invasion of Iraq in 2003, Iran temporarily halted some of the nuclear enrichment necessary for the production of weapons-grade nuclear material. During the middle of the Bush Administration, however, Iranian nuclear enrichment restarted and expanded, leading to the imposition of economic sanctions, the start of a coordinated cyber-campaign against the program (which would ultimately result in the nuclear centrifuge-targeting Stuxnet computer virus), and even calls for military intervention.[45] Meanwhile, the U.N. Security Council adopted a number of resolutions between 2006 and 2010 condemning Iran's nuclear behavior, calling on Iran to suspend uranium enrichment and cooperate with the International Atomic Energy Agency (IAEA), and imposing sanctions.[46] In conjunction with these sanctions, the "P5+1" (Germany and

---

[41] *See* Nemets & Kurz, *supra* note 35, at 89.

[42] United Nations Office for Outer Space Affairs, *Highlights in Space 2009*, U.N. Doc. ST/SPACE/46 (2010).

[43] *See* Shreeya Sinha & Susan Campbell Beachy, *Timeline on Iran's Nuclear Program*, N.Y. Times, Apr. 2, 2015, https://www.nytimes.com/interactive/2014/11/20/world/middleeast/Iran-nuclear-timeline.html?searchResultPosition=1#/#time243_10809.

[44] Paul K. Kerr, Cong. Res. Serv., Iran's Nuclear Program: Status 2 (Washington, D.C., Oct. 9, 2019).

[45] *See* Sinha & Beachy, *supra* note 43.

[46] *See UN Security Council Resolutions on Iran*, Arms Control Ass'n (Aug. 2017),

the five permanent members of the Security Council, i.e., the United States, the United Kingdom, France, China, and the Russian Federation) sought a diplomatic solution to Iran's pursuit of nuclear enrichment. Beginning in 2013, the Obama Administration and the rest of the P5+1, with their position bolstered by the bite of sanctions and the lingering results of the Stuxnet virus, negotiated a new agreement with Iran that came to be known as the Joint Comprehensive Plan of Action (JCPOA). Finalized in July 2015, the JCPOA provided the framework for a 10-to-15-year lull in Iranian nuclear ambitions: in exchange for Iran's agreement to limit nuclear enrichment, accept certain limitations imposed in previous U.N. resolutions (particularly with respect to heavy arms and ballistic missiles), reduce its stockpiles of medium- and low-enriched uranium, and other nuclear limitations, the United States and its allies agreed to lift certain sanctions against Iran (particularly against its oil and banking sectors) and not to impose any new nuclear-related sanctions.[47]

Iran accomplished several additional orbital launches between 2009 and the beginning of the JCPOA negotiations in 2013, launching the Rasad ("Observation") and Navid ("Promise") remote sensing satellites, as well as at least one suborbital, experimental spaceflight involving the allegedly successful launch and return of a live monkey.[48] Iranian space efforts,

https://www.armscontrol.org/factsheets/Security-Council-Resolutions-on-Iran.

[47] *See The Joint Comprehensive Plan of Action (JCPOA) at a Glance*, Arms Control Ass'n (May 2018), https://www.armscontrol.org/factsheets/JCPOA-at-a-glance. While the JCPOA was to officially terminate in October 2025, approximately ten years after its adoption, it included a number of provisions limiting Iranian nuclear activities for periods longer than ten years. For example, the JCPOA imposed limits on the percentage of enrichment to which Iran could enrich uranium-235 (3.67%), the locations at which such enrichment could take place (only the Natanz nuclear facility could be used), and the amount of enriched uranium Iran could keep stockpiled (less than 300 grams) for a 15-year period. *Id.* The agreement also mandated International Atomic Energy Agency monitoring of Iran's centrifuge production facilities and uranium mines/mills for 20 and 25 years, respectively. *Id.* It should be noted that the Trump Administration formally withdrew the United States from the JCPOA agreement in May 2018. *See* Zachary Laub & Kali Robinson, *What Is the Status of the Iran Nuclear Agreement?*, Council on Foreign Relations (updated Jan. 7, 2020), https://www.cfr.org/backgrounder/what-status-iran-nuclear-agreement.

[48] The Rasad, Iran's second successful domestically built and launched satellite, was launched into orbit in June 2011. *See* Tarikhi, *supra* note 16, at 183; U.N. Security Council, *Note by the President of the Security Council*, U.N. Doc. S/2012/395 (2012), 22; SpaceNews Staff, *Iran Lofts Imaging Satellite into Orbit atop Safir Rocket*, SpaceNews, June 20, 2011, https://spacenews.com/iran-lofts-imaging-satellite-orbit-atop-safir-rocket/. The Navid, a microsatellite developed by the Iran University of Science and Technology (and Iran's third domestically built and launched satellite), was launched in February

however, appeared to slow during its talks with the P5+1. Only one Iranian space launch occurred during the negotiations: the successful launch of the Fajr ("Dawn") satellite in February 2015.[49] Even before the nuclear deal was finalized, some observers had speculated that Iran's space program had been "canceled," or, at least, radically reduced.[50] Even such notable outer space experts as Joan Johnson-Freese, the Charles F. Bolden, Jr. Chair of Science, Space & Technology at the Naval War College in Newport, Rhode Island, subscribed to the idea that the Iranian space program was defunct. "The Iranian Space Agency," Johnson-Freese wrote in 2017, "seemed to fall victim to the realization that space travel is difficult and costly and that the price of prestige was more than anticipated or more than Iran was willing to pay."[51] As Iranian space launch attempts ramped up again between 2017 and 2019, however, it became clear that reports of the death of Iran's space ambitions were exaggerated.

B. "Peace and Pride" or Rocket Rogue? Purposes and Perceptions of the Iranian Space Program

Perhaps the most significant issue underlying the Iranian space program, and the international community's response to Iran's space endeavors, can be summarized in a simple question: why? It is a question that has puzzled analysts, and drawn sharply conflicting answers from Iranian, American, and international sources, since at least the launch of Iran's Sina-1 satellite in late 2005.[52] While Iranian officials have been, and continue to be, quick

---

2012. *See* Tarikhi, *supra* note 16, at 184; U.N. Security Council, *Note by the President*, *supra* note 48, at 22. In January 2013, Iran's Press TV reported that a monkey the Islamic Republic had launched approximately 75 miles into the atmosphere with a liquid-fueled sounding rocket had survived its return to Earth. William J. Broad, *Iran Reports Lofting Monkey Into Space, Calling It Prelude to Human Flight*, N.Y. Times, Jan. 28, 2013, https://www.nytimes.com/2013/01/29/world/middleeast/iran-says-it-sent-monkey-into-space.html.

[49] Stephen Clark, *Iranian satellite successfully placed in orbit*, Spaceflight Now (Feb. 2, 2015), https://spaceflightnow.com/2015/02/02/iranian-satellite-successfully-placed-in-orbit/.

[50] Jassem Al Salami, *Iran Just Cancelled Its Space Program*, War Is Boring (Jan. 17, 2015), https://medium.com/war-is-boring/iran-just-cancelled-its-space-program-5b1d5ce50bd6.

[51] Joan Johnson-Freese, Space Warfare in the 21st Century: Arming the Heavens 36 (New York: Routledge, 2017).

[52] Indeed, *New York Times* writers William J. Broad and David E. Sanger made the question the title of one of their articles in the aftermath of the Sina-1 launch. *See* Broad & Sanger, *Iran Joins the Space Club*, *supra* note 40.

to tout Iran's peaceful intentions, the United States and others suspect that Iran's true motivations for developing space-related technology are far less benign than Iran publicly claims.

Iranian officials are insistent that Iran's technological development of space systems and launch vehicles is for strictly peaceful purposes. Pointing to the statutes of the Iranian Space Agency — originally passed by the Iranian Parliament in 2003, approved by the Islamic Republic's Cabinet in 2005, and updated in 2008 — supporters of the space program can cite its ostensible compliance with the principles of the main outer space treaties. Article 3 of the statute states that, among other notably civilian and scientific tasks, the ISA's purpose is:

> [p]lanning to conduct and develop the peaceful uses of outer space, celestial bodies, astronomy and space technology, strengthening the national, regional and international communication networks by the state, cooperative and private sectors and monitoring their implementation in the framework of the major policies of the country.[53]

Drafting the legislative underpinnings of the space program in this way provides a textual basis for Iran's claims of peaceful intentions. Parviz Tarikhi, the Iranian physicist, remote-sensing expert, and ISA bureaucrat who is one of the primary sources for English-language information about the Iranian space program, has argued that "Iran's space programme is really no different from that of any other nation," that "Iran is committed to developing its assets in space both for peaceful purposes and for use as part of various multinational space projects," and that Iran's pursuit of space capabilities is necessary "[t]o attain the position that it deserves in the global arena and for its own well-being."[54] Tarikhi's characterization of Iran's space endeavors as peaceful has been echoed by the country's political leaders. Then-Iranian President Mahmoud Ahmadinejad celebrated the 2009 Omid launch as a victory for the spread of "monotheism, peace, and justice,"[55] contrasting Iran's "divine" view of space technology with the "Satanic" view of "the

---

[53] *Statute of the Iranian Space Agency* (Parviz Tarikhi, trans.), 34 J. Space L. 487, 492-93 (2008).

[54] Tarikhi, *supra* note 5, at 172.

[55] British Broadcasting Corporation (BBC), *Iran launches homegrown satellite*, BBC News (Feb. 3, 2009), http://news.bbc.co.uk/2/hi/middle_east/7866357.stm.

dominating powers of the world" (i.e., the United States and its allies).[56] At the same time, Iran's then-Foreign Minister Manouchehr Mottaki was even more explicit, stating "Iran's satellite technology is for purely peaceful purposes and to meet the needs of the country."[57] Over the years, Iranian officials have not diverged from their protestations that the Iranian space program is for peaceful purposes. The statements of the Islamic Republic's representatives at COPUOS are especially notable in this regard.[58]

Despite Iranian assurances, the United States government — from politicians and policy-makers to military leaders and strategic planners — is suspicious of Iran's intentions. Iran's space program is largely considered to be little more than a cover for Iran's larger ballistic missile aspirations, and, specifically, its desire to develop an Inter-Continental Ballistic Missile ("ICBM") that could reach the United States.[59] The threat of Iranian missiles is particularly acute to U.S. policy-makers due to Iran's on-again, off-again flirtation with the development of nuclear weapons: the Islamic Republic's successful development of an ICBM would provide it with a launch vehicle for any nuclear device later developed. As the Defense Intelligence Ballistic Missile Analysis Committee succinctly notes in a 2017 report: "Progress in Iran's space program could shorten a pathway to an ICBM because space

---

[56] Paul Koring, *Iran challenges U.S. with satellite launch*, Globe & Mail (Feb. 4, 2009, updated Apr. 28, 2018), https://www.theglobeandmail.com/news/world/iran-challenges-us-with-satellite-launch/article25683860/.

[57] BBC News, *supra* note 55.

[58] See, for instance, the statements of Mr. H. Fazeli, Iran's COPUOS representative in the summer of 2011, who insisted that Iran shared a "common goal [with the other nations of the world] of serving humanity by peaceful uses of outer space, [and] establish[ing] close scientific relationship[s] with the leading universities [which] is [sic] also promoting academic contribution in this direction." COPUOS, Unedited Transcript – 630th Meeting, Thursday, June 2, 2011, 10am, 54th Sess., COPUOS/T.630, 16. Mr. Fazeli went on to reiterate that the "Islamic Republic of Iran is of the strong belief that outer space is a common heritage of mankind and a global understanding and action towards peaceful uses of outer space without any discrimination is a key element towards serving mankind effectively." *Id.*

[59] It should be noted that American suspicion of other countries' putatively civilian space programs is neither new, nor targeted solely at Iran. The United States has been concerned "that civilian space programs have been used as a conduit for materials and equipment destined for ballistic missiles" since at least the late 1980s, when the multilateral "Missile Technology Control Regime" (MTCR) was established. U.S. General Accounting Office, GAO/NSIAD-90-176, Arms Control U.S. Efforts to Control the Transfer of Nuclear-Capable Missile Technology 17 (1990), https://www.gao.gov/assets/220/212558.pdf.

launch vehicles (SLV) use inherently similar technologies."[60] Accusations that Iran's satellite launches and SLV tests are a front for developing missile technology have dogged the country's space program since Iran first contracted the construction and launch of the Sina-1, and have certainly contributed to the Trump Administration's view of Iran's space endeavors. In January 2019, Secretary of State Mike Pompeo, responding to Iran's announcement of several planned space launches, repeated the accusation, warning "the regime to reconsider these provocative launches and cease all activities related to ballistic missiles in order to avoid deeper economic and diplomatic isolation."[61] As the *New York Times* noted, Pompeo's warning "seemed intended to build a legal case for diplomatic, military or covert action against the Iranian missile program."[62] After the failed August 2019 launch commented on by President Trump, the United States made its position on Iran's space program even more explicit, leveraging sanctions specifically targeting the ISA, the Iran Space Research Center (ISRC), and the Astronautics Research Institute (ARI).[63] This appears to be the first time the United States has sanctioned another State's (ostensibly) civilian space agency.

While the threat of Iranian development of ICBMs is of utmost concern to the United States and its allies, missile development is not the only reason other nations find Iran's space ambitions disturbing. Since its founding in 1979, the Islamic Republic, perhaps more than any other State, has developed a history of internationally-recognized bad behavior — even including harmful actions associated with outer space technology. The Islamic Republic has been a key state sponsor of terrorism since shortly after its founding.[64] Iran's creation of Hezbollah by uniting and training

---

[60] Defense Intelligence Ballistic Missile Analysis Committee, Ballistic and Cruise Missile Threat 2 (June 2017), https://www.nasic.af.mil/Portals/19/images/Fact%20Sheet%20Images/2017%20Ballistic%20and%20Cruise%20Missile%20Threat_Final_small.pdf?ver=2017-07-21-083234-343.

[61] Carol Morello, *U.S. warns Iran against satellite launches it says could advance missile technology*, Wash. Post, Jan. 3, 2019, https://www.washingtonpost.com/world/national-security/us-warns-iran-not-to-launch-satellites-into-space/2019/01/03/c4bba67c-0f6c-11e9-84fc-d58c33d6c8c7_story.html.

[62] David E. Sanger & William J. Broad, *U.S. Accuses Iran of Using Space Launch as Cover for Missile Program*, N.Y. Times, Jan. 3, 2019, https://www.nytimes.com/2019/01/03/world/middleeast/iran-spacecraft-pompeo.html.

[63] Office of the Spokesperson, *New Sanctions Designations on Iran's Space Program*, U.S. Dep't of State (Sept. 3, 2019), https://www.state.gov/new-sanctions-designations-on-irans-space-program/.

[64] One 1984 CIA document estimates that the Agency had "identified about

formerly disparate Shi'ite militant groups in war-torn early-1980s Lebanon provided the Islamic Republic with a non-traditional proxy organization it has nefariously used to highly destructive effect, from the Beirut Barracks Bombing of 1983 (in which 241 American service members were killed)[65] to current operations in support of Bashar al-Assad in the ruins of the Syrian Arab Republic. Similarly, Iran's support for Palestinian terrorist group Hamas contributed to the Second Intifada[66] and Hamas's continued attacks against Israel. In the aftermath of the United States' invasion of Iraq, the Islamic Republic took advantage of the country's instability, sponsoring Shi'ite militias, stoking sectarian conflict, dominating Iraq's Shi'ite majority government, and, ultimately, turning its former enemy into an Iranian client State.[67] Recently, this has transformed Iraq into a theater where the United States' low-intensity conflict with Iran is taking kinetic form: at the end of December 2019, protestors spurred on by Iranian-backed militias attacked the American embassy in Baghdad;[68] days later, the United States killed Major General Qassim Suleimani, the head of Iran's Quds Force (the extraterritorial, clandestine wing of the Islamic Revolutionary Guard Corps), in a targeted drone strike.[69] Iran has responded, to date, with a January 8, 2020, cruise missile strike against American bases at Al-Asad and Erbil, Iraq, that

---

50 terrorist attacks in 1983 with confirmed or suspected Iranian involvement or encouragement," with "at least 60 Iranian-sponsored attacks and numerous other incidents" occurring in 1984. U.S. Central Intelligence Agency (CIA), *Iranian Terrorist Activities in 1984* (declassified in part), CIA-RDP09-00438R000605820019-9, CIA Freedom of Information Act Online Reading Room, https://www.cia.gov/library/readingroom/docs/CIA-RDP09-00438R000605820019-9.pdf. This document goes on to state that "[t]he lethality of Iran's terrorism continues to outpace that of all other terrorist actors." *Id.*

[65] *See Fain v. Islamic Republic of Iran*, 856 F. Supp. 2d 109 (D.D.C. 2012).

[66] *See Iranian activities in support of the Palestinian intifada*, Israel Ministry of Foreign Aff. (Jan. 30, 2003), https://mfa.gov.il/MFA/MFA-Archive/2003/Pages/Iranian%20activities%20in%20support%20of%20the%20Palestinian%20i.aspx.

[67] *See* Tim Arango, *Iran Dominates in Iraq After U.S. 'Handed the Country Over,'* N.Y. Times, July 15, 2017, https://www.nytimes.com/2017/07/15/world/middleeast/iran-iraq-iranian-power.html.

[68] *See* Falih Hassan, Ben Hubbard & Alissa J. Rubin, *Protesters Attack U.S. Embassy in Iraq, Chanting 'Death to America,'* N.Y. Times, Dec. 31, 2019 (updated Jan. 27, 2020), https://www.nytimes.com/2019/12/31/world/middleeast/baghdad-protesters-us-embassy.html.

[69] *See* Michael Crowley, Falih Hassan & Eric Schmitt, *U.S. Strike in Iraq Kills Qassim Suleimani, Commander of Iranian Forces*, N.Y. Times, Jan. 2, 2020 (updated Jan. 7, 2020), https://www.nytimes.com/2020/01/02/world/middleeast/qassem-soleimani-iraq-iran-attack.html.

resulted in over 100 American troops being diagnosed with traumatic brain injuries,[70] and a rocket attack on Camp Taji by its Iraqi militia partners that killed two American service members and a British service member on March 11, 2020.[71] Finally, Iran has also partnered with the Houthi insurgents of Yemen to engage in a proxy war against Saudi Arabia, its regional rival, destabilizing the Arabian Peninsula and — as the Iranian-sponsored drone and cruise-missile attack on key Saudi Arabian facilities in September 2019 demonstrated — global energy markets.[72]

Perhaps even more disturbingly, the Islamic Republic's terrorist behavior has not been confined to its own Middle Eastern "backyard." Iran and Hezbollah were likely the perpetrators of the 1993 bombing of the Argentine Israelite Mutual Association Jewish Community Center in Buenos Aires, Argentina, which killed 85 people and injured over 300.[73] In southeast Asia, the Iranian Quds Force (the extraterritorial, clandestine wing of Iran's Islamic Revolutionary Guard Corps) was linked to a 2012 bomb plot to assassinate Israeli diplomats in Thailand.[74] In Europe, Hezbollah and Iran

---

[70] *See* Diana Stancy Correll, *109 US troops diagnosed with TBI after Iran missile barrage says Pentagon in latest update*, Mil. Times (Feb. 10, 2020) https://www.militarytimes.com/news/your-military/2020/02/10/more-than-100-us-troops-diagnosed-with-tbi-after-irans-attack-at-al-asad-report/.

[71] *See* Alissa J. Rubin & Eric Schmitt, *Rocket Attack Kills Three U.S. Coalition Members in Iraq*, N.Y. Times, Mar. 11, 2020, https://www.nytimes.com/2020/03/11/world/middleeast/us-troops-killed-iraq-rocket-attack.html.

[72] *See* Eric Schmitt, Julian E. Barnes & David D. Kirkpatrick, *To Find Clues in Saudi Oil Attacks, U.S. Examines Missile and Drone Parts*, N.Y. Times, Sept. 17, 2019, https://www.nytimes.com/2019/09/17/world/middleeast/iran-attacks-saudi-oil.html; Martha Raddatz, *Iran fired cruise missiles in attack on Saudi oil facility: Senior US official*, ABC News, Sept. 15, 2019, https://abcnews.go.com/Politics/iran-fired-cruise-missiles-attack-saudi-oil-facility/story?id=65632653. While the attacks on Saudi Arabia's Abqaiq and Khurais oil facilities did not ultimately result in long-term impacts to global oil markets, oil prices rose by ten percent in the immediate aftermath of the attacks; had the damage to the two Saudi facilities been more extensive, Saudi Arabia's daily oil output could have been reduced by 75%, leading to an estimated 5% decrease in global oil supplies. *See* Clifford Krauss and Stanley Reed, *Oil Prices Spike After Attack on Saudi Facilities but Lasting Disruption Seen Unlikely*, N.Y. Times, Sept. 15, 2019 (updated Sept. 17, 2019), https://www.nytimes.com/2019/09/15/business/saudi-arabia-oil-energy-prices.html.

[73] *See* Kenneth Katzman, Cong. Res. Serv., Iran's Foreign and Defense Policies 7, 58 (2020). *See also* Daniel Politi, *Argentina Designates Hezbollah Terrorist Group on 25th Anniversary of Bombing*, N.Y. Times, July 18, 2019, https://www.nytimes.com/2019/07/18/world/americas/argentina-hezbollah-terrorist-group.html.

[74] Hezbollah, The Global Footprint of Lebanon's Party of God, Hearing of the

were responsible for a July 2012 suicide bombing in Sofia, Bulgaria, that killed five Israeli tourists.[75] Iranian assassination plots against dissident expatriates have been discovered in Denmark, France, and the Netherlands.[76] The Islamic Republic even hatched a half-baked plot to assassinate the Saudi ambassador to the United States in Washington, D.C., in 2011.[77]

Iran's bad behavior is not limited to terrorist activities and support of terrorist and paramilitary groups around the world. Even in the technological realm, the Islamic Republic has flouted international norms and caused varying degrees of mischief. Iran is known to have extensive electronic "jamming" and "spoofing" capabilities.[78] Both have been employed to nefarious effect. From the early 2000s until approximately 2012, for instance, satellite jamming signals emanating from Cuba and Iran disrupted programming and knocked out transponders on a number of American and European satellites being used to transmit Persian-language programming (from the Voice of America, the BBC, and others).[79] Iran's spoofing capabilities are

---

U.S. House Comm. on Foreign Affairs Subcomm. on Terrorism, Nonproliferation, and Trade (Mar. 20, 2013) (testimony of Dr. Matthew Levitt, Director, Stein Program on Counterterrorism and Intelligence, Washington Institute for Near East Policy), https://docs.house.gov/meetings/FA/FA18/20130320/100534/HHRG-113-FA18-Wstate-LevittM-20130320.pdf.

[75] *See* Nicholas Kulish, Eric Schmitt & Matthew Brunwasser, *Bulgaria Implicates Hezbollah in July Attack on Israelis*, N.Y. Times, Feb. 5, 2013, https://www.nytimes.com/2013/02/06/world/europe/bulgaria-implicates-hezbollah-in-deadly-israeli-bus-blast.html; Nicholas Kulish & Eric Schmitt, *Hezbollah Is Blamed for Attack on Israeli Tourists in Bulgaria*, N.Y. Times, July 19, 2012, https://www.nytimes.com/2012/07/20/world/europe/explosion-on-bulgaria-tour-bus-kills-at-least-five-israelis.html?pagewanted=all&_r=0; Katzman, *supra* note 73, at 7.

[76] Adam Taylor, *Did Iran plot four attacks in Europe? The Dutch government thinks so*, Wash. Post, Jan. 8, 2019, https://www.washingtonpost.com/world/2019/01/08/did-iran-plot-attacks-europe-dutch-government-thinks-so/.

[77] Benjamin Weiser, *Man Sentenced in Plot to Kill Saudi Ambassador*, N.Y. Times, May 30, 2013, https://www.nytimes.com/2013/05/31/nyregion/mansour-arbabsiar-sentenced-for-plot-to-kill-saudi-ambassador.html.

[78] "Jamming" is "a type of intentional interference, [involving] overloading targeted radio frequencies with so much electronic noise communications cannot get through to their intended destination." Sarah M. Mountin, *The Legality and Implications of Intentional Interference with Commercial Communication Satellite Signals*, 90 Int'l L. Stud. 101, 104 (2014). "Spoofing," on the other hand, involves the emission of "a usable but false signal … that mimics the characteristics of a true signal so the user receives a fake (or spoofed) signal." *Id.* at 130.

[79] *See* Small Media, Satellite Jamming in Iran: A War Over Airwaves (London, Nov. 2012).

sophisticated enough that even technologically advanced actors such as the United States military can fall victim to its falsified signals.[80] As recently as the summer of 2019, the Islamic Republic was reportedly using GPS spoofing to lure shipping vessels into its territorial waters, providing its naval forces an excuse to seize the ships and their crews.[81] In the cyber realm, too, Iran has been actively engaged in trouble-making, including targeting U.S. businesses and critical infrastructure.[82] On the basis of its electronic, cyber, space, and conventional capabilities, as well as its generally roguish behavior, Iran is named as one of the primary emerging space threats in a number of publications, including the Defense Intelligence Agency's most recent "Challenges to Space Security"[83] report and the Center for Strategic & International Studies' 2019 "Space Threat Assessment."[84]

---

[80] The Iranian capture of an American RQ-170 surveillance drone in 2011, for instance, "is widely believed to have resulted from a spoofing attack where the drone pilot accidentally landed the plane in Iran, believing it was landing at its base in Afghanistan." Frank Oliveri, *The Pentagon's GPS Problem*, Cong. Q. (Feb. 9, 2013), http://public.cq.com/docs/weeklyreport/weeklyreport-000004218242.html.

[81] Ryan Pickrell, *Iran is reportedly jamming ship GPS navigation systems to get them to wander into Iranian waters*, Bus. Insider (Aug. 7, 2019), https://www.businessinsider.com/iran-is-jamming-ship-gps-navigation-systems-to-seize-them-2019-8.

[82] *See* Tim Starks, *Security firms see spike in Iranian cyberattacks*, Politico (Jun. 21, 2019), available at https://www.politico.com/story/2019/06/21/us-iran-cyberattacks-3469447; Ellen Nakashima, *Iran blamed for cyberattacks on U.S. banks and companies*, Wash. Post, Sept. 21, 2012, https://www.washingtonpost.com/world/national-security/iran-blamed-for-cyberattacks/2012/09/21/afbe2be4-0412-11e2-9b24-ff730c7f6312_story.html. Iran has also targeted Saudi Arabia, most infamously with the "Shamoon" cyber-attack against Saudi Aramco in 2012, which wiped data off of tens of thousands of the oil company's computer hard drives. *See* Nicole Perlroth, *In Cyberattack on Saudi Firm, U.S. Sees Iran Firing Back*, N.Y. Times, Oct. 23, 2012, https://www.nytimes.com/2012/10/24/business/global/cyberattack-on-saudi-oil-firm-disquiets-us.html. The Islamic Republic may be getting bolder in its uses of cyber-attacks: in 2018, another Iranian-linked cyber-attack in Saudi Arabia, this one targeting a petrochemical plant, was meant to physically sabotage the plant by causing an explosion. Nicole Perlroth & Clifford Krauss, *A Cyberattack in Saudi Arabia Had a Deadly Goal. Experts Fear Another Try.*, N.Y. Times, Mar. 15, 2018, https://www.nytimes.com/2018/03/15/technology/saudi-arabia-hacks-cyberattacks.html.

[83] *See* Defense Intelligence Agency, Challenges to Security in Space 31 (Washington, D.C., Jan. 2019).

[84] *See* Todd Harrison, et al., Center for Strategic & Int'l Stud., Space Threat Assessment 2019 (Washington, D.C., Apr. 2019).

III. Legal and Policy Framework

In considering questions related to the possible sabotage of the Iranian space program by the United States, there are two primary areas of law that this article will consider. The first is outer space law — the international legal regime, comprising treaty obligations, non-binding U.N. instruments, and customary international law, that governs States' actions in outer space. The second is international law related to armed conflict, specifically the legal principles governing when harmful sabotage perpetrated by one country against another may be justified. Finally, in addition to these two areas of law, this section will also elaborate on the United States' recent policies with respect to outer space security during the Bush, Obama, and Trump Administrations, which will be imperative for analyzing the United States' response to the Iranian space program.

A. Outer Space Law

The development of outer space law at the international level began almost immediately following the Soviet Union's successful launch of the Sputnik 1 satellite in October 1957.[85] The creation of, first, the Ad Hoc Committee on the Peaceful Uses of Outer Space in 1958, and, one year later, the permanent COPUOS, provided a forum for member States to address uses of outer space and work toward the development of norms for its exploitation. Among the most significant results of COPUOS's early work was the development of the Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space.[86] The Declaration, which was approved unanimously by the U.N. General Assembly on 13 December 1963, elaborated a number of principles that would go on to become tenets of outer space law. Perhaps chief among these tenets was a recognition of the "common interest" humanity holds in outer space and the necessity of reserving the space environment for "peaceful purposes."[87] Thus, the Declaration of Legal Principles stressed equal access to, and international cooperation in, space.

---

[85] *See* Moltz, *supra* note 15, at 98.

[86] Although, as professor and aerospace law expert Bin Cheng notes, the Declaration was largely the work of the United States and the Soviet Union, with only a perfunctory debate and approval in COPUOS. Bin Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 Indian J. Int'l L. 23, 28 (1965).

[87] G.A. Res. 1962 (XVIII), Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, pmbl.

Almost the entire Declaration reflected these principles, but primary examples include Paragraph 1 ("[t]he exploration and use of outer space shall be carried on *for the benefit and in the interests of all mankind*"), Paragraph 2 ("[o]uter space and celestial bodies are *free for exploration and use by all States on a basis of equality* and in accordance with international law"), Paragraph 4 ("The activities of States in the exploration and use of outer space shall be carried on *in accordance with international law*, including the Charter of the United Nations, in the interest of *maintaining international peace and security and promoting international co-operation and understanding*"), and Paragraph 6 ("In the exploration and use of outer space, States shall be *guided by the principle of cooperation and mutual assistance* and shall conduct all their activities in outer space *with due regard for the corresponding interests of other States*") (emphases added).[88]

The Declaration of Legal Principles influenced the direction of outer space law profoundly and, to date, irreversibly. Its principles — and much of its text — became the basis for the Outer Space Treaty, which was negotiated between the United States, the Soviet Union, and their respective partners in COPUOS during the mid-1960s, as both sides of the Space Race sought binding international legal principles to prevent the other from "exploiting any territorial or other advantages" that might result from a successful Moon landing.[89] Once COPUOS had agreed on the draft treaty, it was approved (like the Declaration of Legal Principles itself) in a unanimous vote of the U.N. General Assembly, and opened for signature on 27 January 1967. The Treaty came into effect later that year, in October 1967.[90] The provisions of the Outer Space Treaty have received widespread support, and State Parties have continued to accede to the Outer Space Treaty ever since, with the most recent State Party, Slovenia, acceding in February 2019.[91] In total, the Outer Space Treaty has been ratified by 109 State Parties and signed, but not ratified, by an additional 23 States.[92] For the purposes of the present discussion, it is important to note that the United States has both signed and ratified the Outer Space Treaty (making it part of the "supreme Law of the

[88] *Id.*

[89] Moltz, *supra* note 15, at 149.

[90] COPUOS Legal Subcomm., *supra* note 18.

[91] U.N. Office of Disarmament Affairs, *supra* note 18.

[92] *See* COPUOS Legal Subcomm., *supra* note 18.

Land," pursuant to the United States Constitution[93]), while Iran has signed, but not ratified, the Treaty.[94]

Like the Declaration of Legal Principles, the Outer Space Treaty "[r]ecogniz[es] the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes."[95] Building on the text of paragraph (1) of the Declaration, Article I of the Treaty reiterates that the exploration of outer space is the province of all mankind, while expanding on this principle and recognizing the equal rights of all States to access, explore, and investigate outer space for a variety of purposes:

> The exploration and use of outer space, including the Moon and other celestial bodies, shall be carried out *for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development*, and shall be the province of all mankind.
>
> Outer space, including the Moon and other celestial bodies, *shall be free for exploration and use by all States without discrimination of any kind*, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies.
>
> There shall be freedom of scientific investigation in outer space, including the Moon and other celestial bodies, and *States shall facilitate and encourage international cooperation in such investigation*.[96] [Emphases added]

Article II codifies the Declaration's prohibition on nations' appropriating or claiming sovereignty over the outer space environment or celestial bodies, and Article III reiterates that all State Parties to the Treaty agree to carry out their explorations and uses of space "in accordance with international law, including the U.N. Charter, in the interest of maintaining international peace and security and promoting international cooperation and understanding."[97] Thus, international law plays a key role in outer space

---

[93] U.S. Const. art. VI, § 2.

[94] *See* U.N. Office of Disarmament Affairs, *supra* note 18.

[95] Outer Space Treaty, *supra* note 14, pmbl.

[96] *Id.* at art. I.

[97] *Id.* at arts. II and III.

and in the relations between States as they undertake space-related activities. Significantly, this includes not merely the explicitly security-related provisions of the U.N. Charter, such as Articles 2(3), 2(4), and 51,[98] but also the legal principles of the Charter writ large[99] and the full breadth of both customary and codified international law. Aspects of international law relevant to this article will be discussed below.

Unlike the Declaration of Legal Principles, however, the Outer Space Treaty directly addresses military uses of outer space — one of the thorniest issues plaguing outer space law at the time of the Treaty's development, as the United States and the Soviet Union mutually feared both the threat of space weapons and the risk of giving up their right to produce them. Article IV lays out the regime agreed upon by the Space Powers and the other State Parties to the Treaty with respect to the issues of outer space weaponization and military use:

---

[98] Pursuant to the U.N. Charter, "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered," and, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." U.N. Charter art. 2, ¶¶ 3-4. Article 51, on the other hand, recognizes States' rights to defend themselves in the event of an armed attack:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Id. at ¶ 51.

[99] For instance, in interpreting the meaning of Article III's reference to "international peace and security." As Michel Bourbonnière, former Legal Counsel to Canada's Department of Justice, writes "the accepted interpretation of the term 'security' within the U.N. Charter is that of a positive peace, presupposing the 'activity which is necessary for maintaining the conditions of peace.' This 'necessary' military activity includes self-defense and activity that has been legitimized by the U.N. Security Council." Michel Bourbonnière, *National-Security Law in Outer Space: The Interface of Exploration and Security*, 70 J. Air L. & Com. 3, 8 (2005).

> States Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.
>
> The Moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the Moon and other celestial bodies shall also not be prohibited.[100]

Article IV completely prohibits the stationing of "nuclear weapons" and "weapons of mass destruction" in outer space, but, notably, does not explicitly prohibit conventional weapons that are not sufficiently powerful to qualify as "weapons of mass destruction." As Michel Bourbonnière, former Legal Counsel to Canada's Department of Justice, has noted, it is significant "that Article IV does not ban the technology to 'place in orbit,' 'install,' or 'station' such weapons, but only bans the act of doing so."[101] Indeed, with respect to technology and its application to "peaceful purposes" and "peaceful exploration," Article IV is explicit that such technology is lawful under the treaty — even if it is controlled by a military organization or manned by military personnel.

[100] Outer Space Treaty, *supra* note 14, art. IV.

[101] Bourbonnière, *supra* note 99, at 11.

Leaving aside the portions of the Outer Space Treaty dealing with international liability and the registration and control of space objects,[102] the final Article of the Treaty that may be applicable to the question of American interference with the Iranian space program is Article IX. Article IX establishes a duty of "due regard" among States with respect to their outer space activities, stating:

> In the exploration and use of outer space, including the Moon and other celestial bodies, States Parties to the Treaty shall be guided by the principle of cooperation and mutual assistance and shall conduct all their activities in outer space, including the Moon and other celestial bodies, with due regard to the corresponding interests of all other States Parties to the Treaty …. If a State Party to the Treaty has reason to believe that an activity or experiment planned by it or its nationals in outer space, including the Moon and other celestial bodies, would cause potentially harmful interference with activities of other States Parties in the peaceful exploration and use of outer space, including the Moon and other celestial bodies, it shall undertake appropriate international consultations before proceeding with any such activity or experiment. A State Party to the Treaty which has reason to believe that an activity or experiment planned by another State Party in outer space, including the Moon and other celestial bodies, would cause potentially harmful interference with activities in the peaceful exploration and use of outer space, including the Moon and other celestial bodies, may request consultation concerning the activity or experiment.[103]

---

[102] Neither of these subjects is likely to be of significant help in analyzing questions related to possible American sabotage of the Iranian space program. While questions of liability — i.e. would the United States be liable to Iran for any damage or loss of life resulting from U.S. efforts to stall Iran's space program? — could certainly come into play, the international liability provisions of the Outer Space Treaty and the later Liability Convention pertain only to "national activities *in* outer space," Outer Space Treaty art. VI (emphasis added), and to damage "caused *by* [a] space object." Liability Convention art. II (emphasis added; *see also* similar language in articles III-IV). To the extent any sabotage of the Iranian space program by the United States is actually occurring, American actions have been purely terrestrial. The United States has not attacked Iranian space objects in outer space, nor utilized its own space objects to damage Iranian property on Earth. For these reasons, it is likely that any international liability issues will not be settled by reference to the Outer Space Treaty or the Liability Convention.

[103] Outer Space Treaty, *supra* note 14, art. IX.

As previous commentators have observed, "Article IX, like most space law provisions, makes no distinction between military and civilian activities."[104] It appears, then, that State Parties to the treaty — including the United States — would be required to "request consultation" concerning potentially harmful or militaristic outer space activities on the part of another State Party.

B. Interpretations of the Use of Outer Space for "Peaceful Purposes"

As any number of commentators and outer space law experts have pointed out since it took effect in 1967, the Outer Space Treaty contains no definition of the term "peaceful purposes." This is no small omission, as the Outer Space Treaty makes clear — in the spirit of the Treaty as elaborated in its Preamble, if not in the plain language of the text of its articles — that the lawfulness of a given use of outer space (and, particularly, "the Moon and other celestial bodies," pursuant to Article IV) is largely contingent on that use being for "peaceful purposes."[105] In general, two legal perspectives have emerged with respect to interpretations of the "peaceful purposes" language: the "non-military" perspective and the "non-aggressive" perspective.[106] Proponents of the former believe that "peaceful purposes" must exclude *any* use for military-related purposes, while proponents of the latter argue that the term only precludes uses that are inherently aggressive — that is, violations of the U.N. Charter and international law.

While leading advocates of the "non-military" school have argued their case strongly,[107] the United States, and the majority of nations, have

---

[104] Robert A. Ramey, *Armed Conflict on the Final Frontier: The Law of War in Space*, 48 A.F. L. Rev. 1, 76 (2000).

[105] *See* Outer Space Treaty, *supra* note 14, pmbl., art. IV.

[106] *See* Ramey, *supra* note 104, at 78-79.

[107] For instance, Bin Cheng, criticized the "non-aggressive" interpretation of "peaceful purposes" as "needless, wrong, and potentially noxious." Bin Cheng, *The Legal Status of Outer Space and Relevant Issues: Delimitation of Outer Space and Definition of Peaceful Use*, 11 J. of Space L. 89, 103 (1983). Cheng argued that the "non-aggressive" definition would create tautological problems within the text of Article IV of the Outer Space Treaty, which, he believed, demonstrates that such an interpretation could not have been intended by the Treaty drafters. *Id.* at 104. Additionally, he noted that the "non-aggressive" interpretation stretches the definition of "peaceful" to such an extent that any State could potentially pervert international law and policy to argue that it has not acted "aggressively" — in one section, he sarcastically asks if so-called rogue States that have misused nuclear technology to make "non-aggressive bombs" could utilize a similar argument to justify their actions. *Id.* at 105.

solidly subscribed to the "non-aggressive" interpretation of "peaceful purposes."[108] Indeed, the United States has advocated this interpretation since at least the early 1960s. The United States' position, which has remained largely unchanged ever since, was elaborated by Senator Albert Gore, Sr. (father of former Vice President and presidential candidate Al Gore) in an address before the U.N.'s First Committee in December 1962:

> It is the view of the United States that outer space should be used only for peaceful — that is, non-aggressive and beneficial — purposes …. [T]he test of any space activity must be not whether it is military or non-military, but whether or not it is consistent with the United Nations Charter and other obligations of international law.
>
> There is, in any event, no workable dividing-line between military and non-military uses of space. For instance, both American and Russian astronauts are members of the armed forces of their respective countries; but this is not reason to challenge their activities or to deprecate their accomplishments. A navigation satellite in outer space can guide a submarine as well as a merchant ship. The instruments which guide a space vehicle on a scientific mission can also guide a space vehicle on a military mission.
>
> …. The United States, like every other nation represented here in this Committee, is determined to pursue every non-aggressive step which it considers necessary to protect its national security and the security of its friends and allies, until that day arrives when such precautions are no longer necessary.[109]

Senator Gore's reference to the inherent dual-use nature of many outer space technologies (such as rocketry, satellite navigation, remote sensing satellite observation, etc.) is a key problem that continues to bedevil policy-makers and legal experts. Indeed, in the context of the current article, it is directly applicable to the problems presented by Iranian rocket research.

---

[108] *See* Ramey, *supra* note 104, at 79.

[109] United Nations, First Comm., *Verbatim Record of the Twelve Hundred and Eighty-Ninth Meeting* at 13-14, 17th Sess., U.N. Doc. A/C. 1/PV. 1289 (Dec. 3, 1962).

Accepting the "non-aggressive," rather than wholly "non-military," interpretation of "peaceful uses"/"peaceful purposes," it is necessary to understand what would constitute the sort of "aggression" that would make a given use of outer space non-peaceful. As we have seen above, the U.N. Charter, in Article 2(4), prohibits "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[110] This is further elaborated upon in Article 39, which makes the Security Council responsible for determining "the existence of," and responding to, "any threat to the peace, breach of the peace, or act of aggression" — i.e. to any "threat or use of force" that is "inconsistent with the Purposes of the United Nations."[111] But a full understanding of Article 39 and other provisions of the Charter pertaining to lawful versus unlawful force is impossible without a definition of "aggression." Such a definition was not firmly established until December 1974, with the General Assembly's adoption of Resolution 3314 (XXIX).[112] Resolution 3314 (XXIX)'s definition begins by echoing the "threat or use of force" language of Article 2(4), and then further states that the "first use" of unlawful force "shall constitute *prima facie* evidence of an act of aggression" on the part of the perpetrating State.[113] It is in Article 3 of Resolution 3314 (XXIX), however, that the definition offers specifics with respect to aggressive acts:

> Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:
>
> The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,
>
> Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

---

[110] U.N. Charter art. 2(4). *See supra* note 98 and accompanying text.

[111] U.N. Charter art. 39.

[112] G.A. Res. 3314 (XXIX) (Dec. 14, 1974).

[113] *Id.* at Annex, arts. 1 and 2.

> The blockade of the ports or coasts of a State by the armed forces of another State;
>
> An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
>
> The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
>
> The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
>
> The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.[114]

Any act of aggression triggers the attacked State's right of self-defense under Article 51, gives rise to international responsibility on the part of the aggressor State,[115] and requires Security Council analysis under Article 39.

Thus, on the basis of Resolution 3314 (XXIX), so-called "aggressive" uses of outer space are likely to be extremely limited as compared to the much more broadly encompassing "military" uses. An "aggressive" use of outer space would necessarily need to fall within, or directly assist or contribute to, the rubric of aggressive acts outlined in Article 3, above. Since all of these possible aggressive acts entail an actual use or application of armed force against a victim State, it seems that — just as the United States has argued since the early years of the Space Age — any passive use of outer space technology (such as intelligence collection by remote sensing satellites, as Senator Gore noted in 1962) would not satisfy the definition of an aggressive act and, thus, not be use of force or breach of the peace in violation of the U.N. Charter.

---

[114] *Id.* at Annex, art. 3. This list is non-exhaustive. *Id.* at Annex, art. 4.

[115] *See id.* at art. 5, para. 2.

C. United States Space Security Policy

As the second nation to successfully enter outer space, the United States has a long history of policy-making with respect to outer space and its potential uses for enhancing American national security. In the aftermath of the Soviet Union's launch of Sputnik in 1957, then-Senate Majority Leader (and future President) Lyndon Johnson headed a Congressional committee to study the Soviets' space success and make recommendations for the United States' response. Reflecting on the post-Sputnik world of the late 1950s, Johnson later wrote, "For a nation entering the new space age, one urgent need was a national policy. I thought the Congress had an obligation and an unparalleled opportunity to help forge that policy."[116] While the recommendations proposed by Johnson's committee — with their focus primarily on strengthening and modernizing America's traditional, terrestrial military forces[117] — may not resemble the "national policies" for outer space we might expect in the 21st Century, these humble beginnings would lead to the United States' redoubling its space efforts and overtaking the Soviets with the successful Moon landing in 1969. They would also set the stage for continuing developments in American policy related to outer space through the end of the Cold War. Although the United States' efforts and policies related to outer space since 1957 continue to inform overarching American space policy, a full examination of these policies is beyond the scope of this article. With respect to our examination of possible American interference in the Iranian space program, the space policies of the Bush, Obama, and Trump Administrations — the three Presidential Administrations that have overlapped with Iran's expanding outer space capabilities — are of primary importance.

---

[116] Lyndon B. Johnson, The Vantage Point: Perspectives on the Presidency, 1963-1969 275 (New York: Holt, Rinehart & Winston, 1971).

[117] *See Preparedness Subcommittee Recommendations for America's Defenses*, S. Armed Services Comm., 104 Cong. Rec., Pt. 15, 18,887-89 (1958). The Preparedness Subcommittee did, however, make several recommendations that either directly applied to the United States' efforts in outer space — or would go on to become key elements of American space policy. These included Recommendation #3, "Putting More Effort into Developing Antimissile Missiles" (a prelude to the anti-ballistic missile technology and theory that would contribute to President Ronald Reagan's Strategic Defense Initiative, a.k.a. "Star Wars"); Recommendation #8, "Set Up Production Schedules of Atlas, Thor, Jupiter, and Accelerate Development of Titan"; Recommendation # 11, "Start Work at Once on the Development of a Rocket Motor with a Million-Pound Thrust"; and Recommendation #16, "Put More Effort Into Development of Manned Missiles." *Id.*

President George W. Bush's presidency was largely defined by the terrorist attacks of September 11, 2001, the ensuing invasion of Afghanistan and beginning of the "Global War on Terror," and the war in Iraq. Less well known, but, perhaps in the long run, no less significant, was the shift in American outer space policy that occurred during his Presidency. In the decade prior to the 9/11 attacks, the implosion of the Soviet Union and the struggles of the Russian space program in the economically decrepit Russian Federation had inaugurated an age in which the United States was the world's preeminent space power. Far from reassuring some policy-makers and strategic thinkers, however, the United States' primacy in outer space caused new concerns. Given the significant national security applications of U.S. outer space assets (which had been demonstrated to great effect during the 1991 Gulf War), and considering the fact that other nations, as well as both international and domestic private corporations, sought their own access to outer space for national or commercial purposes, some believed it was only a matter of time before the United States would be challenged in outer space.

In response to this concern, Congress, in the National Defense Authorization Act for Fiscal Year 2000, authorized the establishment of the Commission to Assess United States National Security Space Management and Organization (hereinafter, the "Rumsfeld Space Commission," or simply the "Commission") to investigate various aspects of "the organization and management of space activities that support U.S. national security interests."[118] Chaired by soon-to-be Defense Secretary Donald H. Rumsfeld, the Commission published its report in early 2001. Conflict in outer space, in the Commission's opinion, was inevitable,[119] and the report ominously warned of the risk of a possible "Space Pearl Harbor" — a catastrophic attack on American space assets that would devastate commercial, military, and intelligence activities reliant on space-based platforms.[120] In order to preempt threats to or from space, the Commission recommended the creation of a "national-level" policy establishing "space activity as a fundamental national interest of the United States," the development and deployment of "systems in space to deter attack on and … defend" American interests in

---

[118] Comm'n to Assess U.S. Nat'l Sec. Space Mgmt. & Org., *Report of the Commission to Assess United States National Security Space Management and Organization* 1-2 (Washington, D.C.: Jan. 11, 2001).

[119] "[W]e know from history," the Commission Report states in its concluding paragraphs, "that every medium — air, land, and sea — has seen conflict. Reality indicates that space will be no different." *Id.* at 100.

[120] *Id.* at 23.

space (i.e., space weaponry), and a number of organizational and structural changes within the Armed Services to better facilitate space security.[121]

Had the Commission been chaired by just about anyone else, it is possible that its final report and recommendations would largely have fallen through the cracks of an American defense establishment thrown onto its back foot by the 9/11 attacks and gearing up for a fight against an enemy (the Afghan Taliban) that barely fielded an air force, much less a space program. With Donald Rumsfeld at the head of the Defense Department, however, the Commission's recommendations influenced American military policy at the highest levels. As Johnson-Freese notes, the Rumsfeld Space Commission report "became the basis for US space policy."[122] Within the DoD during this time, "[s]pace dominance rhetoric prevailed" and "[could] be traced through a series of [official policy] documents."[123] In August 2002, for instance, the Joint Chiefs of Staff released Joint Publication 3-14, *Joint Doctrine for Space Operations*, which emphasized a number of concepts, such as "space superiority" and "space control,"[124] that built upon the Rumsfeld Space Commission's national security concepts.

---

[121] *Id.* at Executive Summary, XXX.

[122] Johnson-Freese, *supra* note 51, at 58.

[123] *Id.* at 9.

[124] "Space superiority" was defined in joint doctrine as "[t]he degree of dominance in space of one force over another that permits the conduct of operations by the former and its related land, sea, air, space, and special operations forces at a given time and place without prohibitive interference by the opposing force." Joint Chiefs of Staff, Joint Pub. 3-14, Joint Doctrine for Space Operations at GL-6 (Aug. 9, 2002) [hereinafter JP 3-14]. "Space control" was then defined as "Combat, combat support, and combat service support operations to ensure freedom of action in space for the United States and its allies and, when directed, deny an adversary freedom of action in space. The space control mission area includes: surveillance of space; protection of US and friendly space systems; prevention of an adversary's ability to use space systems and services for purposes hostile to US national security interests; negation of space systems and services used for purposes hostile to US national security interests; and directly supporting battle management, command, control, communications, and intelligence." *Id.* JP 3-14 has undergone multiple revisions since then, which simplify these definitions but retain the same sense. The current definition of "space superiority" is "[t]he degree of control in space of one force over any others that permits the conduct of its operations at a given time and place without prohibitive interference from terrestrial or space-based threats." Joint Chiefs of Staff, Joint Publ'n 3-14, Space Operations at GL-6 (Apr. 10, 2018). The current definition of "space control" is "Operations to ensure freedom of action in space for the United States and its allies and deny an adversary freedom of action in space." *Id.*

In August 2006, the Bush Administration released its official National Space Policy ("NSP").[125] Consistent with Secretary Rumsfeld's and the Armed Forces' emphasis on the significance of outer space for national security, the NSP struck a nationalistic tone. Chief among the NSP's key principles was that "the United States considers space capabilities … vital to its national interests."[126] On this basis, America would

> preserve its rights, capabilities, and freedom of action in space; dissuade or deter others from either impeding those rights or developing capabilities intended to do so; take those actions necessary to protect its space capabilities; respond to interference; and deny, if necessary, adversaries the use of space capabilities hostile to U.S. national interests.[127]

Further, the NSP interpreted the Outer Space Treaty's "peaceful purposes" language to "allow U.S. defense and intelligence-related activities in pursuit of national interests" and soundly "reject[ed] any limitations on the fundamental right of the United States to operate in and acquire data from space."[128] Indeed, the Bush Administration explicitly "oppose[d] the development of new legal regimes or other restrictions that [sought] to prohibit or limit U.S. access to or use of space."[129] With the publication of the NSP, the Bush Administration had fully realized one of the primary recommendations of the Rumsfeld Space Commission and made its other underlying goals the United States' national policy. The 2006 NSP made an official shift in American outer space policy from caution and international regulation (a policy regime that had been viewed as largely necessary during the Cold War to prevent a dangerous and expensive arms race with the Soviet Union in outer space) to one of American supremacy and "space nationalism."

The election of President Barack Obama in 2008 seemed as though it might bring about a return to more traditional American attitudes in the realm of outer space policy. While he had not focused much on space during his election campaign,[130] Obama's attitude toward international law and

---

[125] United States, *U.S. National Space Policy*, NSPD-49, Aug. 31, 2006, available at https://fas.org/irp/offdocs/nspd/space.pdf [hereinafter *2006 NSP*].

[126] *Id.* at para. 2.

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *See* Moltz, *supra* note 15, at 308.

partnerships provided a basis for expectations of such a realignment. It would be a year and half after President Obama's inauguration, in June 2010, that the Obama Administration released its own National Space Policy (again, "NSP") — which has been amended, though not replaced, by the current Trump Administration. True to form, the Obama NSP struck a more internationalist tone than that of the Bush Administration. "It is the shared interest of all nations," begins the NSP's first listed principle, "to act responsibly in space to help prevent mishaps, misperceptions, and mistrust."[131] In a similar vein, the NSP, echoing the Outer Space Treaty, reiterates that "[a]ll nations have the right to explore and use space for peaceful purposes, and for the benefit of all humanity, in accordance with international law."[132] The NSP also contains an entire subsection on "International Cooperation," which includes instructions for U.S. department and agencies to "[d]emonstrate U.S. leadership in space-related fora and activities" (presumably a reference to international bodies like COPUOS) and calls for the development of both bi- and multi-lateral "transparency and confidence-building measures" in order to "encourage responsible actions in, and the peaceful use of, space."[133]

Despite its conciliatory, internationalist tone, whether the Obama NSP is truly a departure from the space policies of the Bush Administration is hotly debated. Expanding on the Bush-era policy, Obama's NSP explicitly identifies "the sustainability, stability, and free access to, and use of, space" as vital national interests of the United States.[134] The Obama NSP also echoes the previous Bush NSP's characterization of the Outer Space Treaty's "peaceful purposes" language, declaring that the use of space "for national and homeland security activities" falls within the lawful umbrella of "peaceful purposes."[135] But it is in a subsection entitled "National Security Space Guidelines" that the similarities are most notable. In this section, the Secretary of Defense and the Director of National Intelligence are instructed to (1) "[d]evelop, acquire, and operate space systems and supporting information systems and networks to support U.S. national security and enable defense and intelligence operations during times of peace, crisis, and conflict;" (2) "[e]nsure cost-effective survivability of space capabilities …;" (3) "[i]mprove,

---

[131] National Space Policy of the United States of America 3 (June 28, 2010), https://obamawhitehouse.archives.gov/sites/default/files/national_space_policy_6-28-10.pdf [hereinafter *2010 NSP*].

[132] *Id.*

[133] *Id.* at 6, 7.

[134] *Id.* at 3.

[135] *Id.*

develop, and demonstrate … the ability to rapidly detect, warn, characterize, and attribute natural and man-made disturbances to space systems of U.S. interest;" and, perhaps most significantly of all, (4) "[d]evelop and apply advanced technologies and capabilities that respond to changes to the threat environment."[136] These instructions clearly anticipate both defensive and offensive technologies and capabilities as requirements for outer space-related national defense policy. Such instructions would not be out of place in the Bush Administration's NSP, or as recommendations in the Rumsfeld Space Commission report.

Finally, the Obama NSP contains a concept wholly absent from the previous Bush Administration policy that directly relates to our current discussion of the Iranian space program: the idea of "responsibility" in outer space.[137] While this may be no more than a linguistic descriptor, the terms "responsible" and "responsibility" occur with such frequency in the Obama NSP that to consider their use unintended or inconsequential seems unlikely. Indeed, the NSP contains a number of directives emphasizing the importance of the concept. The United States, for instance, "will employ a variety of measures to help assure the use of space for all *responsible parties*" (emphasis added), will promote space stability via "domestic and international measures to promote safe and *responsible* operations in space," and will "[l]ead in the enhancement of security, stability, and *responsible* behavior in space."[138] Conversely, the United States frowns upon irresponsible behavior in outer space: "[t]he now-ubiquitous and interconnected nature of space capabilities and the world's growing dependence on them mean that *irresponsible acts* in space can have damaging consequences for all of us" (emphasis added).[139] Although nowhere in the NSP does the Obama Administration elaborate on how such "irresponsible acts" will be dealt with, the implication seems to be that the United States may take undefined steps to discourage irresponsible parties from accessing, or irresponsible acts from occurring in, outer space.

---

[136] *Id.* at 13-14.

[137] Note that this is a very different concept than the international law concept of "international responsibility" cited in the Outer Space Treaty. In the Obama NSP, "responsibility" refers to the dictionary definition of the word — that is, that States' actions in outer space be trustworthy, good, moral, and taken with due care.

[138] *2010 NSP*, *supra* note 131, at 3, 4, and 6.

[139] *Id.* at 1.

Following up on the Obama Administration's release of the NSP, the Department of Defense and Office of the Director of National Intelligence released the National Security Space Strategy ("NSSS") in January 2011.[140] The NSSS builds upon the Obama NSP from the standpoint of national defense, stating that American "national security objectives" rely on a number of strategies, including "[p]romot[ing] responsible, peaceful, and safe use[s] of space;" "[p]revent[ing] and deter[ring] aggression against space infrastructure that supports U.S. national security," and "[p]repar[ing] to defeat attacks and to operate in a degraded environment."[141] The NSSS further echoes the NSP, including its emphasis on "responsibility," in its Strategic Objectives:

> We seek a safe space environment in which all can operate with minimal risk of accidents, breakups, and purposeful interference. We seek a stable space environment in which nations exercise shared responsibility to act as stewards of the space domain and follow norms of behavior. We seek a secure space environment in which responsible nations have access to space and the benefits of space operations without need to exercise their inherent right of self-defense.[142]

Again, despite references to international cooperation (a "safe space environment in which all can operate" and a "stable space environment in which nations exercise shared responsibility"), the caveat in the final sentence of the above paragraph regarding "responsible nations" seems to imply that there exists a subset of "irresponsible" nations which the United States would *not* want to "have access to space and the benefits of space operations." This point, of course, is unstated, and the NSSS goes to great lengths — even in the sections concerning "Preventing and Deterring Aggression against Space Infrastructure" and "Preparing to Defeat Attacks and Operate in a Degraded Environment" — to avoid any direct references to the development of space-based weapons systems or offensive capabilities in outer space.[143] Instead,

---

[140] U.S. Dep't of Def. & Office of the Director of National Intelligence, *National Security Space Strategy – Unclassified Summary* (January 2011) [hereinafter, "*2011 NSSS*"].

[141] *Id.* at 5.

[142] *Id.* at 4.

[143] *Id.* at 10-11.

the NSSS simply reiterates the United States' standard declaration that it "will retain the right and capabilities to respond in self-defense" to any attack.[144]

President Donald Trump, unlike his two predecessors (and, indeed, presidents going back to the Carter Administration), has not issued his own National Space Policy. This does not mean the Trump Administration has ignored outer space policy; on the contrary, President Trump's actions in the realm of U.S. space policy, and, particularly, U.S. space security policy are likely to be more lasting and consequential than those of either of his two predecessors. After issuing an Executive Order early in his presidency to reconstitute the National Space Council (an Executive Branch council, chaired by the Vice President, meant to advise the President on outer space policy and strategy),[145] President Trump has issued space policy guidance in the form of a brief "National Space Strategy" and four "Space Policy Directives" (henceforth, "SPDs").[146] Based on SPD-1, which amends a single paragraph from the 2010 NSP, it appears that the Trump Administration has largely adopted the overarching policies of the Obama Administration.[147] With the exception of the altered paragraph described in SPD-1 and certain matters related to nuclear power sources in space, the rest of the Obama NSP remains official government policy.[148] SPD-2 and SPD-3 are subject matter-specific policies involving regulations on commercial uses of space and space traffic management policy, respectively.[149]

---

[144] *Id.* at 10.

[145] President Donald J. Trump, *Executive Orders: Presidential Executive Order on Reviving the National Space Council*, WhiteHouse.gov (June 30, 2017), https://www.whitehouse.gov/presidential-actions/presidential-executive-order-reviving-national-space-council/.

[146] *See* U.S. Office of Space Commerce, *National Space Council Directives* (2019), https://www.space.commerce.gov/policy/national-space-council-directives/.

[147] President Donald J. Trump, *Space Policy Directive 1–Presidential Memorandum on Reinvigorating America's Human Space Exploration Program*, WhiteHouse.gov (Dec. 11, 2017), https://www.whitehouse.gov/presidential-actions/presidential-memorandum-reinvigorating-americas-human-space-exploration-program/.

[148] U.S. Office of Space Commerce, *National Space Policy* (2020), https://www.space.commerce.gov/policy/national-space-policy/ (noting that the Trump Administration's only changes to the 2010 NSP have been in SPD-1 and a Presidential Memorandum on Launch of Spacecraft Containing Space Nuclear Systems).

[149] *See* President Donald J. Trump, *Space Policy Directive-2, Streamlining Regulations on Commercial Use of Space*, WhiteHouse.gov (May 24, 2018), https://www.whitehouse.gov/presidential-actions/space-policy-directive-2-streamlining-regulations-commercial-use-space/; and President Donald J. Trump, *Space Policy Directive-3, National Space Traffic Management Policy*, WhiteHouse.gov (Jun. 18, 2018), available at

From a national security perspective, however, the most significant space policies of the Trump Administration can be found in the "National Space Strategy," a December 2018 memorandum directing the resurrection of U.S. Space Command, and in SPD-4, which ultimately led to the creation of the new United States Space Force ("USSF"). More so than either the Bush or Obama Administrations' NSPs, or, indeed, the 2011 DoD/DNI's NSSS, President Trump's National Space Strategy orients U.S. national security in outer space firmly in a nationalistic and competitive direction. The Strategy emphasizes (in bold, no less) the principles of "America First Among the Stars" (a more intergalactic application of President Trump's "America First" perspective) and "Space Preeminence Through the American Spirit."[150] Even more significant, the Strategy "recognizes that [America's] competitors and adversaries have turned space into a warfighting domain," and that the United States will "emphasize peace through strength" and "seek to deter, counter, and defeat threats in the space domain that are hostile to the national interests of the United States and our allies."[151] While the National Space Strategy's four "pillars" — (1) "[t]ransform[ing] to more resilient space architectures," (2) "[s]trengthen[ing] deterrence and warfighting options," (3) "[i]mprov[ing] foundational capabilities, structures, and processes," and (4) "[f]oster[ing] conducive domestic and international environments" — are not a far cry from the strategies described in previous administrations' NSPs,[152] the nationalistic and bellicose undertones of the rest of the Strategy demonstrate an overt acceptance of outer space as a zone of conflict and competition that previous administrations had avoided.

Building upon the space strategy's focus on space-related national security threats, President Trump issued a memorandum to Secretary of Defense James Mattis in December 2018 directing the establishment of a new functional combatant command: United States Space Command ("USSPACECOM").[153] The "new" USSPACECOM would actually be a res-

---

https://www.whitehouse.gov/presidential-actions/space-policy-directive-3-national-space-traffic-management-policy/.

[150] *President Donald J. Trump is Unveiling an America First National Space Strategy*, WhiteHouse.gov (Mar. 23, 2018), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-unveiling-america-first-national-space-strategy/.

[151] *Id.*

[152] *Id.*

[153] *See* President Donald J. Trump, *Text of a Memorandum from the President to the Secretary of Defense Regarding the Establishment of the United States Space Command*, WhiteHouse.gov, (Dec. 18, 2018), https://www.whitehouse.gov/briefings-statements/text-memorandum-president-secretary-defense-regarding-establishment-united-states-

urrection of a previously defunct organization. The original Space Command had been established in 1985 on the recommendation of key Air Force officials and the Joint Chiefs of Staff to assist with President Regan's "Strategic Defense Initiative" and key aspects of the Reagan Administration's National Space Policy (including "developing survivable and enduring space systems, an anti-satellite capability, and means for detecting and reacting to threats against US space systems").[154] Despite the original USSPACECOM's smashing success in providing space support to Coalition forces during Operation Desert Storm (in the form of intelligence, targeting coordination, communications, and navigation), plans to assign space operations to another command, first explored during the mid-1990s, were realized in the aftermath of the 9/11 attacks when USSPACECOM was disestablished and its space duties transferred to U.S. Strategic Command ("USSTRATCOM").[155] President Trump's memorandum reversed the 2002 merger, assigning USSPACECOM "(1) all the general responsibilities of a Unified Combatant Command; (2) the space-related responsibilities previously assigned to the Commander, United States Strategic Command; and (3) the responsibilities of Joint Force Provider and Joint Force Trainer for Space Operations Forces."[156] USSPACECOM was formally reestablished on August 29, 2019, under the command of Air Force General John Raymond.[157]

---

space-command/. It should be noted that President Trump's decision to reestablish USSPACECOM was by no means a surprise. The resurrection of Space Command had been recommended in an August 2018 report on the "Organizational and Management Structure" of the DoD's outer space components, which had been directed in the previous year's National Defense Appropriations Act ("NDAA"). *See* Department of Defense, *Final Report on Organizational and Management Structure for the National Security Space Components of the Department of Defense*, Report to Congressional Defense Committees (Aug. 9, 2018), available at https://secureservercdn.net/198.71.233.197/b13.8cb.myftpupload.com/wp-content/uploads/2018/08/Space-Force-report-Aug-9-2018.pdf. Additionally, Congress had already been working to re-establish Space Command (though as a subordinate unified command under USSTRATCOM), and, at the time of President Trump's memorandum, had already passed legislation (the Fiscal Year 2019 NDAA) to this effect. *See* John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115232, § 1601, 132 Stat. 2101-04 (2018), https://www.congress.gov/115/plaws/publ232/PLAW-115publ232.pdf.

[154] Edward J. Drea et al., History of the Unified Command Plan 1946-2012, at 55-56 (Washington, D.C.: Joint History Office, Office of the Chairman of the Joint Chiefs of Staff, 2013).

[155] *Id.* at 64-65, 86.

[156] President Trump, *supra* note 153.

[157] *See* Sandra Erwin, *Trump formally reestablishes U.S. Space Command at White House ceremony*, SpaceNews.com, Aug. 29, 2019, https://spacenews.com/usspacecom-officially-re-established-with-a-focus-on-defending-satellites-and-deterring-conflict/.

Finally, in what may be the culmination of military- and national defense-oriented thinking about outer space, President Trump's SPD-4, issued in February 2019, directed the creation of a Space Force "as a sixth branch of the United States Armed Forces within the Department of the Air Force."[158] On the basis of SPD-4, the Department of Defense developed a legislative proposal for the organization of the USSF passed by Congress as part of the National Defense Appropriation Act for Fiscal Year 2020 ("2020 NDAA"), and signed into law by President Trump on December 20, 2019.[159] Pursuant to the 2020 NDAA, the USSF would be established within the Department of the Air Force — essentially by re-designating Air Force Space Command as the USSF and transforming it into an independent service[160] — and its duties would include: "protect the interests of the United States in space;" "deter aggression in, from, and to space"; and "conduct space operations."[161] General Raymond, already the USSPACECOM Commander, was sworn in as the USSF's first Chief of Space Operations (the senior-ranking USSF officer, who will become a member of the Joint Chiefs of Staff) on January 14, 2020.[162] Since that time, General Raymond, the USAF, and the USSF have been working on preliminary organization and force structure matters, releasing a report providing additional details regarding the new service's organization and operations in early February 2020.[163] While the final form, organization, and mission of the USSF continue to develop, the Trump Administration's creation of this new military branch tracks with the space nationalist viewpoint originally proposed by the Rumsfeld Space Commission report and molded in both the Bush- and Obama-era policies related to space security.

---

[158] President Donald J. Trump, *Text of Space Policy Directive-4: Establishment of the United States Space Force*, WhiteHouse.gov, (Feb. 19, 2019), https://www.whitehouse.gov/presidential-actions/text-space-policy-directive-4-establishment-united-states-space-force/.

[159] National Defense Authorization Act for Fiscal Year 2020, S. 1790, 116th Cong. §§ 951-61 (2019), https://www.govinfo.gov/content/pkg/BILLS-116s1790enr/pdf/BILLS-116s1790enr.pdf.

[160] *Id.* at § 952(a).

[161] *Id.* at § 952(b)(4) (10 U.S.C. § 9081(d), amended).

[162] *See* Rachel S. Cohen, *Raymond Sworn In as First Space Force Chief*, Air Force Magazine, Jan. 14, 2020, https://www.airforcemag.com/raymond-sworn-in-as-first-space-force-chief/.

[163] *See generally* U.S. Dep't of the Air Force, *Comprehensive Plan for the Organizational Structure of the U.S. Space Force*, Rep. to Cong. Committees, Feb. 2020, https://www.airforcemag.com/app/uploads/2020/02/Comprehensive-Plan-for-the-Organizational-Struccture-of-the-USSF_Feb-2020.pdf.

