

NAVAL LAW REVIEW

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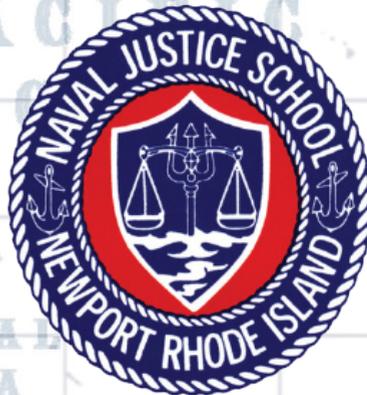
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**THE HOUSE BUILT ON SAND:
AN ANALYSIS OF BATTLEFIELD MERCY
KILLINGS IN NON-INTERNATIONAL ARMED
CONFLICTS UNDER INTERNATIONAL
HUMANITARIAN LAW AND INTERNATIONAL
HUMAN RIGHTS LAW REGIMES**

Lieutenant Commander Anthony P. Sham*

In discussing laws applicable to the conduct of hostilities in non-international armed conflicts, many scholars presume that battlefield mercy killing is per se illegal. However, the history of the drafting of common Article 3 to the Geneva Conventions, as well as the text itself, reveals much more ambiguity. Additionally, although the applicability of human rights law in armed conflicts is still an issue of debate among States, the principles supporting battlefield mercy killing are the same as those which underpin medical euthanasia, an act recognized by several human rights bodies. This Article analyzes arguments under both treaty and customary international law under which battlefield mercy killing could be deemed legally permissible, and it proposes policy considerations that support either foreclosing these legal gaps or strictly regulating the act under international law.

I. INTRODUCTION

A. *United States v. Chief Special Warfare Operator Edward Gallagher, U.S. Navy*

In October 2016, Iraqi and Kurdish forces—assisted by coalition airstrikes and military advisors—began the push to retake Mosul from the Islamic State of Iraq and Syria (ISIS), an operation that would ultimately last nearly eight months.¹ On a day of particularly heated fighting in May 2017, members of SEAL² Team 7's Alpha Platoon found themselves in the heart of Mosul alongside Iraqi security forces. Word came over the radio that a teenage male ISIS fighter was being brought to the SEAL medics at the rear of the battlefield for care. Caught in a coalition airstrike, the semi-conscious ISIS fighter was suffering from external wounds and a collapsed lung, a common injury from being in the concussive blast radius of a large explosion. Some SEALs would later report that their platoon leader, Chief Special Warfare Operator (SOC) Edward Gallagher,

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I owe a debt of gratitude to Professor Gabriella Blum and the incredible staff of Harvard Law School for guidance and support, especially through the uncertainty caused by the COVID-19 pandemic. All mistakes are attributable to the author alone.

¹ Tim Arango & Michael R. Gordon, *Iraqi Prime Minister Arrives in Mosul to Declare Victory Over ISIS*, N.Y. TIMES (July 9, 2017), <https://nyti.ms/3imZ6dt>.

² The United States Navy's Sea, Air, and Land forces, commonly known as SEALs, perform maritime and land-based special operations in urban, desert, jungle, arctic, undersea, and mountain environments. 1 U.S. NAVY, MANUAL OF NAVY ENLISTED MANPOWER AND PERSONNEL CLASSIFICATIONS AND OCCUPATIONAL STANDARDS SO-3 (2016).

was heard over the radio saying, “Lay off him, he’s mine.”³ Upon arriving at the scene, SOC Gallagher, a trained SEAL medic and sniper, joined other medics in placing a breathing tube inside the ISIS fighter’s chest and cutting open an emergency airway in his throat to alleviate his collapsed lung.⁴ Witnesses would later report that while rendering aid, SOC Gallagher pulled out a hunting knife and stabbed the ISIS fighter in the neck twice.⁵ The incident would remain unreported outside of SEAL channels for nearly a year.

In a court-martial process plagued with allegations of prosecutorial spying,⁶ leaking of documents,⁷ and even Presidential interference that would ultimately cost then-Secretary of the Navy Richard Spencer his job,⁸ SOC Gallagher finally saw the inside of a courtroom in the summer of 2019. During the presentation of its case, SOC Gallagher’s team of uniformed and civilian attorneys put forward its star witness—Special Warfare Operator First Class (SO1) Corey Scott. SO1 Scott, also a trained SEAL medic, had been on the scene treating the ISIS fighter. In a twist of courtroom drama, SO1 Scott stated that although SOC Gallagher might have stabbed the ISIS fighter in the neck, he did not ultimately kill the ISIS fighter—SO1 Scott did. In describing the battlefield scene, SO1 Scott testified, “I held my thumb over his trach[eotomy] tube until he asphyxiated.”⁹ Allegedly harboring no malice towards the ISIS fighter, SO1 Scott testified that this was an act of mercy to prevent the ISIS fighter from being tortured by Iraqi security forces. SO1 Scott testified, “I knew he was going to die anyway, and I wanted to save him from waking up to whatever would happen to him.”¹⁰

This case garnered significant media attention and controversy, in part because of President Trump’s unprecedented involvement in the military justice process.¹¹ One uncontroversial aspect of the case related to the illegality of SOC Gallagher’s alleged actions. If SOC Gallagher had committed the act of which he stood accused, stabbing and killing a fighter who had been rendered *hors de combat* out of mere aggression or misguided pursuit of reprisal, his actions would have been unquestionably illegal under international law. SO1 Scott’s actions open up a wholly separate area of discussion—the role of mercy in killing on the battlefield. Assuming the facts were as SO1 Scott relayed, which this Article will not dispute, he killed the ISIS fighter to save him from a significantly worse fate—torture at the hands of Iraqi security forces.

This Article will consider the legality of battlefield mercy killing under both the international humanitarian law (IHL) and international human rights law

³ Dave Philipps, *Navy SEAL War Crimes Witness Says He Was the Killer*, N.Y. TIMES (June 20, 2019), <https://nyti.ms/3aagU8M>.

⁴ Dave Philipps, *Decorated Navy SEAL Is Accused of War Crimes in Iraq*, N.Y. TIMES (Nov. 15, 2018), <https://nyti.ms/31A4P91>.

⁵ *Id.*

⁶ Sasha Ingber, *Judge Removes Lead Prosecutor in Navy SEAL War-Crime Case*, NAT’L PUB. RADIO (June 4, 2019), <https://n.pr/30H1whe>.

⁷ Julie Watson, *Military Judge Airs Concerns About Media Leaks in Navy SEAL’s War Crimes Case*, NAVY TIMES (Feb. 12, 2019), <https://bit.ly/3fIUooA>.

⁸ Dave Philipps et al., *Trump’s Intervention in SEALs Case Tests Pentagon’s Tolerance*, N.Y. TIMES (Nov. 30, 2019), <https://nyti.ms/3abbH0y>.

⁹ Dakin Andone & Jack Hannah, *Prosecutors Say Navy SEAL Eddie Gallagher Killed a Prisoner and Took Pictures with the Corpse. The Defense Says It Was a ‘High Combat Environment,’* CABLE NEWS NETWORK (July 1, 2019), <https://cnn.it/3fLpsEi>.

¹⁰ Carl Prine, *Thanks to SEAL’s Immunity Deals, Confessed Killer Unlikely to Be Charged*, NAVY TIMES (June 24, 2019), <https://bit.ly/31yonL9>.

¹¹ See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (July 31, 2019, 3:58 PM), <https://bit.ly/3fBaPDy>; Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 21, 2019, 8:30 AM), <https://bit.ly/3aaqgRX>; Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 24, 2019, 6:32 PM), <https://bit.ly/33NrD8d>.

(IHRL) regimes as applied in non-international armed conflicts (NIACs).¹² Specifically, this Article will examine whether and how the concept of battlefield mercy killing is contemplated by significant international humanitarian and human rights instruments, as well as areas of developing and established customary international law. Under the IHL framework, this Article will consider obligations imposed on States engaged in NIACs vis-à-vis persons *hors de combat* and whether the act of battlefield mercy killing may be consistent with such obligations. Under the IHRL framework, it will consider whether battlefield mercy killing is *per se* an arbitrary deprivation of life or whether any other human rights considerations could render the act permissible, even desirable. In concluding that battlefield mercy killing is not clearly prohibited by either treaty or customary international law, this Article will set forth several policy reasons supporting either prohibition or strict regulation of the act.

B. History of Battlefield Mercy Killing¹³

The concept of mercy killing evokes polarizing legal and moral reactions from academics and warfighters alike. Anecdotally, there is perhaps no more iconic tale than Ambrose Bierce's story of the *coup de grâce*, or blow of mercy. Bierce served in the Union army during the American Civil War, and in one particularly distressing tale, he described the discovery of a gravely wounded comrade, Sergeant Caffal Halcrow, by his young company commander, Captain Downing Madwell.

The man who had suffered these monstrous mutilations was alive. At intervals he moved his limbs; he moaned at every breath. He stared blankly into the face of his friend and if touched screamed. . . . Articulate speech was beyond his power; it was impossible to know if he were sensible to anything but pain. The expression of his face was an appeal; his eyes were full of prayer. For what? There was no misreading that look; the captain had too frequently seen it in eyes of those whose lips had still the power to formulate it by an entreaty for death. . . . For that which we accord to even the meanest creature without sense to demand it, denying it only to the wretched of our own race: for the blessed release, the rite of uttermost compassion, the *coup de grâce*.¹⁴

In Bierce's account, Captain Madwell, believing that there was no other humane alternative in the circumstances, made the agonizing decision to end Sergeant Halcrow's life. Immediately after running his sword through Sergeant Halcrow's heart, Captain Madwell saw three men approach from the horizon. Two of the men were hospital attendants, and the third was Major Creede Halcrow, Captain Madwell's superior at the regiment and Sergeant Halcrow's older brother. Bierce's tale perfectly illustrates the difficulty faced by soldiers

¹² From a policy standpoint, it would be desirable for battlefield mercy killing to be uniformly legal or illegal in the conduct of all armed conflicts, whether they are international or non-international in nature. However, there is a significantly smaller body of law which governs non-international armed conflicts (NIACs), making this a much less settled area in non-international conflicts. Though this Article will focus on battlefield mercy killing in NIACs specifically, it will discuss, where appropriate, bodies of law which apply to international armed conflicts (IACs) and address the differences.

¹³ Stephen Deakin uses the term "battlefield mercy killing" in his article. Stephen Deakin, *Mercy Killing in Battle*, 12 J. MIL. ETHICS 162, 162 (2013). Other scholars have used terms such as "battlefield euthanasia." E.g., David L. Perry, *Battlefield Euthanasia: Should Mercy-Killings Be Allowed?*, 44 PARAMETERS 119, 119 (2014). This Article adopts the phrase "battlefield mercy killing," as it captures the two most fundamental characteristics of the act.

¹⁴ Ambrose Bierce, *The Coup de Grace*, LIFE AND LIMB 169, 172 (David Seed et al. eds., 2015).

placed in this situation. Emotional life-and-death decisions are made under intense conditions, often without time for significant reflection and without knowledge of all the circumstances.

Battlefield mercy killings are characterized by three fundamental criteria. First, the act must take place on the battlefield, however broadly defined. Death and destruction may be the byproducts of warfare, but fighters are the ones who execute them. And on the battlefield, fighters are permitted to take, and are protected from criminal liability for, such acts which are taken in compliance with international law. Second, the act must be undertaken out of mercy or compassion for the person killed.¹⁵ This creates a novel area of consideration whereby the motivation for taking the life of another becomes of utmost importance. IHL focuses on when the taking of a life is legally permissible, but generally does not consider the motivation of the person taking the life.¹⁶ This concept of considering motivation underlying battlefield actions will be explored in further detail. Third, the act must be accompanied by some objective indication that death as a result of the wounds is imminent. A soldier's subjective, but unreasonable, determination that killing is merciful cannot be justified if the victim's life could be saved with medical intervention.

Reports of battlefield mercy killing are sparse, and it is difficult to say whether prevalence has increased with the advent of "modern" warfare. Improvements in medical capabilities have rendered previously mortal injuries, such as abdominal wounds, amputations, and embedded shrapnel, nonfatal. But advances in medical care must also be viewed in light of advances in military technology. Vietnam saw the widespread use of napalm, a substance capable of adhering to man and machine alike, burning at over 1000° C. Air-to-surface missiles, such as the AGM-114 Hellfire, can be launched from miles away, killing everything within a 50-foot radius of the blast site. And while precision-guided munitions today can greatly limit damage to persons and objects beyond the intended target, there is no question that ordnance today has potential destructive capability beyond that which can be treated through modern medical care.

When discussing the propriety of battlefield mercy killing, many scholars presuppose that the act is *per se* prohibited by international law and *prima facie* immoral.¹⁷ However, given the fact that there is not even a clear consensus on the type of law that applies on the battlefield, this presupposition of illegality merits further examination. Specifically, there are two areas of international law that arguably apply in armed conflict: IHL and IHRL. Whether these areas of law apply complementarily or to the mutual exclusion of each other in armed conflict is an area of debate. IHL governs the conduct of warfare with an eye towards minimizing human suffering in relation to military necessity.¹⁸ Among other things, IHL governs aspects of warfare including which individuals may be the targets of attack, what types of weapons may be used in an attack, and what type of treatment must be afforded to individuals. IHL applies to the conduct of hostilities and, with very little exception, has no applicability in peacetime.¹⁹

¹⁵ Deakin, *supra* note 13, at 162.

¹⁶ This is not to suggest that the law regulating warfare should not concern itself with motivation. Under the just war theory, for example, the criterion of right intention requires that States fight for the sake of a just cause, which prohibits reprisals, retribution, and revenge. *See, e.g.,* Annalisa Koeman, *A Realistic and Effective Constraint on the Resort to Force? Pre-commitment to Jus in Bello and Jus Post Bellum as Part of the Criterion of Right Intention*, 6 J. MIL. ETHICS 198, 201-02 (2007).

¹⁷ *See, e.g.,* Deakin, *supra* note 13, at 171; Perry, *supra* note 13, at 120.

¹⁸ GERD OBERLEITNER, HUMAN RIGHTS IN ARMED CONFLICT: LAW, PRACTICE, POLICY 45 (2015).

¹⁹ *E.g.,* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I].

IHL similarly promotes minimization of human suffering, but more broadly seeks to define, secure, protect, and enforce inherent rights held by individuals. IHL applies in times of peace and, some would argue, even in times of war.

II. BATTLEFIELD MERCY KILLING UNDER THE FRAMEWORK OF IHL

The Geneva Academy of International Humanitarian Law and Human Rights has classified the armed conflict in Iraq against ISIS as a NIAC dating back to 2014.²⁰ At the request of the Iraqi government, the United States-led coalition of international forces began an airstrike campaign targeting ISIS in August 2014.²¹ As the campaign evolved, support by the United States extended to military advisors and enablers on the ground. The onset of a NIAC implicates common Article 3 of the Geneva Conventions,²² binding on both States and organized armed groups as both treaty law and customary international law.²³ In relevant part, common Article 3 states:

- (1) Persons taking no active part in the hostilities, including . . . those placed *hors de combat* by . . . wounds . . . shall in all circumstances be treated humanely . . . To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; . . .
- (2) The wounded and sick shall be collected and cared for.²⁴

Much of the scholarship which presupposes the illegality of battlefield mercy killing points to other articles of the Geneva Conventions, perhaps because other articles are more specific in their discussions of safeguards for protected persons, without considering the classification of the armed conflict.²⁵ For example, Article 12 of the First Geneva Convention states:

Members of the armed forces and other persons mentioned . . . who are wounded or sick, shall be respected and protected in all circumstances. They shall be treated humanely and cared for by the Party to the conflict in whose power they may be . . . Any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered or exterminated, subjected to torture or to biological experiments; they shall not wilfully^[26] be left without medical

²⁰ GENEVA ACAD. OF INT'L HUMANITARIAN L. & HUM. RTS., THE WAR REPORT 184 (Annyssa Bellal ed., 2015).

²¹ *Id.*

²² Common Article 3 refers to language in a particular provision which is common to all four Geneva Conventions. See Geneva Convention I, *supra* note 19, art. 3; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

²³ Jelena Pejic, *The Protective Scope of Common Article 3: More Than Meets the Eye*, INT'L REV. RED CROSS 189, 191 (2011).

²⁴ Geneva Convention I, *supra* note 19, art. 3; Geneva Convention II, *supra* note 22, art. 3; Geneva Convention III, *supra* note 22, art. 3; Geneva Convention IV, *supra* note 22, art. 3.

²⁵ See, e.g., Perry, *supra* note 13, at 120; Deakin, *supra* note 13, at 171.

²⁶ “Wilful” and “wilfully” are used throughout the Geneva Conventions, as this is the common British English spelling. This Article will use the phrases “willful” and “willfully” when not quoting sources.

assistance and care, nor shall conditions exposing them to contagion or infection be created.²⁷

However, other articles of the Geneva Conventions, even if they have achieved the status of customary international law, apply only in international armed conflicts (IACs). And while the language of common Article 3 does recommend that parties to the conflict endeavor to bring into force other provisions of the various Geneva Conventions, this precatory language does not bind State parties to any specific action.

A. *Drafting History of the Geneva Conventions*

The Geneva Conventions were negotiated against the recent memories of World War II and significant violations of traditional notions of the law of war.²⁸ While there was broad consensus regarding the comprehensive applicability of the Conventions to armed conflicts of an international character, there was disagreement about the extent of applicability to internal conflicts of domestic strife.²⁹ To the extent that the Geneva Conventions can be viewed as States placing self-limitations on the conduct of international warfare, common Article 3 can be viewed as States placing even further self-limitations in addressing purely domestic issues. Some States posited that common Article 3 was entirely unnecessary, suggesting that no State would inhumanely treat its own nationals in internal conflict, though this minority view was quickly tabled.³⁰ Taking the opposite approach, the International Committee of the Red Cross (ICRC) proposed that parties to an internal conflict be given the option to fully apply all provisions of the Conventions, believing that parties would be unwilling to refuse in the face of public opinion.³¹ Still, other States suggested that the entirety of the Conventions, which memorialized basic humanitarian provisions, apply to all armed conflicts regardless of characterization.³² At the end of the Diplomatic Conference, the States' representatives had reached a consensus that States engaged in NIACs would be bound by "fundamental humanitarian norms," which essentially provides no practical guidance to States on the interpretation of common Article 3.³³ Considerable authority is bestowed upon the text of common Article 3, but the words themselves leave much to be desired.

B. *Common Article 3*

Common Article 3 provides persons placed *hors de combat* with the guarantee of humane treatment in all circumstances.³⁴ But despite the attempt to craft a universally applicable provision for all armed conflicts not of an international character, the *travaux préparatoires* illustrate a surprising lack of discussion regarding the concept of humane treatment. David Elder adopts a definition of "that which is minimally necessary for the normal maintenance of mental and physical health and well-being of a human being," a meaning not

²⁷ Geneva Convention I, *supra* note 19, art. 12.

²⁸ David A. Elder, *The Historical Background of Common Article 3 of the Geneva Convention of 1949*, 11 CASE WEST. RES. J. INT'L L. 37, 37 (1979).

²⁹ *See id.* at 38 (noting that some scholars argue that as a result of the tilted power dynamics in favor of a few major stakeholders, common Article 3 results in few practical limitations on the internal policies of States).

³⁰ 2 FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, SEC. B, at 329 (1951) [hereinafter FINAL RECORD B].

³¹ Elder, *supra* note 28, at 42.

³² *Id.* at 50.

³³ *Id.* at 53.

³⁴ Geneva Convention I, *supra* note 19, art. 3; Geneva Convention II, *supra* note 22, art. 3; Geneva Convention III, *supra* note 22, art. 3; Geneva Convention IV, *supra* note 22, art. 3.

found anywhere in the text of the Geneva Conventions, but even he recognizes that such a standard is not fixed.³⁵ The minimum standards to uphold the well-being of a human being vary with time, geography, culture, and socio-economic factors.³⁶ Some scholars argue that the ambiguity in common Article 3 was meant to allow the concept of humane treatment to remain relevant against societal changes.³⁷ This flexibility may have been desirable, assuming the drafters foresaw a future in which the conduct of international warfare would become more, not less, humane. Against the dark backdrop of World War II, this may have seemed inevitable. It is unlikely that the drafters of the Geneva Conventions could have anticipated that less than a century later, NIACs would become the prevalent type of armed conflict, overshadowing IACs in both scale and potential for human suffering.³⁸

Rather than seek to define humane treatment, common Article 3 instead enumerates prohibited acts, the first of which is “violence to life and person.”³⁹ Review of the *travaux préparatoires* indicates that some initial drafts of the Conventions qualified this language with the word “serious,” anticipating that some necessary medical treatments would inherently be violent.⁴⁰ Given the requirement to collect and care for the wounded and the sick in common Article 3, this would have been a significant concern. The qualifier was ultimately removed in the final draft, as the ICRC raised concerns that inclusion of such language could be interpreted as authorizing violence, which fell below the ambiguous standard of “serious,” negating the intent of the Conventions. Many States presupposed that legitimate violence, such as medical treatment, would always be permissible, provided it was for the welfare of the wounded and sick.⁴¹ Accordingly, while violence is not qualified in common Article 3, the States believed that the provision would be interpreted to prohibit illegitimate violence, understood as violence that was not for the welfare of the wounded and sick. Again, the phrase “violence to life and person” was not defined in common Article 3, but inclusion of “person” was meant to suggest that both an individual’s physical and moral integrity were to be protected.⁴² This certainly stretches the boundaries of traditional notions of violence, leaving open the question of how the drafters envisioned something like violence against the moral integrity of an individual.

Common Article 3 does not define “violence to life and person,” but lists examples of impermissible violence. This alone was enough to cause consternation by some States, which noted that the enumerated list was less expansive than Article 32 of the Fourth Geneva Convention. It specifically stated that High Contracting Parties were prohibited from taking any measures “causing physical suffering, the extermination of protected persons, murder, torture, corporal punishment, mutilation, medical and scientific experiments, and in general any measures of torture or cruelty whether applied by civilian or military agents.”⁴³ Recognizing that any enumerated list can never be sufficiently expansive, these States feared that common Article 3 could be interpreted as

³⁵ Elder, *supra* note 28, at 60.

³⁶ *Id.*

³⁷ GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 98 (2010).

³⁸ Pejic, *supra* note 23, at 189.

³⁹ Geneva Convention I, *supra* note 19, art. 3; Geneva Convention II, *supra* note 22, art. 3; Geneva Convention III, *supra* note 22, art. 3; Geneva Convention IV, *supra* note 22, art. 3.

⁴⁰ 2 FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, SEC. A, at 158 (1951) [hereinafter FINAL RECORD A].

⁴¹ *Id.*

⁴² *Id.* at 191.

⁴³ FINAL RECORD B, *supra* note 30, at 409.

providing fewer safeguards for protected persons in NIACs than in IACs,⁴⁴ an interpretation which is facially supported by the text of the Geneva Convention.

Common Article 3 enumerates types of violence to life and person, including “murder of all kinds” and torture.⁴⁵ In the Joint Committee of the 1949 Diplomatic Conference of Geneva, this draft language was met with the tongue in cheek question about how many types of murder there were.⁴⁶ While murder had been previously understood to be a criminal matter dealt with under domestic law, the Nuremberg Statutes included murder as a violation of the laws or customs of war, thus thrusting the concept into the purview of international law.⁴⁷ And while the States’ representatives recognized that concepts like murder and torture were described in the criminal law of all countries, there was no effort to reconcile potential differences in understanding of these fundamental concepts.⁴⁸ The 2016 commentary to the Geneva Conventions suggests that the broad language of “murder of all kinds” was meant to account for potential differences in national conceptions of murder and to ensure a broad interpretation,⁴⁹ and yet it goes on to provide its own definition of murder: the “intentional killing or causing of death of [protected] persons, as well as the reckless killing or causing of their death.”⁵⁰ The term “wilful killing” appears throughout the four Geneva Conventions as a grave breach of State obligations.⁵¹ And yet, the drafters of common Article 3 chose not to use that term, adopting instead the phrase “murder of all kinds.” And while murder is also prohibited in IACs by other provisions of the Geneva Conventions,⁵² the phrase is similarly not defined. If the 2016 commentary to the Geneva Convention is correct and the ambiguity in common Article 3 was intended to allow for different domestic conceptions of murder, this raises concerns about how the same undefined act can be prohibited as a matter of international law. The definition of murder proposed in the 2016 commentary does not appear in the 1952 commentary to the Geneva Convention, which simply states that the prohibited actions contained in subsection (1)(a) of common Article 3—including murder of all kinds—are those “which world public opinion finds particularly revolting—acts which were committed frequently during the Second World War.”⁵³

In the ultimate expression of irony, the 1949 Committee Report stated that terms like “murder” and “torture” were self-explanatory when used in the Geneva Conventions.⁵⁴ Still, if the drafters and States’ representatives believed that such concepts were self-explanatory, whether rightfully or wrongfully, it suggests that they shared some common understanding of acts which ultimately had no place on the civilized battlefield. Several States referred to the Nuremberg trials regarding crimes against humanity in discussing the types of acts which the Geneva Conventions purported to prohibit,

⁴⁴ *Id.* at 334.

⁴⁵ Geneva Convention I, *supra* note 19, art. 3; Geneva Convention II, *supra* note 22, art. 3; Geneva Convention III, *supra* note 22, art. 3; Geneva Convention IV, *supra* note 22, art. 3.

⁴⁶ FINAL RECORD B, *supra* note 30, at 329.

⁴⁷ *Id.* at 310.

⁴⁸ *Id.* at 355.

⁴⁹ INT’L COMM. RED CROSS, COMMENTARY ON THE FIRST GENEVA CONVENTION ¶ 597 (2d ed. 2016) [hereinafter 2016 COMMENTARY I].

⁵⁰ *Id.* at ¶ 599.

⁵¹ See Geneva Convention I, *supra* note 19, art. 50; Geneva Convention II, *supra* note 22, art. 51; Geneva Convention III, *supra* note 22, art. 130; Geneva Convention IV, *supra* note 22, art. 147.

⁵² See Geneva Convention I, *supra* note 19, art. 12; Geneva Convention II, *supra* note 22, art. 12; Geneva Convention IV, *supra* note 22, art. 32.

⁵³ JEAN S. PICTET, GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD: COMMENTARY 54 (1952) [hereinafter 1952 COMMENTARY I].

⁵⁴ FINAL RECORD A, *supra* note 40, at 191.

immediately call[ing] up the vision of a person who has lost all sense of humanity, whose remaining instincts are those of a brute, who would not hesitate to smash a child's body against a wall, who would shoot anybody and who would order summary executions without trial or sentence, who would torture his victims or, in violation of the prohibition which we have adopted, would take hostages and perhaps, worse still, would execute them.⁵⁵

Although these examples would clearly meet any reasonable definition of impermissible acts under common Article 3, the perspective of the drafters remains unclear. Are these the most egregious acts conceivable when discussing violence to life and person, establishing a metaphorical ceiling in determining the scope of inhumane treatment? If so, what other types of less egregious acts would still be considered inhumane? If these were the types of notions that “self-explanatory” concepts of murder and torture were meant to convey, a textual argument consistent with the *travaux préparatoires* can be made that the arguably altruistic act of battlefield mercy killing would not have been *per se* prohibited by the drafters of common Article 3.

Common Article 3 also imposes an obligation to collect and care for the wounded and sick.⁵⁶ This is further codified in Article 7 of Additional Protocol II to require medical care and attention “to the fullest extent practicable and with the least possible delay.”⁵⁷ Although the existence of this obligation is clear, the extent of the obligation is more ambiguous. States do not have a limitless obligation to care for persons *hors de combat*, but rather have a duty to use best efforts, which may include relying on humanitarian organizations.⁵⁸ But it is also apparent that given the nature of warfare and limitations of modern medicine, best efforts will not always be sufficient to save a life. Common Article 3 and Article 7 of Additional Protocol II are silent as to what should happen once this determination has been made. That is to say, common Article 3(2) clearly imposes an obligation to care for the wounded and sick. Once it is apparent that best efforts will still result in the death of the person, States must look elsewhere to determine their obligations with regards to persons *hors de combat* who will inevitably die from their wounds.

The Geneva Conventions, like other multilateral documents of international law, obligate State parties to fulfill certain duties upon their consent to be bound by the provisions, or the extent that the provisions reflect customary international law or *jus cogens* norms. Similarly, States agree to be held responsible for violations of international law which can be attributed to the States themselves. Common Article 3 binds “each Party to the conflict,” suggesting that each State is responsible for its own actions.⁵⁹ However, the 2016 commentary to the Geneva Conventions interprets an additional obligation by States not to transfer “persons in their power to another authority when those persons would be in danger of suffering a violation of those fundamental rights [contained in

⁵⁵ FINAL RECORD B, *supra* note 30, at 307.

⁵⁶ Geneva Convention I, *supra* note 19, art. 3; Geneva Convention II, *supra* note 22, art. 3; Geneva Convention III, *supra* note 22, art. 3; Geneva Convention IV, *supra* note 22, art. 3.

⁵⁷ Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 7, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II].

⁵⁸ *Id.* arts. 7, 18.

⁵⁹ Geneva Convention I, *supra* note 19, art. 3; Geneva Convention II, *supra* note 22, art. 3; Geneva Convention III, *supra* note 22, art. 3; Geneva Convention IV, *supra* note 22, art. 3.

common Article 3] upon transfer.”⁶⁰ This is a concept known as *non-refoulement*, which is a significant doctrine of IHRL. The ICRC’s reasoning for interpreting an inherent obligation of *non-refoulement* under common Article 3 was that any other interpretation would allow States to side-step their obligations under common Article 3 by simply transferring persons within their control to a non-compliant State.⁶¹ The doctrine of *non-refoulement* will be addressed in a separate section on human rights law in the conduct of hostilities. At this point, it should just be noted that the text of common Article 3 does not expressly create the obligation of *non-refoulement*.

C. *United States Policy on Persons Hors de Combat in the Conduct of Hostilities*

The United State Department of Defense (DoD) promulgated the most recent version of its Law of War Manual in 2016. At the time, then-General Counsel of the DoD Stephen W. Preston recognized the same principal that the drafters of common Article 3 envisioned—the law of war plays a significant role in civilized military heritage and adherence to its principles stems from both a legal and ethical obligation.⁶² The DoD Law of War Manual offers significant insight into how the United States interprets many of its obligations under the Geneva Conventions. Of note, the Law of War Manual states that common Article 3 is the “minimum yardstick of humane treatment protections” for persons *hors de combat*, suggesting that the United States would recognize even greater protections than those provided for in common Article 3 in a NIAC.⁶³ And indeed, although the United States has not ratified Additional Protocol II, the DoD nonetheless invokes its requirement that persons *hors de combat* shall be “respected and protected,”⁶⁴ meaning that they shall not be “knowingly attacked, fired upon, or unnecessarily interfered with.”⁶⁵ However, it is doubtful that this acknowledgement carries any substantive weight. Citing to the general provision in Article 4 of Additional Protocol II, which requires that persons *hors de combat* are entitled to “respect for their person, honor and convictions, and religious practices,” the Law of War Manual makes no mention of the specifically enumerated acts which are prohibited under the requirement of humane treatment.⁶⁶ Even so, as previously mentioned, it is unclear whether the act of battlefield mercy killing expressly would be prohibited under Article 4 of Additional Protocol II, assuming that its provisions were binding as customary international law, an assumption that the United States would contest.

D. *Proposal to Revise Common Article 3*

Common Article 3 does not foreclose the act of battlefield mercy killing because of the ambiguity of its language. The word “kill” does not appear anywhere in the text of common Article 3. Instead, the text uses undefined phrases such as “violence to life and person” or proscribes certain acts, such as “murder” and “cruel treatment.”⁶⁷ Interpretations of the obligations under common Article 3 similarly adopt other IHL terms, such as prohibiting “attacks”

⁶⁰ 2016 COMMENTARY I, *supra* note 49, ¶ 708.

⁶¹ *Id.* ¶ 710.

⁶² *Foreword* to DEPARTMENT OF DEFENSE LAW OF WAR MANUAL, at ii (2016) [hereinafter LAW OF WAR MANUAL].

⁶³ *Id.* § 8.1.4.1.

⁶⁴ *Id.* § 17.14.1.

⁶⁵ *Id.* § 17.14.1.2.

⁶⁶ *Id.* § 17.6.

⁶⁷ Geneva Convention I, *supra* note 19, art. 3; Geneva Convention II, *supra* note 22, art. 3; Geneva Convention III, *supra* note 22, art. 3; Geneva Convention IV, *supra* note 22, art. 3.

on protected persons.⁶⁸ But while common Article 3 is arguably the only substantive article regarding persons *hors de combat* found in the four main Geneva Conventions which applies in NIACs, it is not the only provision of law which references such protected persons.

Article 23(c) of the Hague (IV) Convention (Hague IV), which only applies in IACs as a matter of treaty law, is more absolute, prohibiting the “kill[ing] or wound[ing of] an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion.”⁶⁹ However, the text of Hague IV is not without its own faults. By reference, Hague IV imposes the same duties of medical care to the sick and wounded as the Geneva Conventions.⁷⁰ Article 23(c) of Hague IV arguably provides no latitude for battlefield medical procedures, which could lead to the death of an enemy *hors de combat*, a concept which was heavily debated at the Diplomatic Conference of Geneva. Specifically, some States at Geneva argued whether doctors would have the latitude to perform inherently violent medical procedures without running afoul of the provisions of common Article 3.⁷¹ Ultimately, the drafters suggested that common Article 3 implies a difference between “legitimate” violence for the welfare of the wounded and sick and “punishable” violence.⁷² Medical treatment would fall under the former, while prohibited acts—such as those enumerated in Article 13 of the Third Geneva Convention⁷³—would fall under the latter. Article 23(c) of the Hague Regulations, in its absolutism, would textually treat both situations similarly.

Each of the four main Geneva Conventions also contains a provision regarding grave breaches of the Conventions, which as a strict matter of treaty law, applies only in IACs.⁷⁴ And while they differ slightly in substance, each provision prohibits “wilful killing [of]” and “wilfully causing great suffering or serious injury to body or health [to]” persons protected by the respective Convention.⁷⁵ The addition of this qualifier to the act of prohibited killing is significant because it removes potential liability for inadvertent killing of protected persons in the performance of life-saving medical procedures; in fact, it removes potential liability for inadvertent, or even reckless, killing entirely. At the Diplomatic Convention of Geneva, the drafters understood a willful act to be both intentional and with full knowledge of its wrongfulness. The guilty person “has considered the import and consequences of that act, and has not been deterred by such reflection from committing it.”⁷⁶ Applying this language to the act of battlefield mercy killing, there is no question that the intent of the actor is to end the life of the person *hors de combat*. The act is willful, and regardless of the motivation of the actor, the act would be prohibited under the unambiguous language of the provision. In 1996, the United States passed the War Crimes Act, which, in part, criminalized certain acts as grave breaches of common Article 3. In it, Congress defined murder as “[t]he act of a person who intentionally kills . . . one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause.”⁷⁷ By

⁶⁸ INT’L COMM. RED CROSS, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 164 (Jean Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter ICRC IHL RULES].

⁶⁹ Convention (IV) Respecting the Laws and Customs of War on Land and its Annex art. 23, Oct. 18, 1907, 36 Stat. 2277.

⁷⁰ *Id.* art. 21.

⁷¹ FINAL RECORD A, *supra* note 40, at 157.

⁷² *Id.*

⁷³ Geneva Convention III, *supra* note 22, art. 13.

⁷⁴ Geneva Convention I, *supra* note 19, art. 50; Geneva Convention II, *supra* note 22, art. 51; Geneva Convention III, *supra* note 22, art. 130; Geneva Convention IV, *supra* note 22, art. 147.

⁷⁵ *Id.*

⁷⁶ FINAL RECORD A, *supra* note 40, at 191.

⁷⁷ War Crimes Act of 1996, 18 U.S.C. § 2441 (2018).

defining the prohibited act as an “intentional killing,” much like the grave breach provisions of the Geneva Conventions, the War Crimes Act removes any ambiguity about battlefield mercy killing by focusing on the intentionality of the act rather than the motivation of the actor.

The fact that the United States has passed legislation prohibiting intentional killing of persons *hors de combat* in NIACs begs the question of whether this arguable ambiguity in common Article 3 makes any difference as pertains to the United States—it absolutely does. First, the United States passed the War Crimes Act of 1996, nearly 50 years after the Geneva Conventions were promulgated. As clarified in 2006, the passage of the law was to “fully satisfy the obligations under Article 129 of the Third Geneva Convention . . . to provide effective penal sanctions for grave breaches which are encompassed in common Article 3 in the context of an armed conflict not of an international character.”⁷⁸ So for nearly 50 years following the Geneva Conventions, during which time the United States was involved in at least two separate NIACs,⁷⁹ the act of battlefield mercy killing was arguably not prohibited as a breach of treaty or domestic law. Second, the adoption of a standard prohibiting intentional killing of persons *hors de combat* is binding on the United States as a matter of domestic legislation, not as a matter of international law. This means that its interpretation and implementation are subject to changes in administration, political climate, and a host of other purely internal variables. In fact, Congress expressly stated that “[n]o foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated [as grave breaches of common Article 3].”⁸⁰ Should any current or future American administration choose to exempt battlefield mercy killing from the definition of intentional killing under the War Crimes Act of 1996, there is arguably no prohibition under international law to supplant that interpretation.⁸¹

Truthfully, it will be difficult to craft treaty language which can enumerate every forbidden act on the battlefield—the State representatives at the Diplomatic Conference of Geneva struggled with that exact issue. Furthermore, to craft such language which could be ratified by States adds another layer of political difficulty. However, common Article 3, as currently drafted, does not textually foreclose the permissibility of battlefield mercy killing in NIACs. If the intent of the global community is to prohibit battlefield mercy killing, it must be expressly indicated in the text of common Article 3 and further expressly acknowledged and applied by States. By amending the current language of common Article 3 to mirror the grave breach provisions of the Geneva Conventions to prohibit willful killing, the international community would do much to narrow this interpretive gap.

III. BATTLEFIELD MERCY KILLING UNDER THE FRAMEWORK OF IHRL

A. *Relationship Between IHL and IHRL in the Conduct of Hostilities*

Less than a year before the Geneva Conventions were adopted, the United Nations General Assembly promulgated the Universal Declaration of

⁷⁸ Military Commissions Act of 2006, Pub. L. No. 109-366, § 6, 120 Stat. 2600, 2632 (2006).

⁷⁹ BARBARA SALAZAR TORREON, U.S. CONG. RESEARCH SERV., U.S. PERIODS OF WAR AND DATES OF RECENT CONFLICTS 5 (2020).

⁸⁰ Military Commissions Act of 2006, § 6.

⁸¹ Although there is little ambiguity that Congressional intent expressed in the text of the statute would prohibit battlefield mercy killing, the matter of enforcement would still fall under the purview of the Executive.

Human Rights (UDHR).⁸² Chaired by Eleanor Roosevelt, the UDHR drafting committee sought to memorialize the fundamental rights of all individuals. And though the UDHR was developed with the recent memory of human rights atrocities in World War II, the document itself makes no mention of war. Rather, the UDHR was meant to address those human rights which are so fundamental that they apply equally in times of war and peace. In addressing the various States' representatives present at the signing ceremony for the Geneva Conventions in 1949, the President of the Diplomatic Conference, Max Petitpierre of Switzerland, channeled those same sentiments. In referencing fundamental rights, such as protections against torture and cruel or inhuman treatment, President Petitpierre noted that both the UDHR and the Geneva Conventions pursued the same ideal—"that of freeing human beings and nations from the suffering of which they are often at once the authors and the victims."⁸³ That poignant statement recognized that the purposes for which the humanitarian and human rights law regimes exist are not so disparate—"human rights want[s] to change society while humanitarian law want[s] to change war."⁸⁴

B. United States Policy on IHRL in the Conduct of Hostilities

Despite President Petitpierre's assertion over 70 years ago at the signing of the Geneva Conventions, the United States has maintained the position that IHL constitutes the controlling *lex specialis* in the conduct of hostilities.⁸⁵ But unlike more moderate views which consider IHRL relevant to the interpretation of IHL, the United States' more extreme view is that IHRL is completely displaced by IHL in armed conflict.⁸⁶ But the operational effect of the government's expansive interpretation of the primacy of IHL in armed conflict is magnified by its refusal to recognize that some significant human rights obligations contained in multilateral treaties apply extraterritorially. This policy will be addressed below in sections regarding the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture).

From a policy standpoint, this interpretation affords the United States great latitude in military operations. This is not to suggest that the United States maintains this viewpoint in order to actively engage in IHRL violations in armed conflicts; after all, IHL still seeks to limit unnecessary suffering and provide fundamental safeguards for protected persons.⁸⁷ Rather, in the conduct of military operations, commanders only need refer to one regime of international law, namely IHL.⁸⁸ Still, it would be irresponsible to leave the argument without exploring exactly what human rights obligations are required under various multilateral treaties and customary international law. The U.S. Government's policy of IHL as *lex specialis*, coupled with its argument of inapplicability of the human rights regime extraterritorially, is a significant minority in the international community.⁸⁹ While it is important to understand the United States policy in this area, it is equally important to understand the position of other international parties, both adversaries and allies alike.

⁸² G.A. Res. 217 (III) A (Dec. 10, 1948).

⁸³ FINAL RECORD B, *supra* note 30, at 536.

⁸⁴ OBERLEITNER, *supra* note 18, at 78.

⁸⁵ LAW OF WAR MANUAL, *supra* note 62, § 17.2.1.3.

⁸⁶ *Id.* § 1.3.2.2. *See also* OBERLEITNER, *supra* note 18, at 93.

⁸⁷ LAW OF WAR MANUAL, *supra* note 62, § 1.3.4.

⁸⁸ *Jus ad bellum*, or the law of war, principles still apply in warfare more broadly. But in the conduct of particular military operations, U.S. commanders look to IHL, and not IHRL. *See id.* § 1.6.3.1 & n.94 (distinguishing between the rules of human rights treaties and the law of war).

⁸⁹ OBERLEITNER, *supra* note 18, at 148.

C. *International Agreements*

1. **International Covenant on Civil and Political Rights (ICCPR)**

The ICCPR was the third human rights instrument adopted after the promulgation of the UDHR. Adopted by the United Nations General Assembly in December 1966, the ICCPR entered into force in March 1976,⁹⁰ currently with 113 State parties including the United States.⁹¹ Informed by the principles declared in the United Nations Charter and the UDHR, the ICCPR seeks to affirm fundamental civil and political freedoms, along with the societal conditions that must be created to ensure the exercise of those freedoms.⁹² Article 28 of the ICCPR also establishes a Human Rights Committee with the authority to issue non-binding general comments regarding interpretation and application of the Covenant.⁹³

Article 6 of the Covenant declares that “[e]very human being has the inherent right to life” and that “[n]o one shall be arbitrarily deprived of his life.”⁹⁴ While the ICCPR authorizes derogation of certain obligations in times of “public emergency which threaten[] the life of the nation,” the protection for the right to life is non-derogable, even in situations of armed conflict.⁹⁵ The ICCPR itself does not define what constitutes an arbitrary deprivation of life or what States must do to protect this inviolable right in the conduct of hostilities. However, the Human Rights Committee creates a comprehensive framework in General Comment 36.

The Human Rights Committee defines deprivation of life as “an intentional or otherwise foreseeable and preventable life-terminating harm or injury, caused by an act or omission.”⁹⁶ Under the human rights framework, battlefield mercy killing constitutes a deprivation of life which clearly falls under the purview of the ICCPR. However, the Human Rights Committee recognizes that the right to life is not absolute. By the black letter text of the ICCPR, arbitrary deprivations of life are prohibited, suggesting that there must be non-arbitrary deprivations of life.⁹⁷ And while deprivations of life which violate international or domestic law are necessarily arbitrary, the Committee looks beyond mere illegality to consider factors such as “inappropriateness, injustice, lack of predictability and due process of law” as well as “reasonableness, necessity, and proportionality.”⁹⁸ This list of factors sheds some light on the Human Rights Committee’s interpretation of arbitrariness. By referencing the IHL doctrines of necessity and proportionality, the Human Rights Committee is again reinforcing its position that the human rights regime remains applicable even in armed conflicts. Additionally, the Committee recognizes that whether an act is deemed arbitrary must be determined in light of the circumstances. For example, the use

⁹⁰ International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. No. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR].

⁹¹ U.N. Treaty Collection, <https://bit.ly/2YEhsQ4> [<https://perma.cc/7ZVZ-DC9Q>] (last visited Apr. 24, 2020).

⁹² ICCPR, *supra* note 90, at pmbl.

⁹³ *Id.* art. 28.

⁹⁴ *Id.* art. 6.

⁹⁵ *Id.* art. 4. *See also* Human Rights Comm., General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, ¶ 2, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018) [hereinafter HRC GC 36].

⁹⁶ HRC GC 36, *supra* note 95, ¶ 6.

⁹⁷ *Id.* ¶ 10.

⁹⁸ *Id.* ¶ 12.

of lethal force in exercising the inherent right of self-defense is generally not arbitrary.⁹⁹ However, the act may be rendered arbitrary if the use of force is not necessary given the threat posed by the attacker, or if the amount of force exceeds that which is necessary to respond to the threat.¹⁰⁰ This is in line with the International Court of Justice's (ICJ) advisory opinion regarding the threat or use of nuclear weapons, where it stated that arbitrariness must be determined by the applicable *lex specialis* (i.e., IHL).¹⁰¹ However, the applicable *lex specialis* in the conduct of hostilities is silent regarding the motivation of the person who commits a deprivation of life.

a. United States Policy Regarding Obligations Under the ICCPR

When the United States submitted its reservations, declarations, and understandings to the ICCPR in 1992, there were no significant substantive submissions regarding Articles 4, 6, or 7.¹⁰² Today, the conflicting interpretations between the United States and the Human Rights Committee about the ICCPR's applicability to the conduct of extraterritorial hostilities remain an unsettled area of international law.¹⁰³

Article 2 of the ICCPR states that “[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant.”¹⁰⁴ In the context of extraterritorial hostilities, General Comment 31 states that State parties must respect the Covenant rights “to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party,”¹⁰⁵ including in all situations of armed conflict.¹⁰⁶ Recognizing that the specific rules of IHL may be of greater relevance in the conduct of hostilities, the Human Rights Committee requires States to apply human rights law complementarily with, not to the exclusion of, IHL. In arriving at this interpretation, the Human Rights Committee takes a very pragmatic approach—any other interpretation which could “permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory” would be unconscionable.¹⁰⁷

The United States takes severe umbrage with this interpretation on several bases. First, as previously discussed, the United States interprets IHL as *lex specialis*, and therefore the only body of international law which applies in the conduct of hostilities. Second, the United States policy is that the provisions of the ICCPR have no application extraterritorially. The United States relies heavily on the literal text of the ICCPR, which states that State responsibility applies “within its territory and subject to its jurisdiction,”¹⁰⁸ arguing that both criteria are

⁹⁹ *Id.* ¶ 10.

¹⁰⁰ *Id.* ¶ 12.

¹⁰¹ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, 240 (July 8).

¹⁰² See 138 CONG. REC. 8068-71 (1992).

¹⁰³ See Naz K. Modirzadeh, *The Dark Sides of Convergence: A Pro-civilian Critique of the Extraterritorial Application of Human Rights Law in Armed Conflict*, 86 INT'L L. STUD. 349, 350 (2010).

¹⁰⁴ ICCPR, *supra* note 90, art. 2 (emphasis added).

¹⁰⁵ Human Rights Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev. 1/Add. 13 (May 26, 2004) [hereinafter HRC GC 31].

¹⁰⁶ *Id.* ¶ 11.

¹⁰⁷ Human Rights Comm., Selected Decisions under the Optional Protocol (Second to sixteenth session), at 91, ¶ 12.3, U.N. Doc. CCPR/C/OP/1 (Feb. 1985) (discussing Communication No. 52/1979).

¹⁰⁸ ICCPR, *supra* note 90, art. 2.

necessary for the duties to apply.¹⁰⁹ By stating that the provisions of the ICCPR apply extraterritorially, the United States argues that the Human Rights Committee incorrectly interprets the text as within its territory *or* subject to its jurisdiction.¹¹⁰ However, some human rights scholars have suggested that the ICCPR does not lend itself to such a narrowly textual reading and that States should consider the object and purpose of the comprehensive human rights treaty in determining their obligations.¹¹¹ Nonetheless, the United States relies on the literal text of the treaty for its conclusion of non-applicability in extraterritorial theaters, and to the extent that the Human Rights Committee's interpretation of extraterritoriality in General Comment 31 could be deemed customary law, claims persistent objector status.¹¹²

This is a key point of contention, as it pertains specifically to the right to life contained in Article 6(1) of the ICCPR. The prohibitions on torture and cruel, inhuman, and degrading treatment contained in Article 7 of the ICCPR are already found in common Article 3, which has clear extraterritorial applicability in the conduct of hostilities.¹¹³ But regarding the expansive right to life in the ICCPR, of which there is arguably no direct corollary in common Article 3, the issue of jurisdiction is of fundamental importance. Adopting *arguendo* the Human Rights Committee's argument that human rights law applies in the conduct of hostilities and extraterritorially, the ICCPR would still not apply in a foreign theater unless individuals were subject to the jurisdiction of the United States. Though the concept of jurisdiction is not defined in the ICCPR, the Human Rights Committee obligates States to ensure rights to "all persons over whose enjoyment of the right to life it exercises power or effective control."¹¹⁴ The ICJ has affirmed that occupation of territory amounts to effective control.¹¹⁵ The European Court of Human Rights (ECtHR) has held that domination over a territory by a State's armed forces amounts to effective control.¹¹⁶ The ECtHR has also held that persons who fall under the physical control of a State through the conduct of hostilities are subject to the State's jurisdiction and entitled to human rights protections.¹¹⁷ But in such cases, physical power and control by a State over an individual has applied to situations of detention or custody.¹¹⁸ An expansive interpretation of rulings by the ECtHR could suggest that battlefield medical care of persons *hors de combat*, which does result in *de facto* physical control over an individual, would be a sufficient exercise of jurisdiction to require application of IHRL, though this is not a universally accepted norm.

2. Convention Against Torture

The Convention Against Torture is one of only two human rights instruments which the United States has ratified. Adopted by the UN General Assembly in 1984, the convention entered into force on June 26, 1987. Referring to the non-derogable prohibition against torture contained in other significant

¹⁰⁹ OBERLEITNER, *supra* note 18, at 150.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See also 42 U.S.C. § 2000dd (2018).

¹¹⁴ HRC GC 36, *supra* note 95, ¶ 63.

¹¹⁵ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 179 (July 9).

¹¹⁶ Hassan v. United Kingdom, App. No. 29750/09, 2014-VI Eur. Ct. H.R. 1, 124 (2014) (citing Al-Skeini and Others v. United Kingdom, App. No. 55721/07, 2011-IV Eur. Ct. H.R. 99, 169 (2011)).

¹¹⁷ *Id.* at 124–28.

¹¹⁸ *Id.*

human rights treaties,¹¹⁹ but providing more specificity, the Convention Against Torture defines the term as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person[.]”¹²⁰ But apart from merely prohibiting the act of torture, the Convention Against Torture places additional obligations on States.

First, each State Party undertakes to take “legislative, administrative, judicial or other measures to prevent acts of torture in *any territory under its jurisdiction*.”¹²¹ Unlike the ICCPR, which textually only applies to areas within the territory *and* under the jurisdiction of the State, the Convention Against Torture seems to require broader applicability by removing the territoriality prong. Second, no State Party shall *refouler* (return) a person to another State “where there are substantial grounds for believing that he would be in danger of being subjected to torture.”¹²² Unlike the ICCPR, where the concept of *non-refoulement* is interpreted into the text by the Human Rights Committee, the obligation is expressly included in the Convention Against Torture. Third, each State Party undertakes to prevent acts of “cruel, inhuman or degrading treatment or punishment which do not amount to torture” under the Convention Against Torture.¹²³ Like the prohibition against acts of torture, this obligation extends to any territory under the jurisdiction of a State Party.

With regards to specific applicability in armed conflict, the Convention Against Torture is clear that a state of war does not provide justification to derogate from the fundamental prohibition against torture.¹²⁴ However, the issue of extraterritorial application adds a layer of analysis that merits examination. In any armed conflict which occurs in a territory under the jurisdiction of a State Party, regardless of whether that conflict is classified as an international or non-international armed conflict, the Convention Against Torture applies, including the obligation of *non-refoulement*. But what of armed conflicts which occur on a territory abroad subject to the jurisdiction of another State Party? The Committee Against Torture seeks to foreclose this argument by emphasizing that the prohibition against torture contained in Article 2 is a *jus cogens* norm of universal applicability, which is undisputed under international law.¹²⁵ In 2007, the Office of the United Nations High Commissioner for Refugees issued an advisory opinion that *non-refoulement*, as contemplated in both the Convention Relating to the Status of Refugees and the Convention Against Torture had similarly achieved the status of *jus cogens*, or at a minimum, the extraterritorial application of *non-refoulement* was an undisputed doctrine of customary international law.¹²⁶ The Committee Against Torture later issued its own general comment concluding that the Convention Against Torture not only applied to territories under the jurisdiction of a State Party, but also “any area under its control or authority.”¹²⁷

¹¹⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment pmbl., Dec. 10, 1984, S. TREATY DOC. No. 100-20, 1465 U.N.T.S. 85 [hereinafter CAT].

¹²⁰ *Id.* art. 1.

¹²¹ *Id.* art. 2 (emphasis added).

¹²² *Id.* art. 3.

¹²³ *Id.* art. 16.

¹²⁴ *Id.* art. 2.

¹²⁵ Comm. Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, ¶ 1, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008).

¹²⁶ U.N. High Comm’r for Refugees, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations Under the 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol (Jan. 26, 2007), <https://bit.ly/3dKYqvM>.

¹²⁷ Comm. Against Torture, General Comment No. 4 (2017) on the Implementation of Article 3 of the Convention in the Context of Article 22, ¶ 10, U.N. Doc. CAT/C/GC/4 (Sept. 4, 2018).

a. United States Policy Regarding Non-refoulement

The United States had very little to say regarding *non-refoulement* in its submission of reservations, declarations, and understandings of the Convention Against Torture in 1990. Specifically, the Convention Against Torture prohibits *refouler* “where there are ‘substantial grounds’ for believing that the person concerned would be in danger of being subjected to torture.”¹²⁸ By ratifying the Convention Against Torture without substantive reservation on this issue, the United States recognized its obligation to consider the human rights record of another State before formally returning or extraditing a person to that State.

The application of *non-refoulement* in the context of battlefield mercy killing raises two questions regarding a State’s responsibility. First, does medical treatment of a person *hors de combat* on the territory of another State constitute an exercise of jurisdiction such that the obligation of *non-refoulement* would apply? Second, would allowing the territorial State to take custody of a person *hors de combat* following medical treatment constitute *refouler*? The Committee Against Torture interprets the jurisdictional clause of the Convention to apply to all persons “subject to the de jure or de facto control of a State party.”¹²⁹ And while medical treatment of a person *hors de combat* results in *de facto* physical control, it arguably falls outside the purview of *non-refoulement*. By its very nature, *non-refoulement* requires that a State have control over the physical fate of an individual—the State can either maintain its control or *refouler* the individual to another State. In the case of rendering medical treatment of a person *hors de combat*, there may be a dispute about whether a treating State ever establishes control over the individual. In exercising *de facto* control over a person *hors de combat*, at least for the duration of medical treatment, the ECtHR would likely hold that such treatment does constitute control sufficient to warrant IHRL obligations.¹³⁰ Others could posit an argument that absent an intent to detain by the treating State, the person *hors de combat* is free to deny treatment, leave the scene, and rejoin the fight, such that jurisdictional control is never really exerted over the individual.

b. Balancing Non-refoulement Against Arbitrary Deprivation of Life

The broader question beyond the extraterritorial applicability of *non-refoulement* is its relation to the prohibition against arbitrary deprivation of life vis-à-vis battlefield mercy killing. In the example of SO1 Scott, his concerns about torture by Iraqi security forces, whether pretextual or not, were supported by facts. During the United Nations Human Rights Council’s Universal Periodic Review of Iraq in 2019, several States and non-governmental organizations called upon Iraq to cease the use of torture as a means to extract confessions and to strengthen control over its security forces and related armed groups.¹³¹ If the principle of *non-refoulement* would have prevented transfer of the ISIS fighter to Iraqi forces, could battlefield mercy killing have been justified as the lesser evil? Under ideal circumstances, departing U.S. forces would have taken the ISIS fighter with them and either retained custody or transferred to compliant Iraqi forces outside of the battlefield. However, exfiltration with enemy casualties is not always possible, and IHRL, if applicable, cannot account only for best case

¹²⁸ *Id.* ¶ 11.

¹²⁹ *Id.* ¶ 10.

¹³⁰ See *Al-Skeini and Others v. United Kingdom*, App. No. 55721/07, 2011-IV Eur. Ct. H.R. 99, 168 (2011) (reviewing situations of custody abroad, kidnapping of relatives, detention in military prisons, and presence onboard a ship).

¹³¹ Rep. of the Human Rights Comm., at 105-07, U.N. Doc. A/HRC/28/2 (2019).

scenarios. In this context, soldiers may seek to apply a balancing test, weighing the certainty of torture at the hands of allied forces against moral or legal barriers to killing persons *hors de combat*—the higher the certainty of torture, assuming such a variable can be known, the lower the moral or legal barriers to mercy killing. However, applying such a framework raises significant practical concerns, such as how certain the likelihood of torture must be before mercy killing can be justified. The Convention Against Torture prohibits *refouler* where there are “substantial grounds” to believe that a person is in danger of being tortured,¹³² but surely a higher level of certainty would be required to effectuate that person’s immediate death, no matter how humane or swift. Given the impossible decision between leaving a person to die from wounds or potential torture, and taking the person’s life in an act of mercy, the purely doctrinal answer might be that killing a person *hors de combat* is never permissible. However, one could argue that this position, while easy to implement, is less humane.

D. *Medical Euthanasia as a Framework to Consider Battlefield Mercy Killing*

The Human Rights Committee reads into Article 6 of the ICCPR the guarantee of the inherent right to life; in its interpretations, the Committee recognizes the right “to enjoy a life with dignity,”¹³³ which also includes the right to die with dignity.¹³⁴ Acknowledging that the right to assisted death is recognized by several States, the Human Rights Committee articulates that such acts in those States will not be deemed arbitrary as long as a system of safeguards exists to protect patients from undue pressure.¹³⁵ In recognizing the right of individuals to consent to assisted death so long as such consent is truly informed, unambiguous, and expressed without coercion, the Committee legitimizes medical patients who “experience severe physical or mental pain and suffering and wish to die with dignity,”¹³⁶ raising the question of whether fighters on the battlefield should be afforded the same right.

Many of the legal and institutional safeguards which exist in medical facilities cannot feasibly be replicated on the battlefield. For example, in the Netherlands where physician-assisted dying (PAD) has been legal for nearly 20 years, physicians must consult with at least one other independent physician who has met with and examined the patient. Both physicians must conclude in writing that there are no reasonable alternatives for the patient. Additionally, there is a comprehensive review following the PAD by an independent body comprised of a lawyer, physician, and ethicist which determines whether the procedure was conducted with due care.¹³⁷ A second medical consultation can take days, which is not a luxury that can be duplicated on the battlefield, where soldiers may have to make such decisions in minutes to avoid remaining in a precarious tactical position for too long.

In medical practice, euthanasia is voluntary when a person requests or gives consent, involuntary when a person is able to but does not request or give consent, and nonvoluntary when a person is unable to request or give consent.¹³⁸

¹³² CAT, *supra* note 119, art. 3.

¹³³ HRC GC 36, *supra* note 95, ¶ 3.

¹³⁴ *Id.* ¶ 9.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ G. K. Kimsma, *Death by Request in the Netherlands: Facts, the Legal Context and Effects on Physicians, Patients and Families*, 13 MED. HEALTH CARE AND PHIL. 355, 356–57 (2010).

¹³⁸ Byron J. Stoyles & Sorin Costreie, *Rethinking Voluntary Euthanasia*, 38 J. MED. PHIL. 674, 674 (2013).

Given the Human Rights Committee's focus on the importance of consent, involuntary battlefield euthanasia is problematic from both a legal and policy perspective; there is no legitimate argument that involuntary euthanasia can be considered anything but an arbitrary deprivation of life and impermissible under human rights law. Similarly, voluntary battlefield euthanasia would arguably present the least controversial scenario given the Human Rights Committee's emphasis on consent, assuming that safeguards could be implemented to preserve the sanctity of that consent. However, blending concepts of battlefield conduct and medical practice illustrates the potential for conflicts of international and domestic laws and the inherent difficulty of implementing such a regime in the conduct of hostilities. One can envision a situation where the person *hors de combat*, the soldier committing the battlefield mercy killing, and the battlefield itself all hail from jurisdictions with different stances on voluntary euthanasia. While international law governs conduct on the battlefield, its ambiguity in the area of battlefield mercy killing raises the legitimate question of whether domestic law has any role and, more importantly, whose domestic law would apply. However, introduction of domestic law onto the battlefield to address the conduct of hostilities is completely impractical; the same set of rules should apply regardless of where the battle is fought or the jurisdiction of the fighters.

On its face, the ICCPR as interpreted by the Human Rights Committee does not completely foreclose the permissibility of voluntary euthanasia on the battlefield. But nonvoluntary euthanasia presents the most legal uncertainty and, at least anecdotally, may account for the most instances of mercy killing on the battlefield. The Committee's emphasis on consent would seem to render nonvoluntary euthanasia *per se* impermissible, but focusing solely on safeguarding consent is unfounded. First, consent alone does not determine action; a medical provider is not obligated to conduct euthanasia merely upon a patient's request or consent. In the same way, a soldier would not be obligated to conduct a battlefield mercy killing simply because a requesting person *hors de combat* did not want to live with a particular impairment. Second, lack of consent does not necessarily mean lack of desire. By definition, nonvoluntary euthanasia suggests that a person is simply unable to express his or her desire, but not that the underlying desire cannot be ascertained. In medical practice, external actors often seek to ascertain the patient's desires—what the patient would express if able or what is best for the patient.¹³⁹ Medical providers or family members, having both a personal and professional history with the patient, may be in a good position to opine on the patient's desires. On the battlefield, however, the information asymmetry is much more pronounced. Presumably, professional soldiers engage in battlefield mercy killings in order to limit or end physical suffering. This raises the concern of whether a soldier, having no personal history with the person *hors de combat*, is qualified to make such a determination.

Doctrinally speaking, battlefield mercy killing—both voluntary and nonvoluntary—arguably facilitates the right to live and die with dignity. But voluntary battlefield mercy killing, though clearly in accordance with the victim's desire and pursuant to the victim's consent, illustrates a tangled web created by the intersection of international and domestic laws. And nonvoluntary battlefield mercy killing creates a framework where consent essentially becomes irrelevant, and the decision regarding the best interest of the victim is made by a stranger, who moments before was an adversary on the battlefield, creating a line that neither States nor non-state armed groups will want to cross.

¹³⁹ *Id.* at 678.

IV. STATUS AS CUSTOMARY INTERNATIONAL LAW?

There is a plausible argument that treaty law does not *per se* prohibit battlefield mercy killing of persons *hors de combat*. But treaty law is not the only source of international law which regulates State action. To the extent that common Article 3 reflected customary international law in the conduct of NIACs when it was drafted immediately following World War II, it must be considered whether customary international law has developed in the interim seven decades.

A. *State Practice*

In April 2004, U.S. Army Captain Roger Maynulet was prosecuted at general court-martial for shooting a wounded fighter. Following a targeted attack on a vehicle in which the driver was severely wounded, Captain Maynulet was advised by his company medic that the driver would not survive. Claiming to afford the wounded individual the dignity of a swift death, Captain Maynulet shot and killed the Iraqi. Captain Maynulet was convicted of assault with intent to commit voluntary manslaughter and sentenced to dismissal from the U.S. Army with no confinement.¹⁴⁰

In December 2004, U.S. Army Staff Sergeant Johnny Horne pleaded guilty to murder for killing a wounded Iraqi teenager near Baghdad. Staff Sergeant Horne claimed that the killing was an attempt to put the individual out of his misery, despite testimony of witnesses that the wounds were not life-threatening and that the teenager could have been saved with medical attention.¹⁴¹ Staff Sergeant Horne was sentenced to three years confinement and a dishonorable discharge.¹⁴² A co-conspirator in the same battlefield mercy killing, U.S. Army Staff Sergeant Cardenas Alban also was convicted and sentenced to one year confinement and a bad conduct discharge.¹⁴³

In 2010, Canadian Army Captain Robert Semrau was tried by military tribunal for his role in killing an insurgent *hors de combat* in Helmand Province, Afghanistan. Captain Semrau's patrol came upon an insurgent who had been shot out of a tree by a U.S. Apache helicopter and was, by one eyewitness account, 98 percent dead. Captain Semrau shot the wounded insurgent in the chest in an act of mercy. A military jury found Captain Semrau guilty of disgraceful conduct. In sentencing him to dismissal from the Canadian armed forces, the military judge stated that Captain Semrau's actions were "so fundamentally contrary to our values, doctrine and training that it is shockingly unacceptable behaviour."¹⁴⁴

In 2013, British Royal Marine Sergeant Alexander Blackman was convicted of murder for his killing of a wounded insurgent in Helmand Province, Afghanistan. The insurgent was seriously wounded by an Apache helicopter following an attack on a British patrol base, and video evidence showed Sergeant Blackman shooting the insurgent *hors de combat* in the chest at close range. Sergeant Blackman's original conviction for murder was subsequently reduced to

¹⁴⁰ Carlos Sadovi, *GI Avoids Prison, Kicked Out of Army*, CHI. TRIB. (Apr. 2, 2005), <https://bit.ly/2YHCwFG>.

¹⁴¹ Under the framework established in this Article, it is arguable that Staff Sergeant Horne's actions would not constitute battlefield mercy killing, as there were evidentiary contradictions about the inevitability of near-future death absent medical intervention.

¹⁴² Edmund Sanders, *U.S. Soldier Pleads Guilty in 'Mercy' Killings of Iraqi*, L.A. TIMES (Dec. 11, 2004), <https://lat.ms/2PE2F2I>.

¹⁴³ Associated Press, *Second GI Convicted in Shooting of Iraqi Teen*, L.A. TIMES (Jan. 15, 2005), <https://lat.ms/2YGyT2A>.

¹⁴⁴ Michael Friscolanti, *Capt. Robert Semrau Dismissed from the Forces*, MACLEAN'S (Oct. 5, 2010), <https://bit.ly/3i6c5JP>.

manslaughter, and after serving three years of a seven-year sentence, he was released following new evidence of mental illness at the time of the battlefield mercy killing.¹⁴⁵

In 2016, former Special Air Service (SAS) Sergeant Colin Maclachlan was investigated by the British Ministry of Defence for comments he made in a book about killing mortally wounded enemy soldiers in Iraq in 2003. With great detail, Sergeant Maclachlan wrote about Iraqi soldiers who had been disemboweled and had lost limbs following rocket attacks by Sergeant Maclachlan's team. According to Sergeant Maclachlan, the Iraqi soldiers pleaded for death, which the SAS team swiftly granted with "entirely humane" motives.¹⁴⁶ To date, it does not appear that former Sergeant Maclachlan faced prosecution by any tribunal for his actions.

In 2019, SOC Gallagher was prosecuted for his role in killing a wounded ISIS fighter in the campaign to retake Mosul. There was no assertion that SOC Gallagher's actions stemmed from anything other than malice for the wounded fighter. But dramatic courtroom testimony by SO1 Scott all but secured SOC Gallagher's acquittal. Two weeks after the start of the contested general court-martial, the panel of military members acquitted SOC Gallagher of the most serious charges, ultimately finding him guilty of posing for a photo with the dead ISIS fighter's body and sentencing him to time served and reduction in rank.¹⁴⁷ Furthermore, due to a grant of testimonial immunity from the court-martial convening authority and the Department of Justice to secure his testimony, SO1 Scott could not be prosecuted for his role in killing the ISIS fighter.¹⁴⁸ Having exhausted all criminal avenues to hold SOC Gallagher accountable for his actions on the battlefield, the U.S. Navy turned to administrative processes and sought to convene a formal review board to remove SOC Gallagher's special warfare insignia, referred to as a SEAL trident.¹⁴⁹ In an unprecedented exercise of authority over military administrative processes, President Trump directed the U.S. Navy to stop all processing of SOC Gallagher and restore SOC Gallagher's rank.¹⁵⁰

Although these examples include several nations from North America and western Europe, it is still a small minority of States. Accounts from many States (e.g., Russia, China, Israel, and France) which have participated in recent conflicts in the Middle East, southwest Asia, and Africa are missing. This handful of examples from a few Western nations may not be sufficient practice to create or change customary international law. This Article merely posits that these high-visibility examples may illustrate that State practice regarding battlefield mercy killing is not so wholly uniform.

¹⁴⁵ Steven Morris, *Marine A, Who Killed Wounded Taliban Fighter, Released from Prison*, GUARDIAN (Apr. 28, 2017), <https://bit.ly/3idUcQC>.

¹⁴⁶ *SAS Soldier 'Investigated for Iraq War Mercy Killing'*, BRITISH BROADCASTING CORP. NEWS (Oct. 16, 2016), <https://bbc.in/3icT4wU>.

¹⁴⁷ Dave Philipps, *Navy SEAL Chief Accused of War Crimes Is Found Not Guilty of Murder*, N.Y. TIMES (July 2, 2019), <https://nyti.ms/3dJzODH>.

¹⁴⁸ Carl Prine, *Thanks to SEAL's Immunity Deals, Confessed Killer Unlikely to Be Charged*, NAVY TIMES (June 24, 2019), <https://bit.ly/2CJGncw>.

¹⁴⁹ Dave Philipps, *Trump Reverses Navy Decision to Oust Edward Gallagher From SEALs*, N.Y. TIMES (Nov. 21, 2019), <https://nyti.ms/31mzVCJ>.

¹⁵⁰ Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 21, 2019, 8:30 AM), <https://bit.ly/2XkJJdn>.

B. *Opinio Juris*

“[E]xpressions of *opinio juris* operate as the fulcrum around which new customary humanitarian law norms crystallize, as well as the basis for the contextual interpretation and development of existing treaty and customary [international humanitarian law] principles and rules.”¹⁵¹ States, however, have become more reticent to offer concrete expressions of *opinio juris*, especially in developing areas of international humanitarian law.¹⁵² With the sheer number of conflicts of both an international and non-international nature in the past two decades, there is no dearth of opportunity to generate or reinforce *opinio juris* in the conduct of hostilities. And yet, the dialogue is far less than robust. While some argue that States preserve freedom by operating within the ambiguities without accompanying expressions of *opinio juris* to generate or reinforce customary international law, other scholars argue that States cede their authority to interpretation by non-state actors, such as the ICRC, to shape the development of customary international law.¹⁵³ As a necessary criterion for the development of customary international law, it is precisely when States fail to voice unequivocal rationales for actions taken, or provide views on actions taken by other State actors, that customary international humanitarian law becomes even less clear.¹⁵⁴

C. *Uncertain Status*

Of the cases highlighted above, only those of Canadian Captain Semrau, British Sergeant Blackman, and U.S. special operator Scott involved actions in a NIAC. However, the consistency of the actions also taken in IACs suggest that this area of practice transcends the NIAC–IAC classification. The comments by Lieutenant Colonel Jean-Guy Perron, the military judge in the case of Canadian Captain Semrau, suggest a strong presumption that the Canadian armed forces believe themselves to be bound by a prohibition on the killing of wounded fighters. Even the United States’ DoD Law of War Manual, in referencing the duty to respect and protect persons *hors de combat* contained in Additional Protocol II, could be read in such a manner.¹⁵⁵ Paired with the high visibility prosecution of military members who engage in battlefield mercy killings, this would appear to be a clear example of established customary international humanitarian law.

And yet, the strong and unequivocal sentiment voiced by Lieutenant Colonel Perron is the exception, not the rule. Furthermore, State practice in this area is far from a uniform illustration of State opinion. The few examples highlighted above fail to reflect cases in which mercy killings are committed on the battlefield but never reported. And even when such cases are reported, and military commanders feel bound—either by domestic law or their own personal senses of justice—to investigate the allegations, State practice remains far from consistent.

First, not all investigated cases result in prosecution. In November of 2019, the spokesperson for the UN Office of the High Commissioner for Human Rights (UNOCHR) issued a statement reminding States that international

¹⁵¹ Michael N. Schmitt & Sean Watts, *The Decline of International Humanitarian Law Opinio Juris and the Law of Cyber Warfare*, 50 TEX. INT’L L.J. 189, 193 (2015).

¹⁵² *Id.*

¹⁵³ *Id.* at 195.

¹⁵⁴ *Id.*

¹⁵⁵ LAW OF WAR MANUAL, *supra* note 62, § 17.14.1 (“The wounded, sick, and shipwrecked . . . should not be knowingly attacked, fired upon, or unnecessarily interfered with.”).

humanitarian law establishes an obligation to “investigate violations and prosecute war crimes.”¹⁵⁶ But, even assuming *arguendo* that battlefield mercy killings are clear violations of international law and prosecutable as war crimes, there is no obligation imposed upon States to prosecute all cases in which such actions are alleged. For example, States must initiate investigations to determine whether allegations are credible or there exists a reasonable basis to proceed. Furthermore, States may also consider the likelihood of success at trial in the calculus of whether to bring a case before a military tribunal. However, these decisions are rarely, if ever, made public. Recommendations made by legal advisors to commanders on prosecution of military criminal cases may be protected by privilege or classification and therefore exempt from broader disclosure requirements. In an area of practice where unequivocal expressions of *opinio juris* are rare and the rationale behind non-prosecution of individuals need not be disclosed, high-visibility unexplained non-prosecutions of individuals like British Sergeant Maclachlan may serve to blur the lines between “mere” violations of international law and “novel” state practice.

Second, military tribunals are but one aspect of State practice. In the same 2019 statement, the UNOCHR spokesperson emphasized that State military justice systems must clearly comply with international law obligations by investigating allegations of wrongdoing, and initiating and completing criminal proceedings.¹⁵⁷ But in the United States, for example, the President as the chief executive and Commander in Chief of the armed forces, retains the authority to grant pardons for offenses against the United States.¹⁵⁸ In 2019, President Trump pardoned former U.S. Army First Lieutenant Clint Lorance and U.S. Army Major Matthew Golsteyn. First Lieutenant Lorance was convicted in 2013 of two counts of murder for ordering his platoon soldiers to fire on unarmed Afghans in Kandahar Province. He was serving his sixth of a 19-year sentence when he received the pardon.¹⁵⁹ Major Golsteyn received his pardon while awaiting trial for allegedly killing an Afghan man he suspected of being a Taliban bomb maker in 2010 in Helmand Province.¹⁶⁰ To the extent that battlefield mercy killing of persons *hors de combat* may be an ambiguous area of international law, the killing of individuals not directly engaged in hostilities against State forces is clearly anathema to established IHL doctrine. And yet, President Trump’s comments, and more importantly his actions, suggested a willingness to undermine those established tenets of IHL by “[sticking] up for [these] great warriors.”¹⁶¹

It should not be lightly argued, nor does this Article do so, that President Trump’s actions undermine established international law prohibiting the killing of individuals not directly engaged in hostilities. However, his involvement does raise the question of the type of presidential action that is sufficient to establish or undermine customary international law versus the type of action that is simply politically-motivated and actually contrary to customary international law, and more importantly, how to distinguish between the two. One could argue that the former might require some semblance of formality, such as an exercise of pardon authority coupled with direction that the Department of Defense change its policy

¹⁵⁶ *US Pardons for Accused War Criminals, Contrary to International Law*, U.N. NEWS (Nov. 19, 2019), <https://bit.ly/3gq0mMn>.

¹⁵⁷ *Id.*

¹⁵⁸ U.S. CONST. art. 2, § 2, cl. 1.

¹⁵⁹ Dave Philipps, *Trump Clears Three Service Members in War Crimes Cases*, N.Y. TIMES (Nov. 15, 2019), <https://bit.ly/31eJYrN>.

¹⁶⁰ Dave Philipps, *Army Denies Request by Soldier Pardoned by Trump, Setting Up Showdown*, N.Y. TIMES (Jan. 9, 2020), <https://bit.ly/39Pgp3L>.

¹⁶¹ Maggie Haberman, *Trump Brings 2 Officers He Cleared of War Crimes Onstage at Fund-Raiser*, N.Y. TIMES (Dec. 8, 2019), <https://bit.ly/3k8y2k6>; see also, Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 12, 2019, 9:49 AM), <https://bit.ly/3fniFkb>.

documents to reflect the President's views. Politically-motivated actions taken by the President, which violate tenets of customary international law, may not demonstrate sufficient state practice and *opinio juris* to actually establish customary international law. But as governmental policy continues to be promulgated through less formal means, such as social media, the line between State practice and partisan politics will continue to blur.

The 2019 statement by the UNOCHR was written in direct response to President Trump's controversial pardons of suspected and convicted war criminals. However, apart from the domestic, and arguably politicized, media which excoriated the President's actions,¹⁶² the silence from other sovereign States was deafening. While state silence in these isolated instances may not necessarily reflect tacit approval or acquiescence, failure to respond to such practices over time could serve as evidence of *opinio juris*.¹⁶³

Though only States have the legal competence to create customary international law, many non-state actors, such as the ICRC, have sought to fill in the gaps left by State silence.¹⁶⁴ While the ICRC's interpretations of State obligations under customary international humanitarian law may not be strictly binding, they serve as a persuasive body of interpretive soft law. In considering the prohibition of killing persons *hors de combat*, which the ICRC concludes is a long-standing norm of customary international law in both IACs and NIACs, even the ICRC frames the doctrine as a prohibition against "attacking" such protected persons.¹⁶⁵ "Attack" is a specific term of art, defined in Article 49 of Additional Protocol I as an "act[] of violence against the adversary, whether in offence or in defence."¹⁶⁶ By utilizing this specific language, the ICRC reinforces the view of the 1949 Diplomatic Conference of Geneva that acts of unnecessary or unwarranted violence are forbidden. Its interpretation of customary international law in this regard still leaves open the possibility that battlefield mercy killings, which arguably are not attacks nor acts of violence, are permissible.

V. POLICY CONSIDERATIONS

Significant policy considerations exist independent of assessments on the legality of battlefield mercy killing. If the international community seeks to prohibit the act, relying on States' self-restraint—either in policy or self-restricting interpretations of ambiguous international law—is naïve. The line between legality and legitimacy is often blurred, such that States perceive those actions which are legally permitted to thus be operationally desirable.¹⁶⁷ Legality becomes a "go/no go" check without the further examination of whether a particular action should be pursued. In this type of environment, it becomes even more important to clearly delineate those acts which are illegal, allowing States to decide for themselves which remaining acts may be legal but undesirable.

¹⁶² See, e.g., Philipps, *supra* note 159.

¹⁶³ DUSTIN A. LEWIS, NAZ K. MODIRZADEH & GABRIELLA BLUM, HARVARD LAW SCHOOL PROGRAM ON INTERNATIONAL LAW AND ARMED CONFLICT, QUANTUM OF SILENCE: INACTION AND JUS AD BELLUM 32 (2019).

¹⁶⁴ Schmitt & Watts, *supra* note 151, at 193.

¹⁶⁵ ICRC IHL RULES, *supra* note 68, at 164.

¹⁶⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 49, June 8, 1977, 1125 U.N.T.S. 3.

¹⁶⁷ Gabriella Blum, *The Role of the Client: The President's Role in Government Lawyering*, 32 B.C. INT'L & COMP. L. REV. 275, 278 (2009).

A. *Difficulty of Discerning Motivation on the Battlefield*

The motivation of the actor is of utmost importance in characterization of the act as battlefield mercy killing, requiring subjective compassion or mercy for the person *hors de combat*. Determining the subjective motivation of a soldier killing on the battlefield is outside the scope of IHL considerations. For example, under IHL targeting rules, if a strike complies with the doctrines of necessity, proportionality, and precaution, the killing is legal regardless of the subjective motivation of the soldier. Assuming that consideration of motivation underlying battlefield actions is currently irrelevant under IHL, battlefield mercy killing raises the question of whether it should stay that way—absolutely. The conduct of hostilities is far from black and white. The legality of a strike may come down to an *ex post* review of a commander’s proportionality analysis or whether feasible precautionary measures were ignored, but the commander’s motivation has no role in the calculation. In the same way, if a soldier executes that strike on a target, the soldier’s motivation is irrelevant to the question of legality. Battlefield mercy killing would introduce a scenario where an otherwise illegal act (e.g., killing a protected person) could be rendered lawful if the soldier’s intent is pure—a slippery slope not worth pursuing.

But even if a legal framework could be developed to discern the subjective motivation of a soldier purporting to kill as an act of mercy, what would be required? In many anecdotal cases, soldiers voice an *ex ante* desire to end the misery of a person *hors de combat*. Assuming that such desire was observed by witnesses, perhaps that would be sufficient to render the killing justified. But, if there is no articulated *ex ante* justification, can a soldier’s action be justified based on an objective standard of reasonableness? For example, a battlefield mercy killing is arguably reasonable only if there is a medical certainty that the person *hors de combat* will die as a result of the wounds. But whose determination of medical certainty matters? The non-medically trained soldier who has seen hundreds of battlefield casualties? The medical officer back at headquarters? Soldiers from allied forces who have a lower standard of domestic healthcare?

Furthermore, discerning the intent of individual soldiers of one’s own military forces would already be burdensome, as discussed above. But, discerning the intent of members of non-state armed groups who are party to the NIAC would be nearly impossible. One can envision a battlefield where mercy killing is used by the adversary, not as a tool of compassion, but as a weapon of choice where malicious intent cannot be proven.

B. *Reconciling the Soldier and the Commander*

Examples of battlefield mercy killing highlight an important disconnect between actions by soldiers and reactions by commanders.¹⁶⁸ On the one hand, soldiers may believe that killing a person not actively engaged in the fight is morally or legally wrong. But on the other hand, something also feels instinctively wrong about allowing a person to suffer towards a slow but inevitable death, when one has the power to put a swift end to it. In making the decision to end a person’s life under such circumstances, soldiers may believe they are choosing the honorable path, regardless of the consequences. And yet, commanders regard such actions as not only dishonorable but criminal.

¹⁶⁸ The author understands that the titles of soldier and commander are not mutually exclusive. In this context, the intent is to differentiate between actions by participants on the battlefield and review of those actions by senior leaders, whether uniformed or civilian, with some degree of separation from the battlefield.

There are many reasons for this disconnect. Soldiers may have to live with the consequences, whether legal or moral, of their individual actions, but commanders are charged with developing and implementing policies for hundreds and thousands of soldiers. Similarly, commanders are directed to uphold good order and discipline among their ranks, and allowing “rogue” individuals to act with impunity only undermines control.¹⁶⁹ That is to say, whether a commander personally agrees with a soldier’s motivation behind battlefield mercy killing may matter little, if overlooking it could result in hundreds of other soldiers taking matters into their own hands.

One policy proposal for narrowing this chasm could be to regulate, rather than prohibit, the act of battlefield mercy killing. There is a basis under international criminal law to decline to investigate or prosecute if such actions would not serve the interests of justice.¹⁷⁰ This could include declining prosecution in the most justifiable circumstances, such as when exfiltration with the injured person is not operationally feasible, when the certainty of death from injury is confirmed by a medical provider, when the act is overseen by a medical provider, and only upon the request or with consent of the victim. Or similarly, these factors could be implemented into statute as an affirmative defense to the crime of murder. Although these factors would likely be met in only the rarest of occasions, this would help ensure that true mercy killing remained a rare instance on the battlefield. These proposed factors do not consider the subjective motivation of the actor, which as discussed earlier, can be difficult to ascertain and even more difficult to prove. Rather, these factors emphasize the objectively verifiable circumstances. Furthermore, these proposed factors still require request by or consent of the victim, thus rendering nonvoluntary mercy killing still impermissible. Although this Article raises several arguments suggesting that consent is too highly weighted in euthanasia generally, it also recognizes that battlefield conditions make nonvoluntary mercy killing too uncertain to implement.

VI. CONCLUSION

Article 31 of the Vienna Convention on the Law of Treaties states that all treaties shall be interpreted in good faith and that treaty terms shall be considered in light of the object and purpose of the treaty.¹⁷¹ The Geneva Conventions memorialize fundamental humanitarian principles protecting, in part, persons who are *hors de combat* in the conduct of hostilities.¹⁷² There is little question that at least one significant purpose of the Geneva Conventions is to preserve the sanctity of protected persons in times of war. Read in light of that purpose, perhaps the prohibition of “violence to life” and “murder of all kinds” contained in common Article 3 clearly precludes battlefield mercy killing. If so, perhaps States prosecute soldiers for engaging in the act because they believe this to be an indisputable doctrine of customary international law. Strong arguments exist against the very foundations of this Article.

However, what if those arguments are not as solid as previously assumed? If arguments could be made to undermine interpretations of common Article 3 or question the customary international law status of the act, this potentially opens an entire class of protected persons to legal death on the

¹⁶⁹ See, e.g., 10 U.S.C. § 5947 (2018).

¹⁷⁰ See, e.g., Rome Statute of the International Criminal Court art. 53, Jul. 17, 1998, 2187 U.N.T.S. 38544.

¹⁷¹ Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331, 340.

¹⁷² 2016 COMMENTARY I, *supra* note 49, at ¶ 1.

battlefield. From a policy standpoint, perhaps we can rely on States to self-restrain in the conduct of hostilities. But States will also act with restraint until it is in their interest not to do so. Until this legal gap is foreclosed, States can await the perfect storm to shake the unsteady foundations of common Article 3, hoping that it never comes.

UNDERWATER FIBER OPTIC CABLES: A CUSTOMARY INTERNATIONAL LAW APPROACH TO SOLVING THE GAPS IN THE INTERNATIONAL LEGAL FRAMEWORK FOR THEIR PROTECTION

Lieutenant Commander Elizabeth Anne O'Connor*

Experts estimate 98 percent of international internet, data, and telephone traffic is transmitted by underwater fiber optic cables. This article gives a brief overview of the history of underwater fiber optic cables to lay the foundation for its analysis of the current international legal regime for their protection. This article also looks at the gaps in that regime. The article then proposes the United States should look at customary international law for solutions to the gaps in the international legal regime protecting underwater fiber optic cables, and presents a comprehensive strategy for the United States to do so.

I. INTRODUCTION

If someone asked you to explain how your email message got from the smart device in your hand to a recipient across the globe, would you know the answer? Chances are you may think it is the myriad satellites orbiting the earth responsible for your email communication from Point A to Point B. If you thought this was the case, then you are not alone. It is a common misperception the world's communications data is transmitted by those satellites. As one commentator noted, "[t]he idea that a person's cell phone link is sent to a nearby cell tower, but that the overseas messages themselves are then broken into bits of data, which then ply the ocean depths at the speed of light via unseen cables, is hard to imagine."¹ In reality, our data travels far below sea-level, along a series of underwater fiber optic cables on the seabed connecting the earth's continents. In March 2019, several prominent newspapers had front-page articles discussing the importance of this web of underwater fiber optic cables that brought greater recognition to their importance.²

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¹ Douglas R. Burnett & Lionel Carter, *International Submarine Cables and Biodiversity of Areas Beyond National Jurisdiction: The Cloud Beneath the Sea*, BRILL RES. PERSP., L. SEA 1.2, at 3 (2017), <https://bit.ly/30n9dZS>.

² See Jeremy Page, Kate O'Keefe & Rob Taylor, *America's Undersea Battle with China for Control of the Global Internet Grid*, WALL ST. J. (Mar. 13, 2019), <https://on.wsj.com/3194qKI> (discussing United States increasing awareness of vulnerabilities to underwater fiber optic cables); see also Adam Satariano, *How the Internet Travels Across Oceans*, N.Y. TIMES (Mar. 10, 2019), <https://nyti.ms/2Xn46Xt> (explaining how email is broken into bits and transferred to its recipient via underwater fiber optic cables).

Experts estimate 98% of international internet, data, and telephone traffic is transmitted by this series of underwater fiber optic cables.³ In the past ten years, there has been increased awareness of the vulnerabilities of underwater fiber optic cables and, more relevant to proponents of international law, there has been increased dialogue regarding not just the international legal regime protecting them but the gaps in that regime as well. There have been no less than four prominent scholarly articles highlighting the gaps in the international legal framework protecting underwater fiber optic cables. The articles recommend various solutions that would use international law to secure the vital underbelly of the world's communications. These solutions vary from the creation of an international treaty to the United States ratification of the United Nations Convention on the Law of the Sea to the collective revision of various treaties that were ratified decades ago. These solutions, while certainly commendable, are not necessarily practical in the world that exists in 2020.

Instead, the United States should look at customary international law for solutions to the gaps in the international legal regime protecting underwater fiber optic cables. This article presents a comprehensive strategy for the United States to establish customary international law to protect the fiber optic cables beyond its territorial seas.

The first section of the article explores the history of underwater cables and briefly discusses the importance of these cables to the world. The second section presents the current international legal framework including its gaps and the various solutions offered by legal scholars. The third section turns to customary international law and how it has been developed over the last century. Lastly, this article offers a comprehensive plan for the United States to establish customary international law to cover some of the current gaps in the international legal regime, specifically protection of fiber optic cables that land in the United States beyond its territorial seas.

II. BACKGROUND

A. *History*

One has to understand the history of underwater cables to fully understand the international legal framework governing them and its current gaps. This article does not attempt to provide a comprehensive history of the subject. Rather, it will briefly highlight the almost 170-year history of telecommunications to provide context to the ensuing legal discussion.⁴ The first telegraph link was laid between Dover, England and Calais, France in 1850.⁵ It failed almost immediately because of an abrasion caused by the surrounding underwater environment.⁶ A new telegraph link was laid between the two locations a year later, but this time was enmeshed with steel; it worked for over a decade.⁷ The first transatlantic underwater cable was laid between Newfoundland and Ireland

³ DOUGLAS R. BURNETT, DAVID FREESTONE & TARA DAVENPORT, SUBMARINE CABLES IN THE SARGASSO SEA: LEGAL AND ENVIRONMENTAL ISSUES IN AREAS BEYOND NATIONAL JURISDICTION 7 (2014), <https://nus.edu/3k4Tgzi>.

⁴ See Stewart Ash, *The Development of Submarine Cables*, in SUBMARINE CABLES: THE HANDBOOK OF LAW AND POLICY, 19–39 (Douglas R. Burnett et al. eds., 2014) (providing a comprehensive review of the history of submarine cables).

⁵ Lionel Carter & Douglas R. Burnett, *Subsea Telecommunications*, in ROUTLEDGE HANDBOOK OF OCEAN RESOURCES AND MANAGEMENT, 349, 350 (Hance D. Smith et al. eds., 2015), <https://bit.ly/39R0J02>.

⁶ Ash, *supra* note 4, at 21.

⁷ *Id.* at 21–22.

in June 1858 and transmitted over 400 messages before it broke after 26 days.⁸ Six years later, in 1864, a new cable was successfully laid between Valentia, Ireland and Hearts Content, Newfoundland.⁹ Cables were then laid successfully around the globe, including a cable connecting land masses along the seabed of the Pacific Ocean in 1902.¹⁰

As one historian noted, “advances in cable design and construction improved reliability and transmission speeds, which increased from twelve words per minute for the first cables to 200 words per minute by the 1920s.”¹¹ The invention of the telephone created a new era in telecommunications in the 1950s. The underwater cables now carried signals by copper wire, allowing transcontinental voice communications between parties.¹² As scientific research continued to advance, these cables advanced in capabilities to allow a single cable to carry multiple voice channels. The first coaxial system, laid between Scotland and Newfoundland in 1956, called a TAT-1, allowed for 707 telephone calls on the first day between the United States and the United Kingdom.¹³ Technological innovation allowed for increased capacity of voice channels over the decades. The last coaxial cable, the TAT-7, had the ability to carry up to 4,000 channels.¹⁴

The emergence of satellites, however, greatly reduced the need for underwater cables in the 1970s.¹⁵ Satellites had more capacity and were more reliable, resulting in their dominance of the telecommunications sphere through the 1980s. Even though it was decades ago, the reliance on satellites during this timeframe explains in small part some of the misperceptions highlighted in this article.

The invention of fiber optic cables shifted the focus back on underwater cables in the late 1980s. Fiber optic cables had significantly more carrying capacity than either the coaxial cables of the past or satellites. The first transatlantic fiber optic cable was laid in 1986.¹⁶ Technological advances have increased the capacity of fiber optic cables by a factor of 100,000 in 25 years.¹⁷ Fiber optic cables are so much more efficient than satellites that one expert estimated in 2007 that, if the then-roughly 40 fiber optic cables connecting the United States to the rest of the world were cut simultaneously, “only 7% of the total United States traffic volume could be carried by satellite.”¹⁸ Thus, technological advancement brought underwater cables to an extremely prominent role not just nationally for the United States, but globally as well.

B. Wait—It’s the Size of a Garden Hose?

An underwater fiber optic cable is roughly the size of a garden hose. Each fiber optic cable contains a set of 6 to 24 glass fibers at its core.¹⁹ Each glass fiber is estimated to be the width of a human hair.²⁰ These glass fibers are

⁸ *Id.* at 22; Carter & Burnett, *supra* note 5, at 350.

⁹ Ash, *supra* note 4, at 22.

¹⁰ *Id.*

¹¹ Carter & Burnett, *supra* note 5, at 351.

¹² STEPHEN C. DREW & ALAN G. HOPPER, INT’L CABLE PROT. COMM., FISHING AND SUBMARINE CABLES: WORKING TOGETHER 8 (2nd ed. 2009), <https://bit.ly/3k7DMKy>.

¹³ Carter & Burnett, *supra* note 5, at 351.

¹⁴ DREW & HOPPER, *supra* note 12, at 6.

¹⁵ *Id.*

¹⁶ Carter & Burnett, *supra* note 5, at 351.

¹⁷ Burnett & Carter, *supra* note 1, at 3.

¹⁸ *Id.* at 4 (quoting Douglas R. Burnett, Int’l Cable Prot. Comm. (ICPC), statement to Senate Foreign Relations Committee (Oct. 4, 2007)).

¹⁹ DREW & HOPPER, *supra* note 12, at 9.

²⁰ *Id.*

encased in a steel tube filled with a thixotropic medium.²¹ There is a layer of steel wire strands to provide strength, a “copper-based composite conductor” carrying electrical power and a “protective insulating sheath of polyethylene” on the outside.²² These layers help protect the cables from the harsh environmental conditions of the seabed. Each underwater fiber optic cable has devices called repeaters at intervals along it to regenerate or strengthen signals sent at long distances.²³

Communications are transmitted via these glass fibers. First, computers at one end of the communication convert sounds and data to “digital pulses,” which are then transmitted by a series of “lasers [that] shoot these pulses of light through the glass fibers of a cable.”²⁴ Computers at the opposite end reconstruct these digital pulses into sounds and data.²⁵ Cable systems are not inexpensive; rather, they represent significant multinational cooperation and investment. A Director of National Intelligence Report for the United States estimates a single cable often represents over \$1 billion dollars of investment.²⁶

C. *Global Importance*

As of 2017, it was estimated the global fiber optic cable landscape encompassed 241 active, separate, and decentralized international cables totaling roughly 1,046,138 kilometers of submarine cables across the globe’s surface.²⁷ In December 2014, it was estimated at least 55 in-service submarine cables landed in the United States, with at least 12 more fiber optic cables planned for construction.²⁸ These cables do not land in disparate locations across the American coastline; rather, they are clustered along patches in California, Florida, New Jersey, New York and Oregon.²⁹ Indeed, the overwhelming majority of the transatlantic fiber optic cables have landing stations all within a 30-mile radius of New York City.³⁰ New fiber optic cables were simply layered on top of previous locations of past cables.