IV. Analysis

In Farid ud-Din Attar's Twelfth Century Sufi poem *The Conference of the Birds*, a Humā bird (making excuses for why it cannot accompany the other birds on the spiritual pilgrimage that forms the main plot of the poem) metaphorically asks, "How can men turn their head away from him whose shadow creates kings?"[164] Over 800 years later, the question is apropos. Despite a surprisingly poor rate of successful launches and the distrust, if not active hostility, of the international community, Iran cannot "turn [its] head away" from pursuing a national space program. The Islamic Republic, believing that the proverbial space Humā's shadow is so valuable (for national pride and prestige, scientific advancement, and likely other, less peaceful, reasons) that an Iranian space capability must be cultivated and advanced, seeks to continue developing and testing supposedly non-military SLVs and satellite systems. The United States, believing that the shadow cast by any Iranian space Humā is inherently bellicose, seeks to prevent the Islamic Republic from expanding its missile development, particularly the construction of ICBMs. To that end, the United States has taken direct steps to hinder the Iranian space program, most recently by directly sanctioning Iran's ostensibly civil space agencies, but perhaps even more dramatically by alleged secretive program of covert sabotage.[165] This section will analyze the United States' alleged sabotage of the Iranian space program, concluding that any direct act of sabotage would likely violate the Outer Space Treaty. Despite this result, however, there may be arguments to justify the United States' (alleged) actions.

A. Alleged American Sabotage in Light of United States' Space Policies

Based on information available in the public domain, the United States' alleged sabotage targeting Iran's missile, and, by extension, space, program has been largely comprised of introducing "faulty parts and materials into Iran's aerospace supply chains."[166] Little additional information is available about the sabotage program, and the United States Government has not publicly acknowledged such a program as existing. Reports indicate, however, that the ballistic missile sabotage program began during the Bush Administration and "rose in tandem" with the United States' similar clandestine program targeting the Iranian nuclear program (of which the Stuxnet computer virus

---

[164] Conference of the Birds, *supra* note 1, at 22.

[165] Sanger & Broad, *U.S. Revives Secret Program*, *supra* note 13.

[166] *Id.*

was one of the crowning achievements).[167] The program allegedly focused on "left of launch" strategies (methods of targeting and neutralizing missiles prior to launch) — strategies that had also been used to subvert the missile program in North Korea.[168] Given the cost and difficulty of intercepting ballistic missiles already in flight, "left of launch" has grown in popularity as a method of ballistic missile defense. This is true even within the traditional military (as opposed to covert or clandestine operations): in November 2014, the service chiefs of the Navy and Army, Admiral Jonathan Greenert and General Raymond Odierno, sent a joint memorandum to Secretary of Defense Chuck Hagel describing the DoD's then-current ballistic missile defense strategy as "unsustainable" and recommending a "more sustainable and cost-effective [program], incorporating 'left-of-launch' and other non-kinetic means of defense."[169] Comments from retired military members indicate the United States was likely developing an active "left of launch" capability, possibly one involving the use of electronic or cyber capabilities, even earlier than 2015.[170] While it is certainly possible that electronic or cyber warfare

---

[167] *Id.*

[168] *See* William J. Broad & David E. Sanger, *U.S. Strategy to Hobble North Korea Was Hidden in Plain Sight*, N.Y. Times, Mar. 4, 2017, https://www.nytimes.com/2017/03/04/world/asia/left-of-launch-missile-defense.html?module=inline.

[169] Jonathan W. Greenert & Raymond T. Odierno, *Memorandum for Secretary of Defense, Subject: Adjusting the Ballistic Missile Defense Strategy*, U.S. Naval Inst. News (Nov. 5, 2014), https://news.usni.org/2015/03/19/document-army-navy-memo-on-need-for-ballistic-missile-defense-strategy.

[170] During a December 2015 Center for Strategic and International Studies (CSIS) panel discussion on missile defense strategy involving four retired flag officers from the Army and Navy, *Breaking Defense* reporter Sidney Freedberg asked the following question:

> There's the other part [of "left of launch" strategy] that all of you have touched on, but one always hears it touched on it but then moves on, that I'd love to delve into a bit, which is the cyber and electronic warfare parts of it. You do have these complex kill chains that rely on computers, rely on various forms of electronic transmissions, *that you can break at some point before the adversary can launch*, unless they're doing dead reckoning of a ballistic missile on a nice target like a city …. How are those capabilities evolving? [Emphasis added]

CSIS, *Full Spectrum Missile Defense*, Panel Discussion, Dec. 4, 2015, https://www.csis.org/events/full-spectrum-missile-defense. While the panelists, hinting at the classified nature of such capabilities, largely demurred on offering specifics, retired Lieutenant General Richard Formica, the former Commanding General of the U.S. Army Space and Missile Defense Command, stated, "There are a wide range of targets associated with [an enemy's] ability to deliver missiles that you would want to go after …. [T]he full suite of lethal and non-lethal capabilities need to be considered and employed as appropriate. And

tools have been used in ballistic missile sabotage, at least with respect to the Iranian missile program the only reported sabotage action has been the "seeding" of Iran's aerospace program with faulty parts.[171]

In the context of American space policy, the alleged sabotage program fits neatly within the policy positions elaborated in the Bush, Obama, and Trump administrations. Beginning with the Bush Administration's NSP, we see the United States' intent to "dissuade or deter others from either impeding [its] rights [in outer space] or *developing capabilities* intended to do so" (emphasis added) and to "deny, if necessary, adversaries the use of space capabilities hostile to U.S. national interests."[172] Given the United States' long history of hostilities with the Islamic Republic, as well as the Bush and Obama Administrations' concerns regarding Iran's development of nuclear weapons, the alleged sabotage of the Iranian missile and space programs would theoretically serve a dual purpose: preventing Iran's development of a delivery system for any future nuclear device and deterring — and possibly even denying — Iran's development of capabilities that could threaten the United States in outer space. The Obama Administration's changes and additions in its 2010 NSP, and, particularly, its emphasis on "responsible" actors and "responsible" behaviors in and related to outer space, underscore the United States' intent to assure the safety of its space assets and preserve its preeminence in outer space affairs.[173] There are few nations the United States views as less "responsible" than Iran, and the fact that the Obama Administration allegedly continued the covert programs targeting Iran's nuclear and missile programs is indicative of the United States' continuing perception of Iran as a threat to international peace and security. Whether intentional or not, the alleged sabotage of the Iranian space program directly furthers the NSP and NSSS policies of preserving outer space as a realm to which only "responsible" actors may have unfettered access. The Trump Administration's reported continuation and expansion of the sabotage program reflects both its preservation (for the most part) of President Obama's outer space policy and its continued view of Iran as a ballistic missile threat. We can see, then, that even if the Iranian space program is not the primary target of the alleged American sabotage program, such a sabotage program would be entirely consistent with the United States' national outer space policies as elaborated over the past three Presidential Administrations.

---

that includes EW [electronic warfare] and other non-lethal capabilities." *Id.*

[171] Sanger & Broad, *U.S. Revives Secret Program*, *supra* note 13.

[172] *2006 NSP*, *supra* note 125.

[173] *See 2010 NSP*, *supra* note 131.

B. Iran, "Peaceful Uses" of Outer Space, and America's Catch-22

From the vantage point of international outer space law, we have seen that, for a use of space to be lawful, it must be "peaceful" (which, again, has largely been accepted to mean "non-aggressive"). Thus, the first question to be addressed is whether Iran's uses of space have been "peaceful." So far, the answer seems to be yes. The development of the Islamic Republic's space program — despite its status as an outgrowth of Iran's post-Iran-Iraq War ballistic missile program — has progressed in a pattern that is very similar to the space programs of other nations. Developing its SLVs from its ballistic missile technology, Iran began its forays into space with the launching of basic sounding rockets in the mid-2000s, progressing to tests of its Safir SLV in 2008, and, finally, the successful launch and placement in orbit of its domestically made Omid Satellite in 2009. After Omid, Iran has launched additional basic satellites and attempted to refine both its rockets (with the development of the larger, more powerful, and, to date, never successfully launched Simorgh SLV) and its satellite technology. This evolution of outer space technology, even including the originally military-oriented rocketry applications from which civil space programs developed, mirrors the historical development of the space program of the Soviet Union, the United States, and the United Kingdom.[174] The steps taken by Iran, including largely military control of even ostensibly civilian space activities, are also similar to those taken by China after Chairman Mao Zedong's 1958 decision that

[174] In the aftermath of World War II, the Soviet Union, which had been researching military applications of rocketry since at least the mid-1920s, utilized the technology and brain-power of captured Nazi scientists, as well as the genius of Sergei Korolev, the head of the Soviet rocketry program, to develop the R-7 ICBM, successfully tested in August 1957. *See* MOLTZ, *supra* note 15, at 71-79, 90-91. While primarily meant as a nuclear delivery system, the R-7 doubled as an SLV and was the method by which Sputnik-1 was delivered to orbit. *Id.* at 91. The United States, like the Soviet Union, took full advantage of captured Nazi technology and scientists to jump-start its own nascent rocketry program. *Id.* at 82-86. American efforts to develop an ICBM would also pave the way for civilian space applications: the first American satellite was launched using a Juno I rocket, derived from the Jupiter medium-range ballistic missiles. *Id.* at 96. Even the United Kingdom's more limited stable of SLVs (not often used, as the U.K. was largely reliant on the United States for space launches and deliveries), developed out of its Black Knight, Blue Streak, and Black Arrow nuclear missile systems. *See* C.N. HILL, A VERTICAL EMPIRE: HISTORY OF THE BRITISH ROCKETRY PROGRAM 1-7 (London: Imperial College Press, 2d ed. 2012). Indeed, as Everett C. Dolman writes in *Astropolitik*, his opus on realpolitik principles as applied to space security, "every successful national space launch program to date has its lineage based in a direct path to a ballistic missile development program." EVERETT C. DOLMAN, ASTROPOLITIK: CLASSICAL GEOPOLITICS IN THE SPACE AGE 91-92 (London: Frank Cass Publishers, 2002).

China pursue an outer space and satellite remote sensing program.[175] Iran is by no means an outlier with respect to the origins and progression of its space program.

Additionally, the satellites Iran has successfully placed in orbit, in addition to being fairly rudimentary, have been created to accomplish non-aggressive, if not distinctly non-military tasks. The 2009 Omid satellite was an "experimental [telecommunications] small satellite with a short-term mission for orbital measurements."[176] The Rasad and Navid satellites, launched in 2011 and 2012 respectively, were basic remote sensing satellites, launched to test their cameras and their ability to transmit sufficiently high-resolution images "for meteorology and natural disaster management applications."[177] Iran's fourth, and, to date, final, successfully orbited satellite, the Fajr, was another basic imaging satellite, albeit with several advanced features — solar panels, cold-gas thrusters, and "an experimental locally made GPS system" — previous Iranian satellites had lacked.[178] As a 2018 report from the Secure World Foundation noted in reference to the Islamic Republic's successful satellites, "[t]hese were all small satellites, 50 kg or lighter, lofted into such low-altitude orbits that atmospheric drag brought them down within weeks."[179] Ultimately, Iran's current satellites have neither been used for any purpose that could be characterized as "aggressive" under the definition of that term offered in General Assembly Resolution 3314 (XXIX), nor are they technologically advanced enough to even theoretically pose any significant military threat.

Finally, while it would be foolish to take Iranian officials' protestations that Iran's space program is completely peaceful as gospel, at least some consideration must be paid to the statements and public affairs-oriented actions of the Islamic Republic in "packaging" its space program. First, it is clear that great care has been taken in naming the Iranian launch vehicles and space objects. From Iran's "Ambassador" (Safir) SLV, to its spiritual-scientific

---

[175] Gregory Kulacki & Jeffrey G. Lewis, A Place for One's Mat: China's Space Program, 1956-2003 at 5, 7-14 (New York: Am. Acad. Arts & Sci., 2009).

[176] Tarikhi, *supra* note 16, at 179.

[177] *Id.* at 183-184.

[178] Iran Vice Presidency for Science and Technology, *Aerospace*, http://en.isti.ir/uploads/aerospace.pdf.

[179] Brian Weeden & Victoria Samson, eds., *Global Counterspace Capabilities: An Open Source Assessment* 4-3, Secure World Foundation (April 2018), http://swfound.org/media/206118/swf_global_counterspace_april2018.pdf.

stable of satellites ("Hope," "Observation," "Promise," and "Dawn"), and even its sounding rockets and secondary space equipment (the Kavoshgar, or "Explorer," sounding rocket and Pishgam, "Pioneer," space capsule, for instance), the naming of Iran's space objects reflects the optimism and anticipation one would expect of a State excited about its ability to successfully begin spacefaring. Additionally, while the Islamic Republic has certainly engaged in a wide range of internationally bad behavior, its interest in the social and scientific benefits of space technology, as well as its participation in international space forums, such as COPUOS, appear to be entirely in earnest. Iran has sponsored and hosted, mostly via the Iranian Space Agency, a number of space-oriented international programs, including a 2010 workshop on international outer space law and the peaceful uses of outer space,[180] a 2011 regional workshop on the use of satellite technology for tele-health applications,[181] and a 2016 workshop on the use of remote sensing technology for dust storm and drought monitoring.[182] These activities, as well as the statements of Iran's representatives at international space forums such as COPUOS, indicate an interest in outer space activities well in excess of what could be expected if its space program was merely a "fig leaf" for ballistic missile development.

Given the above examination of the "peacefulness" of the Iranian space program as it is currently constituted, the United States would encounter two legal problems if it sought to intentionally sabotage Iran's space endeavors. First, while international law indicates that most outer space activities must be "peaceful" to be lawful, it is by no means clear that the Outer Space Treaty's language with respect to "peaceful uses of outer space" is a *threshold* requirement for access to outer space. It is true that Article XI of the Treaty contains a provision for State Parties to inform the U.N. Secretary General and the international scientific community of the nature of their outer space activities — a requirement that could serve as a method of confirming peaceful

---

[180] *See* COPUOS, Rep. on the United Nations/Islamic Republic of Iran Workshop on Space Law on the theme "Role of international space law in the development and strengthening of international and regional cooperation in the peaceful exploration and use of outer space," U.N. Doc. A/AC.105/956 (2010).

[181] *See* COPUOS, Rep. on the United Nations/Islamic Republic of Iran Regional Workshop on the Use of Space Technology for Human Health Improvement, 55th Sess., U.N. Doc. A/AC.105/2012/CRP.13 (2012).

[182] *See* COPUOS, Sci. & Tech. Subcomm., Rep. on the United Nations/Islamic Republic of Iran Workshop on the Use of Space Technology for Dust Storm and Drought Monitoring in the Middle East Region, 54th Sess., U.N. Doc. A/AC.105/C.1/2017/CRP.22 (2017).

intentions prior to a space launch or activity.[183] Having signed but not ratified the Outer Space Treaty, however, Iran would likely not be bound to the Article XI requirement. Even if Article XI applied to Iran, a pre-launch analysis of the relative peaceful or non-peaceful nature of a given space mission is not now, nor has it ever been, required to give a State the "right" to conduct a space launch or other outer space-based activity. Indeed, if the most prevalent interpretation of "peaceful use" — that it refers to "non-aggressive" uses — is accepted as correct, then the peaceful or non-peaceful use of a certain space object is likely to be undeterminable until well after the object is launched into orbit. Further, as then-Major Christopher Petras noted in a 2002 *Air Force Law Review* note, Article I of the Outer Space Treaty is generally viewed as establishing three "positive" freedoms enjoyed by *all* States with respect to outer space: "freedom of access," "freedom of exploration," and "freedom of use."[184] Because Article I is "viewed as having enunciated preexisting legal principles based on the practice of States dating back to the launching of the first satellite," these access, exploration, and use principles are "generally considered to be part of customary international law, binding on all States, regardless of whether they are actually a party to the agreement."[185] Thus, both treaty law and customary law support the notion that any State, including the Islamic Republic of Iran, has a right to access outer space without a predetermination that its activities will be "peaceful."

---

[183] The full text of Article XI reads:

> In order to promote international cooperation in the peaceful exploration and use of outer space, States Parties to the Treaty conducting activities in outer space, including the Moon and other celestial bodies, agree to inform the Secretary-General of the United Nations as well as the public and the international scientific community, to the greatest extent feasible and practicable, of the nature, conduct, locations and results of such activities. On receiving the said information, the Secretary-General of the United Nations should be prepared to disseminate it immediately and effectively.

Outer Space Treaty, *supra* note 14, art. XI. Note that the language of Article XI does *not* specify that State Party notifications take place prior to the space activity. Indeed, as the Article's text refers to the "conduct," "locations," and "results" of such actions, it seems more likely that Article XI contemplates such notifications as taking place *after* a space activity has actually occurred.

[184] Christopher M. Petras, *"Space Force Alpha": Military Use of the International Space Station and the Concept of "Peaceful Purposes,"* 53 A.F. L. Rev. 135, 153 (2002).

[185] *Id.*

Second, based on its own interpretation of the "peaceful uses" language in the Outer Space Treaty, the United States will run into trouble if it seeks to justify any overt or covert action against Iran's space program on the basis that the program is "non-peaceful." As noted above, the United States has been a staunch defender of the "non-aggressive" interpretation of "peaceful purposes" since early in the Space Age. Iran's use of remote sensing satellite technology in outer space is similar to the United States' own early uses of space, and at an even more rudimentary level than that achieved by the United States in the early 1960s. Any accusation by the United States that Iran's space program is, itself, "non-peaceful" would appear to flip the United States' typical interpretation of "peaceful uses" on its head. That is, characterizing the Islamic Republic's space endeavors as "non-peaceful" based on the Iranian military's participation in the space program, or even on something more nebulous, such as the nature of the Islamic Republic as a "rogue state," seems to be a reversion to "non-military" interpretations of the "peaceful uses" language. If Iran's space program development — use of sounding rockets, testing of SLVs, development of basic (and orbitally short-lived) satellites — is "non-peaceful," why have the programs of other States, such as Russia (and former Soviet Union), China, India, and even the United States itself been viewed as "peaceful?"[186] Is the "peacefulness" of a State's space program merely determined by a State's relative power within the international system and other States' inabilities to prevent that State from developing its space systems? Were the Russian (and former Soviet), Chinese, and Indian space programs only classified as "peaceful" because other States lacked either the ability or the political will to prevent them?

---

[186] It should be noted that the United States has become increasingly willing to criticize space activities undertaken by other countries it considers to be "non-peaceful." For example, General Raymond, the USSF Chief of Space Operations, recently criticized what he characterized as "threatening" behavior by a maneuverable Russian satellite that was operating near a classified U.S. imaging satellite. *See* Sandra Erwin, *Raymond calls out Russia for 'threatening behavior' in outer space*, SpaceNews.com, Feb. 10, 2020, https://spacenews.com/raymond-calls-out-russia-for-threatening-behavior-in-outer-space/. In the post-Cold War era, touting and criticizing the threats presented by other States' outer space activities has characterized official U.S. government and military documents since at least the Rumsfeld Space Commission report. It is unclear to what extent such criticism of other countries' particular space activities as "non-peaceful" and, thus violating the spirit, if not the explicit provisions of the Outer Space Treaty, may be colored by the cloud of suspicion that viewing space as a "warfighting domain" is likely to engender. It is also notable that, with respect to established spacefaring States like Russia and China, there has been no suggestion (at least in public documents) that steps should be taken to prevent other States' launches of potentially "non-peaceful" space objects.

If the United States seeks to attack the underlying nature of the Iranian space program itself, at least as it is currently constituted, it seems to be caught in a catch-22. If the Iranian space program is "non-peaceful," then, applying the same interpretation of "peaceful uses," the United States' much more developed space program would be "non-peaceful" as well (to say nothing of the programs of the U.S.'s allies and potential adversaries). While U.S. efforts to sabotage the Iranian space program may not be justified under international law even if the program is "non-peaceful," if the program is "peaceful," the United States has even less legal justification for attempting to interfere with Iran's space ambitions based on the freedoms of use, access, and exploration granted to all States in the Outer Space Treaty.

C. "Aggression" and "Responsibility": New Constructions for Space Participation?

It is, perhaps, based on the foregoing analysis that the United States and its allies do not typically condemn the Islamic Republic's space program for its actual outer space activities. Instead, as we saw in Section II.B, above, criticism of the Iranian space program is based on what the program *could* be — or, rather, the possible other applications to which Iranian advances in rocketry could be put. As technology billionaire and would-be interplanetary explorer Elon Musk, the founder of SpaceX, succinctly noted in reference to his own SpaceX "Starship" SLV: "It's basically an I.C.B.M. that lands …. Nothing gets there faster than a [sic] I.C.B.M. It's just minus the nuclear bomb and add landing."[187] Musk's ominous comparison succinctly draws to the fore the inherently dual-use nature of rocket technology. In fact, his comments (likely unwittingly) reflect the very concerns cited by the U.S. State Department and other American government agencies regarding the Iranian space program.[188] Given national and international policies aimed at preventing the spread of ballistic missile technology, the Iranian space program is simply a recent example of a very old question: can a State, pointing to freedoms outlined in the Outer Space Treaty, mask its ballistic missile ambitions behind the façade of an ostensibly "peaceful" space program? To date, given the tension between the freedom of use, access, and exploration principles outlined in the Outer Space Treaty, the international community's

[187] Kenneth Chang, *SpaceX Unveils Silvery Vision to Mars: 'It's Basically an I.C.B.M. That Lands,'* N.Y. Times, Sept. 29, 2019, https://www.nytimes.com/2019/09/29/science/elon-musk-spacex-starship.html.

[188] *See supra* notes 59-63 and accompanying text.

missile control regimes, and the inherently dual-use nature of rocket technology, no satisfactory answer has been forthcoming.[189]

Is the United States powerless, then, in the face of an Islamic Republic intent on continuing to develop and test various ballistic missile-based space launch vehicles that are, as Musk indicated in his SpaceX-related comments, only a few adjustments away from being re-purposed for warlike purposes? Given that it would be difficult, if not impossible, to put the proverbial genie back in the bottle if Iran did successfully use its experience in "civilian" space rocketry to develop an ICBM, does it make sense for the United States to engage in covert sabotage to decrease the likelihood of this occurring — even if, as we saw above, such sabotage would violate the United States' treaty obligations under the Outer Space Treaty? These questions are intricately related. It may well be the case that, if it considers the threat of Iranian ballistic missiles — or even the threat of Iranian outer space technology — sufficiently serious, the United States would engage in a program of covert sabotage *even if* such a program would violate the letter or spirit of relevant treaties, such as the Outer Space Treaty.[190] The United States, however, may have a legally legitimate, or at least, a colorable legal, basis for sabotaging the Iranian space program. There are, indeed, two potential legal avenues that may

---

[189] Some have even argued that the "Missile Technology Control Regime" is, itself, in violation of the Outer Space Treaty's grant of freedom of access to outer space. *See* Barry J. Hurewitz, *Non-Proliferation and Free Access to Outer Space: The Dual-Use Conflict between the Outer Space Treaty and the Missile Technology Control Regime*, 9 BERKELEY TECH. L.J. 211 (1994). That the Outer Space Treaty could be violated simply by a State's refusal to transfer missile or launch-system technology to another State seems an overly expansive interpretation of the free access rights of States under the Outer Space Treaty (would the Soviet Union or the United States really have accepted the Treaty text if they believed it required the unrestricted transfer of outer space technologies to other States?). Hurewitz's view, however, is indicative of how broad and powerful interpretations of the Outer Space Treaty's freedom of access language can be.

[190] Such a position would be similar to the United States' calculated risk with respect to legally questionable spy-plane overflight of the Soviet Union during the 1950s. As described by Everett C. Dolman,

> In 1956, the United States was fixedly interested in Soviet ICBM progress, and so had commenced high-speed, high-altitude reconnaissance aircraft overflights of the Soviet Union. This action was extremely uncomfortable for the national policymakers, because it was in blatant disregard of international law. Even so, the United States was willing to disregard convention because the potential value of the information was greater than the anticipated international outcry. [Internal citations omitted]

DOLMAN, *supra* note 174, at 107.

justify the United States' alleged sabotage. The first is to seek a justification for action against the Islamic Republic's space program on the basis of *other* principles of international law — that is, principles outside the confines of the Outer Space Treaty, which would take precedence over the provisions of outer space law. The second, likely more difficult path, would be for the United States to diplomatically advocate for either (1) an amendment to the Outer Space Treaty that would clarify the far-ranging right of outer space access granted in the original treaty text, or, at the least, (2) a paradigm shift within international standards on outer space access and basic State behavior necessary to "allow" a State to access or use outer space.

The first potential avenue for legitimizing the United States' alleged sabotage of the Iranian space program is to seek legal justification for the sabotage program outside the realm of outer space law. The Outer Space Treaty, after all, recognizes that "international law, including the Charter of the United Nations" applies to outer space-related activities "in the interest of maintaining international peace and security."[191] As Fabio Tronchetti notes in the *Handbook of Space Law*, the U.N. Charter "is designed to have supremacy over subsequent treaties like the Outer Space Treaty."[192] Thus, if the United States sabotage program can be defended within the context of the Charter's recognition of States' rights of individual or collective self-defense, its provisions regarding the use of force, or its goal of "maintain[ing]… international peace and security," then the United States' actions would not be in violation of the Outer Space Treaty or the principles of international law.

A number of points can be raised in support of the proposition that the alleged American sabotage does not violate the U.N. Charter and, indeed, may even further its aim of maintaining international peace and security. First, if we accept that the alleged sabotage program is operating as described in publicly available sources (i.e., that it is based largely on the introduction of faulty parts in Iran's aerospace supply chain), there is a very real question as to whether the United States' actions constitute a "use of force" under the Charter at all.[193] The "seeding" of a supply chain with faulty parts is a strategy of

---

[191] Outer Space Treaty, *supra* note 14, art. III.

[192] Fabio Tronchetti, *Legal aspects of the military uses of outer space*, *in* HANDBOOK OF SPACE LAW 350 (Franz von der Dunk & Fabio Tronchetti, eds., 2015).

[193] Indeed, "sabotage" itself is an extremely nebulous concept under international law. While States may have domestic laws criminalizing sabotage (the United States, for instance, criminalizes the sabotage of certain facilities, the destruction of certain national defense or war materials, and the intentional production of defective war materials under

a very different nature from the direct application of armed military force, or, indeed, even from the use of a software program or other cyber-weapon to disrupt or degrade an enemy system. Such a strategy's attenuation in time (as Broad and Sanger note, "[i]t can take years to 'seed' a foreign aerospace program with faulty parts and materials"[194]) and directness (it is by no means guaranteed that an adversary would obtain or use sabotaged parts) support an argument that a sabotage program of this type does not constitute "use of force" as traditionally understood. Such sabotage also does not appear to fall within any of the definitions of aggression described in Resolution 3314 (XXIX).[195]

Second, even if the United States' indirect sabotage *does* constitute a "use of force" under the Charter, it must be remembered that Article 2(4) of the Charter only prohibits "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[196] The use of sabotage against the Iranian ballistic missile and space programs does not target either the territorial integrity, nor the political independence, of the Islamic Republic. Further, considering the Security Council's resolutions concerning the Islamic Republic's missile and nuclear programs, such sabotage does not appear to be "inconsistent with the Purposes of the United Nations." Of

---

18 U.S.C. §§ 2151-2156, and aircraft sabotage under 18 U.S.C. § 32), there appear to be no widely-agreed upon international legal definitions of the term, nor any treaties that explicitly prohibit the use of sabotage as a tool of clandestine international policy. Perhaps the closest to an "international law" related to sabotage is the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, adopted by the International Civil Aviation Organization in 1971 and entering into force in 1973. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Jan. 26, 1973, 24 U.S.T. 564, 974 U.N.T.S. 177 [hereinafter Montreal Convention]. The Convention criminalizes "destroy[ing] an aircraft in service or caus[ing] damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight" and "plac[ing] or caus[ing] to be placed on an aircraft in service … a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight," among other things. *Id.* at art. 1. These activities could more succinctly be described as "sabotage," although the Convention makes no reference to that word. Regardless, the Montreal Convention is of little use in the context of the current discussion, because, as its name and its contents show, it applies only to civil aviation — a separate and distinct field from a State's national space program.

[194] Sanger & Broad, *U.S. Revives Secret Program*, *supra* note 13.

[195] *See* G.A. Res. 3314 (XXIX), *supra* note 112.

[196] UN Charter art. 2(4).

particular note in this regard is Resolution 1929, which was adopted by the Security Council in June 2010.[197] In relevant part, Resolution 1929 states that the Security Council

> [d]ecides that Iran shall not undertake any activity related to ballistic missiles capable of delivering nuclear weapons, including launches using ballistic missile technology, and that States shall take all necessary measures to prevent the transfer of technology or technical assistance to Iran related to such activities[.][198]

While Resolution 1929 does not explicitly provide any individual State permission to engage in active steps to hinder or attack unlawful ballistic missile activity by Iran, it could be cited by the United States as evidence that any sabotage of the Iranian missile/space programs is in furtherance of the Security Council's own resolutions. Since the Islamic Republic's space launches are arguably "launches using ballistic missile technology" under the terms of Resolution 1929, Iran's space endeavors may, themselves, be viewed as illegitimate under international law — particularly since the ballistic missile provisions of Resolution 1929 were not altered or amended by the 2015 JCPOA. On this basis, any sabotage of the program allegedly perpetrated by the United States is arguably in furtherance of maintaining international peace and security and preventing Iran from engaging in a program already legally proscribed by the Security Council.

The second method the United States may employ to provide a legal basis for targeting the Iranian space program is to engage with the international community and push for the adoption of updated standards for outer space access and behavior. Admittedly, such a strategy would be extremely difficult. As others have noted, "[t]he Outer Space Treaty's free access principles may be superseded only by the emergence of a new peremptory norm of international law or by amending the treaty."[199] A successful effort to amend the Outer Space Treaty seems unlikely — particularly given the nature of the free access principle as one of, if not *the*, key foundations of outer space law. It is incredibly doubtful that the majority of States, and, particularly, those States that would like to access and use outer space but have not yet

---

[197] S.C. Res. 1929, U.N. Doc. S/RES/1929 (Jun. 9, 2010).

[198] *Id.* at ¶ 9.

[199] Hurewitz, *supra* note 189, at 240.

developed their own space programs, would agree to a radical, textual change to the rights and privileges granted under the Outer Space Treaty.

The United States may have more luck in pursuing interpretations of the existing Outer Space Treaty language that could, over time, influence the nature of customary international law. There are indications that the United States is already pursuing such a subtle change with respect to its own interpretations of the free access and free use principles. Of particular note in this regard are the Obama Administration's 2010 NSP and the DoD/DNI's 2011 NSSS. As noted above, these documents emphasize the significance of "responsibility" with respect to both outer space access and outer space use. Pursuant to the Obama NSP, the United States "will employ a variety of measures to help assure the use of space for all *responsible parties*" (emphasis added) and will promote space stability via "domestic and international measures to promote safe and *responsible* operations in space" — two policies that seem to be clarifications of the United States' understanding of the free use principle.[200] The NSSS is even more explicit with respect to outer space access: "We seek a secure space environment in which *responsible nations have access to space*" (emphasis added).[201] The implication of the NSP and NSSS language is that the United States has a vision of what it believes "responsible" behavior in outer space to be; far from being a violation of the Outer Space Treaty, the United States' active encouragement of "responsible" behavior (or State space actors) and active discouragement or hindrance of "irresponsible" behavior (or State space actors) are simply methods whereby the United States fulfils its own understandings of the free access and free use principles of the Treaty.

While the United States currently appears to be the only State to have actively shifted its interpretation of the free access/free use principles toward an underlying requirement of "responsibility," there is certainly evidence that a focus on responsibility is taking root within international organizations as well. With the dramatic expansion of both the number of State and commercial actors actively operating in outer space, as well as the continued need to address issues such as space debris and electro-magnetic spectrum overcrowding that affect all actors using or operating in outer space, the necessity of "responsible behavior" in outer space is becoming a more and more serious issue for COPUOS and the international community as a whole.

---

[200] *2010 NSP*, *supra* note 131, at 3-4.

[201] *2011 NSSS*, *supra* note 140, at 4.

The annual COPUOS report for 2019, for instance, stresses the necessity of establishing clearer understandings of State responsibility in outer space:

> "rules of the road" [are] needed as a way to identify what constituted responsible behaviour in outer space, and such rules would go a long way towards improving trust and confidence, reducing tensions and avoiding misinterpretation of actions or activities …. [T]ransparency and confidence-building measures would help to reduce the possibility of misinterpreting activities and actions, and deviations from the norms could help signal what would be regarded as irresponsible behaviour in space.[202]

The Report goes on to note that "the national implementation of voluntary, agreed guidelines for the long-term sustainability of outer space activities would strengthen the foundation and pillars of the treaties and help to define responsible behaviour in the sustainable and peaceful uses of space."[203] Despite COPUOS's emphasis on the importance of establishing rubrics for responsible vs. irresponsible behavior in outer space, there is nothing to indicate what actions the members of COPUOS believe ought to be taken against "irresponsible" behavior, or that the members of COPUOS would support a policy that a State's "irresponsible" behavior should negate its ability to freely access and use outer space. Regardless, as the language of responsibility becomes more and more prevalent, and as the multiplicity of outer space actors increases, the necessity for more binding rules with respect to the uses of outer space becomes ever more apparent. In this context, there may come a time when the United States' interpretation of "responsibility" as a pre-requisite for outer space access and use is accepted internationally.

V. Conclusion

At the time of this writing, while American officials are more than willing to decry Iranian efforts to take advantage of the proverbial Humā of outer space access, the United States has not publicly acknowledged that any program of covert sabotage targeting the Iranian ballistic missile or space program exists. This article has examined the legal issues surrounding such a program, based on publicly available sources concerning its nature, in the

---

[202] COPUOS, *Rep. of the Committee on the Peaceful Uses of Outer Space* at 11, 62nd Sess., U.N. Doc. A/74/20 (2019).

[203] *Id.*

context of outer space law. Ultimately, while the alleged sabotage the United States may be undertaking against the Iranian space program violates the United States' treaty obligations as a State Party to the Outer Space Treaty, there are a number of potential bases under international law more generally that provide legal support for such a program. These bases are particularly strong if the Iranian space program is viewed, as the United States believes, as merely a partner program to — or even an oblique cover for — Iran's overarching ballistic missile program, which has already been proscribed by the U.N. Security Council.

The Islamic Republic of Iran intends to continue pursuing its outer space endeavors: in early October 2019, the ISA announced its plans to launch at least three satellites into orbit within the next several months.[204] The first of these planned launches, which took place in February 2020, failed to reach orbit — although this failed launch did not involve dramatic explosions or comments by the President.[205] Mr. Jahromi, the Iranian Minister who had previously engaged with President Trump on Twitter, acknowledged the launch failure, but, like Iran itself, remained undeterred, announcing that Iran was "UNSTOPPABLE" and that "We have more Upcoming Great Iranian Satellites!"[206] In late April 2020, Mr. Jahromi's confidence was finally rewarded: after Iran's string of failed launches, the Islamic Revolutionary Guard Corps successfully launched a military satellite, the *Noor-1*, into orbit.[207] The launch was Iran's first successful insertion of a satellite into orbit in over five years.

Thus, in spite of the Iranian space program's history of mishaps and failures — including the catastrophic August 2019 explosion in Semnan — it seems that the perceived benefits of advancing its outer space and rocketry technologies; expanding a program that has been a source of national pride; and, perhaps, gaining knowledge and capabilities that can be used for more

---

[204] *After failed launch, Iran plans to send 3 satellites to space*, Times of Israel, Oct. 1, 2019, https://www.timesofisrael.com/after-failed-launch-iran-plans-to-send-3-satellites-to-space/.

[205] *See* Associated Press, *Iran Again Fails to Put Satellite Into Orbit*, N.Y. Times, Feb. 9, 2020, https://www.nytimes.com/2020/02/09/world/middleeast/iran-again-fails-to-put-satellite-into-orbit.html.

[206] MJ Azari Jahromi (@azarijahromi), Twitter (Feb. 9, 2020, 11:19 AM), https://twitter.com/azarijahromi/status/1226556188109819905.

[207] *See* Associated Press, *Iran Says It Launched a Military Satellite Into Orbit*, N.Y. Times, Apr. 22, 2020, https://www.nytimes.com/2020/04/22/world/middleeast/iran-satellite-launch.html.

bellicose purposes, is simply too great for the Islamic Republic to turn back now. The outer space Humā beckons, promising riches and power to those who can bask in its shadow. Only time will tell if, through technical difficulty, engineering inability, or covert (American?) sabotage, the Islamic Republic's Humā remains grounded and shadowless.

OPTIMIZING MILITARY INSTALLATION JURISDICTION

*Major Dean W. Korsak**

* Major Dean W. Korsak, USAF, (LL.M., Columbia Law School; J.D., Mississippi College School of Law; B.S., Liberty University) is the Chief of Military Justice, Second Air Force. Major Korsak has held a variety of installation and headquarters level positions requiring complex jurisdictional and interagency coordination, including trial counsel (prosecutor), Chief of Military Justice, Special Assistant United States Attorney, Deputy Staff Judge Advocate, Acquisition Fraud Counsel, Associate General Counsel, and an agency ethics official under the Office of the Secretary of Defense. He is a member of the Mississippi bar.

I. Introduction: Deficiencies in Military Installation Jurisdiction

A chasm between military and civilian criminal justice systems highlights a loss of understanding of how these systems should optimally interact. Concerns exist because of an abundance of overlapping criminal jurisdiction, not because there are deficiencies in military or criminal laws. Military command authority coexists with civilian criminal jurisdiction. Civilian criminal laws apply to both civilians and military service members on a military installation, just as they apply to individuals in local communities. Jurisdictional overlap has led to public safety vulnerabilities, inconsistent enforcement, and a level of dysfunction and confusion among military law enforcement that is easily preventable. This article explains how military commanders, military law enforcement personnel, and civilian authorities can improve their use of jurisdictional tools to enhance military installation security and public safety.

Because every military installation is geographically unique, overlapping jurisdiction at each installation will also be unique. Lack of optimization creates the opportunity for dysfunction. This is due to the complex nature of overlapping jurisdiction and frequent military law enforcement rotations where local geography and jurisdictional status must be quickly learned. Competence in this area requires military installation legal offices and law enforcement to understand the basics of overlapping jurisdiction and also requires close working relationships with federal, state, and local authorities.

This article focuses on increasing understanding of jurisdictional overlap specific to federal property where military and defense activities occur. The information provided, as well as the supporting authorities, serves to enhance the knowledge base of military law enforcement personnel, as well as civilian prosecutors and law enforcement personnel, so that they can decisively respond to incidents, even though multiple authorities maintain jurisdiction where incidents occur. This material will also empower those within the justice system, as well as law enforcement personnel, with additional tools and ideas to evaluate possible charges and alternate forums for certain cases.

Substantive discussion begins at Section II, which explains the sources of military command jurisdiction and how commands can use these authorities to cover all incidents on installation property, regardless of legislative jurisdictional status of installation property. The Appendix provides a template

Defense Property Security Order to assist practitioners in implementing the recommendations throughout this article.

Section III summarizes the civilian criminal jurisdiction landscape, some aspects of which apply to every military installation. There is a brief discussion of federal jurisdiction, including generally applicable federal criminal law, federal enclave law, and the Assimilative Crimes Act, all of which are currently used to prosecute service members accused of certain offenses. This is followed by a discussion of the sovereign rights of tribal, foreign, and state governments to prosecute service members for crimes that take place in their geographical jurisdictions. Such sovereign jurisdiction extends within certain military installations where a state did not cede jurisdiction to the federal government. Section III concludes by discussing types of cases where prosecution of service members by civilian authorities is mandatory and other cases where civilian coordination or prosecution is prudent to enhance public safety.

Section IV discusses steps that military authorities can take to optimize jurisdiction. The discussion highlights the benefits of an enterprise-wide approach that could apply to all installations and defense property, regardless of service component. Military departments may welcome an enterprise-wide approach in the age of joint bases, privatized housing, and disparity in how military departments prosecute civilians and service members under departmental regulations and practices.

This article concludes that all military installations and defense property locations should maintain only proprietary jurisdiction, implement a defense property security order, improve coordination among military and civilian authorities, and charge cases in the forum that will best enhance public safety.

II. Sources of Military Command Jurisdiction

Military commands and directors of defense operations are responsible for the protection of personnel and property entrusted to their control.[1] The primary source of military jurisdiction is the Uniform Code of Military

[1] *See generally,* The Judge Advocate Gen.'s Sch., The Military. Commander and the Law 312-318 (15th ed. 2019) (citing statutory law and DoD policy), https://www.airuniversity.af.edu/AUPress/Display/Article/1812408/the-military-commander-and-the-law/.

Justice (UCMJ). The UCMJ is a criminal code applicable to all federal military service members. Military jurisdiction also includes authority over geographical locations under federal military control.[2] This section discusses the unique criminal jurisdiction that exists over service members and how that authority extends into military retirement. This section then discusses the authority for military commands to inspect and search all persons and property entering and exiting certain facilities. This section discusses unique statutory authority to heighten security and how military commands can better use this authority. Finally, this section provides a foundation to appreciate the overlap military jurisdiction has with civilian criminal jurisdiction. The reach of the UCMJ is unlike civilian jurisdiction; it is not geographically based — authority exists over the individual service member, regardless of geographic locale.

A. UCMJ Jurisdiction over Service Members and Military Retirees

Establishment of the UCMJ military justice system required reconciliation with the constitutional criminal justice norms, such as grand jury indictment and trial by civilian jury.[3] It is well-settled constitutional law that courts-martial jurisdiction "is not exclusive, but only concurrent with that of civil courts."[4] This means even if the UCMJ did not exist, society maintains effective systems to adjudicate crimes committed by service members both on and off military installations.

Historically, military authorities had no jurisdiction over capital offenses, such as rape, that took place within the geographical limits of the United States in times of peace.[5] This meant civilian authorities adjudicated the most serious offenses perpetrated by a service member. The historic model was based on the foundational principle of civilian oversight of military activities embodied in the Constitution.[6] The historic norm was that "a military tribunal ordinarily may not try a serviceman charged with a crime that has

---

[2] *See infra* text accompanying note 116 (discussing debarment authority).

[3] Gosa v. Mayden, 413 U.S. 665, 673 (1973).

[4] *Id.* (quoting Grafton v. United States, 206 U.S. 333, 348 (1907)).

[5] A Manual for Courts-Martial U.S. Army, app. I, The Articles of War, art. 92 (1928) ("no person shall be tried by court-martial for murder or rape committed within the geographical limits of the States of the Union and the District of Columbia in time of peace"); *see also* 41 Stat. 805, § 1, ch. II (enacted June 4, 1920.). *But see* 64 Stat. 140, ch. 169, § 1 (enacted May 5, 1950) (providing military authority to prosecute rape).

[6] Reid v. Covert, 354 U.S. 1, 40-41 (1957).

no service connection."[7] The UCMJ still includes many military-specific offenses, specifically: fraudulent entry to service, desertion, absence without leave, missing movement, contempt toward officials, disrespect towards superiors, insubordination, dereliction of duty, disobedience of lawful orders, cruelty and maltreatment of subordinates, mutiny and sedition, unlawful detention, noncompliance with procedural rules, misbehavior before the enemy, subordinate compelling surrender, improper use of a countersign, forcing safeguard, failure to secure captured or abandoned property, aiding the enemy, mishandling military property, improper hazarding of a vessel, drunk on duty, misbehavior of sentinel or lookout, malingering, conduct unbecoming an officer, and any act that prejudices good order and discipline or is of a nature to bring discredit to the armed forces.[8]

Enactment of the UCMJ was a comprehensive reform to modernize and standardize and improve a deficient military justice system.[9] The UCMJ is often advantageous in lieu of civilian prosecution as it provides a streamlined approach to military discipline.[10] Enactment of the UCMJ sought to accomplish two primary goals: to "unify the service codes of military justice," and to "increase public confidence" in the military justice system.[11] Although a goal of the UCMJ is to increase public confidence, the UCMJ is a code without general applicability, meaning it does not apply to the public at large, only specifically identified personnel.[12]

The best example to describe the reach of the UCMJ over service members is to envision misconduct occurring in a remote location, such as aboard a submarine, a deployed location outside of the continental United States, or, looking to the future, at an outpost in space. Regardless of location, if a service member commits misconduct, the UCMJ provides jurisdiction for the unit commander to discipline the offending subordinate. This sets

---

[7] *Gosa*, 413 U.S. at 673 (discussing O'Callahan v. Parker, 395 U.S. 258 (1969)), which harmonized constitutional principles requiring grand jury indictment and trial by a civilian jury with the constitutional power of Congress "To make Rules for the Government and Regulation of the land and naval Forces" under Article 1, Section 8, Clause 14 of the Constitution).

[8] *See generally 10 U.S.C. §§ 883-934 (2020).*

[9] Burns v. Wilson, 346 U.S. 137, 140-141 (1953) (internal citations omitted).

[10] *Id.* at 141.

[11] Major Mark D. Sameit, *When a Convicted Rape Is Not Really a Rape: The Past, Present, and Future Ability of Article 120 Convictions to Withstand Legal and Factual Sufficiency Reviews*, 216 Mil. L. Rev. 77, 83 (2013).

[12] UCMJ art. 2 (codified at 10 U.S.C. § 802 (2020)).

UCMJ authority apart from other forms of criminal jurisdiction. The UCMJ succinctly declares, "[t]his chapter applies in all places."[13] The status-based reach of personal jurisdiction under the UCMJ comes with unique processes that differ from civilian criminal justice systems.

Courts-martial are not like civilian courts. They are military tribunals spanning from the trial to appellate level, established by the executive authority in Article I of the U.S. Constitution, not Article III judicial authority or state constitutions.[14] Courts-martial authority exists to adjudicate offenses within the military subset of society. Even with this narrow focus on military criminal law, military authorities have historically struggled to define whether the UCMJ and the military justice system, as a whole, exists for the purpose of facilitating justice or discipline.[15] For example, a focus on justice may lead to increased leniency by concentrating solely on ultimate guilt or innocence, while a focus on discipline may lead to harshness in an effort to deter disruption within units. Because commanders control the military justice system, case adjudication may result in a level of compassion or harshness not present in civilian processes, and may also vary widely across commands and military departments.

Instead of grand juries, certain military commanders hold broad powers over subordinate units and personnel by virtue of position.[16] To adjudicate criminal allegations within the military, certain officers, usually higher-ranking commanders overseeing multiple subordinate units, are statutorily entrusted with authority to convene courts-martial, hence the title "convening authority."[17] Convening authorities internally hold judicial

---

[13] UCMJ art. 5 (codified at 10 U.S.C. § 805 (2020)).

[14] Clinton v. Goldsmith, 526 U.S. 529, 533-534 (1999) (internal citations omitted).

[15] David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 Mil. L. Rev. 1, 5-6 (2013).

[16] Command authority is held pursuant to Article II, Section 2 of the U.C. Constitution, establishing the President as the Commander in Chief, and the authority held by commissioned officers by virtue of appointment or assignment as the senior officer in a military unit. *See also* 10 U.S.C. § 747 (designating the highest-ranking commissioned officer as the person in command of forces comprised of different components); Exec. Order No. 12765, 56 Fed. Reg. 27401 (1991) (delegating to the Secretary of Defense the authority to assign command among officers holding the same grade regardless of seniority within the same grade).

[17] 10 U.S.C. §§ 822-824 (2020). The military justice system does not have standing courts as in the civilian criminal justice system. Convening authorities convene courts-martial proceedings as needed.

authority for cases in the military justice system within their command.[18] Understanding the context of how the UCMJ developed highlights why civilian authorities still maintain at least concurrent criminal jurisdiction over service members and installations. Even when civilian authorities prosecute a military member, military commanders can still initiate adverse personnel action as a means to redress the service member's misconduct, and may even request permission to court-martial a member.[19]

In addition to military judicial action, the UCMJ provides commanders broad discretion in a range of administrative non-judicial punishment options for infractions that do not warrant pursuing a criminal conviction or term of confinement. One example of administrative non-judicial punishment is that of a summary courts-martial. This proceeding is conducted with the consent of the accused and provides for punishment up to one month confinement, forty-five days hard labor without confinement, two months restriction to specified geographical limits, and forfeiture of two-thirds pay for one month.[20] Another form of non-judicial action is a commanding officer's non-judicial punishment under Article 15, UCMJ.[21] This forum also requires a service member's consent and provides punishment options within certain ranges, depending on the rank of the imposing commander and the rank of the accused service member.[22]

As previously noted, if an accused is given an administrative, non-judicial punishment, this does not prohibit separate civilian prosecution. For example, a Department of Justice (DoJ) prosecution of a service member for drunk driving survived federal appellate review, even when a military commander previously imposed non-judicial punishment.[23] This is because non-judicial punishment does not violate double jeopardy.[24] This example demonstrates that civilian courts have expressed concern and taken action

---

[18] *Id.*

[19] *See infra* note 161 and accompanying discussion.

[20] UCMJ art. 20 (codified at 10 U.S.C. § 820 (2020)).

[21] UCMJ art. 15 (codified at 10 U.S.C. § 815 (2020)).

[22] *Id.*

[23] United States v. Reveles, 660 F.3d 1138 (9th Cir. 2011).

[24] *Id. See also* United States v. Crank, et al., Nos. 1:11–cr–222(AJT), 1:11–cr–223(AJT), 1:11–cr–224(AJT), 1:11–cr–225(AJT), 1:11–cr–226(AJT) (E.D. Va. Mar. 16, 2012) (discussing the military's disparate adjudication of drunk driving offenses against service members where non-judicial punishment was previously imposed based on unknowing waiver of right to court-martial).

for a civilian offense of great concern, even after the military service took the action it deemed appropriate. This is why it is important for military commanders to understand concerns of local and state officials and be mindful of those concerns when exercising military justice authority. Military authorities should discuss and coordinate service member case dispositions when civilian law enforcement authorities have expressed interest in particular cases and have a vested interest in the outcome.

In addition to military justice authority and use of non-judicial punishment, commanders also have extensive power to administratively discharge a member for a variety of reasons that may generally be described as failing to meet various standards required for military service.[25] Members who are discharged are afforded the opportunity to appeal the action to the same extent any discharged member may appeal for correction to military records.[26] A surprising aspect of the UCMJ and military justice system is that it extends to former service members, who are now civilians, who have retired from military service.

Military jurisdiction extends to military retirees both by express language of the UCMJ[27] and also longstanding judicial precedent.[28] This means that regardless of the ultimate judicial forum, military law enforcement officials are authorized to fully pursue matters involving a subject who is a military retiree. This comes with the standard UCMJ rights advisement requirement, which affords greater protection than the civilian rights advisement.[29]

---

[25] Dep't of Def. Instr. [hereinafter DoDI] 1332.30, Commissioned Officer Administrative Separations (May 11, 2019); DoDI 1332.14, Enlisted Administrative Separations (Apr. 12, 2019). In addition to service characterizations, qualifying personnel may be subject to entry-level separation, release for void enlistment or induction, and separation by being dropped from the rolls of the Military Service under the cited regulations.

[26] 10 U.S.C. § 1552 (2020).

[27] UCMJ art. 2(a) (codified at 10 U.S.C. § 802(a) (2020)).

[28] *See, e.g.,* United States v. Tyler, 105 U.S. 244 (1882) (establishing the connection between military pay and subjection to military judicial authority); *see also* United States v. Dinger, 77 M.J. 447 (C.A.A.F. 2018) (a recent case affirming a military retiree's court-martial conviction and sentence).

[29] UCMJ art. 31 (codified at 10 U.S.C. § 831 (2020)) (mandating specific rights advisement for persons subject to the UCMJ).

Civilians are not prosecuted for crimes under military authority, but even civilians with a minimal connection to the military may be subject to military command authority and then subject to criminal prosecution by civilians.[30] For example, if a civilian attempts to enter a military base, they are subject to inspections, searches, and other forms of intrusion. This is based on the military installation commander's broad authority to safeguard that installation. Such efforts are for the safety and security of federal personnel and property, not enforcement of domestic civilian laws.[31] Evidence obtained in such incidents may be admissible regardless of whether a case is eventually prosecuted by military, federal, or state prosecutorial authority.

B. Installation Entry and Exit Inspections Apply to All Persons and Property

The Fourth Amendment protects individuals from unreasonable searches and seizures performed by government actors. Generally speaking, for a search to be deemed "reasonable," the government has to have a warrant based on probable cause and the government's actions need to be reasonable.[32] This is the general rule, absent some other well-established exception to the Fourth Amendment. This Amendment recognizes society generally has an expectation of privacy that it deems reasonable.[33] Military command authority and regulations to safeguard installations provide a limited exception to the Fourth Amendment, which generally reduces a person's expectations of privacy on an installation. Federal courts have upheld military command authority for entry and exit inspections extending to all persons and property accessing or departing from a closed installation.[34]

---

[30] *See infra* text accompanying note 116 (discussing debarment authority).

[31] *See* Posse Comitatus Act, 18 U.S.C. § 1385 (2020) (restricting the use of United States Armed Forces from enforcing domestic civilian law unrelated to execution of military duties).

[32] Katz v. United States, 389 U.S. 347 (1967).

[33] *Id.*

[34] A closed installation is one where there is controlled access through barriers, guards, and requiring permission or a pass for entry. In this respect, military installation searches are similar to airport security lines and sobriety checkpoints. *See, e.g.,* Morgan v. United States, 323 F.3d 776 (9th Cir. 2003). The Fourth Circuit recognized searches on closed military bases have long been exempt from the usual Fourth Amendment requirement of probable cause based primarily on the rationale to uphold national security. *See, e.g.,* United States v. Jenkins, 986 F. 2d 76 (4th Cir. 1993).

Individuals provide implied consent to search when entering, remaining in, and exiting a closed military installation.[35]

Military commanders have authority to search military personnel and government property located on a closed installation. The Manual for Courts-Martial (MCM), in Military Rule of Evidence (MRE) 313, provides for inspections and inventories, including "an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is to determine and to ensure the security … of the organization …."[36] In MRE 314(c), the MCM describes command authority to conduct searches not requiring probable cause upon entry or exit from installation or enclaves "to ensure the security … of the command." Further, MRE 314(d) describes command authority to conduct searches of government property where the property was not issued for personal use and there is no reasonable expectation of privacy.

Although evidence obtained in such searches may be admissible in court, relying on UCMJ command authority does not equate to being able to prosecute civilians. The military inspection or search may uncover a firearm or illegal substance, but that does not mean there is authority for military law enforcement to cite a civilian for wrongful possession. The authority to cite and prosecute a civilian depends entirely on the jurisdictional status of the location. If the location is under military control but state jurisdiction, military law enforcement may deny the subject entry to the installation but would have to rely on state or local law enforcement to respond for arrest, criminal citation, and prosecution. This constraint is due to the lack of federal criminal jurisdiction and not the restriction on using military forces to enforce domestic civilian laws.[37] However, there is one option where military law enforcement could always issue a criminal citation to civilians whether the location is state or federal jurisdiction. The Internal Security Act provides military commands the authority to issue an installation security regulation, violation of which is a federal crime that extends to the entire installation regardless of state jurisdiction.

---

[35] *See, e.g.,* United States v. Krupa, 658 F.3d 1174 (9th Cir. 2011); United States v. Jenkins, 986 F.2d 76 (4th Cir. 1993); United States v. Ellis, 547 F.2d 863 (5th Cir. 1977).

[36] Manual for Courts-Martial, United States [hereinafter MCM], Mil. R. Evid. 313 (2019).

[37] *See* 18 U.S.C. § 1385.

C. Internal Security Act – Defense Property Security Order

The Internal Security Act[38] authorizes certain federal officials, including military installation commanders, to issue a local regulation designed to safeguard defense property under their control. The Act treats the terms "regulation" and "order" interchangeably.[39] The regulation may extend beyond the installation fence line and cover property such as aircraft, vehicles, and equipment.[40] Violation of such a regulation is punishable as a federal misdemeanor offense.[41]

For installations with portions under state jurisdiction, the regulation applies throughout the installation as a generally applicable federal criminal law.[42] The regulation and criminal prohibition is enforceable against "[w]hoever willfully violates any defense property security regulation …."[43] The statute does not include the qualifier that the offense occur within the special or maritime jurisdiction of the United States.[44] The purpose of this law applies wherever required to protect defense property, regardless of jurisdiction. Military law enforcement may cite civilians[45] for such offenses no matter where the jurisdictional lines are drawn on a military installation. Although prosecution of such offenses must be adjudicated through federal civilian court, military commanders and prosecutors have extensive control over the level of enforcement and advocacy leading to convictions.

The Department of Defense's (DoD) implementation of the Internal Security Act mandates that military installation commanders "shall issue the necessary regulations for the protection and security of property or places under their command, according to [50 U.S.C. § 797]."[46] Of note, DoD

---

[38] Internal Security Act, 50 U.S.C. § 797 (2020).

[39] *Id.* at § 797(a)(4)(D).

[40] *Id.* at § 797(a)(4)(C).

[41] *Id.* at § 797(a)(1).

[42] *Id.*

[43] *Id.*

[44] *See infra* Part III.A.2 (discussing this category of jurisdiction).

[45] Citation is accomplished by issuance of a DD Form 1805, Federal District Court Citation, citing a violation of 50 U.S.C. § 797 and the defense property security order section that was violated. Installation law enforcement then enroll the citation in the Federal Judiciary's Central Violation Bureau like other misdemeanor offenses.

[46] DoDI 5200.08, Security of DoD Installations and Resources and the DoD Physical Security Review Board (PSRB), ¶ E1.1 (inc. Change 3, Nov. 20, 2015).

guidance specifies that installation-level commanders have the authority to issue Internal Security Act regulations and even mandates they do so.[47] In addition to the mandatory DoD implementation requirements, commanders are also required to comply with military department policy which may apply to installation security. Service-level regulations concerning installation defense cite the Internal Security Act, but these regulations are not discussed in this article due to their limited distribution and lack of public access.[48]

Departmental guidance and the statutory language provide installation commanders immediate authority to issue a defense property security order.[49] The order must be "posted in conspicuous and appropriate places."[50] To give notice, signage at installation entry locations may include "WARNING U.S. Air Force Installation, It is unlawful to enter this area without permission of the Installation Commander. Sec. 21, Internal Security Act of 1960; 50 U.S.C. § 797. While on this installation all personnel and the property under their control are subject to search."[51] For example, the Fourth Circuit upheld the search of a vehicle, as it was existing base, pursuant to this authority.[52] However, while the legitimacy of the search was upheld, there was no direct mention of the actual order or whether an order under the Act actually existed. Therefore, caution is warranted in promulgating and enforcing such regulations. Courts will strictly construe regulations that are penal in nature and will not expand them beyond the plain language.[53] Courts may also require actual knowledge of a regulation if publication is deemed insufficient.[54] But when properly executed, this authority resolves many concerns of overlapping jurisdiction.

---

[47] *Id.* at ¶¶ E1.1.1-E1.1.6.

[48] *See, e.g.,* U.S. Dep't of the Air Force Instr. [hereinafter AFI] 31-101, Integrated Defense (July 4, 2017) (referencing the Internal Security Act and DoDI 5200.08). The cited document is a limited-distribution publication that is not publically available, http://static.e-publishing.af.mil/production/1/af_a4/publication/afi31-101/restricted_access.pdf.

[49] 50 U.S.C. § 797(a)(4)(D).

[50] *Id.* at § 797(b).

[51] 50 U.S.C. § 797.

[52] United States v. Jenkins, 986 F.2d 76 (4th Cir. 1993) (holding that because probable cause and a warrant were not required, evidence obtained from a vehicle exiting base was admissible).

[53] Smith v. United States, 360 U.S. 1, 9 (1959).

[54] United States v. Aarons, 310 F.2d 341 (2d Cir. 1962).

A key aspect of the Act is that it does not function as an inspection under the Military Rules of Evidence. Rather, the Act provides a basis for implied consent to search while located on a military installation that is closed to the general public.[55] A properly posted notice of the regulation defeats a reasonable expectation of privacy and associated Fourth Amendment protections.[56] The potential is to go beyond defeating reasonable expectations of privacy to actually create safer installations through criminal enforcement of violations. Military commands can utilize the Act by publishing a simple order describing policy and procedures for everything from firearms, fireworks, dangerous animals, safe driving, and nearly every other category of conduct or hazard that presents risk of damage to defense property or personnel. Discussion of a specific example will demonstrate the usefulness of the Act.

There is no federal gun law that prohibits the possession of a personally owned firearm within the fence-line of a military installation. Consider the following case. A civilian employee keeps a firearm under the seat of a personally owned vehicle on base but never brings the firearm into any buildings. Rather, the civilian employee leaves the firearm in the locked personally owned vehicle parked in the parking lot while working in a building each day. The installation has a sign posted at each gate stating firearms are prohibited in federal facilities, citing 18 U.S.C. § 930. One day, on a routine inspection of vehicles entering the installation, law enforcement officers discover the firearm in the civilian employee's vehicle.

Contrary to popular belief, possession of a firearm within a military installation parking lot or other area outside of a building is not a crime under 18 U.S.C. § 930. This is because the plain language of Section 930 defines "federal facility" for the narrow purposes of the statute as a "building."[57] Federal courts and military courts have interpreted Section 930 as only applying to actual federal buildings, not parking lots or other locations such as areas within a military installation fence line, but outside of an actual building.[58] As of January 1, 2019, military personnel are prohibited from carrying a "dangerous weapon concealed" both on and off military installations;[59] but

---

[55] Jenkins, 986 F.2d 52 at 78.

[56] *Id.*

[57] 18 U.S.C. § 930(g)(1) (2020).

[58] United States v. Rodriguez, 460 F. Supp. 2d 902 (S.D. Ind. Mar. 31, 2006); United States v. Dorosan, Case No. 08-042 (E.D. La. Jan. 22, 2009); United States v. Hooper, ACM 38307, 2014 CCA LEXIS 685 (A.F. Ct. Crim. App. Sept. 24, 2014).

[59] 10 U.S.C. § 914 (2020).

this prohibition does not mention unconcealed weapons and does not apply to civilians. While military law enforcement may be inclined to respond aggressively to all reports of a civilian with a firearm on an installation, criminal prosecution for many situations is useless without a locally posted defense property security order under the Internal Security Act that restricts possession of firearms. The situation is easily preventable by simply issuing an order, as the Act allows.

The United States Postal Service has long maintained a regulation similar to a defense property security order. Courts have upheld the regulation prohibiting firearms on postal facility property, including parking lots.[60] However, the Act provides military commanders much broader authority than the Postal Service, with more severe penalties for violations.[61] Military commanders have generally not used statutory authority to ensure safety and security as the Postal Service has done.

In addition to basic security, a defense property security order is also a method that would allow the DoD to more quickly and effectively counter vulnerabilities created by emerging technology, such as model aircraft, small unmanned aircraft systems (UAS), or drones.[62] While military authorities have many tools available to counter such systems, most of the regulatory framework is classified and only deals with physical and electronic disruption of systems, not prosecuting offenders. A defense property security order would be a more effective means to enforce and deter threats.

Regulations inherently lag behind technological advancements. However, the real value in the Internal Security Act is that it provides military commanders authority to move at the speed of technology to continually

---

[60] Conduct on Postal Property, 39 C.F.R. § 232.1 (1972).

[61] The Postal Service regulation had to undergo public comment in the Federal Register, while the Internal Security Act expressly authorizes military commanders to issue local regulations and enforce them simply by posting appropriate notice. Violations of the Postal Service regulation are punishable by fine and up to 30 days in jail, whereas violation of a regulation under the Internal Security Act is punishable as at least a misdemeanor offense.

[62] *See* 49 U.S.C. § 44801(11)-(12) (2020) (defining "Unmanned Aircraft" as "an aircraft that is operated without the possibility of direct human intervention from within or on the aircraft" and "Unmanned Aircraft System" as "an unmanned aircraft and associated elements (including communication links and the components that control the unmanned aircraft) that are required for the pilot in command to operate safely and efficiently in the national airspace system").

ensure the safety and security of defense property. A relevant example of how this works best is the danger posed by commercially available model aircraft and other UASs.

It is useful to view the risks posed by small flying machines as similar to the risks posed by birds to military aircraft. Programs exist to reduce the operational risk that birds and wildlife pose to civilian[63] and military[64] aircraft operations. This emerging operational risk led to the Federal Aviation Administration (FAA) regulation of small UASs, including for security sensitive areas.[65] The FAA maintains a database of all security sensitive areas, accessible online for small UAS operators.[66] However, deficiencies still exist when military commands rely on FAA regulations to reduce the risks of unmanned aircraft to military operations.

There are practical concerns of regulating new technology, such as an early challenge to FAA regulations of small UASs and applicability to "model aircraft,"[67] tracking the updated statutory and regulatory construct for UASs,[68] and synthesizing the updated FAA construct with new statutory authority for military personnel to mitigate certain UAS threats.[69] Even with a settled regulatory landscape, military law enforcement personnel who intercept small UAS incursions of restricted airspace also need a simple and practical method to issue citations to violators. Violators may be criminally charged or suffer administrative action such as civil penalties, but this

---

[63] Federal Aviation Administration [hereinafter FAA], Advisory Circular 150/5200-33C, *Hazardous Wildlife Attractants on or Near Airports* (Feb. 21 2020).

[64] *See, e.g., Bird/wildlife Aircraft Strike Hazard (BASH),* U.S. Dep't of Air Force Safety Ctr., http://www.safety.af.mil/Divisions/Aviation-Safety-Division/BASH/ (last visited Aug. 31, 2020) (describing the hazard and reduction efforts); AFI 91-212, Bird/Wildlife Aircraft Strike Hazard (BASH) Management Program (May 31, 2018).

[65] Small Unmanned Aircraft Systems, 14 C.F.R. pt. 107 (2020), *cf.* 14. C.F.R. § 99.7 (2020) (requiring small UAS operators to comply with FAA "special security instructions").

[66] FAA National Security UAS Flight Restrictions, reflecting 1,532 records as of November 2019, https://udds-faa.opendata.arcgis.com/datasets/0270b9d8a5d34217856cc03aaf833309_0.

[67] Taylor v. Huerta, 856 F.3d 1089 (D.C. Cir. May 19, 2017).

[68] *See* 49 U.S.C. ch. 448 (reflecting significant statutory changes in 2018) and 14 C.F.R. pt. 107 (regulating small unmanned aircraft systems).

[69] 10 U.S.C. § 130i (2020) (providing the Secretary of Defense authority to authorize DoD employees to mitigate the UAS threat for certain covered facilities and assets, notwithstanding FAA regulations or criminal laws).

assumes military law enforcement are trained in monitoring UASs and are also locally authorized to cite UAS operators, even if an operator is outside of the installation boundary.

Rather than installation commanders relying on new regulatory landscapes that are proactively challenged in federal court and difficult for military law enforcement to enforce, it would be easier and more effective to amend a defense property security order to prohibit the flying of any model or unmanned aircraft in and around restricted military installation airspace. Such an order is easier to create, publish, and enforce than the all-inclusive FAA approach. Also, the order can extend beyond aircraft operations to all facilities that require enhanced security. Every military installation may contain sensitive areas that limit public access to ensure operational security. It is reasonable for a defense property security order to prohibit the flying of devices over military installations without prior coordination and approval. The template order in the Appendix contains such a clause.[70]

The fact that some military commands do not maintain such orders demonstrates that military commands do not use this statutory authority to its full advantage.[71] Military commands should use such authority because there are many issues commanders cannot control.[72] For example, as the next section discusses, military authority does not prevent civilian authorities from investigating and prosecuting offenses by service members or offenses committed on military installations and defense property.

---

[70] *See infra*, Appendix § 6.(f).

[71] *See e.g.,* 32 C.F.R. pt. 263 (Defense Mapping Office traffic and vehicle control for certain sites); 32 C.F.R. pt. 525 (Kwajalein Missile Range entry authorization); 32 C.F.R. pt. 552 (Army regulations covering a variety of activities on various installations); 32 C.F.R. pts. 763 & 770 (Navy regulations regarding public access to certain installations); 32 C.F.R. § 809a.3 (Air Force regulation stating "[u]nder Section 21 of the Internal Security Act of 1950 (50 U.S.C. 797), any directive issued by the commander of a military installation or facility, which includes the parameters for authorized entry to or exit from a military installation, is legally enforceable against all persons whether or not those persons are subject to the Uniformed Code of Military Justice (UCMJ)").

[72] Ideally, a standard Defense Property Security Order could be promulgated through rulemaking to maintain consistency for security personnel who frequently transition to new installations and also reduce litigation risk.

III. Civilian Jurisdiction Applicable to Military Installations

Unlike the UCMJ, which applies in all places, jurisdictional overlap on military installations and defense property exists because of geographical and subject-matter boundaries in civilian criminal law. This section provides an overview of civilian jurisdiction and explains how such authority applies to military installations and defense property. The section first explains the categories of federal criminal law that apply in all places, an additional set of federal criminal laws that apply only within federal enclaves with special jurisdictional status, and how state law fills gaps in federal criminal law in enclaves. The section then discusses how tribal, foreign, and state jurisdiction overlaps with both federal criminal and UCMJ criminal law. All of this provides necessary context for the reader to fully appreciate how military installations and defense property locations can best ensure safety and security by relying on local law as well as implementing a defense property security order. This will create uniform response and case adjudication throughout the federal defense enterprise. Of the categories of criminal jurisdiction discussed, federal criminal laws of general applicability possess the most extensive type of criminal jurisdiction.