These fiber optic cables are largely unseen by the average person using the internet daily. The ubiquity of the internet is, in part, what makes it difficult for the average human being to understand the physical aspect of it. Indeed, the search for the physical infrastructure that supplied the internet led one writer on a search across the globe, culminating in the 2012 book *Tubes: A Journey to the Center of the Internet*.³¹ Its author, Andrew Blum, noted “[o]ther than obscurity and a few feet of sand, [the underwater fiber optic cables] are just there” when describing a fiber optic cable landing on a beach.³² Indeed, this author ventured

²¹ Carter & Burnett, *supra* note 5, at 350.

²² *Id.*

²³ DREW & HOPPER, *supra* note 12, at 9.

²⁴ *Id.*

²⁵ *Id.*

²⁶ PUB.-PRIVATE ANALYTIC EXCH. PROGRAM, DEPT. OF HOMELAND SEC., THREATS TO UNDERSEA CABLE COMMUNICATION 11 (2017), <https://bit.ly/3a1995f>.

²⁷ Burnett & Carter, *supra* note 1, at 45 (citing to a WFN *Subtel Forum* database analysis reported to Douglas Burnett in an email dated Jan. 4, 2017).

²⁸ WORKING GROUP 8: SUBMARINE CABLE ROUTING AND LANDING, THE COMMC’NS SEC., RELIABILITY AND INTEROPERABILITY COUNCIL IV, FINAL REPORT - PROTECTION OF SUBMARINE CABLES THROUGH SPATIAL SEPARATION 1 (2014), <https://bit.ly/30mw7jZ>.

²⁹ Robert Martinage, *Under the Sea*, FOREIGN AFFAIRS, Jan./Feb. 2015, <https://fam.ag/3fl6ofV>.

³⁰ Michael Sechrist, *New Threats, Old Technology: Vulnerabilities in Undersea Communications Cable Network Management Systems (#2012-03)*, in HARVARD KENNEDY SCHOOL: BELFER CENTER DISCUSSION PAPERS 9 (2012), <https://bit.ly/2DpJfvJ>.

³¹ ANDREW BLUM, *TUBES: A JOURNEY TO THE CENTER OF THE INTERNET* (2013).

³² Alexandra Chang, *Why Undersea Internet Cables are More Vulnerable Than You Think They Are*, WIRED (Apr. 2, 2013, 6:30 AM), <https://bit.ly/2DfYhUO>.

to a cable landing location in Lynn, Massachusetts to find a manhole clearly marking its existence in the middle of a rotary on a well-traveled street near the town beach. This particular fiber optic cable was hiding in plain sight of any knowing observer.³³ While landing stations are not the subject of this paper, it is relevant to note this description as it highlights many of the vulnerabilities of underwater fiber optic cables.

The amount of money the internet, and thus this web of underwater fiber optic cables, is responsible for each day is staggering. In a 2017 report, experts noted the Society for Worldwide Interbank Financial Telecommunications (SWIFT) transmitted 15 million messages over cables to 8,300 banking organizations, securities institutions, and corporations around the globe each day.³⁴ Similarly, that same report cited that the United States Clearing House Interbank Payment System (CHIPS) estimated one trillion American dollars is transmitted each day to over 22 countries.³⁵ Thus, if those cables are cut, the financial impact can be devastating. As the former Chief of Staff for the United States Federal Reserve Board once said, “[w]hen communications networks go down, the financial services sector does not grind to a halt, rather it snaps to a halt.”³⁶

There are several recent examples of this devastating impact. In January 2019, Tonga was without internet for more than 11 days when the cable connecting its 170 islands to the rest of the world was cut by what was believed to have been a ship’s anchor.³⁷ International calls were unavailable, as were credit card payments.³⁸ A local satellite internet provider offered some connectivity, but “officials . . . blocked sites like Facebook and YouTube so that essential services [could] squeeze through.”³⁹ In another example in Southeast Asia, it took 11 ships almost 50 days to complete repairs to undersea cables damaged from an underwater earthquake off the coast of Taiwan in 2006.⁴⁰ China, Japan, the Philippines, Singapore, Taiwan, and Vietnam experienced significant disruptions to their respective economies due to lost communication links.⁴¹ In April 2018, Mauritania was without internet access for 48 hours when a cable from Europe to Africa, called the African Coast to Europe (ACE) submarine cable, was cut.⁴² Nine additional countries were impacted by the severed cable, preventing internet access to millions of individuals.⁴³

There has been significant concern in the past few years the Russian government will sever fiber optic cables as a precursor to a traditional kinetic

³³ The fiber optic landing station in Lynn, Massachusetts is located at an obscure but secure facility bearing the name GTT. The cable lands at Nahant Beach, a quaint beach on the shore not two miles from the facility. There are markings on the sidewalk denoting where the fiber optic cable is located underneath, and the manhole is marked with the name of the first telecommunication company that laid the cable (360 Network) as well. See www.surfacing.in (providing interactive webpage to nearly all fiber optic cable landing stations globally, including photos and explanations of how the cable industry works).

³⁴ Burnett & Carter, *supra* note 1, at 4.

³⁵ *Id.*

³⁶ PUB.-PRIVATE ANALYTIC EXCH. PROGRAM, *supra* note 26, at 6 (quoting Stephen Malphrus).

³⁷ Daniel Victor, *Could You Last 11 Days Without the Internet? Tonga Finds Out the Hard Way*, N.Y. TIMES (Jan. 31, 2019), <https://nyti.ms/2BVLerc>.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Martinage, *supra* note 29.

⁴¹ *Id.*

⁴² Chris Baynes, *Entire Country Taken Offline for Two Days After Undersea Internet Cable Cut*, INDEPENDENT (Apr. 10, 2018, 9:29 PM), <https://bit.ly/2Bdus6u>.

⁴³ *Id.*

military operation.⁴⁴ There is even Russian precedent for doing so. As the United Kingdom Member of Parliament (MP) Rishi Sunak noted in his Policy Exchange Report on Undersea Cables, “Russian special forces only had to secure one internet exchange point (at Simferopol) and cut cable connections to the rest of Ukraine” in its annexation of Crimea in 2014.⁴⁵ Russia “was able to control the flow of information” into Crimea, allowing it “to spread disinformation aimed at portraying its actions as legitimate.”⁴⁶ In 2017, the United Kingdom’s then-Defense Chief, Air Chief Marshal Sir Stuart Peach, warned risks to its underwater cables presented a “new risk to our way of life” and that a severed cable to the island would have “potentially catastrophic” impact on its economy.⁴⁷

Further, it is not simply the Russians who can be seen as a threat to this critical underwater infrastructure. In 2013, the Egyptian military arrested three men in scuba gear that allegedly attempted to cut an underwater fiber optic cable off the coast of the Egyptian city of Alexandria.⁴⁸ This attempt is reported to have “caused a 60 percent drop in internet speeds.”⁴⁹ While no further details on the arrest have been reported, MP Sunak noted the incident “demonstrates . . . the low degree of sophistication required for determined individuals to cause serious disruption to internet communications.”⁵⁰ In addition, the United Kingdom reportedly foiled an attempt by Al-Qaeda to sever the United Kingdom’s internet access in 2007.⁵¹ While the planned attack was on the main server house of Telehouse Europe, and not underwater fiber optic cables, the report nevertheless highlights intentional damage to the physical infrastructure of the internet is a prime target of myriad nefarious actors. The next section analyzes the international legal framework protecting the underwater fiber optic cables.

III. THE INTERNATIONAL LEGAL REGIME

A. *The 1884 Convention for the Protection of Submarine Telegraph Cables*

Understanding the history of underwater cables assists in understanding why the cables carrying so much of the world’s communications data in 2020 refer to a treaty established in the 19th century. The importance of underwater cables was recognized very early in their history. Cyrus Field, notable as the first transatlantic cable proponent, stated in 1866 the “telegraph in the air and under the water should be regarded as a sacred thing, protected by unanimous consent against all attack or damage.”⁵² The protection of underwater cables was on the agenda of seven international conventions between 1863 and 1913.⁵³ The first international treaty protecting underwater cables, the Convention for the

⁴⁴ See David E. Sanger & Eric Schmitt, *Russian Ships Near Data Cables Are Too Close for U.S. Comfort*, N.Y. TIMES (Oct. 25, 2015), <https://nyti.ms/2ZbL3zv> (discussing American military concerns regarding Russian naval submarines patrolling close to the location of underwater fiber optic cables).

⁴⁵ RISHI SUNAK, UNDERSEA CABLES: INDISPENSABLE, INSECURE, POLICY EXCHANGE 32 (2017), <https://bit.ly/33j0oSx>.

⁴⁶ *Id.*

⁴⁷ Arj Singh, *Russia ‘Could Cut UK’s Undersea Internet Cables,’ Defence Chief Warns*, INDEPENDENT (Dec. 14, 2017, 11:36 PM), <https://bit.ly/3hYTers>.

⁴⁸ Chang, *supra* note 32.

⁴⁹ *Id.*

⁵⁰ SUNAK, *supra* note 45, at 24.

⁵¹ James Rivington, *UK Foils Terrorist Plot to Kill the Internet*, TECH RADAR (Mar. 12, 2007), <https://bit.ly/2ZcuymP>.

⁵² Douglas Burnett, Tara Davenport & Robert Beckman, *Overview of the International Legal Regime Governing Submarine Cables*, in SUBMARINE CABLES: THE HANDBOOK OF LAW AND POLICY, *supra* note 4, at 65.

⁵³ *Id.*

Protection of Submarine Telegraph Cables (“1884 Cable Convention”), was signed in Paris in 1884.⁵⁴

The 1884 Cable Convention “applies outside territorial waters to all legally established submarine cables landed” on the colonies or territory of the signing parties.⁵⁵ There are several provisions in the convention relevant today. First, it made damage, either intentional or through negligence, a punishable offense.⁵⁶ Second, it gave signatories the right to board vessels when they “have reason to believe that an infraction of the measures provided for in the present Convention has been committed by a vessel other than a vessel of war.”⁵⁷ This is significant because, as the first article of the treaty notes, the 1884 Cable Convention applies outside of territorial waters. While it only addressed submarine cables outside of territorial waters, it has been reported “it was understood by the negotiators that coastal States would also have laws protecting submarine cables within their territorial waters.”⁵⁸ At the time of enactment, however, the width of territorial seas was not nearly as expansive as the twelve nautical miles that it measures today.⁵⁹

The over-arching purpose of the 1884 Cable Convention was to require signatory states to adopt domestic legislation to protect submarine cables. In Article XII, the signatories agreed to “take or to propose to their respective legislatures the necessary measures for insuring[sic] the execution of the present Convention, and especially for punishing, by fine or imprisonment, or both” those who violated the Convention’s provisions.⁶⁰ This is implemented in the United States with penalties for willful injury to a cable including “imprisonment for a term not exceeding two years, or to a fine not exceeding \$5,000, or to both fine and imprisonment.”⁶¹ This legislation, first implemented in the 19th century, has not been updated since. Notably, there has never been an arrest or prosecution under this section of the United States Code.⁶²

B. 1958 Geneva Conference on the Law of the Sea

As the world transformed from telegraph to telephone, underwater cables were still vitally important. Thus, when the newly formed United Nations tasked the International Law Commission (ILC) to codify the law of the sea in 1950s, underwater cables were a topic on its agenda. The ILC struggled with whether to codify all aspects of maritime law, even if it was governed by another treaty such as the 1884 Cable Convention.⁶³ In the end, three provisions of the 1884 Cable Convention were incorporated in the ILC Draft Articles: Article II (making intentional or negligent damage to cables a punishable offense), Article IV (indemnification of the owner of a cable by the owner of another cable company who damaged the cable), and Article V (indemnification for cable owners who

⁵⁴ Convention for the Protection of Submarine Telegraph Cables art. 1, Mar. 14, 1884, 24 Stat. 989 [hereinafter 1884 Cable Convention].

⁵⁵ *Id.*

⁵⁶ *Id.* at art. 2.

⁵⁷ *Id.* at art. 10.

⁵⁸ *Submarine Cables - International Framework*, NOAA OFFICE OF THE GEN. COUNSEL, <https://bit.ly/31rzqXM> (last updated Mar. 1, 2019).

⁵⁹ See George Grafton Wilson, *The Law of Territorial Waters*, 23 AM. J. INT’L. L. 2, 241–380 (Apr. 1929) (detailing history and commentary of the law of territorial waters up until 1929, noting that most coastal states claimed three nautical miles but others varied).

⁶⁰ 1884 Cable Convention, *supra* note 54, at art. 12.

⁶¹ Submarine Cable Act, 47 U.S.C. § 21 (2018).

⁶² Eric Wagner, *Submarine Cables and Protections Provided by the Law of the Sea*, 19 MARINE POL’Y 2, 127, 135 (Mar. 1995).

⁶³ Burnett, Davenport & Beckman, *supra* note 52, at 70.

lost equipment in an attempt to avoid damage to a cable).⁶⁴ These provisions were considered “essential principles on the law of the sea” and thus necessary to include in the ILC Draft Articles.⁶⁵ Only Article II—making intentional or negligent damage to cables a punishable offense—related to the criminalization of damage of the cables. The inclusion of Article IV and Article V illuminate the concerns of the time that the majority of damage would be caused by other cable laying companies. The ILC Draft Articles also, for the first time, included the right of each nation to lay underwater cables.⁶⁶

The first Conference on the Law of the Sea was held in 1958, at which the ILC Draft Articles were used as a negotiating text. The three provisions recommended by the ILC were adopted in the resulting 1958 Convention on the Continental Shelf and the 1958 Convention on the High Seas. Interestingly, the United States initially protested the adoption of just three provisions of the 1884 Cable Convention for fear it “would undermine its effectiveness.”⁶⁷ President Dwight D. Eisenhower noted as much when he transmitted the documents to the Senate for its advice and consent prior to ratification. In the commentary submitted to the Senate, the administration noted it initially urged restraint from including submarine cables in the document “in view of the existing conventions on the subject . . . but withdrew its objection on the understanding that existing conventions or other international agreements already in force would not be affected.”⁶⁸ Thus, in order for the United States to sign and ratify the 1958 treaties, it was agreed that no provisions in the 1958 treaties would impact the 1884 Cable Convention.⁶⁹

C. *1982 United Nations Convention on the Law of the Sea*

The United Nations held a third conference on the law of the sea in 1973, culminating nine years later in the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Three articles specific to the protection of underwater cables were included in the final draft. Article 113 requires states to adopt domestic legislation to prosecute individuals who intentionally or negligently damage submarine cables.⁷⁰ This article, however, makes clear prosecution is limited to “a ship flying its flag or by a person subject to its jurisdiction.”⁷¹ Article 114 requires states to adopt domestic legislation providing for the indemnification of a cable company that causes damage to another cable in the process of laying or repairing a cable.⁷² Finally, Article 115 requires states to adopt domestic legislation providing for indemnification of ship owners that incur costs in the avoidance of damaging cables.⁷³

These provisions were nearly exact duplicates of the ILC Draft Articles approved in the 1958 Conventions. Again, recognizing the history of underwater cables is important in light of the timing of UNCLOS. In the 1970s and 1980s,

⁶⁴ *Id.* at 71.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 72.

⁶⁸ Four Conventions & an Optional Protocol Formulated at the UN Conference on the Law of the Sea, Message from the President of the United States, Dwight D. Eisenhower to the 86th Congress, 1st Session, on Sept. 9, 1959, S. Exec. Doc. J–N, 86-1.

⁶⁹ Burnett, Davenport & Beckman, *supra* note 52 at 73. See Convention of the High Sea, Apr. 29 1958, 450 U.N.T.S. 11 (“The provisions of this Convention shall not affect conventions or other international agreements already in force, as between States Parties to them.”).

⁷⁰ United Nations Convention on the Law of the Sea art. 113, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

⁷¹ *Id.*

⁷² *Id.* at art. 114.

⁷³ *Id.* at art. 115.

satellites were the dominant provider of telecommunications data. While submarine cables were important enough to be included in UNCLOS, very little debate was had regarding the relevant provisions. The first fiber optic cable was not invented until after UNCLOS concluded and the first underwater fiber optic cable was not laid until 1986.⁷⁴ Thus, while UNCLOS is one of the foundational documents for the international legal regime governing underwater fiber optic cables, neither it, nor its predecessor documents in 1958 or 1884, could ever have anticipated the importance underwater fiber optic cables would have to the global economy.

One aspect of UNCLOS relevant for purposes of this discussion is that one of its most important aspects is its emphasis on flag state jurisdiction. As one commentator noted, “it was necessary to clarify that a State could not take legislative measures against nationals of another State, only against its own ships or nationals.”⁷⁵ This article will explore the gaps in the international legal framework now that the foundation for the protection of underwater fiber optic cables has been laid.

D. Gaps in the International Legal Framework

There have been several law review articles, policy papers, and blog posts in the past ten years that have drawn attention to the gaps in the international legal framework regarding the protection of underwater fiber optic cables. Most, if not all, of these sources highlight the same four large holes in the current international law regime.

First, while coastal nations have the right under UNCLOS to adopt laws and regulations relating to innocent passage through their respective territorial seas to protect cables and pipelines, there is no obligation to do so.⁷⁶ Article 113 of UNCLOS also gives coastal states the authority to adopt national legislation to criminalize intentional or willful destruction of an underwater cable for a person under its jurisdiction. Yet, as one commentator noted, “these provisions do not oblige States to take such measures, and many States do not have sufficient laws and regulations to protect cables from international damage within territorial waters, including the most basic measure of ensuring damage to submarine cables is criminalized.”⁷⁷

One review of national legislation of Southeast Asian states found, for example, there were no implementing provisions by any state expressly criminalizing intentional or negligent damage to underwater cables.⁷⁸ Further, even if states adopted such measures under their respective domestic legislation, the legislation may not have been updated since the 1884 Cable Convention. Thus, criminal penalties, even if they do exist, are outdated and do not incentivize coastal nations to enforce and prosecute alleged offenders.

Second, the international legal regime currently limits jurisdiction to flag states. While this is not a problem unique to protection of underwater fiber optic cables, it nonetheless is a limitation for protection of these critical communication

⁷⁴ See *supra* note 16 and text accompanying.

⁷⁵ Myron H. Nordquist, Satya N. Nandan & James Kraska, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY, 268 (Center for Oceans Law and Policy, 2012).

⁷⁶ UNCLOS, *supra* note 70, at art. 21.

⁷⁷ Tara Davenport, *Submarine Cables, Cybersecurity and International Law: An Intersectional Analysis*, 24 CATH. U. J. L. & TECH. 1, 57, 83 (2015).

⁷⁸ Robert Beckman, *Protecting Submarine Cables from Intentional Damage*, in SUBMARINE CABLES: THE HANDBOOK OF LAW AND POLICY, *supra* note 4, at 287 n. 37.

lines. UNCLOS limits jurisdiction of a nation to ships flying its flag or to flag state nationals who commit such acts. There is allowance for a coastal nation to prosecute foreign offenders within its territorial waters for a limited subset of offenses that would include intentional damage to underwater fiber optic cables; however, this is not the case for those offenders outside of the coastal nation's territorial waters.⁷⁹ Thus, not only are there gaps regarding criminalization of the offense, there are significant gaps in jurisdiction of potential offenders.

Third, while the 1884 Cable Convention provided for a right to board suspected vessels of engaging in nefarious acts against underwater cables, the later treaties, to include UNCLOS, do not provide for the same provisions. Thus, it is unclear what right, if any, a nation has to board a suspected vessel outside of its territorial seas. Under UNCLOS, if a vessel is engaged in nefarious activities within the territorial seas, then presumably the passage would not be innocent and, under Article 25, the coastal nation "may take the necessary steps in its territorial sea to prevent passage which is not innocent."⁸⁰ The underwater fiber optic cables, though, are more susceptible to damage at great depths beyond a coastal nation's territorial seas.

Lastly, while not entirely relevant to the discussion of underwater cables discussed in this paper, none of the provisions discussed thus far in this article apply to the cable landing stations on land. The landing stations are, nonetheless, of strategic importance but as of yet lack any international law protections.

E. Recommendations For a Way Forward

Several commentators have recommended ways forward to address these gaps. Each recommendation will be briefly discussed in order to understand the thesis of this article. First, Tara Davenport has written several law review articles on the subject and is an editor of the foremost book on submarine cables, *Submarine Cables: The Handbook of Law and Policy*. Davenport recognizes "the existing legal framework is fragmented and is not capable of ensuring the security of this vital communications infrastructure."⁸¹ Davenport recommends the international community come together to sign an international treaty specifically for the protection of the underwater fiber optic cables.⁸²

In her proposal, any treaty on underwater fiber optic cables would (a) define the range of offenses against cables, to include intentional damage and the introduction of malware; (b) oblige the parties to enact domestic legislation criminalizing said offenses; (c) extend jurisdiction to those acts committed within a state's territory, committed by a national or from a ship flying its flag; (d) oblige states to extend jurisdiction to an offender within its territory even if the offense took place outside of its territory; (e) oblige states to take offenders within its territory into custody; and (f) include provisions regarding extradition of individuals alleged to have committed offenses.⁸³ Davenport's proposal would

⁷⁹ See UNCLOS, *supra* note 70, at art. 27 ("The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases: (a) if the consequences of the crime extend to the coastal State; (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.").

⁸⁰ *Id.* at art. 25.

⁸¹ Davenport, *supra* note 77, at 82.

⁸² *Id.* at 90.

⁸³ *Id.*

consolidate the myriad international laws in one document, and place obligations on signatories to enact domestic legislation. It would also ensure that if a nation will not prosecute offenders within its jurisdictional reach, then that nation must extradite the individual to a country that will do so.

Yoshinobu Takei, another prominent legal scholar in this area of the law, reviews the various jurisdictional arguments and argues customary international law supports states extending universal jurisdiction to offenders who intentionally damage underwater cables.⁸⁴ Takei further recommends three international treaties be revised to bring the international legal order up to date. The treaties he discusses are a) the 1884 Cable Convention; b) existing treaties of the International Maritime Organization; and c) the 1988 Suppression of Unlawful Acts (“SUA”) at Sea Convention.⁸⁵ Similar to Davenport, his proposal calls for the international community to come together to form a consensus regarding underwater cables and enter into legally binding instruments to enhance their protection.

MP Sunak, noted *supra*, acknowledges “the present piecemeal legal regime is deficient in ensuring the security of cables and such vital infrastructure requires a more comprehensive approach.”⁸⁶ He makes several international recommendations in addition to the United Kingdom-specific proposals in his Policy Exchange piece. First, he recommends coastal nations establish cable protection zones akin to New Zealand and Australia.⁸⁷ Second, he recommends, similar to Davenport, for the United Kingdom to push for an international treaty specific to the protection of underwater fiber optic cables.⁸⁸

Lastly, Laurence Reza Wrathall makes several specific recommendations for the United States to take steps to protect the underwater fiber optic cables. First, Wrathall recommends the United States ratify UNCLOS.⁸⁹ Second, he recommends the United States adopt the 1988 SUA Protocol and Amendments and provide clarification as to whether intentional damage to underwater fiber optic cables constitutes piracy.⁹⁰ Third, he recommends the United States establish a central monitoring point of contact within the federal government and, similar to MP Sunak, implement safety zones around underwater fiber optic cables.⁹¹ Finally, he recommends the United States issue declaratory statements regarding its views on protecting underwater fiber optic cables.⁹²

These commentators have several commonalities among them. All recognize the existing gaps and all, in some way, are advocating for the international community to come together to achieve consensus on a way forward to protect these vital communication lines. Yet, all of these approaches are, in some sense, merely illusory. One only has to look to the international community’s struggles with climate change as an example of how difficult achieving international consensus can be in modern day. It took six years for the

⁸⁴ Yoshinobu Takei, *Law and Policy for International Submarine Cables: An Asia-Pacific Perspective*, *ASIAN J. INT’L. L.* 2, 228 (2012).

⁸⁵ *Id.* at 228–29.

⁸⁶ Sunak, *supra* note 45, at 35–36.

⁸⁷ *Id.* at 35. See Carter & Burnett, *supra* note 5 (providing explanation of how cable protection zones work in practice).

⁸⁸ Sunak, *supra* note 45, at 36.

⁸⁹ Laurence Reza Wrathall, *The Vulnerability of Subsea Infrastructure to Underwater Attack: Legal Shortcomings and the Way Forward*, 12 *SAN DIEGO INT’L. L.J.* 1, 223, 248 (2010).

⁹⁰ *Id.* at 249–50.

⁹¹ *Id.* at 250.

⁹² *Id.*

international community to agree on the Paris Agreement in 2015, only to have the United States subsequently rescind its approval when a new administration took office in 2016. Furthermore, the international community initially began its discussions regarding climate change in 1989, almost 25 years prior to the international community finally coming together in Paris. The international community lacks the political will to come together on these issues in a timely manner and, while some of these commentators acknowledge that truth, do not provide alternative solutions to these gaps. If a nation wants to make significant change to the international legal regime, then what about a strategic plan to establish customary international law?

IV. CUSTOMARY INTERNATIONAL LAW

A. *Elements of Customary International Law*

The starting point for any discussion of customary international law is Article 38 of the Statute of the International Court of Justice. It describes the law applied at the International Court of Justice (ICJ), and, as such, is generally considered the most authoritative reference for sources of international law. Article 38 lays out four types of international law it can apply, one of which is relevant to this discussion. It applies “international custom, as evidence of a general practice accepted as law.”⁹³ There are thus two elements to customary international law: (a) the general practice of states; and (b) *opinio juris*. *Opinio juris* is defined as “the acceptance by states that such practice is necessary by rule of law.”⁹⁴

This formula has often been considered to contain an objective element (general practice) and a subjective element (the attitude toward that practice). The American Law Institute (ALI) Restatement (Third) Foreign Relations Law of the United States (ALI Restatement) overstates this principle and seemingly adds a third element to customary international law. It states “customary international law results from a general and consistent practice of states followed by them *from a sense of legal obligation*.”⁹⁵ The Restatement’s use of the words “from a sense of” implies a causation element between the two other elements. For the purposes of this paper, however, customary international law will be looked at through the lens of the two elements found in Article 38.

1. General Practice of States

Brownlie’s Principles of Public International Law includes a non-exhaustive list of what constitutes custom. The list includes the following:

[D]iplomatic correspondence, policy statements, press releases, the opinions of government legal advisors, official manuals of legal questions (e.g., manuals of military law), executive decisions and practices, orders to military force (e.g., rules of

⁹³ Statute of the International Court of Justice, 2007 I.C.J. Acts & Docs. 75 (“The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”)

⁹⁴ LORI F. DAMROSCH & SEAN D. MURPHY, *INTERNATIONAL LAW: CASES AND MATERIALS* 61 (6th ed. 2014).

⁹⁵ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (AM. LAW INST. 1986) (emphasis added) [hereinafter RESTATEMENT (THIRD)].

engagement), comments by governments on ILC drafts and accompanying commentary, legislation, international and national judicial decisions, recitals in treaties and other international instruments (especially when in ‘all states’ form), an extensive pattern of treaties in the same terms, the practice of international organs and resolutions relating to legal questions in UN organs, notably the General Assembly.⁹⁶

Similarly, the ALI Restatement notes general practice “includes diplomatic acts and instructions as well as public measures and other government acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other states.”⁹⁷ Thus, custom can be found in a variety of forms.

Not every nation has to participate in the practice for it to be considered a general practice. *Brownlie’s* reiterates “complete uniformity of practice is not required, but substantial uniformity is” to establish a general practice.⁹⁸ The ALI Restatement also notes “it should reflect wide acceptance among the states particularly involved in the relevant activity.”⁹⁹ For example, if there is a specific custom that is uniquely relevant to coastal states, a custom could be considered general practice if those coastal states practice it even while landlocked states do not, as that custom would not be relevant to landlocked states.

Lastly, there is not a requirement the practice occur over a significant period of time. In *Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands*, the International Court of Justice stated,

[A]lthough the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it may be, State practice, including that of States whose interests are specifically affected, should have been both extensive and virtually uniform.¹⁰⁰

The commentary to the ALI Restatement reiterates this point, noting “the practice necessary to create customary international law may be of comparatively short duration, but . . . it must be ‘general and consistent.’”¹⁰¹

Indeed, in 1960, Judge Kotaro Tanaka of the International Court of Justice noted the time element to establish customary international law may be entirely different in the modern age. Judge Tanaka observed,

[I]n former days, practice, repetition, and *opinio juris sive necessitatis*, which are the ingredients of customary international law might be combined together in a very long and slow process extended over centuries . . . in the contemporary

⁹⁶ JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 24 (8th ed. 2012).

⁹⁷ RESTATEMENT (THIRD), *supra* note 95, at § 102 cmt. b.

⁹⁸ CRAWFORD, *supra* note 96, at 24.

⁹⁹ *Id.*

¹⁰⁰ North Sea Continental Shelf Cases (Fed. Rep. of Ger. v. Den.; Fed. Rep. of Ger. v. Neth.), 1969 I.C.J. 3, 43 (Feb. 20).

¹⁰¹ RESTATEMENT (THIRD), *supra* note 95, at § 102 cmt. b.

age of highly developed techniques of communication and information . . . [it] is greatly facilitated and accelerated.¹⁰²

He envisaged a nation being able to communicate directly with the rest of the world via an international organization such as the United Nations, and immediately knowing the respective countries' reactions to the principle. Thus, a new principle of customary international law could be established over a short period of time if the specially affected nations all adhered to it. This will be illuminated *infra* when the article analyzes the establishment of customary international law regarding the continental shelf.

2. *Opinio Juris*

The second element is often referred to as a subjective element and, as such, it is often difficult to ascertain the reasoning behind a nation's decisions. The International Court of Justice has a varied history with its methodology to determine if *opinio juris* exists in a given case. Generally speaking, the court "will often infer the existence of *opinio juris* from a general practice, from scholarly consensus or from its own or other tribunals' previous determinations."¹⁰³ The ALI Restatement notes "a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law."¹⁰⁴

Brownlie's suggests a usage such as ceremonial salutes at sea would be something generally practiced by nations, but "which does not reflect a legal obligation."¹⁰⁵ Nations may freely choose not to obey such practices as they are practiced out of "courtesy (or 'comity') and are neither articulated nor claimed as legal requirements."¹⁰⁶ *Opinio juris* exists when that practice is adhered to from a legal requirement. The ALI Restatement concedes the subjective element is not as straightforward, noting "it is often difficult to determine when that transformation into law has taken place."¹⁰⁷

B. *Does Customary International Law Still Exist?*

The time element Judge Tanaka mentions in the 1960 International Court of Justice opinion discussed *supra* regarding customary international law highlights some of the most significant changes in its establishment over the past sixty years.¹⁰⁸ Michael Scharf contends the establishment of customary international law is, in reality, a faster and more efficient route to establishing international law than an international treaty. He advocates there are three primary reasons for its continued vitality in the international field. First, he argues customary international law has "more jurisprudential power than does treaty law."¹⁰⁹ Once customary international law is established, it is binding on all states. Treaties, on the other hand, are only binding on those States parties to it.

¹⁰² South West Africa Cases (Ethiopia v. S. Africa; Liberia v. S. Africa), 1966 I.C.J. 6, 289 (July 18) (Tanaka, J., dissenting).

¹⁰³ CRAWFORD, *supra* note 96, at 26.

¹⁰⁴ RESTATEMENT (THIRD), *supra* note 95, at § 102 cmt. c.

¹⁰⁵ CRAWFORD, *supra* note 96, at 23.

¹⁰⁶ *Id.* at 23–24.

¹⁰⁷ RESTATEMENT (THIRD), *supra* note 95, at § 102 cmt. c.

¹⁰⁸ *Supra* note 102.

¹⁰⁹ MICHAEL SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS 30 (2013).

Second, Scharf notes in practice, customary international law is actually faster than treaties.¹¹⁰ For example, it took nearly ten years for UNCLOS to be written by the international community; yet, as will be seen below, President Harry Truman established customary international law almost immediately with his proclamation regarding the continental shelf. Third, treaty law is not as precise with its language because it is a result of the various parties' compromises during negotiation.¹¹¹ Scharf argues customary international law "may provide greater precision since [it] evolve[s] in response to concrete situations and cases and are often articulated in written decisions of international courts."¹¹² Thus, there are distinct advantages for a nation to choose to establish customary international law as opposed to pushing the international community to establish a convention to draft a treaty. This next section will analyze the establishment of customary international law regarding the continental shelf in the 1940s.

C. *The Truman Proclamation*

One example of a nation establishing customary international law in a "radical departure" from what was previously thought of as international law was United States President Harry Truman's proclamation regarding the resources on the continental shelf.¹¹³ On September 28, 1945, President Truman declared "the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control."¹¹⁴ The United States included a series of legal, economic, geological, conservation and national security arguments to justify its departure from international law in an accompanying memorandum. These justifications could be universal for all coastal states. For example, "self-protection compels the coastal state to keep close watch over activities off its shore which are of the nature and relative permanence necessary for utilization of resources of the subsoil and sea bed of the continental shelf."¹¹⁵ Any coastal state would agree with this security assertion.

Similarly, the memorandum noted,

[R]esources often form part of a pool or deposit extending seaward from within the state and their utilization may affect resources therein . . . [making it such that] the government of the country to whose shores the resources are contiguous is clearly the logical government to exercise jurisdiction and control over these resources.¹¹⁶

Thus, again, a coastal state seeing this justification could think to itself that a similar policy would be advantageous to its own security, economic and geological aims.

The speed with which this proclamation was adopted by coastal states around the globe had as much to do with the universal justifications as it did to the growth of international organizations through which the policy could be

¹¹⁰ *Id.* at 30–31.

¹¹¹ *Id.* at 31.

¹¹² *Id.*

¹¹³ *Id.* at 107. See ANN L. HOLLICK, U.S. FOREIGN POLICY AND THE LAW OF THE SEA (1981). (discussing that this arguably should be called "The Roosevelt Proclamation" because of the work he had done on it prior to his untimely passing).

¹¹⁴ Proclamation No. 2667, 10 Fed. Reg. 12,305 (Sept. 28, 1945).

¹¹⁵ HOLLICK, *supra* note 113, at 60.

¹¹⁶ *Id.* at 60.

distributed. The proclamation “unleashed a series of claims throughout Latin America, [including] claims that often went well beyond the original US proclamation.”¹¹⁷ The acceptance was so widespread that Professor Hersch Lauterpacht, a noted International Court of Justice jurist, remarked in 1950 that in considering “a radical change in pre-existing international law, the length of time within which the customary rule of international law comes to fruition is irrelevant.”¹¹⁸ There was a “degree of general acquiescence in what at first appears to be a startling innovation.”¹¹⁹

Lauterpacht also noted that, when considering a creation of new international law by custom, “what matters is not so much the number of states participating in its creation and the length of the period within which that change takes place, as the relative importance, in any particular sphere, of [the] states inaugurating the change.”¹²⁰ With regard to the continental shelf, the United States and Great Britain, the two great maritime powers at the time, were at the vanguard of the change. The stature of these two countries greatly enhanced the credibility of this innovative claim. This was the case despite the United Kingdom’s initial reluctance to join in the Truman Proclamation, as will be discussed *infra*.¹²¹

Thirteen years after the Truman Proclamation, the world came together at the 1958 Geneva Conference on the Law of the Sea. The conference essentially codified the United States’ viewpoint on the continental shelf as customary international law. As one commentator noted, the convention “amounted to a formal international affirmation of the Truman Proclamation.”¹²² This particular example is one of a paramount importance in any discussion of establishing innovative customary international law in the maritime domain. It provides a good framework for the United States to follow in terms of establishing customary international law to protect its underwater fiber optic cables. The next section of this article will lay out several steps for the United States to do so.

V. APPLICATION TO UNDERWATER FIBER OPTIC CABLES

A. *Strategic Plan to Establish Customary International Law*

The sections *supra* highlight there are several gaps in the international legal framework protecting underwater fiber optic cables. One is of paramount importance—the ability to protect cables from intentional damage as a result of nefarious actors beyond a coastal nation’s territorial seas. One method of radical change would be to allow coastal states to prosecute alleged offenders for intentional damage and also to allow for its Coast Guard, and its Navy, for that matter, to be able to stop and board vessels suspected of planning or committing such offenses beyond the territorial seas. If the United States wanted to initiate such a radical change to the regime, then there are several steps it should take to do so.

First, Congress needs to enact updated domestic legislation criminalizing the intentional damage of underwater fiber optic cables. That legislation needs

¹¹⁷ *Id.* at 61.

¹¹⁸ Hersch Lauterpacht, *Sovereignty over Submarine Areas*, 27 BRIT. Y.B. INT’L L. 376, 393 (1950).

¹¹⁹ *Id.* at 393.

¹²⁰ *Id.* at 394.

¹²¹ HOLLICK, *supra* note 113, at 59 (quoting *Letter From the Second Secretary of the British Embassy (Cecil) to Mr. William Bishop, Assistant to the Legal Advisor (Hackworth)*, August 31, 1945, FOREIGN RELATIONS 1945, II, 1527.)

¹²² SCHARF, *supra* note 105 at 119.

modern-day penalties that will make it economically worthwhile for the Coast Guard, Navy, and Department of Justice to investigate, arrest, and prosecute offenders. In addition, the legislation needs explicit language stating it applies extra-territorially to offenses that may have, or have had, an impact on the United States. This would allow for prosecution of any nefarious activity against an underwater fiber optic cable with one end landing in the United States, regardless of the activity's location. If an underwater fiber optic cable with one end landing in the United States is cut in the middle of the Atlantic Ocean, then the impact in the United States, and the other country where the cable lands, for that matter, is the same as if the cable was cut in the territorial seas of the United States: access is shut off, or re-routed (and delayed), in both scenarios. The concept of protective jurisdiction will be expounded upon *infra*, but the key point is the domestic legislation needs to be both updated and explicit with regard to its reach.

Second, similar to the Truman Proclamation, the United States needs to issue a proclamation declaring its intentions. This proclamation should come from the President of the United States, and include transparent legal, security, and diplomatic reasoning behind its decision. This will be expounded upon *infra*, but the emphasis in this step is the announcement should come from the highest office of government. The United States needs to be explicit with its intentions and ensure the entire world is clearly put on notice.

This proclamation should not simply be done in a vacuum. Rather, the United States needs to engage other allies specially affected by underwater fiber optic cables. For example, Australia and New Zealand, already at the forefront of protecting its fiber optic cables with the establishment of cable protection zones, would be ideal countries to issue simultaneous intentions regarding protection of underwater cables beyond their respective territorial waters.¹²³ The United Kingdom would be another country specially affected and would have similar reasoning in wanting to protect its territory from the impact of intentional damage to the underwater fiber optic cables connecting it to the rest of the world. As MP Sunak noted in his Policy Exchange Report, the United Kingdom views an attack on its undersea cable infrastructure as “an existential threat.”¹²⁴ Canada and Japan may be two other countries the United States would want to engage in issuing simultaneous declarations.

All of these countries have like-minded interests in protecting their respective country's access to the internet. The economic and national security concerns exist for each of these countries where fiber optic cables landing on the respective shores connect their respective society to the rest of the world. It could help if an international organization like the North Atlantic Treaty Organization (NATO) joined in the simultaneous proclamation. Whereas some of the countries in NATO may not have fiber optic cables directly landing from the oceans on their land-locked borders, these NATO countries' terrestrial cables are still reliant on the undersea fiber optic cables that carry global communications. Thus, the protection of the undersea fiber optic cables is paramount for these landlocked nations as well.

As Lauterpacht noted in 1950, the importance of the countries initiating the change is paramount.¹²⁵ Thus, having significant allies in America's corner, as well as an international organization like NATO, will mean the proclamation

¹²³ See SUNAK, *supra* note 45, at 18 (discussing cable protection zones in Australia and New Zealand).

¹²⁴ *Id.* at 34.

¹²⁵ Lauterpacht, *supra* note 118, at 394.

carries greater weight and would potentially be more strongly indicative of acceptance as customary international law.

Third, the United States should plan additional diplomatic statements at international events to expound on its reasoning. For example, the Ambassador to the United Nations could issue a diplomatic statement at the annual General Assembly meeting in September. Other Cabinet members, like the Secretaries of State, Homeland Security, and Defense, could provide similar speeches in both domestic and international fora. The Legal Advisor to the Department of State should give a speech laying out the legal justification for this new approach and create a formal memorandum to that effect.

Fourth, again similar to the Truman Proclamation, the United States needs to clearly articulate its legal justification for such a radical departure from previous international legal standards. While this is looped into both the second and third steps, it is carved out as a separate step to underscore the impact that transparent reasoning is contextually necessary to the establishment of customary international law. The justification would begin with the national security threat of the underwater fiber optic cables, and the impact that loss of connectivity would bring to the nation's economy and the broader global economy. This would include a comprehensive description of the significant connectivity the underwater fiber optic cables provide to the United States. Making it clear this only applies to underwater fiber optic cables physically landing on United States' territory provides greater strength to the legal justification. As this article has shown, the impact of a nefarious actor on a fiber optic cable will be most felt by the two nations on either end of the impacted fiber optic cable, regardless of the location of the nefarious act in the world's oceans. This applies to the nation on the other end of the cable landing in the United States, so the responsibility for protection of the respective underwater cable should be shared between them.

In light of the detrimental impact that interference with an underwater fiber optic cable would produce on American soil, the United States would be justified in exerting jurisdiction using the protective principle. The ALI Restatement notes "a state has jurisdiction to prescribe law with respect to . . . certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests."¹²⁶ This so-called "protective principle" has been assumed by "nearly all states . . . over aliens for acts done abroad which affect the internal or external security or other key interests of the state."¹²⁷ Therefore, there is precedent for exerting it in other similarly situated scenarios.

This principle, however, is not without limitation. Rather, a nation's exercise of protective jurisdiction must be reasonable.¹²⁸ The ALI Restatement lays out several factors to consider in determining reasonableness, including "the link of the activity to the territory of the regulating state, i.e., the extent to which the activity . . . has substantial, direct and foreseeable effect upon or in the territory."¹²⁹ Other factors include the following:

¹²⁶ RESTATEMENT (THIRD), *supra* note 95, at § 402 (1986).

¹²⁷ CRAWFORD, *supra* note 96, at 462.

¹²⁸ See RESTATEMENT (THIRD), *supra* note 95, at § 402 (1986) ("Even when one of the bases for jurisdiction under Section 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.").

¹²⁹ *Id.*

[T]he character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities and the degree to which the desirability of such regulation is generally accepted; the importance of the regulation to the international political, legal or economic system; the extent to which the regulation is consistent with the traditions of the international system; the extent to which another state may have an interest in regulating the activity; and the likelihood of conflict with regulation by another state.¹³⁰

The United States would have to clearly articulate its security interests in protecting these underwater fiber optic cables extra-territorially. This is especially important because of the likelihood this legislation will be in conflict with regulations of the flag state of either the vessel or the nationality of the individuals accused of intentionally damaging the underwater cables.¹³¹ In the case of underwater fiber optic cables, simultaneous damage to the cables would cause catastrophic impact to America's economy and national security, wreaking potential havoc on nearly every aspect of American citizens' daily lives. Given the importance of the cables to the financial, political, diplomatic and national security interests of the United States and the ongoing issues with lax flag state enforcement, it is likely exercising protective jurisdiction in this regard would be widely accepted by other coastal nations specially affected by such nefarious activity. This reasoning would also apply to the nation on the other end of the undersea fiber optic cable.

Lastly, the United States should enter into bilateral agreements with the countries at the opposite ends of the underwater fiber optic cables that have landing stations on American soil. For example, transatlantic cables landing in Ireland, Portugal, the United Kingdom, France, and Spain would all necessitate bilateral agreements between the United States and the respective landing station country on the opposite end of the cable. These agreements should provide for protection of the cable beyond the countries' respective territorial seas, and be used to recognize and reinforce this as customary international law. They should require both countries' navies to patrol the world's oceans to protect their respective underwater cables. Further, they should provide for bilateral support in apprehension, evidence collection, and prosecution of alleged offenders. These agreements would seek to reinforce the establishment of customary international law.

In completing these steps, the United States would be establishing both state practice and the *opinio juris* necessary to establish customary international law. Numerous coastal states would be issuing similar proclamations and, once the justification is widely distributed across the globe, other nations will, similar to the Truman Proclamation, recognize their own security interests in protecting the underwater fiber optic cables that land on their respective territory. There is even the potential American adversaries could see the advantage to establishing customary international law in this area. Any interference with an underwater fiber optic cable has the potential to impact the respective countries' ability to utilize the vital communication lines. For example, if several underwater fiber optic cables are cut, then that traffic could be re-routed to other fiber optic cables, which may cause delay to more users, including the nefarious actor's traffic. As

¹³⁰ *Id.*

¹³¹ See Takei, *supra* note 84 (discussing application of universal jurisdiction to offenders of damage to underwater fiber optic cables akin to an act of piracy).

more countries agree to the common principle, there will be more of a collective will to come together to codify the principles in a treaty.

B. Difficulties with this Approach

There are several obstacles standing in the way of this approach. First, and most obvious, is it relies on other allies to share America's concerns with underwater fiber optic cables and agree to simultaneously issue similar proclamations. There is no assurance other nations—even our allies—will agree to a radical departure of this nature. Indeed, even with the Truman Proclamation, neither Canada nor the United Kingdom wanted any part in issuing similar proclamations. The United Kingdom announced “His Majesty’s Government do[es] not wish to be associated with this Decision [regarding the Continental Shelf] and would prefer that, when it is announced, no reference should be made to prior consultation with His Majesty’s Government.”¹³² Similarly, Hollick noted “it was clear that the Canadian government saw no reason to join with the United States in unilateral policy that was unnecessary and that moreover would have a negative impact on relations with other countries.”¹³³ Thus, even with sound legal justification, it is not guaranteed other nations will initially agree to a radical change such as the one proposed here regarding protection of underwater cables, similar to what occurred over the continental shelf.

This goes to the whole premise that customary international law even provides a solution to the gaps in the international legal framework. If other countries or international organizations do not agree with the radical departure from the current regime, then there are not the requisite ingredients for the establishment of customary international law as there is no evidence of uniform state practice. If several states countered this proclamation, it is not clear whether customary international law would be established despite these persistent objectors. Thus, one could argue the commentators and scholars advocating for bringing the world together at a convention to negotiate differences and agree on an international treaty may be the most feasible way to achieve change in this realm.

Second, while the United States is not a party to UNCLOS, the unilateral change it would be advocating for regarding boarding vessels suspected of engaging in intentional damage to underwater cables runs directly counter to the boarding provisions in UNCLOS. UNCLOS provides justification for boarding a non-warship on the high seas if several factors are met, none of which is suspicion of intentional damage of a submarine cable. For example, if a ship is engaged in piracy, the slave trade, or is flying without nationality, then UNCLOS allows for a warship to board said vessel.¹³⁴ In addition, UNCLOS explicitly states “every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.”¹³⁵ Thus, advancing the position that the United States could not just board a vessel suspected of intentional damage to cables but also potentially *prosecute* said individuals in domestic courts would be in stark contrast to the terms of UNCLOS.

Lastly, there are difficulties with the reach of the jurisdictional claims of the United States. The underwater fiber optic cables are not, for the most part,

¹³² HOLLICK, *supra* note 113, at 59 (quoting *Letter From the Second Secretary of the British Embassy (Cecil) to Mr. William Bishop, Assistant to the Legal Advisor (Hackworth)*, August 31, 1945, FOREIGN RELATIONS 1945, II, 1527.)

¹³³ *Id.* at 60.

¹³⁴ UNCLOS, *supra* note 70, at art. 110.

¹³⁵ *Id.* at art. 94.

owned by governments. Whereas the continental shelf and the resources on it belong to the respective coastal states, the underwater cables are owned by private, multinational companies.¹³⁶ While the cables have been deemed “critical infrastructure” by the United States government, the underwater cables themselves are the property of these multinational companies.¹³⁷ These companies have agreements, called “Construction and Maintenance Agreements,” that specify certain provisions, including responsibilities that include “monitoring shipping activities close to the cable[s].”¹³⁸ Thus, in order for this strategy to work, the United States would potentially need agreement from the multinational companies that own the fiber optic cables.

C. *Reasons Why It May Still be the Most Effective Method*

Despite the potential obstacles to this approach, the process of establishing customary international law may be the best possible avenue for the United States to make change in this area of international law. First, the justifications for protecting underwater fiber optic cables are universal. Every state would find commonality in their desire to maintain connectivity via underwater fiber optic cables. As this article has illustrated, the underwater fiber optic cables are vital to not just national economies, but the entire global economy as well. Therefore, similar to the Truman Proclamation, once the United States issues the declaration along with its justification it would not be surprising if other coastal nations express similar declarations regardless of whether these countries initially chose to issue simultaneous declarations.

Second, while UNCLOS does contain explicit provisions regarding boarding of a vessel, that same article begins with “except where acts of interference derive from powers conferred by treaty.”¹³⁹ As noted *supra*, the 1884 Cable Convention is still considered valid international law. The United States can legitimately look to the provisions regarding boarding in Article X.¹⁴⁰ It can also argue there was pre-existing law for this principle. Indeed, Cyrus Field, noted *supra*, recognized the vital importance of underwater cables in the 19th century.¹⁴¹ Thus, it is not necessarily the case that this position would be contrary to UNCLOS. Similarly, there was no limitation on nationality of the offender in the 1884 Cable Convention. UNCLOS, at Article 92, provides a similar exception for exclusive jurisdiction to flag state “save in exceptional cases expressly provided for in international treaties.”¹⁴² Thus, there is precedent in the 1884 Cable Convention for the United States to establish jurisdiction over foreign offenders beyond territorial waters. In addition, as one commentator noted, “Article 113 [of UNCLOS] only concerns the obligations of states that can establish national jurisdiction over an alleged offender, and does not make clear which other states may also exercise penal jurisdiction over the breaking or damage of submarine cables beyond the territorial seas.”¹⁴³ Thus, international law is not clear on the criminalization of offenders beyond the territorial seas. The United States and its allies could clear up any confusion with its declarations.

¹³⁶ See Mick Green, *The Submarine Industry: How Does it Work?*, in SUBMARINE CABLES: THE HANDBOOK OF LAW AND POLICY, *supra* note 4. (discussing how the cable industry works).

¹³⁷ Working Group 8 Submarine Cable Routing & Landing, *supra* note 28, at 11.

¹³⁸ Green, *supra* note 136, at 49.

¹³⁹ UNCLOS, *supra* note 70, at art. 110.

¹⁴⁰ 1884 Cable Convention, *supra* note 54, at art. 10.

¹⁴¹ Douglas Burnett, Tara Davenport & Robert Beckman, *Overview of the International Legal Regime Governing Submarine Cables*, in SUBMARINE CABLES: THE HANDBOOK OF LAW AND POLICY, *supra* note 4, at 65.

¹⁴² *Id.* at art. 92.

¹⁴³ Takei, *supra* note 84, at 217.

Lastly, while it is true the cables are owned and operated by private multinational companies, the United States would not be doing anything to the actual underwater fiber optic cables. The United States Coast Guard and United States Navy would simply be patrolling the areas where the underwater fiber optic cables are located, and would not be in any physical or other contact with the cables. There would be no intention by the United States government to engage the actual underwater fiber optic cable that would in any way cause damage to it. Rather, the intention of the United States government would be protection of those underwater fiber optic cables, which would, in turn, save those companies potentially billions of dollars in repair costs. Thus, while it would be prudent for the United States to engage these multinational companies so they understand the rationale behind the declaration, there would not be a need for a public-private partnership agreement. In fact, these companies would most likely prefer for governments to protect the underwater cables from intentional damage so they do not have to expend millions of dollars to repair them.

Therefore, the United States should strongly consider the advancement of this area of international law through the establishment of customary international law. In doing so, the United States would advance the area of the law more quickly than through treaty formation and, further, clearly establish the parameters of the international law protecting underwater fiber optic cables with explicit language rather than the language of ambiguous compromise that often comes with international treaties. This approach would be a radical departure from prior international law; however, the importance of these underwater fiber optic cables is unprecedented in our world's history. Never before has a set of extra-territorial infrastructure played such a critical role in United States (and global) affairs. Thus, an unprecedented scenario requires an unprecedented solution.

VI. CONCLUSION

The world today is connected by a series of underwater fiber optic cables traversing the globe's surface. While the underwater fiber optic cable in 2020 has transformed in capacity and effectiveness since the first underwater cable was laid in 1850, the international legal regime has not experienced a similar transformation. The international legal regime remains where it was during the mid-20th century, when telephone calls and telegraphs connected the world's continents. Needless to say, there are significant gaps in the international legal regime. This article looks at the gaps and reviews the proposed solutions international law scholars present in various fora. Those solutions all contemplate some form of international collaboration to form a specific treaty bringing together the various pieces of international law into one document and shoring up any gaps in existing law. While the recommendations are commendable, this article looks at customary international law and argues the United States should establish a strategic framework to establish customary international law to protect underwater fiber optic cables. Unilateral action, or action taken with a series of allies or international organizations, especially when done with universal justification, may shake the international community from its deadlock and establish customary international law. Clear precedent exists in the rapid adoption of the United States' unilateral proclamation of rights in its continental shelf in 1945, as it became good international law in less than a decade. In doing so, the United States may find itself on a more efficient path toward protecting itself from nefarious actors looking to wreak havoc on its territory by simultaneously damaging multiple underwater fiber optic cables.

REGULATORY ENCROACHMENT, THE OUTER CONTINENTAL SHELF LANDS ACT, AND THE NEW MARITIME ENCROACHMENT

Lieutenant Commander Paul H. Thompson*

This Article explores modern military encroachment challenges and Department of Defense (DoD) responses in three parts. Part I addresses traditional land-use encroachment dynamics and measures that the DoD has implemented to mitigate land-use encroachment impacts on military training activities. Part II illustrates the impacts of regulatory encroachment on maritime training operations in the Pacific Ocean, the complexities involved with environmental regulatory compliance, and the mitigation measures adopted or imposed by the DoD to continue military training activities in that arena. Part III synthesizes the lessons presented by DoD responses to land use and regulatory encroachment issues and explores those lessons in the context of a new maritime encroachment paradigm posed by the increased offshore drilling proposed by the Trump Administration.

INTRODUCTION

The term “encroachment” in the military context traditionally describes the conflict arising when military training at land-based installations negatively affects a surrounding civilian community. However, across the latter half of the 20th century encroachment challenges evolved from being local conflicts typically addressed on an *ad hoc* basis by individual training ranges and bases, to a complex, interwoven network of military regulations, environmental statutes, and coordinated inter-service training systems.¹ Especially after the implementation of a number of novel environmental protection statutes in the 1970s, encroachment has developed into a dynamic, mission-impacting challenge for military commanders and policymakers alike. In the decades since the 1970s, the Department of Defense (DoD) has developed a range of policies and procedures to address traditional land use encroachment, and has experienced significant disruption in its training operations as the result of regulatory compliance issues. Faced with the potential for novel encroachment conflicts presented by the Trump Administration’s proposed exponential increase in offshore drilling along the American coastline, the DoD must implement the hard lessons learned in navigating past traditional and regulatory encroachment issues.

The DoD has generally defined encroachment as “the cumulative result of any and all outside influences that inhibit normal military training and testing.”² Under this more expansive definition of encroachment, military encroachment doctrines and approaches to resolution have historically involved two general

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¹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-02-614, MILITARY TRAINING: DOD LACKS A COMPREHENSIVE PLAN TO MANAGE ENCROACHMENT ON TRAINING RANGES 5 (2002) [hereinafter GAO-02-614].

² U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-03-621T, MILITARY TRAINING: DOD APPROACH TO MANAGING ENCROACHMENT ON TRAINING RANGES STILL EVOLVING 1 n.2 (2003) [hereinafter Holman Testimony] (containing statement of Barry W. Holman, Director Defense Infrastructure Issues, before the Senate Committee on Environment and Public Works, 107th Congress).

paradigms. The traditional encroachment paradigm involves the sprawl of an urban residential area near a military installation encroaching on military activities because of the resulting increased civilian proximity to “live-fire ranges for artillery, armor, small arms, and munitions training” and other training areas and exercises which are noisy, dangerous, or both.³

The second, more modern encroachment paradigm involves military compliance with various environmental statutes and implementing regulations enacted in the 1960s and 1970s, and the resulting geographical and operational training limitations. In addition to already existing land use and regulatory compliance paradigms, the Trump Administration’s proposed exponential expansion of outer continental shelf oil and gas leasing has the potential to create a third significant encroachment paradigm, where maritime training conflicts with the development and exploration of offshore drilling. Especially in light of the historically limiting impacts of land-use and regulatory historical encroachment paradigms on naval operations, close examination of the possibility of maritime encroachment resulting from offshore drilling expansion—including an analysis of which strategies may be available to mitigate those impacts—is necessary.

This Article will explore modern encroachment challenges in three parts. Part I addresses traditional land-use encroachment dynamics and measures which the DoD has implemented to mitigate encroachment impacts on military training activities. Part II illustrates the outsized impacts regulatory encroachment has had on maritime training operations in the Pacific Ocean, and the complexities involved with environmental regulatory compliance. Part III synthesizes the lessons presented by DoD responses to land use and regulatory encroachment issues and explores those lessons in the context of a new maritime encroachment paradigm posed by the increased offshore drilling proposed by the Trump Administration.

I. TRADITIONAL LAND USE ENCROACHMENT ISSUES AND THE NAVY

Similar to the broad DoD definition of encroachment, the Navy defines encroachment as “private development adjacent to an installation, range, or [operations area], certain environmental restrictions, or growing competition for resources such as waterfront, airspace and frequency spectrum” which impede “the ability to conduct operations, and training or testing in realistic environments.”⁴ Prior to the early 2000s, military encroachment issues largely centered around conflict arising as a result of population growth in urban areas, which in turn caused suburban sprawl towards existing military installations sited in what had previously been lightly populated rural areas.⁵ However, in 2002, the General Accounting Office (GAO) issued a watershed report scoping the breadth and depth of the DoD’s encroachment concerns.⁶ The 2002 GAO report identified eight encroachment issues causing a real loss of training capabilities at four installations and two major commands, and noted that the DoD had no comprehensive plan to collect data, take administrative action, or enact legislative proposals to mitigate encroachment effects.⁷ Naval Air Station Oceana (NAS Oceana) at Virginia Beach, VA was specifically identified as an installation facing encroachment challenges, as urban sprawl had led to a proliferation of noise

³ Ryan Santicola, *Encroachment: Where National Security, Land Use, and the Environment Collide*, THE ARMY LAWYER (July 2006), at 2.

⁴ DEP’T OF THE NAVY, OPNAVINST 11010.40, 1–2 (2007).

⁵ Santicola, *supra* note 3, at 2.

⁶ GAO-02-614, *supra* note 1.

⁷ *Id.* at 3, 13–15, 24.

complaints based on aviation training operations.⁸ As a result of the 2002 GAO report, the DoD ordered each of the service branches to conduct an analysis of training requirements and encroachment effects. It also formed the Sustainable Ranges Initiative to act as a coordinating body for all DoD encroachment issues and to provide a centralized approach to policy, legislative initiatives, and compatible land use activities.⁹

Following the 2002 GAO report, and in response to the DoD requirement, the Navy implemented an Encroachment Management Program (EMP) in 2007 to proactively address potential traditional land-use encroachment issues.¹⁰ The EMP's stated foundation is the "identification and assessment by [military commanders] of all encroachment impacts . . . to ensure operational sustainment."¹¹ The EMP contemplates "active engagement with local, State, other Federal agencies, and community leaders" as the means of preventing encroachment impacts and promoting compatible development of lands adjacent to military facilities and training areas.¹² Although land use incompatibility is still a major challenge for shore-based Naval installations, and is likely to remain so indefinitely based on continuing trends toward suburban sprawl, the proactive approach required by the Navy's EMP and the greater DoD Sustainable Range Initiative (and its progeny) have created a relative stasis. Local communities near military installations recognize the economic and employment benefits accompanying a base, and installation and Region commanders are empowered and required to engage with local entities to ensure continued training opportunities.¹³ Further, training data collection and sharing across the military services provides the military with the data stream necessary to make intelligent basing decisions and coordinate with other federal agencies to preserve training sustainability.¹⁴

Indeed, since being specifically identified as an at-risk installation for land-use encroachment, NAS Oceana has made tremendous progress in addressing encroachment based on suburban sprawl. NAS Oceana and Navy Region Mid-Atlantic, in keeping with the Navy's EMP, work closely with local communities as part of a robust land-use management partnership to ensure sustainable training operations. In 2005, the Navy partnered with Virginia Beach, VA and other neighboring municipalities to conduct a Joint Land Use Study (JLUS), which identifies three distinct Air Installations Compatibility Use Zones (AICUZ) with associated land-use control recommendations.¹⁵ The city subsequently enacted its APZ-1 ordinance as an amendment to its Comprehensive Plan, inventorying existing land use conditions within a "Clear Zone" surrounding NAS Oceana, and requiring all new development or redevelopment in at-risk noise pollution areas to be consistent with Navy requirements.¹⁶ Similarly, the City of Chesapeake, VA, in coordination with the Navy, Virginia state authorities, and neighboring municipalities, funds an "Encroachment Protection Acquisition Program," which matches state funding in order to acquire privately owned properties impacted by the AICUZ and "Accident Potential Zones" identified in

⁸ *Id.* at 12.

⁹ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-86, DEFENSE INFRASTRUCTURE: DoD EFFORTS TO PREVENT AND MITIGATE ENCROACHMENT AT ITS INSTALLATIONS, (2016) [hereinafter GAO-17-86].

¹⁰ OPNAVINST 11010.40, *supra* note 4, at 3.

¹¹ *Id.*

¹² *Id.*

¹³ GAO-17-86, *supra* note 9, at 10–12.

¹⁴ *Id.* at 21.

¹⁵ CITY OF VIRGINIA BEACH, COMPREHENSIVE PLAN – IT'S OUR FUTURE: A CHOICE CITY, § 1.6 1-137 (2018).

¹⁶ *Id.* at 1–144.

the JLUS, and reduces potential conflicts between local military installations and private property within Chesapeake.¹⁷

Across the past two decades, the burgeoning partnership between and among Navy installations and host communities in the Hampton Roads, VA area exemplifies the increased capability of the Navy to proactively identify, address, and mitigate encroachment impacts and sustain training capabilities. Unfortunately, however, the Navy's learning curve with regard to the regulatory encroachment paradigm has been much steeper and more costly.

II. ENVIRONMENTAL COMPLIANCE ENCROACHMENT AND THE NAVY: THE HAWAII-SOUTHERN CALIFORNIA TRAINING AND TESTING RANGE AS A CASE STUDY

As environmental laws have developed in both scope and effect, the encroachment effect of limitations on military training and operations created a second encroachment paradigm which is more regulatory in nature. The National Environmental Policy Act (NEPA), Endangered Species Act (ESA), Marine Mammal Protection Act (MMPA), and other environmental statutes impose a number of requirements and responsibilities on the Department of Defense and the Navy. These requirements have both direct and indirect impacts on when, where, and how the military conducts its training and testing. Whereas NEPA and the ESA have universal impacts on military operations and actions across the DoD, the MMPA naturally has an outsized impact on Naval operations as compared to other actions within DoD. Consequently, the Navy has wrestled with environmental law compliance during at-sea training and testing for the better part of three decades now, particularly with regard to the use of sonar and live explosives during intensive training operations. The strict requirements of MMPA, ESA, and NEPA compliance, combined with steadfast opposition from environmental groups, has led to regulatory maritime encroachment, including significant limitations and impositions on training exercises and other non-deployment at-sea Naval activities. As explained in greater detail below, this regulatory maritime encroachment is exemplified by a series of litigated environmental lawsuits, judicial settlements, and policy changes related to the Navy's Hawaii-Southern California Training and Testing (HSTT) Study Area, a complex spanning millions of nautical square miles in the Pacific Ocean.¹⁸

Balancing the national security requirements for realistic, at-sea training and environmental compliance has proven both costly and time consuming, particularly in the HSST Study Area. The difficulty in striking the appropriate balance between environmental protection and training operations has led to decades of litigation between environmental groups, the National Marine Fisheries Service (NMFS), and the Navy related to training operations around the Pacific coast and Hawaii. As background, sound navigation and ranging, or sonar, is a catch-all term for at-sea navigational and targeting systems which project and/or receive sound waves and their reflections off of underwater objects in order

¹⁷ See generally NALF Fentress Encroachment Protection Acquisition Program, CITY OF CHESAPEAKE, VA., <https://bit.ly/33ibsPY> (last accessed on Mar. 30, 2020) (providing general information about the program).

¹⁸ See Amended Order Granting Conservation Council's Motion for Summary Judgment, Granting NRDC's Motion for Summary Judgment, Denying NRDC's Motion for Leave to Submit Extra-Record Evidence, and Granting in Part and Denying in Part Defendants' Motion to Strike, *Conservation Council for Hawaii, et al. v. Nat'l Maritime Fisheries Service, et al.*, 97 F. Supp. 3d 1210 (D. Haw. 2015), <https://bit.ly/2PFKklG> [hereinafter *Conservation Council Summary Judgment Order*] (disposing of both Civil No. 13-00864 SOM/RLP and Civil No. 14-00154 SOM/RLP).

to measure distances, identify hazards, or locate vessels.¹⁹ While passive sonar systems are effectively listening systems which receive and translate sound waves and noises being produced in the undersea environment, active sonar systems project pulses of sound energy into the water in order to locate submarines, mines, or other undersea features which are too quiet to be detected using passive technology.²⁰ Sonar arrays can operate at different frequencies, and may be operated onboard ships, submarines, and aircraft or be towed systems, which are deployed to trail a vessel at-sea.²¹ Prior to the late 1990s, concern over sonar use was generally focused on its use as a research tool. However, since the early 2000s, the Navy and NMFS have been embroiled in litigation surrounding sonar use and its impact on marine mammals.²² The Navy primarily uses mid- and low-frequency sonar systems, which have both been subject to legal challenges based on scientific assertions that sonar may harm certain marine mammals under certain conditions.²³

For purposes of exploring regulatory maritime encroachment, statutory regulation, litigation, and judicial settlements regarding mid-frequency active sonar (MFAS) system usage in the HSTT area provide an illuminating example of the difficulties of compliance and limiting impacts of environmental regulation on military training operations. The MMPA, ESA, and NEPA are the primary statutes affecting Navy training operations in the HSTT. The MMPA establishes a “moratorium on the taking . . . of marine mammals . . . during which time no permit may be issued for the taking of any marine mammal,” subject to three express exceptions.²⁴ The MMPA broadly defines “take” to mean “to harass, hunt, capture or kill, or [attempt of the same] any marine mammal.”²⁵ For military purposes, there are two primary bases within the statute for authorized takes of marine mammals. First, maritime military actions may be exempt from the MMPA if, “after conferring with the Secretary of Commerce,” the Secretary of Defense determines the actions are necessary for national defense.²⁶ More germane to most training activities, though, the MMPA was amended in 2003 to provide that “incidental take” permits may be issued for military readiness activities as a “specified activity (other than commercial fishing) within a specified geographical region,” for periods of not more than seven consecutive years.²⁷ The 2003 Amendments also modified the statutory definition of harassment in the military readiness context, establishing heightened criteria for establishing harm arising to the level of harassment as compared to the general definition.²⁸

Like the MMPA, the ESA also imposes significant legal requirements on the Navy related to its maritime operations. The ESA broadly prohibits the “take” of specifically listed endangered and threatened species, which include a significant number of marine mammals who inhabit the Pacific Ocean.²⁹ The

¹⁹ *Sound Navigation and Ranging*, U.S. FLEET FORCES COMMAND FLEET INSTALLATIONS AND ENVTL. READINESS, <https://bit.ly/2PsdHbn> (last visited on Feb. 25, 2020).

²⁰ *Id.*

²¹ *Mid- and Low-Frequency Sonar*, U.S. DEP’T OF JUSTICE, ENV’T AND NATURAL RES. DIV. (Updated May 15, 2015), <https://bit.ly/30jFOzr> (last visited on Feb. 25, 2020).

²² EUGENE H. BUCK AND KORI CALVERT, CONG. RESEARCH SERV. REPORT RL33133, *Active Military Sonar and Marine Mammals: Events and References*, 1 (Feb. 11, 2008).

²³ KRISTINA ALEXANDER, CONG. RESEARCH SERV. REPORT RL34403, *WHALES AND SONAR: ENVIRONMENTAL EXEMPTIONS FOR THE NAVY’S MID-FREQUENCY ACTIVE SONAR TRAINING*, 2 (Feb. 18, 2009).

²⁴ 16 U.S.C. 1371 § 101 (2018).

²⁵ 16 U.S.C. 1362 (13) (2018).

²⁶ National Defense Authorization Act for FY2004, P.L. 108-136 § 319(f) (2003).

²⁷ 16 U.S.C. 1371 § 101(a)(5)(A)(ii) (2018).

²⁸ Alexander, *supra* note 23, at 2–3.

²⁹ 16 U.S.C. § 1538 (2018).

ESA broadly defines “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”³⁰ Similar to the permitting requirements of the MMPA, an agency seeking to engage in any activity which might jeopardize a protected species or adversely modify its critical habitat is required to consult with the cognizant department in order to assess the impact of the proposed activity on any nearby endangered species.³¹ The ESA further provides for the issuance of “incidental take” permits where agency action would not “jeopardize” a protected species, with express limitations on the amount and type of take authorized and reasonable measures necessary to mitigate the impact of any such taking.³²

In contrast to the substantive “take” prohibitions and permitting processes contained with the MMPA and ESA, NEPA requires the Navy to include detailed environmental analyses when taking “major” actions.³³ As implemented through regulations promulgated by the Council on Environmental Quality (CEQ), federal agencies must include either or both of an environmental assessment (EA) and a more complex environmental impact statement (EIS), if the action is anticipated to “significantly [affect] the quality of the human environment.”³⁴ As is common practice among federal agencies, the Navy has sought to include required impact assessments under the MMPA and ESA within the NEPA process for its operation of sonar in the HSTT. It is exactly this intersection of law and the complex, scientific, and frequently hotly contested EIS process which led to a new era of regulatory encroachment affecting Naval training activities in the HSTT.

The first major environmental challenge of the Navy’s MFAS use in the Pacific theater was brought in 2007 by a conglomeration of environmental groups and the California Coastal Commission. It sought declaratory and injunctive relief related to the Navy’s integrated major training exercises in waters off of southern California.³⁵ In *NRDC v. Winter*, environmental groups challenged the Navy’s failure to prepare an EIS before conducting 14 major training exercises, arguing that the Navy’s actions in preparing an EA but not an EIS, despite anticipating significant levels of harassment and take of marine mammals, and the CEQ’s subsequent approval of “alternative arrangements” to allow for the continued use of MFAS while complying with NEPA requirements, violated NEPA.³⁶ In *Winter*, the California District court noted that the Navy’s own EA anticipated more than 564 instances of “Level A” harassment involving physiological harm to marine mammals and more than 167,000 instances of “Level B” or behavior-altering harassment as the result of scheduled training exercises. It also found the Navy’s action in promulgating an EA with a Finding of No Significant Impact (FONSI) to be arbitrary and capricious. Based on that finding, the district court imposed significant injunctions on the use of MFAS for the remaining 11 scheduled Navy exercises in the Southern California area.³⁷ On appeal, the Ninth Circuit affirmed the District Court’s action, leaving in place significant restrictions on the Navy’s training exercises, including requiring the shutdown of MFAS when a marine mammal is detected within 2,200 yards of a sonar-emitting source, and requiring an almost total power-down of sonar use in

³⁰ 16 U.S.C. § 1532 (19) (2018).

³¹ 16 U.S.C. § 1536 (a)(2) (2018).

³² 16 U.S.C. § 1536 (b)(4) (2018).

³³ 52 U.S.C. § 4332 (2)(c) (2018).

³⁴ 40 C.F.R. §§ 1501.3, 1501.4 (2020).

³⁵ See BUCK AND CALVERT, *supra* note 22, at 14–15. Notably, the Navy had already been embroiled in a decade of environmental challenges related to low-frequency active sonar systems at the time the complaint was filed in *NRDC v. Winter*, 518 F.3d 658, 669–70, 677–79 (9th Cir. 2008).

³⁶ *NRDC v. Winter*, 518 F.3d 658, 669–70, 677–79 (9th Cir. 2008).

³⁷ *Id.* at 676.

“surface ducting conditions,” where sonar sound carries further than would otherwise be the case.³⁸ The Ninth Circuit Court also left undisturbed a 12-nautical-mile coastal exclusion zone, monitoring requirements before and during MFA use during scheduled exercises, and a second exclusionary zone around the Catalina Basin and the San Clemente islands.³⁹ The Ninth Circuit Court similarly left undisturbed limitations imposed on the Navy’s training operations included in an executive exemption issued to negate claimed violations of the Coastal Zone Management Act (CZMA).⁴⁰

The *Winter* case eventually found its way to the Supreme Court, which granted certiorari to address whether the lower courts had correctly applied equitable principles in enjoining the Navy’s training activities. By a narrow 5-4 majority, the Supreme Court vacated the two injunctive limitations imposed by the District Court and upheld by the Ninth Circuit, noting that the standard for injunctive relief required a showing that “irreparable harm was likely,” rather than probable, and that the lower courts had incorrectly balanced the environmental interest posited by the plaintiffs against the national security interests relied on by the Navy in contesting the injunctions.⁴¹ The Supreme Court reasoned that, as a threshold matter, the lower courts had erred in applying a “probable” standard for the likelihood of irreparable harm, particularly where the Navy had not challenged four of the six limitations imposed. Citing *Mazurek v. Armstrong*,⁴² the Supreme Court held that the plaintiffs’ request for injunctive relief based only “on a possibility of irreparable harm was inconsistent with [the] characterization of injunctive relief as an extraordinary remedy”⁴³ The Supreme Court, in vacating the challenged injunctions, further relied on a substantially different balancing of the public interest than that applied by the lower courts. The Court reasoned that “antisubmarine warfare is one of the Navy’s highest priorities,” and gave judicial deference to senior Navy officials’ statements that 2,200-yard shutdown requirements would effectively negate the purpose of training under realistic conditions, leaving strike groups more vulnerable to enemy submarines.⁴⁴ The Court then concluded, “[w]e do not discount the importance of plaintiffs’ ecologic, scientific, and recreational interests in marine mammals. Those interests, however, are plainly outweighed by the Navy’s need to conduct realistic training exercises”⁴⁵

Although the Navy eventually prevailed at the Supreme Court with the reversal of the 2,200-yard shutdown and “surface-ducting” restrictions, the *Winter* litigation nonetheless resulted in a number of limitations on Naval training activities which simply did not exist in 2006. Given the strictly procedural nature of NEPA, and the import the courts placed on the national security interests fostered by realistic MFAS training, the Navy’s decision to proceed on an EA/FONSI basis instead of pursuing a full EIS demonstrates the responsive, vice proactive nature of the Navy’s response to regulatory maritime encroachment.

Not long after the conclusion of *Winter*, environmental groups raised yet another challenge to the Navy’s use of MFAS in the HSTT region. In 2013, having learned through the *Winter* litigation the cost of relying on a lengthy EA/FONSI analysis rather than an EIS, the Navy coordinated with NMFS to

³⁸ *Id.* at 701–03.

³⁹ *NRDC v. Winter*, 530 F. Supp. 2d 1110, 1118–21 (C.D. Cal. 2008).

⁴⁰ *NRDC v. Winter*, 518 F.3d 658, 674 (9th Cir. 2008).

⁴¹ *Winter v. NRDC*, 555 U.S. 7, 24–26 (2008).

⁴² 520 U.S. 968 (1997).

⁴³ *Winter*, 520 U.S. at 22.

⁴⁴ *Id.* at 28–29.

⁴⁵ *Id.* at 33.

prepare an EIS for proposed training operations in the HSTT from 2013 to 2018, including concurrent coordination on required MMPA and ESA environmental assessments.⁴⁶ The Navy initially published a Notice of Intent to develop an EIS on July 15, 2010, and prepared its draft EIS in May of 2012, after conducting extensive “scoping” activities including holding six public meetings in Utah, California, and Hawaii, and considering email and written comments regarding the EIS during the public comment period.⁴⁷

The proposed rule authorizing Naval training activities in the HSTT, including anticipated Level A and B harassment or “takes” of 39 species of marine mammals, was published on December 24, 2013.⁴⁸ The final rule, even prior to its challenge, included ten specific mitigation measures developed and agreed upon by the Navy and NMFS to effect the “least practicable adverse impact” on marine mammal species in consideration of personnel safety, practicality of implementation, and impact on effectiveness of training as required by the MMPA.⁴⁹ Notwithstanding the exponentially more robust effort by the Navy and NMFS to meet NEPA, MMPA, and ESA requirements in permitting MFAS training activity, environmental groups still took issue with the proposed final rule, leading to more protracted litigation surrounding the HSTT range.

In *Conservation Council for Hawaii et al. v. National Marine Fisheries Service et al.*,⁵⁰ NRDC and a coalition of environmental groups and local government entities filed suit against NMFS and the Navy regarding the proposal renewal of NMFS incidental take authorizations for marine mammals in the HSTT. The *Conservation Council* petitioners argued that the final rule authorizing incidental takes was arbitrary and capricious and failed to meet the requirements of NEPA, the MMPA, and the ESA.⁵¹

In a blistering order granting summary judgment in favor of the plaintiffs, the District Court held the NMFS determination—that the Navy’s proposed training in the HSTT would have a “negligible impact” under the MMPA—was so insufficiently supported as to be arbitrary and capricious.⁵² Specifically, the court rejected the agencies’ assertion that the “take” to be evaluated under for its impact is the *anticipated take*, a lesser number, rather than the authorized take, noting that the express language of the MMPA requires consideration of the authorized take.⁵³ Further, allowing review as posited by the Navy and NMFS could result in the authorization of nearly unlimited takes, as unmooring the “negligible impact” finding from the actual number and type of takings authorized creates a legal fallacy where there the “authorized” takes are exponentially greater than the theoretical “anticipated” takings.⁵⁴ The court further explained, “although MMPA provisions have been adjusted with respect to military readiness activities, those adjustments do not permit the Navy to skirt the MMPA purely to avoid having its training and testing activities

⁴⁶ *Conservation Council* Summary Judgment Order, *supra* note 18, at 5.

⁴⁷ NAVAL FACILITIES ENGINEERING COMMAND, SOUTHWEST/EV21.CS, HAWAII-SOUTHERN CALIFORNIA TRAINING AND TESTING ACTIVITIES DRAFT ENVTL. IMPACT STATEMENT/OVERSEAS ENVTL. IMPACT STATEMENT (May 2012), ES-5-6, <https://bit.ly/2PhG6AO> (last visited on Mar. 1, 2020).

⁴⁸ Takes of Marine Mammals Incidental to Specified Activities; U.S. Navy Training and Testing Activities in the Hawaii-Southern California Training and Testing Study Area, 78 Fed. Reg. 78105 (Dec. 24, 2013) [hereinafter 2013 Final HSTT MMPA Take Rule].

⁴⁹ 2013 Final HSTT MMPA Take Rule at 78113–78114.

⁵⁰ 97 F. Supp. 3d 1210 (D. Haw. 2015).

⁵¹ *Id.*

⁵² *Conservation Council* Summary Judgment Order, *supra* note 18, at 18.

⁵³ *Id.* at 18–19.

⁵⁴ *Id.*

uninterrupted.”⁵⁵ The court then noted a multitude of analytical and factual discrepancies contained within the record to determine that the administrative record did not support the ultimate determination of negligible impact.⁵⁶

The *Conservation Council* court similarly found the NMFS “No Jeopardy” finding under the ESA to be arbitrary and capricious. Although NMFS prepared a 516-page Biological Opinion in support of that determination, the court struck down “No Jeopardy” findings for both whale and turtle endangered species as arbitrary and capricious. Regarding the former, the court noted that NMFS’ “No Jeopardy” finding flows only from “repeated, conclusory statements,” and that the agency erred in reasoning that lethal takes of individual animals among an endangered species would not likely reduce the fitness of individual whales (notwithstanding their deaths), and accordingly are not likely to reduce the viability of affected whale populations.⁵⁷ Similarly, regarding the “No Jeopardy” finding for endangered turtle species, the court wholesale rejected the issuance of an uncapped number of turtle takes due to vessel strike, noting that authorizing an unlimited number of takes “makes it impossible for NMFS to justify” a finding of “No Jeopardy.”⁵⁸

Lastly, the court determined that the Final Environmental Impact Statement (FEIS) prepared by the Navy in consultation with NMFS was arbitrary and capricious in that it failed “to analyze a true ‘no action’ alternative and fail[ed] to analyze alternatives with less environmental harm.”⁵⁹ The court noted that each of the alternatives considered within the FEIS involved the continuation of Navy training activity in the HSTT, and that NMFS improperly abandoned its role in determining whether to authorize the takes requested by the Navy, substituting instead an analysis of differing levels of Navy activity.⁶⁰ The court bluntly concluded that “with what it called a ‘no action’ alternative, NMFS was assuming the very take activities the Navy was proposed to engage in. This is a glaring deficiency in the FEIS.”⁶¹ The court similarly rejected the validity of determinations in the FEIS that time and area restrictions were “impractical,” noting that the agencies’ failure to reasonably address and consider comments recommending such limitations constituted a failure to conduct the “hard look” at environmental consequences required of NEPA.⁶²

As a result of the *Conservation Council* court’s summary judgment award in favor of the environmental groups, the Navy entered into a judicial settlement with the various plaintiffs as a means of resolving the matter without further litigation. Pursuant to the stipulation, approved in September of 2015, the Navy agreed to conduct training operations within the HSTT in accordance with the mitigation measures and limitations contained within the Final Rule promulgated by NMFS, associated letters of authorization (LOAs), the EIS, and 19 additional limitations regarding location, time, and types of training where

⁵⁵ *Id.* at 19.

⁵⁶ *Id.* at 22–39 (noting NMFS failure to include population stock analyses for all potentially impacted marine mammal species in the area, failure to utilize “best available science” in disregarding “potential biological removal” (PBR) levels and authorizing mortality takes in excess of PBR levels for individual species, and ultimately concluding that “the deficiencies growing out of a total failure to consider clearly important information are glaring enough that the court finds it unnecessary to make judgment calls.”).

⁵⁷ *Id.* at 49–50.

⁵⁸ *Conservation Council* Summary Judgment Order, *supra* note 18, at 53.

⁵⁹ *Id.* at 57.

⁶⁰ *Id.* at 59–60.

⁶¹ *Id.*

⁶² *Id.* at 61, 64–65 (citing to *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1300 (9th Cir. 2003)).

MFAS use is authorized.⁶³ Of particular note, the original EIS and associated NMFS LOAs were premised on the Navy conducting 14 major training exercises (MTE) per year, including the use of MFAS and underwater explosives to provide realistic training for the certification of carrier strike groups and as part of international “Rim of the Pacific” (RIMPAC) exercises.⁶⁴ Under the *Conservation Council* settlement, the Navy agreed to limit training in specific areas surrounding the Hawaiian islands to, at most, five MTEs, and to significant curtailment on the use of MFAS during other training exercises.⁶⁵ The settlement also prohibited the Navy from utilizing MFAS during MTEs and wherever possible for smaller training exercises in specified areas around the island of Molokai, and imposed seasonal limitations on MFAS use along specified areas off the coast of California.⁶⁶

All told, the Navy’s freedom to utilize MFAS in its training activities in the HSTT went from being relatively unconstrained to being subject to a litany of self-imposed mitigation measures, limitations required by executive authorizations under the CZMA, the unchallenged restrictions within *Winter*, and the 19 additional restrictions contained within the *Conservation Council* settlement. The dispositive lesson is not so much that the Navy has failed to engage with environmental groups or to attempt to balance its military readiness needs with the web of environmental laws applicable to MFAS use. The lesson instead is that the complexity of environmental compliance is such that the Navy should anticipate and adapt to regulatory encroachment in its maritime operations in the same manner that it has learned to proactively engage with local and state governments to mitigate traditional “land use” encroachment. That lesson is even more apt in light of the potential impacts of Executive Order 13795 (EO 13795), which has the potential to affect a combined “land use” type-encroachment *and* regulatory encroachment on military readiness exercises, particularly along the west coast of the United States.

III. THE TRUMP ADMINISTRATION AND THE ENCROACHMENT POTENTIAL OF INCREASED OFFSHORE DRILLING

Legal scholars describe the regulation of offshore drilling in the United States as “a constellation of federal laws and a complicated nexus of federal agencies . . . [forming] something of a morass.”⁶⁷ However, under the current administration, the government has proposed an exponential expansion of the availability and sale of offshore mineral leases, which in turn could lead to encroachment impacts on Naval maritime operations. The potential for this impact is particularly significant, as the proposed expansion would reverse offshore drilling policies which have prevailed over the past 30 years. A brief analysis of the statutory framework and recent regulatory history of offshore drilling is helpful in fully examining the encroachment-type impacts which might accrue from expanded drilling.

The Outer Continental Shelf Lands Act (OCSLA) is the principle federal statute governing offshore drilling, establishing a policy that “the outer

⁶³ Stipulated Settlement Agreement and Order; Maps “1” – “4,” *Conservation Council for Hawaii, et al. v. Nat’l Maritime Fisheries Service, et. al.*, Civil No. 13-00864 SOM/RLP and 14-00154 SOM/RLP, (D. Haw., Mar. 15, 2015) [hereinafter *Conservation Council Settlement*].

⁶⁴ U.S. DEP’T OF THE NAVY, HAWAII-SOUTHERN CALIFORNIA TRAINING AND TESTING DRAFT ENVTL. IMPACT STATEMENT/OVERSEAS ENVTL. IMPACT STATEMENT INFORMATIONAL MATERIALS, <https://bit.ly/30iJyBr> (last visited on Mar. 2, 2020).

⁶⁵ *Conservation Council Settlement, supra* note 63, at 8–9.

⁶⁶ *Id.* at 9–10. *See also id.* at “Map 3.”

⁶⁷ David Pettit & David Newman, *Federal Public Law and the Future of Oil and Gas Drilling on the Outer Continental Shelf*, 17 ROGER WILLIAMS U. L. REV. 184, 187 (2012).

Continental Shelf is a vital national resource reserve . . . which should be made available for expeditious and orderly development.”⁶⁸ In order to manage the development of those resources, OCSLA requires the Secretary of the Interior to prepare and maintain an oil and gas leasing program for all lands constituting the outer Continental Shelf (OCS), subject to specific environmental, location, timing, and economic balancing.⁶⁹ OCSLA defines the “outer Continental Shelf,” as “all submerged lands lying seaward and outside of the lands beneath navigable waters . . . of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.”⁷⁰ Effectively, the OCS is composed of all of the seabed and subsoil underlying the United States’ territorial seas and exclusive economic zone (EEZ), except for the respective three or nine-mile boundary left to the states under the Submerged Lands Act.⁷¹ Under OCSLA, the Secretary of the Interior must promulgate a five-year leasing program including a schedule of proposed lease sales indicating “the size, timing, and location of leasing activity which will best meet national energy needs.”⁷²

Against this statutory background, the potential for offshore drilling and exploration has been an incredibly dynamic field over the past decade. In 2011, reacting in part to the catastrophic Deepwater Horizon oil spill in the Gulf of Mexico, the Department of the Interior dissolved its Mineral Management Service, reorganizing the Department’s management of the OCS and creating the Bureau of Ocean Energy Management (BOEM), “responsible for managing development of the nation’s offshore management in an environmentally and economically responsible way.”⁷³ Under the Obama Administration, BOEM promulgated a five-year leasing plan which proposed a lease sale schedule of 11 lease sales in four OCS “planning areas” in the Gulf of Mexico and Alaska coastline.⁷⁴ The BOEM 2017–2022 plan (2017 Plan), in keeping with decades of prior precedent, proposed no new leasing along the entire Pacific coast of the United States, reasoning that the energy needs of the nation could be met without drilling or exploration in planning areas other than the four contained within the plan.⁷⁵ Notably, the 2017 Plan was finalized in November of 2016, shortly before President Trump took office. Given the “midnight” nature of the final five-year plan, which is subject to notice and comment rulemaking requirements under the Administrative Procedures Act (APA), its promulgation was viewed as an intentional roadblock to President Trump’s campaign plan to drastically expand U.S. offshore oil production, as any revisions to the five-year plan would require similar APA compliance.⁷⁶

In response, on the eve of his 100th day in office, President Trump issued EO 13795 ordering the Secretary of the Interior to “give full consideration to revising the schedule of proposed oil and gas lease sales,” to include annual lease sales to the maximum extent permitted by law in BOEM planning areas across the Gulf of Mexico, Arctic Sea, Mid-Atlantic, and South Atlantic.⁷⁷ Under the Order,

⁶⁸ 43 U.S.C. § 1332 (2018).

⁶⁹ 43 U.S.C. § 1344(a) (2018).

⁷⁰ 43 U.S.C. § 1331(a) (2018).

⁷¹ BUREAU OF OCEAN ENERGY MGMT, NAT’L OCEANIC AND ATMOSPHERIC ADMIN, SO WHAT? ZONES, LIMITS, AND MARITIME JURISDICTIONS IN THE MARINE ENVIRONMENT, <https://bit.ly/2XiUIJV> (last visited on Mar. 5, 2020).

⁷² 43 U.S.C. § 1344(a) (2018).

⁷³ BUREAU OF OCEAN ENERGY MGMT, DEP’T OF THE INTERIOR, THE REORGANIZATION OF THE FORMER MMS, <https://bit.ly/316GKqd> (last visited on Mar. 3, 2020).

⁷⁴ BUREAU OF OCEAN ENERGY MGMT, DEP’T OF THE INTERIOR, 2017–2022 OCS OIL AND GAS LEASING FINAL PROGRAM, S-2, 11-1 (November 2016).

⁷⁵ *Id.* at 608, 8-22 to 8-23.

⁷⁶ Paul Rogers, *Obama Blocks New Oil Drilling Off California, West Coast Through 2022*, THE MERCURY NEWS (Nov. 19, 2016), <https://bayareane.ws/33cluRv/>.

⁷⁷ Exec. Order No. 13795, 82 Fed. Reg. 20815 (May 3, 2017).

the Secretary of the Interior is required to consult with the Secretary of Defense in revising the five-year plan.⁷⁸ EO 13795 expressed broad changes in policy perspectives, finding that “America must put the energy needs of American families and businesses first and continue implementing a plan that ensures energy security and economic vitality for years to come.”⁷⁹ EO 13795 was the first volley in a number of regulatory and administrative measures taken by the Trump Administration to vastly increase the scope and scale of oil development along the OCS, in keeping with his stated intentions while campaigning.

In compliance with the President’s directive to revisit the 2017 Plan, in January 2018 BOEM promulgated a substantially modified five-year plan for the years 2019 to 2024 (2019 Plan).⁸⁰ The 2019 Plan is a near complete reversal of BOEM OCS leasing strategy under the Obama administration and the 2017 Plan. As compared to proposing 11 lease sales in only four of BOEM’s “planning areas,” the 2019 Plan “would make more than 98 percent of the OCS available to consider for oil and gas leasing during the 2019–2024 period,” via 47 lease sales in 25 of the 26 BOEM planning areas.⁸¹ Using just the Pacific Coast as an example, the 2019 Plan contemplates seven lease sales along the Pacific coastline beginning as early as 2020.⁸² Historically, the most recent lease sale in the Pacific Region was in 1984, and the Southern California Planning Area has existing Federal leases and production from 23 platforms, with no new permits issued since 1984.⁸³

The Pacific Region considered in the 2019 Plan encompasses an area of more than 248 million acres, so it stands to reason that not every oil lease sale will implicate Naval training operations.⁸⁴ Accordingly, the real potential of any limitation on military training activities as a result of the proposed expanded offshore drilling and exploration will not be measurable until actual leaseholds have been sold and exploration activities commence in earnest. However, the Navy can and should expect some level of encroachment on training activities as OCS drilling and exploration increases in the Pacific. Notably, in addressing military activities in the Pacific Region, the 2019 Plan contemplates that military training activities in the Pacific are “critical to military readiness and to national security.”⁸⁵ Notwithstanding that favorable introduction to the importance of military readiness, the 2019 Plan then immediately contemplates limitations on military activities, noting that “[s]ome of the most extensive offshore areas used by DOD include U.S. Navy at-sea Operational Areas,” and that training and testing activities could “occur during any season . . . and could be concentrated within a smaller geographic area than the OPAREA footprint.”⁸⁶ As noted by one Republican senator when questioned about his support for potential oil drilling in the Great Lakes, “I think we have to get the oil where it is.”⁸⁷ Although the Senator in question has been excoriated for his comment, it is a fact that oil resources can only be extracted from where they are geographically located. With

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ BUREAU OF OCEAN ENERGY MGMT, DEP’T OF THE INTERIOR, 2019–2024 NATIONAL OCS OIL AND GAS LEASING DRAFT PROPOSED PROGRAM, (January 2018) [hereinafter 2019 BOEM Plan]. Notably, the 2019 BOEM Plan has not been finalized due to litigation surrounding the President’s revocation of prior executive withdrawals in the Arctic Sea and Alaska. See *League of Conservation Voters v. Trump et al.*, 363 F. Supp 3d 1013 (D. Alaska 2019).

⁸¹ 2019 BOEM Plan, *supra* note 80, at 2, 8.

⁸² *Id.* at 8.

⁸³ *Id.* at 4-1.

⁸⁴ *Id.*

⁸⁵ *Id.* at 6-22.

⁸⁶ *Id.*

⁸⁷ Cary Spivak, *Russ Feingold Says Ron Johnson “Is Willing to Hand Over the Great Lakes to the Oil Companies,”* POLITIFACT.COM (Sept. 3, 2010), <https://bit.ly/2PeTZ2v>.

that truth in mind, conflict over competing maritime usages between military training and offshore oil development is comparable to land-use encroachment, and likely as inevitable. Moreover, this new maritime “sea-use” encroachment was created by regulatory changes in BOEM’s interpretation of its obligations under OCSLA, making this new encroachment model a hybrid of the regulatory and land-use encroachment paradigms. In light of EO 13795 and BOEM’s subsequent regulatory drive to increase American offshore production in the OCS, the Navy and the DoD will have to be proactive in preserving maritime training and testing ranges and programs against this new encroachment threat.