A. Federal Jurisdiction

Federal criminal laws fall into specific categories touching nearly every aspect of life. Some federal criminal laws are based on federal employment status, such as conflict-of-interest prohibitions.[73] Other federal employment status laws apply to those employed by or accompanying the military overseas.[74] A host of federal criminal laws applies generally to the United States population at large.[75] The federal government maintains criminal laws of general applicability "primarily for the protection of its own functions, personnel, and property."[76] The federal government also maintains "Special Maritime and Territorial Jurisdiction,"[77] commonly referred to as federal

[73] *See generally* 18 U.S.C. §§ 201-227 (2020).

[74] *See, e.g.,* Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261-3267 (2020) (providing jurisdiction over crimes committed outside of the U.S. by a person employed by, accompanying or a member of the Armed Forces).

[75] U.S. Dep't of Just., Justice Manual, Criminal Resource Manual § 662, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00662.htm [hereinafter Criminal Resource Manual].

[76] *Id.* (internal citations omitted).

[77] 18 U.S.C. § 7(7) (2020).

enclave laws.[78] This special federal jurisdiction extends in part to "[a]ny place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States."[79] If federal law does not cover some aspect of criminal conduct, it incorporates state law within federal enclaves to fill the gaps in federal criminal law.[80]

Jurisdiction under general federal criminal law and federal enclave law applies to military personnel just as it does civilians. Military personnel more frequently encounter federal criminal jurisdiction than civilian populations due to working and often living on federal enclaves. The UCMJ and federal criminal laws often overlap. This overlap creates concurrent jurisdiction between federal civil and federal military authorities to investigate and prosecute service members for offenses that also apply to the population at large.

1. Criminal Laws of General Applicability

General federal criminal laws apply to any person who commits a prohibited act, as indicated by such laws typically beginning with broad applicability language, including "Whoever" or "A person who." Certain laws specify they apply to "any place in the United States."[81] Most, but not all, generally applicable federal criminal laws are found in Title 18 of the United States Code, Part I. This Part contains 123 chapters with over 2,700 specific criminal statutes. Generally applicable federal criminal offenses run the gamut of criminal conduct. A brief list of examples include crimes involving: aircraft,[82] drive-by-shootings,[83] crimes against federal officials,[84] civil

[78] The term "federal enclave" does not currently appear in federal criminal laws, but has been used by government officials and federal courts to describe laws that apply within the special maritime and territorial jurisdiction of the United States. *See, e.g.* United States v. Markiewicz, 978 F.2d 786, 797 (2d Cir. 1992) (discussing "federal enclave laws" and listing a variety of offenses applicable in federal enclaves).

[79] 18 U.S.C. § 7(7) (2020).

[80] Assimilative Crimes Act, 18 U.S.C. § 13 (2020); *see also* CRIMINAL RESOURCE MANUAL, *supra note* 75, at § 667, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00667.htm.

[81] *See, e.g.,* 18 U.S.C. § 544 (2020).

[82] 18 U.S.C. §§ 32, 38, 39A; Chapter 17A (2020).

[83] 18 U.S.C. § 36 (2020).

[84] 18 U.S.C. §§ 111, 351, 1114, 1751 (2020).

rights violations,[85] embezzlement and theft,[86] extortion and threats,[87] activities involving firearms,[88] murder for hire,[89] taking hostages,[90] bank robbery,[91] counterfeiting coins or currency,[92] controlled substances,[93] and hundreds of other offenses. Such laws apply regardless of where the criminal act takes place. State boundaries and military installation fence lines are irrelevant in such prosecutions.

Of interest to military personnel, there is at least one generally applicable federal criminal law that does not apply to persons subject to the UCMJ. That felony law prohibits attacks on service members and their immediate family members on account of or related to military service, and even covers veterans for five-years after discharge.[94] The statute's exemption states that it "shall not apply to conduct by a person who is subject to the Uniform Code of Military Justice."[95] This is a rare exception in federal criminal law.

Notwithstanding this exception, the UCMJ and general federal criminal laws overlap in every case where a service member violates a generally applicable federal criminal law. For example, military personnel are subject to prosecution for using banned controlled substances under both the federal Controlled Substances Act and Article 112a, UCMJ.[96] As another example, military personnel who provide false information to the government are subject to punishment under 18 U.S.C. § 1001 and Article 107, UCMJ.[97] There are many other examples of overlap between federal criminal law and UCMJ jurisdiction based on military status. In addition to generally applicable

---

[85] 18 U.S.C. ch. 13 (2020).

[86] 18 U.S.C. ch. 31 (2020).

[87] 18 U.S.C. ch. 41 (2020).

[88] 18 U.S.C. § 922 (2020).

[89] 18 U.S.C. § 1958 (2020).

[90] 18 U.S.C. § 1203 (2020).

[91] 18 U.S.C. § 2113 (2020).

[92] 18 U.S.C. §§ 471, 485 (2020).

[93] 21 U.S.C. § 812 (2020).

[94] 18 U.S.C. § 1389 (2020).

[95] 18 U.S.C. § 1389(b) (2020).

[96] *Cf.* 21 U.S.C. § 812 (2020) (prohibiting the use of controlled substances, including marijuana and cocaine), with 10 U.S.C. § 912a (2020) (Article 112a of the UCMJ, prohibiting the use of controlled substances, including marijuana and cocaine).

[97] *Cf.* 18 U.S.C. § 1001, *with* 10 U.S.C. § 907 (2020).

criminal laws, another category of federal criminal jurisdiction exists on federal enclaves where the United States maintains legislative jurisdiction.

2. Enclaves: Exclusive, Concurrent, and Proprietary Jurisdiction

The phrase "federal enclave" refers to parcels of land owned by the United States Government. Federal enclave jurisdiction is a web of complex laws and policies. This section explains enclave law, policies governing the processes by which the United States obtains legislative jurisdiction from the states, the different types of federal legislative jurisdiction, and concludes with a discussion of federal criminal laws which only apply within federal enclaves.

Federal enclaves are areas where the federal government maintains some level of legislative jurisdiction that is typically maintained by a state or municipal government. In the context of federal enclaves, federal legislative jurisdiction is "the power of the federal government to pass and enforce laws on matters that are ordinarily reserved for the States, such as crime prevention and enforcement and family laws."[98] Federal law makes clear that obtaining legislative jurisdiction over federal land interests is not required.[99]

Federal enclave laws apply only within the special maritime or territorial jurisdiction of the United States. Criminal statutes are considered federal enclave laws if they include language stating that the statute applies within the special maritime or territorial jurisdiction of the United States.[100] There are specified categories of special jurisdiction itemized within 18 U.S.C. § 7, such as federal lands and buildings, aircraft, spacecraft, and locations void of foreign jurisdiction.[101] For areas with established local jurisdiction, property owned and controlled by the United States, including military installations, falls under one of three legislative jurisdiction categories: exclusive, concurrent, or proprietary jurisdiction. [102]

---

[98] AFI 32-9002, MANAGEMENT OF REAL PROPERTY, ¶ 4.1.2 (Aug. 3, 2017), https://static.e-publishing.af.mil/production/1/saf_ie/publication/afi32-9002/afi32-9002.pdf.

[99] 40 U.S.C. § 3112 (2020).

[100] 18 U.S.C. § 7 (2020).

[101] *Id.*

[102] *See generally* U.S. DEP'T OF JUST., JUSTICE MANUAL, § 9-20.000 (discussing issues related to territorial jurisdiction), http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/20mcrm.htm (last viewed Aug. 31, 2020). Some references to jurisdiction may include a fourth category, such as "mixed" jurisdiction, but such a description is not useful because overlapping or concurrent jurisdiction will always exist to some extent in every location.

Exclusive federal jurisdiction over land means that only the United States has the authority to prosecute offenses that take place at that situs.[103] Concurrent jurisdiction means that both the United States and the state in which the federal enclave exists both maintain equal authority to prosecute offenses at such locations.[104] Proprietary jurisdiction means that the federal government has the rights of a landowner but does not have the authority to prosecute federal crimes other than generally applicable federal criminal law.[105]

The federal government obtains legislative jurisdiction over land it owns by one of three methods. The first method is a state statute consenting to the United States purchasing land for the purposes enumerated in Article 1, Section 8, Clause 17, of the Constitution of the United States.[106] The second method is by a state cession statute.[107] The third method is a reservation of federal jurisdiction upon the admission of a state into the Union."[108] If the government has not acquired exclusive or concurrent jurisdiction over particular land, then it maintains only proprietary jurisdiction.[109]

Acquiring federal legislative jurisdiction requires a federal executive agent for the land concerned to obtain state consent or state cession of jurisdiction and accept the relinquished jurisdiction by filing notice with the respective state governor.[110] Although the statutory basis for accepting and relinquishing legislative jurisdiction is established, complying with various federal departmental policies and requirements presents challenges for installation commanders seeking to modify federal jurisdiction over land that is under military control.

---

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *See* 40 U.S.C. § 3112 (2020); Adams v. United States, 319 U.S. 312 (1943) (explaining that since February 1, 1940, the United States only acquires jurisdiction over land when the state grants jurisdiction and the appropriate federal official accepts jurisdiction from a state. A less formal process for accepting jurisdiction existed before then. *See* Silas Mason Co. Inc., v. Tax Comm'n, 302 U.S. 186 (1937)). Additional discussion on this topic is located in the JUSTICE MANUAL, *supra* note 102. *See, e.g.,* N.M. STAT. § 19-2-11 (2020) (providing an example of a state statute ceding jurisdiction of specified land to the United States so long as the property is used for military purposes).

[107] N.M. STAT. § 19-2-11.

[108] *See* Collins v. Yosemite Park Co., 304 U.S. 518 (1938).

[109] Adams v. United States, 319 U.S. 312 (1943).

[110] 40 U.S.C. § 3112 (b) (2020).

DoD policy is that military installations should "seek to have a single uniform Federal legislative jurisdiction throughout the installation unless there are compelling reasons to retain differing jurisdictions."[111] However, the next paragraph in this policy states that privatized military family housing areas should normally remain under state legislative jurisdiction regardless of the jurisdictional status of the surrounding installation area.[112] Adding to the complexity is that the United States maintains a general policy "to obtain no more than proprietary Federal legislative jurisdiction over its property" although individual merits of an installation will determine the type of jurisdiction.[113] Proposed changes to federal legislative jurisdiction at military installations must first be coordinated with the local United States Attorney for the district concerned and the Department of Justice headquarters.[114] If uniformity is desired, secretaries of the military departments have statutory authority to initiate relinquishment of federal legislative jurisdiction over controlled property whenever it is considered desirable.[115] It is much easier to reduce exclusive to concurrent and concurrent to proprietary jurisdiction rather than seeking an expansion of jurisdiction. While changes are possible, the present reality is that large swaths of military installation properties maintain more than proprietary jurisdiction, falling under federal enclave law.

Proprietary jurisdiction still allows the United States to restrict access to land it owns and maintain many other administrative regulatory requirements.[116] In addition, the Internal Security Act provides statutory authority for the protection of defense property.[117] Such defense property security

[111] DoDI 4165.70, Real Property Management, ¶ 6.11.1 (Apr. 6, 2005) (inc. Change 1, Aug. 31, 2018), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/416570p.pdf.

[112] *Id.* at ¶ 6.11.1.1. Privatized military housing involves many legal issues beyond the scope of this discussion. It is important to note that change in military installation jurisdiction could result in a local tax authority seeking property taxes from privatized military housing contractors. One basis of the property tax claim is that state and local officials may experience increased law enforcement response to military installations under proprietary jurisdiction.

[113] *Id.* at ¶ 6.11.2.

[114] *Id.* at ¶ 6.11.3.

[115] 10 U.S.C. § 2683(a) (2020). The process of a military department seeking to relinquish federal jurisdiction to a state is frequently used in the Base Realignment and Closure (BRAC) process since the military will no longer occupy closed locations.

[116] *See* 18 U.S.C. § 1382 (2020) (restricting entrance to a military installation once debarred by the installation commander).

[117] 50 U.S.C. § 797 (2020).

orders create what is in essence a micro federal enclave, resulting in an order functioning as federal criminal law within a defined federal enclave. This authority, coupled with the employment status-based UCMJ, provides military installations all of the authority required to ensure that defense property and personnel remain safe and secure. Even with this broad federal authority, states maintain some level of authority to regulate certain conduct in federal enclaves.

Some states have argued that "exclusive" federal jurisdiction does not really mean states have no criminal jurisdiction within such enclaves. The position is that exclusive federal jurisdiction "is not an absolute prohibition against the application of state laws. Rather, its purpose is to protect the federal government against conflicting regulations."[118] Also, if the federal government fails to regulate activity for the public welfare in an enclave, or mandates states do so, then states may determine they retain some level of jurisdiction to ensure public welfare within federal enclaves located within state borders.[119] This is especially the case for child welfare services based on state statute.[120] This means there is at least a logical legal basis for states to pursue certain criminal cases even within enclaves with exclusive federal jurisdiction. Civilian authorities that believe military authorities are not adequately safeguarding individuals on a military installation could attempt to intervene through independent criminal investigations. While such an occurrence seems remote, it is possible. Another complexity in federal enclave jurisdiction is being sure of the jurisdictional status of a specific location where an incident occurs.

There is no known database that contains the status of all enclaves and their jurisdictional status. United States Attorney Offices are charged with knowing the jurisdictional status of federal property within the jurisdiction of the office.[121] This is because offenses committed within federal jurisdiction fall under the responsibility of the Department of Justice (DoJ) to investigate and prosecute. Military installation real estate offices and the Army Corps of Engineers maintain the expertise to ensure source documents and accurate

---

[118] State *ex rel.* Children, Youth & Families Dep't, 120 N.M. 665, 667 (N.M. Ct. App. 1995) (citing Penn Dairies v. Milk Control Comm'n, 318 U.S. 261, 270-71 (1943); James v. Dravo Contracting Co., 302 U.S. 134, 148-49 (1937)).

[119] *Id.* at 668.

[120] *Id.* (citation omitted).

[121] Criminal Resource Manual, *supra* note 75, § 665, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00665.htm.

maps are on file to determine exact jurisdictional status. For locations that are positively federal enclaves, a host of specific laws apply.

There is a vast range of offenses that comprise federal enclave law. Here is a sampling of federal enclave laws:

> arson, 18 U.S.C. § 81; assault, 18 U.S.C. § 113; maiming, 18 U.S.C. § 114; theft, 18 U.S.C. § 661; receiving stolen property, 18 U.S.C. § 662; using false pretenses, 18 U.S.C. § 1025; murder, 18 U.S.C. § 1111(b); manslaughter, 18 U.S.C. § 1112; attempted murder, 18 U.S.C. § 1113; conspiracy to murder, 18 U.S.C. § 1117; kidnapping, 18 U.S.C. § 1201(a)(2); destruction of buildings or property, 18 U.S.C. § 1363; robbery, 18 U.S.C. § 2111; offenses against United States seamen, 18 U.S.C. §§ 2191-93; and crimes involving sexual abuse, 18 U.S.C. §§ 2241-44.[122]

These and other enclave laws apply on military installations under exclusive or concurrent jurisdiction. In addition to general federal criminal laws and enclave laws, there is another aspect of federal jurisdiction that functions as a subset of federal enclave law. This covers misconduct that is not specifically regulated by federal enclave law.

3. Assimilative Crimes Use State Law as a Federal Offense Gap Filler

The Assimilative Crimes Act (ACA) has existed in some form for nearly two hundred years.[123] The title of the law plainly speaks to its purpose: "Law of States adopted for areas within Federal jurisdiction."[124] The ACA incorporates state law into federal enclave law where there is exclusive or concurrent federal jurisdiction.[125] Instead of maintaining an even longer list of federal laws, the ACA simply functions as a gap-filler. The ACA allows federal authorities to enforce the laws of a state within federal enclaves with exclusive or concurrent jurisdiction if there is no federal statute on point for an offense. The most common example is a state traffic code applying on a military installation because there is no federal traffic code. The federal

---

[122] United States v. Markiewicz, 978 F.2d 786 (2d Cir. 1992) ("see" in internal citations omitted).

[123] Crimes Act, 14 STAT. 115 (1825).

[124] 18 U.S.C. § 13 (2020).

[125] *Id.*

government may only assimilate state law if there is no generally applicable federal criminal law.[126] The ACA provides broad military command authority over civilians within federal enclaves, allowing citation for nearly every conceivable offense. The ACA presents military commands an interesting dilemma when deciding whether to prosecute a service member under the UCMJ or ACA for certain offenses occurring within a federal enclave.

The option to charge service members under the UCMJ or ACA for enclave offenses exists because the UCMJ does not constitute generally applicable federal criminal law,[127] and is not "an enactment of Congress" for purposes of the ACA.[128] If it were, then service members would always need to be prosecuted under the appropriate UCMJ offense, not in federal district court under an assimilated federal offense. As it stands, the DoJ may prosecute service members in federal court for violations of assimilated offenses in areas under federal exclusive or concurrent jurisdiction, even though the UCMJ contains a similar offense.[129] This is also because "federal courts have at the very least concurrent jurisdiction with military courts over violations of the laws of the United States by military personnel whether on or off the military reservation."[130] Here is a concise statement of the reasons why federal appellate courts concluded the UCMJ does not prevent prosecution of service members under assimilated federal crimes:

(1) legislative history showing that the ACA was intended to operate when there was no generally applicable federal criminal law; (2) the ACA's purpose to make state law apply uniformly to crimes committed inside and outside federal enclave boundaries; (3) the desire to equalize treatment between military and civilian defendants accused of identical non-service related crimes; [internal citation omitted] (4) the fact that the UCMJ serves a very different function from and is not meant to replace the general criminal law; (5) the principle that federal and military courts have concurrent jurisdic-

---

[126] *See infra* note 127.

[127] United States v. Mariea, 795 F.2d 1094, 1096-9 (1st Cir. 1986); United States v. Walker, 552 F.2d 566, 568 (4th Cir. 1977), *cert. denied,* 434 U.S. 848 (1977); United States v. Debevoise, 799 F.2d 1401, 1402-3 (9th Cir. 1986).

[128] *Id. (Mariea, Walker,* and *Debevoise* hold that a penal offense under the UCMJ does not bar prosecution of a service member in federal court for violating state law under the Assimilative Crimes Act).

[129] *Id.*

[130] Walker, 552 F.2d at 567 (internal citations omitted).

tion over offenses committed by military personnel; and (6) the preference for prosecuting essentially civilian offenses in the district courts.[131]

This discussion culminates in making the point that military commands have many criminal jurisdiction tools under federal law and the UCMJ to ensure safe and secure installations. Equally, civilian authorities maintain at least as much criminal jurisdiction as military commands. Due to various applicable sources of federal and military criminal jurisdiction, military installation prosecutors routinely maintain a dual-hatted status to prosecute service members under the UCMJ but also to prosecute civilians for offenses which occur on a federal enclave.

Military lawyers who are certified as military trial counsel have the authority to prosecute service members for UCMJ offenses in courts-martial proceedings.[132] Installations with either exclusive or concurrent federal jurisdiction should have some of the military trial counsel certified as a Special Assistant United States Attorney (SAUSA) appointed by the local United States Attorney.[133] Military prosecutors with SAUSA appointments are able to prosecute civilians and service members before a United States Magistrate Judge assigned to the respective federal district court for certain offenses perpetrated on a federal enclave. Such prosecutions are with the consent of the defendant to be prosecuted in that forum and typically involve traffic code violations and misdemeanor level offenses such as simple assault. There are over 400 SAUSA appointments throughout the United States.[134] There is a high volume of cases where military prosecutors acting in a SAUSA capacity interact with the DoJ on behalf of the DoD.

---

[131] Debevoise, 799 F.2d at 1402-3 (internal citations omitted).

[132] 10 U.S.C. § 827 (2020) (providing the statutory requirements for detailing trial counsel to represent the United States in courts-martial).

[133] *See* 28 U.S.C. § 543 (2020) (authorizing the Attorney General to "appoint attorneys to assist United States attorneys when the public interest so requires"); *See also* U.S. Dep't of the Army Reg. [hereinafter AR] 27-10, Military Justice ¶ 23-4 (May 11, 2016); Sec'y of the Navy Inst. 5822.1C, Implementation of the Federal Magistrates Act by the Department of the Navy (Mar. 26, 2019); AFI 51-206, Use of Magistrate Judges for Trial of Misdemeanors Committed by Civilians (Aug. 31, 2018).

[134] Personnel and caseload figures provided by the Executive Office for United States Attorneys, e-mails dated December 23, 2013 and December 31, 2013 (on file with the author).

For felony-level cases or cases where there is no SAUSA to prosecute a civilian case, DoD agencies, including the military departments, refer such cases for DoJ disposition. The DoJ does not track the military status of the offender.[135] The DoD consistently refers over 3,000 cases per fiscal year to the DoJ for criminal justice action.[136] In comparison, the DoD refers to the DoJ more cases each year than all of the general and special courts-martial tried by all military departments combined.[137] These figures demonstrate that dual-hatted military prosecutors are fully capable of optimizing jurisdiction on military installations regardless of caseload and that the interaction between the DoD and the DoJ is well established and ongoing. In addition to federal cases generated out of military installations, there are many cases where military authorities interact with non-federal governmental entities.

B. Tribal, Foreign, and State Jurisdiction

Non-federal governmental entities maintain sovereign authority to prosecute offenses that take place within a defined geographical area.[138] This power is separate and distinct from federal criminal jurisdiction.[139] Prosecution by a non-federal governmental entity does not bar subsequent federal prosecution for a "distinct federal offense" based on the same conduct.[140] Overlapping jurisdiction and different equities balancing command discipline and public safety highlights the need to optimize jurisdiction on military installations.

The separate sovereign doctrine is so strong in American jurisprudence there is a judicially created protection of state prosecution sovereignty in the Indian country for crimes committed by a non-Indian against a non-Indian,

---

[135] *Id.*

[136] U.S. Dep't of Just., Federal Justice Statistics 2015-2016, p.6, https://www.bjs.gov/content/pub/pdf/fjs1516.pdf (demonstrating the DoD referred over 3,000 cases per year for fiscal years 2014-16).

[137] *Id., cf.* Annual Reports Submitted to the Committees on Armed Services of the United States Senate and the United States House of Representatives and to the Secretary of Defense, Secretary of Homeland Security, and the Secretaries of the Army, Navy, and Air Force Pursuant to the Uniform Code of Military Justice for Fiscal Years [hereinafter, FY] 2014, 2015, and 2016, https://www.armfor.uscourts.gov/ann_reports.htm (reflecting 1,919 military trials in FY 2014, 1,936 in FY 2015, and 2,216 in FY 2016).

[138] United States v. Lara, 541 U.S. 193, 208-10 (2004).

[139] *Id.* (re-affirming that double jeopardy protection requires a prior prosecution by a federal power).

[140] *Id.* at 210.

notwithstanding the literal wording of a federal statute to the contrary.[141] Indian Tribal jurisdiction is statutorily protected for crimes in the Indian country involving registered Indians.[142] Indian country jurisdiction recognizes that Indian country maintains a measure of tribal sovereignty, just as the United States recognizes for other nations.

Foreign sovereign jurisdiction depends upon the Status of Forces Agreement (SOFA) with the United States and international law.[143] Importantly, federal criminal jurisdiction extends overseas.[144] Federal enclave law is specifically extended to misconduct committed by a service member subject to the UCMJ that takes place outside of the United States.[145] Within the United States, military commands must understand and appreciate the policy concerns of individual states.

States are vested with jurisdiction over most crimes against persons and property in the United States.[146] States maintain sovereign authority to prosecute offenses occurring within a defined geographical area, even if the offense is consummated in a different state.[147] In such situations, the "dual sovereignty doctrine" allows prosecution for the same offense by two different states because the prosecutions are not for the "same" offense under the Double Jeopardy Clause.[148] One example of why a state may prosecute a person previously convicted elsewhere for the same conduct is to pursue and carry out the death penalty.[149] However, there are reasons other than

---

[141] *See* Criminal Resource Manual, *supra* note 75, § 678, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00678.htm (citing United States v. McBratney, 104 U.S. 621 (1882) (creating a judicial exception protecting states' rights from the broad application of federal and tribal jurisdiction pursuant to 18 U.S.C. § 1152, notwithstanding the literal terms of the statute)).

[142] *Id.*

[143] *See generally,* Military Commander and The Law 351-353, (discussing foreign jurisdiction and international law).

[144] *See supra* note 74 and accompanying discussion.

[145] 18 U.S.C. § 3261(a)(2) (2020).

[146] Criminal Resource Manual, *supra* note 75, § 662, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00662.htm.

[147] Heath v. Alabama, 474 U.S. 82, 87-93 (1985).

[148] *Id.* at 92-93.

[149] *See, e.g., id.* at 84-86 (explaining how a murder conviction in Georgia based on a plea deal resulted in a sentence of life imprisonment with possible parole eligibility in seven years, while in a subsequent prosecution in Alabama for the same murder, the jury recommended the death penalty); *Executions*, Ala. Dep't of Corrections,

seeking the death penalty that a state may feel warrants a separate prosecution after a crime is adjudicated by a separate sovereign. Given the general policy favoring federal proprietary jurisdiction,[150] it is vitally important for military commands to work with local and state law enforcement to ensure that military law enforcement response is proper, evidence is secured, and military personnel are prepared and stand ready to aid in state court prosecution.

There are several ways to further military, federal, and state interests simultaneously. First, respectful and responsive working relationships must be established and maintained between law enforcement entities. This is especially important because with military personnel, continuity of personnel may present challenges due to frequent military moves. Second, ensure Memorandums of Understanding (MOUs) are current and relevant. MOUs are no-cost agreements between federal agencies.[151] MOUs typically document the roles, responsibilities, and expectations of all offices. Because MOUs already exist between various military, state, and federal law enforcement entities, installations should ensure proper points of contact discuss cases that involve both military and state interests within MOUs. Maintaining MOUs allows each governmental entity to perform distinct functions, rather than have a single authority perform both federal and state functions. It is possible to have dual-status federal-state military commanders, but it is best to reserve use of that legal construct for infrequent operations such as disaster relief, not installation security.[152]

Of note, it is also possible to have dual-status military law enforcement, meaning that military law enforcement officers, may in limited circumstances, be deputized and have state or local authority, such as a county sheriff in which the installation is located. This allows military law enforcement to act in a dual-status when responding to an incident within proprietary jurisdiction. Military commands may find dual-status military law enforcement most useful in situations where: an installation entry point or visitor control center is located in proprietary jurisdiction; there is a long response time for

---

http://www.doc.alabama.gov/Executions.aspx (last visited Dec. 12, 2019) (reflecting Petitioner Heath, inmate #0000Z425, executed on March 20, 1992).

[150] *See* DoDI 4165.70, *supra* note 111, at ¶ 6.11.2.

[151] DoDI 4000.19, Support Agreements (Apr. 25, 2013) (inc. Change 2, Aug. 31, 2018), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/400019p.pdf.

[152] *See* Dean W. Korsak, *The First Frontier: Domestic Military Operations*, 42 The Reporter 2, 9-18 (2015), https://www.afjag.af.mil/Portals/77/documents/AFD-150827-010.pdf (explaining types of operations that benefit from dual-status command).

state or local law enforcement to arrive; or there is military command or other resistance to maintaining an Internal Security Act regulation or order at the installation. The process for military commands seeking approval to deputize DoD uniformed military and civilian law enforcement personnel is outlined in DoD policy.[153] The secretary for each military department is authorized to approve the acceptance to deputize personnel.[154] The process necessarily begins with a willing state or local law enforcement authority outlining what training and compliance requirements are necessary for deputized personnel.[155] Deputized federal forces could only be used for ensuring the safety and security of military installations and property, not enforcement of domestic civilian laws.[156]

It is also possible to include military law enforcement in a mutual aid and support agreement, but doing so raises many concerns. For example, the DoD has the legal authority and policies for properly trained military personnel to support civil authorities.[157] However, there are well-established statutory constraints restricting military law enforcement from providing active and direct support to civilian law enforcement unless specifically approved by the Secretary of Defense[158] or for a specifically authorized role. Previously authorized support includes activities such as immediate response for ordinance disposal at the request of a civil authority.[159] The legal construct for routine use of deputized military personnel for only installation safety and security matters presents more challenges than solutions. Due to the statutory restrictions to keep military personnel focused on installation safety and security, military law enforcement will be far more constrained than state and local law enforcement in a mutual aid and support agreement even when federal forces are deputized. With solid working relationships

---

[153] DoDI 5525.13, Limitation of Authority to Deputize DoD Uniformed Law Enforcement Personnel by State and Local Governments (June 29, 2018) (inc. Change 1, June 29, 2018), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/552513p.pdf.

[154] *Id.* ¶ 8.

[155] The author was unable to identify any military installations that currently have security forces or military police who are also deputized by a local civilian law enforcement entity.

[156] Posse Comitatus Act, 18 U.S.C. § 1385 (2020).

[157] DoDI 3025.21, Defense Support of Civilian Law Enforcement Agencies (Feb. 27, 2013) (inc. Change 1, Feb. 8, 2019), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/302521p.pdf.

[158] *Id.* at Encl. 3.

[159] *Id.* at Encl. 5 (citing 40 C.F.R. pts. 260-270).

between military and state authorities, cases still arise where strong civilian interests override military interests.

C. Military Cases Where Civilian Coordination or Prosecution is Mandatory

This section explains longstanding policy for why certain cases require military authorities to coordinate with or relinquish control to civilian authorities. This discussion focuses on two categories of cases. The first category of cases occurs when a state prosecutes a service member for an offense. The second category of cases occurs when military authorities are required by policy to notify, confer, or refer a case to the DoJ.

1. State Coordination Required by Military Regulation

Although the federal and state governments are distinct sovereigns, as a matter of comity, military coordination with state authorities is required.[160] The coordination requirement is not absolute.[161] Typically, the local military legal office where the incident occurred will expend considerable time and resources seeking to secure a release from the local district attorney so the military can obtain evidence to pursue its own investigation and prosecution.[162] The military, as a federal entity, also has the ability to prosecute service members even where the member was subject to a state prosecution for the same misconduct. Despite federal policy constraints, federalism allows prosecution for misconduct even if a state trial results in acquittal, as double jeopardy does not attach to a separate sovereign.[163]

---

[160] MCM, *supra* note 36, Rules for Courts-Martial [hereinafter R.C.M.] 201(d); 907(b).

[161] *See* AFI 51-201, Administration of Military Justice, ¶ 4.18 (Apr. 8, 2020) (requiring Air Force consultation with state officials to determine which sovereign will prosecute such cases, or service secretary approval to initiate UCMJ action in parallel with state prosecution).

[162] It is common military practice to obtain a release from a state prosecutor in order to pursue a military investigation and potentially a court-martial where state and military jurisdiction is concurrent.

[163] *See, e.g.,* United States v. Melton, Criminal No. 2:08cr107-DPJ-LRA, 2008 WL 4829893, *3 (S.D. Miss. Nov. 4, 2008) (motion practice in a federal criminal prosecution for alleged civil rights violations against the then-sitting Mayor of Jackson, Mississippi, including the issue of informing the trial jury of a state court acquittal for the same underlying conduct).

It is noteworthy that military courts-martial may produce very different results from state prosecutions. For example, two service members engaged in similar sexual misconduct with two minor victims, resulting in a hung jury in state court for one accused but a court-martial conviction for the other accused.[164] Service members may not be able to use certain defenses in a court-martial that are available in state court, such as reasonable mistake of fact as to the age of a minor sexual assault victim.[165] This demonstrates the benefits of close working relationships between military and civilian prosecutors. Examining how federal, military, and state law apply to a case should result in options that will satisfy the concerns of all authorities involved. While interaction between military and state authorities is often discretionary, military authorities are required to comply with mandatory coordination requirements with federal law enforcement.

2. Notice, Conferral, or Referral Required by the Department of Justice

This section explains required action by military law enforcement and prosecutors for certain categories of offenses. The DoJ and the DoD maintain a MOU delineating which department will lead certain investigative and prosecutorial activities where concurrent federal jurisdiction exists.[166] Currently, the DoJ's summary of the MOU includes the following:

> The agreement provides generally that all crimes committed on military reservations by individuals subject to the Uniform Code of Military Justice shall be investigated and prosecuted by the military department concerned, with certain exceptions. The agreement permits civil investigation and prosecution in Federal district court in any case when circumstances render such action more appropriate.[167]

---

[164] *See* United States v. Lyson, ACM 38067, 2013 CCA LEXIS 239; 2013 WL 5436639 (A.F.C.C.A. Sept. 16, 2013) (discussing the companion *Cooksey* case with no separate citation due to acquittal).

[165] *Id.* at *1-2; 8-9.

[166] DoDI 5525.07, Implementation of the Memorandum of Understanding (MOU) Between the Departments of Justice (DoJ) and Defense Relating to the Investigation and Prosecution of Certain Crimes (Mar. 5, 2020), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/552507p.pdf.

[167] Justice Manual, *supra* note 102, § 9-20.115, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/20mcrm.htm#9-20.115.

This means the DoJ retains what is, in essence, a right of first refusal to prosecute military personnel in federal district court, even over a military commander's objection, on any matter the DoJ deems appropriate. This is in keeping with the vast discretion DoJ prosecutors possess in charging decisions.[168] Relevant factors in deciding to prosecute a case through the DoJ include "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan."[169] DoD policy recognizes the supremacy of the DoJ's investigative authority.[170] This demonstrates that the DoJ has the discretion to incorporate military equities into investigative and prosecution decisions.

The DoJ prosecutes numerous military related cases each year. Examples of such cases include serious offenses like a military parent who is suspected of causing or contributing to the death of their child[171] and sexual misconduct where military reservist used his military affiliation to sexually exploit minors and produce child pornography.[172] However, DoJ enforcement priorities for military misconduct focus on corruption cases. It is noteworthy that military corruption cases are handled even more delicately than high visibility offenses like sexual assault.[173] Corruption cases involve allegations of corruption, bribery, conflict of interest, and related offenses. These cases require external oversight due to the nature of offenses raising the possibility of corruption within a command. Corruption crimes are taken so seriously because of the possibility that senior military officials may

---

[168] Wayte v. United States, 470 U.S. 598, 607 (1985).

[169] *Id.*

[170] *See* MOU, *supra* note 166.

[171] *See, e.g.,* United States v. Webb, 747 F.2d 278 (5th Cir. 1984); Indictment, United States v. Zayas et al., (D.N.M. Apr. 25, 2012), http://www.justice.gov/usao/nm/press-releases/2012/2012-04-25_zayas_et_al_indictment.pdf; *cf.* United States v. Zayas, Case No. 2:12-cr-00944 (D.N.M. 2017) (prosecution of a military member and spouse for child's death at home on military installation).

[172] Press Release, *Former Navy Reservist Pleads Guilty to Sexual Exploitation of Multiple Minors to Produce Child Pornography,* U.S. Dep't of Just. (May 29, 2013), http://www.justice.gov/opa/pr/2013/May/13-crm-615.html.

[173] *See* MOU, *supra* note 166, included at MCM, *supra* note 36, app. 3; *cf.* DoDI 5505.18, Investigation of Adult Sexual Assault in the Department of Defense (Jan. 31, 2019). Military investigators must notify the FBI of all significant corruption cases but are only required to notify the FBI of sexual assaults if an adult victim is unaffiliated with the military (MOU at ¶ 3.a.(1)) or "there is a reasonable basis to believe it has been committed by a person or persons some or all of whom are not subject to the UCMJ …." DoDI 5505.18 at ¶ 3.1.h (citing the MOU in DoDI 5525.07).

actually be implicated in misconduct and there should not be an opportunity to influence an investigation.

The most serious offenses articulated under the MOU mandate that DoD and military investigators will immediately refer to the Federal Bureau of Investigation (FBI) "all significant allegations of bribery and conflict of interest involving military or civilian personnel of the Department of Defense."[174] This category of offenses include alleged violations federal ethics laws such as 18 U.S.C. §§ 201, 203, 205, 208, 209, or 219.[175] Sections 201 and 203 are generally applicable federal criminal laws. Sections 205, 208, 209, 219 apply to federal employees. The DoJ frequently prosecutes service members who violate these criminal statutes notwithstanding UCMJ jurisdiction or military command preference.

The next category of offenses includes fraud, theft, and embezzlement.[176] DoD investigators do not have to refer such cases to the FBI. However, if the offenses may warrant federal prosecution, the DoD must "confer" with the DoJ Criminal Division or the local United States Attorney, and the local FBI field office, who will then consult with the DoD as to which department will have criminal investigative responsibility.[177] Beyond corruption offenses, the MOU contains notification requirements and guidance of which department should lead investigations.[178] Even for cases where there may not be federal general or enclave jurisdiction, the DoJ will provide to DoD military investigators and prosecutors "all technical services normally available to federal investigative agencies."[179] In addition, joint investigations that could potentially lead to prosecution in federal district court must proceed under DoJ guidelines.[180]

There are numerous corruption cases involving DoJ prosecution of a service member. On the less serious end of the spectrum are cases where a service member files a false financial disclosure statement, misuses official

---

[174] MOU, *supra* note 166, ¶ C.1.a.

[175] *Id.* at DoD Supplement Guidance to ¶ C.1.a.

[176] *Id.* at ¶ C.1.b.

[177] *Id.*

[178] MOU, *supra* note 166 ¶¶ C.2-C.3.

[179] *Id.* at ¶ F.5.

[180] *Id.* at ¶ F.6.

equipment, and improperly obtains goods or services for personal benefit.[181] More serious examples of military corruption cases include demanding bribes from military contractors,[182] money laundering,[183] extortion,[184] blatant fraud schemes,[185] stealing and selling military equipment on the black market while deployed,[186] false statements involving the shipment of currency while deployed,[187] and bulk cash smuggling from deployed locations.[188]

---

[181] Press Release, *Huntsville Army Officer Sentenced for False Statements and Theft of Government Property,* U.S. Dep't of Just. (Apr. 23, 2013), http://www.justice.gov/usao/aln/News/April%202013/April%2023,%202013%20Huntsville%20Army.html.

[182] Press Release, *Gunnery Sergeant Pleads Guilty to Soliciting Bribes,* U.S. Dep't of Just. (Jan. 29, 2013), http://www.justice.gov/usao/nce/press/2013/2013-jan-29_02.html.

[183] Press Release, *Army Officer Pleads Guilty to Conspiracy, Bribery and Money Laundering Scheme Involving Department of Defense Contracts at U.S. Army Base in Kuwait,* U.S. Dep't of Just. (June 24, 2008), http://www.justice.gov/opa/pr/2008/June/08-crm-566.html; Press Release, *Two Military Officials, Two Contractors and Contracting Company Indicted for Alleged Roles in Bribery and Money Laundering Scheme Related to DOD Contract in Afghanistan*, U.S. Dep't of Just., (June 9, 2010), http://www.justice.gov/opa/pr/2010/June/10-crm-677.html; Press Release, *U.S. Army Sergeant and Associate Indicted for Alleged Bribe Scheme Involving Contracts at Camp Arifjan in Kuwait*, U.S. Dep't of Just. (June 21, 2011), http://www.justice.gov/opa/pr/2011/June/11-crm-809.html.

[184] Press Release, *Current, Former U.S. Soldiers and Law Enforcement Officer Agree to Plead Guilty to Participating in Bribery and Extortion Conspiracy,* U.S. Dep't of Just. (May 12, 2005), http://www.justice.gov/opa/pr/2005/May/05_crm_257.htm; Press Release, *Four Current and Former U.S. Soldiers and One Civilian Other Agree to Plead Guilty to Participating in Bribery and Extortion Conspiracy*, U.S. Dep't of Just. (Nov. 17, 2005), http://www.justice.gov/opa/pr/2005/November/05_crm_618.html.

[185] Press Release, *Four Army National Guard Soldiers Plead Guilty in Connection with Bribery and Fraud Schemes to Defraud the U.S. Army National Guard Bureau,* U.S. Dep't of Just. (Sept. 4, 2013), http://www.justice.gov/opa/pr/2013/September/13-crm-988.html; Press Release, *Two Army National Guard Soldiers Plead Guilty to Schemes to Defraud U.S. Army National Guard Bureau*, U.S. Dep't of Just. (Oct. 22, 2013), http://www.justice.gov/opa/pr/2013/October/13-crm-1119.html; Press Release, *Two Army National Guard Soldiers Plead Guilty in Connection with Bribery and Fraud Schemes to Defraud the U.S. Army National Guard Bureau*, U.S. Dep't of Just. (Dec. 13, 2013), http://www.justice.gov/opa/pr/2013/December/13-crm-1316.html.

[186] Press Release, *Former U.S. Army Sergeant Pleads Guilty to Stealing Equipment in Iraq and Receiving Proceeds from Sale on Black Market,* U.S. Dep't of Just. (June 28, 2011), http://www.justice.gov/opa/pr/2011/June/11-crm-848.html; Press Release, *Warrant Officer Pleads Guilty to Theft of Government Property*, U.S. Dep't of Just. (June 4, 2013), http://www.justice.gov/usao/nce/press/2013/2013-jun-04_02.html.

[187] Press Release, *U.S. Army Major Pleads Guilty to Making False Statements Related to Shipment of Currency from Iraq to the United States,* U.S. Dep't of Just. (July 7, 2010), http://www.justice.gov/opa/pr/2010/July/10-crm-784.html.

[188] Press Release, *Army Reserve Staff Sergeant Pleads Guilty to Bulk Cash Smuggling and Theft of Government Property While Serving in Afghanistan*, U.S Dep't of Just.

The logic of prosecuting military corruption cases under the civilian criminal justice system as opposed to the UCMJ begins with the unflattering observation that senior military officials, including commanders who exercise judicial authority, are frequently involved in corruption.[189] Even after this widespread problem of ethical apathy is analyzed and highlighted, recent cases continue to emphasize that senior military officers are ensnared in corruption.[190] Senior officers typically hold positions with such vast authority that it is easier to engage in corruption compared to lower ranking service members with multiple supervisory levels and extensive oversight requirements. This explains why the agreement between the Departments of Defense and Justice mandate FBI involvement and even require DoJ control of serious corruption cases.[191]

Another reason military corruption is best handled in federal civilian court is that such cases typically involve the payment of restitution by the offender, sometimes to the tune of millions of dollars.[192] Military courts only recently received the authority to order restitution as part of military justice reforms extending crime victims' rights to the UCMJ.[193] There is no indication that courts-martial would be an appropriate forum to recoup defrauded funds back to the United States in military corruption cases. This begins a new era in military justice, requiring the military to define policies and procedures to enforce restitution. This is in essence a new requirement for the military justice system to establish practices that are norms in civilian criminal justice systems. For all of these reasons, civilian prosecution of

---

(July 15, 2015), https://www.justice.gov/opa/pr/army-reserve-staff-sergeant-pleads-guilty-bulk-cash-smuggling-and-theft-government-property.

[189] *See, e.g.,* Leonard Wong and Stephen J. Gerras, *Lying to Ourselves: Dishonesty in the Army Profession* (U.S. Army War C., Strategic Stud. Inst., Feb. 2015), https://ssi.armywarcollege.edu/lying-to-ourselves-dishonesty-in-the-army-profession/.

[190] Press Release, *U.S. Navy Admiral Plus Eight Officers Indicted as Part of Corrupt Team that Worked Together to Trade Navy Secrets for Sex Parties,* U.S. Dep't of Just. (Mar. 14, 2017), https://www.justice.gov/usao-sdca/pr/us-navy-admiral-plus-eight-officers-indicted-part-corrupt-team-worked-together-trade.

[191] *See supra* note 166, pt. III.C.2. (discussing the Memorandum of Understanding between DoD and DoJ for military corruption cases).

[192] *See, e.g.,* Press Release, *U.S. Army Major Pleads Guilty to Bribery Scheme Related to Department of Defense Contracts in Kuwait,* U.S. Dep't of Just. (Aug. 13, 2008), http://www.justice.gov/opa/pr/2008/August/08-at-721.html (highlighting $5.8 million restitution amount).

[193] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, tit. XVII, § 1701, 127 Stat. 672, (2013) (amending Article 6b, UCMJ, 10 U.S.C. § 806b, extending to victims the right to receive restitution as provided in law).

corruption cases is best. There are other offenses where civilian coordination or prosecution is useful, even when such action is not mandatory.

D. Military Cases Where Civilian Coordination is Prudent

This section highlights cases where military coordination with civilian authorities is not mandatory but may be prudent. It is important to note that such consideration is fact specific for each case. It is inadvisable to approach this topic categorically. The main point of this section is that military authorities must remain aware of public safety concerns, even though the military justice system is designed as a command tool for good order and discipline. The following discussion highlights the need for thoughtful consideration of public safety when processing impaired driving cases, preserving predicate offense convictions for enhanced penalties in drug and sexual misconduct cases, Article 134 Clause 3 cases, and cases where national firearms database compliance may be a concern. The discussion is designed to empower military authorities to improve the decision making process for handling these types of cases.

1. Impaired Driving Cases and the Need for Public Safety Assurance

Impaired driving presents a common public safety concern. Military departments maintain incongruent positions on handling such offenses when committed by service members. Service members accused of an impaired driving offense on a military installation can always be handled through civilian courts instead of under the UCMJ. There are reasons why military commands may conclude that forwarding cases to civilian authorities rather than taking UCMJ action may best advance public safety both on and off of an installation and also preserve military relations with civilian officials.[194]

Service members operating a vehicle under the influence of an intoxicant on an installation may be prosecuted for an offense such as driving under the influence (DUI) or driving while intoxicated (DWI). Such cases

---

[194] Military departments maintain policies for cases where a civilian authority has exercised jurisdiction over a service member, but not when cases should be forwarded to state civilian authorities for consideration of civilian prosecution. *See e.g.,* AR 27-10, *supra* note 133, at ch. 4 (Disciplinary Proceedings Subsequent to Exercise of Jurisdiction by Civilian Authorities); U.S. Dep't of Navy, JAG Instr. 5800.7F, Manual of the Judge Advocate General, § 0124 "Exercise of Court-Martial Jurisdiction in Cases Tried in Domestic or Foreign Criminal Courts" (June 26, 2012); AFI 51-201, *supra* note 161, at ¶ 4.18, "Jurisdiction Involving State or Foreign Prosecution Interest (R.C.M. 201(d))."

can either be processed under the UCMJ or in a civilian court.[195] This same concurrent authority extends to routine violations of state traffic code assimilated to apply in federal enclaves.[196] Military commands must adopt the traffic code of the state in which the installation is located, and follow DoD guidance for locations under proprietary jurisdiction.[197] However, there is disparity in how military departments process cases. The practice at some Army installations is to prosecute service members in federal district court for certain civilian offenses occurring on military installations rather than adjudicate the offense under the UCMJ.[198] Similar to the Army, the Navy and Marine Corps have a documented practice of prosecuting traffic code offenders in federal district court, regardless of military or civilian employment status.[199] The Air Force has an established practice of prosecuting only civilians in federal district court, though the disparity in treating military and civilian offenders differently has been found legally permissible.[200] The aspect of this disparity that should cause the Air Force concern is that DUI/DWI offenses adjudicated through non-judicial punishment prevent the possibility of a criminal conviction, recidivism, and other established public safety measures to decrease the risk of intoxicated driving.[201]

---

[195] *See, e.g.,* Major Aaron L. Lykling, *The Disposition of Intoxicated Driving Offenses Committed by Soldiers on Military Installations*, p.1, The Army Law., U.S. Dep't of the Army Pamphlet 27-50-476 (Jan. 2013), http://www.loc.gov/rr/frd/Military_Law/pdf/01-2013.pdf.

[196] *See, e.g.,* United States v. Walter, 484 F. Supp. 183 (D. Ga. 1980) (military charged by information in federal district court for violating Georgia statutory duty to take certain actions after vehicle accident).

[197] DoDD 5255.4, Enforcement of the State Traffic Laws on DoD Installations, ¶ 3 (Nov. 2, 1981) (inc. Change 2, Jun. 29, 2018), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/552504p.pdf; 32 C.F.R. § 634.25 (2020).

[198] *See, e.g.,* Mariea, 795 F.2d at 1096-9, Walker, 552 F.2d at 568, Debevoise, 799 F.2d at 1402-3; accompanying discussion of *Mareia, Walker*, and *Debevoise supra* notes 127-131; Lykling, *supra* note 196 (advocating the practice of prosecuting certain offenses before a United States Magistrate in federal district court versus under the UCMJ).

[199] United States v. Lee, 786 F.2d 951, 958 (9th Cir.1986).

[200] *Id.* (noting that "the Army, Navy, and Marine Corps prosecute all traffic offenders in district court does not invalidate the Air Force's policy of treating civilian and military offenders differently.").

[201] The basis of this statement is the author's experience and records obtained under Freedom of Information Act Request 2020-00228-F reflecting that the Air Force has a single-digit prosecution rate for intoxicated driving offenses over the past two decades and does not view aggravated cases involving a high level of intoxication differently from lower level cases. Additionally, it is the author's experience that commanders routinely dispose of serious Article 111 cases (those where a driver's BAC exceeded .18) as nonjudicial punishment.

There are six reasons why it may be beneficial to prosecute categories of cases,[202] such as DUI/DWI, under federal or state criminal law instead of the UCMJ. First, as a matter of practice, military commanders frequently adjudicate offenses outside of the judicial system under administrative non-judicial punishment instead of pursuing criminal conviction.[203] The practice of not prosecuting service members for this category of offenses is so prevalent that not even serious DUI/DWI cases may be considered for prosecution.[204] This is in stark contrast to established norms in the civilian public safety and criminal justice systems.[205] It is also noteworthy that the Secretary of Defense reminded commanders of the need to utilize the military justice system instead of administrative action,[206] supporting the point that commanders tend to avoid prosecuting cases. Second, even if the military prosecuted each case, the potential forum could be a summary court-martial, which does not constitute a criminal proceeding or criminal conviction.[207] This means that any such "conviction" by a summary court-martial is not legally a criminal conviction. A subsequent DUI/DWI conviction would not

---

[202] There are other relevant offenses that fit in this category, such as domestic violence offenses.

[203] *See supra* notes 199-202 and accompanying discussion.

[204] *Id.* The author's experience is that Air Force commanders generally do not support prosecution of serious drunken operation of a vehicle (DUI/DWI) cases under Article 111, UCMJ, citing various reasons such as the offense not being worthy of prosecution or a time-consuming court-martial having a detrimental impact on operations tempo. For example, a commander refused to consider court-martial for a 0.226 breath alcohol concentration, deciding to offer non-judicial punishment before even reviewing the casefile. E-mail on file with author (Oct. 6, 2017); U.S. Air Force Security Management Information System (SFMIS) Case Number I20171000001 (Oct. 2 2017). Also, in SFMIS Case Number I20180400086, a major general disposed of a case with non-judicial punishment where an officer operated a government vehicle with a 0.32 breath alcohol concentration. Air Force policy is that commanders should dispose of cases in the non-judicial punishment forum within 21 days of the incident. *See* AFI 51-202, Nonjudicial Punishment, ¶ 3.3.1 (May 14, 2020) (establishing a 21-day metric from offense discovery to serving non-judicial punishment).

[205] Although comprehensive data on state arrest to prosecution trends is not readily available, a sample study by the National Highway Traffic Safety Administration (NHTSA) found arrest to conviction rates from ten sampled jurisdictions ranged from 63% to over 95%. *See* Ralph K. Jones, et al., *Examination of DWI Conviction Rate Procedures,* NHTSA (Aug. 1999), https://one.nhtsa.gov/people/injury/research/dwiconviction/dwiconvictions.htm.

[206] Memorandum from Sec'y of Def. to Sec'ys of the Mil. Dep'ts, Chiefs of the Mil. Services, Commanders of the Combatant Commands, subject: Discipline and Lethality (Aug. 13, 2018).

[207] Middendorf v. Henry, 425 U.S. 25, 32-36 (1976).

trigger stiffer penalties under state or federal recidivism laws. Third, it may be more difficult for military installations to maintain the required equipment such as breathalyzer machines, calibration of the equipment, drawing blood tests, and trained personnel who can comfortably certify test results at a trial which may occur long after a military law enforcement member has deployed or changed stations.[208] Fourth, the UCMJ does not contain mandatory prevention measures that many states require for even first time DUI/DWI offenders, such as an interlock ignition device and sobriety checks that serve as a layer of protection to prevent future risk to society. Fifth, military culture historically glamorized alcohol consumption, creating the need for "alcohol deglamorization" policies.[209] There are fully stocked unit bars, base clubs, and routine discounted alcohol sales in base stores. Based in part on this culture, service members may be more prone to impaired driving on military installations but in practice are often subject only to administrative non-judicial punishment on Air Force installations and joint bases where the Air Force is the lead command. Also, due to military installations being closed to the general public, taxis and ride-hailing transportation is less frequently used. Sixth, the military and federal government do not issue driver licenses, triggering a more cumbersome process to request a state suspend or revoke an impaired driver's license. These reasons make the UCMJ process less than ideal for handling impaired driving cases. Some of these same public safety concerns are present in other types of cases, especially where offenses may involve repeated misconduct where enhanced sentencing is the norm for subsequent convictions.

2. Drug, Sexual Assault, and Cases with Recidivism Sentencing Enhancements

Many civilian criminal laws provide for harsher punishments if a person is a repeat or serial offender. Convictions under the UCMJ are not always qualifying convictions for recidivism sentencing enhancements. For example, a drug-related conviction under the UCMJ does not qualify as a predicate "serious drug offense."[210] This is because the sentencing enhancement statute uses a listing approach, listing statutes under which a conviction

---

[208] This problem is cited based on the author's experience at military installations.

[209] AFI 34-219, Alcoholic Beverage Program, ¶ 3.7 (Apr. 30, 2019); Dep't of Navy JAG/CNLSCINST 5350.5, ¶ 4.a, Standards and Policy for Responsible Use of Alcohol (June 11, 2012).

[210] 18 U.S.C. § 924(e)(2)(A)(ii) (2020); *see* United States v. Stuckey, 220 F.3d 976, 984-5 (8th Cir. 2000).

would be a predicate offense, as opposed to a categorical approach, which lists types of qualifying offenses regardless of the specific statute.[211] For listing-approach sentence enhancements, the specific statutory references of UCMJ offenses would need to be listed. Because UCMJ statutes are not included, convictions under the UCMJ do not qualify to enhance sentences for subsequent convictions based on serious drug offenses under federal criminal law. This is also true for sexual misconduct offenses under the UCMJ.

Both federal criminal law and the UCMJ prohibit sexual misconduct, although under different labels.[212] Federal criminal law penalizes rape and sexual assault under the term "Sexual Abuse."[213] The federal sexual abuse statutes are enclave laws, applying only "in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility [under federal contract]."[214] State law covers offenses not within a federal enclave. The UCMJ labels sexual abuse offenses as "Rape" and "Sexual Assault" in Article 120.[215] There have been focused and extensive efforts to reform military offenses involving sexual misconduct. Even after robust reforms, UCMJ offenses do not qualify as a predicate federal offense for subsequent conviction sentencing enhancement.

Disturbingly, courts-martial convictions are not qualifying convictions under federal sentencing guidelines for repeat and dangerous sex offenses against minors.[216] In one case, the United States Court of Appeals for the Third Circuit held that a former service member's court-martial rape conviction under the UCMJ "was not a qualifying 'sex offense conviction' for purposes of [federal sentencing guidelines]."[217] Military commands would benefit from considering the unavailability of enhanced sentencing when deciding to pursue UCMJ action against offenders who exhibit predatory tendencies. There is no indication that changes are on the horizon to include UCMJ offenses in federal sentencing enhancement. Congress may always change sentencing laws, but commands must proceed under the law as it exists. Even where statutory authority provides military commands discre-

---

[211] *Id.*

[212] *Cf.* 18 U.S.C. §§ 2241-2248, with 10 U.S.C. § 920 (2020).

[213] 18 U.S.C. §§ 2241-2248 (2020).

[214] *Id.*

[215] 10 U.S.C. § 920.

[216] 18 U.S.C. app. § 4B1.5; United State v. Eyster, 386 Fed. Appx. 180 (3d Cir. 2010), *cert. denied,* 562 U.S. 1051 (2010).

[217] *Id.*

tion in charging decisions, there are departmental constraints on withholding military commands from using such authority. Article 134 of the UCMJ provides such an example.

3. Article 134 Offenses Where UCMJ Authority is Administratively Restricted

The UCMJ includes a provision that allows military commands to charge a host of offenses not expressly included in the UCMJ itself. Article 134 contains three distinct charging options for offenses that do not violate an enumerated offense. The first two clauses of Article 134 allow for criminal liability where a service member commits an offense that discredits the armed forces or is prejudicial to good order and discipline. The third clause provides military commands statutory authority to prosecute service members for "crimes and offenses not capital, of which persons subject to this chapter may be guilty …."[218] The plain language of the statute simply means that military commands can prosecute a service member for offenses that do not violate the UCMJ but violate a noncapital federal or state criminal offense. However, military commands are limited in using Article 134 by a puzzling restriction in the Manual for Courts-Martial.

The Manual includes an explanatory note for Article 134.[219] Explanations in the Manual are created through Presidential Executive Order, making them binding on the armed forces.[220] The Article 134, Clause 3 explanation states that the authority may be used to charge federal crimes of general applicability but may not be used to charge a state offense unless the offense was committed within a federal enclave. As previously explained, federal enclave offenses are either enumerated in a federal statute or adopt a state law pursuant to the federal Assimilative Crimes Act.[221] It is reasonable enough to conclude that Article 134, Clause 3 would not include federal enclave law because such statutes have an element that the conduct occurred within the special maritime or territorial jurisdiction of the United States. Obviously, state law would never include such an element. It is also reasonable to conclude that a state law may only be charged pursuant to Article 134, Clause 3 if the offense actually occurred within the prescribing state's

[218] MCM, *supra* note 36, pt. IV, ¶ 91.a. (quoting 10 U.S.C. § 934).

[219] MCM, *supra* note 36, pt. IV, ¶ 91.c.

[220] *See id.,* at pt. I, Preamble (noting relevant executive orders in the discussion section).

[221] *See supra* pt. III.A.3 (discussing the Assimilative Crimes Act).

or foreign entity's geographical boundary. However, it is unreasonable to conclude that the federal Assimilative Crimes Act must be satisfied in order for military commands to charge the elements of a state or foreign law. The restriction on statutory authority exists only in Executive Order and unnecessarily constrains charging options under the UCMJ. This could lead to disjunctive charging, leaving issues of uncharged misconduct or parallel federal and state prosecutions for the same underlying incident, but with different charges.

While it is possible to charge nearly any act under Article 134, Clauses 1 or 2, that course of action assumes every case will have the sufficient evidence to prove the terminal element of the act being service discrediting or prejudicial to good order and discipline. Recent changes to the UCMJ reorganized many offenses falling under Article 134 as specific offenses under different articles so as to remove the terminal element.[222] However, the best and more reasonable course of action would be to include the minor associated offense as a charge violating Article 134, Clause 3, referencing the state offense at issue. The statute allows for such an approach but for the Manual's limiting explanation. There are other concerns military authorities should be mindful of when deciding whether to pursue court-martial or civilian prosecution of a case.

4. Cases Allowing Firearm Background Check Entries

Two points demonstrate why it is important for military authorities to work closely with civilian law enforcement entities to ensure firearms background check information is properly submitted to appropriate databases. First, civilian public safety laws do not always apply to military justice processes. Second, military authorities have consistently struggled to report information that would prevent restricted personnel from obtaining firearms, sometimes with tragic consequences.[223]

---

[222] Specific Article 134 changes are noted throughout the Military Justice Act of 2016 as approved in the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, tit. LX, 130 Stat. 2937-60 (2016).

[223] *See infra* text accompanying note 230 (discussing systemic failures in reporting firearm prohibitions and the Devin Kelley mass shooting).

On the first point, persons under indictment for a crime punishable by imprisonment for a term exceeding one year are restricted from receiving firearms or ammunition.[224] However, even if military law enforcement entered every service member pending general court-martial into the appropriate database, courts-martial do not involve indictment. The Fifth Amendment expressly exempts "cases arising in the land or naval forces" from the requirement of presentment and indictment by grand jury.[225] The Bureau of Alcohol, Tobacco, and Firearms completed a rulemaking technical amendment defining referral to a general court-martial as meeting the definition of "indictment."[226] This is an example of how the military justice system struggles to keep pace with criminal justice norms to ensure public safety. This leads to the second point that military authorities have consistently struggled to report information that would prevent restricted personnel from obtaining firearms.

The Gun Control Act restricts ten categories of individuals from possessing firearms.[227] Military authorities are required to enter certain investigative and case disposition information into criminal databases.[228] As mentioned in the first point above, one of those categories is for individuals pending felony indictment, which does not exist in the military justice system. For the other nine categories, military authorities struggled to maintain compliance with required filings to prevent disqualified individuals from

[224] 18 U.S.C. § 922(n) (2020).

[225] U.S. Const. amend. V. *See also* R.C.M. 201 (discussing the exemption and court-martial jurisdiction generally).

[226] 27 C.F.R. § 478.11 (defining indictment to include "in military cases to any offense punishable by imprisonment for a term exceeding 1 year which has been referred to a general court-martial").

[227] 18 U.S.C. § 922(g) & (n).

[228] DoDI 5505.07, Titling and Indexing in Criminal Investigations (Feb. 28, 2018), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/550507p.pdf.; DoDI 5505.11, Fingerprint Reporting Requirements (Oct. 31, 2019), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/550511p.pdf.

possessing firearms.[229] Focused efforts over the past few years have updated military practices to help ensure compliance with firearms prohibitions.[230]

Separate from military law enforcement requirements to report criminal history, there is a requirement for service members to certify their compliance with one of the ten Gun Control Act categories on DoD Form 2760, "Qualification to Possess Firearms or Ammunition."[231] This certification requires service members to confirm if they were convicted of a domestic violence crime. However, the certification does not contain any of the other nine categories. Importantly, these categories include having a felony conviction, controlled substance addiction, suffering from a mental defect or admittance to a mental institution, being subjected to a restraining order, or pending felony indictment.[232] By comparison, the U.S. Office of Personnel Management security clearance background check form requires disclosure of

---

[229] *See* U.S. Dep't of Def. Inspector General, DODIG-2018-035, Evaluation of Fingerprint Card and Final Disposition Report Submissions by Military Service Law Enforcement Organizations (2017), https://media.defense.gov/2017/Dec/05/2001852278/-1/-1/1/DODIG-2018-035.pdf; U.S. Dep't of Def. Inspector General, DODIG-2015-081, Evaluation of Department of Defense Compliance With Criminal History Data Reporting Requirements (2015), https://media.defense.gov/2015/Feb/12/2001713470/-1/-1/1/DODIG-2015-081.pdf; and U.S. Dep't of Def. Inspector General, Evaluation of Department of Defense Compliance With Criminal History Data Reporting Requirements (1997), https://media.defense.gov/1997/Feb/10/2001715391/-1/-1/1/crimhist.pdf (each evaluation noting reporting deficiencies). *See also* U.S. Dep't of Def. Inspector General, DODIG-2019-030, Report of Investigation into the United States Air Force's Failure to Submit Devin Kelley's Criminal History Information to the Federal Bureau of Investigation (2018), https://media.defense.gov/2018/Dec/07/2002070068/-1/-1/1/DODIG-2019-030.pdf (detailing chronic Air Force failures to file Devin Kelley's criminal history to prevent him from obtaining firearms, which he used to murder 26 people and wound 22 others in a mass shooting at a church in Sutherland Springs, Texas).

[230] *See e.g.*, U.S. Dep't of Air Force Form 177, Notice of Qualification for Prohibition of Firearms, Ammunition, and Explosive (July 30, 2020), https://static.e-publishing.af.mil/production/1/saf_ig/form/af177/af177.pdf (providing a comprehensive listing to guide Air Force authorities in implementing firearms prohibitions).

[231] U.S. Dep't of Def., DD Form 2760, Qualification to Possess Firearms or Ammunition (Dec. 2002), https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd2760.pdf (citing only 18 U.S.C. § 922(g)(9) and E.O. 9397). The ban on gun ownership by domestic violence offenders was imposed by the 1996 Lautenberg Amendment to the Gun Control Act, passed in the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208 § 658, 110 Stat. 3009, 371-72 (1996).

[232] 18 U.S.C. § 922(g)(1), (3), (4), and (8). Subsection (6) restricts service members who have been discharged under dishonorable conditions, a status inapplicable to active duty or reserve members.

concerns like illegal drug use and restraining orders, an improvement but still incomplete coverage of firearms restriction categories.[233] This demonstrates that military authorities can easily fail to identify and report individuals who should be prohibited from possessing firearms and meet public safety expectations. These systemic failures resulted in large municipalities seeking injunctive relief to require military authorities to accurately populate criminal history databases.[234] Facing a history of systemic failure and continuing scrutiny, military authorities have a unique opportunity to perfect criminal history reporting requirements and improve the DoD Form 2760 used to screen service members, civilians, and contractors for eligibility to possess firearms. Although military law enforcement lead the efforts to file accurate data, military commanders also have an obligation to understand the public safety necessity of maintaining accurate data and compliance with reporting requirements.

Military commands at all levels have the discretion to work more closely with civilian authorities to increase public safety by optimizing jurisdiction on military installations and adjudicating offenses in a manner that creates safer communities. There are best practices that military authorities can consider to determine useful improvements.

IV. Steps to Optimize Military Jurisdiction

There are advantages and disadvantages to local and enterprise approaches to optimizing jurisdiction. An enterprise approach will require extensive planning, coordination, approval, implementing guidance, and other well-intentioned, yet time-consuming aspects. Ideally, such a process would render a more sustainable framework that could endure for decades, simplifying processes at all locations. However, there is also the risk of remaining in a deficient status quo while an enterprise approach progresses, and the risk that no policy or uniform approach comes to fruition.

---

[233] U.S. Office of Personnel Mgmt., Standard Form 86, Questionnaire for National Security Positions (Dec. 2010), https://www.opm.gov/forms/pdf_fill/sf86-non508.pdf (relevant sections include Section 21 – Psychological and Emotional Health; Section 22 – Police Records; and Section 23 – Illegal Use of Drugs and Drug Activity).

[234] City of New York, et al. v. U.S. Dep't of Def., et al., Civil Action No. 1:17-cv-01464 (E.D. Va. Apr. 24, 2018), *aff'd by,* 913 F.3d 423 (4th Cir. 2019) (seeking DoD and military department compliance with the National Instant Criminal Background Check (NICS) reporting requirements).

Of note, the DoD is currently pursuing changes to installation jurisdiction in response to a Congressional mandate for improved military handling of juvenile offenses.[235] This approach causes many concerns. Of greatest concern is that the current effort seeks to establish uniform concurrent jurisdiction.[236] When two authorities have concurrent jurisdiction, this will inevitably result in extensive discussions on which authority should take the investigative and prosecutorial lead. There will be discrepancies in desired investigative steps, additional coordination required, and accounting for equities all authorities have in a case. The positive aspects of this effort include the highlighting of a deficient jurisdiction framework in need of improvements and the prospect of increased civilian authority involvement to enhance military installation public safety, especially involving children. Overall, current efforts focused on juvenile misconduct fail to appreciate and account for the broader jurisdiction deficiencies. Optimizing jurisdiction will help correct both the ongoing security vulnerabilities and juvenile misconduct concerns.

A local approach is a readily available option that military commands have statutory and DoD authority to implement.[237] Strengths of a local approach are that close working relationships between military and state and local officials already exist. Once an installation's jurisdiction is optimized, established relationships will easily facilitate effective state and local response to identified categories of juvenile, civilian, and military misconduct. Retrocession of exclusive federal legislative jurisdiction is required for some, but not all, military installations. This is where the focus on juvenile misconduct could help speed jurisdiction optimization for all concerns.

The risks with local implementation are that orders will not be uniform or consistently enforced. From a litigation perspective, local implementation and tinkering with versions of a defense property security order can render advantages. Concerns with various provisions and challenges to local practices will result in a stronger posture if lessons are shared and local implementation incorporates these lessons learned. From a practical perspective,

---

[235] U.S. Gov't Accountability Office Rep't to Congressional Requestors, *Child Welfare: Increased Guidance and Collaboration Needed to Improve DoD's Tracking and Response to Child Abuse,* 17-18 (February 2020), https://www.gao.gov/assets/710/706754.pdf (explaining DoD and Military Departmental retrocession of exclusive jurisdiction efforts).

[236] *Id.*

[237] *See supra* notes 38-51 and accompanying text.

some military commands desire to immediately implement a local order, moving one step closer to enhanced public safety. Here are tools that can speed implementation.