The Navy has historically opposed offshore drilling in Southern California, noting more than 20 years ago that offshore oil rigs pose “an unacceptable safety hazard” to ships, submarines, and military operations off the coast.⁸⁸ However, a 2007 Navy settlement with oil companies regarding development near the Point Mugu training area (part of both the SOCAL range and the cumulative HSTT) may serve as a blueprint for the avoidance of major encroachment complications.⁸⁹ The Woodside Oceanway project proposed a deep-water, mobile port with three potential sites for ship-to-ship petroleum transfers, including sites within or close to the Point Mugu range.⁹⁰ The Navy, while coordinating with Federal approval authorities for the project, outlined a proposed settlement with Woodside Natural Gas, Inc. containing explicit limitations on the manner in which the Oceanway project could inhibit the Point Mugu range.⁹¹ Of note, the proposed settlement contemplated Woodside’s rotation between three alternative transfer sites, subject to an annual limit on transfers within the Point Mugu range, “not to interfere” limitations for other activities, and allowing the Navy a “right of refusal” for activities within or affecting the training range.⁹²

The Woodside Oceanway project was ultimately withdrawn by its parent company due to economic concerns but remains a possible example of the means by which the Navy can seek to mitigate potential encroachment effects from offshore drilling.⁹³ However, much like the early military responses to encroachment issues arising from urban sprawl, “the Navy does not have a standard approach to sea-based energy infrastructure,” and addresses conflicts on a site-by-site basis.⁹⁴ The Woodside model certainly could serve to form the framework for the Navy’s approach to *ad hoc* projects, and entering into legally enforceable agreements with BOEM leaseholders would provide the Navy with justiciable legal remedies in the event of breach by the oil companies. However, the Woodside Oceanway project is an imperfect template considering the broad range of activities required to locate, develop, and extract deep-water oil resources. Specifically, the Woodside Oceanway project involved a mobile offshore liquid natural gas transfer platform which could be moved between sites. For new projects and oil leases, Woodside-type limitations on oil companies might be feasible for early exploration phases. Based on current technologies, most exploratory offshore drilling is conducted either by “jackups,” an oil rig

⁸⁸ Nora Zamichow, *Navy Brands Offshore Oil Rigs Training Hazard*, LOS ANGELES TIMES, Oct. 26, 1989, at B1.

⁸⁹ Stuart Parker, *Navy Reaches Tentative Agreement on West Coast Energy Project*, INSIDE THE NAVY Vol. 20, (Nov. 26, 2007), at 7–8.

⁹⁰ Notice of Woodside Natural Gas Inc. OceanWay Secure Energy Liquefied Natural Gas Deepwater Port License Application, 72 Fed. Reg. 51488, 51353–54 (Sept. 7, 2007).

⁹¹ DEPT. OF THE NAVY, OFFICE OF THE ASST. SEC’Y (INSTALLATIONS AND ENV’T), LETTER TO U.S. MARITIME ADMINISTRATION AND U.S. COAST GUARD, 2 (Oct. 31, 2007), <https://bit.ly/31br58T>.

⁹² *Id.*

⁹³ Rick Wilkinson, *Woodside Petroleum Shelves OceanWay LNG Terminal*, OIL AND GAS J. (Jan. 16, 2009).

⁹⁴ Parker, *supra* note 89, at 3; see also GAO-02-614, *supra* note 1, at 3.

which is movable but requires the extension of “legs” to the seabed for stability, or more expensive semisubmersible or drillship rigs which are held in position by anchors or dynamic positioning.⁹⁵ These fungible assets could be subject to time and place-of-use limitations to meet naval training and testing needs without undue economic disruption to the oil companies, much as with the Woodside Oceanway project offshore terminal. However, once large deposits of hydrocarbons have been found, a permanent platform is typically built to allow their extraction.⁹⁶ Where large oil reserves might be located within individual ranges or OPAREAs, and particularly on the oil-rich California coastline, encroachment issues are likely to be caused by the permanent presence of large rigs and related maritime shipping.⁹⁷

In light of the potentially permanent nature of at least some portion of the lease sales proposed in the 2019 Plan, an *ad hoc* approach to “sea-use” encroachment would waste the lessons learned in the development of the DoD’s extensive, programmatic response to “land-use” encroachment. Resolution by individual settlements would alleviate the immediate headache proposed by an individual project or at least the exploratory phases thereof, but would constitute a short-sighted failure to anticipate and proactively address what could be a massive proliferation of permanent structures across the Pacific coastline.

Conversely, the best alternative to address the “sea-use” encroachment challenges is to leverage the DoD’s experience in resolving encroachment issues ashore and maintain a programmatic, proactive approach to assert the Navy’s interests. However, such a programmatic response would be heavily susceptible to the political influence. As discussed above, the Navy and the DoD currently execute a Sustainable Ranges Initiative and an EMP to collect data, report potential issues, and provide policy-level guidance to commanders in coordinating with other governmental entities.⁹⁸ Given the directive in EO 13795 that the Secretary of the Interior consult with the DoD in implementing its five-year plan, the opportunity exists to “fence off” or otherwise impose limitations on potential lease sale locations based on maritime training and testing needs.⁹⁹

However, the DoD’s response and coordination with BOEM is still very much in its nascency. The only publicly available DoD response to the 2019 Plan is a letter from the Deputy Assistant Secretary of Defense (Force Education and Training), promising further DoD review of mission compatibility in the 2019 Plan’s proposed leasing areas.¹⁰⁰ The DoD response also states an intent to “distinguish areas where [it] will request restrictions from oil and gas activity,” but again, no further public information regarding those potential locations is currently available.¹⁰¹ Although the DoD has stated its intentions to seek the reservation of necessary training ranges, and has the available data to empirically support any objections to a proposed lease area from the Sustainable Range Initiative and EMP programs, the ultimate resolution of those requests will depend on BOEM and executive determinations as to relative economic value of the drilling activity as compared to limiting military (and particularly Navy) OPAREAs.

⁹⁵ *Id.*

⁹⁶ *Offshore Drilling*, NATURALGAS.ORG, <https://bit.ly/2PewOpH> (last visited on Mar. 10, 2020).

⁹⁷ Mark J. Kaiser & Brian Snyder, *A Primer on the Offshore Contract Drilling Industry*, 44 OCEAN DEV. & INT’L L. 287, 288 (2013).

⁹⁸ See GAO-17-86, *supra* note 9, at 3–4.

⁹⁹ Exec. Order No. 13795, 82 Fed. Reg. 20815 (May 3, 2017).

¹⁰⁰ OFFICE OF THE ASST. SEC’Y OF DEF., DEP’T OF DEF., LETTER TO THE BUREAU OF OCEAN ENERGY MGMT (Feb. 1, 2018), <https://bit.ly/2XjiGzk>.

¹⁰¹ *Id.*

IV. CONCLUSION

In conclusion, it is incumbent on DoD and Navy senior leadership to vocalize and substantiate concerns regarding the potential encroachment issues posed by expanded offshore drilling *before* the 2019 Plan is finalized, and to leverage its Congressional liaison branches to ensure legislative awareness of those concerns before the oil industry expends significant resources within and around training ranges. To rely on an old Navy cliché, hope is not a course of action. If the Navy and the DoD are to meaningfully address this new maritime encroachment paradigm, early and vocal intervention is required to ensure that the military is able to “adequately prepare [its] young men and women for the operations and potential combat service which they may be required to perform in service to this Nation.”¹⁰² Given the extensive limitations posed by environmental regulations, the proposed shrinkage of Navy OPAREAs in the Pacific poses a distinct risk that the limited training environments will no longer match real-world conditions. As near-peer military competitors, Russia and China pose more risk to maritime security now than at any time in the past four decades. With the emergence of renewed threats to military operations in the Pacific and beyond, additional maritime encroachment limitations which curtail “real-world” training conditions could have major national security implications. As such, preserving military training to the maximum extent possible is a “no-fail” endeavor. In light of the vast economic and financial interests contemplated by expanded offshore drilling, the military must abandon its normally insular posture regarding external economic activities to ensure executive and congressional visibility on the value and necessity of maritime training grounds and activities to national security.

¹⁰² *Challenges to National Security: Constraints on Military Training: Hearing Before the House Comm. on Gov't Reform*, 107th Cong. 32 (2001) (statement of Admiral William J. Fallon and statement of Lieutenant General Larry R. Ellis that military personnel “must train in the field and train often under conditions that replicate war fighting”), <https://bit.ly/3gjjxaN>.

REFORMING MILITARY JURIES IN THE WAKE OF *RAMOS V. LOUISIANA*

Captain Nino C. Monea*

Juries in the military are smaller than civilian practice and may convict by less-than-unanimous verdicts. Although empirical research has shown larger, unanimous juries perform better by virtually every measure, military courts have not adopted them. They claim that it is inapplicable because the research was conducted on civilians. This Article explains the science supporting large, unanimous juries, courts' resistance to the science, and addresses the objections courts have raised to jury reforms. It concludes that there is no worthwhile reason to maintain the status quo for military juries.

INTRODUCTION

Francis Lieber led an incredible life. Born in Berlin in 1800, he served in the Prussian Army and fought against Napoleon at Waterloo by age fifteen.¹ In the war, he was twice-wounded and left to die.² He was captured, recovered, and was later released, earning a Ph.D. by age twenty.³ He then volunteered to fight in the Greek War of Independence for a brief spell.⁴ Afterward, he immigrated to the United States to teach at South Carolina College.⁵ He was teaching at Columbia College in New York around the time of the American Civil War and was tasked with drafting what became known as the Lieber Code, the first codification of the laws of war issued by a national army for guidance and compliance.⁶ The document heavily influenced the later Hague and Geneva Conventions.⁷ Were all that not enough, the German government adopted the Lieber Code to guide itself during the Franco-Prussian War and Lieber's son would go on to become the Judge Advocate General for the U.S. Army.⁸

Less well-remembered than his contributions to military law, Francis Lieber was also a great lover of juries. He praised them as being “the best school of the citizen, both for teaching him his rights and how to protect them, and for practically teaching him the necessity of law and government.”⁹ In his book, *On Civil Liberty*, he laid out a laundry list of admirable qualities about juries.¹⁰ But there was one point on which the jury system could be improved, in his view. He

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¹ LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM* 71 (2005).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ DEP'T OF THE ARMY, *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975*, at 62 (1975); LEWIS R. HARLEY, *FRANCIS LIEBER: HIS LIFE AND POLITICAL PHILOSOPHY* 90, 92 (1899).

⁷ FISHER, *supra* note 1, at 71.

⁸ DEP'T OF THE ARMY, *supra* note 6, at 62.

⁹ FRANCIS LIEBER, *ON CIVIL LIBERTY AND SELF-GOVERNMENT* 232 (Theodore D. Woolsey ed., 3d ed. 1877).

¹⁰ *Id.* at 234-37.

would write, “[I]t is my firm conviction, after long observation and study, that the unanimity principle [of juries] ought to be given up”¹¹

Though Lieber’s brilliance cannot be doubted, on this point, he was wrong. Empirical evidence may have been lacking in the nineteenth century, but in the twenty-first, we know there is a great deal of value in an unanimity requirement for juries. Non-unanimous verdicts allow minority viewpoints to be ignored during deliberation, a hallmark of bad decision making.¹²

Unfortunately, the military has adopted Lieber’s view on the matter. It is said that the Uniform Code of Military Justice (the Code) “provides many benefits not shared by civilian defendants.”¹³ This is true enough in the abstract.¹⁴ But criminal defendants in the military receive far less generous rights to juries than their civilian counterparts. Jury structure has been called “*the* major difference between military and civilian practice.”¹⁵

Servicemembers have no constitutional right to an “impartial jury.”¹⁶ It is not essential that all of the jurors hear the same evidence throughout the same trial to convict,¹⁷ and it is not fatal if several jurors drop out midway through the trial.¹⁸ Military defendants enjoy less robust peremptory strike privileges than their civilian counterparts.¹⁹ They are generally tried by a jury of their superiors, not their peers.²⁰ There is no right that the jury be drawn from a representative cross-section of the community.²¹ The Fifth Amendment guarantees the right to

¹¹ *Id.* at 238.

¹² Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 40 (1997).

¹³ *United States v. Grostefon*, 12 M.J. 431, 435 (C.M.A. 1982).

¹⁴ The appearance of improper influence by a superior upon court-martial proceedings can form the successful basis for a defense appeal. *United States v. Boyce*, 76 M.J. 242, 253 (C.A.A.F. 2017). An off-hand remark by the President can provide military defendants a windfall at sentencing. See Erik Slavin, *Judge: Obama Sex Assault Comments ‘Unlawful Command Influence,’* STARS & STRIPES (June 14, 2013), <https://bit.ly/3hTdOZm>. Not only is an accused entitled to appeal a capital case, they must appeal. 10 U.S.C. § 861(c) (2018). Military defendants were also entitled to lawyers and *Miranda*-esque warnings long before civilians were. Sam J. Ervin, Jr., *The Military Justice Act of 1968*, 5 WAKE FOREST INTRAMURAL L. REV. 223, 223–24 (1969).

¹⁵ S.A. Lamb, *The Court-Martial Panel Member Selection Process 2* (Apr. 1992) (unpublished thesis, The Judge Advocate General’s School, U.S. Army) (emphasis in original), <https://bit.ly/3jWiMGR>.

¹⁶ *United States v. Kirkland*, 53 M.J. 22, 24 (C.A.A.F. 2000). Note that in this context, saying servicemembers lack the right to an “impartial jury” is shorthand for saying that servicemembers are not entitled to all of the jury rights in the Sixth Amendment that civilians are. Servicemembers *do*, however, have a right to decision makers who are not biased. *Id.* Courts’ justification for cribbing military juries beyond this is rather curious though. The Fifth Amendment provides an explicit exception for the military. The Sixth Amendment, however, says that in “all” criminal prosecutions the accused shall have the right to an impartial jury. Presumably, if the founders meant to exclude servicemembers from jury rights, they would have added the same exception to the Sixth Amendment. Instead, the Supreme Court has said that the Framers “doubtless” meant to apply the Fifth Amendment’s military exception to the Sixth, despite the fact that the Framers did not. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866).

¹⁷ *United States v. Vazquez*, 72 M.J. 13, 20 (C.A.A.F. 2013) (calling the notion that all jurors must have heard the same evidence “directly contrary” to the Uniform Code of Military Justice).

¹⁸ *United States v. Sargent*, 47 M.J. 367, 368–69 (C.A.A.F. 1997) (citing *United States v. Colon*, 6 M.J. 73, 74 (C.M.A. 1978)).

¹⁹ For many years in the Army, even if there were multiple defendants in a consolidated case, the entire defense “side” had only one peremptory challenge. *United States v. Carter*, 25 M.J. 471, 474 (C.M.A. 1988). Navy defendants had no peremptory challenges until the Uniform Code of Military Justice. *Id.* Today, military defendants only get one peremptory strike. 10 U.S.C. § 841 (2018).

²⁰ 10 U.S.C. § 825 (2018).

²¹ *Carter*, 25 M.J. at 473.

a grand jury, but specifically exempts “cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.”²² More importantly, military accused are entitled to smaller juries with lower conviction thresholds. Whereas civilian criminal juries traditionally have twelve members who must be unanimous in conviction, military juries can be smaller and non-unanimous. For non-death penalty cases, the prosecution only needs to secure three-quarters of the jury to convict.²³ And jury sizes move on a sliding scale. Twelve jurors are required for capital cases, eight for a noncapital general court-martial, four for a special court-martial, and one decision maker for a summary court-martial.²⁴ For a noncapital general court-martial, it is acceptable for as few as six jurors to try the case.²⁵

Recently, the Supreme Court addressed jury unanimity requirements in *Ramos v. Louisiana*.²⁶ There, the Court held that the Sixth Amendment demands unanimous juries and that the right applies to the states. The decision invalidated hundreds of convictions in the two states that allowed non-unanimous jury verdicts: Oregon and Louisiana. Although the case did not address the military, military defense attorneys will likely seek to apply it.

Before *Ramos*, the Court in *Ballew v. Georgia*²⁷ and *Burch v. Louisiana*²⁸ drew red lines preventing states from going too far in shrinking juries or allowing non-unanimity in small juries. The decisions were based on hard data: numerous empirical studies showing that juries are better at fostering effective group deliberation, accurate fact-finding, consistency, and diversity among jurors.²⁹ These conclusions are well accepted among statisticians.³⁰ Empirical researchers who study juries think highly of them.³¹

But military courts have declined to adopt these precedents. No military court has offered an evidence-based defense of small, non-unanimous juries. Nor has one analytically attacked the studies supporting *Ballew* or *Burch*. Instead, they claim that because empirical research on juries is from the civilian world, it has no bearing on military courts.³² Yet, the jury expert whose work the Supreme Court cited favorably in *Ballew* and *Burch* said “the same principles [of group decision making] would apply to the military as to civilian decision makers,” and “in other areas of research, only negligible or no differences have been found

²² Article 32 of the Code does provide a “preliminary hearing” to determine if there is probable cause that a crime occurred, but this hearing is conducted by a judge-like official, not a jury. 10 U.S.C. § 832 (2018).

²³ 10 U.S.C. § 852 (2018).

²⁴ 10 U.S.C. § 816 (2018).

²⁵ 10 U.S.C. § 829(d) (2018).

²⁶ *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020).

²⁷ 435 U.S. 223 (1978).

²⁸ 441 U.S. 130 (1979).

²⁹ *Ballew*, 435 U.S. at 232–39.

³⁰ Saks, *supra* note 12, at 14.

³¹ Brian H. Bornstein & Timothy R. Robicheaux, *Crisis, What Crisis? Perception and Reality in Civil Justice*, in *CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL & LEGAL PERSPECTIVES* 1, 2 (Brian H. Bornstein et al. eds., 2008); RITA J. SIMON, *THE JURY: ITS ROLE IN AMERICAN SOCIETY* xiii (1980).

³² *United States v. Guilford*, 8 M.J. 598, 601 (1979) (“[D]ata indicating that jurors supposed to represent a cross-section of a local civilian community do not adequately perform their function under certain conditions cannot be taken to mean that the purpose and function of courts-martial are similarly impaired.”); *United States v. Wolff*, 5 M.J. 923, 925 (1978) (“[W]e are unwilling to adopt and apply the empirical data referred to in *Ballew*. That data was compiled in the civilian community from juries randomly selected to represent a cross-section of the civilian community. Courts-martial are not selected in that manner.”).

between civilian and military populations.”³³ Military courts have settled into a groove of quickly dismissing appeals based on diminished jury rights.³⁴ Civilian courts, too, have declared that civilian studies do not apply to the military without providing evidence in support.³⁵

Not every civilian jury procedure needs to be imported to the military. For example, by using higher-ranking officers to try a defendant the system avoids the risk that inferiors will be afraid to convict a guilty, yet imposing, superior. Tight limits on peremptory challenges help prevent them from being abused to exclude people of color from the jury.³⁶ The military justice system must also be concerned with not encumbering commanders or preventing them from enforcing discipline in their units.

Requiring juries to be larger and unanimous, however, would not undermine the goal of discipline. Larger juries would require the convening authority to detail slightly more court-martial members, and unanimity requirements might slightly raise the incidence of a deadlocked jury. It is hard to see how adding more members would hurt discipline, and when a jury deadlocks, it is impossible to know whether it is caused by a juror being obstinate or properly refusing to convict an innocent defendant.³⁷

This issue is worthy of a fresh look. Not only because of *Ramos* but because the intervening decades have produced troves of new evidence validating juries. As such, this Article makes the argument that military juries should be larger and require unanimous verdicts to convict.

It proceeds in five Parts. Part I examines the *Ramos* decision and how it might apply to the military. Although the opinion certainly aids the cause of jury reform, it does not necessarily require the military to change. In the past, courts have said servicemembers do not have the right to “an impartial jury” as guaranteed by the Sixth Amendment. *Ramos* gives military courts the opportunity to reassess.

Part II explains research showing the sterling quality of juries. Anecdotally, it is easy to think of juries as witless. But empirically, they hold up quite well. They decide cases based on the evidence presented, the demographics of jurors does not unduly influence the outcome, and their decision strategies are logical and predictable. Moreover, study after study has shown that larger, unanimous juries perform better. Larger juries deliberate longer, more thoroughly, and with less bias. Unanimous juries must grapple with pesky gadflies, rather than ignoring dissenting views. Any drawbacks are minuscule by comparison.

Part III explores how courts have been skeptical of evidence about juries. Military judges claim that empirical research conducted on civilians is irrelevant to the military but have never provided a citation. This resistance to scientific evidence is widely observed by courts on a variety of issues.

³³ Richard J. Anderson & Keith E. Hunsucker, *Is the Military Nonunanimous Finding of Guilty Still An Issue?*, DA Pamphlet 27-50-166, ARMY LAW, 57, 59 (Oct. 1986).

³⁴ *United States v. Edwards*, NMCM 93 00935, 1995 CCA LEXIS 412, at *7 (N-M Ct. Crim. App. Dec. 14, 1995); *United States v. Viola*, 26 M.J. 822, 830 (A.C.M.R. 1988); *United States v. Rojas*, 15 M.J. 902, 919 (N-M.C.M.R. 1983); *United States v. Seivers*, 9 M.J. 612, 615 (A.C.M.R. 1980); *United States v. Yoakum*, 8 M.J. 763, 768 (A.C.M.R. 1980).

³⁵ *E.g.*, *Sanford v. United States*, 567 F. Supp. 2d 114, 119–20 (D.D.C. 2008).

³⁶ *E.g.*, *Snyder v. Louisiana*, 552 U.S. 472 (2008).

³⁷ *Ramos v. Louisiana*, 140 S. Ct. 1390, 1401 (2020).

Part IV responds to the argument that civilian juror research is worthless in the military. First, the evidence is consistent that large, unanimous juries are better across an enormous number of test subjects and decision-making settings. Second, research on servicemembers shows that they behave much like civilians on a cognitive functioning level. Third, racial bias can affect everyone, not just people of ill-will. Fourth, history shows that the original justifications for small, non-unanimous juries no longer holds up. And fifth, the policy and legal arguments advanced to maintain the status quo do not outweigh the reasons to change.

Part V concludes with a call for the military justice system to embrace empirically validated jury reforms.

I. *RAMOS V. LOUISIANA* AND ITS APPLICATION TO THE MILITARY

A. *The Decision*

Defendant Evangelisto Ramos was sentenced to life without parole after his jury voted to convict 10 to 2.³⁸ In 48 states, Mr. Ramos would have walked out of court a free man. But because he was tried in Louisiana which, along with Oregon, allowed non-unanimous juries, he was guilty.³⁹ The Supreme Court overturned the conviction, thereby striking down Louisiana and Oregon's jury systems. Justice Neil Gorsuch wrote the majority opinion overturning the conviction, joined in various parts by Justices Stephen Breyer, Ruth Bader Ginsberg, Sonia Sotomayor, Clarence Thomas, and Brett Kavanaugh, and over a dissent by Justice Samuel Alito, joined by Chief Justice John Roberts and Justice Elena Kagan.

The majority began with the racist origins of non-unanimous juries. The nineteenth-century constitutional convention where Louisiana adopted non-unanimous juries was convened with the professed mission of "establish[ing] the supremacy of the white race."⁴⁰ The non-unanimous requirement was a covert means to discriminate against Black jurors, ensuring that the occasional token Black juror allowed on a jury would not be enough to derail a prosecution.⁴¹ Oregon's 1930 non-unanimity rule can also be traced to the Ku Klux Klan and an effort to dilute the racial, ethnic, and religious minority influence on juries.⁴² In their arguments, the states did not deny these facts.⁴³

By its text, the Sixth Amendment guarantees defendants an "impartial jury." Taken at face value, it does not mention an unanimity requirement. But the Court said the text and structure of the Constitution suggested that unanimity must be part of the right.⁴⁴ After all, juries have been unanimous since fourteenth century England, six founding states explicitly required jury unanimity, and the common law demanded the same.⁴⁵ Taken together, these historical antecedents impart meaning to James Madison's phrase "impartial jury."⁴⁶ What is more, nineteenth-century commentators, such as Nathan Dane and Joseph Story, also

³⁸ *Id.* at 1394.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 1395.

⁴⁵ *Id.* at 1395–96.

⁴⁶ *Id.* at 1396.

held this view, and the Supreme Court has commented on the jury’s unanimity requirement 13 times over the years.⁴⁷

Apodaca v. Oregon,⁴⁸ and its companion case *Johnson v. Louisiana*,⁴⁹ were the controlling precedents that *Ramos* had to overcome. In them, Justice Lewis Powell, resolved a 4–4 split by making jury unanimity mandatory for the federal government but optional for the states.⁵⁰ Addressing *Apodaca*’s “breezy” analysis that gave short shrift to unanimity requirements among the states, the *Ramos* majority noted unanimity can promote “more open-minded and more thorough deliberations.”⁵¹ Pushing back against the frequent anti-unanimity argument that it increases the rate of hung juries, the Court observed that a hung jury may well be “an example of a jury doing exactly what the [*Apodaca*] plurality said it should—deliberating carefully and safeguarding against overzealous prosecutions.”⁵² The Court ultimately overturned the defendant’s conviction as violative of the Sixth Amendment.⁵³

1. The Application of *Ramos v. Louisiana* to the Military

Ramos undoubtedly helps those seeking to reform the military’s jury system. The case directly struck down Oregon and Louisiana’s fractured jury system and it probably spells doom for Puerto Rico’s majority verdicts.⁵⁴ As it stands, a court-martial is now the only place in America where a criminal defendant can be convicted without consensus among the jury.

Ramos hinged on the meaning of “an impartial jury” in the Sixth Amendment.⁵⁵ But the Court of Appeals for the Armed Forces has said that servicemembers do not enjoy the right to “an impartial jury.”⁵⁶ This is the consequence of servicemembers occupying a rather odd position in our justice system. The military’s high court first stated that the Bill of Rights applies to courts-martial in 1960;⁵⁷ the Supreme Court never has. There remains “substantial scholarly debate on applicability of the Bill of Rights to the American servicemember.”⁵⁸

Military courts often look to federal civilian courts, including United States Supreme Court cases dealing with civilians, in defining military rights.⁵⁹ This includes analyzing other rights contained within the Sixth Amendment with

⁴⁷ *Id.* at 1396–97.

⁴⁸ 406 U.S. 404 (1972).

⁴⁹ 406 U.S. 356 (1972).

⁵⁰ *Ramos*, 140 S. Ct. at 1397–98.

⁵¹ *Id.* at 1401.

⁵² *Id.*

⁵³ *Id.* at 1408.

⁵⁴ P.R. CONST., art. II, § 11.

⁵⁵ *Ramos*, 140 S. Ct. at 1395.

⁵⁶ *United States v. Kirkland*, 53 M.J. 22, 24 (C.A.A.F. 2000). As used here, “impartial jury” means all of the jury rights embedded in the Sixth Amendment, not a jury comprised of fair-minded individuals.

⁵⁷ *United States v. Jacoby*, 29 C.M.R. 244, 246–47 (C.M.A. 1960). (“While the dissenting Judge apparently disagrees . . . it is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces.”).

⁵⁸ *United States v. Graf*, 35 M.J. 450, 460 (C.M.A. 1992), cert. denied, 510 U.S. 1085 (1994); Frederic I. Lederer & Frederic L. Borch, *Does The Fourth Amendment Apply to the Armed Forces?*, 3 WM. & MARY BILL OF RTS. J. 219 (1994).

⁵⁹ *E.g.*, *United States v. Rodriguez*, 60 M.J. 239, 247–49 (C.A.A.F. 2004) (Fourth Amendment); *United States v. Kemp*, 32 C.M.R. 89, 98–99 (1962) (Fifth Amendment); *United States v. Webster*, 65 M.J. 936, 946 (A. Ct. Crim. App. 2008) (First Amendment); *United States v. Smith*, 56 M.J. 711, 716 (A.F. Ct. Crim. App. 2001) (Second Amendment).

regards to servicemembers.⁶⁰ Jury rights are virtually the only ones not available to servicemembers.

So, while *Ramos* may not require military courts to change course, it gives them a good opportunity to do so. Past cases have relied, at least in part, on the now-overturned *Apodaca* and its companion case to justify the military's jury system.⁶¹ Given that *Apodaca* is no longer good law, military courts may have a clear opportunity rethink the conclusion that fractured juries are acceptable. *Apodaca* was not the only reason military courts have declined to extend unanimous jury rights to servicemembers, but it has played a part in military courts' reasoning.⁶²

If the military moves away from fractured juries, it would be in good company. On the eve of the *Ramos* decision, Oregon was the only state that countenanced fractured juries,⁶³ as Louisianans amended their own constitution to get rid of fractured juries in 2018, before the decision was announced.⁶⁴ Even while the Oregon law was still in effect, there was "widespread agreement among defense lawyers and prosecutors in Oregon that the law [was] deeply flawed, and may have sent innocent people to prison."⁶⁵ It also meant that minority defendants rarely had a true jury of their peers.⁶⁶ There is no evidence that the military adopted its jury system based on racial animus, but the harm the fractured jury system has caused to defendants of color elsewhere should give us pause.

II. JURY RESEARCH

A. *Juries Are a Highly Reliable Form of Adjudication*

Juries offer many benefits—both for the individual case and society at large. They impart republican values upon jurors by allowing them to see the legal system up close.⁶⁷ In every trial that a jury sits, it is a trial "of and by the people, and not just for them."⁶⁸ The effect is so great that deliberating on a criminal jury causes infrequent voters to vote more often—an effect that lasts for years after the case is gaveled out, and is more powerful than face-to-face get-out-the-vote drives.⁶⁹ Jury service was also associated with increased attention to news media and increased conversations with neighbors about community issues

⁶⁰ *United States v. Danylo*, 73 M.J. 183, 187 (C.A.A.F. 2014) (right to speedy trial); *United States v. Squire*, 72 M.J. 285, 286 (C.A.A.F. 2013) (Confrontation Clause); *United States v. Murphy*, 50 M.J. 4, 8 (C.A.A.F. 1998) (ineffective assistance of counsel); *United States v. Reynolds*, 25 C.M.R. 761 (A.F.B.R. 1957) (right to counsel).

⁶¹ *United States v. Murray*, 48 C.M.R. 331, 333 (N-M.C.M.R. 1973); *United States v. McCarthy*, 2 M.J. 26, 30 (C.M.A. 1976); *United States v. Simoy*, 46 M.J. 592, 626 (A.F. Ct. Crim. App. 1996); *United States v. Philidor*, No. ACM 33644, 2001 CCA LEXIS 251, at *7 (A.F. Ct. Crim. App. Sep. 11, 2001).

⁶² *See, e.g.*, *United States v. Philidor*, No. ACM 33644, 2001 CCA LEXIS 251, at *7 (A.F. Ct. Crim. App. Sep. 11, 2001); *United States v. Simoy*, 46 M.J. 592, 626 (A.F. Ct. Crim. App. 1996); *United States v. McCarthy*, No. 30,560. CM 432875., 1976 CMA LEXIS 6931, at *6 n.3 (C.M.A. Sep. 24, 1976).

⁶³ Timothy Williams, *In One State, a Holdout Juror Can't Block a Conviction. That May Not Last.*, N.Y. TIMES (Feb. 23, 2020), <https://nyti.ms/3gmz2hY>.

⁶⁴ *See* LA. CONST. art. I, § 17.

⁶⁵ Williams, *supra* note 63.

⁶⁶ *Id.*

⁶⁷ I ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 448 (James T. Schleifer trans., 2012).

⁶⁸ NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 104 (1937).

⁶⁹ JOHN GASTIL ET AL., *THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION* 9–10 (2010).

for months after the trial.⁷⁰ Trust in the justice system is also improved when people serve on juries.⁷¹

Research tells us juries do a remarkable job ferreting out the truth at trial. A Harvard researcher analyzed 11,000 insurance claims and concluded that jury awards for pain and suffering were neither arbitrary nor capricious.⁷² Research supervised by a Nobel laureate found the facts of a case were the biggest factor for juries in deciding cases, and emotion played little role.⁷³ A jury's approach to damage calculation tends to be "rational and evidence-based, taking into account relevant evidence such as the severity of the plaintiff's injury (for compensation) and the reprehensibility of the defendant's conduct (for punitive damages)."⁷⁴ Studies of jury deliberations show that juries spend more time talking about the evidence, particularly the plaintiff's injuries, than anything else.⁷⁵ This pattern is observed in mock jury studies, post-trial interviews, and analysis of actual jury deliberations.⁷⁶

Juries handle complex cases as well as any other case and they do not get thoughtlessly swept up by expert opinions.⁷⁷ They obey a judge's instructions to consider liability first and, then, independently assess damages.⁷⁸ Jurors are more skeptical of hearsay evidence than eyewitness testimony,⁷⁹ which aligns with the legal system's disfavor of the former.⁸⁰ Punitive damages are meted out judiciously and proportionately to compensatory damages—contrary to the claims of anti-jury alarmists.⁸¹

Little evidence exists that jurors' preexisting attitudes and beliefs have an important impact on their decisions as these things only explain a small amount of the disagreement between jurors.⁸² Race, gender, education, and psychological profiles are all poor predictors of how a jury will vote, supporting the conclusion that jurors vote based on facts, not primal prejudice.⁸³ The effects of evidence and arguments play a considerably bigger role in decision making, and the clearer

⁷⁰ *Id.* at 10.

⁷¹ *Id.*

⁷² Stan V. Smith, *Why Juries Can Be Trusted*, VOIR DIRE, Summer 1998, at 19, 21.

⁷³ *Id.* at 20.

⁷⁴ BRIAN H. BORNSTEIN & EDIE GREENE, THE JURY UNDER FIRE: MYTH CONTROVERSY, AND REFORM 15 (2017).

⁷⁵ *Id.* at 191.

⁷⁶ *Id.*

⁷⁷ Neil Vidmar, *Juries, Judges, and Civil Justice*, in THE JURY AS FACT FINDER AND COMMUNITY PRESENCE IN CIVIL JUSTICE: REPORT OF THE 2001 FORUM FOR STATE APPELLATE COURT JUDGES, ROSCOE POUND INST. 8, 10 (2001).

⁷⁸ Smith, *supra* note 72, at 20.

⁷⁹ Margaret Bull Kovera et al., *Jurors' Perceptions of Eyewitness and Hearsay Evidence*, 76 MINN. L. REV. 703, 703 (1992). It should be noted that eyewitness testimony is not always accurate, even if it is compelling. See generally Dana Walsh, *The Dangers of Eyewitness Identification: A Call for Greater State Involvement to Ensure Fundamental Fairness*, 54 B.C. L. REV. 1415 (2013); Frederick Emerson Chemay, *Unreliable Eyewitness Evidence: The Expert Psychologist and the Defense in Criminal Cases*, 45 LA. L. REV. 721 (1985); William David Gross, *The Unfortunate Faith: A Solution to the Unwarranted Reliance Upon Eyewitness Testimony*, 5 TEX. WESLEYAN L. REV. 307 (1999).

⁸⁰ E.g., Fed. R. Evid. 802.

⁸¹ Theodore Eisenberg et al., *The Relation between Punitive and Compensatory Awards: Combining Extreme Data with the Mass of Awards*, in CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL & LEGAL PERSPECTIVES 106, 115 (Brian H. Bornstein et al. eds., 2008).

⁸² Saks, *supra* note 12, at 10 (citing four studies).

⁸³ See JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY XI, 173 (2000); John Guinther, *The Jury in America*, in THE AMERICAN CIVIL JURY: THE 1986 CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY, ROSCOE POUND FOUND. 52 (1987).

the story told by the evidence, the less individual differences between jurors matter, to the point of vanishing.⁸⁴

Though juries are commonly mocked, their superiority in decision making is logical. Consider how juries are structured. Unlike most decision makers, jurors are screened for impartiality by two opposing sides and a judge.⁸⁵ They are forced to sit through a presentation of *all* of the evidence, rather than being free to only consider the evidence they initially agree with.⁸⁶ The evidence is delivered by professional attorneys whose job is to provide a clear narrative. Evidence is subjected to cross-examination to point out weaknesses.⁸⁷ The courtroom is open to verify that the proceedings are fair but deliberations are closed to ensure jurors speak their mind.⁸⁸ And the process is governed by a sweeping evidentiary code that ensures jurors are not given irrelevant or prejudicial information.⁸⁹ That is a far better system than how most decisions are made in life. It may be a better system than how *any other* prominent public or private body makes decisions.⁹⁰

This is not to say juries are perfect, of course. Juries frequently struggle to understand pattern jury instructions.⁹¹ Better educated jurors may be *less* likely to understand the instructions, according to one study.⁹² Such widespread confusion, even among educated jurors, strongly suggests the fault lies with the judges and lawyers who wrote the instructions, not the jurors who must apply them. Pre-trial publicity can also bias jurors against a defendant, and curative instructions did not help.⁹³ That means, at least on some occasions, jurors may have been considering information they learned outside of the courtroom. But experts still think juries work well on the whole,⁹⁴ and judges have their own share of problems.⁹⁵

B. Unanimous, Large Juries Are Superior to Other Forms of Adjudication

Going back eons, the traditional criminal jury had twelve members. When the Greek god Ares was tried for the murder of Halirrhothius—son of Poseidon—twelve gods sat in judgment.⁹⁶ In the mortal realm, Orestes was given

⁸⁴ Saks, *supra* note 12, at 10 (citing four studies).

⁸⁵ *E.g.*, Fed. R. Crim. P. 24(a).

⁸⁶ This is very different than how human beings ordinarily tackle a problem. The natural course is to begin searching for information to support a theory, and once they feel satisfied, stop looking for more. Paul Bennett Marrow, *Behavioral Decision Theory Can Offer New Dimension to Legal Analysis of Motivations*, 74 N.Y. St. B.J. 46, 47 (2002). This also means that the consideration of alternatives will be abandoned. *Id.*

⁸⁷ *E.g.*, Mil. R. Evid. 611.

⁸⁸ *E.g.*, A.B.A. Standards Relating to Trial by Jury, Part V.

⁸⁹ *E.g.*, Mil. R. Evid.

⁹⁰ For example, although Congress has voluminous rules of *debate*, nothing actually forces members to consider both sides of an issue or have frank conversations with the other party, and members are not excluded from debate if they have prejudged an issue. Facebook's community standards that govern its 2.2 billion users—a quarter of the globe—are made and revised in secret, so we have no idea what information they consider, who is making the decision, and what the rules of the process are. Simon van Zuylen-Wood, "*Men Are Scum*": Inside Facebook's War on Hate Speech, VANITY FAIR (Feb. 26, 2019), <https://bit.ly/3gl0MDN>.

⁹¹ Guinther, *supra* note 83, at 51.

⁹² *Id.*

⁹³ Tarika Daftary-Kapur et al., *Are Lab Studies on PTP Generalizable?: An Examination of PTP Effects Using a Shadow Jury Paradigm*, JURY EXPERT (May 7, 2014), <https://bit.ly/3hZLLYw>.

⁹⁴ *E.g.*, authorities cited *supra* note 31.

⁹⁵ *E.g.*, Michael Berens & John Shiffman, *Special Report: Thousands of U.S. Judges Who Broke Laws, Oaths Remained on the Bench*, REUTERS (June 30, 2020), <https://reut.rs/31ajrM7>.

⁹⁶ LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 1 n.* (2d ed., 1988).

a jury of twelve citizens of Athens after he was accused of killing his mother Clytemnestra 3,000 years ago.⁹⁷ William the Conqueror brought the basic contours of the jury to England in 1066,⁹⁸ and a century later Henry II decreed that twelve men from each hundred in each county would be summoned for jury service.⁹⁹ Over time, a few stable traditions calcified, including unanimity requirements, a fairly random selection of jurors, and that juries would have twelve members.¹⁰⁰ These traditions have held fast the world over,¹⁰¹ and among the vast majority of the states, at least for felonies.¹⁰²

Though the exact origin of the twelve-person jury in Western jurisprudence is unknown, it is believed to have been inspired by the special role for the number in the Bible: twelve apostles, twelve Tribes of Israel, the twelve stones from the Book of Joshua.¹⁰³ An ancient king of Wales, Morgan of Glamorgan, said “as Christ and his twelve apostles were finally to judge the world, so human tribunals should be composed of the king and twelve wise men!”¹⁰⁴

The unanimity requirement is also divinely inspired. The original requirement of unanimity partially flowed from the idea that juries replaced legal systems, such as trial by combat or ordeal.¹⁰⁵ God was thought to ordain the outcome of these contests, and God’s will could not be divided.

As providence would have it, both of these features improve outcomes. Unanimous verdicts mean that dissenters must be consulted rather than steamrolled.¹⁰⁶ And twelve is an ideal number for a jury. Studies have found that juries of twelve perform better than six.¹⁰⁷ Six jurors, in turn, are better than a single judge.¹⁰⁸ Larger groups were more contentious, debated more vigorously, and, perhaps as a result, recalled more evidence, were more consistent, and more predictable.¹⁰⁹

A later meta-analysis of jury size reconfirmed this conclusion. It looked at seventeen studies on jury size which included 2,061 juries comprising 15,000 individuals. It found that larger juries are more likely to contain minorities, deliberate longer, and recall testimony more accurately.¹¹⁰ The extra time deliberating was spent sharing thoughts, proposing ideas, and challenging each

⁹⁷ *Id.* at 1.

⁹⁸ Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 392 (1996).

⁹⁹ Leonard W. Levy, *The Medieval Origins of Trial by Jury*, in THE RIGHT TO A TRIAL BY JURY 23, 23 (Robert Winters ed. 2005).

¹⁰⁰ Douglas G. Smith, *supra* note 98, at 396. Twelve-member juries became the norm throughout Continental Europe and Scandinavia, WILLIAM FORSYTH, HISTORY OF THE TRIAL BY JURY ch. 1, § 2; ch. 2 (Morgan ed. 1875).

¹⁰¹ Neil Vidmar, *A Historical and Comparative Perspective On the Common Law Jury*, in WORLD JURY SYSTEMS 26, 30 (Neil Vidmar ed. 2000) (noting that Australia, Canada, New Zealand, Ireland, and Russia all use twelve-person juries, and unanimity is the norm).

¹⁰² See generally Nancy Jean King, *The American Criminal Jury*, in WORLD JURY SYSTEMS 99 (Neil Vidmar ed. 2000).

¹⁰³ 1 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND *155a.

¹⁰⁴ SUSAN FORD WILTSHIRE, GREECE, ROME, AND THE BILL OF RIGHTS 162 (1992).

¹⁰⁵ Jack Pope, *The Jury*, 39 TEX. L. REV. 426, 437 (1961).

¹⁰⁶ Saks, *supra* note 12, at 41.

¹⁰⁷ MICHAEL J. SAKS, JURY VERDICTS: THE ROLE OF GROUP SIZE AND SOCIAL DECISION RULE (1977); M.J. Saks & M.W. Marti, A Meta-Analysis of the Effects of Jury Size, 21 L. & HUMAN BEHAVIOR, 451-467 (1997).

¹⁰⁸ Cf. RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 69 (2003).

¹⁰⁹ *Are Six Heads as Good as Twelve?*, AM. PSYCH. ASS’N (May 28, 2004) <https://bit.ly/2XiPTL3>.

¹¹⁰ Michael J. Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, in THE JURY SYSTEM: CONTEMPORARY SCHOLARSHIP 401 (Valerie P. Hans ed. 2006).

other's reasoning.¹¹¹ The settings for the studies were diverse: they included worker's comp panels, disciplinary boards, courtrooms and structured lab environments, civil and criminal cases, students, children, and real jurors.¹¹² The authors of the meta-analysis also noted that, "For many kinds of decision tasks, the larger the decision-making group, the better the decision will be."¹¹³

Large juries are also better at avoiding racial bias. This is likely because larger juries are more diverse. Halving the size of a jury also halves the odds for minority representation on the panel.¹¹⁴ This, in turn, sabotages the ability of juries to adjudicate fairly. Individuals recall more information about "in-group" members—those who share socially defining traits—than "out-group" members.¹¹⁵ These differences in memories tend to support stereotype-based biases.¹¹⁶ So jurors belonging to different groups will recall information differently. The upshot is that a diverse jury, which is more likely when it is larger, can pool their collective memory and prevent stereotyping.¹¹⁷ One does not even need studies to prove the superiority of large juries. Logic alone suffices. The Condorcet Jury Theorem shows how.¹¹⁸ Suppose a group of people are trying to answer a yes or no factual question—such as whether the accused is guilty of a crime. The theory holds that the larger the group, the higher the odds that a majority will produce the correct answer. The gameshow *Who Wants to Be a Millionaire* is a good example. Phoning a friend for help on the show will give the correct answer 65 percent of the time, asking the audience will yield the correct answer 91 percent of the time.¹¹⁹ It is the wisdom of crowds in action.

An important caveat: the Theorem requires that each individual in the group has at least a 50 percent chance of being right—better than a coin flip. If group members have no idea what they are talking about, a large group will only produce white noise. So, is it safe to assume jurors will be right 50 percent of the time? Absolutely. A baked-in assumption about the justice system is that juries are intelligent.

Countless military cases have held that jurors are presumed to follow complex, ungainly instructions.¹²⁰ The Supreme Court too has admitted, "A crucial assumption underlying [the] system is that juries will follow the instructions given them by the trial judge."¹²¹ What is more, military jurors are not drawn at random but are handpicked for "age, education, training, experience, length of service, and judicial temperament."¹²² So one would expect them to do better than a coin flip.¹²³

¹¹¹ *Id.* at 408.

¹¹² *Id.* at 403.

¹¹³ *Id.* at 408.

¹¹⁴ *Id.* at 407.

¹¹⁵ Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1291–92 (2000).

¹¹⁶ *Id.* at 1292.

¹¹⁷ *Id.*

¹¹⁸ See, e.g., CASS R. SUNSTEIN, *A CONSTITUTION OF MANY MINDS: WHY THE FOUNDING DOCUMENT DOESN'T MEAN WHAT IT MEANT BEFORE* 9 (2009).

¹¹⁹ Edward Skidelsky, *Always Ask the Audience*, TELEGRAPH (June 28, 2004), <https://bit.ly/33iotsw>.

¹²⁰ E.g., *United States v. Nash*, 71 M.J. 83, 89 (C.A.A.F. 2012); *United States v. Washington*, 57 M.J. 394, 403 (C.A.A.F. 2002); *United States v. Holt*, 33 M.J. 400, 408 (C.A.A.F. 1991).

¹²¹ *Parker v. Randolph*, 442 U.S. 62, 73 (1979).

¹²² 10 U.S.C. § 825(e)(2).

¹²³ Additionally, if one believed that the average military juror was *less* reliable than a coin flip, the solution would be to scrap the jury system altogether, not maintain small, fractured juries.

It would be disingenuous to hold that jurors invariably follow their instructions on one hand, but assume jurors are ignorant for the purposes of analyzing jury decision making. Given that we can safely assume each military juror is better than a coin flip, the Condorcet Jury Theorem demonstrates that increasing the size of the jury will improve its accuracy.

Any downsides of larger or unanimous juries are negligible. Doubling the size of a jury from six to twelve members increases the length of deliberation by a mere seventeen minutes.¹²⁴ In a 1972 case holding that juries did not need to be unanimous, the Supreme Court cited studies showing juries will hang 5.6 percent of the time when they must be unanimous, and 3.0 percent of the time when not.¹²⁵ And the Court's figure may well be excessive, as more recent research tells us that real juries hang less often.¹²⁶ One study estimated that requiring unanimous verdicts in the military would only add 10 to 15 mistrials out of 3,000 courts-martial¹²⁷—which means only 0.3 percent of trials would be affected.

Back when the military was court-martialing hundreds of thousands of people per year,¹²⁸ even tiny changes could have huge consequences. But that is no longer the system we have. In September 2018, the entire Marine Corps had eleven courts-martial.¹²⁹ The entire Navy had fourteen.¹³⁰ In a noncombat setting with so few cases, the chief concern should be accuracy, not haste.

The structure of modern military justice makes it unlikely that a marginal increase in acquittals or mistrials would erode discipline. When a servicemember commits a minor crime, the commander has swifter administrative measures to address misconduct.¹³¹ When a servicemember is suspected of a serious crime that justifies a court-martial, the practice for many years has been to confine or separate the offender from their unit.¹³² By the time the court-martial issues its verdict, the lapse in time is so great it is unlikely to have any appreciable impact on deterrence.¹³³

On top of that, there is every reason to believe that jury reforms would have little impact on discipline. A survey of convening authorities found that four-fifths believed that moving to random selection for jurors—instead of having

¹²⁴ Saks & Weighner Marti, *supra* note 110, at 407.

¹²⁵ Johnson v. Louisiana, 406 U.S. 356, 374 n.12 (1972). That means one additional hung jury every twenty-five cases.

¹²⁶ Saks & Weighner Marti, *supra* note 110, at 411 (stating real juries only hang 1.1 percent of the time); ABRAMSON, *supra* note 83, at xvi (stating a 2.6 percent hung jury rate for federal courts); Valerie P. Hans et al., *The Hung Jury: The American Jury's Insights and Contemporary Understanding*, in THE JURY SYSTEM: CONTEMPORARY SCHOLARSHIP 42 (Valerie P. Hans ed. 2006) (similar).

¹²⁷ Anderson & Hunsucker, *supra* note 33, at 60.

¹²⁸ Randy James, *A Brief History of the Court-Martial*, TIME (Nov. 18, 2009) <https://bit.ly/2PFEyal>.

¹²⁹ STAFF JUDGE ADVOCATE TO THE COMMANDANT, MARINE CORPS GENERAL AND SPECIAL COURT-MARTIAL DISPOSITIONS: SEPTEMBER 2018 (2018), <https://bit.ly/2DsP5My>.

¹³⁰ OFFICE OF THE NAVY CHIEF OF INFORMATION, SPECIAL AND GENERAL COURTS-MARTIAL RESULTS FOR SEPTEMBER 2018 (2019), <https://bit.ly/3k2D0i9>.

¹³¹ *E.g.*, 10 U.S.C. § 185; DEP'T OF THE ARMY REGULATION 600-37 UNFAVORABLE INFORMATION (setting the process for placing official reprimands in a soldier's records).

¹³² Murl A. Larkin, *Should the Military Less-than-Unanimous Verdict of Guilt Be Retained?*, 22 HASTINGS L.J. 237, 255 (1971) (“In today's highly complex military society, however, when a commander finds it necessary to resort to a general or special court-martial, he will often separate the offender from his fellow servicemen by confinement.”).

¹³³ *Id.* (noting that by the time a sentence is imposed, “the mobility of personnel and the lapse of time often preclude the order from having any appreciable ‘disciplinary’ value”).

the convening authority select—would not affect discipline.¹³⁴ Juror selection is arguably a more jarring change to how courts-martial are structured than size or decision rule, yet commanders themselves were fine with it.

III. COURTS UNDERPLAYING EVIDENCE ABOUT JURIES

Courts once thought highly of twelve-member panels. In 1881, the Supreme Court wrote, “It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.”¹³⁵ A few years earlier, the Court had stated that a criminal defendant could not be tried by a jury of less than twelve.¹³⁶ A few years later, the Court invalidated a Utah territorial conviction because it was made by an eight-person jury.¹³⁷

For years, the Court repeatedly held that the Sixth Amendment guaranteed not only a right to a jury, but to a jury of twelve.¹³⁸ In 1968, a Louisiana law was struck down in *Duncan v. Louisiana* that permitted judges alone to try the offense of battery carrying a maximum sentence of two years.¹³⁹ There were plenty of other instances of courts standing up for juries.¹⁴⁰ In the 1950s, the Sixth Circuit was thunderous in defense of unanimous verdicts. It said that the unanimity requirement was “inextricably interwoven with the required measure of proof,” and that anything less would “destroy this test of proof.”¹⁴¹ As a result, a defendant lacked the power to waive the right to a unanimous verdict.¹⁴²

But the love affair with juries did not last. The Eleventh Circuit decided that, upon second thought, defendants could waive the right to a unanimous verdict.¹⁴³ Only two years after *Duncan v. Louisiana*, the Supreme Court was confronted with whether a criminal defendant could be tried by only six jurors in *Williams v. Florida*.¹⁴⁴ It did an about-face. Little empirical evidence at the time indicated that the size made a difference, and the Court doubted whether size had any impact on reliability.¹⁴⁵ After reviewing the purposes of trial by jury, the Court concluded, “we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when

¹³⁴ COMPTROLLER GEN. OF THE U.S., FPCD-76-48, MILITARY JURY SYSTEM NEEDS SAFEGUARDS FOUND IN CIVILIAN FEDERAL COURTS 37 (1977).

¹³⁵ R.R. Co. v. Stout, 84 U.S. 657, 664 (1873).

¹³⁶ Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445, 451 (1874) (citing *Cancemi v. The People*, 18 N.Y. 128 (N.Y. 1858)).

¹³⁷ *Thompson v. Utah*, 170 U.S. 343, 349 (1898).

¹³⁸ *Patton v. United States*, 281 U.S. 276, 289 (1930); *Rasmussen v. United States*, 197 U.S. 516, 528 (1905) (voiding an Alaska statute that permitted six-person juries as “repugnant to the Constitution”); *Maxwell v. Dow*, 176 U.S. 581, 586 (1900) (“That a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment to the Federal Constitution, there can be no doubt.”); *Capital Traction Co. v. Hof*, 174 U.S. 1, 13–14 (1899) (matter-of-factly stating that the right of “trial by jury” means a jury of twelve).

¹³⁹ *Duncan v. Louisiana*, 391 U.S. 145 (1968).

¹⁴⁰ *Capital Traction Co. v. Hof*, 174 U.S. 1, 13 (1899); *Am. Pub. Co. v. Fisher*, 166 U.S. 464, 468 (1897); *Springville v. Thomas*, 166 U.S. 707, 708 (1897); *Clark v. Container Corp. of Am., Inc.*, 589 So. 2d 184, 188 (Ala. 1991); *George v. People*, 167 Ill. 447, 457, 47 N.E. 741, 744 (1897); *Brown v. State*, 42 A. 811, 814 (N.J. 1899); *McRae v. Grand Rapids, L. & D. R. Co.*, 93 Mich. 399, 406 (1892); *Power v. Williams*, 205 N.W. 9, 12 (N.D. 1925).

¹⁴¹ *Hibdon v. United States*, 204 F.2d 834, 838 (6th Cir. 1953).

¹⁴² *Id.*

¹⁴³ *Sanchez v. United States*, 782 F.2d 928, 934 (11th Cir. 1986).

¹⁴⁴ *Williams v. Florida*, 399 U.S. 78, 100 (1970).

¹⁴⁵ *Id.* at 100–01.

it numbers 12.”¹⁴⁶ The size of twelve was dismissed as nothing more than a “historical accident” and not necessary to due process.¹⁴⁷ The Court soon permitted sub-twelve juries for civil cases as well.¹⁴⁸ And so a century of precedent was erased.

Williams, however, was predicated on faulty assumptions about group decision making. In addition to incorrectly stating that size did not matter, it also postulated that there was no difference between a vote of 8 to 4 and a vote of 4 to 2 because the proportion is the same.¹⁴⁹ This claim was “contradicted by all of the studies on which the Court relied for support of its proposition.”¹⁵⁰ In truth, there is a great difference between a vote of 10 to 2 and a vote of 5 to 1. Indeed, research tells us a dissenter is far more likely to stand their ground if they have but a single ally, even if the proportion of the vote is identical.¹⁵¹ The very scholars that the Court relied upon in *Williams* said the Court had gotten their research wrong.¹⁵²

Newly empowered to shrink juries, states were all too happy to sell their constitutional birthright for a mess of pottage. They hacked jury sizes down to the bone,¹⁵³ for every juror cut meant a few more precious dollars saved.¹⁵⁴ Many more ditched the traditional unanimity requirement.¹⁵⁵ Georgia took it the farthest, allowing defendants to be tried by a jury of five.¹⁵⁶

It was a bridge too far. Armed with richer empirical data to draw upon, the Court first drew a line in the sand in *Ballew v. Georgia*. The evidence showed that the smaller juries were less likely to foster deliberation, overcome biases, and self-criticize, all of which led to inaccurate verdicts.¹⁵⁷ Smaller juries also disproportionately hurt the defense and reduced the odds of minority representation.¹⁵⁸ Based on the new evidence, the *Ballew* Court held that five was too small but allowed six-person jurors to continue.¹⁵⁹ Separately, the Court struck down a Louisiana law that allowed for non-unanimous verdicts among six-person juries in *Burch v. Louisiana*. Relying on similar data, the *Burch* Court required six-person juries to be unanimous.¹⁶⁰

Naturally, military defense attorneys read these opinions and hastily challenged the emaciated juries permitted by the Uniform Code of Military Justice. It did not end well for them.

¹⁴⁶ *Id.* at 100.

¹⁴⁷ *Id.* at 102.

¹⁴⁸ *Colgrove v. Battin*, 413 U.S. 149, 149 (1973).

¹⁴⁹ *Williams*, 399 U.S. at 101 n.49.

¹⁵⁰ Saks & Weighner Marti, *supra* note 110, at 409.

¹⁵¹ *Id.*

¹⁵² Aliza B. Kaplan & Amy Saack, *Overturing Apodaca v. Oregon Should Be Easy: Nonunanimous Jury Verdicts in Criminal Cases Undermine the Credibility of Our Justice System*, 95 ORE. L. REV. 1, 11 (2016).

¹⁵³ JAMES P. LEVINE, JURIES AND POLITICS 29 (1992).

¹⁵⁴ *Burch v. Louisiana*, 441 U.S. 130, 139 (noting that the state justified weakening juries to save time and money). Cost savings are an ever-favorite argument of those seeking to limit popular participation in the justice system.

¹⁵⁵ LEVINE, *supra* note 153, at 29.

¹⁵⁶ *Ballew v. Georgia*, 435 U.S. 223, 224 (1978). Some states have, to this day, defended indispensable nature of a twelve-person jury. *See e.g.*, *Kakos v. Butler*, 63 N.E.3d 901, 911 (2016).

¹⁵⁷ *Ballew*, 435 U.S. at 232–34.

¹⁵⁸ *Id.* at 236–37.

¹⁵⁹ *Id.* at 239.

¹⁶⁰ *Burch*, 441 U.S. at 138.

The first case was *United States v. Wolff*.¹⁶¹ In it, the defendant argued that because courts-martial could be different sizes depending on how many members were struck, and smaller juries achieve less-accurate results, different defendants were getting different levels of justice.¹⁶² He relied on *Ballew* and the empirical evidence contained therein.¹⁶³ The court dismissed this out of hand, saying—without evidence in support—that those studies did not apply to the military because civilian juries are selected differently.¹⁶⁴ *Wolff* contrasted how civilian jurors are randomly selected from a cross-section of the community on the one hand, with how military jurors are handpicked based on who is “best qualified” on the other.¹⁶⁵ Notably absent was any explanation for why this would affect group decision-making in any way. After discounting the available empirical evidence to the contrary, it declared, “[t]here is no showing that a five-member court-martial does not render the same quality of justice as does a larger court.”¹⁶⁶

After *Wolff*, military courts tended to dismiss similar jury challenges quickly and with little analysis. *United States v. Guilford*¹⁶⁷ was the next case that gave the issue any extended discussion. In it, the defendant once again cited *Ballew* and *Burch*.¹⁶⁸ *Guilford*’s attempt to distinguish precedent was even less spirited than *Wolff*. There, the court claimed that the Supreme Court cases did not apply since the court-martial had seven members not six and reiterated that studies about civilians did not apply to the military.¹⁶⁹

From there on out, military courts routinely dismissed challenges to jury rules without analysis.¹⁷⁰ At the Supreme Court, Justice William Brennan asked to review non-unanimity requirements in the military in 1984, but it did not go anywhere.¹⁷¹ Vote counts were not recorded, but since four votes are required to hear a case, we can surmise it was fewer than four.¹⁷²

These rulings are odd in light of the Supreme Court’s own writings on military juries. In *United States ex rel. Toth v. Quarles*,¹⁷³ the Court said “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 serve as jurors. They bring a “variety of different experiences, feelings, intuitions and habits” and have “manfully stood up in defense of liberty.”¹⁷⁴

¹⁶¹ *United States v. Wolff*, 5 M.J. 923, 923 (N.C.M.R. 1978).

¹⁶² *Id.* at 924.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 925.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *United States v. Guilford*, M.J. 598, 598 (A.C.M.R. 1979).

¹⁶⁸ *Id.* at 601.

¹⁶⁹ *Id.*

¹⁷⁰ *United States v. Brown*, 13 M.J. 381 (C.A.A.F. 1982); *United States v. Spear*, No. ACM 38537, 2015 CCA LEXIS 310, at *8-9 (A.F. Ct. Crim. App. July 30, 2015); *United States v. Wilt*, No. NMCCA 201300274, 2015 CCA LEXIS 57, at *24-25 (N-M. Ct. Crim. App. Feb. 19, 2015); *United States v. Edwards*, NMCM 93 00935, 1995 CCA LEXIS 412, at *7 (N-M. Ct. Crim. App. Dec. 14, 1995); *United States v. Viola*, 26 M.J. 822, 830, (A.C.M.R. 1988); *United States v. Rojas*, 15 M.J. 902, 919, (N-M. 1983); *United States v. Seivers*, 9 M.J. 612, 615 (A.C.M.R. 1980); *United States v. Yoakum*, 8 M.J. 763, 768 (A.C.M.R. 1980).

¹⁷¹ Dwight H. Sullivan, *Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty*, 158 MIL. L. REV. 1, 21–22 (1998).

¹⁷² *Id.* at 22 n.101.

¹⁷³ *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 18 (1955).

¹⁷⁴ *Id.*

The status quo of allowing small, variable juries leads to strange results. If a conviction requires two-thirds, and the panel has five members, four must vote in favor of conviction for the government to prevail. Thus, the defense only needs to get two members to vote not guilty to win. But if the panel has six members, still only four votes are required to convict. So now, the defense must secure three votes for a finding of not guilty. Additionally, if a jury has seven members with a two-thirds rule, the government needs five votes to convict. If the defense peremptorily strikes one, the government only needs four to convict, as the struck jurors will not be replaced in military courts.¹⁷⁵ This forces defense attorneys to make a Hobson's choice between striking a potentially unfriendly juror and lowering the government's threshold to convict.

IV. ARGUMENTS AGAINST LARGER, UNANIMOUS JURIES ARE UNPERSUASIVE

The core of the argument against reforming juries is that empirical research is wholly inapplicable to the military because it was conducted on civilians.¹⁷⁶ In this view, servicemembers are almost a different species, psychologically speaking. While facially plausible, this argument does not hold up well under scrutiny.

For starters, as Army Captain Scott A. Hancock has pointed out,¹⁷⁷ the logic does not make sense on its own terms. If military jurors are truly superior to civilian jurors, as implied, why allow non-unanimity? If military jurors are as sublime as courts make them out to be, should not a single dissenter be enough to prevent a conviction? After all, if military jurors are more astute than civilians, a military juror's dissenting view should be entitled to just as much, if not more, weight.

As explained further below, evidence shows: (1) servicemembers behave much like anyone else on a psychological level, particularly when one considers that the military is a remarkably diverse organization, both in terms of who joins and roles performed, (2) cognitive biases have plagued the military as long as warfare has existed, (3) any expertise military jurors bring to the table does not prevent cognitive bias, (4) racial bias affects even those who are not mean-spirited, (5) the military has blurred the distinction between martial and civil over the decades, and (6) historical justifications for small, fractured juries no longer apply.

¹⁷⁵ *United States v. Kelly*, 76 M.J. 793, 796 (A. Ct. Crim. App. 2017). The reason struck jurors are not replaced is because in the military, peremptory strikes are not used to purge potential jurors; rather, strikes remove jurors who are already seated. See Gregory B. Coe, "Something Old, Something New, Something Borrowed, Something Blue": *Recent Developments in Pretrial and Trial Procedure*, 1998 ARMY LAW. 44, 70 (1998).

¹⁷⁶ *United States v. Wolff*, 5 M.J. 923, 925 (1978); *United States v. Guilford*, 8 M.J. 598, 601 (1979). This is in keeping with the general trend of courts undervaluing social scientific evidence. As one commentator wrote, "The reaction of courts to social science evidence is frequently an uneasy one." Richard O. Lempert, *Social Science in Court: On 'Eyewitness Experts' and Other Issues*, 10 L. & HUMAN BEHAVIOR 167, 167 (1986).

¹⁷⁷ Scott A. Hancock, *The Constitution and the Criminally Accused Soldier: Is the Door Opening or Closing?*, 1987 ARMY LAW. 28, 33 (1987).

A. *Research Does Not Show Servicemembers Are Psychologically Unique*

Professor Michael Saks, the jury expert from the Supreme Court cases of *Ballew* and *Burch*, opined that “the same principles [of group decision-making] would apply to the military as to civilian decision makers,” and “in other areas of research, only negligible or no differences have been found between civilian and military populations.”¹⁷⁸ When confronted with this reality, in a separate case, the Solicitor General of the United States brushed it aside without challenging its truth.¹⁷⁹

Opinion polling suggests that members of the military hold different views from the general public, but not radically so.¹⁸⁰ Studies looking at the effect of military service on political beliefs have said “gross comparisons between those serving and those not serving point toward modest effects at best” and “the simple distinction between service and nonservice was too crude a cutting tool and [it was] necessary to make finer distinction.”¹⁸¹

Research on the impact of military service on socioeconomic attainment has found positive, negative, and neutral associations with earnings and status depending on the veterans’ characteristics and era of service.¹⁸² In other words, there are no clear categorical rules of how servicemembers behave and service affects everyone differently.

The simplest explanation for all this is that the military is not monolithic. On the contrary, it is diverse. There are roughly 1.3 million active-duty servicemembers, and about 800,000 in the Reserves and National Guard.¹⁸³ The racial demographics of the military roughly mirror society at large,¹⁸⁴ and it is growing ever more diverse.¹⁸⁵ Though a long way from reaching gender parity, it is moving in that direction now that women are one-sixth of the force.¹⁸⁶ Compare that to the 1970s—which is when *Ballew* and *Burch* were decided—when only one-twentieth of servicemembers were women.¹⁸⁷

More than demographics, the breadth of what servicemembers actually do is immense. When we think of the military, we think of combat arms—branches like infantry, artillery, or jet pilots. But most soldiers perform combat support roles—like cooking, logistics, and so forth, even in a combat theater.¹⁸⁸ The Army alone has hundreds of professions, from interpreter to water treatment specialist to nutrition care specialist to counterintelligence agent.¹⁸⁹ All might

¹⁷⁸ Anderson & Hunsucker, *supra* note 33, at 59.

¹⁷⁹ *Id.*

¹⁸⁰ Leo Shane III, *Support for Trump is Fading Among Active-Duty Troops, New Poll Shows*, MIL. TIMES (Oct. 15, 2018), <https://bit.ly/3gluuZl>.

¹⁸¹ M. Kent Jennings & Gregory B. Markus, *The Effect of Military Service on Political Attitudes: A Panel Study*, 71 AM. POL. SCI. REV. 131, 146 (1977).

¹⁸² Alair MacLean, *The Privileges of Rank: The Peacetime Draft and Later-life Attainment*, 34 ARMED FORCES SOC. 682, 682 (2008).

¹⁸³ Kim Parker, Anthony Cilluffo & Renee Stepler, *6 Facts About the U.S. Military and Its Changing Demographics*, PEW RES. CEN. (Apr. 13, 2017), <https://pewrsr.ch/30koo5R>.

¹⁸⁴ *Id.*

¹⁸⁵ Amanda Barroso, *The Changing Profile of the U.S. Military: Smaller in Size, More Diverse, More Women in Leadership*, PEW RES. CENTER (Sept. 10, 2019), <https://pewrsr.ch/2DaFSJc>.

¹⁸⁶ George M. Reynolds & Amanda Shendruk, *Demographics of the U.S. Military*, COUNCIL ON FOREIGN RELATIONS (Apr. 24, 2018), <https://on.cfr.org/3gxsc8>.

¹⁸⁷ Barroso, *supra* note 185.

¹⁸⁸ JOHN J. McGRATH, THE OTHER END OF THE SPEAR: THE TOOTH-TO-TAIL RATIO (T3R), in MODERN MILITARY OPERATIONS 50 (2007).

¹⁸⁹ Rod Powers, *Complete List of Army Enlisted MOS: Army Military Occupational Specialties* (June 18, 2019), <https://bit.ly/3hR2yNk>.

have received similar training upon entry to the military, but the day-to-day job and life for a Green Beret is going to be very different from, say, a military air traffic controller.

There is even less reason to believe that *officers* are distinct psychological animals from all civilians. This is a particularly important question for purposes of military juries. Any officer is entitled to serve on a court-martial, but enlisted jurors can only serve if an enlisted defendant requests it, and even then, enlisted need comprise no more than one-third of the body.¹⁹⁰ The vast majority of them have either a college or advanced degree.¹⁹¹ This means that officers had four-plus years in a civilian institution (excepting the small share who attended service academies).¹⁹² Unlike enlisted servicemembers, officers are generally allowed to live off base, giving them a deeper connection to the civilian world.¹⁹³ They are permitted to live off-post because “their duties require a more independent lifestyle.”¹⁹⁴

In the romanticized version, the military may be purely martial in character. But this is not correct. By the time of the 1970s, half of enlisted servicemembers performed technical jobs (like mechanic) and another third performed service-related jobs (like food service).¹⁹⁵ And “[s]ociologists have noted the gradual convergence of military and civilian social structures due to technology and the bureaucratization of military functions.”¹⁹⁶ The old notion that the military is a separate society is no longer accurate. Today, “the military functions much like a large civilian corporation, with officers playing the role of managers and enlisted personnel playing the role of employees.”¹⁹⁷ Even the Court of Military Appeals has recognized this reality. Persons in the military “are neither puppets nor robots . . . they are human beings endowed with legal and personal rights.”¹⁹⁸

The above-cited research on jury performance involved studies that looked at tens-of-thousands of people in many different types of deliberative settings.¹⁹⁹ Nearly all of the studies reached the same conclusions: large, unanimous juries perform better. Such consistent evidence should not be brushed aside simply because it focused on civilians, given that no evidence exists military juries would not see the same sorts of improvements from larger, unanimous juries.

¹⁹⁰ 10 U.S.C. § 825.

¹⁹¹ Parker et al., *supra* note 183.

¹⁹² For example, West Point has an enrollment of about 4,000. *A Brief History of West Point*, U.S. MIL. ACADEMY (last visited Sept. 5, 2019) <https://bit.ly/2PFDVHq>. There are about 80,000 officers in the Army. Erin Duffin, *Total Military Personnel of the U.S. Army for Fiscal Years 2018 to 2020, by Rank*, STATISTA (Apr. 29, 2019), <https://bit.ly/3i21CG6>.

¹⁹³ Rod Powers, *Living On or Off Base For Single Military: The Barracks or Apartment Living?*, BALANCE CAREERS (July 18, 2019), <https://bit.ly/3185mid>.

¹⁹⁴ KEITH E. BONN, *ARMY OFFICER’S GUIDE 94* (50TH ED. 2005).

¹⁹⁵ Edward F. Sherman, *Military Justice Without Military Control*, 82 YALE L.J. 1398, 1402 (1973).

¹⁹⁶ *Id.*

¹⁹⁷ Karen A. Ruzic, *Military Justice and the Supreme Court’s Outdated Standard of Deference: Weiss v. United States*, 70 CHI.-KENT. L. REV. 265, 265 (1994). See also Elizabeth Lutes Hillman, *The “Good Soldier” Defense: Character Evidence and Military Rank at Courts-Martial*, 108 YALE L.J. 879, 893 (1999) (“The technologically advanced, professional standing armed forces are not so ‘separate’ a society as perhaps they once were.”).

¹⁹⁸ *United States v. Milldebrandt*, 25 C.M.R. 139, 143 (C.M.A. 1958).

¹⁹⁹ Saks & Weighner Marti, *supra* note 110, at 401.

B. *Evidence Suggests Servicemembers Are Susceptible to the Same Cognitive Biases as Everyone Else*

The history of warfare is rife with flawed decision making. This fact shows that servicemembers are human, not a different genus. In the Civil War, both Union and Confederate commanders made unforced errors.²⁰⁰ Commanders during World War I fundamentally erred by adopting offensive strategies in a battle space that heavily favored defensive tactics.²⁰¹ The British were able to exploit the cognitive biases of Axis leaders to great effect in World War II.²⁰² Groupthink is a well-known cognitive bias where a team fails to critically assess itself, allowing bad ideas and false assumptions to flourish unchecked. It is seen as the root of many military disasters, including Pearl Harbor, the Bay of Pigs, and escalation of the Vietnam War.²⁰³ A 1973 study found that overconfidence bias—which makes people more sure of their decisions than they should be—is prevalent in the military.²⁰⁴ The presence of unjustified confidence is even more pronounced on hard questions.²⁰⁵

In 2009, a Navy submarine and amphibious ship crashed into each other in Bahrain.²⁰⁶ Navy officials displayed retrievability bias and hindsight bias by illogically assuming that ship crashes were more likely going forward—that is to say, a recent vivid example of a shipwreck gave the false impression that shipwrecks were becoming more common.²⁰⁷

As summarized above, research indicates that larger, unanimous juries help counteract these natural impulses.²⁰⁸ Longer deliberation helps expose bad ideas and discover good ones.²⁰⁹ More people—and more diversity—reduce the odds that everyone will be on the same page at the start.²¹⁰ And unanimity requirements guarantee that a devil’s advocate cannot be ignored.²¹¹

²⁰⁰ MICHAEL J. JANSER, COGNITIVE BIASES IN MILITARY DECISION MAKING 9, 10 (2007) <https://bit.ly/3gk9bas> (describing cognitive errors made by General George McClellan and Robert E. Lee).

²⁰¹ JACK SNYDER, THE IDEOLOGY OF THE OFFENSIVE: MILITARY DECISION MAKING AND THE DISASTERS OF 1914, at 9, 15–17 (1984).

²⁰² Blair S. Williams, *Hueristics and Biases in Military Decision Making*, MIL. REV. 40, 43, 48 (Sept.-Oct. 2010), <https://bit.ly/2EL4Z5X>.2010.

²⁰³ Andrew Hill, *Why Groupthink Never Went Away*, FIN. TIMES (May 6, 2018) <https://on.ft.com/3198VVr>

²⁰⁴ JANSER, *supra* note 200, at 3.

²⁰⁵ *Id.*

²⁰⁶ *USS Hartford and USS New Orleans Arrive in Port Bahrain*, U.S. NAVY (Mar. 21, 2009), <https://bit.ly/39O7HCR>.

²⁰⁷ Williams, *supra* note 197, at 42–43. Relatedly, the Israeli Air Force incorrectly believed that pilots responded well to negative criticism after a bad flight because pilots did better the next time. DANIEL KAHNEMAN, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 10 (1982). But the real reason is probably that after a bad flight, the next one would be better because the only direction to go was up. *Id.*

²⁰⁸ E.g., Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 37, 41 (1997).

²⁰⁹ Michael J. Saks & Mollie Weighner Marti, *A Meta-Analysis of the Effects of Jury Size*, in THE JURY SYSTEM 401 (Valerie P. Hans ed. 2006).

²¹⁰ *Ballew v. Georgia*, 435 U.S. 223, 232–39 (1978).

²¹¹ Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1291–92 (2000).

C. *Racial Bias Affects Most Everyone, Even Those Who Should Be Aware of and Opposed to It*

The history of racial hatred and jury trials is well known.²¹² Modern studies show that the race of a juror does not generally affect how they will vote,²¹³ but that does not mean trials are perfect. Racial bias can infect decision making for all professions of all sorts. Studies that measure implicit racial bias found evidence of unconscious prejudice against African Americans in a wide variety of test subjects. A study found that most peremptory challenges were based on group stereotypes, and judges almost always accept neutral explanations for these.²¹⁴

When participants read a story about a fight, they remembered the characters as more aggressive when they were Black rather than white, and invented false memories of the Black characters acting aggressively.²¹⁵ Subjects in these studies included first-year law students,²¹⁶ police officers and probation officers,²¹⁷ judges,²¹⁸ and, most surprisingly, capital defense attorneys.²¹⁹ Defense attorneys representing Black clients were also more likely to interpret, unintentionally, the evidence available as probative of guilt.²²⁰

Racial injustice haunts the military justice system like any other. A recent study found that Black servicemembers face court-martial actions and nonjudicial punishment at a substantially higher rate.²²¹ Depending on the service, a Black servicemember can be 1.29 to 2.61 times more likely than a white servicemember to face punishment.²²² Because members of the military are screened for prior criminal histories and are guaranteed to have a steady paycheck, it is hard to explain this disparity on non-racial grounds. History also supplies examples of racial injustices.²²³

Military courts have stated, “In our American society, the Armed Services have been a leader in eradicating racial discrimination.”²²⁴ Defense Secretary Mark Esper has said, “Racism is real in America, and we must all do our very best to recognize it, to confront it, and to eradicate it.”²²⁵ We know that enlarging juries would aid in this cause. Larger juries are more likely to have

²¹² *E.g.*, GILBERT KING, *DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA* 9 (2012) (example of black jurors being excluded); AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 437 (2012) (describing white juries acquitting white defendants who attacked black victims).

²¹³ *Id.* at xi.

²¹⁴ ABRAMSON, *supra* note 83, at xxiv, xxvi.

²¹⁵ Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 398–401, 400–02 (2007).

²¹⁶ Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1544 (2004).

²¹⁷ Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 331 (2010).

²¹⁸ Jeffrey J. Rachlinski et al., *Does Unconscious Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195 (2009).

²¹⁹ Eisenberg & Johnson, *supra* note 216, at 1553.

²²⁰ L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2636 (2013).

²²¹ PROTECT OUR DEFENDERS, *RACIAL DISPARITIES IN MILITARY JUSTICE: FINDINGS OF SUBSTANTIAL AND PERSISTENT RACIAL DISPARITIES WITHIN THE UNITED STATES MILITARY JUSTICE SYSTEM* (2017) <https://bit.ly/3gtwlvn>.

²²² *Id.* at i.

²²³ Jeff Schogol, *‘Racism is real in America’—SecDef Esper Condemns the Killing of George Floyd*, TASK & PURPOSE (June 3, 2020) <https://bit.ly/3gtwu1S>.

²²⁴ *United States v. Santiago-Davila*, 26 M.J. 380, 390 (C.M.A. 1988).

²²⁵ Schogol, *supra* note 223.

people of color on them. Those jurors, in turn, can help counteract racial stereotypes.

D. *The History of Military Juries Shows that Size and Decision Rules Were Created to Solve Problems that Are Far Less Pressing Today*

History once provided a strong argument for treating military juries differently. No more. Commentators have noted that the traditional justifications courts assert to treat servicemembers differently have not aged well.²²⁶

In the beginning, military juries were preeminent. On June 28, 1775, a committee including George Washington and Philip Schuyler drafted the Articles of War, and two days later, Congress adopted them.²²⁷ The inaugural Articles of War did not set out specific punishments. For the most part, its authors decided that discretion was the better part of valor. By way of example, Article 8 stated that deserters “shall be punished at the discretion of a general court-martial.” This “discretion” empowered courts-martial to mete out a variety of punishments, including reductions in rank, dismissal from service, docking pay, imprisonment, or whipping.²²⁸ Vague language is used throughout the rest of the Articles, thus placing few limitations on the conduct of courts-martial and the jurors who would run them.²²⁹

Though commanders loomed large over the process, no judge monitored the proceedings. Judicial functions were shared between the prosecutor and the jurors themselves.²³⁰ The president of the court-martial—the senior-most member of the jury—oversaw the trial and the jury ruled on motions and evidentiary objections.²³¹ Jurors took an active role at trial, questioning, recalling, and ordering the appearance of witnesses,²³² and until 1916, testifying.²³³ They were also the ones to decide challenges for cause against panel members.²³⁴

Even after the adoption of the Uniform Code of Military Justice, jurors still played an outsized role compared to their civilian counterparts. The 1951 Manual for Courts-Martial stated that the “president of a special court-martial will rule in open court upon all interlocutory questions other than challenges arising during the trial.”²³⁵ Jurors could even overturn a judge’s ruling on a motion for a finding of not guilty or a finding of the accused’s sanity.²³⁶ Counsel could argue the law directly to juries on these issues.²³⁷ When judges did rule on such a motion, it would be “subject to the objection of any court member,” and jurors

²²⁶ Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933, 948-50 (2015).

²²⁷ DEP’T OF THE ARMY, *supra* note 6, at 7.

²²⁸ 1775 Articles of War, art. 51.

²²⁹ There are a few exceptions. Officers guilty of “profane cursing or swearing” would be fined four shillings. 1775 Articles of War, art. 3. Soldiers who misbehaved in church would be fined one-sixth of a dollar for the first offense, and fined and jailed for the second. *Id.* at art. 2. Soldiers could suffer death for abandoning their post, revealing the watch-word, or surrendering a post to the enemy. *Id.* at arts. 25, 26, and 31.

²³⁰ DEP’T OF THE ARMY, *supra* note 6, at 89.

²³¹ *Id.*

²³² *Id.*

²³³ CHRIS BRAY, COURT-MARTIAL: HOW MILITARY JUSTICE HAS SHAPED AMERICA FROM THE REVOLUTION TO 9/11 AND BEYOND (2016) 242.

²³⁴ *United States v. Carter*, 25 M.J. 471, 475 (C.M.A. 1988).

²³⁵ Manual for Courts-Martial, United States (1951 ed.) § 57c.

²³⁶ *Id.* at § 57d.

²³⁷ See LUTHER C. WEST, THEY CALL IT JUSTICE: COMMAND INFLUENCE AND THE COURT-MARTIAL SYSTEM 2 (1977).

could acquit on purely legal grounds.²³⁸ The president of a court-martial would chide attorneys like a judge might, and in one case, the president of a court-martial told a judge that it was not necessary for him to rule on the motion, to which the judge replied, “Very well.”²³⁹ Later rules to restrict the power of juries were resisted.²⁴⁰ All this was in keeping with a proud American tradition of reposing great confidence in juries.²⁴¹

The 1775 Articles of War set out two types of court-martial: general and regimental.²⁴² The former consisted of at least thirteen commissioned officers, with the president being a field officer.²⁴³ The latter consisted of at least five officers or, if necessary, three.²⁴⁴ The drafters considered the large size important, as general courts-martial could only be shrunk if empanelling a full thirteen would cause “manifest injury to the service.”²⁴⁵ During trial, it was acceptable for the number of jurors to drop below thirteen, but not below five.²⁴⁶ Later amendments would also require convening authorities to explain why they were using fewer than thirteen members.²⁴⁷

It was not until 1920 that the Articles of War dropped the hard suggestion of thirteen jurors. Instead, it simply set a lower limit of five for general courts-martial, three for special courts-martial, and one for a summary court-martial.²⁴⁸ This was continued in the 1948 Elston Act that instituted many reforms to the military justice system,²⁴⁹ the 1949 rough draft of the Uniform Code of Military Justice,²⁵⁰ and finally, the adopted version of the Code.²⁵¹

The Navy followed a similar progression. The earliest rules for the Navy in 1776 stated that a court-martial should consist of three captains, three first lieutenants, and a like number of Marine officers if they were available, with the eldest captain presiding.²⁵² A range of five to thirteen court-martial members was also adopted by the Navy in 1799.²⁵³ More than a century later in 1932, it had this same range and called upon convening authorities to appoint as many members as possible without inflicting “injury to the service.”²⁵⁴ The 1932 version of the Articles for Government of the Navy—known as the Rocks and Shoals—remained in force until the Code replaced it.²⁵⁵

²³⁸ *Id.* at 3.

²³⁹ *Id.* at 84.

²⁴⁰ *United States v. Miller*, 14 M.J. 924, 925 n.1 (A.F.C.M.R. 1982) (ignoring rule that forbid jurors from asking questions directly).

²⁴¹ Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 927-28 (1987).

²⁴² 1775 Articles of War, art. 33.

²⁴³ *Id.* On occasion, courts-martial could be *larger* than thirteen. Fourteen officers, for example, tried Major John Andre, the spy who conspired with Benedict Arnold. LOUIS FISHER, *MILITARY TRIBUNALS & PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM* 12 (2005).

²⁴⁴ 1775 Articles of War, art. 38.

²⁴⁵ 1806 Articles of War, art. 64; 1874 Articles of War, art. 75; 1916 Articles of War, art. 5.

²⁴⁶ WILLIAM WINTHROP, *A DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY WITH NOTES* 87 (1895).

²⁴⁷ 1878 Articles of War, art. 17.

²⁴⁸ Articles of War, art. 5 (1920).

²⁴⁹ Act of June 24, 1948, Pub. L. 758, 62 Stat. 628, ch. 625, §§ 204, 205.

²⁵⁰ NATIONAL MILITARY ESTABLISHMENT, *UNIFORM CODE OF MILITARY JUSTICE: TEXT, REFERENCES AND COMMENTARY BASED ON THE REPORT OF THE COMMITTEE ON A UNIFORM CODE OF MILITARY JUSTICE TO THE SECRETARY OF DEFENSE* (1949).

²⁵¹ Article 16, Uniform Code of Military Justice [10 U.S.C. § 816] (1950).

²⁵² Rules for the Regulation of the Navy of the United Colonies (1776).

²⁵³ Articles for the Government of the Navy, art. 47 (1799).

²⁵⁴ Articles for the Government of the United States Navy, art. 39 (1930).

²⁵⁵ *Rocks and Shoals*, NAVAL HIST. & HERITAGE COMMAND (June 22, 2018), <https://bit.ly/2PifuPZ>.

The size of courts-martial was dropped in the interest of convenience, not justice. Congress was worried that small, detached units might not be able to obtain thirteen officers.²⁵⁶ This was once a valid concern. The military was born of an era where “mails were slow and telegrams unknown.”²⁵⁷ Congress is given the constitutional power to “declare” rather than “make” war because the founders knew it could take too long for Congress to convene, and the president would need to act immediately.²⁵⁸ During the Revolutionary War, it could take Washington several months to get in touch with a state governor.²⁵⁹

That was another world entirely. Apart from technological improvements, the nature of military justice has changed. It is not essential that defendants be tried at the location of the event, even in combat situations. Overseas servicemembers are usually transported to different locations for prosecution.²⁶⁰ In Vietnam, servicemembers were flown to Japan for courts-martial.²⁶¹ The My Lai massacre case was tried in the United States.²⁶²

In addition to geographic isolation, there would have been valid logistical concerns about finding enough officers. Three years after the Treaty of Paris ended the Revolutionary War, the American Army shrank down to fewer than forty officers, so it would have been virtually impossible to assemble the required thirteen officers for a capital case.²⁶³ By 1801, the officer corps had grown to only 248.²⁶⁴

Today, no one can now contend the military lacks the bodies to fill a jury of twelve. There are nearly a quarter-million officers in the military.²⁶⁵ The force has become increasingly top-heavy.²⁶⁶ In the event there was ever a scenario that prevented twelve officers from being collected, the Uniform Code of Military Justice already provides an exception to jury size for “physical conditions or military exigencies.”²⁶⁷

Early courts-martial did not have unanimity requirements. For much of the military’s history, no set percentage was established for a conviction, but it was usually a majority vote.²⁶⁸ At the time of the Civil War, a majority of jurors could vote to impose a noncapital punishment, and two-thirds would suffice for a death sentence.²⁶⁹ In 1874, Congress officially set two-thirds as the percentage necessary for a death sentence, but was silent about the standard for other types

²⁵⁶ *Mendrano v. Smith*, 797 F.2d 1538, 1546 (10th Cir. 1986).

²⁵⁷ WILLIAM ADDLEMAN GANO, *THE HISTORY OF THE UNITED STATES ARMY* 16 (1964).

²⁵⁸ LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 250 (5th ed. 2007).

²⁵⁹ GANO, *supra* note 257, at 32.

²⁶⁰ Sherman, *supra* note 195, at 1401.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ JONATHAN LURIE, *MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775–1980*, 4 (2001).

²⁶⁴ GANO, *supra* note 257, at 108.

²⁶⁵ Gregory C. McCarthy, *Are There Too Many General Officers for Today’s Military?*, 87 *JOINT FORCE QUARTERLY* 76, 78 (2017) <https://bit.ly/3hXR0b2>.

²⁶⁶ *Id.* at 76, 78 (noting, respectively, that the ratio of general officers to active duty troops has more than quadrupled since World War II, and that in the last 30 years, the ratio of 4-star officers to the overall force as increased 65 percent).

²⁶⁷ 10 U.S.C. § 825(c)(4).

²⁶⁸ *Mendrano*, 797 F.2d at 1546.

²⁶⁹ DEP’T OF THE ARMY, *supra* note 6, at 60.

of cases.²⁷⁰ In 1916, Congress codified the longstanding practice of two-thirds for capital cases and a majority vote for all others.²⁷¹

Once again, efficiency, not justice, was the driving force behind these changes. This time, the goal was to reduce the incidence of hung juries.²⁷² Or, at least, that is what courts think. In declaring this as fact, the Tenth Circuit stated that reducing hung juries was the “obvious policy preference” of Congress, but did not cite any evidence of Congress’ intent or evidence or any studies showing what effect, if any, non-unanimous decisions had on hung juries.²⁷³ Had it bothered to look, it might have learned it is rare for one or two holdouts to result in a deadlocked jury.²⁷⁴

Though courts have worked hard to preserve the status quo for jury size and decision rules, it is not clear Congress has given the matter much thought. When the Uniform Code of Military Justice was debated in Congress, there were concerns about juries but on a different topic. The complaint was that convening authorities should not be able to select the jurors, as it gives the impression that the game is rigged.²⁷⁵ If any issue has since dominated discussion of military juries, it has been this.²⁷⁶ There was no debate in Congress over the proper size of military juries or decision rules.

If anything, Congress appears to recognize that larger juries would be good for defendants. During hearings the produced the 1920 version of the Articles of War, the Army General Staff admitted that larger minimum requirements to convict help the accused.²⁷⁷ Case in point, the number of required jurors goes up for more serious crimes,²⁷⁸ and the unanimity requirement only kicks in for capital cases.²⁷⁹ The inference is that defendants facing the most serious charges deserve the most due process in decision rules. In the 2016 Military Justice Act, Congress also upped the conviction threshold for noncapital cases from two-thirds to three-quarters.²⁸⁰

E. Reasons to Uphold the Current System Do Not Tip the Scale

The Army’s Trial Counsel Assistance Program has put out guidance explaining why *Ramos v. Louisiana* does not invalidate existing rules for courts-martial.²⁸¹ The Army’s main point is that the Sixth Amendment has not been interpreted to apply to courts-martial.²⁸² Indeed, a long line of cases backs up this assertion.²⁸³ The Army also stresses that if the Sixth Amendment did apply to the

²⁷⁰ Articles of War, art. 46 (1878).

²⁷¹ Articles of War, art. 43 (1920).

²⁷² *Mendrano*, 797 F.2d at 1546.

²⁷³ *Id.* Note that the court was happy to accept this unsupported supposition to justify a policy, but courts require defendants has to produce unassailable empirical evidence that smaller juries degrade decision-making in the context of the military.

²⁷⁴ Taylor-Thompson, *supra* note 115, at 1317.

²⁷⁵ 96 Cong. Rec. 1350 (Feb. 2, 1950) (statement of Mr. Kefauver).

²⁷⁶ COMPTROLLER GENERAL OF THE UNITED STATES, *MILITARY JURY SYSTEM NEEDS SAFEGUARDS FOUND IN CIVILIAN FEDERAL COURTS* 6 (June 15, 1977) <https://bit.ly/2DeFtpD>.

²⁷⁷ S. REP. NO. 130, 64 at 30 (1916).

²⁷⁸ *See* 10 U.S.C. § 816.

²⁷⁹ 10 U.S.C. § 852(b).

²⁸⁰ Act of Dec. 23, 2016, Pub. Law 114-328, 130 Stat. 2894.

²⁸¹ TCAP Express, *Ramos v. Louisiana—Unanimous Jury Verdicts* (May 5, 2020). The Navy’s Trial Counsel Assistance Program has taken a similar position on non-unanimous juries and the *Ramos* decision.

²⁸² *Id.*

²⁸³ *See Ex parte Quirin*, 317 U.S. 1 (1942); *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012).

military, the court-martial system would have been non-compliant for years, so *Ramos* does not change anything.²⁸⁴ And the Army points to *Weiss v. United States*,²⁸⁵ which set out a test for evaluating due process challenges to courts-martial, in response to substantive due process arguments.

Weiss said that in deciding what process is due, the Court “must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces.”²⁸⁶ The standard to win a military due process challenge is “whether the factors militating in favor of [a new right] are so extraordinarily weighty as to overcome the balance struck by Congress.”²⁸⁷ This standard has been used to deny jury rights in the past.²⁸⁸

Though a high standard, due process demands larger, unanimous juries in the military. The private interest is self-evident: defendants should want juries that entertain minority viewpoints, must reach 100% agreement on guilt, overcome racial prejudices, and represent the diversity of the armed forces. The countervailing government interest is slight: studies predict seventeen additional minutes added to trial, and fifteen additional mistrials for every 3,000 courts-martial.²⁸⁹ There is no additional cost, since jury service is simply something that servicemembers can be tasked with, not something they need to be paid separately for.²⁹⁰ And jury reforms directly contribute to lowering the odds of an erroneous decision, as explained above.

Finally, the Army says that “the issue of whether an Accused has a right to a unanimous jury verdict for serious crimes is not a question for the court system to decide.”²⁹¹ There is some truth to this. Ideally, Congress would act to reform the system, as it has done in the past.²⁹² But military courts have decided many times on their own that change was necessary to ensure a fair trial.²⁹³ This includes rights that relate to juries. In *United States v. Santiago-Davila*, which ended the use of racially biased peremptory strikes in the military, the Court of Military Appeals said, “even if we were not bound by *Batson*, the principle it espouses should be followed in the administration of military justice.”²⁹⁴

²⁸⁴ TCAP Express, *supra*, note 281.

²⁸⁵ 510 U.S. 163 (1994).

²⁸⁶ *Id.* at 177 (quoting *Middendorf v. Henry*, 425 U.S. 25, 43 (1976)).

²⁸⁷ *Id.* at 177–78 (quoting *Middendorf*, 425 U.S. at 44).

²⁸⁸ *United States v. Spear*, No. ACM 38537, 2015 CCA LEXIS 310, at *5-6 (A.F. Ct. Crim. App. July 30, 2015).

²⁸⁹ Anderson & Hunsucker, *supra* note 33, at 60 (citing Larkin, *Should The Military Less-Than-Unanimous Verdict of Guilty Be Retained?*, 22 HASTINGS L.J. 237, 256–57 (1971)).

²⁹⁰ See 10 U.S.C. § 825(e)(2). Even if costs were an issue, parsimony is a strange justification to degrade the quality of the justice system. Particularly in light of the fact that the military, by way of example, spends over \$400 million on bands. Arden Dier, *US Hasn't Shown Military Bands Are Worth the Bill*, NEWSER (Aug. 17, 2017), <https://bit.ly/30IIDud>.

²⁹¹ TCAP Express, *supra* note 281.

²⁹² See, e.g., Act of December 23, *supra* note 280.

²⁹³ See, e.g., *Wade v. Hunter*, 336 U.S. 684, 687–88 (1949) (double jeopardy applies to the military); *United States v. Hershey*, 20 M.J. 433, 435–36 (C.M.A. 1985) (Sixth Amendment right to a public trial applies to the military); *United States v. Gay*, No. CMR 23492, 1984 CMA LEXIS 20813, at *1 (C.M.A. 1984) (finding the military's death penalty procedures insufficiently protective); *United States v. Ezell*, 6 M.J. 307, 310–11 (C.M.A. 1979) (requiring a neutral and detached decision maker to issue search warrants); *United States v. Prater*, 43 C.M.R. 179, 182 (C.M.A. 1971) (applying speedy trial rights to military defendants); *United States v. Kemp*, 32 C.M.R. 89, 97 (C.M.A. 1962) (Fifth Amendment protects servicemembers against self-incrimination); *United States v. Brown*, 28 C.M.R. 48, 54–55 (C.M.A. 1959) (requiring commanders to show probable cause for a search); *United States v. Sutton*, 11 C.M.R. 220, 222 (C.M.A. 1953) (adopting the Confrontation Clause for military practice).