A. Local Military Command Approach

Military authorities can enhance the safety and security of installations by establishing or verifying key jurisdictional guideposts. Military commands can validate existing jurisdictional lines by reviewing installation real property records, certified maps from the U.S. Army Corps of Engineers files, and coordination with the local United States Attorney. Determine if the safety and security of the installation would benefit from maintaining a uniform jurisdiction throughout the installation, remembering that DoD policy favors proprietary jurisdiction. That being said, jurisdiction at a particular installation should be determined on the merits of each location.[238] Decide if the installation safety and security would benefit from a defense property security order in accordance with the Internal Security Act. For installations that have always maintained proprietary jurisdiction, enforcement of the order in federal district court will require coordination with the clerk's office to understand citation enrollment in the Central Violation Bureau (CVB). The local United States Attorney's Office may require a bond schedule corresponding to each provision in the defense property security order, and may also want to appoint a military prosecutor as a Special Assistant United States Attorney to handle cases originating at the installation.[239] This effort will strengthen relationships with federal, state, and local law enforcement that have jurisdiction within, or adjacent to, the installation. After local coordination with the United States Attorney is complete, military commands can sign a defense property security order and train military law enforcement on citing violations. Military policy and preferences will govern whether civilians and military are cited or handled differently. Depending on the local jurisdiction of federal property, military commands can initiate a request to relinquish all but proprietary jurisdiction. Local implementation could lead to great success and spur an enterprise approach.

---

[238] DoDI 4165.70, *supra* note 111.

[239] This has been the author's experience coordinating a defense property security order with a U.S. Attorney's Office.

B. DoD Enterprise Approach

An enterprise approach could range from a major undertaking to brief guidance. A major undertaking would involve identifying the jurisdictional status of all military and defense property. Then, the military departments would engage directly with states to relinquish all but proprietary jurisdiction on all military installations. The Secretary of Defense or other authorized DoD employee would implement a uniform defense property security order. Local installations and facilities would post notice of the order in appropriate locations. Guidance would also include when to issue citations and the CVB enrollment process. Another option is to not undertake a major initiative and simply issue a directive-type memorandum. The directive can express a preference for local military commands to issue a defense property security order and then evaluate if the jurisdictional status of property best serves the interests of safety and security. Many installations and facilities will likely have already identified concerns that the order, and possibly relinquishing exclusive or concurrent jurisdiction, would resolve. Military commands would then have the discretion to initiate such changes and know that higher headquarters would support the requests. The bottom line remains, without pursuing a local or enterprise approach to optimize jurisdiction, military response vulnerabilities continue and the risk of criminal justice dysfunction and disparity persist.

V. Conclusion

Military command authority remains a strong and efficient judicial process to maintain good order and discipline within the armed forces. Because that authority does not extend to many of the individuals who frequent military installations, it is important that military commands work toward optimizing jurisdiction. This is a geographically unique process, although there are many similarities across the DoD enterprise. Gaps in jurisdiction are the result of deficient processes, not a lack of jurisdiction in any area. Military law enforcement, prosecutors, and commanders should understand the various types of jurisdiction that can exist on their installations. Military commands should maximize the use of different tools available for consistent response and case processing throughout installations. Optimizing military installation jurisdiction is readily achievable to improve the safety and security of military installations both now and in the future.

[MILITARY INSTALLATION NAME]
Defense Property Security Order

Authority: Internal Security Act, 50 U.S.C. § 797; Department of Defense Instruction 5200.08.

1. PURPOSE
This part is punitive in nature and applies to all persons assigned to, attached to, or present on the installation of the above named installation. A violation of, attempted violation of, or solicitation or conspiracy to violate any provision of this part provides the basis for criminal prosecution under the Uniform Code of Military Justice, applicable Federal Law, other regulations, and/or adverse administrative action. Civilian visitors may be barred from the installation of and prosecuted under appropriate Federal laws. The enumeration of prohibited activities in this part is not intended to preclude prosecution under other provisions of law or regulation.

2. SCOPE
This part does not list all activities or practices prohibited on the above named installation. Various other Department of Defense and military regulations specifically prohibit other activities or practices not referenced herein.

3. APPLICABILITY
This order applies to all real property and equipment under the charge and control of the [Host Installation Command], to all tenant agencies, and to all persons entering in or on such property. This order shall be posted at conspicuous places on such property.

4. INSPECTIONS
(a) Purses, briefcases, and other containers brought into, while on, or being removed from the property are subject to inspection. A person arrested for violation of this order may be searched incident to that arrest.

(b) Vehicles and their contents brought into, while on, or being removed from installation property are subject to inspection and search. A prominently displayed sign at installation entry points shall advise in advance that vehicles and their contents are subject to inspection and search when entering the installation, while in the confines of the area, or when leaving the area. Persons entering these areas who object and refuse to consent to

the inspection of the vehicle, its contents, or both, may be denied entry and barred from installation property. Entering the property without objection implies consent. A full search of a person and any vehicle driven or occupied by the person may accompany an arrest.

5. SUPPLEMENTAL VEHICULAR AND PEDESTRIAN TRAFFIC REQUIREMENTS

(a) Conformity with signs and directions. All persons in and on property shall comply with official signs of a prohibitory or directory nature, and with the directions of military law enforcement personnel or other authorized individuals.

(b) Drivers of all vehicles in or on installation property shall be in possession of a current and valid state or territory issued driver's license and vehicle registration, and the vehicle shall display all current and valid tags and licenses required by the jurisdiction in which it is registered. Drivers must ensure all passengers are visible to installation security personnel.

(c) Drivers of all vehicles in or on installation property shall comply with the signals and directions of military law enforcement personnel or other authorized individuals, and all posted traffic signs. Operation of a motor vehicle on installation property while impaired by alcohol, drug, or intoxicant, is prohibited.

(d) The blocking of entrances, driveways, walks, loading platforms, or fire hydrants in or on installation property is prohibited.

6. UNSAFE ACTIVITIES

(a) Disturbances. Disorderly conduct which impedes ingress to or egress from installation property, buildings, or otherwise obstructs the usual use of entrances, foyers, corridors, offices, elevators, stairways, and parking lots, is prohibited.

(b) Loitering in any public place on installation property, to include all parking lots, is prohibited. Loitering is defined as remaining idle in essentially one location, spending time idly, loafing, or walking around without a purpose in such a manner as to create a disturbance or annoyance to the comfort of any person, create a danger of a breach of the peace, obstruct or interfere with any person lawfully, or obstruct or hinder the free passage of vehicles or pedestrians. Any person loitering as defined above in any public place may be ordered by a law enforcement officer to leave that place or installation property.

(c) Smoking (defined as having a lighted cigar, cigarette, pipe, or other smoking material including electronic substitutes which emit an odor or vapor) is prohibited in all installation buildings and office space, including public lobbies, and within fifty (50) feet of building entry and exit points.

(d) All photographs of installation property, buildings, aircraft, government vehicles and in areas where posted must be coordinated with and approved by the appropriate public affairs office.

(e) Dangerous Dogs and other animals. Dogs and other animals that pose a danger to persons or property are prohibited. Dogs shall be leashed when outside fenced areas. Nothing in this order prohibits use of dogs or other animals used to assist persons with disabilities or military working dogs.

(f) Aircraft, Model Aircraft, Unmanned Aircraft, and other flying machines. Operation of all such systems without prior coordination and approval of the installation commander or designee, is prohibited. This prohibition applies to operating such systems in, on, or in the vicinity of installation property. Military law enforcement personnel or other authorized individuals maintain the authority to respond and issue violation citations to individuals outside of the installation fence line where such devices are operated in proximity of installation property or equipment. Enforcement of this order outside of the installation fence line requires notice of this order in conspicuous locations where a system operator should reasonably be on notice of the restriction.

[Optional: (g) Duty to Notify First Responders of Potentially Incapacitated Person. Persons on installation property shall report any person, who is not an immediate family member, that is incapacitated or in a condition lacking control of personal faculties. Such notification or report shall be made to military law enforcement, security personnel, or emergency response personnel who are then on-duty.]

[Optional for Operational Security: (h) Recording of conversations. No person may electronically or mechanically record meetings or conversations conducted in the course of official business without the consent of the senior official present.]

7. WEAPONS AND EXPLOSIVES

Notwithstanding the provisions of any other law, rule or regulation, persons who reside on installation property, including privatized housing, either permanently or temporarily, shall comply with firearms and weapons registra-

tion, transport, storage requirements maintained by installation military law enforcement. All persons on installation property, whether residents or not, are prohibited from carrying a firearm, other dangerous or deadly weapon, or explosives, either openly or concealed, or storing the same on installation property, in a vehicle, workplace, or other location, except for official purposes. Unauthorized possession or shooting of fireworks is prohibited on installation property.

8. PENALTIES

(a) To all persons subject to the Uniform Code of Military Justice (UCMJ), this order constitutes a lawful general order and is punitive in nature, violation of which may be punishable under Article 92, UCMJ.

(b) Persons who violate this order are subject to prosecution under the Internal Security Act of 1950 (50 U.S.C. § 797), violations of which may result in a maximum penalty of imprisonment for one year, or a fine of $5,000 or both.

(c) Additionally, persons who violate this subpart may also be subject to prosecution under 18 U.S.C. § 1382, which prohibits entry upon any military installation for any purpose prohibited by law or lawful regulation, violations of which may result in a maximum penalty of six month imprisonment, a $500 fine, or both.

9. ENFORCEMENT

(a) Military law enforcement and security personnel assigned to the installation shall be responsible for enforcing this order in a manner that will protect installation property, persons thereon, and military equipment. Members of a Military Criminal Investigative Office (MCIO), Security Forces, Military Police, Civilian Uniformed employees of a Military Department, and other authorized personnel may likewise enforce this order.

(b) Enforcement of this order is independent of and without regard to the status of Foreign, Tribal, State, or Local legislative jurisdiction over installation property. Nothing contained in this order shall be construed to abrogate any such laws or regulations applicable to any area in which the property is situated.

ORTIZ V. UNITED STATES: THE SAVIOR OR DEATH SENTENCE OF THE MILITARY JUSTICE SYSTEM?

Major Lauren A. Shure and Colonel (Ret.) Jeremy S. Weber***

* Major Lauren A. Shure, Judge Advocate, United States Air Force (J.D., Duquesne University School of Law; B.A. The Ohio State University) is currently assigned to the Special Victims' Counsel Division as the Deputy Division Chief. She is a member of the Georgia bar. Major Shure represented Ortiz from his initial appeal to the Air Force Court of Criminal Appeals until the United States Supreme Court issued its final decision in the case; she argued the issues presented at the Court of Appeals for the Armed Forces.

** Colonel (Retired) Jeremy S. Weber (M.A. and M. Strategic Studies, Air University; J.D., Case Western Reserve University; B.S. in Journalism, Bowling Green State University) retired after more than 23 years of active duty service as a Judge Advocate, United States Air Force. He currently works as an Assistant Attorney General for the State of Alabama, where he represents the State in constitutional law matters. He is a member of the Ohio and Alabama bars. Colonel Weber was an appellate military judge on both the Air Force Court of Criminal Appeals and the U.S. Court of Military Commission Review, and was a colleague of Judge Martin Mitchell, whose simultaneous service on both courts was at issue in the case discussed in this article.

I. Introduction

The U.S. military justice system has always been somewhat of a curiosity, an odd cousin to American criminal justice that is not quite fully like civilian criminal courts but not entirely unlike them either. Its status as a unique hybrid of military discipline and civilian-like justice has never been fully resolved. As one recent exploration of the nature of military justice explained, "there has always been, and will always be, a debate over the exact purpose and function of the military justice system."[1]

Ortiz v. United States[2] was not supposed to be the case that further fueled the debate over what exactly military justice is. It involved an obscure issue about an ancillary component of the military justice system involving the composition of an appellate panel that adjudicated the appeal of a routine court-martial conviction. The granted issue dealt with the following unremarkable question: whether a military judge's participation in the case at the Air Force appeals court while simultaneously serving on the Court of Military Commission Review violated a statute that generally prohibits active duty military officers from simultaneously serving in certain civil offices.[3] The Court ultimately had no trouble disposing of that issue, and the case normally would have been a footnote in the story of military justice.

However, a University of Virginia law professor's efforts made *Ortiz* much more meaningful. In forcing the Supreme Court to examine its jurisdiction over matters arising from the military justice system, the professor drove a decision that — despite a Court that seemed approving of military justice — just may have sounded the death knell for the military justice system as we know it. *Ortiz* ultimately raises two fundamental issues that may dramatically alter what the military justice system becomes. First, in finding that the military justice system is inherently judicial rather than disciplinary in nature, does a valid justification for an independent military justice system remain? In other words, if, as the *Ortiz* majority held, court-martial proceedings have become virtually indistinguishable from any other federal courts, does this support the position of some political leaders and groups who have advocated removing commanders from the court-martial process? Second, and conversely, if the *Ortiz* dissent is correct that the Court has no

---

[1] David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 Mil. L. Rev. 1, 5 (2013) [hereinafter Schlueter, *Justice or Discipline?*].

[2] 585 U.S. ___; 138 S.Ct. 2165 (2018).

[3] *Ortiz*, 138 S. Ct. at 2181-82.

jurisdiction over appeals because military courts are not Article III courts, what does this say about the inherent fairness of the military justice system? If military courts-martial are not "courts" at all, then does military justice satisfy modern notions of fairness?

Ultimately, *Ortiz* forces policymakers to reconsider the underlying question of exactly what the military justice system is. This article explores the ramifications of the *Ortiz* decision. As the system has evolved from a mere instrument of command authority to something more resembling a civilian criminal justice system, the question of whether the military justice system is executive or judicial presents itself. Both the *Ortiz* majority and dissenting opinions paint those two as mutually exclusive and incapable of existing within one body. Is that right, or is it perhaps true that the military justice system can maintain its unique hybrid status, unlike anything else in the American system of jurisprudence?

This article begins with a brief review of the military justice system and the evolving views about what exactly military justice is and how it fits within our constitutional framework, with an emphasis on the role of the commander. It then explores the path of *Ortiz* to the Supreme Court and details the split opinions over the issue of the Court's jurisdiction to hear matters arising from the military justice system. Finally, the article examines possible answers to the important questions that *Ortiz* raises about the military justice system. It concludes that neither the majority nor the dissenting opinions adequately address the question of what exactly military justice is, and thus what manner of reforms of the system should be made. Undeniably, the military justice system we know today is not the same as even the military justice system of ten years ago. *Ortiz* has set the stage — along with the other recent changes in the law — for the future of military justice to fundamentally shift. Military justice is first and foremost a system founded on discipline. Without discipline, the basic fabric of our military degrades. Political forces have always influenced the shape of the military, and that influence simply creates a necessary fluidity. While the military justice system will likely always need an aspect of discipline, the *Ortiz* majority opinion calls into question what role discipline will play in military justice going forward.

II. What is Military Justice and How is it Different?

A. Military Justice's Purpose and the Role of the Commander

Any student of military justice understands that military justice is not the same as the civilian criminal justice system. Military justice may resemble civilian criminal justice to a casual observer: court-martial proceedings take place in a familiar-looking courtroom with a military judge, attorneys representing both the government and the accused service member, rules of evidence, and a group of panel members that functions much like a jury.[4] However, appearances can be deceiving.

The military justice system has a distinct purpose, set forth in the *Manual for Courts-Martial*'s preamble. That purpose is "to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[5] Thus, apart from the intent to "promote justice," military justice has unique purposes, and thus a different system. Most notably different, the commander plays a central role in the military justice system while leading his or her organization in readying for combat.[6]

---

[4] *See* Chris Bray, Court-Martial: How Military Justice Has Shaped America from the Revolution to 9/11 and Beyond xiii (2016) ("If you attended a court-martial today, it would look a lot like a trial in your local courthouse: There's a judge, the two sides look like the prosecutor and the defendant with his defense lawyer, and the members of the court look like a jury.")

[5] Manual for Courts-Martial, United States (2019 ed.) [hereinafter MCM], pt. I, ¶ 3.

[6] Victor Hansen describes the role of a commander as follows:

> The commander holds a unique position in a military organization. Primarily through his use of positive leadership and example, the commander sets the tone for the unit. He ensures that the soldiers under his command are well trained and prepared to conduct military operations and achieve the unit's objectives. The commander is the focal point of military discipline and order within the unit. He is responsible for maintaining command and control over his subordinate forces. The commander stands on the line that separates a disciplined military unit from a lawless mob.

Victor Hansen, *The Impact of Military Justice Reforms on the Law of Armed Conflict: How to Avoid Unintended Consequences*, 21 Mich. St. Int'l L. Rev. 229, 251 (2013).

The commander's role in military justice is rooted in history. As the Army Court of Criminal Appeals recognized in modern times, "Up until World War I, commanders and the public felt that the disciplining of troops was primarily commanders' business, because a commander who could be trusted to take his troops into combat could also be trusted to treat them fairly in courts-martial."[7] Thus, well into the last century, "U.S. military commanders enjoyed a position of almost absolute power within the military justice system."[8] That ultimately changed following World War II, as concerns about the commander's role in military justice drove Congress to enact reforms that resulted in the Uniform Code of Military Justice (UCMJ). Today, the UCMJ remains largely intact from its original version with more additions rather than removals, while systematic operations have dramatically changed over time.[9] These reforms sought to maintain a role for the commander in the system to maintain good order and discipline, but also to increase the role of lawyers to protect due process and ensure justice, supplying a check and balance in the military justice process.[10]

Thus, even after the World War II-era reforms, military justice is not equivalent to civilian criminal justice. "Justice" is but one goal of military justice. Commanders retain a central role in the military justice system to this day.[11] The commander's role is "[d]istinctive to military justice" with

---

[7] United States v. Bauerbach, 55 M.J. 501, 502 (A. Ct. Crim. App. 2001).

[8] Victor Hansen, *Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from this Revolution?*, 16 Tul. J. Int'l & Comp. L. 419, 426 (2008).

[9] For discussion of the reports of abuses in the court-martial system that led Congress to act, *see, e.g.*, Robinson O. Everett, Military Justice in the Armed Forces of the United States 9-10 (1956); Robert Sherrill, Military Justice is to Justice as Military Music is to Music 75-78 (1970); Bray, *supra* note 4, at 263-93; John W. Brooker, *Improving Uniform Code of Military Justice Reform*, 222 Mil. L. Rev. 1, 10-11 (2014).

[10] *See* Graci Bozarth, *Strange Bedfellows: The Military, The University, and Sexual Assault*, 84 UMKC L. Rev. 1003, 1011 (2016) (detailing post-World War II reforms such as the right to counsel and concluding that for reformers, "[a] chief concern regarded the influence of the commander on the military justice process, which translated into due process concerns for prosecuted service members"); Lieutenant Colonel Jeremy S. Weber, *Sentence Appropriateness Relief in the Courts of Criminal Appeals*, 66 A.F. L. Rev. 79, 88 (2010) (discussing reforms of court-martial appellate review and concluding that "Congress's primary concern in establishing a better system for appellate review was to mitigate the virtually unfettered control commanders enjoyed over the court-martial process.")

[11] *See generally* Major Anthony J. Ghiotto, Back to the Future with the Uniform Code of Military Justice: The Need to Recalibrate the Relationship Between the Military

"no correlate in civilian criminal justice."[12] Commanders take a number of quasi-judicial actions in courts-martial; the commander "prefers" charges against the accused and creates the court-martial by "referring" the case to trial.[13] Once the court-martial process is underway, commanders make many of the major decisions involving the case, including whether to accept an offer for a plea agreement; whether to grant immunity to potential military witnesses; and whether to approve agreements to employ expert witnesses.[14] In the post-trial stage, the commander who refers the case receives submissions from the convicted service member and defense counsel, and may grant relief either relating to the findings or sentence under certain situations.[15]

Thus, the military justice system "upholds[s] the central role of the commanding officer as convening authority with the consolidation of executive and judicial functions."[16] This role remains controversial, however. For example, a 2001 report on the 50th anniversary of the UCMJ observed:

Justice System, Due Process, and Good Order and Discipline, 90 N.D. L. Rev. 485 (2014) (emphasizing the role commanders should play in the military justice system, and asserting that the system needs to focus more on discipline).

[12] Eugene R. Fidell et. al., Military Justice Cases and Materials 79 (2007).

[13] *See* MCM, *supra* note 5, pt. II, Rule for Courts-Martial (R.C.M.) 307(a) (2019) (describing who may prefer charges); Uniform Military Code of Justice (UCMJ) arts. 22-24 (codified at 10 U.S.C. §§ 822-824 (2019)) (describing who may convene courts-martial).

[14] MCM, *supra* note 5, pt. II, R.C.M. 703(d) (expert witnesses), 704(c) (immunity), and 705 (plea agreement) (2019).

[15] UCMJ art. 60(c) (codified at 10 U.S.C. § 860(c) (2019)); MCM, *supra* note 5, pt. II, R.C.M. 1107 (2019). This authority to grant clemency used to be almost unlimited and represented the accused's "best hope for sentence relief." United States v. Davis, 58 M.J. 100, 102 (C.A.A.F. 2003). However, in 2003, amendments to UCMJ Article 60(c) limited the authority of the convening authority to grant clemency in terms of findings or sentence, and generally only minor findings or sentence relief can be provided. National Defense Authorization Act (NDAA) for Fiscal Year 2014, Pub. L. No. 113-66, § 1702, 127 Stat. 672 (2013). Additionally, while formerly the convening authority had the discretion to grant relief without any explanation or stated reason, recent amendments to the R.C.M. now require the convening authority to provide a written explanation if he or she sets aside any finding of guilty, otherwise modifies the findings, or grants sentence relief. MCM, *supra* note 5, pt. II, R.C.M. 1110(e)(2)-(3) (2019).

[16] Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 Geo. Wash. L. Rev. 649, 666 (2002).

> [T]he far-reaching role of commanding officers in the court-martial process remains the greatest barrier to operating a fair system of criminal justice within the armed forces. Fifty years into the legal regime implemented by the UCMJ, commanding officers still loom over courts-martial, able to intervene and affect the outcomes of trials in a variety of ways. The Commission recognizes that in order to maintain a disciplinary system as well as a justice system commanders must have a significant role in the prosecution of crime at courts-martial. But this role must not be permitted to undermine the standard of due process to which servicemembers are entitled.[17]

The commander's role in the military justice system and the accompanying unique purposes of military justice is still heavily debated. In the 69 years since the UCMJ's enactment, the system has undergone extensive reform, largely aimed at striking the right balance between preserving a role for the commander while providing sufficient due process protections for service members.[18] However, in the early 2000s the pace of reform quickened to an almost untenable rate.[19] "[O]ver the past 10 years, the committee [on armed services] has spearheaded the enactment of hundreds of legislative changes that have affected every aspect of the Military Sexual Assault Prevention and Response Program."[20] Consequently, legislative

---

[17] Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice 6-7 (May 2001), 6-7, http://www.loc.gov/rr/frd/Military_Law/pdf/Cox-Commission-Report-2001.pdf [hereinafter Report on 50th Anniversary of the UCMJ].

[18] *See* Brooker, *supra* note 9, at 10-11 (recounting the distrust of granting commanders too much power that led to the enactment of the UCMJ, and concluding that those same concerns drive debates about military justice reform today); Ghiotto, *supra* note 11, at 495 ("After each major conflict, veterans, who often saw the abuses of unbridled command discretion firsthand, returned with calls for reform. It is from these calls for reform that due process entered into the military justice system.")

[19] UCMJ art. 120 (codified at 10 U.S.C. § 920 and amended in 1992) (removed the marital limitation on rape); 1996 (additional modifications to Article 120); 2006 (substantially revised the entirety of the text of Article 120); 2009 (amending and addressing post-trial and appellate delays); 2011 (substantial revisions to Article 120); 2013-2015 (over 60 legislative provisions dealing with military justice were enacted, many dealing with the content of Article 120); 2016 (changes to Article 120 found in the Military Justice Act of 2016); and 2017 (word substitution in Article 120).

[20] *Combating Military Sexual Assault Act: Hearing on S. 1495 to Receive Testimony on the Military Services' Prevention of and Response to Sexual Assault, Before the Subcomm. on Personnel, Comm. on Armed Services*, 116th Cong. 2-3 (2019), https://www.armed-services.senate.gov/imo/media/doc/19-21_03-06-19.pdf

changes coming at such a rapid-fire pace limits the system's ability to foresee the collateral consequences of such legislation. Further, between December 2013 and December 2016 there were five executive orders amending the Manual for Courts-Martial in far-reaching ways.[21]

The Military Justice Act of 2016, the majority of which went into effect on January 1, 2019, "is the most significant overhaul of the military justice system since 1983."[22] "Taken together, the provisions contained in the conference report constitute the most significant reforms to the Uniform Code of Military Justice since it was enacted six decades ago."[23] The "legislation attempts to improve the effectiveness and efficiency of the military justice system without diminishing due process or good order and discipline throughout the military."[24] The changes include structural updates to make the system more like its counterparts in federal court.[25] In broad scope, these changes include: (1) increasing the military judge's authority pre-trial;[26] (2) implementing a more robust military magistrate program

---

[hereinafter Hearing on S. 1495] (opening remarks from Sen. Thom Tillis (N.C.), Chairman, Subcomm. on Personnel).

[21] Exec. Order No. 13643, 78 Fed. Reg. 29,559 (May 15, 2013); Exec. Order No. 13669, 79 Fed. Reg. 34,999 (June 13, 2014); Exec. Order No. 13696, 80 Fed. Reg 35,781 (2015); Exec. Order No. 13730, 81 Fed. Reg. 33,331 (2016); Exec. Order No. 13740, 81 Fed. Reg. 65,175 (2016).

[22] Hearing on S. 1495, *supra* note 20 (statement of Lieutenant General Jeffrey A. Rockwell, The Judge Advocate, United States Air Force, p.3) (General Rockwell's statement is available at https://www.armed-services.senate.gov/imo/media/doc/Rockwell_03-06-19.pdf.)

[23] Sen. John S. McCain (Ariz.), Remarks accompanying S. Rep. No. 114-255, to accompany S. 2943, NDAA for Fiscal Year 2017 (Nov. 30, 2016) (statement is no longer accessible online).

[24] Shane Reeves and Mark Visger, *The Military Justice Act of 2016: Here Come the Changes*, Lawfare Inst. (Aug. 29, 2017), https://www.lawfareblog.com/military-justice-act-2016-here-come-changes.

[25] Meghann Myers, *Here's what you need to know about the biggest update to the UCMJ in decades,* Military Times (Jan. 15, 2019) https://www.militarytimes.com/news/your-army/2019/01/15/heres-what-you-need-to-know-about-the-biggest-update-to-ucmj-in-decades/ ("The Military Justice Act of 2016 called on the services' judge advocate general corps to take a big-picture look at criminal justice in the military, updating some rules and definitions, while changing up some proceedings to streamline processes or to get them in line with civilian federal courts.")

[26] *See* UCMJ art. 30a (codified at 10 U.S.C. § 830a) (authorizing military judges to issue rulings on issues that may arise prior to referral in a court-martial); UCMJ art. 46 (codified at 10 U.S.C. § 846) (expanding the pre-trial investigation procedures through increased use of subpoenas and other investigative tools).

giving them authority akin to that of federal magistrates;[27] (3) the creation of a judge-alone special court-martial forum;[28] (4) new panel sizes for each of the different courts-martial, and changes to panel composition;[29] and (5) changes to the sentencing process, including segmented procedures similar to federal courts.[30] The Act also implements major changes to the post-trial phase, arguably one of the areas of practice that is most filled with error.[31] It continues with recent efforts to limit convening authorities' power to amend the findings or sentences. It also attempts to streamline the post-trial process[32] by scaling down on automatic rights of appeal and implements set tours for military judges.[33] However, while these are significant changes, the commander still plays a fundamental role in the military justice system.

---

[27] *See* UCMJ arts. 19, 26a, and 30a (codified at 10 U.S.C. § 819, § 826a, and § 830a) (altering the usage of military magistrate to mirror the federal magistrate system).

[28] *See* UCMJ art. 16 (codified at 10 U.S.C. § 816) (establishing a new option for disposition of certain minor offenses in a judge-alone special court-martial with sentence limitations).

[29] *See* UCMJ arts. 16 and 25a (codified at 10 U.S.C. § 816 and § 825a) (establishing set numbers for panels in each type of courts-martial); UCMJ arts. 51 and 52 (codified at 10 U.S.C. § 851 and § 852) (establishing voting rules and procedures, and also setting required concurrence for each type of panel members); UCMJ art. 25 (codified at 10 U.S.C. § 825) (increasing the opportunities for enlisted members to serve on courts-martial panels).

[30] *See* UCMJ arts. 25, 53, and 56 (codified at 10 U.S.C. §§ 825, 853, and 856).

[31] *See* United States v. Parker, 73 M.J. 914, 921-22 (A.F. Ct. Crim. App. 2014) (quoting United States v. Lavoie, ACM S31453 (recon), 2009 CCA LEXIS 16, at *11 (A.F. Ct. Crim. App. 21 January 2009)) ("The Government's neglectful post-trial processing in a significant case involving confinement for life created an issue where none should have existed …: '… the integrity of our military justice system demands careful attention in each and every case …. Slip-shod treatment of the court-martial process, whether at the pre-trial, trial, or post-trial stage, cannot help but undermine faith in the system itself, making it less effective overall as a tool for maintaining military discipline.'").

[32] Military Justice Review Group, Department of Defense, Report of the Military Justice Review Group Part I: UCMJ Recommendations [hereinafter MJRG Report] 7, 34 (2015); NDAA for Fiscal Year 2014, Pub. L. No. 113–66, § 1702, 127 Stat. 672, amending UCMJ art. 60 (codified at 10 U.S.C. § 860) (to remove certain authorities of the convening authority post-trial); UCMJ arts. 60a-60b (codified at 10 U.S.C. §§ 860a-860b) (to eliminate redundant post-trial paperwork); Art. 60c (codified at 10 U.S.C. § 860c) (to mirror the federal civilian practice by requiring an entry of judgment by the military judge); UCMJ art. 60a (codified at 10 U.S.C. § 860a) (to give the convening authority the ability to suspend a sentence in accordance with a military judge's recommendation); UCMJ art. 54 (codified at 10 U.S.C. § 854) (to simplify the processing of creating and finalizing records of trial).

[33] *See* UCMJ art. 66 (codified at 10 U.S.C. § 86) (limiting the Courts of Criminal

B. Other Key Differences Between the Military Justice System and Civilian Criminal Justice

"The Article III courts, … do not handle all the judicial business of the United States."[34] Throughout history Congress has used its authority to create "specialized tribunals, including courts-martial that are free from the tenure and salary protections of Article III."[35] The courts-martial is an "example of a court system in which the protections, procedures, and inherent inefficiencies of the Article III courts would interfere with the military's ability to use the system effectively to help maintain good order and discipline."[36] Military courts, and the vast legal system surrounding them, operate guided by the demands of military service. The military and civilian justice systems are similar in many ways, but there are key distinctions between them, which include the role of the military commander, the distinctly different substantive criminal code with unique offenses unknown to the civilian justice system, the lack of a jury (and the unanimity associated with a jury's verdict), the role of military judges, and the constitutional compromises and statutory protections that are necessary to ensure the military system meets its dual purposes of justice and discipline.

Understanding these key differences, the history behind them, and why they remain, informs what the military justice system is and why it exists in its current form. Further, it may help to inform what the system should look like in the future. The *Ortiz* decision is but one indication that the military justice system is bound to change. Further reforms loom on the horizon. Yet

---

Appeals automatic review in non-capital cases to only those where the sentence includes a punitive separation or confinement for more than two years and allowing permissive filings in all cases where the sentence includes confinement of more than six months); UCMJ art. 62 (codified at 10 U.S.C. § 862) (expanding the government's ability to file interlocutory appeals); UCMJ art. 45 (codified at 10 U.S.C. § 845) (establishing a standard of review for guilty plea cases similar to that applied in federal civilian courts); UCMJ arts. 26 and 66 (codified at 10 U.S.C. §§ 826 and 866) (setting minimum tour lengths and selection criteria for military trial and appellate judges); UCMJ arts. 60b and 60c (codified at 10 U.S.C. §§ 860b and 860c) (delineating the commander's authority with regard to post-trial actions on sentences).

[34] Major Christopher W. Behan, *Don'T [sic] Tug on Superman's Cape: in Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 Mil. L. Rev. 190, 229 (2003).

[35] *Id.* (internal citations omitted).

[36] *Id.* at 231.

understanding the origins and rational for the current system will allow for informed decisions about the future.

1. Substantive Criminal Law

Because one of the two purposes of military law is discipline, offenses listed in the UCMJ are considered military offenses even when similar civilian offenses exist. "This is because crimes committed by military members, irrespective of substantially similar civilian counterparts, have the potential to seriously damage unit cohesion by destroying the bonds of trust critical to successful mission accomplishment."[37] General William T. Sherman, a lawyer and military leader, said of the differences:

> The object of the civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation. These objects are as wide apart as the poles, and each requires its own separate system of laws, statute and common.[38]

Today, the UCMJ includes a vast array of offenses, from those typically associated as civilian felony-level offenses, such as rape, murder, assault, and robbery, to uniquely military offenses, such as aiding the enemy, insubordinate conduct, mutiny and sedition, failure to obey orders and regulations, and cruelty and maltreatment, to crimes that lie somewhere in between, espionage, misconduct as a prisoner, drunken operation of a vessel or vehicle, and provoking speech or gestures.

Articles 133 and 134 are the most uniquely military, and historically can be traced back to long before the Constitution; however, they are also the subject of most criticism. These "general articles" punish "all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and

---

[37] MJRG Report, *supra* note 32, at 17.

[38] William T. Sherman, Military Laws (1879), reprinted in *Uniform Code of Military Justice: Hearing on H.R. 2498 Before Subcomm. No. 1 of the House Comm. on Armed Servs.,* 81st Cong. 780 (1st Sess. 1949).

offenses not capital[.]"[39] Although the Articles of War, which formed the basis of our current system, did not specifically mention the general article those origins have been "interpreted to embrace only crimes the commission of which had some direct impact on military discipline."[40]

The uniqueness of military society necessitates different types of crimes where military members are held to a higher standard than their civilian counterparts. "Not everyone is or can be expected to meet unrealistically high moral standards, but there is a limit of tolerance based on customs of the service and military necessity below which the personal standards of [a military member] …" will not be accepted.[41]

2. The Lack of a Right to a Jury Trial

Military members have a right to a panel of court-martial members in most courts-martial.[42] This panel performs many of the functions of a jury, such as examining evidence and issuing verdicts, but a panel is distinct from a jury.[43] Although the Sixth Amendment guarantees the right to an

---

[39] UCMJ art. 134 (codified at 10 U.S.C. § 934); UCMJ art. 133 (codified at 10 U.S.C. § 933) ("Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct."). The *Explanation* section of the MCM describes the nature of the offense under Article 133 as follows:

> Conduct violative of this article is action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer. There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty …. This article prohibits conduct by a commissioned officer, cadet, or midshipman which, taking all the circumstances into consideration, is thus compromising.

MCM, *supra* note 5, pt. IV, ¶ 89.c(2)

[40] O'Callahan v. Parker, 395 U.S. 258, 271 (1969).

[41] UCMJ art. 133 (codified at 10 U.S.C § 933).

[42] *See* UCMJ arts. 25, 25a, and 29 (codified at 10 U.S.C. §§ 825, 825a and 829 (2019)).

[43] *See* Andrew S. Williams, *Safeguarding the Commander's Authority to Review the Findings of a Court-Martial*, 28 B.Y.U. J. Pub. L. 471, 485-502 (2014) (exploring differences between a civilian jury and a court-martial panel).

impartial jury in "all criminal prosecutions,"[44] military courts-martial have been exempt from this requirement for the entirety of the nation's history.[45] The Supreme Court has recognized as much, acknowledging that in courts-martial, "not all of the specified procedural protections deemed essential in Art. III trials need apply," including the Sixth Amendment's right to a jury trial.[46] The Court's decision included the following extended discourse on the differences between a court-martial panel and a jury:

> [T]here is a great difference between trial by jury and trial by selected members of the armed forces. It is true that military personnel because of their training and experience may be especially competent to try soldiers for infractions of military rules. Such training is no doubt particularly important where an offense charged against a soldier is purely military, such as disobedience of an order, leaving post, etc. But whether right or wrong, the premise underlying the constitutional method for determining guilt or innocence in federal courts is that laymen are better than specialists to perform this task. This idea is inherent in the institution of trial by jury.
>
> A court-martial is tried, not by a jury of the defendant's peers which must decide unanimously, but by a panel of officers empowered to act by a two-thirds vote …. [T]he suggestion of the possibility of influence on the actions of the court-martial by the officer who convenes it … and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to eliminate the danger.[47]

[44] U.S. CONST. amend. VI.

[45] Williams, *supra* note 43, at 476-77.

[46] *O'Callahan*, 395 U.S. at 261.

[47] *Id.* at 263-64.

Court-martial panels also have different size and unanimity requirements from civilian juries. For example, federal civilian juries must be comprised of at least twelve jurors,[48] whose verdicts must be unanimous.[49] Court-martial panels lack these critical safeguards against wrongful convictions, and except in death penalty cases, a service member may be convicted by a three-fourths of panel members.[50] Moreover, courts-martial may consist of as few as four members for special courts-martial and eight members for general courts-martial except in death penalty cases.[51] The size and lack of unanimity in courts-martial have been the subject of criticism.[52]

Court-martial panels also differ from civilian juries in that the former is not selected at random from a cross-section of the defendant's peers. Instead, a convening authority personally selects the members who will hear the case.[53] The convening authority selects members whom he or she considers "best qualified" on the basis of "age, education, training, experience,

---

[48] Thompson v. Utah, 170 U.S. 343, 351 (1898) (overturning the conviction in District Court, as "it was his constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons."). *See also*, FED. R. CRIM. P. 23(b)(1) ("A jury consists of 12 persons unless this rule provides otherwise," such as when agreed upon by the parties or when a juror is excused during the proceedings.). State juries also may be as small as six people, "particularly if the requirement of unanimity is retained." Williams v. Florida, 399 U.S. 78, 100 (1970). *But see* Ballew v. Georgia, 435 U.S. 223, 232-36 (1978) (holding that a five-person state jury was unconstitutional because such a small jury is inherently unreliable.)

[49] *See, e.g.*, United States v. Scalzitti, 578 F.2d 507, 512 (3d Cir. 1978) (discussing the requirement of unanimity in the federal jury system, its role as "an indispensable element of a federal jury trial," and its "deep roots in federal jurisprudence."). *See also* FED. R. CRIM. P. 31(a) ("The jury must return its verdict to a judge in open court. The verdict must be unanimous.") State juries are not constitutionally required to be unanimous, but most state laws require a unanimous guilty verdict for felony charges. *But see* OREGON REV. STAT. § 136.450 (2019) (Except in murder or aggravated murder cases, "the verdict of a trial jury in a criminal action shall be by concurrence of at least 10 of 12 jurors"); LOUISIANA CODE CRIM. PROC. ANN. § 782A (2018) (For non-capital cases: "Cases in which punishment is necessarily confinement at hard labor shall be tried by a jury composed of twelve jurors, ten of whom must concur to render a verdict. Cases in which the punishment may be confinement at hard labor shall be tried by a jury composed of six jurors, all of whom must concur to render a verdict.")

[50] UCMJ art. 52(a)(2) (codified at 10 U.S.C. § 852(a)(2) (2019)).

[51] UCMJ art. 16 (codified at 10 U.S.C. § 816 (2019)).

[52] Williams, *supra* note 43, at 494; Richard J. Anderson and Keith E. Hunsucker, *Is the Military Nonunanimous Finding of Guilty Still an Issue*, ARMY LAW., Oct. 1986, 57, 58-59.

[53] MCM, *supra* note 5, pt. II, R.C.M. 503.

length of service, and judicial temperament."[54] A panel member must also be senior to the accused in rank.[55] Thus, military members do not enjoy a "jury of one's peers"[56] but rather a hand-selected group of higher-ranking military members chosen by the commander who convenes the court-martial.

3. Judges

At least in federal civilian courts, the Constitution goes to great lengths to ensure the independence of judges. Article III guarantees federal judges with lifetime tenure, except for the rare instance of removal for good cause.[57] The military justice system looks remarkably different in this regard. As a notable report marking the 50th anniversary of the UCMJ's enactment noted, "Complaints against the military justice system have long been fueled by allegations that military judges are neither sufficiently independent nor empowered enough to act as effective, impartial arbiters at trial."[58]

As with civilian judges, military judges exercise enormous power over trial proceedings. The military judge is the "presiding officer in a court-martial," "responsible for ensuring that court-martial proceedings are conducted in a fair and orderly manner, without unnecessary delay or waste of time or resources."[59] The military judge sets the time and uniform for each session, ensures the dignity and decorum of the proceedings are maintained, exercises reasonable control over the proceedings, rules on all interlocutory questions and all of the questions of law raised, and instructs the members on questions of law and procedure.[60] The military judge determines the "manner and order in which the proceedings may take place," including the timing and order of litigating motions, the manner of voir dire and challenges, the order of witnesses, and similar matters of courtroom management.[61]

---

[54] UCMJ art. 25(d)(2) (codified at 10 U.S.C. § 825(d)(2) (2019)).

[55] UCMJ art. 25(d)(1) (codified at 10 U.S.C. § 825(d)(1) (2019)).

[56] *See* Williams v. Florida, 399 U.S. 78, 87 (1970) (finding "a long tradition attaching great importance to the concept of relying on a body of one's peers to determine guilt or innocence as a safeguard against arbitrary law enforcement).

[57] Turley, *supra* note 16, at 667.

[58] Report on 50th Anniversary of the UCMJ, *supra* note 17, at 8.

[59] R.C.M. 801(a) and Discussion.

[60] *Id*. at (a)(1)-(5).

[61] *Id.* at (a)(3) Discussion (citing R.C.M. 905, 902(d), 912, 913, 919, 1001(h) and Mil. R. Evid. 611).

While military judges exercise most of the same privileges for running their courtrooms that civilian judges do, they are subject to executive oversight in a way that many observers find shocking. One scholar's examination summarized the difficulties with oversight of military judges this way:

> One of the most central guarantees for criminal defendants in the federal system is the guarantee of an Article III judge with lifetime tenure …. In the military, judges operate in an environment that could not be more inimical to such independence. These judges often rotate from their judicial roles into non-judicial roles. Any given judge can thus expect to serve in a different capacity in a matter of years. The promotion and reputation of such officers can be significantly affected by their rulings in criminal cases, particularly high-profile cases. Moreover, these judges are officers who have considerable dependence and identification with the military system and the [chain of command] system. In any given case, these judges are expected at times to differ sharply with convening authorities and other high-ranking officers. They are also expected to impose sanctions against other officers in the trial counsel and defense counsel. Although many judges perform their functions admirably, there is a lack of structural independence for judges and much of the system depends on the belief that individual judges will resist obvious conflicts or pressures in the performance of their roles.[62]

Trial judges do not report to the convening authority; instead, they are rated through a separate, legal chain of command.[63] The Military Justice Act of 2016 attempts to increase military judges' independence by establishing set tour lengths,[64] but the fact remains that military judges are still subject to substantial pressure of executive oversight (real or perceived).[65]

---

[62] Turley, *supra* note 16, at 667-68.

[63] Lieutenant Colonel James B. Roan and Captain Cynthia Buxton, *The American Military Justice System in the New Millennium*, 52 A.F. L. Rev. 185, 208 (2002); UCMJ art. 26(c) (codified at 10 U.S.C. § 826).

[64] MJRG Report, *supra* note 32, at 26 (As a part of the MJRG Report, the Group recommended "establishing in statute the foundational requirements for qualification and appointment of military judges" and establishing minimum tour lengths from the President.); s*ee also* UCJM arts. 16, 19, 26, and 30a (codified at 10 U.S.C. §§ 816, 819, 826, and 830a (2019)).

[65] A recent decision from the Air Force Court of Criminal Appeals indicates the

4. Constitutional Compromises and Statutory Protections

The differences between the military justice system and systems of civilian criminal justice reflect the underlying reality that the military itself is different from society at large. Thus, the military justice system represents a constitutional compromise of sorts: military members are denied certain constitutional rights guaranteed to civilians, but granted other statutory protections in an effort to at least partially offset that deficit. The Supreme Court has characterized the military as a "specialized society separate from civilian society."[66] Military members, the Court held, may be entitled to most of the basic protections under the Constitution, but they are not entitled to the full protections guaranteed to civilians.[67] Rather, "the different character of the military community and of the military mission requires a different application of [the constitutional] protections."[68]

This constitutional compromise is reflected in a number of areas in the military justice system. One such example is discussed above: military members lack the constitutional right to a jury trial, but by statute they are afforded increased rights with regard to other constitutional protections, which are considered the best protection afforded them while remaining consistent with military exigencies. Another example involves grand juries. The Constitution specifically exempts military members from the Fifth Amendment's right to a grand jury indictment.[69] However, Congress through the UCMJ created a pretrial hearing that performs a similar role and in some ways provides

---

potential for pressure on military judges. In *United States v. Vargas,* the court reversed a sexual assault conviction, finding that the military judge abused his discretion by failing to recuse himself from presiding over the trial No. ACM 38991, 2018 CCA LEXIS 137, at *21 (A.F. Ct. Crim. App. Mar. 15, 2018) (unpublished opinion). The court found the military judge was a potential witness because he was involved in the removal of a prior military judge in the case. *Id.* at *18. That removal was the subject of a defense unlawful command influence motion. *Id.*, at *2. The evidence developed on that motion, according to the Air Force court, indicated "dissatisfaction" with the prior military judge, discussion about how to prevent the prior military judge from hearing sexual assault cases, and ultimately the prior military judge's removal from sexual assault cases (though not other types of cases) after that military judge acquitted a member of sexual assault and adjudged a sentence for remaining specifications that included minimal confinement and no punitive discharge. *Id.* at *5-6.

[66] Parker v. Levy, 417 U.S. 733, 743 (1974).

[67] *Id.*

[68] *Id.* at 758.

[69] U.S. Const. amend. V.

greater protections than that of a grand jury.[70] This reflects a desire to create a system that meets the military's needs but that is also seen as just, both by the public and military members.[71]

The result is a system that tolerates a deprivation of rights that would not be accepted in civilian society, but that attempts to make up for those intrusions in other ways. The result of these compromises is "a system of military justice notably more sensitive to due process concerns than the one prevailing through most of our country's history,"[72] but not necessarily on par with civilian criminal justice systems' provision of due process or just results. In interpreting the role of the military justice system, historically the Supreme Court has "been willing to balance individual rights against a strong interest in the 'special constitutional function' of the military."[73] In so doing, the Court has recognized what the framers of the Constitution understood: Congress is in the best position institutionally to regulate the military, including how to translate civilian notions of justice and due process into the military environment:

> The Founding Fathers were well aware of the power struggle that had existed between Parliament and the King regarding the powers of the military. Likewise, many of the Framers were combat veterans who had served in the Continental Army and understood the demands of military life and the need for a well-disciplined fighting force. Their solution for the government of the armed forces was a classic balancing of constitutional interests and powers. Through a combination of structural grants of power and legislation, they assured that Congress — with its responsiveness to the population, its

---

[70] UCMJ art. 32 (codified at 10 U.S.C. § 832 (2019)) (providing for a preliminary hearing before referral of charges in a general court-martial, and setting forth rights of the accused such as the right to be advised of the charges, the right to be represented by counsel at the preliminary hearing, the right to cross-examine witnesses who testify at the preliminary hearing, and the right to present additional evidence).

[71] MJRG Report, *supra* note 32, at 16 (asserting the history of military justice is built around the principle that "a system of military law can only achieve and maintain a highly disciplined force if it is fair and just, and is recognized as such both by members of the armed forces and by the American public.")

[72] Weiss v. United States, 510 U.S. 163, 194-95 (1994) (Ginsburg, J., concurring).

[73] Turley, *supra* note 16, at 682 (quoting Greer v. Spock, 424 U.S. 828, 837 (1976)).

> fact-finding ability, and its collective deliberative processes — would provide for the government of the armed forces.[74]

As the Court has recognized, "military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts."[75] The service member defends the Constitution, and yet does not enjoy all of the same rights as a civilian when facing criminal charges. Thus, the military relies upon a constitutional and statutory compromise to meet the dueling needs of justice and discipline by providing additional protections to members in certain areas, such as the right to remain silent, but limiting other rights, such as the right to a jury. The compromise is necessary to ensure the system, while still upholding discipline, is regarded as fair. As a recent study of the military justice system observed: "The current structure and practice of the UCMJ embodies a single overarching principle based on more than 225 years of experience: a system of military law can only achieve and maintain a highly disciplined force if it is fair and just, and is recognized as such both by members of the armed forces and by the American public."[76]

The Supreme Court has previously held the guarantees provided to all citizens by the Constitution cannot be denied by those who are military dependents or simply employees of the military (i.e., non-military members), but the Court has never held as much with regard to uniform-wearing military members.[77] However, despite these limits on constitutional protections for military members, both the public and members of the armed forces must, and do, view the system as "fair and just."[78]

While some continue to hold that the need for discipline stands in opposition to principles of due process and justice, others see no conflict there. A recent top uniformed attorney of the Air Force opined: "[D]ue process

---

[74] Behan, *supra* note 34, at 212.

[75] Reid v. Covert, 354 U.S. 1, 39 (1955) (quoting United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955)).

[76] MJRG Report, *supra* note 32, at 17.

[77] *See* Reid v. Covert, 354 U.S. 1 (1957) (excluding military dependents from courts-martial jurisdiction); Grisham v. Hagan, 361 U.S. 278 (1960) (excluding civilian employees of the various services within the Department of Defense from the jurisdiction of courts-martial).

[78] MJRG Report, *supra* note 32, at 17.

safeguards our combat effectiveness. Conversely, when we permit due process to suffer, we discourage enlistment of America's best and brightest; we demoralize and discourage the retention of currently-serving Airmen, …, and as a consequence, we degrade military discipline and combat effectiveness."[79] However, the Supreme Court has taken a different approach, holding:

> While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience … may render permissible within the military that which would be constitutionally impermissible outside it.[80]

The result of all of these compromises and developments is "a system of military justice notably more sensitive to due process concerns than the one prevailing through most of our country's history" but not necessarily a system that is more just.[81]

Discipline remains prominent in military justice. The words of a commentator from a century ago still ring true: "Military justice wants discipline … this being absolutely necessary for prompt, competent, and decisive handling of masses of men. The court-martial system … takes on the features of Justice because it must … But its object is discipline."[82] In order to achieve discipline, service members must give up some rights. Most observers believe that there is simply no way to achieve the requisite discipline, while meeting the needs of military exigencies, and also providing all the constitutional protections afforded to a civilian society. A compromise of some sort is necessary.

---

[79] Richard C. Harding, Lieutenant General, United States Air Force, The Judge Advocate General, *A Revival in Military Justice; An Introduction by The Judge Advocate General*, The Reporter, Vol. 37, No. 2, at 4 (Summer 2010).

[80] Parker v. Levy, 417 U.S. 733, 758 (1974).

[81] Weiss v. United States, 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring).

[82] John H. Wigmore, *Lessons from Military Justice*, 4 J. Am. Jud. Soc'y 151 (1921), reprinted in Joseph W. Bishop, *The Case for Military Justice*, 62 Mil. L. Rev. 215, 218 (1973).

C. Military Justice: Executive or Judicial?

Because the military justice system has unique purposes, employs the commander in a central decision-making role, and has different substantive laws, scholarship has often struggled to identify exactly where military justice belongs in our constitutional structure. Some have argued that the system is inherently executive — an instrument of command authority that is not intended to fit within the Article III judicial system. As a congressionally-created body within the Department of Defense, the military justice system derives its jurisdiction from Article I .[83] Thus, in 1920, the noted military justice scholar, Colonel William Winthrop wrote that a court-martial was not a "court" in any real sense of the term but instead a mere instrument of the commander to carry out his will.[84] Others take the opposite approach: military justice is (or should be) considered an inherently judicial function. Especially in light of the UCMJ's enactment and refinements continually making military justice look more court-like and less instruments of command authority,[85] the argument that military courts — with judges, attorneys, laws, evidentiary rules, procedural rules, appellate oversight, and guarantees of most constitutional rights — are not "courts" falls short. Some have even argued that military appellate courts should be reconstituted as Article III courts, arguing that military necessity can be respected while guaranteeing accused service members a fair adjudication process.[86]

Before *Ortiz*, the Supreme Court had never definitively settled this question. It had cast doubt on military tribunals' ability to appropriately protect constitutional rights, asserting that "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."[87] Yet that disparaging language comes from a decision now 50 years old, and does not acknowledge the numerous changes that have made military courts much more "judicial" than historically was the case. The exact nature of

---

[83] U.S. Const. art. I, § 8 (granting Congress the power to "make Rules for the Government and regulation of the land and naval Forces"); UCMJ art. 2 (codified at 10 U.S.C. § 802 (2019)) (generally setting forth the jurisdiction of the military justice system).

[84] William Winthrop, Military Law and Precedents 49-50 (2nd ed. 1920).

[85] *See, e.g.*, Jeremy S. Weber, *Whatever Happened to Military Good Order and Discipline?*, 66 Clev. St. L. Rev. 123, 174 (2017) ("The changes Congress has imposed upon the military justice system tilt in one direction only — toward the civilianization of military justice.")

[86] *See generally*, *Military Justice and Article III*, 103 Harv. L. Rev. 1909 (1990).

[87] O'Callahan v. Parker, 395 U.S. 258, 265 (1969).

military justice remains an open question. As one observer noted, "it seems that military justice exists somewhere between the legislative and executive branches, outside Article III and unlike any other American institution."[88]

This is the system the Supreme Court was called upon to examine in *Ortiz*.

III. Ortiz v. United States

A. Background and Procedural History

Ortiz is one of the few courts-martial to receive direct appellate review from the Supreme Court. It was not until 1983 that Congress opened the Supreme Court as an option for direct review of courts-martial.[89] In the ensuing years, the Supreme Court has heard just ten court-martial appeals on direct review.[90] Until *Ortiz*, none of these cases questioned the Court's jurisdiction to hear military appeals.

The petitioner, Keanu Ortiz, was convicted at a general court-martial for possessing and distributing child pornography.[91] The court-martial sentenced him to two years of confinement and a dishonorable discharge.[92] Ortiz's sentence qualified for an automatic review at the Air Force Court of

---

[88] Captain David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 Mil. L. Rev. 129 (1980):

> By distributing power over the armed forces between the legislative and executive branches, the framers nicely "avoided much of the political-military power struggle which typified so much of the early history of the British court-martial system." They made it clear that while overall command of the military rested with the executive, the military would be governed and regulated according to the law handed down by the legislative branch. Thus, government of the armed forces would always reflect the will of the people as expressed through their representatives in Congress.

[89] 28 U.S.C. § 1259 (1983).

[90] Ortiz v. United States, 585 U.S. ___; 138 S.Ct. 2165 (2018); United States v. Denedo, 556 U.S. 904 (2009); Clinton v. Goldsmith, 526 U.S. 529 (1999); United States v. Scheffer, 523 U.S. 303 (1998); Edmond v. United States, 520 U.S. 651 (1997); Loving v. United States, 517 U.S. 748 (1996); Ryder v. United States, 515 U.S. 177 (1995); Davis v. United States, 512 U.S. 452 (1994); Weiss v. United States, 510 U.S. 163 (1994); Solorio v. United States, 483 U.S. 435 (1987).

[91] *Ortiz*, 138 S.Ct. at 2171.

[92] *Id*.

Criminal Appeals, a body of military judges that reviews certain court-martial convictions.[93] The Air Force court summarily affirmed Ortiz's conviction and sentence.[94] Judge Colonel Martin Mitchell was one of the judges on Ortiz's three-judge panel.[95] Ortiz appealed his conviction to the U.S. Court of Appeals for the Armed Forces (CAAF), a body of five civilian judges appointed by the President for 15-year terms that reviews cases from the service courts of criminal appeals, largely on a discretionary basis.[96]

Before CAAF, Ortiz argued that Judge Mitchell was barred from sitting on the Court of Criminal Appeals because he was simultaneously appointed to serve as an appellate military judge on the U.S. Court of Military Commission Review (USCMCR), an Article I body that reviews appeals from military commission cases.[97] CAAF granted review of two issues: (1) Whether Judge Mitchell's simultaneous service on the two courts violated the Appointments Clause of the Constitution;[98] and (2) Whether Judge Mitchell was statutorily barred from sitting on the Air Force Court of Criminal Appeals under a statute that provides that a regular active duty officer of the armed forces may not: "[e]xcept as otherwise authorized by law, … hold, or exercise the functions of, a civil office in the Government of the United States

---

[93] At the time of *Ortiz's* case, the UCMJ provided for automatic review of courts-martial by each service's court of criminal appeals so long as the appellant did not waive appellate review and the sentence approved by the convening authority included one of the following: death; dismissal of a commissioned officer, cadet, or midshipman; dishonorable or bad-conduct discharge; or confinement for one year or more. UCMJ art. 66(b) (codified at 10 U.S.C. § 866(b) (2016)). Recent amendments modify the last criterion for automatic review to sentences involving confinement for two years or more, but also provide for discretionary review of any court-martial in which the sentence extends to confinement for six months. UCMJ art. 66(b)(1) (codified at 10 U.S.C. § 866(b)(1), (3) (2019)).

[94] United States v. Ortiz, No. 38839, 2016 CCA LEXIS 337 (A.F. Ct. Crim. App. June 1, 2016).

[95] *Id.*

[96] Article 67 of the UCMJ sets forth CAAF's jurisdiction. In addition to death penalty cases and cases that a service's Judge Advocate General orders sent to the court for review, the UCMJ provides that the court has jurisdiction over all cases reviewed by a service court of criminal appeals where the accused has petitioned for review and shown good cause. UCMJ art. 67(a) (codified at 10 U.S.C. § 867(a) (2019)). The court's composition is also prescribed by the UCMJ. UCMJ art. 142 (codified at 10 U.S.C. § 942 (2019)).

[97] United States v. Ortiz, 76 M.J. 189, 190 (C.A.A.F. 2017).

[98] U.S. Const. art. II, § 2, cl. 2.

… that requires an appointment by the President by and with the advice and consent of the Senate."[99]

CAAF quickly disposed of both issues in the government's favor. After recounting the route by which the President came to nominate Judge Mitchell to the USCMCR,[100] it held that the statutory issue did not bar him from serving on the Court of Criminal Appeals because his appointment to the USCMCR did not terminate his military commission. Reasoning that the statute at issue prohibits the "holding of 'civil office' … rather than the performance of assigned duty," CAAF held that Ortiz's challenge was more properly aimed at Judge Mitchell's service on the USCMCR instead of his service on the Court of Criminal Appeals.[101] As to the Appointments Clause issue, CAAF held that Judge Mitchell's status as a principal officer on the USCMCR did not invest him with "authority or status not held by ordinary [Court of Criminal Appeals] judges."[102] CAAF saw no issue with Judge Mitchell's service on the Court of Criminal Appeals merely because at times he served as a principal officer on another court.[103] Ortiz petitioned for a grant of certiorari to the Supreme Court, and the Supreme Court granted review.[104]

In granting the writ of certiorari, the Supreme Court did something surprising. In an amicus brief, University of Virginia Law Professor Aditya Bamzai questioned whether it even had jurisdiction to hear Ortiz's appeal. Even though the Court had previously reviewed nine CAAF decisions without any challenge to its jurisdiction to do so,[105] the Court took Bamzai's chal-

---

[99] 10 U.S.C. § 973(b)(2)(A) (2012). For the full recitation of the issues before CAAF, *see Ortiz*, 76 M.J. at 190.

[100] *Ortiz*, 76 M.J. at 191 (quoting United States v. Dalmazzi, 76 M.J. 1, 2 (C.A.A.F. 2016)).

[101] *Id.* at 192-93.

[102] *Id.* at 193.

[103] *Id*.

[104] *Ortiz*, 138 S.Ct. 54 (2017). The Court initially also granted writs of certiorari in two related cases and consolidated those cases with *Ortiz*. However, the Court ultimately dismissed those other two cases as improvidently granted. *Ortiz*, 138 S.Ct. at 2172 n.2.

[105] *See* United States v. Denedo, 556 U.S. 904 (2009); Clinton v. Goldsmith, 526 U.S. 529 (1999); United States v. Scheffer, 523 U.S. 303 (1998); Edmond v. United States, 520 U.S. 651 (1997); Loving v. United States, 517 U.S. 748 (1996); Ryder v. United States, 515 U.S. 177 (1995); Davis v. United States, 512 U. S. 452 (1994); Weiss v. United States, 510 U.S. 163 (1994); Solorio v. United States, 483 U.S. 435 (1987).

lenge seriously, and directed the parties to brief and argue the question of whether the Court had jurisdiction to review Ortiz's case.[106]

Professor Bamzai argued that Supreme Court review of courts-martial "goes beyond what Article III allows."[107] The Court, he noted, has jurisdiction over cases in two distinct areas: original jurisdiction and appellate jurisdiction.[108] *Ortiz* involved a question of whether the Court had appellate jurisdiction over the matter; original jurisdiction was not an option.[109] Under the relevant portion of Article III of the Constitution, the Court enjoys "appellate Jurisdiction, both as to Law and Fact," over all "other Cases" that the Constitution provides for, including federal questions.[110]

Professor Bamzai argued that courts-martial are not "Cases" as envisioned in Article III, and thus the Supreme Court lacks appellate jurisdiction. His focus of this argument rested on the seminal interpretation of the Court's appellate jurisdiction, *Marbury v. Madison*.[111] Using the well-known facts of *Marbury* in a unique manner, Professor Bamzai noted that in *Marbury*, Chief Justice Marshall explained that the Court's appellate jurisdiction is limited to "revis[ing] and correct[ing] the proceedings in a cause already instituted."[112]

Briefly summarized, *Marbury* unfolded as follows. The case arose when President John Adams, having lost his bid for re-election in 1800, made forty-two presidential appointments in an attempt to preserve his party's control of the judiciary.[113] Among those, he signed a commission for William

---

[106] Supreme Court of the United States, Official Web Page Docket Search: No. 16-1423, Keanu D. W. Ortiz, Petitioner v. United States (last visited Aug. 22, 2020) https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/16-1423.html.

[107] *Ortiz*, 138 S.Ct. at 2173.

[108] *See generally*, *The Original Jurisdiction of the United States Supreme Court*, 11 Stanford L. Rev. 665 (1959); Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 Wash. & Lee L. Rev. 1043 (1977).

[109] *Ortiz*, 138 S.Ct. at 2173 ("Bamzai starts with a proposition no one can contest — that our review of CAAF decisions cannot rest on our *original* jurisdiction.") (emphasis in original).

[110] U.S. Const. art. III, § 2, cl. 2.

[111] 5 U.S. 137 (1803).

[112] *Marbury,* 5 U.S. at 175.

[113] *Id.*; Tally of Electoral Votes for the 1800 Presidential Election (Feb. 11, 1801),

Marbury to serve as a justice of the peace and affixed the seal of the United States to it, but failed to actually deliver the commission to Marbury.[114] When President Thomas Jefferson took office, he refused to allow the commissions to be delivered,[115] and subsequently Marbury sought a writ of mandamus ordering the Secretary of State, James Madison, to deliver the commission.[116] Chief Justice Marshall's opinion for the Court held that Marbury was entitled to delivery of the commission;[117] however, more notably, he held that Marbury was not entitled to a writ of mandamus from the Supreme Court to remedy the injury.[118] Establishing the most famous case of judicial review, the Court found the law allowing the Supreme Court to issue writs of mandamus contrary to the jurisdictional limits established in the Constitution.[119] Noting that its jurisdiction must be based on either original jurisdiction or appellate jurisdiction, the Court held, "It is an essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause."[120]

---

https://www.archives.gov/legislative/features/1800-election/1800-election.html (last visited Aug. 22, 2020). The presidential election of 1800 was a contest between Thomas Jefferson and his Democratic-Republican followers and John Adams and his Federalist Party. For further discussion on the election of 1800 *see* THE JEFFERSON MONTICELLO, THOMAS JEFFERSON ENCYCLOPEDIA, https://www.monticello.org/site/research-and-collections/election-1800 (last visited Aug. 22, 2020).

[114] *Marbury,* 5 U.S. at 155.

[115] Letter from President Thomas Jefferson to Henry Knox (Mar. 27, 1801), https://founders.archives.gov/documents/Jefferson/01-33-02-0407 (last visited Aug. 22, 2020).

[116] *Marbury,* 5 U.S. at 154, 169 ("This writ, … would be directed to an officer of the government, and its mandate to him would be, … 'to do a particular thing therein specified, … which the court has previously determined, … to be consonant to right and justice.'").

[117] *Id*. at 162.

[118] *Id*. at 180.

[119] *Id*. at 175-77.

[120] *Id*. at 175.

Ortiz's petition came to the Supreme Court on review of a CAAF decision, which reviewed a criminal proceeding that originated in a court-martial.[121] In this sense, the matter before the Court seemed to be a "case." However, Professor Bamzai argued that the CAAF is an administrative or executive body, not a judicial one, and thus it could not issue decisions which would fall within the Court's appellate jurisdiction.[122] This was the central jurisdictional issue: are military courts-martial (and appeals thereof) "cases"?

B. Majority Opinion

In a 7-2 decision authored by Justice Kagan, the Court found it had appellate jurisdiction over this matter, concluding that the essential character of the military justice system is judicial, and thus there is no reason to treat it any different than other judicial tribunals.[123] The military system, the Court found, offers "virtually the same" procedural protections to service members as in any U.S. civilian criminal proceeding, and judgments issued by military courts arise from the same legal considerations as civilian courts.[124] Because of this, decisions of courts-martial enjoy *res judicata* effect[125] and are covered by the Double Jeopardy clause.[126]

As further support for its position, the Court noted that both the "jurisdiction and structure of the court-martial system … resemble those of other courts whose decisions [the Court] review[s]."[127] Specifically concerning the jurisdiction of courts-martial, it noted that while at one time courts-martial were limited to only certain types of offenses, today courts-martial "can try service members for a vast swath of offenses, including

---

[121] Ortiz v. United States, 138 S.Ct. 2165, 2174 (2018) (quoting Transcript of Oral Argument at 47-48).

[122] *See* Brief of Professor Aditya Bamzai as *Amicus Curiae* in Support of Neither Party, Ortiz v. United States, 585 U.S. ___; 138 S.Ct. 2165 (2018) (Nos. 16-961, 16-1017, and 16-1423), https://www.supremecourt.gov/DocketPDF/16/16-961/20364/20171120102515876_brief.pdf (last visited Aug. 22, 2020).

[123] *Ortiz*, 138 S.Ct. at 2173 ("[T]he judicial character and constitutional pedigree of the court-martial system enable this Court, in exercising appellate jurisdiction, to review the decisions of the court sitting at its apex.").

[124] *Id*. at 2174 (quoting David A. Schlueter, Military Criminal Justice: Practice and Procedure, § 1-7, 50 (9th ed. 2015)).

[125] *Id.*

[126] *Id*.; U.S. Const. amend. V.

[127] *Ortiz*, 138 S.Ct. at 2174.

garden-variety crimes unrelated to military service."[128] Courts-martial also impose similar sentences to civilian criminal courts and their decisions undergo an appellate process similar to that found in most states.[129] Finally, it found, courts-martial rest upon a solid constitutional history, and, in fact, are older than the Constitution itself.[130]

The majority conceded that courts-martial are not Article III bodies. Congress established courts-martial and their reviewing bodies (including CAAF) within the executive branch.[131] This, Professor Bamzai argued, prevented the Court from exercising appellate jurisdiction over CAAF's decisions because CAAF, like Madison in *Marbury*, was an executive agent.[132] However, the majority did not see CAAF's constitutional locus as an impediment to appellate jurisdiction. As the majority found, the Court's appellate jurisdiction has long encompassed review of bodies other than Article III courts.[133] For example, the Court exercises appellate jurisdiction over state court decisions, federal territorial court decisions, and cases tried in the District of Columbia courts, none of which is necessarily founded as an Article III body.[134] The Court found the subject-matter of the case determines its appellate jurisdiction, not the locus of the court within or without of Article III, and thus courts-martial "stand[] on much the same footing as territorial and D.C. courts," over which the Supreme Court has exercised appellate jurisdiction without controversy.[135] As the Court held, there exists no "powerful reason to divorce military courts from territorial and D.C. courts when it comes to defining [their] appellate jurisdiction,"[136] and if there is no reason to carve out an exception to the Supreme Court's otherwise broad appellate jurisdiction based on a geographic area, there is also no reason to treat the jurisdiction over a specific group of people (i.e., service members) differently.[137] The Court concluded:

---

[128] *Id*. (citing 10 U.S.C. §§ 877-934 and United States v. Solorio, 483 U.S. 435, 438-41 (1987)).

[129] *Id.* at 2174-75.

[130] *Id*. at 2175.

[131] *Id*. at 2176 (citing 10 U.S.C. §§ 941-942 and Edmond v. United States, 520 U.S. 651, 664, n.2 (1997)).