²⁹⁴ 26 M.J. 380, 390 (C.M.A. 1988) (applying the *Batson* rule to courts-martial).

Just so, although *Ramos* may not be binding on courts-martial, its principles should be followed.

V. CONCLUSION

As the United States Supreme Court has often said, the military is different.²⁹⁵ This much is obvious. But the notion that civilian social science research is totally inapplicable to the military plays into the false idea that servicemembers are infallible beings at a time when the average American is more disconnected from the military than ever before and the reality of military life has become “incomprehensible” to many.²⁹⁶

The history of military justice is littered with discarded punishments and procedures that range from bizarre to barbaric. Soldiers were once “earnestly recommended” to diligently attend church services, and if they acted disrespectfully in church, they could be fined one-sixth of a dollar for the first offense, and fined and jailed for the second.²⁹⁷ Those convicted of desertion could be sentenced to wearing a twelve-pound ball and chain around their neck for years, and branded with the letter “D” that was one-and-a-half inches long.²⁹⁸ Times change.²⁹⁹

In the past, the military has been able to improve itself using science. For example, by establishing a scientific triage system to treat the wounded, mortality rates fell from 4.7 percent in World War II to 1 percent in Vietnam.³⁰⁰ Not every legal question lends itself to empirical analysis. Many simply lack any research from which courts can draw conclusions. Other times, the empirical evidence is spotty or contradictory. But on jury size and unanimity, we have a rich body of evidence that all points in the same direction: juries operate better when they are large and when they are unanimous. That translates into fewer guilty defendants going free, fewer innocent defendants going to prison, and less prejudice infecting the military justice system. Those are things everyone should be able to get behind.

²⁹⁵ *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) (“The military constitutes a specialized community governed by a separate discipline from that of the civilian.”); *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (“the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment”).

²⁹⁶ Adam J. Tiffen, *Here’s What Most People Don’t Understand About the Civilian-Military Divide*, TASK & PURPOSE (June 2, 2014). Less than one percent of Americans have served in the past decade, only seven percent of Americans are veterans, and the share of veterans in Congress has fallen from 77 percent in 1977 to 20 percent today. *Id.*

²⁹⁷ Articles of War, art. 2 (1775).

²⁹⁸ *Items from Lieutenant General Sheridan’s Headquarters*, CHI. TRIBUNE (July 22, 1869), <https://bit.ly/3jYK3Z4>.

²⁹⁹ For example, the Navy recently got rid of its age-old punish of confinement on bread and water. Geoff Ziezulewicz, *Happy holidays, Seaman Timmy! No more confinement on bread and water for you*, NAVY TIMES (Dec. 11, 2018), <https://bit.ly/33jWkrB>.

³⁰⁰ Katharyn Kennedy et al., *Triage: Techniques and Applications in Decisionmaking*, 28 ANNUALS OF EMERGENCY MEDICINE, 136, 137 (1996).

BALIKATAN NO MORE? SOFAS AND INTERNATIONAL LAW IN LIGHT OF THE TERMINATION OF THE UNITED STATES- PHILIPPINE VISITING FORCES AGREEMENT

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On February 11, 2020, President Duterte announced the termination of the U.S.-Philippines Visiting Forces Agreement (VFA), the bilateral status of forces agreement concerning U.S. personnel in the Philippines. President Duterte subsequently suspended termination, but the catalyzing domestic and international forces that drove termination remain. In light of this potential for upheaval in a decades-long regional security partnership, this Article identifies the complex history of the U.S.-Philippine defense relationship, contextualizes the VFA within international law, considers the origins of demands within the Philippines for termination, and explores the legal impact of VFA termination on the network of bilateral defense agreements between the U.S. and the Philippines, especially the long-standing Mutual Defense Treaty and recent Enhanced Defense Cooperation Agreement.

I. NARROWLY AVOIDING DISASTER: CHANGING THE WORLD IN 180 DAYS

A clock started ticking on February 11, 2020. That clock ticked quietly as the world focused on understanding and responding to the spread of a novel coronavirus. The looming 180-day deadline would bring legal rather than medical challenges to the rules-based world order, but would nonetheless disrupt business as usual and potentially impact the United States' strategic position in the Pacific for generations.

On February 11, 2020, the government of Philippine President Rodrigo Duterte, a strident critic of U.S. involvement in the Philippines, announced via Twitter that he was exercising the termination clause of the Visiting Forces Agreement (VFA),¹ which governs the status of United States armed forces visiting the Philippines on matters including customs, immigration, and criminal jurisdiction.² Under the VFA, either party can terminate the agreement by providing notice of intent to terminate, which becomes effective after 180 days. While the VFA's termination clause appears clear, the consequences of termination for U.S. forces and existing international agreements between the Philippines and the United States under international law would be significantly less so. The VFA is among a class of agreements known as status of forces agreements (SOFA). Since 1998, the VFA has provided the legal framework for U.S.-Philippine military cooperation and, more generally, reinforced an important regional partnership. Moreover, the VFA is one of a series of mutually reinforcing

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¹ Agreement Regarding the Treatment of United States Armed Forces Visiting the Philippines, Phil.-U.S., Feb. 10, 1998, T.I.A.S. No. 12931 [hereinafter Visiting Forces Agreement].

² Andrew Yeo, *President Duterte Wants to Scrap a Philippines-U.S. Military Agreement. This Could Mean Trouble*, WASH. POST (Feb. 13, 2020), <https://wapo.st/3gJW6Ha>.

agreements between the U.S. and the Philippines, including the Mutual Defense Treaty (MDT)³ and Enhanced Defense Cooperation Agreement (EDCA),⁴ that enables a strategic military partnership in the region to the benefit of both parties.

Fortunately, President Duterte agreed to suspend the termination for now, but a “suspended termination” is a far cry from a fully restored security partnership.⁵ The very real threat of termination provides an inflection point for both parties to consider what is at stake, both in terms of the VFA itself and the broader relationship between the U.S. and the Philippines. The current impasse between the U.S. and a key ally in the Pacific is a familiar one, though perhaps both the stakes and obstacles are greater than at any time since the end of the Cold War. At issue are decades-old legal arguments, concerns over regional stability, and the Philippines’ evolution as a post-colonial sovereign state. While many echoes of the past can be found in the current debate over the VFA, key differences also exist; namely, an already-resurgent China actively encroaching in the South China Sea and a Philippine President seemingly willing to roll the dice with his country’s defense partnerships with no apparent replacement plan in place. The uncertainty surrounding the VFA is only one part of the larger challenges to the rule of law and the U.S. strategic position in the region. In this moment of suspended termination, U.S. leaders should revisit the importance of the Philippines as a partner.

This Article will briefly discuss the history of visiting forces agreements between the Philippines and United States. Section two will first look at the complicated history of U.S. forces in the Philippines, then place visiting forces agreements in a larger context of international law, and finally discuss the implications of the current impasse between the two states on both the legal and geopolitical order of the region. After highlighting the importance of the VFA, section three will discuss the forces at play in the Philippines’ move to withdraw. Finally, section four will discuss the legal implications of President Duterte’s threatened withdrawal and then analyze the effect a potential withdrawal from the VFA would have on the MDT and EDCA by applying customary international law principles found in the Vienna Convention on the Law of Treaties (VCLT).

II. COLONIALISM, INTERDEPENDENCE, AND NEGOTIATION: BALANCING SOVEREIGNTY AND SECURITY INTERESTS THROUGH SOFAS

A. *A Brief History of the U.S.-Philippine Security Relationship and Visiting U.S. Forces*

The U.S. and Philippines held the 35th annual Balikatan military exercise in 2019, marking almost four decades of military cooperation.⁶

³ Mutual Defense Treaty, Phil.-U.S., Aug. 30, 1951, 3 U.S.T. 3947 [hereinafter Mutual Defense Treaty].

⁴ Enhanced Defense Cooperation Agreement, Phil.-U.S., Apr. 28, 2014, as amended April 13, 2016, T.I.A.S. 16-413.1, <https://bit.ly/2XN3XwV>. In addition, a reciprocal agreement regarding the treatment of Philippine forces visiting the U.S. will be discussed later in this Article. See Agreement Regarding the Treatment of Philippines Personnel Visiting the US, Phil.-U.S., Oct. 8, 1998, T.I.A.S. 12931, <https://bit.ly/2XOWsp1>; see also *infra* note 104 and accompanying text.

⁵ See, e.g., Alyssa Rola, *Defense Chief Cites COVID-19 Pandemic, Need For International Cooperation in PH Decision to Suspend VFA Termination*, CNN PHIL. (June 3, 2020), <https://bit.ly/38KE3xQ>; Paolo Romero, *Senators Still Want VFA Review*, THE PHILIPPINE STAR (June 4, 2020), <https://bit.ly/2ZkmjWZ>.

⁶ *Balikatan* means “shoulder-to-shoulder” in Tagalog or, as phrased by the Chief of Staff of the Armed Forces of the Philippines when discussing Balikatan 2019, “carrying the load together on our shoulder, however heavy the load, however huge the obstacle, and whatever the cost.” Priam Nepomuceno,

However, the historical relationship between the U.S. and the Philippines complicates the present security and political relationships between the two countries. A 48-year period of American colonization began in 1898, after the Spanish ceded the territory at the end of the Spanish-American War.⁷ The year after the Philippines gained independence, the issue of continued U.S. military presence came to the forefront during the negotiation of the 1947 Military Bases Agreement.⁸ Negotiations over military basing took place concurrently with discussions about trade and U.S. financial and military assistance to the newly-independent state.⁹ The final Military Bases Agreement contained a version of a SOFA.¹⁰ The agreement provided the U.S. with extensive jurisdiction over its own servicemembers, allowing the U.S. military, as opposed to the Philippine government, to prosecute U.S. servicemembers who committed crimes within the Philippines.¹¹ Four years later, the two countries signed the 1951 Mutual Defense Treaty which, along with the 1947 Military Bases Agreement, established Subic Bay as the largest naval facility in the world during the Cold War and facilitated the presence of U.S. forces in the Philippines for decades.¹² Jurisdictional provisions remained a source of tension in the years that followed, however, leading to a new SOFA in 1965 that repealed a number of the controversial jurisdictional provisions, including distinctions between on-base and off-base crimes.¹³

While other agreements and amendments have been made between the U.S. and the Philippines regarding visiting forces since the 1947 agreement, the modern VFA has functioned as a SOFA for U.S. armed forces personnel stationed in the Philippines since 1998, providing clarity and predictability in the relationship between the sending and receiving states. The agreement outlines a rubric of both exclusive and concurrent jurisdiction for the parties.¹⁴ It draws from the North Atlantic Treaty Organization (NATO) SOFA model, giving the Philippines primary jurisdiction over U.S. personnel who commit offenses in the Philippines punishable under Philippine law, but giving the U.S. authority to keep physical custody of an accused until completion of all judicial proceedings.¹⁵ Similar compromises, balancing the strategic interests of both states, are also reflected in the VFA, EDCA, and the MDT. For example, while the agreements grant the U.S. an important strategic position in the Pacific, the VFA benefits the Philippines in tangible ways, such as facilitating U.S. assistance to the Philippines

⁷ 'Balikatan' Highlights Historic PH-US Military Ties, PHILIPPINE NEWS AGENCY (Apr. 1, 2019), <https://bit.ly/3gmM6E5>. The 2020 iteration of Balikatan was cancelled due to COVID-19. Press Release, U.S. Indo-Pacific Command, U.S. Indo-Pacific Command Cancels Balikatan 2020 (Mar. 26, 2020), <https://bit.ly/31ds74i>.

⁸ *The Philippines, 1898-1946*, U.S. HOUSE OF REPRESENTATIVES: HIST., ART, & ARCHIVES, <https://bit.ly/2XijB37> (last visited Aug. 1, 2020).

⁹ Rafael A. Porrata-Doria Jr., *The Philippine Bases and Status of Forces Agreement: Lessons for the Future*, 137 MIL. L. REV. 67, 74 (1992). The SOFA was controversial at the time of its negotiation, as it provided U.S. military basing privileges at 16 locations, rights to use the adjacent territorial air and water space, and expansive criminal jurisdiction modeled on the NATO SOFA, giving the U.S. jurisdiction to certain offenses off base and nearly exclusive jurisdiction on base. An amendment later gave the Philippines jurisdiction over most offenses committed off base. *Id.*

¹⁰ *Id.*

¹¹ See Agreement Concerning Military Bases, Phil.-U.S., Mar. 14, 1947, 61 Stat. 4019.

¹² *Id.* art. XIII ¶¶ 1(b)(c), 4(a). The U.S. had near-exclusive jurisdiction of all crimes committed on military bases and those crimes committed off base in which both the victim and the perpetrator were members of the U.S. forces.

¹³ Peter G. Strasser, *A Marine's Murder Trial and the Drug War: The "Delicate Balance" of Criminal Justice in the Philippines*, 14 U. PA. ASIAN L. REV. 158, 174 (2019).

¹⁴ See Agreement on Military Bases in the Philippines: Criminal Jurisdiction Arrangements, U.S.-Phil., Aug. 10, 1965, 16 U.S.T. 1090.

¹⁵ Porrata-Doria Jr., *supra* note 8, at 76.

¹⁶ Visiting Forces Agreement, *supra* note 1, art. 5.

during the Haiyan super typhoon in 2013, when the U.S. provided extensive and timely humanitarian assistance and disaster relief operations, deploying 13,400 troops, 66 aircraft, an aircraft carrier, and a whole host of other military assets.¹⁶

B. The Philippine Agreements in Context

The VFA sits within a body of law that helps states meet their larger strategic aims by negotiating the limits of the exercise of sovereignty in relation to other states. While the definition of sovereignty can vary, customary international law supports broad and absolute control over state affairs. A state may voluntarily waive portions of exclusive territorial jurisdiction over visiting forces.¹⁷ In this way, SOFAs are a unique instrument in international law. For example, under customary international law sovereign states generally have jurisdiction over crimes committed in their territory.¹⁸ The practice of waiving the underlying principles regarding jurisdiction arose in the context of visiting warships. The U.S. Supreme Court commented as early as 1812, that “a sovereign is understood to cede a portion of his territorial jurisdiction . . . where he allows the troops of a foreign prince to pass through his dominions By exercising it, the purpose for which the free passage was granted would be defeated”¹⁹ Modern states negotiate this waiver of jurisdiction, and the resulting relationship between the two states, through SOFAs.²⁰

The negotiated immunity of foreign armed forces is considered essential for forces stationed on foreign territory, making SOFAs critical to strategic goals of States with overseas military interests.²¹ From the perspective of the sending state, retaining jurisdiction over servicemembers is critical for maintaining good order and discipline. The U.S., like any other state, seeks to maximize its foreign criminal jurisdiction over troops deployed overseas.²² In the case of the Philippines, the agreements were negotiated as the number of U.S. servicemembers stationed around the globe grew substantially in the years after World War II. SOFAs, VFAs, and other such arrangements became critical not only to foster predictable criminal jurisdiction, but also to ensure quality of life issues such as the ability to secure housing or a driver’s license. Favorable SOFA terms on jurisdiction and quality of life issues are especially significant to the U.S., whose armed forces personnel, often with family members and a civilian workforce in tow, are stationed in and transiting through countries around the world in both temporary and long-term assignments.

Given their importance, states seek to negotiate favorable terms in SOFAs, and the 1965 U.S.-Philippine SOFA was no exception. The 1965 agreement repealed some of the more controversial provisions in the Military

¹⁶ Richard Heydarian, *Philippines Risks Danger by Abruptly Terminating US Defense Agreement*, NIKKEI ASIAN REV. (Feb. 27, 2020), <https://s.nikkei.com/2Zk6G1Z>.

¹⁷ Porrata-Doria Jr., *supra* note 8, at 86.

¹⁸ See Steven J. Lepper, *A Primer on Foreign Criminal Jurisdiction*, 37 A.F. L. REV. 169, 171 (1994).

¹⁹ *The Schooner Exchange v. McFaddon*, 11 U.S. 116, 139 (1812).

²⁰ Porrata-Doria, Jr., *supra* note 8, at 86.

²¹ THE HANDBOOK OF THE LAW OF VISITING FORCES 3 (Dieter Fleck ed., Oxford Univ. Press 2d ed. 2018).

²² See Mark R. Ruppert, *Criminal Jurisdiction over Environmental Offenses Committed Overseas: How to Maximize and When to Say “No,”* 40 A.F. L. REV. 1, 8 (1996). The U.S. Department of Defense has reason to be concerned about criminal jurisdiction in the Philippines in particular. The U.S. Embassy warns that “[e]xperience has shown that arrests and trials in the Philippines are often unpredictable. Significant deviations from prescribed procedures do occur, arrestees are often not given clear information about procedures and charges, and allegations of corruption are common.” U.S. Citizen Serv., *Arrest of a U.S. Citizen, U.S. Embassy in the Philippines*, U.S. EMBASSY IN THE PHIL., <https://bit.ly/2XnzogV> (last visited Aug. 2, 2020).

Bases Act, but retained many favorable terms for the United States. The agreement had a renewal requirement and was due to expire in 1991. Though the leaders of the two states signed an extension of the agreement, the Philippine Senate failed to ratify an extension or a replacement that would protect U.S. forces in the Philippines.²³ One of the main arguments against ratification centered around Philippine sovereignty in the light of the history of U.S. colonialism in that country.²⁴ Philippine Senator Agapito Aquino, in a speech on the Senate floor, argued that a vote against renewal “is a vote for a truly sovereign and independent Philippine nation. It is a vote to end a political adolescence tied to the purse strings of America—a truly crippling dependence.”²⁵

When ratification failed, it ended U.S. control of two of the most strategic locations in the Pacific: Clark Air Force Base and Subic Bay Naval Base, located just north of Manila. Both locations had been leased to the U.S. since 1946.²⁶ The loss of the bases meant the loss of critical logistical capacity for supplies, repairs, and staging services that had sustained efforts in Korea, Vietnam, and even the Gulf War.²⁷ However, increasingly aggressive behavior by the Chinese in the South China Sea near Philippine-controlled reefs in the 1990s eventually led Philippine political leaders to renegotiate the U.S. presence in the country. Eventually, those negotiations led to the 1998 VFA.²⁸

C. *A New Cycle of the U.S.-Philippine Security Relationship*

History appears to be repeating itself, though perhaps with higher stakes and uncertainty. The current rift between the U.S. and the Philippines carries refrains of the movement for greater independence and empowerment that led the Philippine Senate to refuse to ratify an extension to the SOFA in 1991. Withdrawal from the VFA is consistent with President Duterte’s position on the U.S., including general antipathy regarding the value of the alliance and concern over U.S. interference in the internal affairs of the Philippines.²⁹ Philippine sovereignty is a recurring theme in the discussions of Philippine leaders on the VFA, and Presidential spokesperson, Salvador Panelo, even explained the withdrawal by saying, the “VFA was terminated because [Duterte] does not want, as a matter of principle, interference with or attacks against our sovereignty.”³⁰

A growing economy, improving bilateral relations with China, and declining worries over a communist insurgency are empowering Duterte to move the country away from its long-standing reliance on the United States.³¹ In a 2016 meeting in Beijing, President Duterte said, “I want, maybe in the next two years,

²³ Porrata-Doria, Jr., *supra* note 8, at 86.

²⁴ *Id.* at 74.

²⁵ Philip Shenon, *Philippine Senate Votes to Reject US Base Renewal*, N.Y. TIMES (Sept. 16, 1991), <https://nyti.ms/38N3oqV> (quoting Senator Agapito Aquino).

²⁶ Strasser, *supra* note 12, at 173.

²⁷ For a short history of the Philippine bases, see James A. Gregor, *The Key Role of U.S. Bases in the Philippines*, HERITAGE FOUND. BACKGROUNDER (Jan. 19, 1984), <https://bit.ly/3ir4qwl>.

²⁸ See *Visiting Forces Agreement*, *supra* note 1.

²⁹ Ian Storey, *US-Philippine Alliance Facing Major Stress Test*, THE STRAITS TIMES (Feb. 14, 2020), <https://bit.ly/3fkb32p>. Some examples of U.S. intervention include supporting an anti-insurgency campaign in the 1950s and Ferdinand Marcos in the 1970s, which sparked anti-basing sentiment throughout the 1980s.

³⁰ Alexis Romero, *No New Defense Deal with US, Says Palace*, PHILIPPINE STAR (Mar. 2, 2020), <https://bit.ly/2ZhUv5C>.

³¹ Aileen Baviera, Opinion, *The Philippines Moving to Active Middle Power Diplomacy*, PRESENZA INT’L PRESS AGENCY (Apr. 8, 2020), <https://bit.ly/2Wb9iNE>.

my country free of the presence of foreign military troops. I want them out.”³² While recent economic concerns may have affected the decision to suspend termination, strategic partnerships benefit more from stability than do markets.³³ Moreover, concerns that SOFAs create the perception that a state cannot provide for its own defense and is dependent on another state for protection have dominated Philippine rhetoric.³⁴ Panelo, when discussing the reasons for withdrawal, argued the VFA “has been disadvantageous to us, plus the fact that our country believes we have to stand on our own as a country. We can’t always rely on other countries for our defense.”³⁵ Just as politicians in 2020 echo their predecessors from the 1990s, legal scholarship from the 1990s is salient anew, as one law review author argued:

The renegotiation of the Philippine Bases and Status of Forces Agreement proved to be an extremely difficult endeavor. To begin with, the current Agreement was a somewhat unusual one and always has remained highly controversial in the Philippines. Furthermore, these negotiations commenced at a time when many of the strategic assumptions upon which the United States based its presence in the Philippines have changed drastically and when the United States was struggling to deal with a budget deficit. At the same time, the Philippines was undergoing a period of severe political and economic stress and turmoil. Not surprisingly, almost every word of the current Agreement appeared to be in controversy.³⁶

Despite these challenges, the VFA was negotiated just a few years later, and there have been several other indicators of the importance of the U.S.-Philippines strategic partnership. One key agreement has been the 2014 Enhanced Defense Cooperation Agreement (EDCA), a ten-year defense agreement that allows the United States to access and use designated areas controlled by the Armed Forces of the Philippines, in support of the larger Mutual Defense Treaty (MDT) framework.³⁷ In 2018, the first EDCA warehousing project began and the Department of National Defense Secretary, Delfin Lorenzana, argued,

EDCA is a demonstration that our two nations are interested to long term solutions to shared problems. . . . The prepositioning of equipment and supplies in a consolidated location increases our ability to respond quickly. Hence, it is the Filipino community that will ultimately benefit from this project which is not only a testament to our countries’ commitment to having a stronger alliance, but also to our desire to help one another grow capabilities together.³⁸

³² Adam Taylor, *The Philippines’ Duterte Is Trying to Trump Trump*, WASH. POST (Feb. 13, 2020), <https://wapo.st/2AULne0> (quoting President Duterte).

³³ Maria Siow, *Philippines’ Move to Keep US Military Pact Reveals Shift in South China Sea Calculations*, S. CHINA MORNING POST (June 6, 2020), <https://bit.ly/3ekgMUL>.

³⁴ Porrata-Doria, Jr., *supra* note 8, at 87.

³⁵ Romero, *supra* note 30.

³⁶ See Porrata-Doria, Jr., *supra* note 8, at 101.

³⁷ Frances Mangosing & Matikas Santos, *What Is the Enhanced Defense Cooperation Agreement and what does it What Does It Mean for PH?*, PHIL. DAILY INQUIRER (Apr. 28, 2014), <https://bit.ly/2ZknG8j>.

³⁸ Priam Nepomuceno, *EDCA to Allow PH, US to Respond to Regional Security Challenges*, PHIL. NEWS SERV. (Apr. 18, 2018), <https://bit.ly/2Zmj2GW>.

As the Secretary indicates, being positioned, with both people and logistical supplies, enables States interested in maintaining rule of law to respond to security challenges quickly, hopefully minimizing escalation.

The historical relationship of the U.S. and the Philippines adds a layer of complexity to the negotiations between the two countries, but the underlying issues can also impact U.S. relations with other regional allies, such as Vietnam, Singapore, Japan, and South Korea. The U.S. “pivot to Asia” and subsequent regional policy of “rebalance”³⁹ highlight the significance of the Asia-Pacific region to U.S. security interests, and U.S. presence in the region not only reassures partners but reinforces those strategic relationships. Many countries in the western Pacific, in addition to the Philippines, have expressed concerns over China’s increasing military strength and excessive maritime claims, leading them to look to the U.S. for the regional leadership exercised in the 1990s.⁴⁰ Recent actions during the pandemic in the South China Sea have brought advances of anti-submarine warfare and reconnaissance aircraft to the Spratly Islands as well as the creation of two “administrative districts” in the disputed Paracel Islands, areas of interest for many claimants in the region.⁴¹ At the same time, Beijing has attempted to employ soft power through development grants and has courted leaders like President Duterte in an effort to establish regional supremacy. The suspension of VFA termination is seen by some as a strategic loss for China, one that demonstrates that countries in the region wish to retain a counterbalance to China’s agenda.⁴² Other Association of Southeast Asian States (ASEAN) states may be watching the VFA as an indicator of U.S. commitment to a Pacific free from Chinese domination.

III. STRATEGY IN A MULTIPOLAR WORLD: TERMINATION AS A TOOL OF NEGOTIATION

President Duterte’s decision to terminate and then suspend termination reflects the complicated political and strategic impacts of the VFA. Without the VFA’s legal protections, the U.S. would likely suspend most defense cooperation activities with the Philippines, thereby undermining strategic initiatives such as the Free and Open Indo-Pacific policy.⁴³ The VFA’s significance exceeds its strict terms regarding the movement of U.S. personnel in the Philippines; it provides a means through which the U.S. can support its other mutual defense obligations in the region through the positioning of forces and logistical supplies, promoting peace and stability.⁴⁴ Termination, especially if abrupt and without replacement, may embolden China, whose encroachment in the South China Sea ultimately threatens Philippine interests and regional security, much as it did in the 1990s. Such concerns mean the decision to withdraw from the VFA was not met with universal praise in the Philippines, or even within the Duterte administration. Foreign Secretary Teodoro Locsin told the Senate the withdrawal was likely to “foster aggression” in the South China Sea, presumably by China.⁴⁵ The spring of 2020 saw an emboldened China taking a more aggressive stance

³⁹ Ash Carter, *The Rebalance and Asia-Pacific Security: Building a Principled Security Network*, FOREIGN AFF. (2016).

⁴⁰ See, e.g., Rajeswari Pillai Rajagopalan, *The Danger of China’s Maritime Aggression Amid COVID-19*, THE DIPLOMAT (Apr. 10, 2020), <https://bit.ly/300fFnV>.

⁴¹ Siow, *supra* note 33.

⁴² Jason Gutierrez, *Philippines Backs Off Threat to End U.S. Alliance*, N.Y. TIMES (Jun. 3, 2020), <https://nyti.ms/3gPXUys>.

⁴³ Storey, *supra* note 29.

⁴⁴ Derek Grossman, Opinion, *There’s Still Life in the U.S.-Philippines Visiting Forces Agreement*, FOREIGN POLICY (May 1, 2020), <https://bit.ly/38OT9CM>.

⁴⁵ Storey, *supra* note 29.

throughout the region, from a border skirmish with India to a takeover of Hong Kong and an increasing number of military interactions at sea.⁴⁶ Given the history between China and the Philippines, particularly over the South China Sea, and China's expansionism over the past decade, one must ask what would prompt the Philippines to undermine cooperative defense efforts with the U.S. at this point in time.

The stage for withdrawal may have been set several years ago in the prosecution of a 2014 homicide. Criminal jurisdiction over U.S. forces in the Philippines has always been a contentious issue.⁴⁷ The 2014 murder of a Philippine national by a U.S. Marine, Private First Class (PFC) Scott Pemberton, became a flash point. PFC Pemberton met a woman, Jennifer Laude, at a Manila nightclub and brought her back to his hotel room. Upon discovering the woman was transgender, an altercation ensued, and PFC Pemberton killed Jennifer Laude.⁴⁸ The murder sparked outrage and allegations of a hate crime in the Philippines. Under Philippine law, bail would not be available due to the nature of the charges, but, in accordance with the terms of the VFA, PFC Pemberton remained in U.S. custody throughout the investigation and trial.⁴⁹ The proceedings caused some to argue that PFC Pemberton received special treatment while Filipinos were treated as second-class citizens in their own country as a result of the protections afforded to U.S. servicemembers under the VFA.⁵⁰ Following PFC Pemberton's conviction, a lawyer for the victim's family celebrated not only justice but Philippine independence: "[t]he fact that a member of the U.S. Marines was found guilty for breach of our criminal laws for the very first time is an affirmation of Philippine sovereignty."⁵¹ PFC Pemberton's crime and trial catalyzed a critique of U.S. military presence in the Philippines. Despite the words of the Laude's attorney, his conviction did not quell the outrage.

The legal and political legacy of the Pemberton case was reflected in a speech by Representative Roque in the House of Representatives in 2016:

While the President himself has said that he is not ready to abrogate the Visiting Forces Agreement and the EDCA, he has, nonetheless, said that this year's military exercise involving the Philippine and the U.S. Marines may well be the last military exercise. Of course, putting an end to this military exercise will ensure that there will be no more Jennifer Laudes, . . . In the first place, . . . Jennifer Laude would not have been [a] victim[] of U.S. servicemen if not because of the VFA which enabled the presence of these U.S. servicemen in Philippine territory. . . . [E]ven public officials were involved in the Jennifer Laude case, not to accord justice to the family or to the Filipino people, but to please the Americans for whatever reasons they may have. I am happy to note that two years after her murder, perhaps her death was not for naught. I am hoping

⁴⁶ Steven Lee Myers, *China's Military Provokes Its Neighbors, but the Message is for the United States*, N.Y. TIMES (Jun. 29, 2020), <https://nyti.ms/3a31cwi>.

⁴⁷ Porrata-Doria, Jr., *supra* note 8, at 71.

⁴⁸ Floyd Whaley, *U.S. Marine Guilty in Killing of Transgender Woman in Philippines*, N.Y. TIMES (Dec. 1, 2015), <https://nyti.ms/32bkhKG>.

⁴⁹ *Id.*

⁵⁰ See Per Liljsa, *Philippines: Transgender Murder Becomes Rallying Point for LGBT Rights*, TIME (Oct 24, 2014), <https://bit.ly/2OipJDj>.

⁵¹ Virgil Lopez, *CA Affirms Conviction of Pemberton for Killing Jennifer Laude*, GMA NEWS (Apr. 10, 2017), <https://bit.ly/2AOctmP>.

that the Filipinos have learned that only the Filipinos can promote the national interest. I am hoping that because of the painful experience of Jennifer Laude, more Filipinos will zealously guard Philippine sovereignty and Philippine jurisdiction.⁵²

Although the Pemberton case served as an important flash point in U.S.-Philippine relations, criminal jurisdiction is not the only issue driving the allies further apart. Since assuming the presidency, Duterte has been engaged in a war on drugs marked by violence, extrajudicial killings, and international condemnation.⁵³ While the Trump Administration took various stances on Duterte's drug programs, recently the U.S. denied a visa to one of the masterminds of the anti-drug program, former police chief Senator Ronald Dela Rosa, under an amendment passed by the U.S. Senate in accordance with the Global Magnitsky Human Rights Accountability Act.⁵⁴ Dela Rosa is accused of involvement in the wrongful imprisonment of another Philippine senator, Leila de Lima, an outspoken critic of the drug war.⁵⁵ The termination of the VFA was announced in conjunction with condemnation of the decision to deny Dela Rosa a visa, tying the withdrawal to the accusation of United States meddling in the Philippines' internal affairs.

Perhaps the most compelling reason for the Philippines to withdraw from the VFA, and the related EDCA, is the most concerning: a lack of a shared strategic purpose. Representative Roque of the Philippines summarized this concern:

If battle experience is what is important in a military exercise . . . it is the Americans that will benefit from the joint military exercises; they will benefit from the war, from the battle experience of Philippine soldiers.

They also say that the VFA is important because we need to modernize our Armed Forces. . . . I did not see the Armed Forces of the Philippines modernized despite the lapse of this 20-year period I find the EDCA completely worrisome [The EDCA] actually contemplates the stationing of U.S. troops and facilities in Philippine military bases, subject to the full control of American authorities

What are the dangers of the EDCA? We have seen very clearly . . . there is a difference between the Philippine national interest and the American national interest. Even in the West Philippine Sea controversy, the United States has made its position very clear. We do not take sides in the ongoing territorial dispute. The American concern is only freedom of navigation in the West Philippine Sea. In other words, even if the Chinese were to occupy all the islands that are currently

⁵² Representative Herminio L. Roque, Jr., Address to the Republic of Philippines House of Representatives (Oct. 12, 2016), <https://bit.ly/314uZ4X>.

⁵³ Regine Cabato, *Thousands Dead. Police Accused of Criminal Acts. Yet Duterte's Drug War Is Wildly Popular*, WASH. POST (Oct. 23, 2019), <https://wapo.st/3elmB44>.

⁵⁴ Yeo, *supra* note 2. The Act targets those accused of violating human rights around the world. See Global Magnitsky Human Rights Accountability Act of 2016, Pub. L. No. 114-328. Ironically, President Duterte has said that he once applied for, and was denied, a visa to visit the United States. Yeo, *supra* note 2.

⁵⁵ Yeo, *supra* note 2.

under the occupation of the Philippines, the Americans could not care less, provided that China will not consider the West Philippine Sea as part of its national territory

Perhaps, the greatest danger of the EDCA . . . is given this divergence of national interest between the Philippines and the United States, and given the worsening posturing between the United States and China, the EDCA, in case of a full-blown armed conflict between the United States and China, will make the Philippines yet their battleground It is for this reason, Mr. Speaker, that despite the Mutual Defense Treaty, the Americans did not lift a finger when China took away Mischief Reef and, recently, Scarborough Shoal from our possession.⁵⁶

Representative Roque's 2016 speech raises the fundamental question: if the agreements are themselves exercises of sovereignty, but the agreement no longer serves the strategic interests of the sovereign, is there a benefit to the country that is relinquishing some of its sovereignty? Representative Roque also highlights one of the most fundamental differences between the current crisis and the failure to renew the SOFA. In the 1990s, the Philippines saw the U.S. as a balance to Chinese aggression and a force for regional stability, but Representative Roque highlights the view that in recent years, the U.S. has demonstrated an unwillingness to take action to stop China's expansion into the South China Sea while also engaging in what many see as provocative freedom of navigation operations in the region. It is possible China's actions following the announced termination of the VFA have restored a shared strategic purpose for the Philippines and U.S. that resolves these sovereignty concerns as, since February 2020, China has been accused of pointing a laser gun at a Philippine frigate, ramming and sinking a Vietnamese vessel, and intimidation of Vietnamese and Malaysian oil and gas exploitation efforts.⁵⁷ While some see the decision to suspend termination as a response to China's increasingly aggressive posture in the South China Sea while the world responds to the pandemic, the U.S.-Philippines relationship is complex and the implications for Philippine sovereignty are keenly felt by many.⁵⁸ As a result, there will likely be continued calls within the Philippines that the VFA, along with EDCA and MDT, do not provide a useful framework to the host nation that bears the costs, politically and legally, of those agreements.

IV. A TWEET HEARD AROUND THE PACIFIC: LEGAL IMPLICATIONS OF PRESIDENT DUTERTE'S VFA TERMINATION

[T]he VFA strengthens the [MDT and EDCA] . . . if you remove it, that means the two deals would weaken. Then, you will get there. If the basis of the President is to be self-reliant, all the logical consequences will come.

- Presidential Spokesperson Panelo, regarding the effect of VFA termination⁵⁹

The VFA, EDCA, and MDT form a network of bilateral rights and responsibilities that underpin the U.S.-Philippines defense relationship. Withdrawal from any of the agreements limits the options for regional

⁵⁶ Roque, *supra* note 52.

⁵⁷ Siow, *supra* note 33.

⁵⁸ *Id.*

⁵⁹ Romero, *supra* note 30.

engagement. While VFA termination appears to have been suspended, the crisis is not past. The underlying factors that motivated President Duterte's VFA termination efforts persist, and future termination efforts would further test the strength of the legal instruments effecting the U.S.-Philippines relationship. As leaders in both countries assess the challenges facing the region and the future of U.S.-Philippines defense cooperation, the existing agreements may be revised—or targeted anew for termination, as some Philippine leaders have threatened. While EDCA or MDT withdrawal would potentially be more destructive, VFA termination remains most likely. A sober look at the ways in which VFA termination would dismantle more than 60 years of legal architecture—with and especially without the consent of both parties—may prove valuable.

Procedurally, the VFA includes a termination clause that allows either party to notify the other of their intent to withdraw; the agreement then terminates 180 days after notification.⁶⁰ Negotiating for termination of an international agreement is consistent with the principle of state sovereignty under customary international law and as articulated in the Vienna Convention on the Law of Treaties, Article 54.⁶¹ In the VFA, the explicit termination clause likely ameliorated domestic concerns in the Philippines over sovereignty and coercion during the 1990s negotiations.⁶² However, as a practical matter, should termination proceed, any legal protections and privileges the VFA afforded to the U.S. armed forces—as organizational entities and at the level of individual servicemembers, civilian employees, and dependents accompanying them—will cease to exist.

Less clear would be the fate of *other* defense treaties and agreements under international law if the VFA is terminated or if those treaties are themselves targeted for termination. Some political leaders within the Philippines have made broad statements that the VFA's termination would render other U.S.-Philippines agreements null and void.⁶³ Other members of the administration have made more cautious statements, promising that the Philippine Senate will examine the impact of the VFA's termination on the MDT and EDCA, the latter of which is largely

⁶⁰ Visiting Forces Agreement, *supra* note 1, art. 9.

⁶¹ Vienna Convention on the Law of Treaties art. 54, Apr. 24, 1970, 1155 U.N.T.S. 331 [hereinafter VCLT] (“The termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the parties after consultation with the other contracting States.”). This Article focuses solely on the effect of customary international law and the VCLT on the status of the VFA, MDT, and EDCA. Although a discussion of the impact of U.S. and Philippines domestic law on international agreements is outside the scope of this Article, it warrants brief mention. Some Philippine political leaders question whether President Duterte has unilateral power in the Philippines to withdraw from the treaty. The Philippines Senate has asked the Philippines Supreme Court to clarify whether the President can even unilaterally withdraw from a treaty that required the concurrence of the Senate before it was passed. *Clarifying Senate Role In Ending A Treaty*, MANILA BULL. (Mar. 12, 2020), <https://bit.ly/31GHd2q>. Additionally, in 2016, the Philippines Supreme Court found the EDCA was constitutional as an executive agreement implementing the VFA, and therefore did not require approval by the senate. *Saguisag v. Ochoa*, G.R. No. 212426 (S.C., Jan. 12, 2016) (Phil.), <https://bit.ly/3gMCS4n>. At the time, this finding allowed the EDCA to enter into force for both parties. Following the VFA's termination, it may now serve to undermine the EDCA domestically in the Philippines. Additionally, the EDCA is an “Agreement” but is also listed by the U.S. Department of State in its “Treaties in Force” publication. There is an extensive body of literature on the distinction in U.S. law between treaties made in accordance with Article II of the U.S. Constitution, international agreements made with congressional approval, and executive agreements more generally, and the implications for their termination under domestic law. *See generally*, e.g., Harold J. Koh, *Presidential Power to Terminate International Agreements*, 128 YALE L.J. F. 432 (2018); Curtis A. Bradley, *Exiting Congressional-Executive Agreements*, 67 DUKE L.J. 1615 (2018).

⁶² Porrata-Doria, Jr., *supra* note 8, at 91.

⁶³ *See, e.g.*, Eimor Santos, *Philippines Formally Ends Visiting Forces Agreement with US*, CNN PHIL. (Feb 11, 2020), <https://bit.ly/324JBH>.

seen as implementing the VFA.⁶⁴ Moreover, there are at least 24 defense-related treaties in force between the U.S. and the Philippines supporting the strategic partnership and underlining its significance, but also which may be related to the VFA.⁶⁵ As a result, understanding the procedure and impacts of termination is critical to understanding the significance of the action. Perhaps most importantly, future attempts at termination by the Philippines may signal continued interest in aligning with Beijing. However, as described below, not all termination rationales are equally viable and not all require the same level of upheaval in the defense relationship between the U.S. and the Philippines. The selection of rationale, therefore, speaks volumes about the intended security orientation of the Philippines in the years ahead.

A. *Which Termination Rules Apply?*

With 116 state parties and another 15 signatory states, the VCLT provides an architecture for understanding the legal effect of President Duterte's notification on other U.S.-Philippines treaties.⁶⁶ That architecture is useful, if imperfect, in this case: while the Philippines is a party to the VCLT, the U.S. is not, having signed but never ratified the treaty.⁶⁷ The Philippines could argue that, as the U.S. is not a party to the VCLT, its terms create no privileges for the U.S. and no duties for the Philippines in bilateral treaties with the U.S. Indeed, Article 4 of the VCLT provides that,

[w]ithout prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.⁶⁸

As the Convention has not entered into force for the U.S., the second clause of Article 4 likely precludes any insistence by either party to rights or privileges purely under the VCLT.

⁶⁴ See, e.g., Enhanced Defense Cooperation Agreement art. I, Phil.-U.S., Apr. 28, 2018 [hereinafter EDCA] ("This Agreement deepens defense cooperation between the Parties and maintains and develops their individual and collective capacities, in furtherance of Article II of the MDT, which states that 'the Parties separately and jointly by self-help and mutual aid will maintain and develop their individual and collective capacity to resist armed attack,' and within the context of the VFA."); see also *Saguisag v. Ochoa*, G.R. No. 212426 (S.C., Jan. 12, 2016) (Phil.), <https://bit.ly/3gMCS4n> ("What EDCA has effectively done, in fact, is merely provide the mechanism to identify the locations in which US personnel may perform allowed activities pursuant to the VFA. As the implementing agreement, it regulates and limits the presence of US personnel in the country.").

⁶⁵ The U.S. Department of State's most recent *Treaties in Force* publication lists 22 bilateral, defense-related treaties between the U.S. and Philippines. See U.S. DEPARTMENT OF STATE, *TREATIES IN FORCE* (Jan. 1, 2019), <https://bit.ly/3gMEomS>. An additional two agreements (signed in 2017 and 2019) are available on the State Department's *Treaties and Other International Acts Series* (T.I.A.S.) database. See *Agreement Concerning Defense Cooperation*, Phil.-U.S., Sept. 15, 2017, T.I.A.S. 17-915, <https://www.state.gov/17-915/>; *Special Security Agreement*, Phil.-U.S., Apr. 15, 2019, T.I.A.S. 19-415, <https://www.state.gov/philippines-19-415>.

⁶⁶ VCLT, *supra* note 61, art. 54.

⁶⁷ See UNITED NATIONS TREATY COLLECTION, <https://bit.ly/30DCyPS> (last visited Jul. 23, 2020), listing the status of the VCLT.

⁶⁸ VCLT, *supra* note 61, art. 4.

The first clause, however, conceives of independent sources of international law that may apply even where the Convention does not.⁶⁹ Historically, the VCLT was the result of a project to codify existing customary international law around treaty creation, interpretation, and termination.⁷⁰ The VCLT is regularly referenced by states who are not parties, including the U.S., and applied by international tribunals as persuasive, even where it is not controlling.⁷¹ Several of these decisions specifically address grounds for termination.⁷² Because the VCLT largely codifies customary international law on the subject of treaty interpretation, it is a valuable tool to evaluate the existing duties and rights under U.S.-Philippines treaties. These decisions are relevant should the Philippines or U.S. ultimately request an international tribunal's judgment on the legal effect of the VFA's termination, however unlikely such a request may be considering both parties' past practice. As a member of the ASEAN, the Philippines has almost 50 years of experience in an international organization with an intentionally consensus-based approach to conflict resolution.⁷³ Perhaps more strikingly, in the 73-year history of the International Court of Justice (ICJ), the Philippines has not been party to a single case.⁷⁴ Finally, though the Philippines sought and obtained a favorable ruling by the Permanent Court of Arbitration under the United Nations (UN) Convention on the Law of the Sea regarding possession of the Spratly Islands, the Philippines have yet to enforce that ruling against the People's Republic of China.⁷⁵ For its part, the U.S. has demonstrated historical support for international tribunals, supporting the creation of the International Criminal Tribunals for Yugoslavia and Rwanda by the UN Security Council,⁷⁶ and has had a U.S. member of the

⁶⁹ See generally A. Watts, *The International Court and the Continuing Customary International Law of Treaties*, in THE HAGUE: KLUWER LAW, LIBER AMICORUM JUDGE SHIGERU ODA 251, 251–66 (N. Ando, E. McWhinney and R. Wolfrum eds., 2002).

⁷⁰ ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 8 (2013) 5–6.

⁷¹ *Id.* at 10–11. For examples of such decisions, see, e.g., *Kasikili/Sedudu Island (Botswana v. Namibia)* ICJ Reports (1999), p. 1045, ¶ 18; ILM (2000) 310, 320; 119 ILR 467 (applying the VCLT to interpret an 1890 treaty despite VCLT's explicit non-retroactivity); see also Curtis A. Bradley, *Treaty Termination and Historical Gloss*, 92 TEX. L. REV. 773, 777 (2014) (noting that “although the United States is not a party to the Convention, Executive Branch officials have stated at various times that they regard the Convention as largely reflective of binding rules of international custom, and U.S. courts also regularly refer to the Convention”).

⁷² *Fisheries Jurisdiction (U.K. v. Ice.)*, Judgment, 1973 I.C.J. 3, ¶¶ 24, 36 (Feb. 2) (interpreting a pre-VCLT treaty in light of VCLT Articles 50 and 62, finding those articles codified international law); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, ¶ 94 (June 21); *Gabcikovo-Nagymaros Project (Hungary-Slovakia)*, Judgment, 1997 I.C.J. 7, ¶¶ 42–48 and 92–100 (Sept. 25) [hereinafter *Gabcikovo*] (analyzing VCLT Articles 60 to 62 and finding they generally reflected customary international law).

⁷³ See Rodolfo C. Severino, Secretary-General, Association of Southeast Asian Nations, *The ASEAN Way and the Rule of Law*, Address at the International Law Conference on ASEAN Legal Systems and Regional Integration (Sept. 3, 2001) (charting the development of ASEAN as an organization without legal dictates and noting “thirty-four years after its founding, ASEAN adheres to the evolutionary approach, relying largely on patient consensus-building to arrive at informal understandings or loose agreements”); RODOLFO C. SEVERINO, *SOUTHEAST ASIA IN SEARCH FOR COMMUNITY: INSIGHTS FROM THE FORMER ASEAN SECRETARY-GENERAL 1–37* (2006) (describing the “ASEAN Way” of decision making through consensus and, often, unanimity as a response to the historical experience of colonization and foreign influence); Asian Development Bank Institute, *THE ASEAN READER 184–85* (2015) (assessing consensus as an effective decision-making tool for security and defense matters but identifying concerns about the use of consensus for economic decisions).

⁷⁴ *List of All Cases*, INT'L CT. OF JUST., <https://bit.ly/2ATufoU> (last visited July 10, 2020).

⁷⁵ *The Republic of the Philippines v. The People's Republic of China*, Award on Jurisdiction and Admissibility (Perm. Ct. Arb.), 55 I.L.M. 805 (2014).

⁷⁶ S. C. Res. 827 (May 25, 1993) (establishing the International Tribunal for the former Yugoslavia (ICTY)); and S. C. Res. 955 (Nov. 8, 1994) (establishing the International Criminal Tribunal for Rwanda (ICTR)).