[132] *Id*., *see also*, Brief of Professor Aditya Bamzai, *supra* note 122.

[133] *Id*.

[134] *Id*. at 2176-77.

[135] *Id*. at 2178.

[136] *Id*.

[137] *Id*.

> CAAF is a permanent "court of record" created by Congress; it stands at the acme of a firmly entrenched judicial system that exercises broad jurisdiction in accordance with established rules and procedures; and its own decisions are final (except if we review and reverse them).[138]

The Court held that military courts, unlike Madison's refusal to deliver an appointment to Marbury, make "inherently judicial decisions," and thus there is nothing unusual about the Supreme Court exercising appellate jurisdiction over such matters.[139] After this lengthy exposition on the jurisdiction issue, the Court wasted no space in disposing of the question involving Judge Mitchell's simultaneous service on two courts in the government's favor. First addressing Ortiz's statutory challenge, the Court found that a statutory provision allowing him to serve on the CMCR as an officer provides an exception to the general prohibition found elsewhere in the U.S. Code.[140] With regard to the Appointments Clause issue, it found that Ortiz's argument that a principal officer cannot serve with an inferior officer "stretche[d] too far" the meaning of that clause.[141] It had no concerns with improper influence or incongruity with dual service on the Court of Criminal Appeals and the CMCR.[142] Thus, the Supreme Court affirmed CAAF's decision and upheld Ortiz's conviction.[143]

C. Concurring Opinion

Justice Thomas concurred with the majority decision, but wrote separately to underscore that "the statute giving the [Supreme] Court appellate jurisdiction … complies with Article III of the Constitution" and "that conclusion is consistent with the Founders' understanding of judicial power — specifically, the distinction they drew between public and private rights."[144] He noted that Article III places two important limitations on the Supreme Court's appellate jurisdiction: (1) the Court can only review cases

---

[138] *Id*. at 2180. Despite this holding, the Court specifically withheld any judgment regarding whether it could exercise appellate jurisdiction over other cases originating in the executive branch.

[139] *Id*.

[140] *Id*. at 2182.

[141] *Id*. at 2183.

[142] *Id*.

[143] *Id*. at 2184.

[144] *Id*. (Thomas, J., concurring).

which do not fall within the Court's original jurisdiction; and (2) the Court cannot review a case under its appellate jurisdiction unless it is a case where "judicial power" has been exerted.[145] Article III, he observed, places no other self-executing constraints on the Court's exercise of appellate jurisdiction.[146] Summarizing his position, he stated, "In short, this Court's appellate jurisdiction requires the exercise of *a* judicial power, not necessarily '[*t*]*he* judicial power of the United States' that Article III vests exclusively in the federal courts, § 1".[147]

In Justice Thomas's view, judicial power has historically encompassed the distinction between public and private rights.[148] Public rights are those rights which "'belong to the people at large,'" but private rights, like the right to life, liberty, and property, belong to "'each individual.'"[149] "The Founders linked the disposition of private rights with the exercise of judicial power …. They considered 'the power to act conclusively against [private] rights [as] the core of the judicial power.'"[150] Under his analysis, "military courts adjudicate core private rights to life, liberty, and property."[151] He continued:

> [T]he powers that the Constitution gives Congress over the military are "so exceptional" that they are thought to include the power to create courts that can exercise a judicial power outside the confines of Article III. *Northern Pipeline,* [*Constr. Co. v. Marathon Pipe Line Co.,* 458 U. S. 50, 64 (1982) (plurality opinion)]. Thus, military courts are better thought of as an "exception" or "carve-out" from the Vesting Clause of Article III rather than an entity that does not implicate the Vesting Clause because it does not exercise judicial power in the first place.[152]

---

[145] *Id*. (quoting *In re* Sanborn, 148 U.S. 222, 224 (1893)).

[146] *Id.* at 2185.

[147] *Id*. (emphases in original).

[148] *Id*.

[149] *Id*. (quoting Wellness Int'l Network, Ltd. v. Sharif, 575 U. S. 665, 135 S. Ct. 1932, 1965 (2015) (Thomas, J., dissenting)).

[150] *Id*.

[151] *Id*. at 2186.

[152] *Id.* (citing *Wellness*, *supra* note 142, at 1963-65).

Military courts, in Justice Thomas's mind, are thus "exempt from the structural requirements of Article III 'because of other provisions of the Constitution, not because of the definition of judicial power.'"[153] In other words, military courts exercise judicial power because of what they do, not because of where they sit within the branches of government. CAAF acts upon private rights in an adversarial system, has independent authority to make its own rules of procedure mirroring federal courts, decides cases only in accordance with established law, and can only decide matters of law.[154] Additionally CAAF's decisions are based upon "independent[ ] interpret[ation of] the Constitution, the Uniform Code of Military Justice, and other federal laws," its judgments are binding on the parties, and there is no mechanism for further executive branch review or modification.[155] Additionally, Justice Thomas observed, "Unlike the CAAF's decisions, court-martial proceedings are not final until they are approved by the convening authority."[156] In other words, the executive review has been completed by the time CAAF reviews the decision, and therefore there are no "finality problems" with the Supreme Court's review under Article III.[157]

Justice Thomas quoted *United States v. Ritchie*[158] in warning of being "misled by a name" and failing to look to the underlying "substance and intent of the proceeding" when determining whether the body performs a judicial function.[159] Thus, in his view, "It is the *case*, then, and not *the court*, that gives the jurisdiction."[160]

---

[153] *Id.* (citing *Wellness*, *supra* note 142, at 1964; quoting Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 565, 576 (2007)).

[154] *Id.* at 2187 (quoting 10 U.S.C. § 867(c), § 944; *Wellness, supra* note 142, at 1963; Nelson, *supra* note 146, at 574; citing *generally* CAAF RULES OF PRAC. AND PROC. (2017)).

[155] *Id*. (citing 10 U.S.C. § 876; Nelson, *supra* note 146, at 574).

[156] *Id*. at 2187 n.3.

[157] *Id.* (quoting James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 717 n.327 (2004)).

[158] 58 U.S. 525 (1854).

[159] *Ortiz*, 138 S.Ct. at 2188 (quoting *Ritchie*, 58 U.S. at 534).

[160] *Id.* at 2815 (quoting Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 338 (1816)) (emphases in original).

D. Dissenting Opinion

Justices Alito and Gorsuch parted from the other seven justices in a lengthy dissent that labeled the majority's decision contrary to 200 years of Supreme Court precedent. In the dissent's view, the Court is only authorized to review cases where there was a "lawful exercise of *judicial* power."[161] More specifically, the dissenters argued that the Supreme Court only possesses appellate jurisdiction over courts established under Article III that exercise federal judicial power, or that exercise the judicial power of an independent or congressionally-created sovereign.[162] Moreover, "[c]ourts-martial are older than the Republic and have always been understood to be Executive Branch entities that help the President, as the Commander in Chief, to discipline the Armed Forces."[163]

The dissent's opinion is based on three main points: (1) Only Article III courts can exercise the judicial power of the United States, and CAAF is not an Article III court;[164] (2) both territorial courts and the District of Columbia are different from military courts because territorial and District courts exercise the judicial power of their own inherent sovereigns;[165] and (3) the majority has adopted a "looks-like" test that is not appropriate and does not comply with Supreme Court precedent.[166] In the opinion of the dissenters, it does not matter what a court-martial looks like, or how it acts; rather, the position of courts-martial within the government defines their ability to exercise Article III judicial power.

As to the first point, the dissent asserted that "the judicial power of the United States may be vested only in tribunals whose judges have life tenure and salary protection."[167] CAAF judges do not have life tenure, but rather serve a set term and are not immune from presidential removal.[168] Noting that federal appellate courts may only act upon the judgment of the

---

[161] *Id.* at 2190 (Alito, J., and Gorsuch, J., dissenting) (alteration in original).

[162] *Id*.

[163] *Id*.

[164] *Id*. at 2191.

[165] *Id*. at 2196.

[166] *Id*. at 2203.

[167] *Id*. (citing U.S. Const. art. III, § 1).

[168] *Id*.

inferior "*courts,*"[169] the dissent asserted that based on extensive Supreme Court precedent, a case may only be reviewed under its appellate jurisdiction if it has previously been submitted and a decision made to a tribunal lawfully able to exercise "judicial power".[170] Executive agencies have long been adjudicating matters; however, the dissent asserted that those adjudications are not "cases" under Article III.[171] For example, in *Marbury* the Court held that it could not review disputes between executive branch officers because those officers could not exercise the judicial power of the United States.[172] The Court has also taken this approach in determining which state cases to review under appellate jurisdiction.[173]

On the dissent's second main point — the distinctions between military courts and other non-Article III courts that the Supreme Court does exercise jurisdiction over — the dissenters examined three differences they believed warranted a different approach for military courts. First, the dissent identified a key distinction between military courts and the Court of Claims, a body originally created by Congress that was only in 1866 brought into compliance with Article III provisions. The dissent noted that the Court of Claims's pre-1866 decisions were not self-executing, and thus the Court of Claims did not exercise judicial power.[174] More importantly, the dissent noted that Congress has not brought military courts into compliance with Article III as it did in 1866 with the Court of Claims.[175] Second, the dissent considered the treatment of habeas corpus petitions.[176] The dissent asserted that the Supreme Court may only review habeas petitions from inferior federal and state courts where those courts clearly exercise judicial power versus

---

[169] *Id*. at 2191 (quoting Willliam Blackstone & Thomas McIntyre Cooley, Commentaries on the Laws of England 411 (1768)) (emphasis in original).

[170] *Id*.

[171] *Id*. at 2192 (citing Arlington v. FCC, 569 U.S. 290, 304-305, n.4 (2013); Freytag v. Commissioner, 501 U.S. 868, 910 (1991) (Scalia, J., concurring in part and concurring in judgment); Jerry Mashaw, Creating the Administrative Constitution 34-35 (2012).

[172] *Id*. at 2193 (citing *Marbury*, 5 U.S. at 137)).

[173] *Id*. at 2192 (citing Betts v. Brady, 316 U.S. 455, 458-460 (1942); Chicago R.I. & P.R. Co. v. Stude, 346 U.S. 574, 578-579 (1954)).

[174] *Id*. at 2193.

[175] *Id*. *compare* James E. Pfander, *Article I Tribunals, Article III Courts, and The Judicial Power of the United States*, 118 Harv. L. Rev. 643, 717 n.327 (2004) (asserting that the principle that a court whose judgments are not self-executing does not comply with Article III no longer applies to the military because CAAF's decisions cannot be acted upon by the executive branch).

[176] *Id*. at 2194.

some other type of power.[177] Military courts, the dissent asserted, do not exercise judicial power, as demonstrated by their review of habeas petitions in military tribunals.[178] However, the Court denied to hear any of those petitions, and yet the dissent relies upon the precedent set by the prior denials of "habeas petitions from individuals in the custody of 'various American or international military tribunals abroad.'"[179] In *Ex parte Vallandigham*, the Court affirmed that the power of military tribunals is not judicial in the same sense that U.S. courts enjoy.[180] The dissent identified two cases in which the Supreme Court did hear habeas petitions from military tribunals, but the petitioners in those cases both sought relief from lower federal courts prior to seeking review at the Supreme Court.[181]

Finally, distinguishing territorial courts and D.C. courts from military courts-martial, the dissent concluded that Congress enjoys "unique authority" to create governments for the territories and the District with authority that sets territory and District courts apart from other congressionally-created bodies.[182] Essentially, the dissenters asserted, Congress can vest territorial courts with the appropriate Article III power as a judicial body, but it cannot do the same for military courts because they represent no inherent, independent sovereign.[183] The historical roots of courts-martial indicate they "have always been understood to be an arm of military command exercising executive power, as opposed to independent courts of law exercising judicial power."[184]

---

[177] *Id*.

[178] *Id*.

[179] *Id.* at 2195 (quoting Richard Fallon, Jr. Et. Al., Hart and Wechsler's The Federal Courts and the Federal System 292 (7th ed. 2015)).

[180] *Id*. (citing *Ex parte* Vallandigham*,* 68 U.S. 243, 253 (1864)) (alteration in original). Interestingly, the dissent did not provide additional analysis addressing the fact that *Vallandigham* involved a military commission rather than a court-martial. *See Vallandigham*, 68 U.S. at 249 for an explanation of the differences in the two types of military courts.

[181] *Ortiz*, 138 S.Ct. at 2195 (Alito, J., and Gorsuch, J., dissenting).

[182] *Id*. at 2196 (*but see* U.S. Const. art. I, § 8, cl. 14. "Congress shall have Power To … make Rules for the Government and Regulation of the land and naval Forces[.]").

[183] *Id*. at 2198-99.

[184] *Id*. at 2199.

Lastly, the dissent took issue with what it characterized as the majority's assertion that courts-martial "resemble" conventional courts and therefore exercise judicial power.[185] After previously noting that the military justice system has undergone reforms in recent years to make it more closely resemble civilian criminal courts,[186] the dissent asserted that just because a court-martial may look like a court and act like a court, it is not necessarily a court with judicial power.[187] In other words, the dissent argues, the Supreme Court has never adopted a "looks-like" test to determine what is and is not a court for purposes of its appellate jurisdiction.[188] Courts-martial, under this interpretation, make executive rather than judicial decisions; while these decisions may deprive individual citizens of their life, liberty, and property, they do not do so with judicial power.[189]

Regardless of any changes the military justice system has experienced, according to the dissent, the system was originally designed to effectuate discipline within the armed forces and a court-martial can only be an executive tribunal clothed to look like a court.[190] In addressing the majority's position regarding the application of due process and a "judicial-like" system in military courts the dissent noted that William Winthrop, whom the Court has called "the Blackstone of Military Law,"[191] labeled courts-martial as court-like "*[n]otwithstanding* that the court-martial is only an instrumentality of the executive power having no relation or connection, in law, with the judicial establishments of the country."[192] Regardless,

---

[185] *Id.* at 2203.

[186] *Id.* at 2200.

[187] *Id.*

[188] *Id.* at 2203.

[189] *Id.* at 2200 (citing *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 119, 122 (1866)). *But see* Grafton v. United States, 206 U.S. 333 (1907) (allowing application of the Double Jeopardy Clause in courts-martial, and determining military courts have jurisdiction to make decisions over service members which civilian tribunals must respect with regard to Double Jeopardy); Reid v. Covert, 354 U.S. 1 (1957) (prohibiting the use of courts-martial to try U.S. citizens living abroad with service members because of the protections of the Constitution and the Bill of Rights); Grisham v. Hagan, 361 U.S. 278 (1960) (extending application of the *Reid* rule to civilian employees and ensuring constitutional protections for civilian employees charged with crimes while employed by the military).

[190] *Ortiz*, 138 S.Ct. at 2200-01.

[191] *Id.* at 2200 (quoting Reid v. Covert, 354 U.S. 1, 19, n.38 (1957)) (internal quotation omitted).

[192] *Id.* at 2202 (quoting WINTHROP, *supra* note 84, at 61 (alterations and emphasis in original).

the dissent held, military courts do not even look like Article III courts: their decisions are not self-executing and are not final because the President could take further action;[193] CAAF judges are not appointed for life and are subject to oversight by the Secretaries of Defense, Homeland Security, and the military departments;[194] and CAAF must review any case a Judge Advocate General of a military service orders it to hear.[195] Ultimately, the dissent asserted, regardless of how much courts-martial look like Article III courts, they are not. The President, through the executive branch, has made important and necessary changes to the court-martial system to allow for more due process-like protections, but that is not enough to bring courts-martial within the Supreme Court's appellate jurisdiction.

IV. Application – The Meaning and Impact of *Ortiz*

Taken together, the opinions of the majority, the concurring Justice Thomas, and the dissenters, finally provide an answer to the age-old question: what exactly *is* military justice? Is it an executive instrument or a judicial one? Should military courts be treated on par with civilian courts because they look similar and act similarly? Have the steady reforms to make military justice mirror civilian notions of justice altered military courts' constitutional role? Stated differently, if the dissenters accurately portray the military justice

---

[193] *Id.* at 2204 (citing 10 U.S.C. §§ 871, 876). 10 U.S.C. § 871 (2012) sets forth provisions under which the President or designee executes the sentence of a court-martial following appellate review. 10 U.S.C. § 871 was repealed by Div E, Title LVIII, § 5302(b)(2) of the NDAA for Fiscal Year 2017, P.L. 114-328, 130 Stat. 2923, effective January 1, 2019 (collectively, these amendments to UCMJ are known as the Military Justice Act of 2016). As provided by § 5542(a) of the Military Justice Act, which appears as 10 U.S.C. § 801, the changes to the UCMJ became effective January 1, 2019. *See also* Runkle v. United States, 122 U.S. 543, 557 (1887) (quoting 11 Op. Att'y Gen. 19, 21 (1864):

> [Under 10 U.S.C. § 871] the action required of the President is judicial in its character, not administrative …. 'Undoubtedly the President, in passing upon the sentence of a court-martial, and giving to it the approval without which it cannot be executed, acts judicially. The whole proceeding from its inception is judicial. The trial, finding, and sentence are the solemn acts of a court organized and conducted under the authority of and according to the prescribed forms of law …. When the President, then, performs this duty of approving the sentence of a court-martial dismissing an officer, his act has all the solemnity and significance of the judgment of a court of law.')

[194] *Ortiz*, 138 S.Ct. at 2204 (Alito, J., and Gorsuch, J., dissenting).

[195] *Id*.

system as "an instrumentality of the executive power having no relation or connection, in law, with the judicial establishments of the country,"[196] then why do reformers keep trying to make it look and act more and more like civilian criminal courts? Last, what does *Ortiz*, taken as a whole, have to say about whether military justice is any different from its civilian counterparts?

The opinion demonstrates the uniqueness of the military justice system. When even the Supreme Court sharply disagrees over what the military justice system is, there is quite possibly no "right" answer, but rather, many answers. "America is the only country that can project military might globally."[197] "The military justice system...goes wherever the troops go — to provide uniform treatment regardless of locale or circumstances."[198] "Given the global nature of America's armed forces, commanders must have the ability to 'expeditiously deal with misconduct to prevent degradation of the unit's effectiveness and cohesion.'"[199]

Military courts cannot truly lose the right to be different, not as long as they maintain the inherent differences existing in the system. The lack of a jury, the involvement of the commander, the dual purpose of justice and discipline, its existence somewhere between the legislative and executive branch,[200] and the constitutional compromise: all of these make the military justice system different; regardless of the judicial function of the military courts, they remain outside of Article III and unlike any other American

---

[196] *Id.* 2202 (quoting WINTHROP, *supra* note 84).

[197] Stephen Calabresi, '*A Shining City On A Hill': American Exceptionalism And The Supreme Court's Practice Of Relying On Foreign Law*, 86 B.U. L. REV. 1335, 1392 (2006) (internal citations and quotation marks omitted).

[198] Roan and Buxton, *supra* note 63, at 191.

[199] David A. Schlueter, *American Military Justice: Responding to the Siren Song for Reform*, 73 A.F. L. REV. 193, 213 (2015) (internal citations omitted).

[200] Behan, *supra* note 34, at 214 (quoting David M. Schlueter, Captain, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129 (1980):

> By distributing power over the armed forces between the legislative and executive branches, the framers nicely 'avoided much of the political-military power struggle which typified so much of the early history of the British court-martial system.' They made it clear that while overall command of the military rested with the executive, the military would be governed and regulated according to the law handed down by the legislative branch. Thus, government of the armed forces would always reflect the will of the people as expressed through their representatives in Congress.)

institution. The *Ortiz* majority paves the way for an increasingly judicial-like system, but it cannot eliminate those differences.

A. Reaction and Issues

Commentators have offered significant debate and analysis on the *Ortiz* decision since it was issued on June 22, 2018. Reactions have been mixed, but they seem to agree that this narrow decision on an esoteric jurisdictional issue is likely to have far-reaching and unanticipated implications. Such implications could affect the entirety of the military justice system, the status of the Court of Appeals of the Armed Forces as an Article I court, and even the jurisdiction and ability of other executive agencies to appeal directly to the Supreme Court without an intermediate appeal to an Article III tribunal.

In a post on *Lawfare*, an author listed a number of issues the Court's decision leaves open, including the Court's future Article III jurisdiction, "namely, whether administrative agencies may one day be able to appeal directly to the Supreme Court without an intermediate Article III tribunal."[201] Another *Lawfare* post by an Army judge advocate questioned: "Are Military Courts Really Just Like Civilian Courts?"[202] Determining the answer to the question is still open for debate, the author argued, "Because of how the court defended its jurisdiction … this decision carries non-obvious, but somber, implications … which before *Ortiz*, had cleanly segregated military criminal justice from its civilian cousin."[203] That is, by comparing and equating military and civilian courts, the Court has, possibly inadvertently, removed the reason for commanders to be at the center of the military justice system.[204]

A number of articles address how the *Ortiz* decision will impact the future of the military justice system. A retired Air Force Colonel asserted that, contrary to the Supreme Court's decision in *Parker v. Levy*,[205] the

---

[201] Harry Graver, *Summary: The Supreme Court Rules in Ortiz v. United States,* Lawfare Inst. (June 23, 2018, 11:15 AM), https://www.lawfareblog.com/summary-supreme-court-rules-ortiz-v-united-states.

[202] Dan Maurer, *Are Military Courts Really Just Like Civilian Courts?,* Lawfare Inst. (July 13, 2018, 10:00 AM), https://www.lawfareblog.com/are-military-courts-really-just-civilian-criminal-courts.

[203] *Id.*

[204] *Id.*

[205] 417 U.S. 733 (1974).

Court no longer believes there is anything unique about military courts.[206] She questioned whether the decision spells the "end for involvement of commanding officers in military justice," but cautioned that this should not be a "wholesale abandonment" of a successful system which has governed the military since before the Republic began.[207]

Professor Steve Vladek, counsel of record for the petitioner in *Ortiz*, argued the decision has signaled a new "de facto military federalism."[208] Specifically noting, "although the Supreme Court can and will have the last word when it wants to (as *Ortiz* confirms), as is increasingly the case with respect to the federal territories, federalism-like principles should also apply to the Supreme Court's relationship with the military."[209] In analyzing the opinion and its apparent signal for this military federalism, Professor Vladek countered with three opposing arguments:

> First, it fails to account for limits on appellate review within the court-martial system. Second, it neglects the highly circumscribed nature of collateral review of military convictions. And third, it makes no sense whatsoever as applied to the Guantánamo military commissions, given both their structural differences from courts-martial and their track record to date. To spoil the punchline, although *Ortiz* settles that the Supreme Court can directly supervise the military justice system, it leaves in its wake difficult — and unanswered — questions about what that supervision should look like.[210]

In addition, two lengthy law review articles on the *Ortiz* decision have been published. First, a *Harvard Law Review* note about the decision asserted that the key issue for practitioners to take away from the decision is that "the mere *specter* of Executive revision, influence, or involvement — without more — will not render an otherwise capable tribunal incapable of

---

[206] Colonel (Ret.) Linda Strite Murnane, *Did Military Courts Just Lose Their Right to be Different? Five Takeaways from Ortiz v. United States,* The Nat'l Jud. C.: Jud. Edge (July 25, 2018), https://www.judges.org/did-military-courts-just-lose-their-right-to-be-different-five-takeaways-from-ortiz-v-united-states/.

[207] *Id.*

[208] Steve Vladeck, *The New Military Federalism,* Harv. L. Rev. Blog (June 29, 2018), https://blog.harvardlawreview.org/the-new-military-federalism/.

[209] *Id.*

[210] *Id.*

exercising 'judicial power' outside of Article III."[211] What that "something more" is, the note observed, is left for another day.[212] In the meantime, "the CAAF is a duck under Article III, eligible for direct appellate review; *Ortiz* nonetheless offers limited aid for those figuring out what it really means to walk, swim, and quack in the constitutional sense."[213] The second law review work on *Ortiz* comes from a Marine Corps Second Lieutenant who proposed that rather than continue to allow CAAF to function as a "court" that sits within the executive branch under Article I, CAAF should move to a constitutionally complete Article III court.[214] A move to an Article III court, according to this note, would address all the problems noted by the minority opinion in *Ortiz* and would completely ensure civilian oversight of the military justice system.[215]

B. Analysis

As the first military justice case the Supreme Court reviewed *de novo* in over 25 years, *Ortiz* will have a significant impact on the military justice system.[216] The majority decision, the concurrence, and the dissent all opine on the fundamental nature of the military justice system. Given the interest in military justice reform in recent years, it seems fair to say that advocates for and against such reform will seize upon language in the opinions to support their respective views. The question thus becomes: Is this decision the savior or the death sentence to the military justice system as it has been known?

When looking at the development of the military justice system holistically, the military has always resisted change, especially the changes which made it "more judicial"; in other words, the military establishment has generally opposed any increase in due process rights. Appellate review

---

[211] *The Supreme Court 2017 Term: Leading Case: Constitutional Law: Article III — Federal Courts — Ortiz v. United States,* 132 Harv. L. Rev. 317, 318 (2018).

[212] *Id.* at 326.

[213] *Id*.

[214] Tyler W. Winslow, *Reconstituting USCAAF Under Article III: Preserving Fairness, Resolving Political Tensions, and Balancing Justice and Order in American Military Justice*, 58 Washburn L.J. 449, 451-52 (2019).

[215] *Id*.

[216] Vladeck, *supra* note 208 ("Although it was not exactly a headline-grabbing ruling, the Supreme Court's decision last Friday in *Ortiz v. United States* will likely receive a fair amount of academic attention, especially from Federal Courts casebooks, thanks to its long-overdue analysis of the types of disputes (and nature of the tribunals) over which the Court may exercise direct appellate jurisdiction.")

of military cases was initially thought to be counter to a military code of justice, and yet, today there is an expansive system of appellate review.[217] The MJRG's recommendations were born of an internal and collaborative process, one that included many military members, and adopted many of the recommendations of those members. The military, rather than simply reacting to public outcry, conducted its own study and decided changes were needed. *Ortiz* adds to those changes, lending credibility to the idea many military justice practitioners have long held that the system is equally based in justice and discipline:

> Discipline lies at the heart of command and control …. Discipline is commanders' business since they have the ultimate responsibility to build, maintain, and lead the disciplined force … To build this disciplined force … the military justice system works to strike a careful constitutional balance between all competing equities in the process.[218]

The military justice system is constantly evolving. If it is to continue, it must attend to the changing nature of the military mission, the system's requirement to function and operate world-wide, and the military's need for strict discipline. In the words of one law review article, "Despite attempts to portray the military justice system as being out of touch with modern legal thought, the system has withstood the test of time, both in terms of constitutional challenges and practical application."[219]

Critics often cite the commander's influence and control of the process as the biggest problem with the military justice system:

> The American court-martial, with its command-dominated structure, all military personnel, commander-selected jury primarily from the officer class, inadequate pre-trial procedures, and limited appeals, provides servicemen with an inferior form of criminal justice. Proposed reforms of the UCMJ

---

[217] Frederick Bernays Wiener, *American Military Law in Light of the First Mutiny Act's Tricentennial*, 126 Mil. L. Rev. 1, 1 (1989).

[218] Hearing on S. 1495, *supra* note 20 (statement of Lieutenant General Jeffrey A. Rockwell, The Judge Advocate, United States Air Force, p.2) (General Rockwell's statement is available at https://www.armed-services.senate.gov/imo/media/doc/Rockwell_03-06-19.pdf.)

[219] Roan & Buxton, *supra* note 63, at 211.

> would remedy some of these problems but would leave intact the structure of court-martial, with its intrinsic relationship to military disciplinary policies and control.[220]

Removing commanders from the process would answer such concerns, ensuring due process and removing perceived impediments to due process from the commander's involvement or influence. This would bring the military justice system closer to civilian courts, and "the greater use of civilian courts would … bring the military closer to the concept of the Framers and reaffirm the status of service members as citizens entitled to many of the basic protections that they serve to defend." [221] *Ortiz* began as a case fundamentally about civilian preeminence and control over the military, yet it could anticipate reforms that would remove the system from the command and military judiciary. However, consider the challenges to a "justice only" system. "[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the … control of a military force are essentially professional military judgments."[222]

Complete removal of military experience seems impracticable and unworkable. A dedicated group of civilian attorneys would be the vast majority of the make-up of the independent judiciary, similar to the Department of Justice, but lack the experience in the profession of arms to bring that balance to an independent judiciary.[223] Congress has, as noted in *Ortiz*, created independent sovereign governments within territories, and vesting the military judiciary with similar authorities could address this issue. Essentially,

---

[220] Schlueter, *Justice or Discipline?*, *supra* note 1, at 41 (citing Edward F. Sherman, *Military Justice Without Military Control*, 82 Yale L. J. 1398, 1425 (1973)) (emphasis added); *See also* Robinson O. Everett, *Some Comments on the Civilianization of Military Justice*, The Army Law., Sept. 1980, at 1 ("noting that if by 'civilianization' it meant ignoring the uniqueness of military justice, he was opposed but that he favored civilianization if it meant an 'acknowledgement that certain basic ethical norms apply to the military as well as the civilian'").

[221] Turley, *supra* note 16, at 717.

[222] Chappell v. Wallace, 462 U.S. 296, 302-303 (1983) (citing Gilligan v. Morgan, 413 U.S. 1, 10 (1973)).

[223] *See,* Sam Walenz*,* Note, *Smith v. Obama: A Neoclassical After Action Review,* 44 Fla. St. U. L. Rev. 1503, 1515-1518 (2017) *(*quoting Michael Walzer, Just and Unjust Wars: A Moral Argument with Historical Illustrations 316 (5th ed. 2015) "Officers take on immense responsibilities … unlike anything in civilian life, for they have in their control the means of death and destruction. The higher their rank, the greater the reach of their command, the larger their responsibilities.").

if Congress were to grant the military judiciary authority to operate as a judicial system within the independent sovereign that independent judiciary could be made up of both officers and lawyers, similar to what we see today, but with the added distinction of being a court with "judicial power." This could retain the characteristics noted by the majority, but also address the issues noted by the dissent. However, doing so would undeniably run afoul of the constitutional provisions placing complete governance of the military within the legislative and executive branches.

Additionally, although the critics believe removal of the commander from the military justice system would improve the system for both victims and the accused, "the evidence does not support a conclusion that removing convening authority from senior commanders will … improve the quality of investigations and prosecutions of sexual assault cases in the Armed Forces."[224] A justice-only system is unlikely to produce the intended results, and may impair the capacity to operate internationally, thereby negating gains from the military justice system working more independently.

It is undeniable that, at least in some sense, the seven Justices' majority and concurring opinions may alter the equation for the military justice debate. Congress, the media, special interest groups, and others have pushed heavily in recent years to fundamentally reform military justice by removing the commander from a central decision-making role, essentially turning prosecutorial decisions over to lawyers (military or civilian).[225] In the past five years, numerous calls have been sounded to remove commanders from military justice altogether.[226] Despite these calls, thus far, a majority of military leaders, researchers, academics, and congressional panels have remained convinced that commanders must remain in control of the military justice system, and the commander's role in the system has not fundamentally been altered. While the definition of "good order and discipline" has not been well articulated,[227] most of these observers agree that this doctrine

---

[224] Report of the Response Systems To Adult Sexual Assault Crimes Panel 6 (June 2014), http://responsesystemspanel.whs.mil.

[225] *See* David A. Schlueter, *American Military Justice: Responding to the Siren Song for Reform*, 73 A.F. L. Rev. 193, 195–99 (2015) (summarizing proposals to limit or remove commanders' powers to prefer court-martial charges or convene courts-martial).

[226] *See* Ghiotto, *supra* note 11, at 491; MJRG Report, *supra* note 32, at 20-23.

[227] *See generally* Weber, *supra* note 85 (summarizing military leaders' attempts at and difficulties in explaining what good order and discipline is and why it requires a separate, commander-driven military justice system).

is essential to the military justice system. It is the predominant rationale for keeping commanders front and center. The commander is the actor best placed in this system to reconcile the tensions between good order and discipline and justice; essential to her role as an effective military leader is the authority to handle such disciplinary matters expeditiously.[228] As a leading scholar has observed, "It is a well-accepted axiom that a commander conducting combat operations needs to have control over the military justice system so that system can be used as a means of enforcing and maintaining discipline over his forces."[229] Similarly, the Judge Advocate General of the Air Force recently told Congress: "Discipline makes [the force] ready. Discipline makes [the force] lethal."[230]

The *Ortiz* majority decision potentially undercuts this argument. By holding that the military justice system's "essential character" is "judicial,"[231] by observing that the jurisdiction of courts-martial "overlaps significantly" with those of state and federal criminal courts,"[232] and by holding that courts-martial have, throughout their history, "operated as instruments of military justice, not … mere 'military command,"[233] the majority undermines the claim that military justice is different from civilian criminal justice. If the drafters of the UCMJ are correct that the modern military justice system represents a balance between justice and discipline, then in holding that the military justice system is "inherently judicial,"[234] the Court is also suggesting that the system is *not* "inherently discipline-based."

---

[228] *See, e.g.*, Ghiotto, *supra* note 11, at 523 ("It is good order and discipline, with its emphasis on creating a state of mind within service members to follow the will of their commanders, which enables commanders to order their service members at risk to achieve mission objectives and to have their service members follow the orders.")

[229] Hansen, *supra* note 8, at 462 (citing Michael I. Spak & Jonathon P. Tomes, *Courts-Martial: Time to Play Taps?*, 28 Sw. U. L. Rev. 481, 534-41 (1999)).

[230] Hearing on S. 1495, *supra* note 20 (statement of Lieutenant General Jeffrey A. Rockwell, The Judge Advocate, United States Air Force, p.2) (General Rockwell's statement is available at https://www.armed-services.senate.gov/imo/media/doc/Rockwell_03-06-19.pdf.)

[231] *Ortiz*, 138 S.Ct. at 2174.

[232] *Id.* at 2174-75.

[233] *Id.* at 2175 (quoting in part *Ortiz*, 138 S.Ct. at 2199 (Alito, J., and Gorsuch, J., dissenting)).

[234] *Id.* at 2169, 2180.

There is no indication that the majority intended to undermine discipline as a core rationale for a separate military justice system. In fact, the majority goes out of its way to indicate it is supporting the system as it is currently constituted.[235] The majority specifically states that it sees no conflict between military justice's judicial and disciplinary roles. One supports the other. In so doing, it takes a firm position in one of the biggest debates about military justice. The traditional view has been that justice and discipline are in conflict; thus, Congress after World War II attempted to reconcile the two, aiming for "a middle ground between the viewpoint of the lawyer and the viewpoint of the general."[236] Since then some observers have supposed that the twin goals of discipline and justice represent a conflict,[237] though recently some commentators have opined that the system is primarily justice-based, and that by imposing justice, the system supports discipline.[238] The *Ortiz* Court arguably sides with the latter, holding that by utilizing a system

---

[235] As to its support for the current military justice system, the majority stated:

> The independent adjudicative nature of courts-martial is not inconsistent with their disciplinary function, as the dissent claims …. By adjudicating criminal charges against service members, courts-martial of course help to keep troops in line. But the way they do so — in comparison to, say, a commander in the field — is fundamentally judicial …. Colonel Winthrop stated as much. Even while courts-martial "enforc[e] discipline" in the armed forces, they remain "as fully a court of law and justice as is any civil tribunal." And he was right. When a military judge convicts a service member and imposes punishment — up to execution — he is not meting out extra-judicial discipline. He is acting *as a judge*, in strict compliance with legal rules and principles — rather than as an "arm of military command." It is in fact one of the glories of this country that the military justice system is so deeply rooted in the rule of law. In asserting the opposite — that military courts are not "judicial" in "character" — the dissent cannot help but do what it says it would like to avoid: "denigrat[e the court-martial] system."

Id. at 2176 n.5 (internal citations omitted) (emphasis in original).

[236] U.S. War Dep't Advisory Comm. on Military Justice, Report to the Secretary of War 5 (1946), https://www.loc.gov/rr/frd/Military_Law/pdf/report-war-dept-advisory-committee.pdf.

[237] *See generally* Schlueter, *Justice or Discipline?*, *supra* note 1 (summarizing various approaches to resolve the relationship between justice and discipline).

[238] *See, e.g.*, Harding, *supra* note 79, at 5 ("[D]ue process safeguards our combat effectiveness. Conversely, when we permit due process to suffer, we discourage enlistment of America's best and brightest; we demoralize and discourage the retention of currently-serving Airmen, …, and as a consequence, we degrade military discipline and combat effectiveness.")

that promotes basic constitutional protections such as due process, military justice enhances discipline.

Yet the *Ortiz* majority (plus Justice Thomas) raise further questions about the future of military justice. If the system really is "inherently judicial," and if providing military members basic constitutional rights enhances discipline, then why not give military members the full benefit of such constitutional protections? Prior to World War II, it was assumed that any fundamental legal protections for service members would undercut discipline.[239] Similarly, why must the commander be at the center, if a purely judicial system is *per se* supportive of good order and discipline? These questions remain unanswered and thus await further scholarship and jurisprudence.

The dissent's position is simple: Article III, or not? Article III status is the basis upon which the Court can exercise appellate jurisdiction and military courts are not Article III courts; therefore, no appellate jurisdiction exists. The argument is simplistic, possibly to a fault. It concentrates on the history of military courts and origins of the system dating back to colonial times. However, this position accepts "'military society' as unchanged in [American history]."[240] To take such a position is to ignore reality. The military looks nothing like it did at the founding of this country; it is now a standing independent society, whose numbers amount to more than some of the states in the United States. The framers, in fact, clearly opposed and feared the creation of a standing military body into the likes of what the military has become today.[241] The military in general, and military justice in particular, have changed a great deal since the days of Winthrop. Ignoring such facts, then, fatally undermines the dissent's argument. Its anachronistic analysis rests upon assumptions about the workings of the American government and the U.S. military that no longer hold true.

---

[239] For example, appellate review of military cases was initially thought to be antithetical to military justice, yet now an expansive system of appellate review exists without significant controversy. *See generally* Weber, *Sentence Appropriateness*, *supra* note 10, at 82-92 (detailing the development of military appellate courts). Congress sought to balance discipline and justice in enacting the UCMJ, but *Ortiz* calls into question whether that fundamental balancing relationship between discipline and justice should continue to drive decisions about the military justice system.

[240] Turley, *supra* note 16, at 694.

[241] *Id.* at 701.

This is not the only problem with the dissent. It also claims, wrongly, that if military courts are not Article III courts, they are thus invalidated. Yet, "The Article III courts … do not handle all the judicial business of the United States."[242] Throughout history Congress has created "specialized tribunals, including courts-martial that are free from the tenure and salary protections of Article III."[243] Consular Courts came about as a result of the congressional authority "over treaties and commerce under Article I."[244] These courts empowered certain American authorities overseas jurisdiction in dealing with U.S. citizens charged with breaking the laws of another country.[245] The Supreme Court has recognized the constitutional legitimacy of these courts despite the failures to meet all Article III requirements, such as providing grand jury hearings, because unlike the UCMJ and laws applicable to consular courts, the Constitution, does not apply outside of the United States.[246] That difference is the crucial distinction the dissent fails to address.

Consular courts are not the only instance in which Congress has created non-Article III courts that can appeal to the U.S. Supreme Court. Congress is authorized to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[247] "As part of this power, Congress has established legislative courts to handle both criminal and civil matters within the territories."[248] In other words, Congress acts as an independent sovereign creating legislative courts, and the other structures of government to carry out the functioning of the territory. This same authority applies to the District of Columbia.[249]

---

[242] Behan, *supra* note 34, at 230.

[243] *Id.* (internal citations omitted).

[244] Behan, *supra* note 34, at 232 (citing 234 U.S. CONST. art. I, § 8, cl. 1; Richard B. Saphire & Michael E. Solimine, *Shoring Up Article III: Legislative Court Doctrine in the Post CFTC v. Schor Era*, 68 B.U. L. REV. 85, 89-91 (1988)).

[245] *See, In re* Ross, 140 U.S. 453 (1891); REVISED STATUTES OF THE UNITED STATES §§ 4083-4096 (2d ed. 1878).

[246] *Id.* (overruled on holding, but analysis of what constitutes a fair trial remains true).

[247] U.S. CONST. art. IV, § 3.

[248] Behan, *supra* note 34, at 233.

[249] Kendall v. United States ex rel. Stokes, 12 Pet. 524, 619 (1838), *but see, Ortiz*, 138 S.Ct. at 2195 (Alito, J., and Gorsuch, J., dissenting).

Although the Supreme Court has said that legislative courts cannot receive or exercise the judicial power of the United States,[250] courts-martial are distinguishable. While they are technically legislative courts, they are also a perfect "example of a court system in which the protections, procedures, and inherent inefficiencies of the Article III courts would interfere with the military's ability to use the system effectively to help maintain good order and discipline."[251] Military courts must function differently than any other legislative courts because of the unique mission the military carries out within the government; to protect the national security and fight the nation's wars is unlike any other governmental duty. Therefore, the Supreme Court has consistently given deference to the military in running their system of discipline, "[t]o prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life."[252] Where a service member's constitutional rights are in conflict with the military purpose, there must be a balance to reach the compromise between the two, and Congress is empowered by the Constitution to make those compromises.[253]

The *Ortiz* dissent also falls short in that it tacitly recognizes the validity of the Court's own jurisprudence in making its argument. That is, it claims that Article III courts can have no part in the military justice system, while repeatedly citing to its own decisions on military jurisdiction and criminal justice.[254] The very evidence that the dissent relies upon belies its claim that military courts are not real federal courts.

---

[250] The Court held:

> These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, …. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress.

American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828).

[251] Behan, *supra* note 34, at 231.

[252] Schlesinger v. Councilman, 420 U.S. 738, 757 (1975).

[253] Behan, *supra* note 34, at 231 (citing Burns v. Wilson, 346 U.S. 137, 140 (1953); citing James M. Hirshhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. Rev. 177 (1984) (providing a theoretical framework and justification for the military deference doctrine)).

[254] *Cf. Ortiz*, 138 S.Ct. at 2200 (Alito, J., and Gorsuch, J., dissenting) (citing *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 119, 122 (1866)).

The fundamental distinction between the majority and dissent is whether military courts are Article I or Article III courts. Ultimately, neither is correct. This is a false dichotomy. The military justice system is both. Its historical roots stretch further back than the Constitution or even the Republic itself. The courts have questioned whether the removal of the commanders from the system will produce the desired effect, "If this trend continues, could we reach a point where the military justice system is no longer unique, and thus is no longer necessary?"[255] Have we actually realized the point at which the military justice system is no longer unique?

The uniqueness is the justification for differential treatment, but the majority and dissenting opinions, taken together, constitute a series of propositions that are at once axiomatic and self-contradictory: the military is both executive and legislative; it is judicial, and not; it can exercise judicial power, but maybe not the "constitutional" judicial power; it is deserving of appellate review, but generally should be left alone to attend to the business of war. The irresistible conclusion to be drawn from these observations, the authors would submit, is that the military is different, and this in turn justifies the differential treatment for a system of justice that is truly *sui generis*.

Ortiz appears to divide upon a sharp line between the majority and dissent, but the opinions actually share more common ground than it might appear at first. The majority lays out the thesis: military courts exercise a judicial function much as any other court. The dissent sets forth the antithesis: military courts-martial are a function of the executive branch, not the judiciary. Synthesizing the two opinions, the conclusion is apparent: military courts are unique, something else altogether. Courts-martial exist *between* the executive and legislative branch, and they require a judiciary capable of dealing with the competing interests of justice and discipline. Therefore, military courts must exist independent of federal courts, while also requiring appellate review to ensure justice remains a foremost concern.

In *Schlesinger v. Ballard*, the Supreme Court stated "[t]he responsibility for determining how best our Armed Forces shall attend to that business rests with Congress … and with the President[,]"[256] and not the Supreme

---

[255] United States v. Ralston, 24 M.J. 709, 711 (A.C.M.R. 1987) (appendix to opinion, extracted from United States v. Flores, ACMR 8600439 (A.C.M.R. 18 Mar. 1987) (Raby, J., concurring in the result)).

[256] Schlesinger v. Ballard, 419 U.S. 498, 510 (1975) (citing U.S. Const. art. I, § 8, cls. 12-14).

Court. Therefore, the current structure of the military justice system is unique enough to justify having a separate quasi-judicial system: "The differences between the military and civilian systems is the result of not only the claim of the necessity of a distinct legal system by the military but the acceptance of that claim by the Supreme Court." [257] Because the military is unique, special treatment is justified; that uniqueness also justifies a separate system that is without parallel elsewhere in the U.S. government structure. The military has long argued for a separate system, Congress and the President have given it one, and the Supreme Court has endorsed this compromise — repeatedly.[258]

If complete independence is not the answer, what is next for military justice? *Ortiz* concludes that military justice is a judicial function, and thus "separate but equal,"[259] though not in the pejorative sense usually implied by that phrase. However, the Supreme Court has never been timid in voicing its criticism about military courts' capacity to protect defendants' constitutional rights, "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."[260] While any judge advocate would object, that criticism is not entirely without merit. The military legal framework is set up to fight wars, and "the Court has previously voiced concern that imposing certain protections on the military justice system would distract the military from its war-fighting duties and drain resources."[261]

Military justice is fluid and adaptable. That is, in fact, the point of the system: it is adjustable to fit the needs of the military. The system has survived longer than the United States, and its future is not set in stone. The future of the military justice system is the mirror of its past: adaptable, flexible, ever-changing, but "[t]he history of the [UCMJ] and the evolution of the court-martial system into one that provides comparable protections of the rights of parties does not warrant the wholesale abandonment of the basic

---

[257] Turley, *supra* note 16, at 685, (citing James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. Rev. 177 (1984)).

[258] *Cf., Ortiz*, 138 S.Ct. 2165 (2018); O'Callahan v. Parker, 395 U.S. 258; Burns v. Wilson, 346 U.S. 137, 139-40 (1975); *In re* Grimley, 137 U.S. 147, 11 S. Ct. 54 (1890); Middendorf v. Henry, 425 U.S. 25 (1976); Greer v. Spock, 424 U.S. 828 (1976); Orloff v. Willoughby, 345 U.S. 83 (1953).

[259] *See* Brown v. Bd. of Educ., 347 U.S. 483, 74 S. Ct. 686 (1954).

[260] O'Callahan v. Parker, 395 U.S. at 265.

[261] Turley, *supra* note 16, at 716.

need for the court-martial process."[262] Throughout its history, one review observed, "the military justice system has served the United States well and will continue to do so into the future."[263]

Still, military justice is capable of change, sometimes from within. In fact, in 2016, Congress enacted "the most significant reforms to the Uniform Code of Military Justice since it was exacted six decades ago,"[264] and did so after an internal and collaborative Secretary of Defense-directed process that produced a 1300-page report recommending a massive overhaul of the entire military justice system.[265] The military took its own look at the system and decided changes were needed. *Ortiz* now builds upon those changes, giving credence to the idea many military justice practitioners have long held: the system is equally at least as based in justice as it is in discipline.

As military justice system's highest court recognized soon after the UCMJ's passage, efforts to separate justice from discipline are made in vain.[266] In this regard, the *Ortiz* majority and dissent, taken together, reveal what many military justice practitioners have believed all along: justice and discipline are not in opposition.[267] As one early report to the Secretary of the Army observed:

> Once a case is before a court-martial, it should be realized by all concerned that the sole concern is to accomplish justice under the law …. It is not proper to say that a military court-martial has a dual function as an instrument of discipline and as an instrument of justice. It is an instrument of justice and in fulfilling this function it will promote discipline.[268]

---

[262] Murnane, *supra* note 205.

[263] Roan and Buxton, *supra* note 63, at 211 (citing David A. Schlueter, Military Criminal Justice Practice and Procedure, 3 (5th ed. 1999)).

[264] Sen. John S. McCain (Ariz.), Remarks accompanying S. Rep. No. 114-255, *supra* note 23.

[265] *See generally* MJRG Report, *supra* note 32.

[266] United States v. Littrice, 13 C.M.R. 43, 47 (C.M.A. 1953) ("It was generally recognized [by Congress] that military justice and military discipline were essentially interwoven …. [C]onfronted with the necessity of maintaining a delicate balance between justice and discipline, Congress liberalized the military judicial system but also permitted commanding officers to retain many of the powers held by them under prior laws.")

[267] *See generally* Schlueter, *Justice or Discipline?*, *supra* note 1.

[268] The Comm. on the Unif. Code of Mil. Just., Good Order and Discipline in the Army, Rep. to Hon. Wilbert M. Brucker, Sec'y of the Army 12 (1960),

Military justice has existed longer than the United States, yet more than two hundred years after the Constitution was formed — with a military larger than the framers ever predicted and technological advances far beyond what the framers could have imagined — courts and military justice scholars are trying to fit military courts-martial into a constitutional framework that was created after courts-martial existed. Perhaps that is not the best approach to determining the proper place for courts-martial in our constitutional structure.

V. Conclusion

For a case that started off dealing with an obscure issue about a judge's service on two courts simultaneously, *Ortiz v. United States* just may end up being one of the most significant developments in the history of military justice. In the unremarkable act of determining that the Supreme Court has appellate jurisdiction over military justice "cases," the *Ortiz* majority may have inadvertently handed a victory to those who wish to reform what makes military justice unique and separate. Yet military justice is always changing, and all the *Ortiz* opinions taken together might do more to raise questions about the fundamental nature of military justice (and therefore what it should look like going forward) than to answer those questions.

Is the military justice system fundamentally judicial in character, or is it a mere instrument of executive authority? The answer, of course, is that it is both, and neither. Just as service members are part of society yet separate, just as they enjoy the basic privileges of citizenship while also being denied basic rights at specific points in a way civilians do not generally understand, so too is military justice a paradox. In the words of one recent study, "Military justice is separate from civilian justice, but not separate from American society; it's a different forum, but it's not a different country."[269] The fact that the military justice system is getting closer and closer to a civilianized judicial system is driven mainly through political pressures placed on congressional leaders. Institutions as long-standing as the United States military are constantly faced with pressures to change, calls to modernize. As this article has noted, the system needs fluidity, but an institution that is older than the Republic must remain true to its origins. The military requires a disciplined force. Due process must balance with discipline. That is what the current system achieves.

---

https://www.loc.gov/rr/frd/Military_Law/pdf/Powell_report.pdf.

[269] Bray, *supra* note 4, at xi.

The need for balance among competing interests is a familiar theme. While the Supreme Court has answered some questions about the nature of military justice, it has raised others. Age-old debates about the nature of military justice will persist. For our purposes, though, the answer is that in the armed forces justice and discipline are not only compatible, they are inseparable. Our current military justice system recognizes that fact and, arguably, strikes the appropriate balance between these two competing and foundational values.

INCIDENT TO SERVICE: THE FERES DOCTRINE AND THE UNIFORM CODE OF MILITARY JUSTICE

*James M. Brennan**

* James M. Brennan (J.D., 2019, New York University School of Law; B.S., 2015, The Ohio State University) currently works as a law clerk to Chief Judge D. Brooks Smith of the United States Court of Appeals for the Third Circuit. He is a member of the New York bar. Many thanks to the editors of The Air Force Law Review for their assistance and to Andrew Effron, Richard Epstein, Samuel Issacharoff, Benjamin Perotin, and Nathaniel Tisa for their feedback and encouragement.

The Feres doctrine is an interpretation of the Federal Tort Claims Act that bars military service members from bringing claims against the federal government that arose "incident to service." Despite widespread criticism among academics and lower courts, Feres's "incident to service" test is still the law of the land. The principal policy justification of the Feres doctrine is a concern about exposing too much of the military's unique discipline and command decisions to judicial second-guessing. Previously proposed alternatives to the Feres doctrine do not adequately handle this concern. This article proposes to refine the Feres "incident to service" test by looking to where Congress has already designated certain types of military activity as so critical that civilians may be subject to court-martial: the Uniform Code of Military Justice Article 2(a)(10). While the notion that Article 2(a)(10) functions as an activity test is not apparent in its recent caselaw, earlier cases and practices support just such an understanding. Courts should import this activity test from military law into the Feres "incident to service" context. By looking to the body of military justice law approved by the political branches, courts will be able to employ an "incident to service" test that only invites judicial second-guessing into activities the political branches have designated as not critical to the military's disciplinary structure.

I. Introduction

The Federal Tort Claims Act (FTCA)[1] is the principal statute enabling individuals to hold the federal government liable for its tortious conduct. Every year, thousands of FTCA claims, alleging a wide variety of misconduct, are filed in courts and federal agencies.[2] While a substantial percentage of these claims are unsuccessful,[3] one class of claimants is

---

[1] Federal Tort Claims Act, ch. 753, Title IV, 60 Stat. 842 (1946) (codified as amended at 28 U.S.C. §§ 1346(b)(1), 1402(b), 2401(b), 2402, 2671–2680 (2012)) [hereinafter FTCA].

[2] Lester S. Jayson & Robert C. Longstreth, Handling Federal Tort Claims § 1.01 (release No. 97, Nov. 2017). FTCA claims are normally first filed in federal agencies, because the FTCA requires an exhaustion of administrative remedies before claimants may bring suit in court. *See* 28 U.S.C. § 2675(a).

[3] George A. Bermann, *Federal Tort Claims at the Agency Level: The FTCA Administrative Process*, 35 Case W. Res. L. Rev. 509, 539 n.144 (1985).

particularly unlikely to obtain relief: military service members. Service member claimants face the unique hurdle of *Feres v. United States*, a 1950 Supreme Court case which held "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[4]

This holding, known as the *Feres* doctrine, has been the subject of "widespread, almost universal criticism."[5] Although *Feres* has largely stayed out of the popular press,[6] the doctrine is disfavored among military law experts,[7] many federal judges,[8] and the American Bar Association.[9] The most pervasive criticism of the *Feres* doctrine is that "incident to service" has come to encompass too many types of service member claims.[10] This criticism is particularly repeated in cases involving military-sponsored recre-

---

[4] Feres v. United States, 340 U.S. 135, 146 (1950).

[5] United States v. Johnson, 481 U.S. 681, 700–01 & n.* (1987) (Scalia, J., dissenting) (quoting *In re* "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 1242, 1246 (E.D.N.Y. 1984)) (collecting criticisms).

[6] *But see, e.g.*, Harriet Sokmensuer, *Set on Fire by a Co-Worker, Army Nurse and Mom-of 3 Has a New Cause: Making the Military Pay*, PEOPLE, Apr. 25 2019, https://people.com/politics/army-nurse-katie-blanchard-fire-fights-feres-doctrine-reform/; Byron Pitts, *A Question of Care: Military Malpractice?*, CBS NEWS, Jan. 31, 2008, https://www.cbsnews.com/news/a-question-of-care-military-malpractice/ (reporting on the death of Sergeant Carmelo Rodriguez).

[7] *See, e.g.*, *Carmelo Rodriguez Military Medical Accountability Act of 2009: Hearing on H.R. 1478 Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 148–53 (2009) [hereinafter *2009 H.R. 1478 Hearing*] (statement of Eugene R. Fidell, President, Nat'l Inst. of Military Justice); Deirdre G. Brou, *Alternatives to the Judicially Promulgated* Feres *Doctrine*, 192 MIL. L. REV. 1 (2007).

[8] *See, e.g.*, Richards v. United States, 176 F.3d 652, 657–58 (3d Cir. 1999); *see also* Nicole Melvani, Comment, *The Fourteenth Exception: How the* Feres *Doctrine Improperly Bars Medical Malpractice Claims of Military Service Members*, 45 CAL. W. L. REV. 395, 432 n.232 (2010) (collecting examples).

[9] *2009 H.R. 1478 Hearing*, *supra* note 7, at 114–15 (statement of Stephen A. Saltzburg, Member, ABA House of Delegates) (asserting that the position of the ABA is that Congress at a minimum should "repeal the *Feres* doctrine as it applies to military medical malpractice cases").

[10] *See, e.g.*, Costo v. United States, 248 F.3d 863, 870 n.1 (9th Cir. 2001) (Ferguson, J., dissenting) ("[T]he 'incident to service' test appears to have given way to an 'incidental to service' inquiry, further distorting Congress' original language in the FTCA."); Major v. United States, 835 F.2d 641, 644 (6th Cir. 1987); Barry Bennett, *The* Feres *Doctrine, Discipline, and the Weapons of War*, 29 ST. LOUIS U. L.J. 383, 388–93 (1985).

ation[11] or medical malpractice.[12] Other critics attack the legal reasoning of *Feres*'s "incident to service" test itself,[13] with the harshest declaring *Feres* to be a judicial usurpation of Congress's legislative role,[14] or a violation of the Equal Protection Clause.[15] Yet despite the weight of these criticisms, Congress has not abrogated the *Feres* doctrine,[16] a point oft-cited by defenders of *Feres*.[17]

Today, the *Feres* doctrine is best justified as a means to protect the unique structure of military discipline from judicial interference and second-guessing.[18] Even critics of the *Feres* doctrine accept the validity of this rationale, if not its application.[19] However, the use and discussion of the military discipline rationale of *Feres* is strangely unmoored from a careful analysis of the most important source of military discipline: the Uniform

---

[11] *See, e.g.*, *Costo*, 248 F.3d at 869 (majority opinion).

[12] *See, e.g.*, Persons v. United States, 925 F.2d 292, 294–96 (9th Cir. 1991).

[13] *See, e.g.*, United States v. Johnson, 481 U.S. 681, 694–701 (1987) (Scalia, J., dissenting).

[14] Jonathan Turley, *Pax Militaris: The* Feres *Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 Geo. Wash. L. Rev. 1, 67–70 (2003).

[15] *Costo*, 248 F.3d at 874–76 (Ferguson, J., dissenting).

[16] In the latest National Defense Authorization Act, Congress included a provision authorizing the Secretary of Defense to pay certain service member claims against the United States arising from the medical malpractice of a Department of Defense healthcare provider. *See* National Defense Authorization Act for Fiscal Year 2020 (NDAA 2020), Pub. L. No. 16-92, 133 Stat. 1457, sec. 731 (2019) (to be codified at 10 U.S.C. § 2733a). For reasons explained below, *infra* Section IV.E.2, this does not repeal the *Feres* doctrine or constitute legislative endorsement of the *Feres* doctrine for other claims. Prior to the enactment of NDAA 2020, proposed bills would have amended the FTCA to allow service member medical malpractice claims to be brought in the same manner as other FTCA actions. *See* H.R. 1478, 111th Cong. (2009); H.R. Rep. No. 111-466 (2010).

[17] *See, e.g.*, *Johnson*, 481 U.S. at 688 n.* (majority opinion); Joan M. Bernott, *Fairness and* Feres*: A Critique of the Presumption of Injustice*, 44 Wash. & Lee L. Rev. 51, 55 & n.32 (1987) (pointing to "thirty-seven years of congressional ratification" and failed bills on military medical malpractice reform).

[18] *See, e.g.*, Millang v. United States, 817 F.2d 533, 535 (9th Cir. 1987) (finding the effect on military affairs and military discipline to be the "key inquiry" in *Feres* cases); *see also* Chappell v. Wallace, 462 U.S. 296, 299–304 (1983).

[19] *See, e.g.*, Joseph J. Dawson, Note, *In Support of the* Feres *Doctrine and a Better Definition of "Incident to Service,"* 56 St. John's L. Rev. 485, 500–04 (1982); Geoffrey G. Leder, Casenote, *The* Feres *Doctrine, Negligent Prenatal Care, and Injuries to the Children of Pregnant Military Servicewomen:* Brown v. United States, 76 U. Cin. L. Rev. 1043, 1065 (2008).

Code of Military Justice (UCMJ).[20] The UCMJ does not initially appear useful in limiting the *Feres* doctrine's application to service members because active duty service members are subject to military discipline at all times.[21] However, the UCMJ covers more than just service members; it also contains provisions that subject civilians to military justice under certain circumstances.[22] This article suggests that a better understanding of "incident to service" can be gleaned from the circumstances under which civilians are subject to military justice. Furthermore, this article proposes that this understanding of "incident to service" can be operationalized in FTCA cases and suggests that *Feres* should only be used to bar service member claims when a civilian injured under similar circumstances could have been subject to military justice.

Part II of this article addresses the current state of *Feres* doctrine jurisprudence. Section II.A provides background information on the legislative history of the FTCA, the text of the FTCA, and the Supreme Court's interpretations of the FTCA as applied to service members. Section II.B discusses how the courts and have approached the *Feres* doctrine and summarizes the alternative proposals to *Feres* that judges and commentators have put forth. Stepping back from *Feres*, Part III discusses military justice. Section III.A describes the basics of the American military justice system, including the development of the UCMJ. Sections III.B and III.C focus on the personal jurisdiction provisions of UCMJ Article 2.[23] Section III.D discusses the divergent approaches with respect to the UCMJ's principal civilian jurisdictional provision, Article 2(a)(10).[24] Part IV finally ties the two areas of jurisprudence together. Section IV.A first analyzes criticisms of *Feres* in light of the robust law on military justice. Section IV.B then discusses the weakness of current alternatives to *Feres*, with particular attention to the treatment of the military discipline rationale. Section IV.C advances a new test of "incident to service," where the *Feres* doctrine only bars a service member's claim when a civilian injured under similar circumstances would have been subject to military justice. Section IV.D applies this new "incident to service" test, in conjunction with other exceptions to the FTCA, to paradigm *Feres* cases. Section IV.E addresses anticipated concerns with this new

[20] 10 U.S.C. §§ 801–947 (2012).

[21] *Cf.* Brou, *supra* note 7, at 29 (citing UCMJ art. 2 (codified at 10 U.S.C. § 802)).

[22] UCMJ arts. 2(a)(8)–(12) (codified at 10 U.S.C. § 802(a)(8)–(12)).

[23] UCMJ art. 2 (codified at 10 U.S.C. § 802).

[24] UCMJ art. 2(a)(10) (codified at 10 U.S.C. § 802(a)(10)).

understanding of "incident to service," including the ability of lower courts to apply this new understanding in line with precedent.

II. The *Feres* Doctrine

A. The *Feres* Doctrine's Origin and Expansion

Feres is first and foremost an interpretation of the FTCA. Thus, despite references to *Feres* in other caselaw,[25] the *Feres* doctrine cannot be understood without examining the FTCA. This section begins with a brief history of the FTCA, followed by an overview of the FTCA and its provisions. This section then outlines the Supreme Court's decisions on the FTCA's applicability to service members, both pre- and post-*Feres*.

1. The Need for the FTCA

Under the doctrine of sovereign immunity, the federal government cannot be sued without its consent.[26] While there are a variety of historical and policy-based justifications for sovereign immunity, the need for the government to waive its sovereign immunity is a "rule of strict construction" that applies in all circumstances, regardless of the strengths of the justifications in any particular case.[27] This absolute immunity is not lightly waived either; the government's consent to suit must be expressed both "unequivocally"[28] and via the legislative branch.[29] In order to relieve the harshness of sovereign

---

[25] Chappell v. Wallace, 462 U.S. 296, 298–99 (1983) (using the reasoning of *Feres* to support barring *Bivens* actions brought by service members); Steve Vladeck, *Justice Thomas and the* Feres *Doctrine*, Lawfare (June 27, 2013), https://www.lawfareblog.com/justice-thomas-and-feres-doctrine ("[T]he mischief caused by *Feres* isn't limited to FTCA suits by service members."). A discussion of *Bivens* is beyond the scope of this article.

[26] *See, e.g.*, United States v. Navajo Nation, 556 U.S. 287, 289 (2009); *see also, e.g.*, California v. Arizona, 440 U.S. 59, 61 (1979) (finding this principle settled, even when a State files a claim against the Unites States). For a record of the emergence of this rule in Supreme Court decisions, see Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 Geo. Wash. Int'l L. Rev. 521, 523 n.5 (2003).

[27] John Paul Stevens, *Is Justice Irrelevant?*, 87 Nw. U. L. Rev. 1121, 1125–26, 1129–30 (1993).

[28] *See, e.g.*, United States v. Bormes, 568 U.S. 6, 9 (2012) (quoting United States v. Nordic Village, Inc., 503 U.S. 30, 33–34 (1992)).

[29] United States v. Dalm, 494 U.S. 596, 610 (1990) ("If any principle is central to our understanding of sovereign immunity, it is that the power to consent to such suits is reserved to Congress.").

immunity in individual cases, Congress may pass private bills that either grant relief directly or waive immunity to suit with respect to an individual matter. Congress also has the power to pass laws waiving sovereign immunity.[30] Before the FTCA, Congress passed a few acts waiving sovereign immunity in special circumstances:[31] The Private Vessels Act of 1887 allowed suits for damages caused by a public vessel,[32] and the Railroad Control Act of 1918 did the same for federally controlled railroad carriers.[33]

These limited waivers of sovereign immunity, however, could not cover the wide range of torts caused by an expanding federal government. Individuals unable to sue the United States for their injuries because of sovereign immunity instead lobbied Congress for relief, which caused Congress to spend an inordinate amount of time and effort on private bills.[34] In response to this private bill logjam, Congress passed the FTCA[35] as Title IV of the Legislative Reorganization Act of 1946.[36] Congress prohibited the introduction of any private bill for its consideration when that private bill consists of claims that fall under the waiver of sovereign immunity contained in the new FTCA.[37] Thus, while the types of claims that fall under the FTCA's waiver (detailed below) can no longer be remedied via private bill, those claimants have the ability to sue the federal government in court pursuant to the FTCA's limitations. Meanwhile, claims that fall outside the FTCA waiver remained barred by sovereign immunity and remediable only through the disfavored and uncommon private bill process (unless there is an applicable *sui generis* statute waiving sovereign immunity).[38] The result of this dichotomy is that,

---

[30] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 380 (1821) ("But [a sovereign's] consent is not requisite in each particular case. It may be given in a general law.").

[31] Paul Figley, *In Defense of* Feres*: An Unfairly Maligned Opinion*, 60 Am. U. L. Rev. 393, 405–08 (2010).

[32] Public Vessels Act, ch. 428, 43 Stat. 1112 (1887) (codified as amended at 46 U.S.C. §§ 31101–31113 (2012)).

[33] Railroad Control Act, ch. 25, § 10, 40 Stat. 451, 456 (1918).

[34] *See Tort Claims: Hearings on H.R. 5373 and H.R. 6463 Before the H. Comm. on the Judiciary*, 77th Cong. 49–55 (1942).

[35] FTCA, *supra* note 1.

[36] Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 812 (codified as amended in scattered sections of 28 U.S.C.) ("An Act to provide for increased efficiency in the legislative branch of the Government.").

[37] *See id.* § 131 (codified at 2 U.S.C. § 190g (2012)).

[38] *See, e.g.*, Fitch v. United States, 513 F.2d 1013, 1016 & n.4 (6th Cir. 1975) (dismissing the FTCA complaint of plaintiff who was inducted to the Army via an erroneous draft card, but noting that the dismissal "does not jeopardize [his] opportunity

for most potential claimants, the issue of inclusion within the FTCA's waiver will determine whether any reasonable prospect of relief exists.

2. Text and Structure of the FTCA

The FTCA's principal waiver provision, 28 U.S.C. § 1346(b)(1), generally waives sovereign immunity for claims that are:

> [1] against the United States, [2] for money damages, … [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[39]

There are a few additional things to note about the general rule of the FTCA before addressing its exceptions. First, the FTCA provides that only the United States may be sued for tort claims arising from the negligent actions of its employees — not the employees themselves.[40] Second, military service members are explicitly included as employees of the government who may cause compensable harm.[41] Third, the requirement that the United States be in similar circumstances to a private person is reinforced elsewhere in the statute, where the United States' liability is defined "in the same manner and to the same extent as a private individual under like circumstances."[42] This parallel private liability requirement is similar to how the earlier sovereign immunity waiver statutes were structured.[43]

---

to secure compensation from Congress for the injustice that befell [him]"); Bernott, *supra* note 17, at 67 n.103 (suggesting that relief via private bill might be appropriate for any *Feres*-barred "genetic injury" claims not remedied by a separate statute).

[39] FDIC v. Meyer, 510 U.S. 471, 477 (1994) (alterations in original).

[40] *See* 28 U.S.C. § 2679(b)(1). The major exception to this rule is when the civil action "is brought for a violation of the Constitution of the United States." § 2679(b)(2)(A).

[41] FTCA, *supra* note 1, at § 2671 ("'Acting within the scope of his or employment', in the case of member of the military … means acting in line of duty."); *see also* 38 U.S.C. § 105(a) (2012) (defining "line of duty"); *infra* notes 156–159 and accompanying text.

[42] *Id.* § 2674.

[43] *See* Figley, *supra* note 31, at 405. For example, the Public Vessels Act first broadly waives immunity for actions against the United States arising from public vessels, 46 U.S.C. § 31102 (2012), and subsequently ensures the United States at least the same

The FTCA's exceptions are enumerated in Section 2680. The exceptions most relevant for an analysis of *Feres* are the foreign injury exception,[44] the combatant activities exception,[45] the intentional tort exception,[46] and the discretionary function exception.[47] The first two exceptions are fairly straightforward. The foreign injury exception, § 2680(k), "bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred" notwithstanding the fact that liability under the FTCA is generally determined in "accordance with the law of the place where the act or omission occurred."[48] The combatant activities exception, § 2680(j), is not a generic military exception. First, the exception only applies "during time of war."[49] Second and more importantly, is that courts and commentators have interpreted "combatant activities" to encompass an exceedingly narrow range of activity even within wartime.[50]

The intentional tort exception, § 2680(h), is more complicated. The unaptly named exception is an enumeration of specific torts that does not cover many intentional torts (like trespass) and also applies to some torts that can arise from negligent conduct (like misrepresentation).[51] While the exception clearly states assault and battery claims are not capable of being

---

liability limitations that a private vessel owner has, 46 U.S.C. § 31106.

[44] FTCA, *supra* note 1, § 2680(k) (excepting "[a]ny claim arising in a foreign country").

[45] *Id.* at § 2680(j) (excepting "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war").

[46] *Id.* at § 2680(h) (excepting "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights").

[47] *Id.* at § 2680(a) (excepting "[a]ny claim … based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused").

[48] Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004); *see also* Paul Figley, A Guide to the Federal Tort Claims Act 39 (2012).

[49] FTCA, *supra* note 1, § 2680(j).

[50] *See, e.g.*, *In re* "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 1242, 1255 (E.D.N.Y. 1984); Skeels v. United States, 72 F. Supp. 372 (W.D. La. 1947) (allowing a claim resulting from Army target practice in the Gulf of Mexico during World War II); Ann-Marie Woods, Note, *A "More Searching Judicial Inquiry": The Justiciability of Intra-Military Sexual Assault Claims*, 55 B.C. L. Rev. 1329, 1365 n.182 (2014); Comment, *The Federal Tort Claims Act*, 56 Yale L.J. 534, 548–49 (1947). *See generally* Figley, *supra* note 48, at 38–39.

[51] Levin v. United States, 568 U.S. 503, 507 n.1 (2013).

brought under the FTCA, subsequent acts and decisions have held this exception inapplicable to many medical malpractice claims.[52] However, what most complicates this exception are the cases where an incident brings rise to both excepted torts (like battery) and unexcepted torts (like negligence). As an initial matter, a claimant cannot simply recharacterize intentional conduct, like throwing a well-aimed punch, as merely negligent in order to escape this requirement.[53] But this bar on recharacterization does not provide a rule for claims alleging the government negligently supervised (or hired, or trained) the employee who committed a tort excepted by § 2680(h).

In *Sheridan v. United States*, the Supreme Court found the intentional tort exception inapplicable to a negligence claim in the case of an intentionally tortious government employee acting *outside* the scope of employment where the government's liability arose independent of the employer-employee relationship (such as liability under a Good Samaritan duty).[54] *Sheridan* left open the question on how the intentional tort exception applies in the case of a tortious employee acting *within* the scope of employment,[55] while lower courts generally require a claimant to show that the government had a duty to supervise independent of the employment relationship.[56] The two other opinions of *Sheridan* advocated very different tests. Justice Kennedy, concurring in judgment, would apply the intentional tort exception to any claim that arose from the employment relationship the government has with a tortious

---

[52] *See, e.g.*, 10 U.S.C. § 1089(e) (waiving explicitly the intentional tort exception for claims of medical malpractice committed by military personnel); FIGLEY, *supra* note 48, at 32–33 (citing Keir v. United States, 853 F.2d 398, 410–11 (6th Cir. 1988)). For the development of statutes waiving the intentional tort exception for medical malpractice, see JAYSON & LONGSTRETH, *supra* note 2, § 6.01[4].

[53] *See* Lambertson v. United States, 528 F.2d 441, 443 (2d Cir. 1976) ("[A] court must look, not to the theory upon which the plaintiff elects to proceed, but rather to the substance of the claim which he asserts."); FIGLEY, *supra* note 48, at 32 (citing United States v. Faneca, 332 F.2d 872, 875 (5th Cir. 1964)).

[54] Sheridan v. United States, 487 U.S. 392, 402–03 (1988) (6-3 in judgment; 5 agreeing in majority opinion); *see also* Leleux v. United States, 178 F.3d 750, 757 (5th Cir. 1999); FIGLEY, *supra* note 48, at 33. *Sheridan*'s holding limited dicta in an earlier case decided on the *Feres* bar. *See* United States v. Shearer, 473 U.S. 52, 54–57 (1985) (plurality opinion) ("We read [§ 2680(h)] to cover claims like respondent's that sound in negligence but stem from a battery committed by a Government employee.").

[55] *See Sheridan*, 487 U.S. at 392 n.8.

[56] *See* JAYSON & LONGSTRETH, *supra* note 2, §§ 9.05[2][h] nn.134–35, 13.06[2] n.84–90. *But see, e.g.*, Brock v. United States, 64 F.3d 1421, 1425 (9th Cir. 1995) (finding "that it would be irrational to allow the Government immunity for negligent supervision of employees, but deny it immunity for negligent supervision of nonemployees").

employee regardless of the scope of employment, but would not bar any claim predicated on a theory of liability arising from a different relationship.[57] The three-justice dissent, however, would apply the intentional tort exception to bar any claim where the intentional tort is "essential to the claim," regardless of the particular cause of action.[58] However, the majority's test of *Sheridan* is still the law and thus FTCA claims alleging negligent supervision because of an intentional tort committed by a government employee turn on (1) whether that intentional tort was committed in the scope of employment and (2) whether an independent duty to supervise existed.[59]

The discretionary function exception, contained in § 2680(a), is the most important and sweeping of the FTCA exceptions.[60] It is also "regarded as [the most] difficult to understand or to apply."[61] The settled understanding is that the exception bars claims where the government conduct at issue is both (1) a matter of judgment and (2) "susceptible to a policy analysis."[62] This exception can be used to bar FTCA claims arising from the military's discretionary actions as well.[63] However, because of the breadth of the discretionary function exception's two prongs it is routinely criticized for

---

[57] *See Sheridan*, 487 U.S. at 406–08 (Kennedy, J., concurring in judgment) ("If the allegation is that the Government was negligent in the supervision or selection of the employee and that the intentional tort occurred as a result, the intentional tort exception of § 2680(h) bars the claim.").

[58] *See Sheridan*, 487 U.S. at 408–09 (O'Connor, J., dissenting) ("A parallel construction of the exception at issue here leads to the conclusion that it encompasses all injuries associated in any way with an assault or battery.")

[59] For an argument that the law should allow FTCA claims for intra-military violence under this standard, see Elizabeth A. Reidy, Comment, Gonzales v. United States Air Force*: Should Courts Consider Rape to be Incident to Military Service*?, 13 AM. U. J. GENDER, SOC. POL. & L. 635, 661–65 (2005) (arguing that the military has an affirmative duty to protect service members from dangerous individuals and that no FTCA exceptions (or *Feres*) apply to claims alleging the failure of that duty).

[60] *See* FIGLEY, *supra* note 48, at 26–30; David S. Fishback, *The Federal Tort Claims Act is a* Very Limited *Waiver of Sovereign Immunity – So Long as Agencies Follow Their Own Rules and Do Not Simply Ignore Problems*, U.S. ATTYS.' BULL., Jan. 2011, at 16, 16 (quoting McMellon v. United States, 387 F.3d 329, 335 (4th Cir. 2004)).

[61] JAYSON & LONGSTRETH, *supra* note 2, § 12.04[1].

[62] United States v. Gaubert, 499 U.S. 315, 325 (1991). The Court has actually improved the clarity of the second prong over time. *See* Berkovitz v. United States, 486 U.S. 531, 536 (1988) (describing the second prong as exempting liability from decisions "of the kind that the discretionary function exception was designed to shield"); *see also* JAYSON & LONGSTRETH, *supra* note 2, § 12.05[1] (describing changes in the formulation of the exception).

[63] *See* Brou, *supra* note 7, at 70 n.437 (collecting examples).

excluding too many claims.[64] In effect, the discretionary function exception is only certain *not* to bar FTCA claims when the injury was a result of the violation of a mandatory rule, regulation, or directive.[65] But determining whether an action is "mandated" by a policy is its own challenge.[66] Praising function over form, the Supreme Court has acknowledged the existence of "expressed or implied" policy in non-comprehensive-regulation — such as internal guidance and case-by-case proceedings — that may be gleaned from the "general aims and policies of the controlling statute."[67]

Despite these numerous statutory exceptions to the FTCA waiver, there is no explicit exception barring claims brought by service members, even though earlier bills included an exception.[68] Nor is there anything in the bill's committee reports addressing the meaning of this omission and what Congress envisioned for service member claims.[69] One explanation for this omission is surplusage: Congress thought service member claims would already be excluded by the existence of other regimes.[70] Furthermore, a deluge of private bills from service members was never an issue for Congress,[71] so perhaps Congress thought an explicit exclusion would not be worth the candle. The canonical counter-explanation, however, is that no explicit exclusion exists because no exclusion was ever meant. After the

---

[64] *See* Andrew Hyer, Comment, *The Discretionary Function Exception to the Federal Tort Claims Act: A Proposal for a Workable Analysis*, 2007 BYU L. Rev. 1091, 1107 (2007) (collecting criticisms and praises).

[65] *See Gaubert*, 499 U.S. at 324; Fishback, *supra* note 60, at 19.

[66] *See* Fishback, *supra* note 60, at 19–20.

[67] *Gaubert*, 499 U.S. at 324; *see also* Anestis v. United States, 749 F.3d 520, 528–29 (6th Cir. 2014) (finding a mandatory policy not based on any written directive, but on testimony that showed a policy was expected of VA employees).

[68] *See, e.g.*, United States v. Brooks, 169 F.2d 840, 847, 849–51 (4th Cir. 1948) (Parker, J., dissenting), *rev'd*, 337 U.S. 49 (1949). *But see* Figley, *supra* note 31, at 456–58 (dismissing the importance of earlier bills because of the wide variety of tort claims bills that were considered across a two-decade long period).

[69] Feres v. United States, 340 U.S. 135, 138 (1950).

[70] Figley, *supra* note 31, at 456–58 (citing Feres v. United States, 177 F.2d 535, 537–38 (2d Cir. 1949), *aff'd*, 340 U.S. 135 (1950)).

[71] *Feres*, 340 U.S. at 140. *But see* Note, *Military Personnel and the Federal Tort Claims Act*, 58 Yale L.J. 615, 618 n.12 (1949) (noting that "there is no available compilation of data as to the classes of people who submitted private bills to Congress" and that several private laws passed before 1946 compensated service members for property losses suffered in service, and awarded survivors of deceased service members the equivalent of six months of decedent's pay).

Fourth Circuit held (in *United States v. Brooks*, discussed below)[72] that the FTCA's waiver was intended by Congress to not apply to claims from service members regardless of the claim's connection to military service, the principal drafter of the FTCA called the court's interpretation of congressional intent "utterly erroneous."[73] Just like many other pieces of legislation then, an examination of the FTCA's previous drafts does not dispel any confusion about the final statute.[74] Thus, the applicability of the FTCA to service members, because of both the statute's dearth of legislative history and impact on millions of service members, has always been a difficult question, desperate for clarification from the Supreme Court.[75]

3. Supreme Court Interpretation of the FTCA as Applied to Service Members

The first Supreme Court case to interpret the FTCA's applicability to injured service members was *United States v Brooks*.[76] In *Brooks*, two Army brothers on leave were driving their private car with their civilian father when an Army truck negligently struck them.[77] The Fourth Circuit held that while the civilian father could recover under the FTCA, the service member sons and their estates could not.[78] The Supreme Court reversed, finding that the FTCA did not categorically exclude claims by service members.[79] In deciding for the Brooks brothers, the court stressed the fact that the accident "had nothing to do with the Brooks' army careers," and noted "were the accident incident to the Brooks' service, a wholly different case would be presented."[80]

---

[72] United States v. Brooks, 169 F.2d 840, 846 (4th Cir. 1948).

[73] Note, *supra* note 71, at 621 n.26.

[74] *Cf.* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 873 (1930).

[75] *Brooks*, 169 F.2d at 842; Jefferson v. United States, 77 F. Supp. 706, 711 (D. Md. 1948).

[76] *Brooks,* 169 F.2d 840.

[77] *Id.* at 841.

[78] *Id.* at 841, 846.

[79] United States v. Brooks, 337 U.S. 49, 51 (1949) ("We are not persuaded that 'any claim' means 'any claim but that of servicemen.'").

[80] *Id.* at 52.

That wholly different case came to the Court in *Feres*. *Feres* was a consolidation of three cases: two medical malpractice cases — *Griggs v. United States*[81] and *Jefferson v. United States*[82] — and *Feres v. United States*, which involved a defective heating plant that caused a deadly fire in an Army barracks.[83] Unlike *Brooks*, the injuries in *Feres* were all sustained while the service members were on active duty.[84] The Court, answering the question left unresolved in *Brooks*, held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."[85] The Court in *Feres* provided three justifications for its "incident to service" exclusion. First, the United States could not be liable because there is no "remotely analogous" private individual that runs a military.[86] Second, it would make "no sense" to apply different state law to the claims of service members who had no choice where to be stationed in a "distinctively federal" system.[87] Third, Congress had already created other compensation systems for service members and veterans.[88]

These three rationales have been reaffirmed by later Courts, despite significant variations in the underlying facts.[89] In *Stencel Aero Engineering Corp. v. United States*, a National Guardsman injured by his aircraft's malfunctioning ejection system sued both the United States and the system manufacturer (Stencel), who in turn cross-claimed against the government.[90] The Court held that *Feres* barred not only the service member's claim against the United States, but also the indemnification claim raised by the third-party manufacturer.[91] The Court found the rationales of *Feres*

---

[81] 178 F.2d 1 (10th Cir. 1949) (allowing recovery).

[82] 178 F.2d 518 (4th Cir. 1949) (denying recovery).

[83] 177 F.2d 535, 536 (2d Cir. 1949) (denying recovery).

[84] Feres v. United States, 340 U.S. 135, 138 (1950).

[85] *Id.* at 146.

[86] *Id.* at 141–42.

[87] *Id.* at 142–44.

[88] *Id.* at 144–45.

[89] United States v. Johnson, 481 U.S. 681, 688–92 (1987) (5-4); Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 671–74 (1977).

[90] *Id., Stencel*, 431 U.S. at 667–68.

[91] *Id.* at 674. In the time since *Stencel*, a robust government contractor defense has developed, preventing both civilians and service members from claiming damages from products made by government contractors. *See* Boyle v. United Techs. Corp., 487 U.S. 500 (1988) (5-4); Aaron L. Jackson, *Civilian Soldiers: Expanding the Government*

controlling in indemnity actions, such as Stencel's, "where the injured party is a serviceman."[92] This emphasis on whether a claim arose because of a service member's injury — later dubbed the genesis test — has been applied by lower courts beyond the indemnity context.[93] On the other side of the injured–injurer equation, a bare majority of the Court, in *United States v. Johnson*, held that the same rationales for *Feres* applied even when the alleged tortious conduct that injured a service member was committed by a civilian (in the Federal Aviation Administration) and not a member of the military.[94]

In expanding the holding of *Feres*, *Stencel* and *Johnson* emphasized rationales not present in the original *Feres* opinion, namely, that the *Feres* doctrine exists to prevent both judicial second-guessing of sensitive military decisions and negative effects on military discipline.[95] The Court in *Johnson* concluded that any service member suit involving service-related activity "could undermine the commitment essential to effective service" because "military discipline involves not only obedience to orders, but more generally duty and loyalty to one's service and to one's country."[96]

Johnson has remained the last word from the Supreme Court on the scope of the *Feres* doctrine and the strength of its rationales.[97] In the thirty years since *Johnson*, the challenge for lower courts has been in reconciling the expanding rationales of *Feres* with *Brooks*'s recognition that service members are not categorically excluded from the FTCA. As explored below, this challenge has yielded "an extremely confused and confusing area of law."[98]

Contractor Defense to Reflect the New Corporate Role in Warfare, 63 A.F. L. Rev. 211, 215–19 (2009).

[92] *Stencel*, 431 U.S. at 674.

[93] Molly Kokesh, Note, *Applying the* Feres *Doctrine to Prenatal Injury Cases After* Ortiz v. United States, 93 Denv. L. Rev. Online 1, 5–6 (2016); *see also, e.g.*, Figley, *supra* note 48, at 22 n.70 (collecting cases of *Feres*-barred loss of consortium claims).

[94] United States v. Johnson, 481 U.S. 681, 686 (1987).

[95] *See Johnson,* 481 U.S. at 690–91; *Stencel*, 431 U.S. at 671–73 (citing United States v. Brown, 348 U.S. 110, 112 (1954)).

[96] *Johnson*, 481 U.S. at 691.

[97] Purcell v. United States, 656 F.3d 463, 465–66 (7th Cir. 2011).

[98] Taber v. Maine, 67 F.3d 1029, 1038 (2d Cir. 1995).

B. Applications and Criticism of *Feres*

Like most areas of law, the lower courts largely bear the burden in applying the *Feres* doctrine and filling in gaps left by the Supreme Court's caselaw.[99] What follows in Section II.B.1 is a description of the lower courts' struggle to make sense of *Feres*. Section II.B.2 presents the array of critiques of *Feres* as a matter of legal reasoning. Finally, Section II.B.3 summarizes the alternatives to *Feres* by courts and commentators.

1. Struggles in Applying Feres

While the Supreme Court has had several opportunities to modify or clarify the *Feres* doctrine, the Court insisted in *United States v. Shearer* that "[t]he *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in the light of the statute as it has been construed in *Feres* and subsequent cases."[100] Despite denouncing bright-line rules in *Feres* cases, the Court has not wholeheartedly embraced standards either. In *United States v. Stanley*, the Court held that "[a] test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking" — one rationale of *Feres* — would be impermissible for its intrusion upon military matters.[101]

There is an obvious tension between these two holdings: one eschewing bright-line rules, and the other insisting on a bright-line rule, at least for the military discipline rationale.[102] To resolve this tension, lower courts have turned to multi-factor tests to determine whether a claim arose "incident to service" (an approach seemingly endorsed by *Shearer*), but at a level of generality where each case's facts are compared to "significant factual

---

[99] *Cf.* Samuel Issacharoff, *What Does the Supreme Court Do?*, *in* The U.S. Supreme Court and Contemporary Constitutional Law 19, 25–27 (Kaiser et al. eds., 2019) (describing the rarity of Supreme Court review and the importance of providing a consistent body of law for lower courts to apply).

[100] 473 U.S. 52, 57 (1985). *But see* Tara Willke, *Three Wrongs Do Not Make a Right: Federal Sovereign Immunity, the* Feres *Doctrine, and the Denial of Claims Brought by Military Mothers and Their Children for Injuries Sustained Pre-Birth*, 2016 Wis. L. Rev. 263, 281 (arguing that courts have created bright-line rules which deny recovery). *See generally* Jayson & Longstreth, *supra* note 2, § 3.44 (summarizing *Shearer*).

[101] 483 U.S. 669, 682 (1987).

[102] For an example of a court acknowledging this dilemma, see *Regan v. Starcraft Marine LLC*, 524 F.3d 627, 635–36 (5th Cir. 2008).

guideposts" (in an effort to satisfy *Stanley*).[103] There exists a handful of factors every court is likely to consider in its balancing test:[104]

> (1) the place where the negligent act occurred, (2) the duty status of the plaintiff when the negligent act occurred, (3) the benefits accruing to the plaintiff because of the plaintiff's status as a service member, and (4) the nature of the plaintiff's activities at the time the negligent act occurred.[105]

Of course, not one of these factors is determinative.[106] As a result, these balancing tests yield inconsistent results,[107] even in cases with similar facts to *Feres* or *Brooks*.[108]

Some categories of FTCA service member claims are more consistently handled than others. At one end of the spectrum are the routinely *Feres*-barred cases of intra-military violence — where a claimant either self-harms or is harmed by fellow service members and alleges negligent supervision.[109] While there are few cases post-*Stanley* addressing whether courts can make particularized judgments on the impact that the trial of

---

[103] JAYSON & LONGSTRETH, *supra* note 2, § 5A.02 (citing, inter alia, Henninger v. United States, 473 F.2d 814, 815–16 (9th Cir. 1973) (barring a claim for alleged malpractice during the final step of a claimant's discharge process)); *see also, e.g.*, Ricks v. Nickels, 295 F.3d 1124, 1129–30 (10th Cir. 2002) (explaining the relationship between *Stanley*'s prohibition and the "incident to service" test).

[104] FIGLEY, *supra* note 48, at 21–22.

[105] McConnell v. United States, 478 F.3d 1092, 1095 (9th Cir. 2007) (quoting Costo v. United States, 248 F.3d 863, 867 (9th Cir. 2001)).

[106] FIGLEY, *supra* note 48, at 21 (citing Richards v. United States, 176 F.3d 652, 655 (3d Cir. 1999)).

[107] *See, e.g.*, JAYSON & LONGSTRETH, *supra* note 2, § 5A.01 –.02 (summarizing different "incident to service" tests after noting that "[i]n some instances inconsistencies appear"); *see also, e.g.*, McConnell v. United States, 478 F.3d 1092, 1095 (9th Cir. 2007) ("[T]he various cases applying the *Feres* doctrine may defy reconciliation.").

[108] *See, e.g.*, Elliott v. United States, 13 F.3d 1555 (11th Cir.) (allowing an FTCA claim alleging that the Army negligently maintained a vent pipe to an on-base apartment at Fort Benning), *aff'd by an equally divided court,* 37 F.3d 617 (11th Cir. 1994).

[109] JAYSON & LONGSTRETH, *supra* note 2, § 5A.08[5][j] (collecting examples of harassment and hazing leading to suicide or suicide attempt), § 5A.08[5][s] (collecting two egregious hazing cases, Brown v. United States, 739 F.2d 362 (8th Cir. 1984); Day v. Mass. Air Nat'l Guard, 994 F. Supp. 72 (D. Mass 1998), *aff'd in part*, *rev'd in part*, 167 F.3d 678 (1st Cir. 1999)); FIGLEY, *supra* note 48, at 23–24 & n.80.

individual offenders would have on military discipline,[110] it is clear that most claims in intra-military violence cases would go directly to the core personnel decisions of the military and that such a result must be covered by even a minimal military discipline rationale.

On the other extreme of consistency is the ongoing struggle to fit *Feres* to prenatal injury cases.[111] In these cases, a pregnant servicewoman alleges that the government negligently administered prenatal care that resulted in the injury or death of the child. One approach, advocated by Paul Figley (former Deputy Director of the Department of Justice's Torts Branch and prolific writer on *Feres* and the FTCA),[112] applies the *Feres* bar to cases of prenatal injury unless the negligent medical care was meant to be provided to the fetus instead of to the service member mother.[113] Several courts, though, have deviated from this "treatment-focused approach," focusing instead on whether the service member's mother suffered a physical injury; the result is a clear split of authority on the issue.[114] While the lower courts' difficulties in applying *Feres* is readily apparent in claims arising from prenatal injuries, the scope of the *Feres* doctrine is difficult to ascertain for many other types of service member claims as well.[115]

---

[110] *Cf.* Brown v United States, 739 F.2d 362, 363–64 (8th Cir. 1984) (allowing claims against fellow service members who participated in a mock lynching, but barring under *Feres* claims against superior officers that would "impinge upon the unique military discipline structure"), *with Day*, 994 F. Supp. at 79–80 (finding that *Feres* barred claims against participants in the attack because "even a trial of [a service member-attacker] alone would require improper oversight by the court of military decision making, discipline and regulation, an intrusion that *Feres* makes taboo.").

[111] *Cf.*, Irvin v. United States, 845 F.2d 126, 131 (6th Cir. 1988) (finding *Feres* barred claim for negligent prenatal diagnosis and care) *with* Romero v. United States, 954 F.2d 223, 227 (4th Cir. 1992) (finding *Feres* did not apply). *See generally* Kokesh, *supra* note 93, at 6–9.

[112] *See generally* Figley, *supra* note 48; Paul Figley, *Ethical Intersections & the Federal Tort Claims Act: An Approach for Government Attorneys*, 8 U. St. Thomas L.J. 347 (2011); Figley, *supra* note 31; Paul F. Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 Tort Tr. & Ins. Prac. L.J. 1105 (2009).

[113] Figley, *supra* note 48, at 23 (citing Brown v. United States, 462 F.3d 609, 614 (6th Cir. 2006); Romero v. United States, 954 F.2d 223 (4th Cir. 1992)).

[114] *See, e.g.*, Ortiz v. United States, 786 F.3d 817, 826–31 (10th Cir. 2015) (discussing different jurisprudential approaches to prenatal injuries, rejecting a treatment-focused test, and applying an "injury-focused" approach).

[115] *See generally* Jayson & Longstreth, *supra* note 2, § 5A.08 (featuring five illustrative categories of *Feres* cases, with the "Miscellaneous" category having nineteen subcategories).

2. *Criticisms of the* Feres *Doctrine*

Even if the *Feres* doctrine were easy to apply, it would still be the target of heavy criticisms. The first major criticism of *Feres* is that it is simply unfair. Courts often express dismay when applying *Feres* to bar claims in cases of medical malpractice,[116] recreational activity injury,[117] prenatal injury,[118] or genetic injury[119] because of a sense that *Feres* is an injustice. This sense likely arises from a belief that, because of *Feres*, "servicemen have less access to relief for their government-caused personal injuries than nonservicemen similarly situated."[120] Academic critics of *Feres* have similarly argued that decreased court access for service members is a reality, most often by drawing on the *Feres* doctrine's application in medical malpractice cases.[121] Conversely, defenders of *Feres* compare service members to federal employees and find that the *Feres* doctrine's bar of recovery combined with the Veterans' Benefits Act (VBA) compensation treats service members roughly the same as federal employees, who are barred from bringing tort claims but are covered by workers' compensation.[122] However, this federal employee comparison fails to apply to third-parties not entitled to recover under the VBA — such as government subcontractors or children of service members claiming a genetic injury — and barred by *Feres*.[123]

---

[116] *See, e.g.*, Loughney v. United States, 839 F.2d 186, 187 & n.2 (3d Cir. 1988) ("We are sympathetic to Loughney's legal arguments, and we are distressed by the tragic circumstances that gave rise to her suit. We do not, however, write on a clean slate.").

[117] *See, e.g.*, McConnell v. United States, 478 F.3d 1092, 1098 (9th Cir. 2007) (Gould, J., concurring) (expressing "a concern that our precedent interpreting the scope of the *Feres* doctrine creates an injustice").

[118] *See, e.g.*, *Ortiz*, 786 F.3d at 832 ("In sum, the *Feres* doctrine applies to the [prenatal] injuries alleged here. We wish, frankly, that were not the case.").

[119] *See, e.g.*, Mondelli v. United States, 711 F.2d 567, 569 (3d Cir. 1983) ("We sense the injustice … of this result.").

[120] Bernott, *supra* note 17, at 62–63 (delineating this category of fairness critiques as the "equity question," as distinct from an "accountability question").

[121] *See, e.g.*, *2009 H.R. 1478 Hearing*, *supra* note 7, at 152 (statement of Eugene R. Fidell, President, Nat'l Inst. of Military Justice) ("There is simply no reason why a military dependent or a retiree should be able to recover under the Federal Tort Claims Act but not a GI, for identical care at the identical military treatment facility."); Willke, *supra* note 100, at 282 (citing Reilly v. United States, 665 F. Supp. 976, 978–79 (D.R.I. 1987)).

[122] Jayson & Longstreth, *supra* note 2, § 5A.05; Bernott, *supra* note 17, at 63–66; Figley, *supra* note 31, at 468–69.

[123] Bernott, *supra* note 17, at 66–68; Patricia O. Jungreis, Comment, *Pushing the* Feres *Doctrine A Generation Too Far: Recovery for Genetic Damage to the Children of Service members*, 32 Am. U. L. Rev. 1039, 1068 n.164 (1983).

Putting aside the fairness concerns, the second persistent criticism of the *Feres* doctrine is that *Feres* and its progeny are legally unsound. The paragon of this criticism is Justice Scalia's four-vote dissent in Johnson.[124] The *Johnson* dissent began by taking issue with each of *Feres*'s three original rationales: the requirement of parallel private person liability,[125] the distinctly federal nature of the military,[126] and the existence of other compensation systems for service members.[127] Each rationale, the dissent argued, was flawed and had been abandoned by the Court in post-*Feres* FTCA cases.

To the *Johnson* dissent, the parallel private liability requirement, the only rationale "purport[ed] to be textually based," could not justify *Feres*.[128] Interpreting the parallel private liability requirement as the government's shield from liability for activities which private individuals do not typically engage in (like running a military) would make surplusage of many explicit exceptions in the FTCA — a disfavored statutory construction.[129] Taken to its extreme, this interpretation would disallow claims against the federal government merely because the government chose to displace all other actors. For this reason, as the dissent noted, the Court discarded the private parallel liability requirement soon after deciding *Feres* in *Indian Towing Co. v. United States*.[130]

The other original rationales were similarly dismissed in quick fashion. The importance for uniformity in a federal system could not justify choosing uniform non-recovery (as effected by the *Feres* doctrine) over occasional recovery.[131] Furthermore, the FTCA had already perpetuated non-uniformity

---

[124] United States v. Johnson, 481 U.S. 681, 692 (1987) (Scalia, J., dissenting).

[125] United States v. Feres, 340 U.S. 135, 141–42 (1950).

[126] *Id.* at 142–44.

[127] *Id.* at 144–45.

[128] *Johnson*, 481 U.S. at 694–95 (Scalia, J., dissenting).

[129] *Id.* (citing, *inter alia*, 28 U.S.C. § 2680(i) (excepting claims for regulation of the monetary system)).

[130] Indian Towing Co. v. United States, 350 U.S. 61, 67–69 (1955) (5-4) (finding the FTCA's private parallel liability requirement does not exclude liability from activities which private parties do not typically perform — like lighthouse operation — but distinguishing *Feres* on the basis of military personnel's exclusively federal-law relationship to the government); *see also* Rayonier, Inc. v. United States, 352 U.S. 315, 319 (1957) (7-2) (allowing claim alleging negligent firefighting by the United States Forest Service).

[131] *Johnson*, 481 U.S. at 695–96 (Scalia, J., dissenting).

among service members and other claimants with its explicit exceptions.[132] (While not mentioned in the *Johnson* dissent, the Court several decades earlier did not find the uniformity rationale controlling for similar reasons when it came to the issue of allowing prisoner suits under the FTCA.)[133] As for the existence-of-other-remedies rationale, the dissent noted that the brothers in *Brooks* were not barred from bringing FTCA claims, even though they were compensated under the Veterans' Benefit Act.[134] The existence of the VBA should not have been taken to exclude other awards, because the strings attached to compensation under the VBA are often worse than other compensation systems,[135] and a court could always reduce FTCA damages by the amount received under the VBA.[136]

The dissent also doubted the strength of *Feres*'s newer military discipline rationale, despite its endorsement as the best justification of *Feres*.[137] The first strike against the rationale was its post-hoc origin, as neither Congress nor the *Feres* Court thought to mention it.[138] Second, it was possible that Congress considered the torts that would most damage military discipline, like injuries overseas and injuries from intentional torts, already barred by explicit exceptions in the FTCA.[139] Third, the axiomatic conclusion that Congress would always prefer to protect military discipline by barring service members claims was faulty because it was possible that "Congress thought

---

[132] *Id.* at 696 (citing § 2680(k) (excepting foreign injuries)).

[133] United States v. Muniz, 374 U.S. 150, 159–66 (1963) (allowing prisoner suits against the United States, distinguishing from *Feres*, and finding that "though the Government expresses some concern that the nonuniform right to recover will prejudice prisoners, it nonetheless seems clear that no recovery would prejudice them even more"). The fact that federal prisoners, but not service members, may bring FTCA claims is not always embraced warmly by commentators. *See, e.g.*, Francine Banner, *Immoral Waiver: Judicial Review of Intra-Military Sexual Assault Claims*, 17 Lewis & Clark L. Rev. 723, 751 (2013).

[134] *Johnson*, 481 U.S. at 697 (Scalia, J., dissenting) (citing Brooks v. United States, 337 U.S. 49 (1949)).

[135] *Id.* at 698 (citing Note, *From* Feres *to* Stencel*: Should Military Personnel Have Access to FTCA Recovery?*, 77 Mich. L. Rev. 1099, 1106–08 (1979)).

[136] *Id.* at 697–98 (citing *Brooks*, 337 U.S. at 53–54).

[137] *Id.* at 698–700. For examples of the elevation of the military discipline rationale, see *supra* notes 18–19 and accompanying text.

[138] *Id.* at 699.

[139] *Id.* at 699–700; *see also* Robert A. Hitch, *The Federal Tort Claims Act and Military Personnel*, 8 Rutgers L. Rev. 316, 342 (1954).

that *barring* tort recovery by servicemen might adversely affect military discipline."[140]

In questioning the military discipline rationale, the dissent also addressed the closely related rationale that the *Feres* doctrine existed to protect all sensitive matters of military decision making (which in turn may adversely affect the discipline of service members).[141] The dissent noted the *Feres* doctrine does not prevent litigation over all sensitive military decisions; *Feres* only prevents service members from obtaining relief.[142] As later reframed by Major Edward Bahdi:

> In reality, federal courts do in fact scrutinize the military's role in committing torts. This is illustrated in FTCA causes of action brought by civilian plaintiffs against the military, whether the alleged injury was caused by medical malpractice, negligent personal injury, property damage, or ultra-hazardous activities. Furthermore, service members often provide sworn testimony as to how such torts were committed during depositions or at trial.[143]

Scalia's *Johnson* dissent remains widely-cited as a comprehensive account of the *Feres*'s doctrine's legal failings.[144] Because none of the Justices who participated in *Johnson* remain on the Supreme Court, it is difficult to predict how strong these criticisms resonate with the Court today. But, the little evidence that does exist suggests that the Court is not eager to modify or overrule the *Feres* doctrine.[145] The extent to which lower courts can still

---

[140] *Id.* at 700.

[141] *Id.* at 696, 700–02.

[142] *Id.* (citing *In re* "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 1242, 1252 (E.D.N.Y. 1984)).

[143] Edward G. Bahdi, *A Look at the* Feres *Doctrine as It Applies to Medical Malpractice Lawsuits: Challenging the Notion That Suing the Government Will Result in a Breakdown of Military Discipline*, Army Law., Nov. 2010, at 56, 66; *see also* Willke, *supra* note 100, at 282 ("[E]ven though the same rationales underpinning the doctrine may be implicated in claims for medical malpractice by civilians, civilians are allowed to bring those claims.").

[144] *See, e.g., 2009 H.R. 1478 Hearing, supra* note 9.

[145] Daniel v. United States, 139 S. Ct. 1713 (2019) (Ginsburg, J., voting in favor to grant petition for writ of certiorari; Thomas, J., dissenting from denial of certiorari); Lanus v. United States, 133 S. Ct. 2731, 2732 (2013) (Thomas, J., dissenting from denial of certiorari) (citing *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting)).

shape the scope of the *Feres* doctrine and abide by *stare decisis* is briefly discussed below in Section IV.E.

3. Alternative Tests and Legal Analogies

Given the long-standing criticisms of *Feres*, it is no surprise that there have been several proposed alternative understandings of the FTCA's relationship to service members. Most alternatives seek to better define "incident to service" in order to narrow the courts' current application of *Feres*. While some alternatives appear mostly rule-like and draw sharp distinctions based on time of injury or the strength of military compulsion,[146] other alternatives urge judges to reduce the impact of *Feres* through a standard that is slightly narrower and more exacting than the current doctrine.[147]

Several commentators advocate for the complete abolition of the Feres doctrine and rely on the FTCA's discretionary function exception to preserve critical military decision making from judicial inquiry.[148] Commentators have also advanced a discretionary function exception specific to military

---

[146] *See, e.g.*, Thomas M. Gallagher, Note, *Service members' Rights Under the* Feres *Doctrine: Rethinking "Incident to Service" Analysis*, 33 VILL. L. REV. 172, 200 (1988) (generally barring claims when the injuries occurred during working hours, while acting under orders, or while following regulations, but allowing claims when the injury is "far removed from the military sphere, outside the military chain of command, and in no way connected with a service member's military duties …."); *see also* Donald A. Cyze, Note, *The Federal Tort Claims Act: A Cause of Action for Servicemen*, 14 VAL. U. L. REV. 527, 568–75 (1980) (describing a "military duty" test which uses duty hours and orders as presumptions of service).

[147] *See, e.g.*, David E. Seidelson, *From* Feres v. United States *to* Boyle v. United Technologies Corp.*: An Examination of Supreme Court Jurisprudence and a Couple of Suggestions*, 32 DUQ. L. REV. 219, 239 (1994) (advancing a "truly incident to military service" approach, but with a rationale to "protect the public fisc"); Dawson, *supra* note 19, at 512 ("[I]t is suggested that courts focus upon the *nature* of the activity engaged in by the serviceman at the time of his injury and examine whether the requisite proximate relationship exists between that activity and military service."); Jennifer L. Zyznar, Comment, *The* Feres *Doctrine: "Don't Let This Be It. Fight!,"* 46 J. MARSHALL L. REV. 607, 627–28 (2013) (inquiring first whether the injury arose from a combatant activity, and second whether the injury was a foreseeable consequence of government conduct).

[148] *See, e.g.*, Brou, *supra* note 7, at 60–72; Jennifer L. Carpenter, Comment, *Military Medical Malpractice: Adopt the Discretionary Function Exception as an Alternative to the* Feres *Doctrine*, 26 U. HAW. L. REV. 35, 59–68 (2003).

discipline.[149] Other alternatives do not seek to reform or eliminate all of *Feres*, but rather limit how Feres applies in the context of a specific tort.[150]

In the courts, judges have occasionally used other areas of law to inform the meaning of *Feres*'s "incident to service" test. The key phrase "incident to service" is not found anywhere in the FTCA, but does appear in the 1943 Military Claims Act (MCA) — an act which gave the Secretary of War the authority to settle certain personal injury claims provided that the injuries were not "incident to service."[151] In order to provide a consistent body of law and prevent a proliferation of multiple "incident to service" standards, one could expect that courts would turn to this statutory term to inform the application of *Feres*. However, in part because of the dearth of cases under the MCA, very few courts have equated the *Feres* test to it.[152]

---

[149] Note, *supra* note 135, at 1121–25 ("[Courts] can, of course, turn to the large body of law already developed under the [discretionary function] exception. Some special standards, however, will be necessary to test the discretionary nature of military actions and decisions to protect legitimate areas of military autonomy."); *cf.* Robert Cooley, Note, *Method to This Madness: Acknowledging the Legitimate Rationale Behind the* Feres *Doctrine*, 68 B.U. L. Rev. 981, 1013–18 (1988) (proposing a *Feres* test that analyzes the alleged tortious conduct of the military, and whether it was, first, a result of a command decision, and second, whether the conduct involved a decision unique to the military).

[150] *See, e.g.*, Carpenter, *supra* note 148, at 67 (advocating for the elimination of the *Feres* doctrine in the case of medical malpractice); Tiffany-Ashley Disney, Note, *Unfair to the Unborn: A Look at* Ortiz *and the Injustice of the* Feres *Doctrine When Applied to Injuries Incurred to a Fetus While in the Womb of an Active Duty Service Woman*, 6 U. Miami Nat'l Sec. & Armed Conflict L. Rev. 178, 203–04 (2015) (advocating the elimination of the genesis test for cases of unborn children); Leder, *supra* note 19, at 1060–66 (advocating a limited application of the genesis test in the case of prenatal negligence claims).

[151] Military Claims Act, Pub. L. No. 78-112, sec. 1, 57 Stat. 372, 373 (1943) (codified as amended at 10 U.S.C. § 2733 (2012)); Figley, *supra* note 31, at 408–09 & n.119. The most recent National Defense Authorization Act included a provision with a similarly structure to the Military Claims Act which, instead of disallowing claims "incident to service," *allows* the Secretary to settle personal injury claims arising "incident to service" when the personal injury was caused by medical malpractice of a Department of Defense healthcare provider. National Defense Authorization Act for Fiscal Year 2020 (NDAA 2020), Pub. L. No. 16-92, 133 Stat. 1457, sec. 731 (2019) (to be codified at 10 U.S.C. § 2733a). The implications of this provision for the purposes of understanding *Feres* are discussed, *infra* Section IV.E.2.

[152] Jayson & Longstreth, *supra* note 2, § 5A.02 n.3 (citing, *inter alia*, LaBash v. U.S. Dep't of Army, 668 F.2d 1153, 1157 n.7 (10th Cir. 1982)).

An alternative application of *Feres* employed in the Second Circuit, after being advanced by Judge Calabresi, treats "incident to service" as a scope of employment test: *Feres* should only bar claims where a service member would be entitled to recovery under a "standard workers' compensation" scheme.[153] This scope of employment approach does not rely on the eligibility criteria of the existing system of veterans' benefits, but instead refers to the definition of "scope of employment" under nonmilitary federal law.[154] Outside of the Second Circuit, courts have declined to explicitly adopt the scope of employment test, despite arguably using the same considerations in the guise of multi-factor tests.[155]

The idea of equating "incident to service" to the ability of a claimant service member to recover veterans' benefits, instead of a generic scope of employment test, has even less support in the courts. Under the current scheme of veterans' benefits, service members may seek compensation for injuries or diseases that occur in the "line of duty."[156] "Line of duty," however, is much broader than a scope of employment standard. Injuries are considered to arise in the "line of duty" whenever incurred during active service, with only a few, targeted exceptions for injuries arising from drug abuse, willful misconduct, and time serving a punishment from court-martial.[157] Courts have recognized "line of duty" as too broad to define *Feres*'s "incident to service" test.[158] In an interesting legal parallel, this conclusion about the overbreadth of "line of duty" was also drawn by the Army Judge Advocate General's School in 1945 when it interpreted the meaning of "incident to service" in the MCA.[159]

---

[153] Taber v. Maine, 67 F.3d 1029, 1049–50 & n.21 (2d Cir. 1995).

[154] *Id.* at n.21 (citing Federal Employees' Compensation Act, 5 U.S.C. § 8102).

[155] *See, e.g.*, Skees v. U.S. Dep't of Army, 107 F.3d 421, 425 n.3 (6th Cir. 1997); *cf.* JAYSON & LONGSTRETH, *supra* note 2, § 5A.02 ("[C]ourts have not defined 'incident to service' in [workmen's compensation] terms, although the decisions are generally consistent with, and perhaps even broader than, this analysis.")

[156] 38 U.S.C. § 105(a) (2012).

[157] 38 U.S.C. § 105(b) (2012); 38 C.F.R. § 3.1(m); *see also* Manio v. Derwinski, 1 Vet. App. 140, 142–43 (1991).

[158] *See, e.g.*, Hale v. United States, 416 F.3d 355, 358 (6th Cir. 1969); *see also* JAYSON & LONGSTRETH, *supra* note 2, § 5A.02 n.79 (collecting cases).

[159] JUDGE ADVOCATE GEN.'S SCH., CLAIMS BY AND AGAINST THE GOVERNMENT 30–31 (1945), *quoted by* Note, *supra* note 71, at 621 n.28. For a history of the interpretations of "line of duty" advanced by different departments and courts, see JUDGE ADVOCATE GEN.'S SCH., MILITARY AFFAIRS pt. X, 25–34 (1945), https://www.loc.gov/rr/frd/Military_Law/pdf/military-affairs_3.pdf.

None of these alternative conceptions of *Feres* or "incident to service" has won over either the courts or legal academia. Given the conflicting direction from the Supreme Court to both eschew bright-line rules and avoid fact-specific judicial inquiries into the effects of military discipline, this is unsurprising.[160] However, given the importance of the military discipline justification of *Feres*, there seems to be an under-utilized source of legal authority that can lend assistance to determining what is "incident to service" — namely, the law of military justice.

III. Military Discipline and the Reach of Military Justice

As mentioned above, the newest and most prominent justification of the *Feres* doctrine is a concern for protecting the unique structure of military discipline. While there are many tools a military may use to maintain discipline, the principal tool of a disciplinary regime is punishment.[161] The American military is no exception. This Part thus begins with a brief description of the development of the American military justice system and the basics of its current penal code, the Uniform Code of Military Justice. Of course, any system of punishment can be analyzed across multiple dimensions.[162] However, given the debate over whether the *Feres* doctrine unfairly treats service members differently from non-service members,[163] one question of penal system design appears the most relevant: What classes of people may be

---

[160] How each currently proposed alternative either runs afoul of *Shearer* or *Stanley*, or is untenable for another reason, is addressed *infra* Section IV.B.

[161] *Cf.* Stefan G. Chrissanthos, *Keeping Military Discipline*, *in* The Oxford Handbook of Warfare in the Classical World 312, 312–13 (Brian Campbell & Lawrence A. Tritle eds., 2013) (explaining that while military discipline "has usually been equated" with punishment, "discipline also encompasses a wide range of meanings and involves such factors as training, the nature of leadership practiced by a general, rewards bestowed by officers and communities for proper military behavior, and the social and martial values of the soldiers themselves which inspired bravery in battle."). The extent to which the military justice system exists to provide justice independent of discipline is a much more complicated issue. *See generally* David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 Mil. L. Rev. 1 (2013).

[162] *Cf.* H.L.A. Hart, Punishment and Responsibility 3 (2d ed. 2008) (1968) ("What is needed is the realization that different principles (each of which may in a sense be called a 'justification') are relevant at different points in any morally acceptable account of punishment."). For a list of factors that commanders are recommend to consider when choosing when and how to punish, *see* Manual for Courts-Martial, United States (2019) [hereinafter MCM], *infra* note 172, at A2.1-1.

[163] *See supra* notes 120–123 and accompanying text.

punished in the name of military justice?[164] The rest of this Part will explore the jurisprudence on this question of military justice's personal jurisdiction, with particular focus on when civilians may be subject to military justice.

A. Origin and Basics of Military Justice

The origin of American military justice follows a pattern familiar to the rest of American law. The nation's first Articles of War, ratified by the Second Continental Congress in 1775, was taken directly from the British Articles of War, which itself was based on the Roman Code.[165] Although Congress has subsequently passed numerous important reforms to the Articles of War,[166] many of the substantive offenses have remained remarkably stable. Specific offenses like "contempt toward officials"[167] and the general offense of "conduct of a nature to bring discredit upon the armed forces"[168] exist in the modern era with little differences from their British predecessors.

---

[164] This is similar to one of the questions in Professor Hart's framework for justifying a system of punishment. *See* HART, *supra* note 162, at 3 ("What justifies the general practice of punishment? To whom may punishment be applied? How severely may we punish?").

[165] JOHN ADAMS, THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 68–69 (Charles Francis Adams ed., 1851); THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, THE BACKGROUND OF THE UNIFORM CODE OF MILITARY JUSTICE 1–2 (1959), https://www.loc.gov/rr/frd/Military_Law/pdf/background-UCMJ.pdf; WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 17–22 (2d ed. 1920) (1886), https://www.loc.gov/rr/frd/Military_Law/pdf/ML_precedents.pdf; *cf.* David A. Schlueter, *The Court-Martial: An Historical Survey*, 87 MIL. L. REV. 129 (1980) (tracing the lineage of the American court-martial).

[166] THE JUDGE ADVOCATE GEN.'S SCH., U.S. ARMY, *supra* note 165, at 2–9; Schlueter, *supra* note 165, at 150–65 (summarizing the "quiet growth" of the court-martial system until 1900 and the "periods of drastic change" that took place in the twentieth century).

[167] *Cf.* UCMJ art. 88 (codified at 10 U.S.C. § 888), *with* British Articles of War of 1765, Sec. II, Arts. I–II, *reprinted in* WINTHROP, *supra* note 165, at 932. The most important development of this offense since Roman times, the inclusion of heads of state as "officials," happened in the sixteenth century. *See* John G. Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice*, 81 HARV. L. REV. 1697, 1701–08 (1968).

[168] *Cf.* UCMJ art. 134 (codified at 10 U.S.C. § 934), *with* British Articles of War of 1765, Sec. XX, Art. III, *reprinted in* WINTHROP, *supra* note 165, at 946. For a chronicle of the general article's development in British military law, see D. B. Nichols, *The Devil's Article*, 22 MIL. L. REV. 111, 113–16 (1963).

The military justice system differs from civilian justice systems in its allocation of powers between the three branches of government.[169] As an initial matter, the President has the authority as Commander in Chief to conduct all aspects of military justice (including the convening of courts-martial) independent of Congress.[170] However, the Constitution creates concurrent powers in the area of military justice by granting Congress the authority "to make Rules for the Government and Regulation of the land and naval Forces."[171] Today, the most important role in military justice retained by the President is promulgating the provisions of the Manual for Courts-Martial (MCM), which contains both the Rules for Court-Martial and Military Rules of Evidence.[172]Congress has used its authority to create a

---

[169] The significance of this distinction in constitutional law is still debated. *Compare* Ortiz v. United States, 138 S. Ct. 2165, 2190 (2018) (Alito, J., dissenting) ("As currently constituted, military tribunals do not comply with Article III, and thus they cannot exercise the Federal Government's judicial power."), *with Ortiz*, 138 S. Ct. at 2188 (majority opinion) ("While the [Court of Appeals for the Armed Forces] is in the Executive Branch and its purpose is to help the President maintain troop discipline, those facts do not change the *nature* of the power that it exercises …. [T]he CAAF exercises a judicial power because it adjudicates private rights").

[170] Gregory E. Maggs & Lisa M. Schenck, Modern Military Justice 3–4 (2d ed. 2015); Winthrop, *supra* note 165, at 27; *see also* Winthrop, *supra* note 165, at 49 ("Not belonging to the judicial branch of the Government, it follows that courts-martial must pertain to the executive department … to aid [the President] in properly commanding the army and navy and enforcing discipline therein ….").

[171] U.S. Const. art. I, § 8, cl. 14; *see, e.g.*, United States v. Kemp, 22 C.M.A. (46 C.M.R.) 152, 154 (1973) (citing *Ex parte* Quirin, 317 U.S. 1, 43–45 (1942)); Maggs & Schenck, *supra* note 170, at 3; Richard A. Epstein, Roger Pilon, Geoffrey R. Stone & John C. Yoo, *Federalism: Executive Power in Wartime*, 5 Geo. J.L. & Pub. Pol'y 309, 320, 330 (Dr. Pilon). Even without this clause it is arguable that Congress's other war powers, and the Necessary and Proper Clause, would provide for the authority to establish a military justice system. *See* Robinson O. Everett, *Military Jurisdiction over Civilians*, 1960 Duke L.J. 366, 370–71. A minority think that Congress has the authority to regulate courts-martial from another clause in Section 8. *See* Epstein, Pilon, Stone & Yoo, *supra*, at 329 ("When I read [art. I, § 8, cl. 14], I don't think of setting up a set of tribunals to handle court-martials [sic]. That's done elsewhere in the Constitution where the Congress receives the power to 'constitute Tribunals inferior to the supreme Court.'" (quoting U.S. Const. art. I, § 8, cl. 9)) (Professor Epstein); *cf.* Wm. C. Peters, *On Law, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction over Civilian Contractor Misconduct in Iraq*, 2006 BYU L. Rev. 367, 406–08 (mentioning § 8, cl. 9 as one of several arguments for Congress's authority).

[172] Maggs & Schenck, *supra* note 170, at 5–6. *See generally* MCM. The MCM also contains supplementary discussions and analyses that were created by the Department of Defense for informational purposes but do not have the force of law. *See* MCM, *supra*, pmbl. The section of the most recent MCM which contains an analysis of the Rules for Court-Martial largely incorporates by explicit reference the analysis in the MCM.

system of appeals from courts-martial that allow for the possibility of review by the Supreme Court.[173] Inferior Article III courts now also may decide the validity of court-martial convictions upon collateral review.[174]

Offenses in the military justice system may be handled by different processes depending on the seriousness of the offense.[175] Minor misconduct can be addressed by either "administrative corrective measures," like admonitions or extra military instruction,[176] or "nonjudicial punishments," like limited arrest or forfeiture of pay.[177] More serious misconduct can lead to the convening of one of three kinds of courts-martial. Summary courts-martial are informal proceedings typically heard by one junior officer that can impose only modest sanctions; special courts-martial handle adversarial criminal trials roughly equivalent to misdemeanor prosecutions; and general courts-martial resemble full criminal trials and are capable of imposing the full array of lawful punishments, including the death penalty.[178] In all these procedures, constitutional guarantees that are applicable in every Article III court — like the right to trial by jury in criminal cases — may not apply or may be applied differently.[179]

---

[173] UCMJ art. 66 (codified at 10 U.S.C. § 866) (establishing a Court of Criminal Appeals within each of the armed force branches); UCMJ art. 67 (codified at 10 U.S.C. § 867) (establishing the Court of Appeals for the Armed Forces (CAAF) above each branch's highest court); UCMJ art. 67a (codified at 10 U.S.C. § 867a) (providing that decisions of the CAAF "are subject to review by the Supreme Court by writ of certiorari"); *see also* 28 U.S.C. § 1259 (providing jurisdiction to the Supreme Court over a set of CAAF cases).

[174] Before 1953, the established rule was that civilian courts could only review the jurisdictional authority of military tribunals, and not any other constitutional claim. *See, e.g.*, *In re* Yamashita, 327 U.S. 1, 8–9 (1946). A line of cases beginning with the plurality opinion in Burns v. Wilson, 346 U.S. 137 (1953), has asserted civilian court jurisdiction over other constitutional claims, mostly in the context of habeas corpus review. *See generally* John E. Theuman, Annotation, *Review by Federal Civil Courts of Court-Martial Convictions — Modern Status*, 95 A.L.R. Fed. 472 Art. 2[a] (2017).

[175] Maggs & Schenck, *supra* note 170, at 11–18.

[176] MCM, *supra* note 172, pt. V, ¶ 1.g.

[177] UCMJ art. 15(b) (codified at 10 U.S.C. § 815(b)).

[178] Maggs & Schenck, *supra* note 170, at 16–17. *See generally* UCMJ arts. 16–21 (codified at 10 U.S.C. §§ 816–821) (providing for the jurisdiction of the types of courts-martial).

[179] *See, e.g.*, United States v. Easton, 71 M.J. 168, 174–75 (C.A.A.F. 2012) (citing United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004)); *see also* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 15 (1955). For example, the Fifth Amendment's grand jury requirement does not apply in "cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." U.S. Const. amend V.

Perhaps because of these differences from civilian justice systems, the military justice system that millions of Americans experienced during World War II was viewed as woefully underprotective of service members' rights.[180] Calling military justice a "system" at that time might even have been a tad generous, as the Army, Navy, and Coast Guard operated under separate penal codes and procedures.[181] The returning population of World War II veterans, dissatisfied with these "ancient" military penal codes, became the catalyst for the creation of the Uniform Code of Military Justice.[182]

The UCMJ was a vast improvement in American military justice for the new protections it afforded to service members.[183] The UCMJ made great progress in addressing the issue of multiple military codes because, true to its name, the processes of the UCMJ apply across all service branches and across the globe.[184] The UCMJ's punitive articles[185] — the list of offenses subject to court-martial — were largely taken from the Army's penal code.[186] (Note that the existence of a punitive article for failure to obey orders and regulations still effectively allows branch-specific offenses.)[187] However, despite its relative universality, the UCMJ clearly was not meant to govern the conduct of every American. This leaves the interesting issue as to *whom* the UCMJ applies.

B. Structure of the UCMJ Jurisdiction Provisions

Every court-martial, as a "creature of statute," must meet jurisdictional prerequisites before being able to render a valid judgment.[188] For a court-

---

[180] *See, e.g.*, Michael Scott Bryant, *American Military Justice from the Revolution to the UCMJ: The Hard Journey from Command Authority to Due Process*, 4 Creighton Int'l & Comp. L.J. 1, 3–5 (2013).

[181] *See* Maggs & Schenck, *supra* note 170, at 4; Robinson O. Everett, *The 50th Anniversary of the Uniform Code: A Historical Look at Military Justice*, 16 Crim. Just. 20 (Fall 2001).

[182] Everett, *supra* note 181, at 21; *see also* David A. Melson, *Military Jurisdiction over Civilian Contractors: A Historical Overview*, 52 Naval L. Rev. 277, 293–94 (2005).

[183] *See, e.g.*, Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 188–90 (1962); *see also* Everett, *supra* note 181, at 21–22 (listing substantial reforms).

[184] Maggs & Schenck, *supra* note 170, at 4.

[185] UCMJ, arts. 77–134 (codified at 10 U.S.C. §§ 877–934).

[186] Edward F. Sherman, *The Civilianization of Military Law*, 22 Me. L. Rev. 3, 38–39 (1970).

[187] UCMJ art. 92 (codified at 10 U.S.C. § 892).

[188] David. A. Schlueter, Military Criminal Justice: Practice and Procedure

martial to properly have jurisdiction, the court-martial must: (1) be properly convened and composed by qualified personnel, with charges properly referred; (2) have jurisdiction over the offense; and (3) have jurisdiction over the person (personal jurisdiction).[189] As mentioned above, the body of law on court-martial jurisdiction over the person is most relevant in understanding the *Feres* doctrine, but the requirement of jurisdiction over the offense will also be discussed below, in Section III.C.3.

Article 2 of the UCMJ enumerates the categories of persons who are subject to court-martial jurisdiction.[190] Active-duty service members are first on the list and account for the majority of trials by court-martial.[191] Members of the service academies[192] and reservists while training[193] are also included. More controversially, retired members of the armed forces who are either receiving pay[194] or hospitalization from an armed force[195] are also subject to the UCMJ. While courts-martial for retirees were once thought to be justified only in "extraordinary circumstances,"[196] recent instances in the exercise of court-martial jurisdiction over retirees has prompted renewed criticism.[197]

---

§ 4-2(B) (9th ed. 2017) (citing McClaughry v. Deming, 186 U.S. 49, 62 (1902)).

[189] MCM, *supra* note 172, R.C.M. 201(b), analysis, at A15-4 (incorporating MCM, 2016, *supra* note 172, R.C.M. 201(b) analysis, at A21-8 (decomposing the first prerequisite into three elements); *id.* § 4-2(C).

[190] UCMJ art. 2 (codified at 10 U.S.C. § 802).

[191] UCMJ art. 2(a)(1) (codified at 10 U.S.C. § 802(a)(1)); Maggs & Schenck, *supra* note 170, at 30.

[192] UCMJ art. 2(a)(2) (codified at 10 U.S.C. § 802(a)(2)).

[193] UCMJ art. 2(a)(3) (codified at 10 U.S.C. § 802(a)(3)).

[194] UCMJ art. 2(a)(4) (codified at 10 U.S.C. § 802(a)(4)).

[195] UCMJ art. 2(a)(5) (codified at 10 U.S.C. § 802(a)(5)).

[196] U.S. Dep't of Army, Reg. 27-10, Military Justice para. 5-2(b)(3) (11 May 2016); *see also* Rick Houghton, *The Law of Retired Military Officers and Political Endorsements: A Primer*, Lawfare (Oct. 3, 2016), https://www.lawfareblog.com/law-retired-military-officers-and-political-endorsements-primer (providing "a brief primer on the legal status of retired service members, and the statutes and rules which govern their participation in politics").

[197] *See infra* note 211 and accompanying text (noting constitutional challenges to exercise of court-martial jurisdiction over retirees).

Civilians who fall under certain conditions are also subject to the UCMJ.[198] By far the most important civilian jurisdiction provisions are Articles 2(a)(10)[199] and 2(a)(11).[200] Article 2(a)(10) provides for jurisdiction over persons accompanying the armed forces when "in the field," and is yet another UCMJ provision derived from the British Articles of War.[201] Article 2(a)(11) asserts court-martial jurisdiction over civilians who, during wartime or peacetime, accompany the armed forces anywhere outside the United States. Unlike Article 2(a)(10) and its British pedigree, Article 2(a)(11) first appeared in the 1916 Articles of War as an attempt to close the jurisdictional gap that led to a diplomatic incident where an embezzling civilian, who was accompanying the armed forces in Cuba, could not be tried in either the United States or Cuba for his overseas activity.[202]

These Article 2 provisions might seem oddly specific and narrowly tailored. But, as detailed in the next section, this is for a good reason: The Constitution does not allow Congress to broadly designate all classes of persons as subject to military justice. Fortunately, enlightened statesmanship and academic commentary are not the only forces preventing an unconstitutional expansion of the UCMJ's jurisdictional provisions. Civilian and military courts have both considered the constitutionality of Article 2's provisions governing jurisdiction over civilians and have found some of its congressionally enacted provisions unconstitutional.

---

[198] Article 2 has five provisions which subject civilians to military justice. *See* UCMJ arts. 2(a)(8)–(12) (codified at 10 U.S.C. § 802(a)(8)–(12)); MCM, *supra* note 172, R.C.M. 202(a)(1). This does not include UCMJ art. 2(a)(7), which provides for jurisdiction over persons already serving a sentence imposed by court-martial. (codified at 10 U.S.C. § 802(a)(7)).

[199] UCMJ art. 2(a)(10) (codified at 10 U.S.C. § 802(a)(10)) ("In time of declared war or contingency operation, persons serving with or accompanying an armed force in the field.").

[200] UCMJ art. 2(a)(11) (codified at 10 U.S.C. § 802(a)(11)) ("Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States …").

[201] British Articles of War of 1765, Sec. XIV, Art. XXII, *reprinted in* Winthrop, *supra* note 165, at 941.

[202] Luke Lea, Revision of the Articles of War, S. Rep. No. 64-130, at 18, 37–38 (1st Sess. 1916); Edmund M. Morgan, *Court-Martial Jurisdiction over Non-Military Persons Under the Articles of War*, 4 Minn. L. Rev. 79, 95–97 & n.68 (1920).

C. Constitutionality of the UCMJ Jurisdiction Provisions

There exists an inherent tension in the Constitution between the enshrinement of guaranteed criminal procedural protections and Congress's power to create military justice procedures without those protections.[203] The easier it is to subject a person to military justice, the easier it is for the government to evade those cherished constitutional protections;[204] the harder it is to subject a person to military justice, the harder it is for the government to maintain a state of discipline that is necessary for a functioning military.[205] Over time, the Supreme Court has laid forth a few guiding principles on how constitutional law should police this boundary between the scope of criminal procedural protections and the scope of military justice.

The first of such principles, as formulated by the Court in *Ex parte Milligan*, is that military necessity cannot justify the use of military tribunals of civilians who are "nowise connected with the military service" when functioning civilian courts are available.[206] While valuable for the situations where civilians have no conceivable connection to the military, this principal of *Milligan* is not much help for answering more general questions about the proper use of military justice, like the use of military justice during war or its use over current and former service members. Answering such questions

---

[203] *See, e.g.*, David A. Schlueter, *Court-Martial Jurisdiction: An Expansion of the Least Possible Power*, 73 J. Crim. L. & Criminology 74, 74 (1982); *cf.* Warren, *supra* note 183, at 186 ("But sometimes competing … with the 'Thou Shalt Nots' of the Bill of Rights [] is the claim of military necessity.").

[204] *See, e.g.*, Reid v. Covert, 354 U.S. 1, 21 (1957) (plurality opinion) ("Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the rights to jury trial and of other treasured constitutional protections.").

[205] This tension in the applicability of constitutional rights between procedural protections and military necessity parallels the debate on the justifications for having any military justice system. *See* Schlueter, *supra* note 161, at 5–6 ("The poles — as they always have been — are two: justice and discipline. These two values are often in competition with each other.")

[206] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 121–22 (1866) (Davis, J.); *Milligan* at 141 (Chase, C.J., concurring) (5-4 on the issue of whether Congress *could* ever authorize military tribunals of unconnected civilians in time of war, holding such tribunals to be unconstitutional when civilian courts are available). For a collection of the reactions to the *Milligan* majority's strong constitutional claim, see Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 Theoretical Inquiries L. 1, 13–17 (2004).

requires a more generalizable principle on the reach of military justice like the one announced in *Toth v. Quarles*.[207]

In *Toth*, a civilian ex-service member was court-martialed for crimes he committed in Korea while serving in the Air Force.[208] The Supreme Court found this use of military justice unconstitutional, holding that courts-martial of ex-service members violated the protections afforded to citizens in the Bill of Rights.[209] The Court reasoned that any infringement on those constitutional rights because of military necessity required Congress to exercise the "'least possible power adequate to the end proposed'" and that, in the case of ex-service members like Toth, "[military] discipline will not be improved by court-martialing rather than trying by jury some civilian ex-soldier who has been wholly separated from the service ...."[210] This least-power-adequate principle of *Toth* provides a more generalizable framework than *Milligan* for the constitutional debate between military necessity and procedural protections and can be applied to any of the UCMJ's jurisdiction provisions.[211]

Of course, the annunciation of this principle in *Toth* does not mean that the constitutionality of military justice has been settled for every conceivable situation or that the constitutional analysis is static across time. This is most evident with respect to the question of military jurisdiction over civilians, where there has been much concern with the apparent inability of the United States to bring its private military contractors in the War on

---

[207] Toth v. Quarles, 350 U.S. 11 (1955).

[208] *Id.* at 13.

[209] *Id.* at 21–22.

[210] *Id.* at 22–23 (quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 230–31 (1821)).

[211] Like retired service members under Article 2(a)(4)–(5), for example. *See* United States v. Dinger, 76 M.J. 552, 554–57 (N-M. Ct. Crim. App. 2017) (reviewing "from first principles" the constitutionality of court-martial jurisdiction over retirees because jurisprudential developments since 1882 had challenged leading rationales); *see also* Petition for Writ of Certiorari, United States v. Larrabee, 139 S. Ct. 1164 (2019) (No. 18-306) (presenting the question for the Supreme Court of whether the Constitution and *Toth* permits the court-martial of a retired military service member).

Terror[212] to justice for various atrocities committed overseas.[213] Although the Military Extraterritorial Jurisdiction Act (MEJA) makes it possible for civilians employed by or accompanying the armed forces overseas to face prosecution in federal courts for their acts,[214] many find the MEJA as only a partial solution to the problems posed by civilian contractors.[215] Some commentators argue that the solution is the use of courts-martial over civilian contractors, and that the UCMJ and the Constitution support such exercise of military jurisdiction.[216] However, an equally strong contingent maintains that the application of the UCMJ to contractors is unconstitutional or at least unwise.[217] Regardless of the merits, *Toth* centers this debate on whether exercising military jurisdiction would be the least power adequate to address the controversy of civilian contractors.

In sum, important considerations exist on both sides of any debate about the constitutionality of exercising military jurisdiction. This includes debates on which classes of people may be subject to military justice. The remainder of this section will summarize the developments on the constitu-

---

[212] As used here, the "War on Terror" refers to several related United States military operations launched in the Middle East and North Africa after 9/11 and is not meant to imply congressional authorization, either via a declaration of war or the current Authorization for Use of Military Force. *Cf., e.g.*, *A New Chance for Congress to Join the War on Terrorism*, Bloomberg (Aug. 25, 2017, 7:30 AM), https://www.bloomberg.com/view/articles/2017-08-25/a-new-chance-for-congress-to-join-the-war-on-terrorism.

[213] *Cf.* Ian Kierpaul, Comment, *The Mad Scramble of Congress, Lawyers, and Law Students after Abu Ghraib: The Rush to Bring Private Military Contractors to Justice*, 39 U. Tol. L. Rev. 407, 423–27 (2008).

[214] Military Extraterritorial Jurisdiction Act of 2000, Pub. L. No.106-523, 114 Stat. 2488 (codified as amended at 18 U.S.C. §§ 3261–3267 (2012)); 32 C.F.R. § 153 (2018) (implementing regulation); *see* Schlueter, *supra* note 188, § 4-7(D).

[215] *See, e.g.*, *Holding Criminals Accountable: Extending Criminal Jurisdiction to Government Contractors and Employees Abroad: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 31–35 (2011) (statement of Lanny A. Breuer, Assistant Att'y Gen.) ("As much as we [the Criminal Division of the Department of Justice] have been able to accomplish under existing law, however, MEJA leaves significant gaps in our enforcement capability.").

[216] *See, e.g.*, Peters, *supra* note 171, at 399–414; Katherin J. Chapman, Note, *The Untouchables: Private Military Contractors' Criminal Accountability Under the UCMJ*, 63 Vand. L. Rev. 1047, 1072–78 (2010).

[217] *See, e.g.*, Geoffrey S. Corn, *Bringing Discipline to the Civilianization of the Battlefield: A Proposal for a More Legitimate Approach to Resurrecting Military-Criminal Jurisdiction over Civilian Augmentees*, 62 U. Miami. L. Rev. 491, 520–37 (2008); Melson, *supra* note 182, at 317–21; John F. O'Connor, *Contractors and* Courts-Martial, 77 Tenn. L. Rev. 751 (2010).

tionality of two key UCMJ personal jurisdiction provisions — Article 2(a)(10) and 2(a)(11) — and the Supreme Court's experiment with limiting which offenses may be subject to military jurisdiction.

1. Article 2(a)(11) and Persons Accompanying the Armed Forces Overseas

After the Supreme Court found the use of court-martial jurisdiction unconstitutional in *Toth* (a case involving the peacetime court-martialing of a civilian for his crimes committed while he was a service member), any statute that authorized the peacetime court-martialing of civilians who had *never* been service members could certainly be seen as standing on shaky constitutional grounds. In 1957, the Court addressed the constitutionality of Article 2(11) — the equivalent to today's Article 2(a)(11) — in *Reid v. Covert*.[218]

At issue in *Reid* were two cases where a civilian wife killed her serviceman-husband while at an overseas military base during peacetime; each wife was then tried by court-martial and convicted of murder under UCMJ Article 118, using Article 2(11) as the jurisdictional basis.[219] In a fractured decision, the plurality opinion authored by Justice Black first explicitly compared the status of the civilian wives to the ex-service member in *Toth* and found that "if anything" the difference would favor not allowing military jurisdiction over the wives who had "never served in the army in any capacity."[220] Justice Black then addressed the government's argument that the exercise of court-martial jurisdiction over civilians accompanying the armed forces overseas was a practical necessity and that the government's war powers included the ability to effectively establish defensive posture overseas in peacetime.[221] The Court ruled against the government, finding that the government's war powers could only be used to justify military jurisdiction during wartime and holding that Article 2(11) was unconstitutional when applied to civilian dependents, in times of peace, for capital offenses.[222]

---

[218] 354 U.S. 1 (1957). *Reid* is also a notable case for the Court's interpretation of the federal government's treaty power. *See, e.g.*, Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1921 (2005). For an excellent account of the backstory of *Reid*, see Brittany Warren, *The Case of the Murdering Wives:* Reid v. Covert *and the Complicated Question of Civilians and Courts-Martial*, 212 MIL. L. REV. 133 (2012) (citing Frederick Bernays Wiener, *Persuading the Supreme Court to Reverse Itself:* Reid v. Covert, LITIGATION, Summer 1988, at 6).

[219] *Reid*, 354 U.S. at 3–5 (plurality opinion).

[220] *Id.* at 32–33.

[221] *Id.* at 34–35.

[222] *See Reid*, 354 U.S. at 35 (plurality opinion); *Reid*, 354 U.S. at 45 (Frankfurter, J.,

These narrowing factors placed on the plurality's opinion by the rest of the Court — dependency status and capital offenses — did not last. The holding of *Reid* was broadened just three years later with a trio of cases decided on the same day: *Kinsella v. United States ex rel. Singleton* held Article 2(11) unconstitutional for civilian dependents, in peacetime, for *noncapital* offenses;[223] *Grisham v. Hagan* held the same for *employees*, in peacetime, for capital offenses;[224] and finally *McElroy v. United States ex rel. Guagliardo* held the same for *employees*, in peacetime, for *noncapital* offenses.[225] After this line of cases, Article 2(a)(10) effectively became the only provision under which a civilian could face military justice.[226]

2. Article 2(a)(10) and Persons Accompanying the Armed Forces in the Field

Article 2(a)(10) does not have the same illustrious history of Supreme Court caselaw as Article 2(a)(11), but it has been interpreted several times by the highest military court.[227] The first major development in Article 2(a)(10) jurisprudence came during the Vietnam War, when the literal text of then-Article 2(10) extended military justice to certain civilians simply "in time of war."[228] In *United States v. Averette*, a majority of the Court of Military Appeals held that "in time of war" meant only in time of "a war formally declared by Congress."[229] *Averette*'s narrow interpretation was a break from previous jurisprudence, and, because Congress has not declared war since World War II, had the practical effect of ending court-martial jurisdiction under Article 2(a)(10).[230] Combined with the *Reid* line of cases, court-martial jurisdiction over civilians became dead letter.

---

concurring) ("I must emphasize that it is only the trial of civilian dependents in a capital case in time of peace that is in question"); *Reid*, 354 U.S. at 65 (Harlan, J., concurring).

[223] Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234 (1960).

[224] Grisham v. Hagan, 361 U.S. 278 (1960).

[225] McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281 (1960).

[226] *Cf. Reid*, 354 U.S. at 34 n.61 (plurality opinion) ("We believe that Art. 2 (10) sets forth the maximum historically recognized extent of military jurisdiction over civilians under the concept of 'in the field.'").

[227] Today, the highest court in the military justice system is called the Court of Appeals for the Armed Forces (CAAF). Prior to 1994, the court was named the (United States) Court of Military Appeals. *See* MAGGS & SCHENCK, *supra* note 170, at 8.

[228] *Cf.* 10 U.S.C. § 802(10) (1964) *with* 10 U.S.C. § 802(a)(10) (2012).

[229] 19 C.M.A. (41 C.M.R.) 363, 365 (1970).

[230] *See* O'Connor, *supra* note 217, at 779–82.

This *de facto* nullification of Article 2(a)(10) persisted from Vietnam into the War on Terror, when a late Senate amendment to the 2007 defense authorization bill amended Article 2(a)(10) to its current language of "in time of declared war or contingency operation."[231] This amendment came as a surprise even to military experts,[232] and it took the Department of Defense seventeen months to decide how to best exercise its expanded (or renewed) jurisdiction.[233] This amended language did nothing, however, to resolve a question pre-existing *Averette*: Does "in time of war" place any geographic limitations on Article 2(a)(10) or is it satisfied by a war (contingency operation) in any corner of the globe?[234] Recently amended statutes with such gaping ambiguities appear to be ripe for judicial interpretation. Unfortunately, few courts have had the need to address the amended Article 2(a)(10).

The first court-martial brought under the newly amended Article 2(a)(10) culminated in the *United States v. Ali* decision from the Court of Appeals for the Armed Forces.[235] *Ali* involved Alaa Mohammad Ali, an Iraqi-Canadian interpreter who worked as an independent contractor for an American company that provided linguistic services to the United States.[236] Ali was assigned to a squad of military police in Iraq, and while in Iraq he: reported to the squad's staff sergeant; wore the same body armor as the soldiers; lived in the same outpost as the soldiers; and went on missions with

---

[231] *See* John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, sec. 552, 120 Stat. 2083, 2217 (2006); Kara M. Sacilotto, *Jumping the (Un)constitutional Gun?: Constitutional Questions in the Application of the UCMJ to Contractors*, 37 Pub. Cont. L.J. 179, 185–86 (2008) (reviewing the sparse legislative history of the amendment).

[232] *See* Corn, *supra* note 217, at 517–18.

[233] *See* Andres Healy, *The Constitutionality of Amended 10 U.S.C. § 802(a)(10): Does the Military Need a Formal Invitation to Reign in "Cowboy" Civilian Contractors?*, 62 Fla. L. Rev. 519, 524 (2010) (citing Memorandum from Robert M. Gates, Sec'y of Def., to Sec'ys of the Military Dep'ts, Chairman of the Joint Chiefs of Staff, Under Sec'ys of Def., and Commanders of the Combatant Commands (Mar. 10, 2008), https://fas.org/sgp/othergov/dod/gates-ucmj.pdf.

[234] *See* MCM, *supra* note 172, R.C.M. 103(21) analysis, at A15-3 (incorporating MCM, 2016, *supra* note 172, R.C.M. 103(19) analysis, at A21-4 to A21-5 ("Under the [Court of Military Appeals'] analysis, whether a time of war exists depends on the purpose of the specific article in which the phrase appears, and on the circumstances surrounding application of that article.")).

[235] United States v. Ali, 71 M.J. 256 (C.A.A.F. 2012), *cert. denied*, 569 U.S. 972 (2013).

[236] *Ali*, 71 M.J. at 259.

the soldiers, facing threats of enemy fire daily.[237] After Ali attacked a fellow interpreter with a knife and violated his travel restrictions, he was charged under the UCMJ and a general court-martial was convened.[238]

Ali challenged both the statutory jurisdiction of the court-martial under Article 2(a)(10) and the constitutionality of Article 2(a)(10) as applied to him.[239] As an Iraqi-Canadian working in Iraq, the MEJA did not apply to Ali and so no Article III court was an available alternative for trial.[240] This fact resulted in a unanimous decision to uphold the constitutionality of Ali's court-martial, but via three separate opinions taking different approaches to the constitutional question.[241] These opinions in *Ali* touch upon significant, unresolved constitutional considerations like the rights of foreign nationals,[242] the precise source of Congress's power to court-martial civilians,[243] and the commitment to *Toth*'s least-adequate-power principal. However, for the purposes of this article, it is the majority's interpretation of the Article 2(a)(10) statute that is most relevant.

In *Ali*, the majority of the court discussed three requirements of Article 2(a)(10): "contingency operation," "serving with or accompanying an armed force," and "in the field." "Contingency operation" was the most straightforward for the court, as the term was defined elsewhere in the U.S. Code (and undoubtedly included Operation Iraqi Freedom).[244] To determine the meaning of "serving with or accompanying an armed force," the *Ali* majority could not rely on a statutory definition, but instead looked to *United States v. Burney*, an earlier civilian court-martial, stating that "[t]he test is whether [the

---

[237] *Id.* at 263–64.

[238] *Id.* at 259–60.

[239] *Id.* at 258, 265.

[240] *Id.* at 270.

[241] For a breakdown of the differences in the opinions in *Ali*, see Steve Vladeck, *Analysis of* U.S. v. Ali*: A Flawed Majority, Conflicting Concurrences, and the Future of Military Jurisdiction*, Lawfare (July 19, 2012), https://www.lawfareblog.com/analysis-us-v-ali-flawed-majority-conflicting-concurrences-and-future-military-jurisdiction.

[242] *Cf. Ali* at 266–69 (majority opinion), *with Ali* at 279 (Effron, J., concurring) ("The portion of the majority opinion that discusses the rights of foreign nationals is not necessary to the disposition of the present case ….").

[243] *Cf. Ali* at 269–70 (majority opinion), *with Ali* at 271–76 (Baker, C.J., concurring) ("The real question in this case is whether the combination of the Rules and Regulations Clause, the war powers, and the Necessary and Proper Clause authorized Congress to legislate court-martial jurisdiction over this contractor, in this context.").

[244] *Ali.* at 262 n.12 (majority opinion) (citing 10 U.S.C. § 101(a)(13) (2006)).

accused] has moved with a military operation and whether his presence with the armed force was not merely incidental, but directly connected with, or dependent upon, the activities of the armed force or its personnel."[245] When applying this test to Ali, the majority repeated the lower court's observation that Ali's role as an interpreter was integral to the mission of the squad.[246] As for the even more nebulous "in the field" element, the court adopted the dicta of *Reid* and held that this element requires "an area of actual fighting."[247]

Ultimately court-martial jurisdiction over Ali was upheld, and the Supreme Court did not grant certiorari.[248] With no more developments in Article 2(a)(10) case law on the horizon,[249] *Ali* remains the settled understanding of many of Article 2(a)(10)'s statutory requirements despite the case's narrow factual circumstances and open constitutional questions.

3. Jurisdiction over the Offense

The previous sections discussed developments of Article 2(a) caselaw and the limits to which persons have a status that renders them validly subject to military justice. Toward the end of the Warren Court era, however, the Supreme Court found a new way to restrict the reach of military justice. In *O'Callahan v. Parker*, the majority found that court-martial jurisdiction could only extend to alleged offenses when the *offenses* were "service connected."[250] This meant that even active duty service members (who undoubtedly fit the personal jurisdiction provisions of Article 2)[251] could not be court-martialed for certain offenses notwithstanding their inclusion in the UCMJ's punitive articles. The Court reasoned that military justice could not be used as an end-around the constitutional guarantees afforded in civilian courts; without a service connection requirement, an offense like tax evasion could be tried by court-martial even though it "did not involve any question of the flouting of military authority, the security of a military post, or the integrity of military property."[252]

---

[245] *Id.* at 263–64 (alterations in original) (quoting United States v. Burney, 6 C.M.A. 776, 788 (1956)).

[246] *Id.* at 263–64.

[247] *Id.* at 264 (quoting Reid v. Covert, 354 U.S. 1, 34 n.61 (1957) (plurality opinion)).

[248] *Id.* at 265, *cert. denied*, 569 U.S. 972 (2013).

[249] UCMJ art. 2(a)(10) (codified at 10 U.S.C. § 802(a)(10)).

[250] O'Callahan v. Parker, 395 U.S. 258, 272–73 (1969).

[251] UCMJ art. 2(a)(1) (codified at 10 U.S.C. § 802(a)(1) (2012)).

[252] *O'Callahan*, 395 U.S. at 273–74; *see also* Solorio v. United States, 483 U.S. 435,

O'Callahan's service-connection test was an instant headache.[253] The Court soon enumerated twelve factors to be analyzed under the service-connection test.[254] Predictably, the body of law was largely left to the Courts of Military Review to handle, where they began to develop per se rules.[255] Those courts found *O'Callahan*'s limitation to be inapplicable to offenses committed overseas,[256] offenses committed on post,[257] and petty offenses.[258] With respect to drug-related offenses, however, the courts struggled to apply *O'Callahan*'s service connection requirement consistently.[259] In *Solorio v. United States*, a five-member majority of the Court used this struggle as evidence of *O'Callahan*'s incorrectness, and returned to the pre-*O'Callahan* regime whereby no service connection was necessary.[260] *Solorio* has proved to be a stable result, unlike *O'Callahan*, and has remained "good law" since.[261]

With jurisdiction no longer turning on which offense is charged, the relevant jurisdictional inquiry for a properly convened and composed court-martial is whether the accused's military status meets a provision of UCMJ Article 2 and whether that provision is constitutional. Certainly, the distinction between service member and civilian is a major threshold

---

467 (1987) (Marshall, J., dissenting).

[253] For one early criticism of the Court's decision and the consequences of the service connection test, see Robinson O. Everett, O'Callahan v. Parker — *Milestone or Millstone in Military Justice?*, 1969 Duke L.J. 853, 859–85. Then-Professor Everett's piece was one of many. *See* Relford v. Commandant, U.S. Disciplinary Barracks, 401 U.S. 355, 356 nn.1–6 (1971) (collecting commentary).

[254] Relford v. Commandant, U.S. Disciplinary Barracks, 401 U.S. 355, 365 (1971).

[255] Norman G. Cooper, O'Callahan *Revisited: Severing the Service Connection*, 76 Mil. L. Rev. 165, 166–67 (1977).

[256] *See, e.g.*, United States v. Keaton, 19 C.M.A. (41 C.M.R.) 64, 67 (1969).

[257] Cooper, *supra* note 255, at 169–71 (summarizing the development of the on post exception after Supreme Court decisions).

[258] United States v. Sharkey, 19 C.M.A. (41 C.M.R.) 26, 27–28 (1969).

[259] Solorio v. United States, 483 U.S. 435, 449–50 (1987); Cooper, *supra* note 255, at 175–82.

[260] 483 U.S. 435, 436, 450–51 (1987).

[261] Geoffrey S. Corn & Chris Jenks, *A Military Justice Solution in Search of a Problem: A Response to Vladeck*, 104 Geo. L.J. Online 29, 38–39 (2015). While a concurrence by Justice Stevens questioned the extent that *Solorio* overruled *O'Callahan*, *see* Loving v. United States, 517 U.S. 748, 774–75 (1996) (Stevens, J., concurring) (suggesting *Solorio* is inapplicable to capital cases), *Solorio* has been interpreted as reaffirming military status as the only jurisdictional inquiry for all cases and offenses. *See, e.g.*, United States v. Hennis, 75 M.J. 796, 810–11 (Army Ct. Crim. App. 2016).

question for purposes of Article 2.[262] And, as evident from the caselaw over the civilian jurisdiction provisions, it is clear that the scope of Article 2(a)(10) determines the maximum extent to which military justice can be exercised over civilians. Thus, it is critical that the elements of Article 2(a)(10) be thoroughly examined. Upon examining the reasoning of *Ali* and the history of Article 2(a)(10) there emerges an alternative to an "area of actual fighting" standard: a test that accounts for the importance of the military activity at issue.

D. Alternative Interpretations of Article 2(a)(10) and "In the Field"

The *Ali* majority's interpretation of Article 2(a)(10), while not subjected to nearly the same volume of critique as *Feres*, is nonetheless contestable on its brief treatment of court-martial history.[263] The caselaw and legislative history on Article 2(a)(10) and its predecessors show a more complicated analysis of when persons are "in the field" than *Ali*'s treatment.

As an initial aside, the *Ali* majority's analysis of "serving with or accompanying an armed force" arguably focuses the inquiry on the wrong party by repeating the importance of Mr. Ali to his squad's mission. The legislative history on "accompanying" in Article 2(a)(10) makes clear that the provision was meant to apply to Red Cross workers, the Salvation Army, and newspaper war correspondents.[264] While an Iraqi interpreter is clearly integral to the operation of a squad, it is quite different to suggest that war correspondents are essential to any operation. This suggests that the relevant inquiry should be what the plain language of *United States v. Burney* implies: The test is whether the civilian's presence with the armed forces was dependent on the activities of the armed forces, not the other way around.[265]

---

[262] *See supra* notes 198–217 and accompanying text.

[263] The *Ali* majority also arguably gave short shrift to Ali's argument on the unconstitutionality of the broad statutory definition of "contingency operation" but that is beyond the scope of this article. *See* United States v. Ali, 71 M.J. 256, 262 n.11 (2007); Anna Manasco Dionne, Note, *"In Time of Whenever the Secretary Says": The Constitutional Case Against Court-Martial Jurisdiction over Accompanying Civilians During Contingency Operations*, 27 YALE L. & POL'Y REV. 205, 223–37 (2008).

[264] *Uniform Code of Military Justice: Hearing on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Servs.*, 81st Cong. 872–73 (1949) (statement of Felix Larkin, Assistant General Counsel, Office of the Secretary of Defense); Peters, *supra* note 171, at 379–80. The caselaw for Article 2(a)(10)'s predecessors also supports the inclusion of these civilians. *See* Morgan, *supra* note 202, at 90–92.

[265] United States v. Burney, 6 C.M.A. 776, 788 (1956) ("The test is whether

More significant than the "serving with or accompanying" element, the *Ali* majority interpreted (via a citation to *Reid* and little further discussion) "in the field" to mean "in an area of actual fighting."[266] The history of civilian courts-martial under Article 2(a)(10) casts heavy doubt on this conclusion.[267] As a threshold matter, *Ali*'s reference to the plurality opinion in *Reid* suggests some weakness in authority, because *Reid*'s discussion of Article 2(10) was arguably dicta accompanying an Article 2(11) holding.[268] Indeed the only other case the *Ali* court cited on for this proposition, *Burney*, interpreted "in the field" to "imply military operations with a view to an enemy … determined by the activity in which [an armed force] may be engaged at any particular time, not by the locality where it is found."[269] That construction is quite different from "area of actual fighting."[270] Therefore, the best authority for *Ali*'s "area of actual fighting" standard must come from those sources cited by the *Reid* plurality.[271]

The first source the *Reid* plurality looked to in interpreting "in the field" was Colonel William Winthrop,[272] the "Blackstone of military law."[273] Winthrop, however, never used the language "area of actual fight-

---

[an accused] has moved with a military operation and whether his presence with the armed force was not merely incidental, but directly connected with, or dependent upon, the activities of the armed force or its personnel.").

[266] United States v. Ali, 71 M.J. 256, 264 (C.A.A.F. 2012) (quoting Reid v. Covert, 354 U.S. 1, 34 n.61 (1957) (plurality opinion)).

[267] Mark Visger, *Civilian Court-Martial Jurisdiction and* United States v. Ali*: A Re-Examination of the Historical Practice*, 46 Tex. Tech L. Rev. 1111, 1121–29, 1134–37 (2014). Lieutenant Colonel Visger's article is the most thorough examination of the sources relied upon in *Ali* and *Reid*, but there are other examinations of the historical record. *See, e.g.*, Jesse A. Ouellette, "*In the Field" A Legal Analysis of Military Jurisdiction Over Civilian Contractors Accompanying the Armed Forces During a Contingency Operation for Offenses Committed Outside of an Area of Actual Fighting*, 4 Nat'l Security L. Brief 21, 26–32 (2014); Lawrence J. Schwartz, *The Case for Court-Martial Jurisdiction over Civilians Under Article 2(a)(10) of the Uniform Code of Military Justice*, Army Law., Oct./Nov. 2002, at 31, 36.

[268] *Ali*, 71 M.J. at 264 ("Although the Supreme Court in *Reid v. Covert* analyzed the provisions of Article 2(11)…'); Corn & Jenks, *supra* note 261, at 44–46 ("*Reid* never reached the issue of the propriety of military jurisdiction over civilians accompanying the armed forces in the field …").

[269] *Burney,* 6 C.M.A. at 787–88 (citing 14 Ops. Att'y Gen. 22 (1872)).

[270] Visger, *supra* note 267, at 1124, 1127–29.

[271] Reid v. Covert, 354 U.S. 1, 33–35 & n.61 (1957) (plurality opinion).

[272] *Id.* at 34 n.61 (citing Winthrop, *supra* note 165, at 100–02).

[273] *Id.* at 19 n.38. *See generally* Joshua E. Kastenberg, The Blackstone of Military

ing." Instead, he interpreted "in the field" as extending military justice to "both to the period and pendency of war and to acts committed on the *theatre of the war*."[274] Furthermore, Winthrop's authority for that formulation, an 1872 Attorney General opinion on the Indian Wars, used (and originated) an entirely different phrase: "military operations with a view to an enemy."[275] The remaining authorities the *Reid* plurality cited to support "area of actual fighting" either rely on the 1872 Attorney General opinion or use the term "theatre of war," like Winthrop did.[276]

Thus, the standard of "area of actual fighting" endorsed by *Reid* is a misstatement of its historical support. The more supported standard turns out to be "military operations with a view to an enemy." Of course, "military operations with a view to an enemy" is not self-defining and replacing one vague term ("in the field") with another does not advance the law. Furthermore, it is not clear from *Reid* that even "military operations with a view to an enemy" was accepted by courts. Fortunately, there are dozens of reported civilian courts-martial before *Reid* (some involving conduct outside an area of actual fighting) that develop the meaning of "in the field."[277]

In cases predating *Reid*, some courts took on a strict geographic sense of "in the field" and did not distinguish between "military operations." For example, in *Ex parte Gerlach*, Judge Augustus Hand found "in the field" to simply mean "any place, whether on land or water, *apart from permanent cantonments or fortifications*, where military operations are being conducted."[278] This distinction about permanent fortifications was not a factor to all other courts, however. In *Ex parte Jochen*, a civilian was tried by court-martial for offenses during his service with troops along the Rio Grande during World War I, where there was a threat of conflict from

---

LAW: COLONEL WILLIAM WINTHROP (2009).

[274] WINTHROP, *supra* note 165, at 101 (emphasis added).

[275] 14 Ops. Att'y Gen. 22 (1872) (George H. Williams).

[276] Visger, *supra* note 267, at 1124–27.

[277] *See, e.g.*, Seymour W. Wurfel, *Court-Martial Jurisdiction Under the Uniform Code*, 32 N.C. L. REV. 1, 37–40 (1953) (collecting cases from the Civil War to World War II); *see also* L.K. Underhill, *Jurisdiction of Military Tribunals in the United States over Civilians* (pt. 1), 12 CALIF. L. REV. 75, 82–83 (1924) (summarizing the facts and holdings of civilian courts-martial tried during World War I).

[278] *Ex parte* Gerlach, 247 F. 616, 617 (S.D.N.Y. 1917) (emphasis added); *see also In Re* Berue, 54 F. Supp. 252, 255 (S.D. Ohio 1944) (quoting *Gerlach*, 247 F. at 617); *Ex parte* Falls, 251 F. 415, 416 (D.N.J. 1918) (same).

German-allied Mexico.[279] Of course, Mexico did not send troops into the United States and the Rio Grande never became "an area of actual fighting." The *Jochen* court nevertheless upheld the court-martial jurisdiction over the civilian and held that "in the field" must minimally cover "where the armies are in *or expecting* actual conflict."[280] A similar conception of "in the field" was employed by another district court in *Ex parte Mikell* (before being overturned by the Fourth Circuit) to *deny* court-martial jurisdiction over a civilian stenographer who was employed at a temporary encampment for training soldiers for deployment to Europe in World War I.[281]

Courts also developed in parallel a strain of caselaw that focused less on the geographic *location* of the civilian's offense and more on the *activity* of the armed forces at the time.[282] For example, the court in *Jochen* went beyond a narrow holding to offer its preferred construction of "in the field" as "service in mobilization, concentration, instruction, or maneuver camps as well as service in campaign, simulated campaign or on the march."[283] The Fourth Circuit, in *Hines v. Mikell*, made this connection even more explicit with its reversal of the lower court.[284] *Hines* found that the definition of "in the field" was "not determined by the locality in which the army may be found, but rather by the activity in which it may be engaged in at any particular time."[285] Under this understanding, areas for deployment training and troop transportation also constitute "in the field."[286]

---

[279] *Ex parte* Jochen, 257 F. 200, 201, 207–08 (S.D. Tex. 1919).

[280] *Id.* at 208–09 (emphasis added).

[281] *Ex parte* Mikell, 253 F. 817, 821 (E.D.S.C. 1918) (finding "in the field" to ordinarily "mean in the actual field of operations against the enemy; not necessarily the immediate battle front … but … the territory so closely connected with the absolute struggle with the enemy that is a part of the field of contest."), *rev'd*, Hines v. Mikell, 259 F. 28 (4th Cir. 1919).

[282] Another possible reckoning of this caselaw is that World War I and II courts expanded the reach of civilian courts-martial. *See, e.g.*, Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 Admin. L. Rev. 673, 712 (2010) ("During the World Wars, however, the phrase ['in the field'] came to be interpreted more broadly ….").

[283] *Jochen*, 257 F. at 208–09.

[284] 259 F. 28 (4th Cir. 1919), *rev'g Ex parte* Mikell, 253 F. 817 (E.D.S.C. 1918).

[285] *Hines*, 259 F. at 34.

[286] *See, e.g.*, McCune v. Kilpatrick, 53 F. Supp. 80, 84 (E.D. Va. 1943) ("A military voyage for the purpose of transporting army troops and supplies during the present war is, in my opinion, clearly a military expedition 'in the field'.").

Because the facts of these civilian courts-martial are often distinguishable (especially with *Gerlach*'s distinction between temporary and permanent encampments), it is difficult to determine a settled interpretation using only caselaw. Turning to secondary authorities, the current Manual for Courts-Martial's analysis of Article 2(a)(10) — merely persuasive, not binding[287] — rightly eschews *Reid*'s language of "area of actual fighting" in favor of "military operations with a view to an enemy."[288] In characterizing this understanding of "in the field," the MCM analysis favorably cites the activity test of *Hines* and asserts jurisdiction over civilians who accompany the armed forces in stateside activities like deployment training or transportation of supplies.[289] In academic commentary, Lieutenant Colonel Visger advances a separate test relying on the proximity of the civilian to potential hostilities, much like the district court in *Mikell*, and whether the armed force has established a "combat footing."[290] Under Visger's test, for example, a civilian drone operator working safely from an American base, though engaged in an activity critical to an overseas contingency operation against an enemy, would not fall under Article 2(a)(10).[291] However, Visger also suggests that court-martial jurisdiction over civilians who do fall within this definition cannot be exercised "when no possible disciplinary purpose is

---

[287] MCM, *supra* note 172, pmbl; United States v. Miller, 67 M.J. 87, 89 (C.A.A.F. 2008).

[288] MCM, *supra* note 172, R.C.M. 202(a) analysis, at A15-4 to -5 (incorporating MCM, 2016, *supra* note 172, R.C.M. 202(a) analysis, at A21–11 (citing 14 Ops. Att'y Gen. 22 (1872))). This should not be interpreted a response to *Ali* or any post-2007 developments because the MCM analysis over civilian jurisdiction has remained unchanged since 1984. *See* Manual for Courts-Martial, United States, R.C.M. 202(a) analysis, at A21–9 to A21–10 (1984).

[289] MCM, *supra* note 172, R.C.M. 202(a) analysis, at A15-4 to -5 (incorporating MCM, 2016, *supra* note 172, R.C.M. 202(a) analysis, at A21–11 (citing, inter alia, *Hines*, 259 F. at 34; *In re* Berue, 54 F. Supp. 252 (S.D. Ohio 1944))). For an earlier recognition of the activity test of *Hines* as the definitive meaning in the hands of the judiciary, see Wurfel, *supra* note 277, at 40 ("The federal courts have held that the question of whether an armed force is 'in the field' is to be determined by the activity in which it is engaged at the time rather than by the locality in which it may be.").

[290] Visger, *supra* note 267, at 1133–37; *see also Ex parte* Mikell, 253 F. 817, 821 (E.D.S.C. 1918). For an earlier academic endorsement of such a standard, see Decision, 44 Colum. L. Rev. 575, 577 n.11 (1944) ("Limiting the term 'in the field', as used in the Second Article of War, to areas of actual conflict or those reasonably proximate thereto, would more effectively preserve to civilians the guaranties of the 5th and 6th Amendments.").

[291] Visger, *supra* note 267, at 1133–37. For one narrative challenging the idea that drone operators are shielded from psychological harm, *see* Eyal Press, *The Wounds of the Drone Warrior*, N.Y. Times Mag. (June 13, 2018), https://nyti.ms/2JHbiow.

served by the exercise of court-martial jurisdiction," suggesting that the outer boundaries of this test would otherwise result in some cases of court-martial jurisdiction that could run afoul of *Toth*.[292]

Further, an examination of the earlier caselaw yields two important takeaways. First, a strict "area of actual fighting" standard is unjustified, as courts-martial routinely upheld jurisdiction outside areas of actual fighting. In fact, the Supreme Court, in a case on the validity of so-called martial law, made sure to not interfere with "the well-established power of the military to exercise jurisdiction over … those directly connected with [armed] forces."[293] This principle was so well-established before *Reid*, that the *Burney* court noted that most civilian defendants challenged court-martial jurisdiction on the "serving with" element of Article 2(a)(10), not the "in the field" element.[294] On a larger timeframe, it is possible that these cases are "too episodic, too meager, to form a solid basis of history."[295] However, it is clear that the historical basis for "area of actual fighting" is even thinner.

Second, there is a persistent strain in military law, evident through cases like *Hines* and *Jochen*, that distinguishes certain military activity as so critical to service and discipline that even civilians may be subject to military justice. If military law is able to support a test that distinguishes between military activity in determining an area of constitutional import, perhaps courts may use this to inform their understanding of "incident to service" and the scope of the *Feres* doctrine. Part III, below, discusses the possibilities and challenges of doing so.

IV. The Intersection of *Feres* and the UCMJ

So far, this article has discussed two disparate areas of law seemingly only tied together by a mention of a "military discipline" rationale. Nonetheless, the connection between the two jurisprudences is more than superficial. The *Feres* doctrine has evolved to operate as an inquiry on the status of the service member tort victim, taking into account factors such as location and activity. The law of military jurisdiction operates much the same way when analyzing the status of the accused, as most evident from the law on civilian

---

[292] Visger, *supra* note 267, at 1136.

[293] Duncan v. Kahanamoku, 327 U.S. 304, 313 & n.7 (1945) (citing, inter alia, *Ex parte* Jochen, 257 F. 200, (S.D. Tex. 1919); *Hines*, 259 F.28).

[294] United States v. Burney, 6 C.M.A. 776, 788 (1956)).

[295] *Cf.* Reid v. Covert, 354 U.S. 1, 64 (1957) (Frankfurter, J., concurring).

courts-martial. Part IV will use these similarities to develop a more explicit connection between *Feres* and the UCMJ. First, Section IV.A will evaluate the critiques of the *Feres* doctrine in light of its military justice rationale and detail a limited role for the *Feres* doctrine. Section IV.B then points to weakness in current *Feres* alternatives in light of *Feres*'s limited correctness. Section IV.C proposes a new approach for the *Feres* doctrine: *Feres* should only be used to bar service member FTCA claims when a civilian injured under similar circumstances would have been subject to military justice. Section IV.D goes through a few examples of how this new proposal can be applied in paradigm with FTCA cases. Finally, Section IV.E addresses potential criticisms of this proposal, including its treatment of precedent and *stare decisis*.

A. The Limited Correctness of the *Feres* Doctrine

Before introducing another interpretation of "incident to service" and the *Feres* doctrine, it is important to establish what the *Feres* doctrine gets right. The holding of *Feres* — that the government cannot be held liable for service member injuries that occurred incident to service[296] — is correct. This is not because *Feres* is an interpretation of the combatant activities exception, as many commentators claim.[297] If that were the case, then courts should plainly feel empowered to fix this gross misinterpretation of "combatant activities."[298] Rather, *Feres* is correct because it is a sensible interpretation of the FTCA's parallel private liability requirement.[299]

---

[296] Feres v. United States, 340 U.S. 135, 146 (1950).

[297] *See, e.g.*, Patrick J. Austin, *Incident to Service: Analysis of the* Feres *Doctrine and Its Overly Broad Application to Service Members Injured by Negligent Acts Beyond the Battlefield*, 14 Appalachian J.L. 1, 3–4, 17 (2014); David W. Fuller, *Intentional Torts and Other Exceptions to the Federal Tort Claims Act*, 8 U. St. Thomas L.J. 375, 380 (2011) ("In 1950, this [combatant activities] exception was significantly expanded when the Supreme Court decided *Feres v. United States* …"); *cf.* Lanus v. United States, 133 S. Ct. 2731, 2732 (2013) (Thomas, J., dissenting from denial of certiorari) (noting that § 2680(j) does not bar the claims of service members generally and then stating that "[t]here is no support for [the *Feres* doctrine] in the text of the statute").

[298] *Cf. supra* note 50 and accompanying text.

[299] Figley, *supra* note 48, at 20 ("The 'private person liability' element is also the root of the *Feres* doctrine ….").

As previously discussed, the FTCA only waives sovereign immunity for claims "where the United States, if a private person, would be liable to the claimant"[300] and the United States is only made liable "in the same manner and to the same extent as a private individual under like circumstances."[301] The reasoning of cases which Justice Scalia and others have pointed to as rejections of the parallel private liability requirement[302] would be improper to extend to military service. While Congress in 1946 could have foreseen the rich debate on the proper role of private and public actors in the operation of lighthouses,[303] it would have been a radical step for Congress to subject the United States to the same standard of tort liability as an ambitious anarcho-capitalist defense agency.[304] Military service is a unique interaction between the government and its citizens, separate from any jurisprudential quagmire that requires delineating traditional government functions.[305] The Supreme Court recognized as much in the *Selective Draft Law Cases*, when it held that the federal government could compel citizens into military service — a power that no private individual has.[306] Thus, the conclusion that the FTCA bars claims for injuries arising "incident to service" is supported by a more stringent (and faithful) application of the parallel private liability requirement.

---

[300] FTCA, *supra* note 1, 28 U.S.C. § 1346(b)(1).

[301] *Id.* at § 2674.

[302] United States v. Johnson, 481 U.S. 681, 694–95 (1987) (Scalia, J., dissenting) (citing Rayonier, Inc. v. United States, 352 U.S. 315, 319 (1957); Indian Towing Co. v. United States, 350 U.S. 61, 66–69 (1955)).

[303] *See* Indian Towing Co. v. United States, 350 U.S. 61, 66–67 (1955) (5-4); R. H. Coase, *The Lighthouse in Economics*, 17 J.L. & Econ. 357 (1974); Robert C. Ellickson, *A Hayekian Case Against Anarcho-Capitalism: Of Street Grids, Lighthouses, and Aid to the Destitute*, 11 N.Y.U. J.L. & Liberty 371, 385–88 (2017).

[304] *See, e.g.*, Hans-Hermann Hoppe, *The Private Production of Defense*, 14 J. Libertarian Stud. 27 (1999) (attacking the "legitimacy of the modern state" by "demonstrat[ing] that the idea of collective security is a myth").

[305] *See, e,g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 547 (1985) ("We therefore now reject, as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.'").

[306] Selective Draft Law Cases, 245 U.S. 366, 378–81 (1918) (9-0) ("It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it.").

The problem with the *Feres* doctrine is the expansiveness of "incident to service." The Court in *Brooks* explicitly rejected an interpretation barring all service member claims and instead allowed claims for injuries not incident to service.[307] But when, say, a service member and spouse receive the identical (negligent) treatment in an identical healthcare facility and only the service member is barred by *Feres*, then "incident to service" functions much like the automatic status-based bar rejected by the Court in *Brooks*.[308]

There is a distinction between recognizing military service as special and advocating for a separate legal sphere between the military and civilians.[309] Much like the justice-discipline problem in the law of military jurisdiction,[310] the best framework does not favor one absolute at the expense of another. Applying this lesson to *Feres*, the challenge is in creating a definition of "incident to service" that covers what makes military service a special relationship with the state, without being so broad as to create unwarranted distinctions between service members and civilians.

B. Weakness of Current *Feres* Alternatives

Most alternative "incident to service" tests rely on some balancing test to protect military discipline, perhaps with an exception for when the importance of discipline crosses an uncertain threshold.[311] All such tests suffer

---

[307] Brooks v. United States, 337 U.S. 49, 52 (1949).

[308] *See 2009 H.R. 1478 Hearing*, *supra* note 7, at 152 (statement of Eugene R. Fidell, President, Nat'l Inst. of Military Justice); Willke, *supra* note 100, at 282 (citing Reilly v. United States, 665 F. Supp. 976, 978–79 (D.R.I. 1987)).

[309] *See generally* James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. Rev. 177, 178 n.8 (1984) (collecting cases accepting the "separate community" doctrine). For an example of this separate sphere reasoning to support a broad *Feres* bar, see *The Feres Doctrine: An Examination of This Military Exception to the Federal Tort Claims Act: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 11 (2002) (statement of John Altenburg, Major General (Retired), Former Assistant Judge Advocate General, U.S. Army) ("I think there are two aspects to the good order, discipline, and effectiveness argument …. [T]he second is … the extraordinary regulation and control that the military exerts on itself, directly related to the demands that have no civilian counterparts that we make on our soldiers that are different in kind and degree from the civilian sector."). For an emphatic rejection of the separate sphere doctrine, see Warren, *supra* note 183, at 188 ("[O]ur citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes.").

[310] *See supra* note 205 and accompanying text.

[311] *See* sources cited *supra* notes 146–147.

from the same fatal flaw that the Court has already, correctly, disapproved of in *United States v. Stanley*: "A test for liability that depends on the extent to which particular suits would call into question military discipline and decision making would itself require judicial inquiry into, and hence intrusion upon, military matters."[312] After all, judicial intrusion upon military matters is not merely a bad idea because of policy non-expertise;[313] it is a threat to the separation of powers.[314] This possibility of intrusion is a pervasive, recognized concern in military pay cases, where administrative law courts have maintained that the judiciary can review the military's deviations from *non-discretionary procedure* but not military decisions on the *merits*.[315] To put it another way, civilian courts have recognized that the judicial branch must be restrained by more than a vague standard when interacting with military affairs, less there be judicial aggrandizement and unconstitutional overreach.[316]

So, if the problem with some *Feres* alternatives is that ungrounded balancing tests will result in judicial intrusion, then perhaps solutions that rely on the discretionary function exception[317] are the answer. (Recall that

---

[312] 483 U.S. 669, 682 (1987).

[313] *See, e.g.*, John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161, 165–69 (2000) (citing Martin v. Mott, 25 U.S. (12 Wheat.) 19, 30–31 (1827)).

[314] *See, e.g.*, Gilligan v. Morgan, 413 U.S. 1, 5–12 (1973); *see also* Orloff v. Willoughby, 345 U.S. 83, 93 (1953) ("[J]udges are not given the task of running the Army."); *cf. supra* note 169 and accompanying text.

[315] *See, e.g.*, Adkins v. United States, 68 F.3d 1317, 1323 (Fed. Cir. 1995) ("This court has consistently recognized that, although the *merits* of a decision committed wholly to the discretion of the military are not subject to judicial review, a challenge to the particular *procedure* followed in rendering a military decision may present a justiciable controversy."); *see also* William C. Bryson, *"Military Pay Cases": An Introduction*, 65 ADMIN. L. REV. 476 (2013).

[316] To put it yet another way, this is just an instance of the political question doctrine. Professor Barkow, after noting that the Supreme Court's expansion of judicial supremacy has coincided with a decline in the Court's willingness to allow other branches to interpret the Constitution, has suggested that reviving a "classical political question doctrine" (which would call only for constitutional interpretation and not simply "any prudential factors [a judge] deems important") to limit abuse by the Court. *See* Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 319–36 (2002). To be fair to the judiciary, other institutions also seem to take expansive views of their own "jurisdiction" when left unchecked. *Cf.* City of Arlington v. FCC, 133 S. Ct. 1863, 1886 (2013) (Roberts, C.J., dissenting) (decrying the increasing power of the administrative state and the ability of an agency "to decide when it is in charge.").

[317] *See* sources cited *supra* notes 148–149.

the discretionary function exception does not allow the government to avoid liability when the violation of any mandatory rule results in injury.)[318] In this way, *Stanley*'s prohibition against free-floating inquiries is heeded because judges only have to determine whether conduct did or did not violate a mandatory rule. Presumably, another advantage of applying the discretionary function exception in place of *Feres* is that the same standards that apply to every other agency would be applied to the military, and that the same standards that apply to civilians would apply to service member claimants. In fact, some FTCA cases have properly used the discretionary function exception to bar claims brought by *civilians* arising from military conduct that is "subject to a policy analysis."[319] This would be a commendable step in the direction of fairer treatment between civilians and service members in FTCA cases.

But this alternative overshoots the mark for equality because (1) determining what is "mandatory" involves more judicial discretion than it appears, and (2) this alternative does not account *at all* for the special concern of military discipline, a place where the civilians and service members spheres do not overlap and the military differs from other areas of the federal government.

The first dilemma with use of the discretionary function exception is that its litigation requires determining which regulations, policies, directives, etc. are intended to be mandatory, or intended to serve merely as guidance.[320] The military has no shortage of orders and guidelines[321] that can be subject to this fine-grained[322] examination. But the discretionary function exception has not been limited to codifications; the last word from the Supreme

---

[318] United States v. Gaubert, 499 U.S. 315, 324 (1991); *supra* note 65 and accompanying text.

[319] Brou, *supra* note 7, at 70 n.437 (collecting examples).

[320] Fishback, *supra* note 60, at 19–20.

[321] *See, e.g.*, United States v. Shavrnoch, 49 M.J. 334, 336 (C.A.A.F. 1998) ("The [MCM] reflects the fact that a myriad of regulations, instructions, and manuals govern virtually every aspect of military life …"). Indeed, service members are reminded of the totality of these instructions during every waking second. *Cf, e.g.*, U.S. Marine Corps, Order 5000.18, Marine Corps Band Manual app'x B at B-6 (May 10, 2013) (providing the musical notation for "Reveille. Sounded to awaken all Marines for morning roll call"), B-8 (providing notation for "Taps. The last call at night").

[322] Fishback, *supra* note 60, at 20 ("Thus, it is important to look very closely to determine whether an agency rule or policy is in fact mandatory within the ambit of the discretionary function exception analysis.").

Court leaves open the possibility that a mandatory policy can be established through adjudication, internal guidelines, or implied by "the general aims and policies of the controlling statute."[323] In the hypothetical case where a claimant alleges that a mandatory policy existed outside of the ordinary litany of military publications, Article III judges could be tasked with determining the "general aims" of a military function or conducting investigations into the on-the-ground establishment of an expected practice. Neither case appears ideal from a separation-of-powers perspective.

The second and more concerning issue with wholesale adoption of the discretionary function exception emerges from a comparison to the military justice system's treatment of "mandatory" orders and regulations. While the military could theoretically subject every disobedience of a general order or regulation to court-martial,[324] it does not do so.[325] Instead, military justice determines when a regulation is mandatory by looking to whether the regulation "is basically intended to regulate conduct of individual members and that its direct application of sanctions for its violation is self-evident."[326] This distinction between orders gives a reason to think that when expanding outside the common bureaucracy, "mandatory" regulations in agencies do not have the same enforcement incentives as "mandatory" regulations in military bureaucracy. Unlike every agency, the military's discretion in punishing violations of mandatory regulations can serve the purpose of creating an important military culture and sense of morale.[327] Applying the same discretionary function exception standard to all military decisions could, if tort liability has any of its desired deterrence effect on the federal government,[328] force the

---

[323] *Gaubert*, 499 U.S. at 324; *see also* Anestis v. United States, 749 F.3d 520, 528–29 (6th Cir. 2014) (finding a mandatory policy not based on any written directive, but on testimony, showed a policy was expected of VA employees).

[324] UCMJ art. 92(1) (codified at 10 U.S.C. § 912 (2012)) ("Any person subject to this chapter who [] violates or fails to obey any lawful general order or regulation … shall be punished as a court-martial may direct.").

[325] MCM, *supra* note 172, pt. IV, ¶ 18.c.(1)(e) ("Not all provisions in general orders or regulations can be enforced under Article 92(1).").

[326] United States v. Nardell, 21 C.M.A. 327, 329, 45 C.M.R. 101, 103 (1972). *See generally* Walter B. Huffman & Richard D. Rosen, Military Law: Criminal Justice & Administrative Process § 3:121 (Mar. 2016 update) ("In other words, only when general orders or regulations are punitive in character … is a service subject to court-martial.").

[327] *See supra* note 161 and accompanying text.

[328] *But see* Figley, *supra* note 31, at 459–62 (putting forth several reasons why a repeal of *Feres* would not create any financial deterrent for the Department of Defense).

military to put the thumb on the scale of over-enforcement to the detriment of ideal military culture and effectiveness.

Of course, these problems could be avoided by recognizing more military decision making as discretionary, notwithstanding mandatory regulations, because of the sensitive nature of military discipline. But this would put the entire inquiry back to square one: the federal government could expand the discretionary function exception to every action involving a service member by making a connection to military discipline, unless courts could discern what discretionary decisions were relevant for military discipline. Instead of looking to the discretionary function exception, courts need a way to acknowledge that differences between civilians and service members exist — as recognized by the parallel private requirement and "incident to service" test — without resorting to balancing tests that have no input from the political branches. The UCMJ can help courts navigate this service inquiry.

C. Tying "Incident to Service" to the UCMJ

The *Feres* doctrine and its military discipline rationale sit in an uneasy middle ground. If the *Feres* doctrine is intended to prevent questioning of military decisions generally, it is inexplicable error to permit civilian suits to go forward when service members in the same circumstances are barred by *Feres*.[329] If the *Feres* doctrine is concerned more specifically with the FTCA's impact on military discipline, then the doctrine's distinctions are unprincipled. Congress has determined that service members should be "subject to military discipline even while at play" in order to ensure proper military discipline.[330] By creating an "incident to service" test that considers what actions likely affect military discipline, courts are engaging in an analysis that is very similar to the service-connection test that was necessitated by *O'Callahan* and subsequently rejected by *Solorio*.

When looking beyond the UCMJ's application to service members, however, it becomes apparent that Congress has distinguished some conduct as more central to military discipline. Although civilians are thought not to

---

[329] *Cf.* Brou, *supra* note 7, at 70 n.436 (collecting examples of service members who "but for their military status, could likely have recovered under the Act."); sources cited *supra* notes 141–143.

[330] United States v. Brooks, 169 F.2d 840, 842 (4th Cir. 1948); *see* UCMJ art. 2(a)(1) (codified at 10 U.S.C. § 802(a)(1)).

be subject to military justice generally,[331] Congress has designated a class of activity — in the field and overseas — as so critical to military functioning and discipline that the military must be given the ability to break this general rule. This mirrors the FTCA, where Congress has designated certain functions, like taxation,[332] to be critical enough to be beyond the general rule allowing suit against the United States. These designations of special activity even overlap in one instance, as both the FTCA and UCMJ included an exception for conduct overseas.[333]

Once military jurisdiction over civilians is viewed as a designation of particularly sensitive military activity, a new tool emerges that can distinguish between different levels of "service." This new tool can address both the overbreadth problems of the current *Feres* doctrine (because civilians are not subject to military justice to the same extent as service members), and the intrusion concern expressed by the Court in *Stanley* (because the designations of special service are based on congressionally enacted military law, not a free-floating judicial inquiry). While there are likely many ways to employ the understanding of the UCMJ's civilian jurisdiction provisions to *Feres*, this article advances the following new "incident to service" test: A service member's claim should only be barred by *Feres* if a civilian injured under similar circumstances would still be subject to the UCMJ. The following sections will operationalize this idea into a more concrete test, apply this test to paradigm *Feres* cases, and address its possible weaknesses.

D. Operationalizing Article 2(a)(10) for *Feres*

Before discussing the appropriate scope of a military-justice-influenced *Feres*, it is important to understand what role the explicit FTCA exceptions leave for *Feres*. First, *Feres* can only be relevant for service member injuries suffered in the United States because "the FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country,

---

[331] *See, e.g.*, McElroy v. United States *ex rel.* Guagliardo, 361 U.S. 281, 284–85 (1960); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 122–27 (1866).

[332] FTCA, *supra* note 1, 28 U.S.C. § 2680(c).

[333] *Cf.* 28 U.S.C. § 2680(k), *with* UCMJ arts. 2(a)(11)–(12), (codified at 10 U.S.C. § 802(a)(11)–(12)). Note also that when jurisdiction over service members had to be justified as service-connected following *O'Callahan*, a *per se* rule allowing jurisdiction for offenses committed overseas. *See* United States v. Keaton, 19 C.M.A. (41 C.M.R.) 64 (1969); *see also* Cooper, *supra* note 255, at 167–68.

regardless of where the tortious act or omission occurred."[334] Furthermore, the discretionary function exception's scope bars claims that go to the military's high-level decisions, like procurement, whether the claimant is a civilian or a service member.[335] This section will focus on developing a new military test of "incident to service" by applying two types of cases left unaddressed by those FTCA exceptions: domestic medical malpractice cases and intra-military violence cases.

1. Assumptions for Application

First, as previously stated, this proposal seeks to better define *Feres*'s "incident to service" test; it does not require disturbing the principles of *Stencel* and *Johnson*. So, the genesis test of *Stencel* should still bar third-party FTCA claims on the basis of the service member's injury. Also, per *Johnson*, claims against the federal government on the basis of civilian actions should still be barred by *Feres* when the injury arises "incident to service."

In attempting to apply this proposal's new understanding of "incident to service" to the remaining sphere of *Feres* cases, the main difficulty is that many questions about military jurisdiction over civilians remain unanswered, both as a matter of statutory interpretation and constitutional law.[336] For simplicity's sake, this article will assume the constitutionality of Article 2(a)(10) and focus solely on the different interpretations of the statute's meaning. Therefore Article 2(a)(10)'s statutory elements — a person is "serving with or accompanying an armed force," while "[i]n time of declared war or a contingency operation" and "in the field" — become the inquiry for determining whether a service member's claim is barred under *Feres*. Each of the three elements has some unresolved ambiguities.

A civilian should be understood to be "serving with or accompanying" the armed forces whenever the civilian's presence with the armed forces is not incidental, but dependent upon the activities of the armed forces.[337] Put another way, a person is "accompanying an armed force" when they

---

[334] Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004); *see also* FIGLEY, *supra* note 48, at 39.

[335] Brou, *supra* note 7, at 70–72; text accompanying *supra* note 319.

[336] *See supra* Section III.C–.D.

[337] United States v. Burney, 6 C.M.A. 776, 788 (1956); *supra* text accompanying notes 264–265.

do not engage with an armed force "by chance."[338] Unlike a civilian, a service member must have at some point engaged with the armed force non-incidentally (i.e., enlisted) in order to be classified as a service member in the first place, and so should be presumed to be "accompanying" an armed force in satisfaction of this element, regardless of the activity of the armed force at the time of an injury. For example, even a service member injured during a military recreation exercise should satisfy this element of the *Feres* bar.

On the question of "in a time of declared war or military operations," this article will assume that a state of war or contingency operation is global for purposes of Article 2(a)(10).[339] Therefore, as long as the military continues contingency operations in the Middle East, a service member injured in either Baghdad or Baton Rouge would satisfy this element of *Feres* because the military is still "in a time of declared war or military operation" for any similarly situated civilians.

The third element of Article 2(a)(10), that the person must be "in the field," should then be the element that most limits the application of the *Feres* bar for service member injuries (because of the ease with which the first two elements, "serving with or accompanying" and "in a time of war," are satisfied.) Because of the weakness of *Reid-Ali*'s narrow "area of actual fighting" standard in military law jurisprudence,[340] this test for "in the field" should not be used in the application of *Feres*.[341] However, rejecting the *Reid-Ali* definition still leaves several alternative understandings of "in the field." In the subsequent examples, a common FTCA scenario will be analyzed under the following understandings of "in the field": (1) the *Hines* activity test, where the armed force is "in the field" if it performs activities like deployment training or troop transport[342]; (2) the *Hines* activity test

---

[338] *See In re* Di Bartolo, 50 F. Supp. 929, 933 (S.D.N.Y. 1943) ("Petitioner was at that base, not casually, not as a visitor, not by chance.").

[339] *Cf., e.g.*, United States v. Taylor, 4 U.S.C.M.A. (15 C.M.R.) 232, 238 (1954) (finding that Korean war placed the United States "in time of war" for purposes of Article 43, even for offenses committed outside of Korea). *See generally supra* note 234.

[340] *See supra* notes 266–277 and accompanying text.

[341] As another consideration, an "area of actual fighting" standard would seem to completely be redundant with the FTCA's combatant activities exception which would completely overturn *Feres* and "incident to service."

[342] Of the cases endorsed by the non-binding portion of the MCM, 2016, *supra* note 172, R.C.M. 202(a)(4) analysis, at A21–11, as falling within the *Hines* activity test, all involve an armed force either preparing to deploy to an area of hostilities or travelling to or from the hostilities. *See* Hines v. Mikell, 259 F. 28 (4th Cir. 1919) (training for

with the caveat of *Gerlach* that permanent bases are not "in the field"; and (3) the proximity-to-hostilities and combat footing test advanced by Visger. In making ultimate conclusions about how FTCA cases under a proposed military-law understanding of *Feres* should be resolved, this article, like the non-binding portion of the MCM, adopts the *Hines* activity test as the test for "in the field."

2. Medical Malpractice

In cases of medical malpractice, the result of a military-law understanding *Feres* doctrine should be that *Feres* does not bar FTCA service members claims. This is because a civilian undergoing the same medical operation in similar circumstance should not be subject to military justice under Article 2(a)(10). Even if a civilian who undergoes a medical operation performed by a military doctor could be considered as accompanying the armed forces not "incidentally" (which could be doubted if there was a chance event precipitating the operation),[343] that civilian would not likely have been "in the field" under any competing understanding of Article 2(a)(10). Under the Visger formulation, the armed forces that hosted the medical operation would not be "in the field" as there was no combat footing or expectation of attack on the base. This scenario also falls outside the *Hines* formulation for "in the field" unless the hosting armed force had been training for deployment overseas when the medical operation was performed. Under the *Hines* and *Gerlach* formulation, this is even more clear-cut unless the medical operation was performed at a temporary encampment.

The same result would hold in cases of negligent prenatal care, regardless of whether the medical professional directed the injury-causing treatment to the servicewoman instead of the fetus, or whether the servicewoman suffered any injury at all. Under this article's proposed test, the inquiry for any third-party claim still focuses on the status of the relevant service member, and whether a civilian in similar circumstances to *the service member* would be subject to military justice. In the case of prenatal injury, then, the analysis

---

deployment to front lines of World War I theatre); *Ex Parte* Gerlach, 247 F. 616 (S.D.N.Y. 1917) (transporting via steamship from Europe to New York); *In re* Berue, 54 F. Supp. 252 (S.D. Ohio 1944) (transporting supplies via sea to World War II theatre); McCune v. Kilpatrick, 53 F. Supp. 80 (E.D. Va. 1943) (same). The sole exception, *Burney*, involved the armed forces' occupation of Japan pursuant to a mutual defense agreement. *See* 6 C.M.A. at 788 (upholding court-martial jurisdiction over civilian employed at Air Force base to repair radar equipment).

[343] *Burney,* 6 C.M.A. at 788; *see also supra* note 265 and accompanying text.

of whether a civilian in the place of the servicewoman would be subject to military justice collapses into the same inquiry used for medical malpractice cases: the FTCA claim would not be barred by *Feres* unless the armed forces that treated the servicewoman were in an area of hostilities (which is not likely within the United States) or, under *Hines*, deploying to a theatre of war.

3. Intra-Military Violence

Claims of intra-military violence are less clear-cut and depend on unresolved questions about the reach of military justice away from the battlefield. Take, as an example, the facts of *Gonzalez v. United States Air Force*: A serviceman on an Air Force base in Oklahoma unlawfully entered the room of an active duty servicewoman — who was assigned to the base for training — and raped her.[344] The servicewoman-victim brought claims against the United States under the FTCA, alleging negligent supervision, failure to perform required background checks, and a state statutory claim.[345] Because the serviceman-rapist acted outside the scope of employment, no intentional tort exception applies under the FTCA.[346] To determine whether the intra-military violence claimed would be barred under a new conception *Feres* requires answering whether a civilian in the place of the servicewoman would be subject to military justice. Assuming the time of war and accompanying armed forces elements are clearly satisfied, the servicewoman's FTCA claim should not be barred by *Feres* because a civilian in the same place would not be subject to military justice. Certainly, under the *Gerlach* test, the claim would be permitted because an Air Force base in Oklahoma is not a temporary encampment, so any person at the base is not "in the field." Under the Visger test, the base would not be considered "in the field" unless Oklahoma could be considered within an area of hostilities. Under the *Hines* formulation it is possible to subject a civilian on-base to military justice if the base was undergoing deployment training, but would otherwise not likely be performing an activity that placed the Air Force "in the field" at the time of the rape.

Thus, this article's proposed understanding of *Feres* should reach a result contrary to the norm in intra-military violence cases (where those

[344] 88 F. App'x 371, 372–73 (9th Cir. 2004) (unpublished decision); *see also* Reidy, *supra* note 59.

[345] *Gonzalez*, 88 F. App'x at 374.

[346] *See supra* notes 54–59 and accompanying text.

claims are most often barred by *Feres*)[347] depending on the activity of the armed forces at the time of the intra-military violence. Two factors should militate against condemning this proposal's conception of *Feres* because it may permit intra-military violence claims. The first is that this possibility of allowing intra-military violence claims only can arise because the current jurisprudence of the intentional tort exception allows such claims if an independent duty of care exists; it is conceivable that the intentional tort exception should bar all claims arising from such assaults, making the lack of *Feres* bar a non-factor.[348] The second reason for caution is that this possibility may be foreclosed without an amendment to the FTCA: If Congress and the courts expand the scope of military justice and permit it to be applied to civilians in scenarios where intra-military violence occurs, then this article's proposed understanding of *Feres* would likewise expand to bar intra-military violence claims. Of course, this second solution is not specific to FTCA claims of intra-military violence. The next section continues to address concerns related to this article's proposed *Feres* test outside of any specific tort.

E. Anticipated Concerns

Like other alternative *Feres* tests, the one proposed in this article — that *Feres* should only bar claims where a civilian under similar circumstances would be subject to military justice — faces criticisms on a conceptual and operational level. This section begins with the broadest, conceptual objections to associating military law with *Feres* and the FTCA and progresses to more practical considerations in how courts apply this *Feres* test.

1. Differences between Civilians and Service Members

This article is undergirded by a rejection of the separate sphere doctrine and the idea that there is an absolute distinction between civilians and service members. As a matter of interpretation of both the FTCA and the UCMJ, this seems warranted. Congress did not write an explicit service member exception into the FTCA and post-enactment history of the act suggests that no such bright line between service member and civilian was intended.[349] It is clear from the text of the UCMJ that "service" is not an

---

[347] *See supra* notes 109–110 and accompanying text.

[348] Sheridan v. United States, 487 U.S. 392, 404, 408–10 (1988) (O'Connor, J., dissenting).

[349] And there is some history to suggest that Congress did not intend such a bar. *See supra* notes 68, 73 and accompanying text.

activity reserved for the sphere of military service members; civilians can be subject to military justice if "serving or accompanying" the armed forces. The fact that only a subset of "service" activity will permit civilians to be court-martialed while service members may be court-martialed regardless of what "service" they were performing does not mean that the service member/civilian division is the only valid (or political-branch-approved) distinction to take away from the UCMJ. It is the designation of some "service" as so central to military discipline that civilians can be subject to military justice — a serious constitutional question — that creates the link to *Feres*'s "incident to service" holding.

Because this separate sphere doctrine is rejected, this allows this article's use of a "similar circumstances" analysis to determine whether a civilian would be subject to military justice in the place of an injured service member. This is not meant to be an expansive or free-floating judicial inquiry like the one at the heart of the *Feres* doctrine's current confusion. Rather, this is only a trivial recognition of the fact that a service member has been enlisted into the military while a civilian has not; thus, a test relying on "same circumstances" could never be employed without accounting for this enlistment.[350] Some may argue this difference in circumstance — formal induction into the armed forces — should be enough to always distinguish a service member from a civilian. At its core, this is just an advocacy of the separate sphere doctrine for the military. If there is any acknowledgment of areas where military life has a civilian analogy, as *Brooks* recognizes, then such absolutism must fail.

[350] *Cf.* Brooks v. United States, 337 U.S. 49, 52 (1949) ("But we are dealing with an accident which had *nothing to do with the Brooks' army careers*, injuries not caused by their service *except in the sense that all human events depend upon what has already transpired.*" (emphasis added)).

Of course, rejecting an absolute distinction between civilian and service member does not mean military service should be ignored. Much like *Toth*'s least-power-adequate principal allows for some cases of civilian court-martial, military necessity may call for an exception to an otherwise general rule waiving sovereign immunity. If military service were completely ignored as a distinguishing factor in *Feres* cases,[351] military necessity could play no role in barring FTCA cases. This article's understanding of *Feres* rejects that strict conclusion and instead implies that whichever military necessity reasons keep civilians from being tried in a civilian court should be the same reasons relied upon to keep service member FTCA claims out of civilian court.

2. *Congressional Intent*

In December 2019, as part of the National Defense Authorization Act for Fiscal Year 2020 (NDAA 2020), Congress authorized the Secretary of Defense to "allow, settle, and pay a claim against the United States for personal injury or death incident to the service of a member of the uniformed services that was caused by the medical malpractice of a Department of Defense health care provider."[352] While proclaimed as a small victory for critics of the *Feres* doctrine,[353] the NDAA 2020 provision "does not change or repeal the *Feres* doctrine"[354] or any part of the FTCA, and, even for medical malpractice claims, leaves service members without a remedy for certain government healthcare providers.[355]

---

[351] *Cf.* Costo v. United States, 248 F.3d 863, 870, 874–76 (9th Cir. 2001) (Ferguson, J., dissenting) (arguing that the *Feres* doctrine does not survive the rational basis test of equal protection law).

[352] National Defense Authorization Act for Fiscal Year 2020 (2020 NDAA), Pub. L. No. 16-92, 133 Stat. 1457, sec. 731 (2019) (to be codified at 10 U.S.C. § 2733a).

[353] *See, e.g.*, Richard E. Custin, Opinion, *Congress Grants Military Members Partial Victory, but* Feres *Doctrine Survives*, The Hill (Dec. 20, 2019, 1:00 PM), https://thehill.com/opinion/national-security/475024-congress-grants-military-members-partial-victory-but-feres-doctrine.

[354] Senate & House Armed Servs. Comms., FY20 NDAA Conference Summary 5 (2019), https://www.armed-services.senate.gov/imo/media/doc/FY20%20NDAA%20Conference%20Summary%20_%20FINAL.pdf; *see also* H.R. Rep. No. 116-333, at 1280–81 (2019).

[355] *See, e.g.*, Daniel Perrone, *The* Feres *Doctrine: Still Alive and Well after Enactment of the National Defense Authorization Act for Fiscal Year 2020?*, JURIST (Mar. 14, 2020), https://www.jurist.org/commentary/2020/03/daniel-perrone-feres-doctrine-ndaa/ (noting that the definition of "covered medical facility" in the 2020 NDAA excludes facilities maintained by the Department of Veterans Affairs); *see also* James Clark, *A*

However, the fact that Congress provided an alternative remedy for the kinds of claims that were most frequently used to level criticism of *Feres*[356] could be argued by proponents of the *Feres* doctrine as settling the current *Feres* doctrine as the correct interpretation of the FTCA. The argument would be that Congress, which knows of the *Feres* doctrine, has tacitly approved of its current application by only tweaking one aspect (service member medical malpractice claims) and has simultaneously rejected any other interpretation of the FTCA or *Feres* (such as this article's) by not also enacting those amendments alongside the NDAA 2020 provision.[357] Such an argument interpreting legislative inaction as acquiescence,[358] however, is disfavored by the Court.[359] The Court has even explicitly rejected the acquiescence argument where Congress amended related provisions relying on a settled interpretation of the statute at issue.[360] Thus, here, the passage of one provision in the massive NDAA 2020 that impacts a subset of *Feres* cases should not prevent courts from shaping or reconsidering the *Feres* doctrine as a whole.

New Law Could Finally Force DoD to Compensate Troops Who Suffered From Military Doctors' Mistakes, Task & Purpose (Dec. 9, 2019, 9:21 PM), https://taskandpurpose.com/analysis/ndaa-feres-doctrine-medical-malpractice ("It's still unclear whether this change could pave the way for future amendments to allow for claims on sexual assault, workplace violence, or training incidents, all of which remain barred by *Feres*.").

[356] *See supra* notes 6, 116 and accompanying text.

[357] *Cf., e.g.*, Apex Hosiery Co. v. Leader, 310 U.S. 469, 488–89 (1940) ("The long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one.").

[358] William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 Mich. L. Rev. 67, 71–77 (1988) (describing such an argument as the "acquiescence rule").

[359] *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 291–93 (2001) ("It is impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation." (quoting Patterson v. McLean Credit Union, 491 U. S. 164, 175, n. 1 (1989)); *see also* Helvering v. Hallock, 309 U.S. 106, 119–22 (1940).

[360] Eskridge, *supra* note 358, at 76–77 (citing *Aaron v. SEC*, 446 U.S. 680, 694 n.11 (1980) ("But, since the legislative consideration of those statutes was addressed principally to matters other than that at issue here, it is our view that the failure of Congress to overturn the [prior] interpretation falls far short of providing a basis to support a construction of [the statute following the prior interpretation]")); *see also Sandoval*, 532 U.S. at 291–93.

The issue of the recent Congressional (in)action aside, the broad conclusion of this article — that courts should look to UCMJ standards when applying *Feres*'s "incident to service" test — could evoke a concern about remaining faithful to Congress's intent in passing the FTCA. In other words, did Congress, in creating a statute to waive sovereign immunity, intend for military law to be relevant?

One reason to answer affirmatively is the fact that the FTCA was passed in 1946 (just four years before the UCMJ), when World War II had recently demonstrated the importance of the American military and military law. While not every law passed during this time would have called for incorporation of military law jurisprudence, Congress had recently created a sovereign immunity waiver for the military context.[361] And a comprehensive change in sovereign immunity law, like the FTCA, would impact the military and military law. Today, sovereign immunity law is understood to play such an important role in the lives of service members that military law experts charged with examining the role of the UCMJ in service member life expanded their mission to consider *Feres* as well.[362] With a subject as relevant to the military as sovereign immunity, in an historical era where the military and military law were in the spotlight, it would be strange for Congress not only to intend that military law be irrelevant to the application of the FTCA and *Feres*, but to make this intention known only implicitly.

3. Treatment of Precedent and Stare Decisis

Because of the impact of the *Feres* doctrine and the abundance of lower court cases that have shaped the contours of its application, even some opponents of *Feres* think that only Congress can or should limit the *Feres* doctrine's scope.[363] Although this article suggests that the proper statutory basis for *Feres* doctrine comes from a different understanding of the FTCA's parallel private liability requirement than *Indian Towing* suggests,[364] this

---

[361] Military Claims Act, Pub. L. No. 78-112, 57 Stat. 372 (1943) (codified as amended at 10 U.S.C. § 2733 (2012).

[362] *Cf. 2009 H.R. 1478 Hearing*, *supra* note 7, at 150–51 (statement of Eugene R. Fidell, President, Nat'l Inst. of Military Justice) (discussing the work of the Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice and how the Commission came to recommend further study of *Feres*).

[363] *See, e.g.*, Willke, *supra* note 100, at 282 ("[W]hether members of the military should be barred from bringing claims under the FTCA is a far-reaching policy determination that should be left for Congress.").

[364] *See supra* notes 299–306 and accompanying text.

does not change the fact that the Supreme Court's task to the lower courts remains to determine whether an injury arose "incident to service." This determination of "incident to service" could be made solely in light of previous cases, but that does not preclude an incorporation of military law standards any more than it precludes the scope of employment law understanding of the Second Circuit or whatever prudential factors were relied upon in earliest FTCA cases. This is not to downplay the fact that the Supreme Court in *Feres v. United States* itself barred two medical malpractice claims that likely did not occur "in the field" under any conception. But as the *Feres* doctrine becomes increasingly criticized from a variety of perspectives and justifications, the old rulings of even seminal *Feres* cases can and should be distinguished to the extent they become incongruent with each other and the rest of the legal system.[365]

4. Unresolved Questions of Military Jurisdiction

A more practical criticism of this article's recommendation would be that the body of military law on jurisdiction over civilians is too underdeveloped to be useful for FTCA claims in civilian courts. After all, even putting aside *Ali* (the most recent case decision on the matter), there are a few competing understandings of the scope of Article 2(a)(10). While this is a persuasive critique for anyone who wants to minimalize the amount of judicial exposition of constitutional law, the countervailing concern is that issues of such impact as civilian military jurisdiction should have a developed theory before the next rush of interest.[366] And, if one views *Feres* and the UCMJ both as aspects of military law and life, then the effect of ignoring the military law of civilian jurisdiction in *Feres* cases is to create a discordant body of military law in exchange for avoiding the duty of constitutional interpretation.

---

[365] Guido Calabresi, A Common Law for the Age of Statutes 163–66 (2009) (suggesting that courts be recognized to "not be bound to declare or promulgate the new in order to find that the old fails to fit" and positing that "[Courts] would exercise the same capacity to define what are 'like' cases at different levels of generality, in terms of different sources of law (statutory, jurisprudential, case, scholarly comment) and in response to technological, societal, and even ideological changes.").

[366] As what happened with respect to contractors during the War on Terror. *See supra* notes 213–217 and accompanying text.

V. Conclusion

With the increasing civilianization of the military over the past half-century, "[t]here seems to be less reason than ever for treating the soldier as different from the civilian, except in the peculiarly military aspects of his life."[367] *Feres*'s "incident to service" test can be viewed as an attempt to determine what part of a service member's life is distinctive to military service.[368] The civilian jurisdiction provisions of UCMJ Article 2 can be seen as accomplishing the same thing from a different perspective: Article 2(a)(10) determines what part of military service is so distinctive that the general rule against civilian court-martial is inapplicable. By explicitly linking these two bodies of law, one can hope to create a more uniform body of military law and an understanding of what makes the military service unique under our Constitution.

[367] Note, *supra* note 71, at 624 (published in March 1949).

[368] *Cf.* Brooks v. United States, 337 U.S. 49, 52 (1949).

YOUR MONEY OR YOUR LIBERTY: CLARIFYING MILITARY CONTINGENT CONFINEMENT

*Andreas Kuersten**

* Andreas Kuersten is a Visiting Researcher at Georgetown University. The author previously clerked for the U.S. Court of Appeals for the Armed Forces and U.S. Court of Appeals for the Federal Circuit. He was also a legal fellow with the National Oceanic and Atmospheric Administration, Office of General Counsel. The author would like to thank the Honorable Scott W. Stucky, James A. Young, and Catherine Kuersten for their helpful input during the drafting process. In addition, he is grateful for the edits and comments of the Air Force Law Review staff, which materially improved the article.

I. Introduction

Your money or your liberty? Barring certain limitations, monetary penalty or incarceration awaits service members who have fines and contingent confinement — i.e., sentence conditions allowing for the imposition of confinement if an individual fails to pay a punitive fine — adjudged against them under the military justice system.[1] This is the case despite recent significant changes to the Manual for Courts-Martial (MCM) and Rules for Courts-Martial (RCM)[2] and contrary interpretations of how to implement contingent confinement.[3]

The RCM outlines military fine enforcement through contingent confinement in Rule 1003(b)(3), which states that sentences including fines "may be accompanied by a provision" providing "that, in the event the fine is not paid," the convicted individual may be "confined until a fixed period considered an equivalent punishment to the fine has expired."[4] Although another rule addressing this punishment was removed from the RCM by Executive Order 13825 in 2018 — Rule 1113(e)(3), which described contingent confinement as replacing any associated fine and the manner in which this substitution must take place[5] — Rule 1003(b)(3) was left unchanged.[6] Both courts and scholars, however, have stumbled in interpreting this Rule, creating confusion as to its true legal effect and viability for achieving certain penological outcomes.

---

[1] It must be noted that "courts-martial rarely adjudge punitive fines" due to the legal and administrative effort often required to collect them post-sentencing. Major Daniel J. Murphy, *Do Not Pay $200–Go Directly to Jail: Clarifying the Fine Enforcement Provision*, Army Law., Oct. 2012, at 4.

[2] Exec. Order No. 13825, 2018 Amendments to the Manual for Courts-Martial, United States, 2018, 83 Fed. Reg. 9889, 9889–10353 (Mar. 1, 2018) (amending the Manual for Courts-Martial and Rules for Courts-Martial); *see* Lisa M. Schenk, Modern Military Justice: Cases and Materials v (3d ed. 2019) (referring to Executive Order 13825 as one of "four executive orders making extensive amendments to the [MCM]").

[3] United States v. Rascoe, 31 M.J. 544 (N.M.C.M.R. 1990); Murphy, *supra* note 1.

[4] Manual for Courts-Martial, United States, [hereinafter MCM] (2019 ed.), Rule for Courts-Martial [hereinafter R.C.M.] 1003(b)(3).

[5] MCM (2016 ed.), R.C.M. 1113(e)(3). See Exec. Order. No. 13825, *supra* note 2, at 10048–50 (presenting the revised R.C.M. 1113, which does not include R.C.M. 1113(e)(3)).

[6] *Id*. at 10015.

Clear illustrations of such missteps are presented in an article by Major Daniel Murphy[7] and the opinion of the United States Navy-Marine Corps Court of Military Review (NMCMR) — the precursor to the Navy-Marine Corps Court of Criminal Appeals — in *United States v. Rascoe*.[8] The article and opinion incorrectly put forth that, under Rule 1003(b)(3) and former Rule 1113(e)(3), those who fail to pay fines may be subject to contingent confinement *and* remain liable for their original financial punishment, rather than one or the other.[9] Though the NMCMR does so expressly in dicta,[10] courts have relied on the interpretation as precedent, propagating faulty law.[11] Murphy additionally proposes problematic recommendations for the modification of Rule 1003(b)(3) and Rule 1113(e)(3).[12]

In light of the aforementioned recent removal of Rule 1113(e)(3) from the RCM and inaccurate scholarly and judicial presentations, this article clarifies the law of military fine enforcement through contingent confinement and offers recommendations for its use. Part II presents an overview of the historical development of military contingent confinement prior to the promulgation of the 1984 MCM. Throughout this period, the sanction is shown to have operated to discharge attendant fines via the imposition of confinement.

Part III examines the language of Rule 1003(b)(3), which was first published in the 1984 edition of the MCM, remained unchanged by Executive Order 13825,[13] and continues to govern the imposition of military contingent confinement.[14] Rule 1003(b)(3) directs that if confinement is imposed for failure to pay a court-ordered fine pursuant to a fine enforcement provision, the fine is discharged and any confinement contingent on nonpayment of the fine replaces the monetary penalty as punishment for the crime.[15] Part III also provides an assessment of former Rule 1113(e)(3),[16] which similarly

---

[7] Murphy, *supra* note 1, at 8–10.

[8] *Rascoe*, 31 M.J. at 550–52.

[9] *Id*. at 550–53; Murphy, *supra* note 1, at 9.

[10] *See Rascoe*, 31 M.J. at 552 n. 6 (referring to its interpretation of the relevant RCM provisions as "dictum").

[11] *See e.g.*, United States v. Phillips, 2006 WL 650022, at *34 (N-M Ct. Crim. App. Mar. 16, 2006); United States v. Smith, 44 M.J. 720, 724 n. 6 (A. Ct. Mil. Rev. 1996).

[12] Murphy, *supra* note 1, at app. A.

[13] Exec. Order No. 13825, *supra* note 2, at 10015.

[14] MCM (2019 ed.), R.C.M. 1003(b)(3).

[15] *Id*.

[16] MCM (2016 ed.), R.C.M. 1113(e)(3). R.C.M. 1113(e)(3) is R.C.M. 1113(d)(3) in

first appeared in the 1984 MCM,[17] but was removed from the RCM by Executive Order 13825.[18] The analysis of Rule 1113(e)(3) reinforces the interpretation of Rule 1003(b)(3) advocated here. Part III further argues that Rule 1003(b)(3) requires that contingent confinement replace an associated fine when it is executed and that partial payments made prior to execution and any payments made following execution have no effect on the period of imprisonment an individual must suffer; pre-confinement, partial payments must be returned and post-confinement payments cannot be accepted. Rule 1003(b)(3) should be amended to make this process explicit and a draft Rule 1003(b)(3) is provided.

Part IV analyzes how the military appellate courts have addressed contingent confinement under Rule 1003(b)(3) and former Rule 1113(e)(3) to help determine whether and to what degree case law should be adjusted to match the interpretations of this article. Although the United States Court of Appeals for the Armed Forces (CAAF) and its predecessor, the United States Court of Military Appeals (CMA), have thus far failed to rule on the issue, the appellate courts of the service branches have weighed in. In *Rascoe*, the NMCMR — though expressly in dicta[19] — espoused the position that this article critiques, while the Army appellate precedent entails conclusions that substantially mirror those of this article. Air Force appellate precedent is less clear but appears congruent with that of the Army.

Finally, Part V critiques Murphy's recommendations for the modification of Rule 1003(b)(3) and former Rule 1113(e)(3). It articulates shortcomings in the understandings of Murphy and the NMCMR with regard to the nature of the fiscal sanction an adjudged fine subjects individuals to. Part V then provides recommendations for the effective use of fine enforcement provisions at sentencing. Their employment is argued to be ineffective when the goal is the recouping of financial losses because the imposition of contingent confinement extinguishes the financial obligation and forces the government to expend additional resources on incarceration. If a debt goes unpaid, the United States has many effective avenues by which it can still collect what is owed. But when the penological goals are, wholly or in part, retribution

---

iterations of the MCM preceding the 2012 edition. *See, e.g.*, MCM (1984 ed.), R.C.M. 1113(d)(3).

[17] *Id*.

[18] Exec. Order No. 13825, *supra* note 2, at 10048–50.

[19] United States v. Rascoe, 31 M.J. 544, 552 n. 6 (N.M.C.M.R. 1990). *But see supra* note 11 and accompanying text.

or deterrence, such provisions give authorities more options and the chance to put the government in a better financial position without sacrificing the alternative punishment of confinement.

II. The Development of Military Contingent Confinement

The law of military fine enforcement through contingent confinement has evolved over decades to assume its current form. From the beginning of its codified existence in the 1918 MCM to its presentation in the 1984 MCM, the history of this punishment reveals that its imposition discharged attendant financial obligations.

Prior to its codification, as presented by the Army Judge Advocate General (Army TJAG) in 1880, contingent confinement was implemented as a matter of custom: "Sentences of imprisonment till a fine, also imposed by the sentence, is paid, are sanctioned by the usage of the service."[20] The Army TJAG went on to note that "[i]t is proper … in such sentences to affix a limit beyond which the punishment shall not be continued in any event."[21] This explanation, while stating that *some* limit on possible confinement *should* be prescribed, indicates that such additions were discretionary and provides no guidance for determining the length of possible confinement as a result of failing to pay a punitive fine. In addition, the language, "till a fine … is paid," does not make clear whether service of contingent confinement for the adjudged period discharged the fine.

The discretionary nature of affixing a limit beyond which contingent confinement would not continue is illustrated in the case of "an officer[] sentenced … to the payment of a fine and to imprisonment till the fine was paid and held for *some time in confinement* by reason of the non-payment of the fine …."[22] After "some time in confinement," the officer "applied

---

[20] William Winthrop, A Digest of Opinions of the Judge Advocate General of the Army, With Notes 285 (1880). *See* George B. Davis, A Treatise on the Military Law of the United States: Together With the Practice and Procedure of Courts-Martial and Other Military Tribunals 168 (3rd ed. 1913) ("[A] sentence of imprisonment until a certain fine, specified in the sentence, has been paid is … authorized by custom of service.").

[21] *Id.*, Winthrop at 285 (internal quotation marks and citations omitted). *See id.,* Davis at 168 ("The term of imprisonment should be expressly stated in the sentence.").

[22] Charles McClure, A Digest of Opinions of the Judge Advocate General of the Army 376 (1901) (emphasis added). For a further demonstration of this discretionary nature, *compare* Colman v. United States, 38 Ct. Cl. 315, 335 (Ct. Cl. 1903) (stating, in

to be released."[23] When the case reached the Army TJAG, he stated that official procedures for determining whether an individual is a "poor convict" be followed "before exercising any clemency in [the] case" so as "to protect the Government from fraud."[24] No set period of confinement was delineated and the officer had to apply for release after serving "some time." The Army TJAG then recommended that the officer continue to be imprisoned without a fixed end date unless he was found to be a "poor convict" warranting clemency.[25] This case also indicates that the imposition of contingent confinement did not extinguish the officer's financial obligation. That is, the conditional incarceration did not discharge the fine since the officer remained imprisoned indefinitely for not paying, and paying the fine was the key to securing his release.

Passages from the 1896 edition of Colonel William Winthrop's influential treatise on military law expound upon these early understandings and implementations of military contingent confinement.[26] With regard to the punishment generally, Winthrop writes,

> In the military, as in the civil, procedure, where a fine is imposed, it commonly is, and in general properly should be, added in the judgment that the party shall be imprisoned till the fine is paid. But, especially as there is no process known to the military law by which a convict, destitute of means,

---

relevant part, that the service member was sentenced "to pay a fine of $700 to the United States, and be imprisoned for the period of seven months at such place as the general commanding should designate, and thereafter until said fine was paid and said sum of money turned over," and further noting that "upon a finding of payment of the fine before mentioned, [the service member] was discharged from further imprisonment"), *with* Runkle v. United States, 19 Ct. Cl. 396, 398–99 (Ct. Cl. 1884) (recounting, in relevant part, that the service member "was sentenced … to pay the United States a fine of $7,500, and to be confined … for the period of four years; and in the event of the non-payment of the fine at the expiration of four years, that he should be kept in confinement until the fine be paid; the total term of imprisonment, however, not to exceed eight years").

[23] *Id.* at 376.

[24] *Id*.

[25] *Id*.

[26] *See* William Winthrop, Military Law and Precedents 420 (2nd ed. 1920) (discussing contingent confinement in the military). The most widely available version of this treatise was printed in 1920, but this iteration is simply a reissue of the book's second edition that was originally published in 1896, though with a smaller type size and, therefore, different pagination. *See id*. at 3 (stating that the 1920 version is a "reprint[]" of the 1896 edition), 8 (describing alterations to type size and pagination).

> can, because of his inability, be relieved from an imprisonment imposed for the enforcement of a fine, it is usual and proper in a military sentence to declare that such an imprisonment shall not exceed a certain term of months or years; otherwise — the pardoning power not intervening — the confinement might be indefinitely prolonged.[27]

As examples of how to adjudge such confinement, Winthrop presents court language abating the owed fine at a rate of "five (or other number of) dollars *per* day" and imposing imprisonment of "one day for every two dollars [owed], or any part thereof that remains unpaid."[28] Contrary to the Army TJAG, Winthrop appears to evince a preference for contingent confinement sentences in terms of direct dollars-to-days conversions. This would seem to have allowed for the progressive diminishment of a fine as conditional imprisonment was served, perhaps having permitted an individual to secure his liberty at a lower cost the longer he was incarcerated.

The first mention of contingent confinement in the primary text of the military legal system, the MCM, was in its 1918 iteration. The 1918 MCM provides that the imposition of a fine as criminal punishment

> is usually accompanied in the sentence by a provision, in order to enforce collection, that the person fined shall be imprisoned until the fine is paid or until a fixed portion of time considered as an equivalent punishment has expired.[29]

This passage appears to have left open the following two avenues for convicted individuals to secure their liberty following confinement for failure to pay a fine: (1) they paid the fine in full and were released, the fine apparently unabated by any contingent confinement already served; or (2) they served the full term of conditional imprisonment. With regard to the second option, "imprisonment … until a fixed portion of time considered as an equivalent punishment has expired," it is unclear from the language whether being subjected to such a period of confinement satisfied the fine owed; the mere execution of the contingent confinement provision does not appear to have discharged the fine given that payment mid-term of imprisonment seemed an acceptable path to immediate release. Since contingent confinement was

---

[27] *Id*. at 420.

[28] *Id*. at 420 n. 73 (emphasis in original).

[29] MCM (1918 ed.), pt. XII, ¶ 317.

meant to be an "equivalent punishment" for the crime, as was the original fine, interpreting this language as leaving the financial penalty in place after service of "a fixed portion of time" would appear to have doubled an individual's punishment for his conduct.

The following sample "forms for sentences" supplied in Appendix 9 of the 1918 MCM provide insight into the shapes these punishments took:

> To pay to the United States a fine of ------- dollars and to be confined at hard labor, at such place as the reviewing authority may direct, until said fine is so paid, but not more than ------- months (*or* years) ….
>
> To pay to the United States a fine of ------- dollars, to be confined at hard labor, at such place as the reviewing authority may direct, for ------- months (*or* years), and to be further confined at hard labor until said fine is so paid, but for not more than ------- months (*or* years), in addition to the ------- months (*or* years) hereinbefore adjudged.[30]

Following sentences to confinement at hard labor with "until said fine is so paid" indicates that the contingent confinement satisfied the adjudged financial sanction and did so once the whole term of imprisonment was served.

The 1918 MCM's description of military fine enforcement through contingent confinement is in broad accordance with Winthrop's; that is, with the service of the contingent confinement discharging the fine. The 1918 MCM's sample sentences, however, differ from those offered by Winthrop by simply declaring a period of time beyond which contingent confinement would not continue and at the conclusion of which the entire fine was deemed satisfied.[31] There is no indication in the 1918 MCM examples that a fine was abated as contingent confinement was served or that the sum due following service of only a portion of the full contingent confinement term was less than the amount adjudged or owed at the time the imprisonment was executed.[32]

---

[30] *Id*. at app. 9 (capitalization altered).

[31] *Id*.

[32] *Id*. Of additional interest in the 1918 MCM is the following passage in Appendix 2, which is titled, "System of courts-martial for National Guard not in the service of the United States":

Military contingent confinement, as outlined in the MCM, next underwent change in the 1951 edition, assuming the following form:

> In order to enforce collection, a fine is usually accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired …. The total period of confinement adjudged in such a sentence shall not exceed the jurisdictional limitations of the court.[33]

One of the clearest changes is the elimination of the passage in the 1918 MCM allowing for contingent confinement "until the fine is paid."[34] This deletion is significant insofar as it appears to have removed the possibility of securing liberty via fine payment after contingent confinement was executed. Additionally, a sentence was added limiting "[t]he total period of confinement adjudged," including both contingent and non-contingent confinement, to "the jurisdictional limitations of the court."[35] Thus, contingent confinement terms were limited by the maximum confinement imposable for the crime(s) in question and the punitive mandates of different types of courts-martial; this indicates that, if executed, such confinement served as punishment for crimes in place of associated fines.[36] Finally, with regard to examples of

---

> All courts-martial of the National Guard, not in the service of the United States, including summary courts, shall have power to sentence to confinement in lieu of fines authorized to be imposed: Provided, That such sentences of confinement shall not exceed one day for each dollar of fine authorized.

Id. at app. 2. This is the only mention in the 1918 MCM of a dollars-to-days conversion standard.

[33] MCM (1951 ed.), pt. XXV, ¶ 126(h)(3). The MCM editions between 1918 and 1951 contain the same language as the 1918 edition. *See, e.g.*, MCM (1949 ed.), pt. XXVI, ¶ 116(g) ("In order to enforce collection, a fine is usually accompanied in the sentence by a provision that the person fined shall be imprisoned until the fine is paid or until a fixed portion of time considered as an equivalent punishment has expired.").

[34] MCM (1918 ed.), pt. XII, ¶ 317.

[35] MCM (1951 ed.), pt. XXV, ¶ 126(h)(3). *See* William B. Aycock & Seymour W. Wurfel, Military Law Under the Uniform Code of Military Justice 79–84 (1955) (describing the then-contemporary limitations on punishments for individual offenses and at summary and special courts-martial).

[36] *See* United States v. Garcia, 17 C.M.R. 88, 92–93 (C.M.A. 1954) ("There is, of course, no doubt under the Manual language … that alternative confinement imposed for the purpose of compelling payment of a fine is nonetheless a part of the sentence."). This

contingent confinement sentences, the Appendix to the 1951 MCM offers substantively identical form sentences to those that were in the 1918 MCM, each including the important "until said fine is so paid" language indicating that the conditional incarceration discharged the fine.[37]

Between the 1951 MCM and the next meaningful change to the military's contingent confinement provisions, the legal landscape surrounding such punishment shifted as the Supreme Court decided a trio of cases involving individuals subjected to contingent confinement as a result of their inability to pay rather than any nefarious refusal to do so.[38] The first case, *Williams v. Illinois*, decided in 1970, involved an appellant convicted of petty theft and sentenced to the maximum term of confinement permitted by statute (one year) and to pay $505 in fines and court costs.[39] Additionally, "if appellant was in default of the payment of the fine and court costs at the expiration of the one-year sentence," he was to "remain in jail … to 'work off' the monetary obligations at the rate of $5 per day."[40] Because the appellant was indigent, "the effect of the sentence … required [him] to be confined for 101 days beyond the maximum period of confinement fixed by the statute."[41]

In *Tate v. Short*, decided in 1971, the appellant accumulated $425 in fines through nine convictions for traffic offenses.[42] When he was unable to pay this amount as a result of indigence, the court committed him to a

---

new language in the 1951 MCM was perhaps in response to determinations like that in *United States v. DeAngelis*. 12 C.M.R. 54 (C.M.A. 1953). In *DeAngelis*, the CMA held that, under the 1949 MCM (which contained a contingent confinement provision identical to that in the 1918 MCM), a sentence including confinement at hard labor for five years and a fine of $10,000 with two years of potential contingent confinement was permissible, despite the fact that the maximum allowable confinement for the offense in question was five years. *Id*. at 61–62; *see id*. at 62 ("The provision for further confinement was not made as punishment for the offense, but merely as a means of coercing the collection of the fine imposed …. The provision that the accused be further confined until the fine is paid, after imposition of the maximum period of confinement, was a proper exercise of the court-martial's punitive authority, and is legal.").

[37] MCM (1951 ed.), app. 13.

[38] Williams v. Illinois, 399 U.S. 235 (1970); Tate v. Short, 401 U.S. 395 (1971); Bearden v. Georgia, 461 U.S. 660 (1983).

[39] *Williams,* 399 U.S. at 236.

[40] *Id*.

[41] *Id*.

[42] *Tate,* 401 U.S. at 396.

municipal prison farm to work off his debt at a rate of $5 per day.[43] This dollars-to-days conversion rate meant that the appellant would serve 85 days on the prison farm.[44] Furthermore, as opposed to the situation in *Williams*, this confinement came from infractions that, statutorily, did not carry imprisonment as a punishment and from a municipal court that otherwise had no jurisdiction to impose confinement.[45]

Finally, *Bearden v. Georgia*, decided in 1983, brought before the Supreme Court an appellant who pled guilty to burglary and theft and was sentenced to three years on parole and to pay amounts totaling $750.[46] The appellant borrowed $200 from his parents but was unable to come up with the remaining sum due to indigence.[47] Consequently, the court required him "to serve the remaining portion of the probationary period in prison."[48] Since the appellant was initially sentenced in October 1980 and sentenced for the second time in May 1981, this meant that he was to serve roughly 17 months in confinement rather than on probation by reason of his destitution.[49]

In each of these three cases, the Court found that the Equal Protection Clause of the Fourteenth Amendment[50] bars the imposition of confinement on an individual for failure to pay a fine if the failure is the result of indigence.[51] These practices were held to unconstitutionally visit deprivations of liberty upon those unable to pay fines while allowing those with sufficient financial means to avoid such severe sanctions, a significant difference in sufferable hardship impermissibly based on individual wealth.[52]

Citing *Williams*, *Tate*, and *Bearden* — along with other sources — the drafter's Analysis of the 1984 MCM notes that alterations to military contingent confinement provisions were made in this edition "to avoid con-

---

[43] *Id*.

[44] *Id*.

[45] *Id*.

[46] *Bearden,* 461 U.S. at 662.

[47] *Id*.

[48] *Id*. at 663.

[49] *Id*.

[50] U.S. CONST. amend. XIV, § 1 ("No state shall … deny to any person within its jurisdiction the equal protection of the laws.").

[51] *Williams*, 399 U.S. at 241–44; *Tate*, 401 U.S. at 397–98; *Bearden*, 461 U.S. at 672–73.

[52] *Bearden,* 461 U.S. at 662.

stitutional problems."[53] Rule 1113(d)(3) was added[54] and Rule 1003(b)(3) was modified to reference the newly created subsection in both the Discussion section following the Rule and the Analysis of the Rule in Appendix 21.[55] This article turns to them now.[56]

III. The Relevant Rules for Courts-Martial

"When deciding an issue governed by the text of a legal instrument, the careful lawyer or judge trusts neither memory nor paraphrase but examines the very words of the instrument,"[57] and the language of Rule 1003(b)(3) produces the most powerful argument for the position taken by this article.[58] That is, if, subject to a fine enforcement provision, a service member is placed in confinement for failing to pay a punitive fine, the financial obligation is discharged and the confinement becomes the punishment for the crime. This mandate is limited in accordance with the three Supreme Court decisions noted above,[59] but, barring indigence and adequate alternative punishments, it is the law put in place by the President. An analysis of the now-defunct Rule 1113(e)(3) further supports this position.

---

[53] MCM (1984 ed.), app. 21, Analysis, R.C.M. 1113(d)(3). The military did, however, apply the protections for indigent individuals mandated by these cases by relying on federal law prior to their inclusion in the RCM. *See* Colonel (Ret.) Myron L. Birnbaum, *Confinement for Non-Payment of Fines*, 9 The Reporter 7, 9 (1980) ("We have long held that this procedure applies to persons confined as the result of courts-martial.").

[54] *See supra* note 16 and accompanying text.

[55] MCM (1984 ed.), R.C.M. 1003(b)(3) and 1113(d)(3).

[56] MCMs since the 1984 edition do not contain instructive sample form sentences. For its part, the 1984 MCM provides no sample sentence including contingent confinement. *Id*. at app. 11. The current MCM, published in 2019, also provides no such sample form sentence. MCM (2019), app. 11. In turn, the 2016 MCM offers the following: "To pay the United States a fine of $ ____.00 (and to serve (additional) confinement of (____ years) (and) (____ months) (and) (____ days) if the fine is not paid)." MCM (2016), app. 11.

[57] Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 56 (2012).

[58] *Cf*. United States v. Sager, 76 M.J. 158, 161 (C.A.A.F. 2017) (quoting Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253–54 (1992)) ("The Supreme Court has 'stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.'"); United States v. Desha, 23 M.J. 66, 68 (C.M.A. 1986) (quoting Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)) ("If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'").

[59] *See supra* notes 38–52 and accompanying text.

The NMCMR noted in *Rascoe* that "[Rule] 1003(b)(3) appears on its face to provide for a fixed period of confinement set by the court to become substitute for the adjudged fine if the fine is not paid."[60] Murphy also states that "[a] logical reading" of the Rule "suggests" that "contingent confinement discharges the accused's liability to pay the adjudged fine."[61] Both the NMCMR and Murphy then work against this "suggestion." The discharge of liability for an adjudged fine through the imposition of contingent confinement is, however, no mere suggestion; it is the law, resting foremost on the foundation of the language of Rule 1003(b)(3).

A. Rule 1003(b)(3)

In pertinent part, Rule 1003(b)(3) states the following:

> To enforce collection, a fine may be accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired. The total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court-martial.[62]

The words "considered an equivalent punishment to the fine" appear to tie the period of possible confinement for failing to pay an adjudged fine to the degree of severity of the fine itself. Because the fine is adjudged as a just punishment for the crime(s) without the application of contingent confinement, the possible confinement arrived at through the application of Rule 1003(b)(3) is as well: it is a just punishment for the crime(s) without the application of the fine. Therefore, both the fine and confinement have the severity, whether or not initially mixed with other punishments in a sentence, necessary to sufficiently punish an individual without the other. Applying them in tandem results in sentences whereby individuals find themselves doubly punished for the crime(s) committed.

This, however, is exactly what Murphy and the NMCMR advocate. Citing the language, "[t]o enforce collection," Murphy argues that since

---

[60] United States v. Rascoe, 31 M.J. 544, 550 (N.M.C.M.R. 1990).

[61] Murphy, *supra* note 1, at 8–10.

[62] MCM (2019 ed.), R.C.M. 1003(b)(3).

Rule 1003(b)(3) and contingent confinement are meant to enforce payment of adjudged fines,

> it is critical to remember that a fine enforcement provision itself is not punishment for the crime. As such, it would follow that an accused's confinement served under a fine enforcement provision would not discharge his liability to pay an adjudged fine, but only serve to enforce payment of the punitive fine.[63]

The NMCMR uses similar reasoning, asserting that "a fine enforcement provision is not punishment."[64]

Such arguments show a misunderstanding of the fair application of law and how Rule 1003(b)(3) actually works to enforce the collection of fines. Murphy and the NMCMR believe that the administration of contingent confinement through the Rule serves as a punishment solely for failing to pay an adjudged fine and that this is how individuals are induced to pay. But, as noted above, the severity of such confinement is fashioned to be of equivalent severity to the original fine.[65] The confinement is therefore tailored to be a just punishment for the crime(s) and meant to be employed *in place of* the financial penalty. Murphy and the NMCMR seek to subject those who commit the relatively minor infraction of failing to pay a punitive fine to punishments meant for those who commit criminal offenses. An individual subject to this interpretation will suffer both a fine *and* confinement, each having been tabulated to individually serve the punitive interests of the military justice system for the crime(s) committed. Punishing failures to pay fines with confinement fitted to crimes under the Uniform Code of Military Justice (UCMJ), and thereby doubling the punishment or a portion of it for such offenses, is an incorrect interpretation of the law, unjust, and could erode the standing and credibility of the military justice system in the eyes of service members and the public.[66]

---

[63] Murphy, *supra* note 1, at 9.

[64] *Rascoe*, 31 M.J. at 550.

[65] *See supra* note 62 and accompanying text.

[66] *Cf.* Janice Nadler, *Flouting the Law*, 83 Texas L. Rev. 1399 (2005) (presenting experimental and real-world examples of perceived injustice in legal systems resulting in reduced respect for and compliance with the law); Paul H. Robinson, Geoffrey P. Goodwin, & Michael D. Reisig, *The Disutility of Injustice*, 85 N.Y.U. L. Rev. 1940, 1997 (2010) ("[C]riminal law's moral credibility is essential to effective crime control and is enhanced if the distribution of criminal liability is perceived as 'doing justice' — that is, if it assigns liability and punishment in ways that the community perceives as consistent

Further supporting the interpretation that contingent confinement replaces financial penalties adjudged under Rule 1003(b)(3) is the following language: "The total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court-martial."[67] Such limitations are the maximum confinement under the UCMJ that can be doled out for the offense(s) for which a defendant is convicted at a given type of court-martial.[68] Accordingly, contingent confinement durations are restricted by the maximum punishments allowable under the MCM for the crime(s) committed and the maximum punishments different types of courts-martial have jurisdiction to impose. Contingent confinement must therefore be implemented as punishment for any crime(s), replacing the adjudged fines to avoid double punishment.

The aforementioned considerations show that Rule 1003(b)(3) does not mean "to enforce [the] collection"[69] of fines by over-punishing individuals, but rather by taking liberty in place of money should they fail to pay. Some individuals may not settle financial penalties adjudged against them without harsh enough inducement. This is where Rule 1003(b)(3) comes in: it provides the means by which, upon failure to pay an adjudged fine, individuals will be subject to a deprivation of liberty equal to and in place of the monetary penalty.[70]

The "equal" portion of the preceding sentence, however, is not entirely accurate and should be read as more of a guideline for the translation of fines into confinement rather than a hard rule. This is because the Supreme

---

with its shared intuitions of justice. Conversely, the system's moral credibility, and therefore its crime-control effectiveness, is undermined by a distribution of liability that deviates from community perceptions of just desert.").

[67] MCM (2019 ed.), R.C.M. 1003(b)(3).

[68] *See* Lawrence J. Morris, Military Justice: A Guide to the Issues 103 (2010) ("The additional time cannot exceed the maximum punishment authorized for that offense ….");*see also* United States v. Tualla, 52 M.J. 228, 229 (C.A.A.F. 2000) (explaining that "[t]he President is authorized to establish the maximum punishment for offenses under the UCMJ, subject to limitations in the Code applicable to specific offenses and types of courts-martial," and referring to such maximums as "jurisdictional limitations" under Rule 1003(b)).

[69] MCM (2019 ed.), R.C.M. 1003(b)(3).

[70] *See* David M. Jones, *Making the Accused Pay for His Crime: A Proposal to Add Restitution as an Authorized Punishment Under Rule for Courts-Martial 1003(b)*, 52 Naval L. Rev. 1, 52 (2005) ("The threat of additional confinement might be enough to convince the accused to either start, or to keep, making … payments.").

Court has concluded that deprivations of liberty are inherently more severe than financial punishments.[71] The NMCMR itself, in *Rascoe*, reached the same understanding.[72] In addition to inherent severity, the UCMJ, in certain situations, makes confinement more severe than fiscal punishments on their own by automatically applying financial penalties when incarceration is imposed. Service members convicted at court-martial and sentenced to "confinement more than six months" or "confinement for six months or less and a dishonorable or bad-conduct discharge or dismissal" automatically forfeit all pay and allowances for that period, or two-thirds of all pay in the case of special courts-martial.[73] Enlisted members face stiffer punishment: if their court-martial sentence includes a punitive discharge, *any* confinement, or hard labor without confinement and they are above pay grade E-1, they are automatically reduced to E-1.[74]

---

[71] *See* Blanton v. N. Las Vegas, 489 U.S. 538, 542 (1989) ("Penalties such as probation or a fine *may engender a significant infringement of personal freedom,* ... but they cannot approximate in severity the loss of liberty that a prison term entails. Indeed, because incarceration is an intrinsically different form of punishment, ... it is the most powerful indication of whether an offense is 'serious.'") (internal quotation marks and citations omitted); *see also Criminal Sentencing of Indigents*, 97 Harv. L. Rev. 86, 88 n. 13 (1983) (interpreting Supreme Court precedent "holding that the state may use imprisonment only as a last resort" as "manifest[ing] the assumption that incarceration, for any period, is a more severe punishment than a fine").

[72] United States v. Rascoe, 31 M.J. 544, 568 (N.M.C.M.R. 1990) ("[W]hen the punishment of a fine is transformed into confinement, a more severe punishment is imposed."), 569 ("[C]onfinement is more severe than fines or forfeitures."), 569 n. 28 ("Common sense would also indicate that confinement is more serious than monetary punishments since confinement is used as the tool to enforce payment. If confinement were not more severe, it would not be an effective tool of enforcement.").

[73] UCMJ arts. 58b(a)(1), (a)(2)(A), and (a)(2)(B) (codified at 10 U.S.C. § 858(a)(1), (a)(2)(A), and (a)(2)(B)); *See* Morris, *supra* note 68, at 103 (describing this "administrative consequence of confinement").

[74] UCMJ art. 58a(a) (2018). Previously, Article 58a contained the following language preceding its directive to automatically reduce pay grade: "Unless otherwise provided by regulations to be prescribed by the Secretary concerned." *Id* at art. 58a(a) (2018). Accordingly, each military branch abrogated the application of this Article — to varying degrees — in the following service-specific manners: the Army allowed the automatic reduction only when a punitive discharge or confinement in excess of 180 days or six months was sentenced, U.S. Dep't of Army, Reg. 27-10, Military Justice para. 5–29(e) (11 May 2016); the Navy allowed it only when a punitive discharge or confinement in excess of 90 days or three months was sentenced, U.S. Dep't of Navy, JAGINST 5800.7F, Manual of the Judge Advocate General (JAGMAN) sec. 0152(c) (26 June 2012); and the Air Force and Coast Guard did not give effect to Article 58a's automatic reduction, U.S. Dep't of Air Force, Instr. 51-201, Administration of Military Justice para. 9.26.3 (6 June 2013); U.S. Coast Guard, Commandant Instr. M5810.1E,

Confronting individuals with a harsher alternative punishment if they fail to pay a punitive fine is a potentially effective means of inducing compliance.[75] Rule 1003(b)(3) operates in this way by providing for the replacement of financial penalties with the inherently more severe punishment of confinement, which can also entail corresponding additional financial penalties.

B. Former Rule 1113(e)(3)

It is worth addressing the language of Rule 1113(e)(3), which was present in editions of the MCM from 1984 until its removal by Executive Order 13825, effective January 1, 2019.[76] It is an important part of the history of military contingent confinement and meaningfully elaborated on Rule 1003(b)(3). Rule 1113(e)(3) supports this article's argument by further showing the imposition of contingent confinement serving to discharge attendant fines under the military justice system throughout the punishment's codified existence.

Rule 1113(e)(3) is important for understanding Rule 1003(b)(3) because the latter deferred to the former for the implementation of contingent confinement.[77] Specifically, Rule 1003(b)(3)'s Discussion section required that one "[*s*]*ee* [Rule] 1113(e)(3) concerning imposition of confinement when the accused fails to pay a fine."[78] In addition to specifying certain procedures meant to ensure the constitutional execution of contingent confinement,[79] Rule 1113(e)(3) described what becomes of an attendant fine upon the imposition of contingent confinement.

Military Justice Manual para. 4.E.1 (Mar. 2018). These unique treatments under Article 58a are no longer allowed as a result of the removal of the language quoted above — as of January 1, 2019—which made the automatic pay grade reduction as put forth in the Article mandatory. *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5303(1)(A) (2016) ("striking" the language in question); *see also* Exec. Order No. 13825, *supra* note 2, at 9889 (providing January 1, 2019 as the effective date for this change).

[75] *See supra* note 70 and accompanying text.

[76] Exec. Order No. 13825, *supra* note 2, at 10048–50.

[77] MCM (2016 ed.), R.C.M. 1003(b)(3) (Discussion).

[78] *Id*.

[79] *See supra* notes 38–55 and accompanying text.

Rule 1113(e)(3) provides the following:

> *Confinement in lieu of fine.* Confinement may not be executed for failure to pay a fine if the accused demonstrates that the accused has made good faith efforts to pay but cannot because of indigency, unless the authority considering imposition of confinement determines, after giving the accused notice and opportunity to be heard, that there is no other punishment adequate to meet the Government's interest in appropriate punishment.[80]

The most significant language is in the heading, "*Confinement in lieu of fine*."[81] The word "lieu" means "place" or "stead," and the phrase "in lieu of" means "in place of" or "instead of."[82] The imposition of confinement through fine enforcement provisions and Rule 1003(b)(3) was understood to replace the initial fine as punishment for the crime. If individuals could not pay their fines as a result of indigence, this conversion could only take place after consideration and rejection of other possible punishments.[83]

---

[80] *Id*. at R.C.M. 1113(e)(3).

[81] The following consideration must be kept in mind when using provision headings, or "catchlines," in statutory interpretation: "Section headings or catchlines are subject to different treatment in the various compilations. As a general principle those which were supplied by the compiler have but little interpretative value. On the other hand, a section heading or catchline which was part of the statute as enacted generally does have considerable value." Arie Poldervaart, 50 L. Libr. J. 504, 511–12 (1957); *accord* 1A Sutherland Statutory Construction § 21:4 (7th ed. 2016); 2A Sutherland Statutory Construction § 47:14 (7th ed. 2016); Earl T. Crawford, Statutory Construction: Interpretation of Laws 359–61 (1940); Francis J. McCaffrey, Statutory Construction: A Statement and Exposition of the General Rules of Statutory Construction 60 (1953); Scalia & Garner, *supra* note 57, at 221–24. Since the R.C.M. is drafted by the Executive Branch in its entirety and promulgated through executive orders by which the President signs off on all of the language contained therein, it is appropriate to accord substantial interpretative value to Rules' headings. *See, e.g.*, Exec. Order No. 12473, MCM (1984 ed.), 49 Fed. Reg. 17,216 (Apr. 23, 1984) (dictating the headings and body text of relevant rules in the 1984 MCM); *see also* Captain Gregory E. Maggs, *Judicial Review of the* Manual for Courts-Martial, 160 Mil. L. Rev. 96, 100–01 (1999) (outlining "The President's Power to Promulgate the [MCM]," including the R.C.M.).

[82] *Lieu*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/lieu (last visited Aug. 20, 2020); *In lieu of*, Black's Law Dictionary (10th ed. 2014).

[83] MCM (2016 ed.), R.C.M. 1113(e)(3). *See* Bearden v. Georgia, 461 U.S. 660, 672 (1983) ("If the probationer could not pay despite sufficient bona fide efforts to acquire the resources to do so, the court must consider alternate measures of punishment other than imprisonment. Only if alternate measures are not adequate to meet the State's interests in

Additional noteworthy language is the passage referring to the "Government's interest in appropriate *punishment*."[84] This shows that the confinement imposed through Rule 1003(b)(3) was interpreted to not simply be for enforcement purposes, but was also viewed as carrying out the punishment originally adjudged in the form of a fine. Contingent confinement was understood to ensure that even if individuals refused or were unable to pay a fine levied against them, the government could still satisfy its interest in punishing them for the crimes they were convicted of, albeit in a different form.

Despite the language of Rule 1113(e)(3), the NMCMR suggests that this provision, in conjunction with Rule 1003(b)(3), should be interpreted such that "the fine of an accused confined for contumacious conduct is not discharged regardless of how much confinement he serves; nor is an indigent accused's fine discharged if the fine enforcement provision is *not* transformed into punishment."[85] Put more plainly, the NMCMR asserts that impositions of contingent confinement can only discharge adjudged fines if convicted individuals are determined to be indigent, and even then only if their sentences specifically state that the imposition of contingent confinement will function in such a manner. Per the NMCMR, the title of Rule 1113(e)(3) and the deference to it with regard to all contingent confinement situations in Rule 1003(b)(3)'s Discussion section were to be ignored. This is a misinterpretation of Rule 1113(e)(3).[86]

---

punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay."); Tate v. Short, 401 U.S. 395, 399 (1971) (holding that criminal punishments cannot be "limit[ed] … to payment of [a] fine if one is able to pay it, yet convert [a] fine into a prison term for an indigent defendant without the means to pay."); Williams v. Illinois, 399 U.S. 235, 241-42 (1970) ("[O]nce the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency."). It has been noted that sentences containing contingent confinement are relatively uncommon "[b]ecause of the administrative complexities involved with adjudging that confinement (a hearing at which the government must prove that the accused is able to pay)." Morris, *supra* note 68, at 103.

[84] MCM (2016 ed.), R.C.M. 1113(e)(3) (emphasis added).

[85] United States v. Rascoe, 31 M.J. 544, 552 n. 6 (N.M.C.M.R. 1990) (emphasis in original). It is unclear whether Murphy agrees with this proposition, which he cites in putting forth that there is "ambiguity" as to the functioning of Rule 1003(b)(3) and Rule 1113(e)(3). Murphy, *supra* note 1, at 9.

[86] To its credit, the NMCMR recognized the potential invalidity of its view of Rule 1003(b)(3) and Rule 1113(e)(3), noting the following: "We leave for future decision, however, the validity of this dictum for we recognize that the phrase in [Rule] 1003(b)(3)

Furthermore, diving deeper than Rule 1113(e)(3)'s language, the drafter's Analysis of the Rule cites the "Fines" section of the 1979 edition of the American Bar Association's Sentencing Alternatives and Procedures.[87] This section, in relevant part, states the following:

> The court should not be authorized to impose alternative sentences, for example, "thirty dollars or thirty days." The effect of nonpayment of a fine should be determined after the fine has not been paid and after examination of the reasons for nonpayment. The court's response to nonpayment should be governed by standard 18-7.4.[88]

In turn, the germane portion of Standard 18-7.4 of the same publication provides:

> [i]ncarceration should not automatically follow the nonpayment of a fine. Incarceration should be employed only after the court has examined the reasons for nonpayment. It is unsound for the length of a jail sentence imposed for nonpayment to be inflexibly tied, by practice or by statutory formula, to a specified dollar equation. The court should be authorized to impose a jail term or a sentence involving immediate sanctions [] for nonpayment, however, within a range fixed by the legislature for the amount involved, but in no event to exceed one year. *Service of such a term should discharge the obligation to pay the fine*.[89]

'in addition to any period *considered an equivalent punishment to the fine has expired*' could also mean either that the accused's fine is entirely discharged, if he does, in fact, serve the maximum of the additional fixed period of confinement prescribed by the court-martial that adjudged his sentence, as approved and ordered executed by the convening authority, or that he is entitled, at least, to some credit for time spent in confinement as a result of the execution of the fine enforcement provision." *Rascoe*, 31 M.J. at 552 n. 6 (emphasis in original).

[87] MCM (2016 ed.), app. 21, Analysis, R.C.M. 1113(e)(3).

[88] American Bar Association, Sentencing Alternatives and Procedures, Standard 18-2.7(e) (approved on Aug. 14, 1979).

[89] *Id*. at 18-7.4(b) (emphasis added).

This further supports the interpretation that the imposition of contingent confinement under military law for failure to pay a fine has served to discharge the financial obligation throughout the punishment's codified existence and continues to do so today.

C. When Contingent Confinement Replaces an Attendant Fine

Thus far, contingent confinement — throughout its codified existence and currently under Rule 1003(b)(3) — has been argued to replace the fine with which it is adjudged, but when this replacement occurs has yet to be addressed. Such substitution transpires as a matter of law when the conditional imprisonment is *executed*. Moreover, this event extinguishes the fine and an individual therefore cannot secure release from contingent confinement via payment once it is executed because there is no longer a fine to satisfy, just a liberty debt. Finally, partial payment of a fine prior to the execution of contingent confinement has no effect on the length of imprisonment an individual must suffer for failing to discharge the fine in its entirety. If such a partial payment is made, it must be returned upon the execution of contingent confinement and the full term of the conditional incarceration adjudged must be served. Support for these interpretations can be found in the history of military contingent confinement and the language of Rule 1003(b)(3).

As noted above, removal of the language, "until the fine is paid," from the relevant provision of the 1951 MCM and all editions thereafter appears to have eliminated the option for an individual to pay the adjudged fine following the execution of contingent confinement in order to secure release prior to completion of the full term of imprisonment.[90] The only course remaining under Rule 1003(b)(3) is to be confined for the full, adjudged contingent confinement period.

In addition, the following language of Rule 1003(b)(3) is material: "in the event the fine is not paid, the person fined *shall* … be further confined until a *fixed period* considered equivalent to the fine *has expired*."[91] It is "the general rule that the word 'shall' is mandatory and inconsistent with the idea of discretion."[92] In turn, the CAAF has repeatedly found inclusion of

---

[90] *See supra* notes 33–34 and accompanying text.

[91] MCM (2019 ed.), R.C.M. 1003(b)(3) (emphases added).

[92] State *ex rel*. Shepherd v. Nebraska Equal Opportunity Com'n, 557 N.W.2d 684, 694 (Neb. 1997). *See* Kingdomware Technologies, Inc. v. United States, 136 S.Ct. 1969, 1977 (2016) ("Unlike the word 'may,' which implies discretion, the word 'shall' usually

the word "shall" in the RCM to indicate a mandate from the President.[93] Accordingly, following failure to pay a fine, and barring indigence, the convicted *must* serve the "fixed period" of contingent confinement until it "has expired." This means that payment prior to the execution of contingent confinement does not reduce an individual's imprisonment liability — partial payment is still a failure to pay the full fine — and payment after execution has no effect because the conditional imprisonment replaces the monetary debt as a matter of law; there is no longer a fine to satisfy since it has been extinguished and the entire period of incarceration must be served, precluding payment and release mid-term. Any partial payments made prior to the execution of contingent confinement must, therefore, be returned because the full financial obligation is expunged by the imposition of imprisonment and payments made during confinement cannot be accepted because there is no longer a fine to apply them to.

In line with the analysis thus far, the following modifications to Rule 1003(b)(3) are recommended:

> To enforce collection, a fine may be accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired. The total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court-martial. [Execution of contingent confinement requires imposition of the full term of contingent confinement adjudged and extinguishes the fine in full; the person subject to the execution of contingent confinement cannot remit such punishment through payment. Any partial payments made prior to the execution of contingent confinement must be returned.][94]

---

connotes a requirement.").

[93] *See, e.g.*, United States v. Wilson, 65 M.J. 140, 143 (C.A.A.F. 2007) (interpreting the word "shall" in a Rule for Courts-Martial to communicate a "mandate" that "the convening authority was obligated to follow"); United States v. Miller, 58 M.J. 266, 272 (C.A.A.F. 2003) (stating that employment of the word "shall" in the Rule at issue indicates an "express[] mandate[]"); *see also* United States v. Rodriguez, 67 M.J. 110, 117 (C.A.A.F. 2009) (determining that inclusion of the word "shall" in the Article of the UCMJ in question "embodies a congressional mandate").

[94] MCM (2019 ed.), R.C.M. 1003(b)(3).

IV. Judicial Treatment

Military appellate courts vary in the extent and manner with which they have engaged the relationship between fines and contingent confinement and whether imposition of the latter extinguishes the former. This body of case law — since the issuance of the 1984 MCM — is analyzed here to determine whether relevant precedent is in line with the interpretations of this article and, if not, which courts should endeavor to adjust their legal approaches to this issue and to what degree they should do so. The CMA and CAAF are addressed first, followed by the service appellate courts.

A. The CMA and CAAF

Following the changes to military contingent confinement in the 1984 edition of the MCM noted above,[95] the CMA decided *United States v. Tuggle* in 1992, where the appellant's sentence included a fine of $10,000 and a fine enforcement provision providing for one year of contingent confinement if the financial penalty went unpaid.[96] Tuggle failed to pay and faced a fine enforcement hearing.[97] He was found not to be indigent and not to have "made a good-faith effort to meet his court ordered obligation"[98] by failing to accept his mother's offer to incur an additional mortgage and continuing to make "voluntary" child support payments, despite making "reasonable efforts" to obtain a personal loan.[99] The CMA, however, disagreed with these findings and "took a more reasoned and compassionate approach."[100] It held that, in line with Tuggle's request at the fine enforcement hearing, he "should have been given the opportunity to pay the adjudged fine in good faith" through monthly forfeitures or an installment payment scheme.[101] Of additional importance for the purposes of this article, the court determined that "the confinement was a *substitute punishment* for the unpaid fine."[102] Moreover, it concluded that because the assertion that the "appellant has already served the confinement" was not challenged, "the fine has been

---

[95] *See supra* notes 53–55 and accompanying text.

[96] 34 M.J. 89, 90 (C.M.A. 1992).

[97] *Id*.

[98] *Id*. (internal quotation marks omitted).

[99] *Id*. at 92. *See* United States v. Tuggle, 31 M.J. 778, 779 (Army Ct. Crim. App. 1990).

[100] Captain Tall, *How Far Must a Soldier Go in Attempting to Pay a Fine?*, The Army Law. 26, June 1992, at 26.

[101] *Tuggle*, 34 M.J. at 93.

[102] *Id*. at 90 n. 3 (emphasis added).

satisfied by operation of law and no longer has legal effect."[103] The CMA therefore interpreted the relevant rules to provide that a fine accompanied by a fine enforcement provision is automatically discharged upon the imposition of attendant contingent confinement.

It took twelve years, but the CAAF — formerly the CMA — finally addressed contingent confinement again in *United States v. Palmer* in 2004.[104] Palmer's sentence included a $30,000 fine and twelve months of contingent confinement if he failed to pay.[105] Within the required timeframe — which included a 30-day extension — Palmer made payments of $5,000 and $17,175, leaving $7,825 unpaid — approximately 26 percent of the adjudged fine.[106] As a result, a fine enforcement hearing was held, at the conclusion of which Palmer was found not to be indigent and to have attempted to hide assets to avoid paying what he owed.[107] Accordingly, he was given two additional weeks to pay, and it was recommended that "if the balance was not paid by that time[,] then he should serve an additional 95 days of confinement" — approximately 26 percent of the contingent confinement adjudged.[108] Palmer then failed to pay within the new timeframe and "the convening authority remitted the unpaid $7,825 balance of the fine and executed an additional 95 days of confinement in lieu of the fine."[109] Palmer, however, made a partial payment of $3,000 one day later.[110] The convening authority rejected the money, returning $2,342.34, which was the payment minus "other debts … owed the United States."[111]

Before the CAAF, Palmer challenged the convening authority's rejection of his payment, the finding that he was not indigent, the length of executed contingent confinement, and the fact that he was not afforded alternate payment options prior to imprisonment.[112] The court ruled against

---

[103] *Id*. at 93.

[104] United States v. Palmer, 59 M.J. 362 (C.A.A.F. 2004).

[105] *Id*. at 363.

[106] *Id*.

[107] *Id*.

[108] *Id*. at 364.

[109] *Id*.

[110] *Id*.

[111] *Id*.

[112] *Id*. at 365.

him on each contention. Pertinently, affixed to a quotation of the language of Rule 1003(b)(3) is a footnote stating the following:

> The unpaid portion of Palmer's fine was remitted pursuant to Department of the Air Force Instruction 51-201, Administration of Justice, §§ 9.9.2, 9.9.5.11 (Nov. 26, 2003) [(AFI 51-201)], both of which indicate that the additional confinement is a 'substitute' for the fine. This opinion does not address whether the convening authority may execute contingent confinement without remitting any unpaid portion of an approved fine or providing for remission of the unpaid portion of a fine upon service of a contingent period of confinement.[113]

The court noted the tension between the convening authority's actions and the language of Rule 1003(b)(3) and AFI 51-201, which posit that contingent confinement is a sanction for failing to pay the full amount of a fine and is to be enacted as a whole, displacing a fine as a whole. That is, as noted above, the language of the Rule, and the Instruction, does not seem to allow for the abatement of conditional imprisonment due to partial payment and any financial obligation is only extinguished through service of the entire contingent confinement period adjudged.[114] In this case, such an interpretation would require the conclusion that Palmer's partial payment did not reduce his contingent confinement liability and that service of only a portion of the conditional incarceration originally sentenced did not discharge his fine. However, the CAAF expressly avoided this issue.

Finally, the most recent CAAF case involving contingent confinement was *United States v. Phillips*, decided in 2007.[115] In relevant part, Phillips was sentenced to a fine of $400,000 and "if the fine was not paid, [he] would be required to serve an additional five years of confinement."[116] Yet the convening authority disapproved $100,000 "and suspended for a period of twenty-four months execution of that portion of the sentence adjudging a fine in excess of $200,000."[117] Thus, $100,000 of the adjudged fine remained due. When Phillips only managed to pay $790, a fine enforcement hearing

---

[113] *Id*. at 364 n. 4 (alteration in original).

[114] *See supra* notes 62–75, 90–94 and accompanying text.

[115] United States v. Philips, 64 M.J. 410 (C.A.A.F. 2007).

[116] *Id*. at 411.

[117] *Id*.

was initiated by his commanding officer.[118] Phillips was found not to be indigent and to have "failed to make bona fide efforts to pay the fine, and [to have] engaged in asset-shifting to avoid payment."[119] In addition, a payment plan proposed by Phillips was deemed inadequate "to meet the Government's interest in carrying out the adjudged sentence."[120] Based on these findings, the commanding officer ordered the execution of the five years of contingent confinement.[121]

Among other contentions, Phillips challenged the lack of consideration given to his alternative payment plan.[122] The court, however, concluded that the commanding officer would only have been compelled to consider it if Phillips was found to be indigent.[123] Since he was not, alternative punishments did not have to be contemplated.

The cases above illustrate a skeletal body of precedent when it comes to contingent confinement and the military's highest court. Of most relevance to the argument advanced in this article is the court's interpretation of the relevant rules of the RCM to require that an adjudged fine is discharged upon the imposition of attendant contingent confinement. Also of note is the court's express avoidance of the issues of whether partial payments made prior to the execution of contingent confinement reduce the period of imprisonment and whether service of a term of contingent confinement less than that adjudged discharges an associated fine.

B. The Service Branch Appellate Courts[124]

The Navy-Marine Corps and Army service appellate courts have offered clearer interpretations of military fine enforcement through contingent confinement than the CAAF. As noted above, the NMCMR, in what seems the only pertinent Navy-Marine Corps appellate opinion, determined, though

---

[118] *Id*. at 413.

[119] *Id*.

[120] *Id*.

[121] *Id*.

[122] *Id*. at 411.

[123] *Id*. at 415.

[124] The United States Coast Guard Court of Criminal Appeals has yet to meaningfully interpret R.C.M. 1003(b)(3) or R.C.M. 1113(e)(3) with respect to the topics covered by this article.

expressly in dicta,[125] that "the fine of an accused confined for contumacious conduct is not discharged regardless of how much confinement he serves; nor is an indigent accused's fine discharged if the fine enforcement provision is not transformed into punishment."[126] That is, the imposition of contingent confinement upon a failure to pay an adjudged fine only automatically discharges the fine if the individual in question is found to be indigent, and even then only if the sentence expressly puts forth that the imposition of confinement functions in such a manner.

For its part, the Army Court of Military Review (ACMR) — the precursor to the Army Court of Criminal Appeals (ACCA) — reached a different conclusion. In what appears to be the only Army appellate court opinion addressing the fate of adjudged fines following the imposition of attendant contingent confinement, the ACMR held that, under the relevant provisions of the RCM, "[c]onfinement imposed in lieu of a fine is not punishment but is a tool to enforce collection of the fine."[127] Nevertheless, the court determined that the fine "is transformed into punishment when the fine is not paid."[128]

The Air Force appellate court has approached the issue less directly, but appears to fall on the same side as the Army. In *United States v. Arnold*, the Air Force Court of Military Review (AFCMR) — the precursor to the Air Force Court of Criminal Appeals (AFCCA) — addressed a sentence that included "a fine of $1,000.00[] [and] one year and one day confinement if the fine is not paid."[129] The opinion did not mention whether this ambiguous phrasing entailed the automatic replacing of the fine with confinement in the event of non-payment. However, roughly three years later, the AFCMR cited *Arnold* in noting the following: "We previously interpreted [Rule] 1003(b)(3) to permit confinement *in lieu of paying a fine* only when such confinement would be additional to other confinement originally adjudged."[130] Then, in

---

[125] *See supra* note 10 and accompanying text. *But see supra* note 11 and accompanying text.

[126] United States v. Rascoe, 31 M.J. 544, 552 n. 6 (N.M.C.M.R. 1990).

[127] United States v. Blizzard, 34 M.J. 763, 764 (A. Ct. Mil. Rev. 1992).

[128] *Id*. at 764–65. Curiously, the ACMR cites *Rascoe* in making this assertion.

[129] United States v. Arnold, 27 M.J. 857, 857 (A.F. Ct. Mil. Rev. 1989).

[130] United States v. Haley, 1992 WL 40719, at *1 (A.F. Ct. Mil. Rev. Feb. 19, 1992) (emphasis added). The Air Force appellate court would go on to reverse itself with regard to requiring contingent confinement to accompany other adjudged confinement by holding that R.C.M. 1003(b)(3) does indeed "permit[] a court-martial sentence to include confinement designed to enforce collection of a fine without also requiring punitive confinement." United States v. Ferris, 72 M.J. 817, 822 (A.F. Ct. Crim. App. 2013).

2005, the court — now as the AFCCA — again interpreted the imposition of military contingent confinement as discharging the fine to which it is attached: "service members may satisfy a fine through the use of savings, selling an asset, obtaining a loan, *or serving contingent confinement*."[131] Finally, in 2017, the AFCCA interpreted Rule 1003(b)(3) and Rule 1113(e)(3) as allowing for the *conversion* of a fine into confinement by a convening authority through the execution of a contingent confinement sentence provision, provided constitutional safeguards against the wanton imprisonment of indigents are observed.[132] These passages do not furnish clear interpretations of the RCM and emanate from unpublished opinions, but they seem to show the Air Force appellate court considering punitive fines discharged upon the imposition of contingent confinement.

V. Realizing Just and Effective Military Contingent Confinement

Building on suspect interpretations of Rule 1003(b)(3) and Rule 1113(e)(3), Murphy offers problematic recommendations for the rules' modification and the use of contingent confinement at sentencing. Moreover, these recommendations are products of a misunderstanding of the nature of the financial obligation that an adjudged fine creates, one shared with the NMCMR. Here, these shortcomings are outlined and recommendations for the proper use of military contingent confinement at sentencing are provided.

A. False Starts and Misunderstandings

After presenting his interpretations of the RCM's contingent confinement provisions, Murphy offers recommendations for their modification. In line with his and the NMCMR's understandings, Murphy desires to make it explicit within Rule 1003(b)(3) that

> [c]onfinement under this provision is not a punishment for the crime committed, but an enforcement provision authorized upon the convening authority's finding that the accused's failure to pay was willful and not due solely to the accused's indigence. In no way shall this confinement discharge the

[131] United States v. Ladwig, 2005 WL 486353, at *2 (A.F. Ct. Crim. App. Feb. 8, 2005) (emphasis added).

[132] United States v. Hacker, 2017 CCA LEXIS 285, at *8–10 (A.F. Ct. Crim. App. Apr. 26, 2017).

> accused of his liability to the United States under the fine imposed.[133]

Murphy goes on to reiterate this approach in proposed language for a revised Rule 1113(e)(3).[134] However, he spares those unable to pay their fines as a result of indigence. For these individuals, contingent confinement "shall become a substitute punishment for the adjudged fine …. Upon serving [such] confinement …, the fine will be discharged."[135] Yet for those whose nonpayment is determined to be "willful or recalcitrant"—i.e., those who are determined to have the assets to pay but do not — "confinement serves only as a tool to enforce payment of the fine and the accused shall be confined until such time as the fine is paid, not to exceed the length of time announced as part of the fine."[136] Thus, under Murphy's proposed regime, rather than indigent individuals facing harsher penalties for being poor, which the Supreme Court explicitly found unconstitutional,[137] wealthier persons, based on their affluence and failure to pay, are subjected to two sanctions, each severe enough in its own right to sufficiently punish them for the crime(s) committed.

Murphy's modified rules are based on a misunderstanding of how military contingent confinement works to enforce fine collection. As noted above, it does not do so by over-punishing those who fail to pay, but rather by threatening to replace financial penalties with deprivations of liberty, which are more severe and often entail additional, attendant fiscal sanctions.[138]

Murphy's proposals are also based on a misunderstanding of the legal obligation that an adjudged, punitive fine places on a convicted individual, one also evinced by the NMCMR in *Rascoe*. Both Murphy and the NMCMR put

---

[133] Murphy, *supra* note 1, at app. A.

[134] *Id*. at app. B. It must be noted, however, that Murphy's recommendations for the modification of former Rule 1113(e)(3) are predominantly sensible. This is because the RCM does not contain procedures for transforming unpaid fines into confinement. *See* Larry Cuculic, *Contingent Confinement and the Accused's Counter-Offer*, The Army Law., May 1992, at 29 ("Although [Rule 1113(e)(3)] attempts to ensure constitutional protections to an accused, it fails to establish specific procedures that the government should use to convert an unpaid fine into confinement."). Murphy's proposition presents clear guidelines for how a fine enforcement hearing should proceed and hearing officers and convening authorities should execute their authority. Murphy, *supra* note 1, at app. B.

[135] Murphy, *supra* note 1, at app. B.

[136] *Id*.

[137] *See supra* notes 38–52 and accompanying text.

[138] *See supra* notes 62–75 and accompanying text.

forth that absent the ability to impose contingent confinement, the government lacks any means of effectively enforcing the obligation to pay a fine.[139] For his part, Murphy states that,

> [a]s powerful a punishment as it may be, a fine is only as effective as the government's ability to enforce it. While forfeitures are enforceable through the government's withholding of pay, satisfaction of a punitive fine requires the accused to affirmatively pay money to the government. Absent some enforcement measures, the accused's obligation to pay a fine is subject only to the accused's own "moral persuasion."[140]

The NMCMR, in turn, offers the following: "Unless the court-martial includes such a fine enforcement provision in its sentence, no tool is provided the Government to enforce its collection, and in effect, the fine is enforceable only by moral suasion."[141] The NMCMR's mistake is particularly acute because elsewhere in *Rascoe* it acknowledges that "adjudged fines are debts owed the United States always … subject to collection,"[142] a situation that allows the government considerable latitude in recovery.

"[A] fine is a debt to the United States and does not terminate when accused is discharged."[143] Moreover,

> [a] fine creates a debt owed to the government for the entire amount of money specified in the sentence. The accused is immediately liable to the United States after the fine is ordered executed. A fine is not contingent on the accused's receipt of pay, and a fine may be collected from sources other than the accused's pay.[144]

---

[139] United States v. Rascoe, 31 M.J. 544, 552 (N.M.C.M.R. 1990); Murphy, *supra* note 1, at 7.

[140] Murphy, *supra* note 1, at 7 (quoting *Rascoe*, 31 M.J. at 552). Murphy actually misquotes the NMCMR, which writes, "moral *suasion*." *Rascoe*, 31 M.J. at 552 (emphasis added).

[141] *Id*. at 552.

[142] *Id*. at 558 (citing Department of Defense rules and federal law).

[143] 57 C.J.S. *Military Justice* § 575 (2017).

[144] Major Michael K. Millard, *A Defense Counsel's Guide to Fines*, Army Law., June 1987, at 34.

The fact that an adjudged fine is a debt to the United States means that, inconsistent with the statements of Murphy and the NMCMR,

> [i]f voluntary payment is not forthcoming, there are several ways to collect the fine involuntarily. Fines can be collected from any pay that may accrue to an enlisted accused (similar to collection of forfeitures), and from final settlement of pay at the time of an enlisted accused's discharge.[145]

Fines may also be collected from officer pay, service member retirement pay, and other federal payments — e.g., income tax refunds and pay due federal civilian employees.[146] In addition, those who fail to pay "may expect to encounter the full range of debt collection actions" authorized by federal law, including: referral of debt to a private debt collector, negative credit score impacts, wage garnishment, and property seizure.[147] It is therefore apparent that, in the absence of contingent confinement, "moral suasion" is far from the only impetus for a convicted individual to pay what he owes and the government has a litany of means to secure remuneration if so inclined.

B. Recommendations for the Use of Contingent Confinement

The true nature of punitive fines helps illuminate the proper use of contingent confinement provisions at sentencing. When the government's primary interest is the recoupment of that which was unlawfully taken, contingent confinement is not an effective means of inducing payment. This is because, as asserted above, its execution extinguishes an individual's punitive financial obligation.[148] Accordingly, not only does the government miss out on any payment, it spends additional money confining the individual when an adjudged fine amount could have been collected through a number of different means. In these situations, fines should be imposed sans contingent confinement provisions and, should an individual fail to pay, recovered through the expansive powers of the government.

---

[145] *Id*. at 37.

[146] *Id*.

[147] *Id*. *See* 31 U.S.C. § 3711 (2018) (detailing the extensive debt collection methods permitted the Government).

[148] *See supra* notes 90–94 and accompanying text.

Alternatively, if the government is only marginally interested in obtaining financial satisfaction from an individual and its primary desire is to exact quick, visible punishment for the purposes of retribution or deterrence, a contingent confinement provision can make sense and provide the government flexibility. Such a provision mandates payment by a convicted individual and coerces such action with the inducement of imprisonment. The individual can be placed behind bars if the government determines that its interests would be better served by an immediate punishment rather than the more prolonged process of collecting funds through the application of federal authority. The government may, however, ultimately conclude that a monetary result is more desirable and choose not to execute contingent confinement.

VI. Conclusion

This article has argued that contingent confinement provisions in sentences serve to replace monetary penalties with incarceration should an individual fail to pay an adjudged fine and contingent confinement be executed. In conducting this argument, this article has recounted the codified history of military contingent confinement, throughout which such imprisonment has been articulated as replacing associated fines when imposed[149]; analyzed Rule 1003(b)(3), the proper interpretation of which entails the replacement of a financial sanction with attendant contingent confinement when the latter is executed[150]; and explained the nature of punitive fines as debts to the United States and how contingent confinement should be used to further the government's penological interests.[151] Military appellate court precedent on this issue has also been detailed so the concordance of this case law with the interpretations of this article can be discerned and, hopefully, any discordance can be addressed.[152]

---

[149] *See supra* notes 20–56, 76–89 and accompanying text.

[150] *See supra* notes 62–75, 90–94 and accompanying text.

[151] *See supra* notes 133–47 and accompanying text.

[152] *See supra* notes 95–132 and accompanying text.

Throughout the aforementioned presentations, the problematic understandings of military contingent confinement evinced by Murphy and the NMCMR have been confronted. Their interpretation that the execution and service of such confinement does not discharge an associated financial obligation is inaccurate, would result in the double-punishing of service members for crimes, and risks eroding faith in the military justice system. Accordingly, it is important that Rule 1003(b)(3) is correctly understood: contingent confinement *replaces* the punitive fine to which it is attached *when executed*. Rule 1003(b)(3) should be amended in the manner recommended above to make this transformation explicit and ensure the correct and fair implementation of military justice.


THE JUDGE ADVOCATE GENERAL'S SCHOOL
UNITED STATES AIR FORCE
THE JUDGE ADVOCATE GENERAL'S SCHOOL