International Court of Justice (ICJ) since the Court's founding in 1946.⁷⁷ However, the U.S. has also criticized some nations' recourse to the ICJ as overtly political.⁷⁸ Moreover, the U.S. withdrew from an Optional Protocol creating ICJ jurisdiction for matters regarding consular relations, and declined to ratify the Rome Convention establishing the International Criminal Court.⁷⁹ Both the U.S. and Philippines have substantial practice resolving disputes outside the fora of international courts. They can be expected to rely on that experience if they assess their national interests are best served outside an international court's jurisdiction.

However, even if one assumes neither party would bring the matter to an international tribunal, the termination rationales articulated in the VCLT and interpreted by the ICJ provide an important framework and vocabulary. A reputation for fulfilling the terms of one's defense treaties is not inconsequential.⁸⁰ Both states are therefore likely to frame their actions in these terms as complying with international law, even if they take opposing views.

Four customary international law termination rationales⁸¹ are the most likely contenders if President Duterte and other leaders seek to dismantle the bilateral agreements that structure the U.S.-Philippines defense relationship. Each termination rationale has an analogue in the VCLT: (1) the treaties' explicit terms; (2) material breach; (3) supervening impossibility of performance; and (4) fundamental change of circumstances.⁸² Several of these rationales would provide the U.S. grounds to terminate the MDT or EDCA, though none require that the U.S. seek termination and, given the regional significance of the U.S.-Philippines defense relationship, it is unlikely the U.S. would pursue termination at this time. The last rationale provides perhaps the strongest argument for termination by the Philippines, though its invocation poses interesting legal and political questions for both parties.

1. Explicit Terms (Art. 54, VCLT)

The most straightforward way to terminate a treaty is according to that treaty's own explicit terms. To the extent the Duterte regime and its successors seek to alter the nation's network of defense agreements while preserving the Philippines' international reputation as a reliable partner, this termination rationale provides the best chance of success. Presently, there is no viable legal argument that termination of the VFA would automatically terminate either the

⁷⁷ *All Members*, INT'L CT. OF JUST., <https://bit.ly/3gObN0c> (last visited July 10, 2020).

⁷⁸ See Office of the Legal Advisor to the U.S. Secretary of State, *International Courts and Tribunals and the Rule of Law* (May 11, 2006), <https://bit.ly/2WbKS6G>.

⁷⁹ In 2005, the U.S. withdrew from the Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes. The effect of the withdrawal was to terminate submission of U.S. consular actions to ICJ jurisdiction. See United Nations Treaty Collection, Status of Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, <https://bit.ly/30HNPi2> (last visited on Aug. 9, 2020).

⁸⁰ See e.g., ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 105–8 (1984) (arguing that “[i]n the absence of specific retaliation, governments may still have incentives to comply with regime rules and principles if they are concerned about precedent or believe that their reputations are at stake”); ABRAM CHAYES & ANTONIA H. CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 25 (1995) (arguing that the driving force for states' behavior within treaty regimes is reputational, forged through “an iterative process of discourse among the parties, the treaty organization, and the wider public”).

⁸¹ See AUST, *supra* note 70, at 10–11; see also *supra* notes 70–71 and accompanying text.

⁸² VCLT, *supra* note 61, arts. 54, 60–62. See AUST, *supra* note 70, at 10–11, for a discussion of customary international law status and at 252, 257, 260–64 for a discussion of each termination rationale. As an additional note, if either party intends to invoke these bases for termination, VCLT Articles 62 to 65 require specific procedures for effecting that termination, none of which have been exercised in this case.

MDT or EDCA under the explicit terms of those agreements. Both agreements include their own termination procedures. Specifically, Article VIII of the MDT provides that either party may terminate the MDT, effective one year after providing notice to the other party.⁸³ No such notice has been offered and therefore, termination of the MDT has not been triggered under that treaty's explicit terms. The EDCA's own terms do not allow termination until the year 2024. The EDCA provides that it shall have an initial term of ten years and then continue in force unless and until either party gives one year's written notice through diplomatic channels of intent to terminate.⁸⁴

However, if the relationship between the U.S. and the Philippines deteriorates, or if the Duterte regime considers termination threats likely to create political leverage, it is possible the MDT or, in 2024, the EDCA could be President Duterte's next target for termination. Terminating these agreements would be a dramatic move. The Philippines conceivably could exercise the EDCA's termination clause to renegotiate the specifics of the U.S.-Philippines defense relationship. However, the MDT is a straightforward and comprehensive mutual defense agreement. Exercise of the MDT's termination clause would be unlikely to result in an agreement more favorable to the Philippines and therefore would likely indicate a commitment to a future with heavy ties to Beijing.

2. Material Breach (Art. 60, VCLT)

Because the Duterte administration invoked the VFA's termination clause, it cannot now invoke its own action as forming a material breach of the MDT or EDCA to terminate those agreements.⁸⁵ The U.S. could theoretically cite the Philippines' act of terminating the VFA as material breach, though the argument is not a strong one and, at present, most U.S. leaders have expressed interest in preserving U.S.-Philippines defense agreements.⁸⁶

In order to support termination, the breach must be *material* and of the treaty itself, not of another treaty or other duties under international law.⁸⁷ To be material, a breach must be a repudiation of the treaty or a violation of a provision that is "essential to the accomplishment of the object and purpose of the treaty."⁸⁸ For example, the UN Security Council characterized Iraq's refusal to fully comply with investigations by the International Atomic Energy Commission as material breaches of Iraq's duties under UNSCR 687.⁸⁹

VFA termination alone likely does not constitute material breach of the MDT. The essential terms of the MDT are that the U.S. and the Philippines will act in each other's defense and mutual defense can be performed without a SOFA.

⁸³ Mutual Defense Treaty, *supra* note 3, art. VIII.

⁸⁴ EDCA, *supra* note 64, art. XII, ¶ 4.

⁸⁵ See AUST, *supra* note 70, at 259, 262; Gabcikovo, *supra* note 72, ¶ 110.

⁸⁶ See, e.g., Dzirhan Mahadzir, *U.S. Warns China Will Gain Edge if the Philippines Ends Visiting Forces Agreement*, USNI NEWS (Feb. 12, 2020), <https://bit.ly/33HcSDy> (quoting Secretary of Defense Mark Esper that "I do think [VFA termination] would be a move in the wrong direction as we both bilaterally with the Philippines and collectively with a number of other partners and allies in the region are trying to say to the Chinese, 'You must obey the international rules of order. You must obey, you know, abide by international norms As we try and bolster our presence and compete with [China] in this era of great power competition, I think it's a move in the wrong direction for the longstanding relationship we've had with the Philippines for their strategic location, the ties between our peoples, our countries.'").

⁸⁷ See AUST, *supra* note 70, at 259; Gabcikovo, *supra* note 72, ¶ 106.

⁸⁸ VCLT, *supra* note 61, art. 60(3); see also AUST, *supra* note 70, at 260.

⁸⁹ S.C. Res. 707, ¶ 2 (Aug. 15, 1991).

There is no requirement in the MDT to maintain a SOFA and, indeed, the 1998 VFA was signed following a period of lapse where no SOFA existed. Under these circumstances, any argument that the absence of a SOFA is a material breach of the MDT appears flimsy.

Though it is unlikely to do so, the U.S. could more plausibly argue that the Philippines has breached its duties under the EDCA by terminating the VFA. The EDCA, signed in 2014, is characterized as implementing the VFA.⁹⁰ Members of the Philippines government, while surely not attempting to bolster a potential U.S. claim of material breach, have perhaps strengthened such an argument by stating the VFA's termination obviates the EDCA.⁹¹ However, even this is a stretch. Closer analysis of the nature of any alleged breach would be required if the U.S. sought to claim VFA termination constituted material breach of the EDCA or MDT. Any such argument would likely fail on both the question of materiality and on whether the breach was "of the treaty itself."

Though the treaties are closely related, the EDCA's provisions never explicitly require the existence of a SOFA. For example, the VFA provides that "[t]he Government of the Philippines shall facilitate the admission of United States personnel and their departure from the Philippines in connection with activities covered by this agreement."⁹² The EDCA provides that "[w]hen requested, the Designated Authority of the Philippines shall assist in facilitating transit or temporary access by United States forces to public land and facilities (including roads, ports, and airfields), including those owned or controlled by local governments, and to other land and facilities (including roads, ports, and airfields)."⁹³ At first blush, elimination of the Philippines' VFA duty to facilitate admission and departure may seem to support an argument that the Philippines had breached its duties under the EDCA. However, a fact-specific analysis of these and other closely related clauses suggests the Philippines' duties under the EDCA are sufficiently distinct from those of the VFA that termination of one does not constitute breach of the other. Considering the clauses cited *supra*, one might imagine a situation in a post-VFA world in which no U.S. personnel were present within the Philippines, but the U.S. made a request under the EDCA for the Philippines to facilitate temporary access by U.S. forces to ports or airfields controlled by local governments. If the Philippines flatly refused to assist in the requested facilitation, the Philippines may be in breach of the EDCA itself, regardless of the VFA's status. The U.S. would then have to decide whether to invoke that breach as grounds to terminate the EDCA. The legal analysis would return to the question of whether the breach was "material" but would at least have resolved the question of whether the breach was "of the treaty itself": if the Philippines refuses to comply with a request under the EDCA, it would be in breach of the EDCA itself.

There remains, of course, the possibility that either the U.S. or the Philippines could take another action that constitutes material breach of the MDT or EDCA—or even of the VFA while it remains in effect. However, if only one party to a bilateral treaty is interested in terminating the agreement, material breach is an unlikely rationale. As articulated above, the state seeking to end an agreement cannot use their own action-in-breach as grounds for termination. The party desiring to maintain the status quo can therefore avoid this rationale for

⁹⁰ Renato Cruz de Castro, *Philippine Supreme Court Approves EDCA: Unlocking the Door for the Return of U.S. Strategic Footprint in Southeast Asia*, ASIA MAR. TRANSPARENCY INITIATIVE (Feb. 1, 2016), <https://bit.ly/3gUuvmZ>.

⁹¹ See Santos, *supra* note 63.

⁹² Visiting Forces Agreement, *supra* note 1, art. III, ¶ 1.

⁹³ EDCA, *supra* note 64, art. III, ¶ 3.

termination by continuing to fulfill its duties and claim its privileges under the agreement.

Finally, and hypothetically, the Philippines could intentionally and directly breach the VFA, EDCA, or MDT to force the U.S. to terminate the agreements. However, such an action would not be guaranteed to result in termination and would place the Philippines in a precarious security position. Such an approach is therefore unlikely, barring a formal alliance between the Philippines and China.

3. Supervening Impossibility of Performance (Art. 61, VCLT)

Statements from leaders in the Philippines that VFA termination renders the MDT moot have, to date, been framed in political rather than legal terms. The closest legal analogue to this rhetoric is the treaty termination basis of supervening impossibility of performance. As in the case of material breach, international law precludes the Philippines from invoking their own action as the supervening impossibility of performance under the MDT or EDCA, whether that be VFA termination or some other state action.⁹⁴ Again, though the U.S. is unlikely to do so, it could potentially invoke an action by the Philippines as terminating the agreements.

If the U.S. were so inclined, its strongest argument for termination of the EDCA under the rationale of “supervening impossibility of performance” is that Article 1 of the EDCA states the treaty operates “in the context of the VFA.” The VCLT provides that “[w]hen a treaty specifies that it is subject to . . . an earlier or later treaty, the provisions of that other treaty prevail.”⁹⁵ The U.S. could argue that the EDCA can only be implemented “in the context of the VFA” and so, absent that context, the VFA cannot be implemented.

However, the threshold for supervening impossibility of performance is high. Article 61 of the VCLT requires that “the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.”⁹⁶ Examples of objects’ permanent disappearance or destruction recognized in international law are physical in nature: the submergence of an island, the destruction by fire of loaned art, or the destruction of tents at issue in a defense treaty.⁹⁷

Considering first whether VFA termination would constitute supervening impossibility of performance: while not a frivolous legal argument, the lack of a pre-agreed status for armed forces personnel is likely distinguishable from the destruction of the physical object of a treaty. The ICJ has not addressed the question of whether a legal regime could qualify as an “object,” the disappearance of which could justify termination. Significantly, in considering

⁹⁴ VCLT, *supra* note 61, arts. 61(2), 62(1); *see also* AUST, *supra* note 70, at 262 (noting that a state seeking to terminate a treaty on the basis of supervening impossibility of performance cannot cite an impossibility created by its own action); *see* Gabcikovo *supra* note 72, ¶ 103 (rejecting Hungary’s argument that it was no longer bound by a treaty due to supervening impossibility of performance on the grounds that “Article 61, paragraph 2, of the Vienna Convention expressly provides that impossibility of performance may not be invoked for the termination of a treaty by a party to that treaty when it results from that party’s own breach of an obligation flowing from that treaty”).

⁹⁵ VCLT, *supra* note 61, art. 30.

⁹⁶ *Id.* art. 61(1).

⁹⁷ AUST, *supra* note 70, at 262.

Hungary's and Slovakia's series of treaties regarding energy production on the Danube River, the ICJ avoided this question by finding the parties had sufficient tools to resolve their dispute.⁹⁸ In the case of the U.S. and the Philippines, continued consular and defense communications following any termination of the VFA could be expected to undermine an argument for supervening impossibility. It is a thorny, yet surmountable challenge.

However, even if the termination of a related treaty were found theoretically sufficient to qualify as supervening impossibility of performance, the actual duties and rights established by the VFA, MDT, and EDCA may not support such a claim. As discussed *supra*, the VFA concerns itself with the status of U.S. personnel within the physical space of the Philippines. By contrast, the EDCA is largely concerned with materiel, contracting, use of "agreed locations," security, and utilities. In the absence of a SOFA, the EDCA is unlikely to be used as extensively as it has been since its signing in 2014, but there are no explicit requirements in the EDCA—for example, jurisdiction over personnel in agreed locations—which would be impossible to execute if the VFA were terminated.

It remains possible that actors within the Philippines seeking to alter the U.S.-Philippines security relationship may take political or legal action to *create* a supervening impossibility of performance. Given the prospective nature and broad language of the MDT, it is difficult to imagine an action by the Philippines that would render performance of the MDT impossible. The EDCA, with its concrete and specific duties and privileges, is a more likely candidate for termination under this rationale, though, as previously stated, the U.S. appears unlikely to seek such termination. The actions that would be required by the Philippines to create a supervening impossibility of performance would be a significant break with current policy and likely deeply destabilizing to Philippine security.

4. Fundamental Change of Circumstances (Art. 62, VCLT)

The final termination rationale for the MDT or EDCA is the least well-established in customary international law.⁹⁹ It also has the broadest potential for termination by either party.

Termination under this rationale requires a change in circumstances that "constituted an essential basis of the consent of the parties to be bound by the treaty" and also that "the effect of the change is radically to transform the extent of obligations still to be performed under the treaty."¹⁰⁰ There is an open question in international law as to whether a government's change of policy could suffice.¹⁰¹ However, the ICJ found the political and economic transition of Hungary and Slovakia from communism to democracy did not qualify as a fundamental change of circumstances for the purposes of a bilateral treaty to develop energy plants along the Danube River because the political and economic changes did not radically transform the extent of obligations still to be performed under the treaty.¹⁰² If the end of communism, a turning point of global

⁹⁸ See Gabcikovo, *supra* note 72, ¶ 103 (finding it was not necessary to reach the question of whether a legal regime constituted an "object," the destruction of which would justify terminating a treaty under Article 61, VCLT, because the network of treaty relationships "made available to the parties the necessary means to proceed at any time, by negotiation, to the required readjustments between economic imperatives and ecological imperatives").

⁹⁹ See, e.g., AUST, *supra* note 70, at 263.

¹⁰⁰ VCLT, *supra* note 61, art. 62(1).

¹⁰¹ See, e.g., AUST, *supra* note 70, at 263.

¹⁰² See Gabcikovo, *supra* note 72, ¶ 104.

significance marking end of the Cold War, did not qualify as a fundamental change of circumstances, then that is a high bar indeed for any country seeking to claim a change in domestic policy voids its international obligations.

As above, though the Philippines is prohibited from invoking its own action as a fundamental change of circumstances terminating the MDT or EDCA, the U.S. could potentially invoke that argument. This argument may be tenable with respect to the EDCA. The U.S. could plausibly argue that the VFA was an essential basis of its consent to be bound by the EDCA and that the effect of VFA termination radically transforms the extent of obligations still to be performed under the EDCA. This is, facially, a reasonable argument with respect to the presence of U.S. personnel at “agreed locations” and the conduct of bilateral exercises, both of which are covered within the EDCA.

Because the VFA post-dates the MDT, the U.S. could not argue that the existence of the VFA was an essential basis of its consent to be bound by the MDT. However, this termination rationale could be far more sweeping than any other if the U.S. sought to employ it. While the former rationales for termination would require a close, fact-based analysis of whether specific terms of either treaty were truly breached or genuinely impossible following VFA termination, the U.S. could invoke the Philippines’s termination of the VFA as *evidence of a fundamental change of circumstances*, triggering the termination of not just the MDT and EDCA but all bilateral defense treaties between the two states. If the U.S. desired to terminate the agreements that structure its defense relationship with the Philippines, it could argue that the Duterte regime has repeatedly undermined that relationship with rhetoric, with increasingly close ties to China, and now with the threatened termination of the VFA. The plausibility of this argument will be shaped in the months and years to come by the response of leaders within the Philippines and the fate of the VFA.

Just as this termination basis is broader for the U.S., there is a potential rationale by which the Philippines could invoke it as well. Rather than citing the termination of the VFA as a fundamental change of circumstances, the Philippines could assert that the relationship between U.S. and the Philippines has fundamentally altered in ways that render the bilateral defense treaties impossible to execute. By this logic, the Philippines could cast their termination of the VFA as a response to that altered relationship. This rationale would resonate with Representative Roque’s assertion that the U.S.-Philippines partnership has not produced the anticipated modernization of the Philippine armed forces and that recent U.S. actions demonstrate the U.S. will not fulfill its security promises.

However, the more time passes without such an explicit invocation, the weaker the rationale becomes for both countries. The VCLT provides that states may lose their right to terminate a treaty if, following a fundamental change of circumstances, the state “must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be.”¹⁰³ Admittedly, “must” is a strong word. If challenged on this point, the Philippines could plausibly point to the political statements suggesting the MDT and EDCA were untenable or the referral for legal review as conduct precluding an obvious conclusion of acquiescence.

¹⁰³ VCLT, *supra* note 61, art. 45(2); AUST, *supra* note 70, at 263.

B. *Future Forces in the Philippines.*

Absent from discussions to date, perhaps due to the global focus on responding to COVID-19, is the fact that the VFA has a twin: a reciprocal bilateral agreement governing the status of personnel from the Philippines visiting the United States.¹⁰⁴ Under that treaty, members of the Philippines' armed forces are able to receive training in the U.S. and on U.S. platforms. That agreement's explicit terms state it entered into force with the VFA and "will continue in force as long as [the VFA] remains in force."¹⁰⁵ Once part of a paired set embodying the commitment of the U.S. and the Philippines to interoperability and security cooperation in the Pacific, this twin would be a silent casualty of President Duterte's termination of the VFA.

By contrast, the MDT and EDCA could likely survive the VFA's termination under international law, but at a cost to both the U.S. and the Philippines. A glance at the last lapse in the Philippines-U.S. SOFA shows the potential for increased uncertainty in the Pacific. When the Military Bases Agreement expired in 1991, the U.S. began leaving the next year, finishing in 1995. That same year, the Chinese entered Mischief Reef in the absence of a strong deterrent, prompting a change of course in the Philippines that resulted in the VFA.¹⁰⁶ The months-long standoff over Scarborough Reef in 2012 tested the U.S. deterrent.¹⁰⁷ This time, if China continues to act in the "grey zone" of conflict, precluding a U.S. response, the Philippines is unlikely to see a new agreement as advantageous to their interests.

If the Philippines continues to seek termination of the VFA, both countries should anticipate extended friction as they unravel interrelated military operations and continue operating in close proximity in the Pacific. Arguments should be expected about rights and obligations under related treaties and especially under the MDT and EDCA. Those arguments, which are likely to employ the language of international law even if they are made in the court of public opinion, will necessarily be technical if made under the treaties' explicit terms, fact-specific if asserting material breach or impossibility of performance, and profoundly political if alleging a fundamental change of circumstances. Asserting termination of the MDT under its explicit terms, or of any defense treaty due to a fundamental change of circumstances, while perhaps most likely to succeed, would most powerfully signal an irrevocable break in a longstanding, if complex, regional security relationship.

IV. EXERCISING SOVEREIGNTY: LEGAL LIMITATIONS AND STRATEGIC CHOICES

The Philippines faces a choice between two partners: one with a mixed history of colonialism and partnership, and another offering support while also engaging in explicit violations of its sovereignty. The historical significance of the partnership with the U.S. and U.S. efforts to influence actions within the Philippines may have driven President Duterte closer to China and away from the

¹⁰⁴ Agreement Regarding the Treatment of Philippines Personnel Visiting the US, Phil.-U.S., Oct. 8, 1998, T.I.A.S 12931, <https://bit.ly/2XOWsp1>.

¹⁰⁵ *Id.*

¹⁰⁶ Cliff Venzon, *Will the Philippine-US Military Alliance Survive Duterte and Trump?*, NIKKEI ASIAN REV. (Mar. 24, 2020), <https://s.nikkei.com/38O3Bu0> (quoting military historian and defense analyst Jose Antonio Custodio as saying "[i]f not for China's takeover of the Mischief Reef, I doubt there would be a VFA").

¹⁰⁷ *Id.*

arrangements in the VFA. However, the pandemic has revealed the long-term goals of China's growing naval power.¹⁰⁸ One unforeseen benefit of the pandemic may end up being an opportunity for strategic pause and reassessment by both the U.S. and the Philippines regarding their defense relationship.

The Duterte administration has emphasized sovereignty and “self-reliance.” Perhaps counterintuitively, though, terminating the VFA would eliminate an avenue for the Philippines to build that self-reliance through training in the U.S. and with U.S. armed forces by automatically terminating the reciprocal agreement. Thirty years ago, the U.S. and the Philippines drifted apart and returned shoulder-to-shoulder, *Balikatan*. In the interval, however, China was able to expand its toehold in the Pacific. For the moment, the region is breathing a sigh of relief that the U.S. presence will not be adversely affected in the middle of the pandemic.¹⁰⁹ The coming months and years will reveal whether and at what cost the U.S. and the Philippines can chart a course for a new century of security cooperation—or whether one or both seeks new strategic partners to resolve their respective uncertainty in the Pacific and establish an acceptable balance of self-reliance and mutual defense.

¹⁰⁸ Gutierrez, *supra* note 42.

¹⁰⁹ Siow, *supra* note 33.

“HAZING” AND THE MILITARY: A HISTORICAL REVIEW OF MILITARY TRAINING TRADITIONS

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The military historically has struggled with defining “hazing” and providing comprehensible guidance to service members on permissible and impermissible conduct. Further, some military institutions, in the past, embraced conduct associated with new entrant training that currently is disfavored, despite objections from numerous graduates of the prior programs, who found merit with the now disfavored training techniques. This Article examines the military’s historic attempts to define “hazing,” discusses how the Department of Defense Service Academies and Marine Corps Recruit Training have grappled with the issue, and reviews how “hazing” is treated under military law.

I. INTRODUCTION

The military has long embraced various forms of traditions, initiations, and rites of passage as a means of instilling *esprit de corps* and loyalty into its service members.¹ Many of these traditions continue in modern times.² Further, the military’s entry-level training programs have historically been stressful and physically demanding, and have deliberately included conduct easily characterized as harassing or demeaning.³ Some training programs, such as

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¹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-16-226, DOD AND COAST GUARD: ACTIONS NEEDED TO INCREASE OVERSIGHT AND MANAGEMENT INFORMATION ON HAZING INCIDENTS INVOLVING SERVICEMEMBERS 1 (2016) [hereinafter GAO-16-226] (“Initiations and rites of passage can be effective tools to instill esprit de corps and loyalty among servicemembers and are included in many traditions throughout the Department of Defense (DOD) and in the Coast Guard.”); *see also* DEP’T OF THE NAVY, SEC’Y OF THE NAVY INSTRUCTION 1610.2A, DEPARTMENT OF THE NAVY (DON) POLICY ON HAZING ¶ 5(b) (2005) [hereinafter SECNAVINST 1610.2A] (“Military customs and traditions have long been an integral part of the Navy and Marine Corps.”); KRISTY N. KAMARCK, CONGRESSIONAL RESEARCH SERVICE, HAZING IN THE ARMED FORCES 1 (2019) (“Initiation customs have long been part of the culture in the United States Armed Forces as a method to welcome new members and mark rites of passage.”).

² GAO-16-226, *supra* note 1, at 15 (“[T]he Army, the Navy, and the Marine Corps . . . permit command-authorized rituals, customs, and rites of passage that are not cruel or abusive, and require commanders to ensure that these events do not include hazing”); *see also* SECNAVINST 1610.2A, *supra* note 1, ¶ 5(b) (noting that “ceremonies, initiations or rites of passage . . . if properly supervised, can be effective leadership tools”).

³ *See* Captain Joseph S. Groah, Treatment of Fourth Class Midshipmen: Hazing And Its Impact On Academic and Military Performance; and Psychological and Physical Health 19 (June 2005) (unpublished M.S. thesis, Naval Postgraduate School), <https://bit.ly/38Moxle> (noting that “in Marine Corps recruit training hazing is an instrumental and planned portion of initial training”). *See generally* THOMAS E. RICKS, MAKING THE CORPS (1997) (describing the training of a platoon of Marine Corps recruits).

Marine Corps Recruit Training and Navy SEAL training, pride themselves on their physical and mental rigor.⁴

Attendant to these long-standing practices,⁵ various forms of conduct developed that were generically referred to as “hazing.” Some hazing-related conduct was perfectly legitimate, albeit harsh and stressful, whereas other conduct was viewed as impermissibly abusive. The line between permissible conduct—associated with the military’s traditions, training, and discipline—and impermissible conduct has been ill-defined and not easily ascertained.⁶ Part of the problem has been the lack of a clear, uniformly-accepted, and well-understood definition of hazing. The term refers to both a specific criminal offense and is slang for a broad spectrum of conduct, some of which may be perfectly legal.⁷ In the criminal context, the failure to adequately define hazing as an offense may give rise to “void for vagueness” challenges.⁸ Further, although “hazing” has been illegal as far back as 1870, historically, both hazing-related conduct viewed as permissible and conduct viewed as lying outside the scope of sanctioned activities has been tolerated—even embraced—by various parts of the military.⁹ Indeed, many of those subjected to harsh forms of treatment that would be viewed as impermissible today found merit in the earlier practices.¹⁰

This Article will review the historic attempts to define “hazing” and discuss hazing-related treatment of cadets and midshipmen of the three Department of Defense (DoD) service academies,¹¹ and of recruits at Marine

⁴ See Dave Phillips, *20 Marines at Parris Island May Be Punished in a Hazing Incident*, N.Y. TIMES (Sept. 14, 2016), <https://nyti.ms/2ZrSley> (reporting Marine Corps culture “prizes toughness”); Company Commanders, Recruit Training Regiment, MCRD San Diego, *An Officer’s Role in Recruit Training*, MARINE CORPS GAZETTE, Dec. 2014, at 58, 60 [hereinafter Company Commanders] (“Tough training makes tough Marines.”); RORKE DENVER, DAMN FEW: MAKING THE MODERN SEAL WARRIOR 17–18 (2013) (arguing that SEAL training is the toughest in the military and that SEALs argue with one another as to who had the most difficult training) [*Damn Few* by Rorke Denver, copyright 2013, 2014. Reprinted by permission of Hyperion, an imprint of Perseus Books, LLC, a subsidiary of Hachette Book Group, Inc.].

⁵ One recent study grouped hazing into three basic types: conduct associated with (1) initiation rites, (2) newcomer testing, and (3) maintenance of existing power structures. KIRSTEN M. KELLER ET AL., RAND CORPORATION, HAZING IN THE U.S. ARMED FORCES: RECOMMENDATIONS FOR HAZING PREVENTION POLICY AND PRACTICE 32–33 (2015).

⁶ GAO-16-226, *supra* note 1, at 1 (“[I]t has not always been easy for servicemembers to draw a clear distinction between legitimate traditions and patterns of misconduct.”). See also *id.* at 21 (“[W]e found that the military services may not have provided servicemembers with sufficient information to determine whether specific conduct or activities constitute hazing”); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/NSIAD-93-36, DOD SERVICE ACADEMIES: MORE CHANGES NEEDED TO ELIMINATE HAZING 2 (1992) [hereinafter GAO/NSIAD-93-36] (“The distinction between hazing and legitimate fourth class indoctrination is somewhat unclear.”); KENDALL BANNING, WEST POINT TODAY 22 (Colonel A. C. M. Azoy ed., 5th ed. 1959) (1937) (“It is difficult . . . to draw a clear-cut line of demarcation at all times between hazing and discipline.”).

⁷ See *infra* note 14 and accompanying text.

⁸ “Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed.” *United States v. Brown*, 45 M.J. 389, 394 (C.A.A.F. 1996) (quoting *Parker v. Levy*, 417 U.S. 733, 757 (1974)); see also ROLLIN M. PERKINS AND RONALD N. BOYCE, CRIMINAL LAW 6 (3d ed. 1982) (explaining that “a statute which purports to provide for punishment, without making sufficiently precise just what is punishable thereunder, is held to be ‘void for vagueness’”).

⁹ See *infra* notes 79, 88–90, 149, 154, 180–82, 295, 304, 311, and accompanying text.

¹⁰ See *infra* notes 265–76, 323–24, 327 and accompanying text.

¹¹ The three service academies are the United States Military Academy (USMA), West Point, New York; the United States Naval Academy (USNA), Annapolis, Maryland; and the United States Air Force Academy (USAF), Colorado Springs, Colorado. USMA and USAFA students are “cadets” and USNA students are “midshipmen.” U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-03-1001, MILITARY EDUCATION: STUDENT AND FACULTY PERCEPTIONS OF STUDENT LIFE AT THE MILITARY ACADEMIES 1 n.1 (2003). Fourth class cadets (freshmen) at the Military and Naval academies are referred to as “plebes.” GAO/NSIAD-93-36, *supra* note 6, at 10 n.1. At the USAFA, fourth class cadets are referred to as “doolies.” *Id.*

Corps Recruit Training. These entities were chosen for their long-standing reputation for extremely rigorous and harsh training regimes. The Article will discuss efforts taken to mitigate hazing-like conduct previously incorporated into such training, oftentimes over the objection of graduates of those earlier programs. Although both institutions have reformed their approach to entry-level training, the academies have taken the furthest strides away from an absolutist, attrition-based model. Next, the Article will discuss the purpose of, or justifications for, hazing-related conduct. Finally, the Article will discuss how “hazing,” and conduct constituting impermissible hazing-like offenses, have been treated under military law.

II. HAZING: IN PURSUIT OF THE ELUSIVE DEFINITION

As an initial matter, any discussion of “hazing” in the military is difficult because the term is used to identify a specific criminal offense,¹² as slang for various forms of misconduct,¹³ and to describe a stressful—but legal—encounter between a junior member of the armed forces (e.g., academy fourth class cadet, recruit) and a higher-ranking authoritative figure (e.g., upper-class cadet, drill sergeant), oftentimes in an initial training environment.¹⁴ The term does not easily lend itself to a clear definition.¹⁵

In 1874 Congress criminalized “the offense commonly known as hazing” and mandated that the Superintendent of the United States Naval Academy (USNA) court-martial any midshipman guilty of such misconduct.¹⁶ Despite having criminalized “hazing,” Congress failed to define the term.¹⁷ In 1885, the U.S. Attorney General issued an opinion attempting to define the offense. First, the opinion noted that the 1874 statute focused solely on the USNA and that the offense of hazing “is unknown either to the common or statutory law of the land.”¹⁸ In determining that the offense of hazing stemmed from the Superintendent’s order forbidding such conduct and in USNA regulations subjecting midshipmen to dismissal for hazing, the Attorney General opined that “to constitute the offense of *hazing* under the statute it is essential that the victim of the maltreatment should be a new cadet of the fourth class.”¹⁹ The Attorney General, however, made no effort to clarify exactly what conduct constituted the

¹² 10 U.S.C. § 8464(a) (2018).

¹³ See, e.g., Brock Vergakis, *Marine Convicted of Hazing, Has Rank Reduced*, MARINE CORPS TIMES (May 11, 2015), <https://bit.ly/31f611m>.

¹⁴ See Captain David R. Alexander III, *Hazing: The Formative Years 2* (Dec. 1994) (unpublished research paper, Long Island University), <https://bit.ly/39OP0in> (“The term has become a part of the West Point language and in many cases is used to describe ‘impositions’ that are in no way in violation of the regulation.”); see, e.g., CAPTAIN DONNA PETERSON, *DRESS GRAY: A WOMAN AT WEST POINT 75* (1990) (referring to hazing in the context of upperclassmen who stopped plebes in the hallway and harassed them as “play[ing] games with the plebes”); cf. ED RUGGERO, *DUTY FIRST: WEST POINT AND THE MAKING OF AMERICAN LEADERS 31* (2001) (describing some forms of “hazing” as “just stupid, boys’-school and fraternity row stuff”); GAO/NSIAD-93-36, *supra* note 6, at 67 (acknowledging that some activities characterized as “hazing-type treatment” “can be viewed as relatively harmless, spirit-related pranks”).

¹⁵ Groah, *supra* note 3, at 5 (“hazing does not fit easily into a single definition or ideology”).

¹⁶ GAO/NSIAD-93-36, *supra* note 6, at 13 (citing Act of June 23, 1874, ch. 453, 18 Stat. 203). The act provided: “That in all cases when it shall come to the knowledge of the Superintendent of the Naval Academy at Annapolis, that any cadet-midshipman or cadet-engineer has been guilty of the offense commonly known as hazing, it shall be the duty of said superintendent to order a court-martial, . . . and any cadet-midshipman or cadet-engineer found guilty of said offense by said court shall, upon recommendation of said court be dismissed; and such finding, when approved by said superintendent, shall be final.” Act of June 23, 1874, ch. 453, 18 Stat. 203.

¹⁷ Naval Academy-Hazing, 18 Op. Atty. Gen. 292, 293 (1885).

¹⁸ *Id.*

¹⁹ *Id.* at 297 (emphasis in original); see also GAO/NSIAD-93-36, *supra* note 6, at 13 (“The U.S. Attorney General, in an 1885 opinion, determined that to constitute the offense of hazing, the victim must be a member of the fourth class.”).

offense of hazing and then left untouched the extremely broad USNA regulation definition: “The practice of molesting, annoying, ridiculing, maltreating, or assuming unauthorized authority over the new cadets of the fourth class”²⁰

The following year, the Secretary of the Navy requested a legal opinion as to the sufficiency of certain court-martial charges against a midshipman for the offense of hazing.²¹ Reviewing the Academy regulations defining the offense, the Attorney General determined that the court-martial specifications alleging that the accused midshipman (1) pulled the nose and otherwise maltreated and (2) struck at and otherwise annoyed a fourth classman “plainly exhibit a case of *maltreatment*, which, in conjunction with the other circumstances mentioned, contains all that is essential to constitute the offense of ‘hazing’ in the sense of the statute.”²²

Decades later, in 1956, Congress enacted three separate anti-hazing statutes for the USNA (10 U.S.C. § 6964), the United States Military Academy (USMA) (10 U.S.C. § 4352) and the United States Air Force Academy (USAFA) (10 U.S.C. § 9352), respectively.²³ With regard to the USNA, 10 U.S.C. § 6964(a) defined “hazing” as “any unauthorized assumption of authority by a midshipman whereby another midshipman suffers or is exposed to any cruelty, indignity, humiliation, hardship, or oppression, or the deprivation or abridgement of any right.”²⁴ Rather than adopt a uniform definition of hazing for all three academies, Congress authorized the Superintendents of the Military and Air Force academies to define “hazing” by regulation, subject to the approval of the relevant Service Secretary.²⁵

In the mid-1970s, the Comptroller General examined “hazing” at the three Department of Defense service academies.²⁶ A subsequent report addressed hazing-like conduct in three categories: (1) hazing (undefined), which was prohibited by law; (2) harassment, which was prohibited by academy policy; and (3) certain activities permitted under the fourth class system, which could be perceived as harassment but were, as Academy officials explained, “training programs designed to develop character and self-discipline in the fourth classmen through activities which place them under stress.”²⁷ This third permissible

²⁰ Naval Academy-Hazing, 18 Op. Atty. Gen. 292, 297 (1885).

²¹ Hazing at the Naval Academy, 18 Op. Atty. Gen. 376 (1886).

²² *Id.* at 377 (emphasis in original). In 1905 the Attorney General opined that the Superintendent could not summarily dismiss a midshipman for the offense of hazing pursuant to the 1874 Act, but instead required that the midshipman be subject to trial by court-martial. Hazing-Summary Dismissal of Cadet-Secretary of the Navy, 25 Op. Atty. Gen. 543, 546 (1905).

²³ See also GAO/NSIAD-93-36, *supra* note 6, at 13; DEP’T OF DEFENSE INSTRUCTION NO. 1322.22, SERVICE ACADEMIES 12 (2015) [hereinafter DoDI 1322.22] (“The practice of hazing is prohibited by law.”) (citing 10 U.S.C. §§ 4352, 6964, 9352). Effective February 1, 2019, 10 U.S.C. § 9352 was renumbered 10 U.S.C. § 9452; 10 U.S.C. § 6964 was renumbered 10 U.S.C. § 8464; and 10 U.S.C. § 4352 was renumbered 10 U.S.C. § 7452. Pub. L. No. 115-232, div. A, Title VIII, 132 Stat. 1832, 1836, 1839 (Aug. 13, 2018).

²⁴ See also GAO/NSIAD-93-36, *supra* note 6, at 13.

²⁵ 10 U.S.C. § 4352(a)(1) (Military Academy); 10 U.S.C. § 9352(a)(1) (Air Force Academy); see also GAO/NSIAD-93-36, *supra* note 6, at 13. As of 1992, the Air Force Academy followed the definition of hazing in 10 U.S.C. § 6964(a) with only slight modifications. GAO/NSIAD-93-36 *supra* note 6, at 31. The Military Academy defined hazing “as the wrongful striking, laying open hand upon, treating with violence or offering to do bodily harm by one cadet in a senior-subordinate relationship to another cadet with intent to punish or injure the subordinate cadet, or other unauthorized treatment by such cadet of another cadet of tyrannical, abusive, shameful, insulting, or humiliating nature. Hazing can also be defined to include verbal abuse.” GAO/NSIAD-93-36, *supra* note 6, at 43.

²⁶ COMPTROLLER GEN. OF THE U.S., B-159219, RESPONSE TO THE HONORABLE SAMUEL S. STRATTON, HOUSE OF REPRESENTATIVES, ON HAZING AT THE SERVICE ACADEMIES (Mar. 21, 1975), <https://bit.ly/3k4aJrC> [hereinafter COMPTROLLER GEN. OF THE U.S.]. The Comptroller General also reviewed the amount of combat training at the three academies. *Id.*

²⁷ *Id.* at 1.

category of activities included prohibiting fourth classmen from visiting certain locations, requiring that they square corners, prohibiting them from speaking at meals or in the hallways unless otherwise authorized, requiring that they memorize and recite certain knowledge, and requiring that fourth classmen, while in the dining hall, “sit at attention; i.e., erect, hands in the lap heads up, eyes straight ahead, and using the bottom but not the back of the chair.”²⁸ Certain “harassment-type” activities that had changed during this period included shouting at fourth classmen, which was now prohibited,²⁹ and limiting the required recitation of knowledge during meals “to insure [sic] that each fourth classman eats a full meal.”³⁰

Significantly, the Comptroller General opined that “the concepts of hazing and harassment at the academies cannot be specifically defined nor adequately explained in terms of certain activities.”³¹ Characterizing harassment as an “art form,” the report noted that the undesirability of the activities were not to be gauged by the underlying acts alone, but rather by how they were carried out and by the contribution they made to the fourth classmen, their supervisors, and the academies.³²

In 1992, the Government Accountability Office (GAO) examined the treatment of fourth classmen and issued an extensive report discussing hazing at the three DoD service academies. Ironically, the GAO never defined the term “hazing” before discussing it.³³ Instead, the GAO noted that traditional practices involving the treatment of fourth class cadets and midshipmen that exceeded those sanctioned by the academies “*can* be considered hazing.”³⁴ For purpose of its analysis, the GAO instead used “the term ‘hazing-type treatment’ . . . to reflect the fact that the distinction between appropriate and inappropriate behavior often lies in the degree of the treatment and the manner in which it is conducted.”³⁵ The GAO acknowledged that some of the practices they viewed as “hazing-type activities” were “permitted, within limits, by the rules of the fourth class indoctrination system.”³⁶ Further, recognizing that the college-aged cadets and midshipmen were “prone to engage in many of the pranks and hijinx [sic] that are practiced by their civilian counterparts,” the GAO conceded that some of the activities that they characterized as “hazing-like activities” could “be viewed as relatively harmless, spirit-related pranks.”³⁷ With regard to the general attitude toward the fourth class system, the GAO found that “[t]he belief that a rigorous

²⁸ *Id.* The Air Force Academy specifically excluded the following activities from a characterization of harassment: “shining shoes, drill, making beds, parades, required class attendance, taps, haircuts, [and] prohibition on car ownership . . .” *Id.* at 3.

²⁹ *Id.* at 2 (“Corrections are to be made quietly but firmly.”). *Id.* At least through the 1990s this rule appears to have been frequently violated. See RUGGERO, *supra* note 14, at 30 (describing how plebes were screamed at by upper class cadets).

³⁰ COMPTROLLER GEN. OF THE U.S., *supra* note 26, at 2. At least through the 1990s, this mealtime restriction appears to have been largely ignored. See PETERSON, *supra* note 14, at 86 (“A favorite trick of the upper-class cadets is to prevent plebes from eating by keeping them constantly busy with table duties.”).

³¹ COMPTROLLER GEN. OF THE U.S., *supra* note 26, at 3.

³² *Id.* at 3. For example, requiring a fourth classman to shine his shoes, by itself, does not constitute harassment, but the activity could ripen into harassment if the upperclassman were to require the plebe to report to his room every 10 minutes with shined shoes and then soiled the shoes. *Id.*

³³ GAO did reference the definition contained in 10 U.S.C. § 6964, but this definition did not serve as the basis of its further analysis. GAO/NSIAD-93-36 *supra* note 6, at 13.

³⁴ *Id.* at 2 (emphasis added).

³⁵ *Id.*

³⁶ *Id.* at 67.

³⁷ *Id.* The GAO found the “misuse of formally granted authority” as the factor that distinguished permissible pranks from hazing. *Id.* at 68. “If specific individuals are singled out and subjected to significantly more such spirit-related treatment than their peers, such targeted harassment *may* be hazing.” *Id.* (emphasis added).

fourth class year is an effective method for developing military officers has been accepted largely as an article of faith.”³⁸

In its response to the report, DoD criticized GAO for its failure to define what constituted “hazing-type treatment.”³⁹ DoD noted, “The term can and does mean different things to different people. Theoretically, any aggressive training regime could be construed as ‘hazing-type treatment’ while not actually being hazing, which is more clearly defined.”⁴⁰

The GAO investigation revealed that during the 1989 to 1990 time frame, the USNA operated under a fourth class indoctrination instruction that had modified 10 U.S.C. § 6964’s statutory definition of hazing to prohibit “undue” humiliation.⁴¹ Providing little additional guidance, the USNA instruction noted that “[t]raining should be rigorous, both physically and mentally, however, there is a clear boundary between military discipline and harassment.”⁴²

Reviewing the USNA’s instruction as part of a comprehensive review of the fourth class system at the three academies, the GAO observed that “the instruction . . . did little to specify where that boundary was” and “contained few details on what constituted improper indoctrination or hazing.”⁴³ Even the bright-line examples of prohibited conduct were limited, leaving much to be desired in terms of clarifying the gray area between a large body of permissible and impermissible conduct: “(1) imposing unit runs for punishment, (2) requiring more than 10 push-ups at a time or more than 80 in 1 day, (3) imposing ‘physical punishment’ during Extra Military Instruction periods, and (4) requiring a midshipman to consume any portion of his meal in an unusual or degrading manner, or against his will.”⁴⁴ Unsurprisingly, investigators determined that midshipmen had difficulty determining what conduct constituted hazing.⁴⁵

In July 1990, the USNA made an unsuccessful attempt to clarify the meaning of various terms contained in 10 U.S.C. § 6964. The essence of the term “cruelty” was limited to intentional conduct: “[T]he intent to hurt another—to inflict pain—whether physically, psychologically or otherwise.”⁴⁶ Not defining “indignity,” the USNA took an almost aspirational approach, merely noting that every midshipman was “entitled to be treated in all circumstances as a human being who has significant value” and their dignity was “not to be degraded.”⁴⁷ Acknowledging that the term “humiliation” did not extend to the feelings generated by failure generally, the USNA stated that the term did “extend to acts intended to fundamentally debase a midshipman in the opinion of self or others.”⁴⁸ When determining whether conduct fell within “hardship or oppression,” one had to take into account the plebe’s “total load,” and conduct did not constitute hazing so long as it fell within “the published plebe indoctrination system” However, the conduct *may* constitute hazing if it fell outside that structure,

³⁸ *Id.* at 3.

³⁹ *Id.* at 89.

⁴⁰ *Id.*

⁴¹ *Id.* at 16, 88.

⁴² *Id.* at 16.

⁴³ *Id.* at 16.

⁴⁴ *Id.* at 16–17.

⁴⁵ *Id.* at 17; *see also id.* at 25 (“In the fall of 1990, what constituted hazing was still unclear to a sizeable number of midshipmen.”).

⁴⁶ *Id.* at 19.

⁴⁷ *Id.*

⁴⁸ *Id.* at 20. A subjective standard, presumably conduct did not arise to the level of humiliation if neither the plebe nor onlookers viewed the conduct as humiliating; that is, intended to fundamentally debase the plebe. Conduct that actually humiliated a plebe, but was viewed as not intending to do so, would not satisfy this definition.

“especially if it has *serious* negative consequences in the academic or other realms.”⁴⁹ The prohibition against the “deprivation or abridgment of any right” was triggered by limiting rights of other midshipmen beyond those already limited by policy or regulation, if done “without explicit authorization.”⁵⁰

Having offered these vague explanations, the USNA offered three principles to guide their midshipmen: (1) lead midshipmen like you would lead enlisted sailors or Marines, (2) take a long term view and “emulate the positive, instructional aspects of boot camp” as part of plebe indoctrination, and (3) midshipmen were not to view their responsibilities as extending to “weed[ing] out” plebes unlikely to be able to perform well in a combat environment or while operating under the stress attendant to “a professional military regimen.”⁵¹ Finally, the USNA appeared to reject the long-standing view that the offense of hazing was limited to a fourth-class victim, by extending it to peer-to-peer and even subordinate-to-superior conduct.⁵²

The lack of clarity as to what conduct constitutes impermissible hazing did not improve with time. In 2012, at the request of the DoD’s Office of Diversity Management and Equal Opportunity, the RAND Corporation examined DoD’s hazing prevention policies and practices.⁵³ Significant for purposes of this Article, RAND determined that inconsistent definitions of hazing existed within the DoD and that “[c]onfusion persists regarding what actions constitute hazing and what do not.”⁵⁴

In 2016, after examining military-hazing policies and their implementation, the GAO issued a report of its findings. Relevant to this Article, the GAO “found that the military services may not have provided service members with sufficient information to determine whether specific conduct or activities constitute hazing.”⁵⁵ After speaking with three groups of non-commissioned officers (NCO), the GAO found that the NCOs believed the military’s hazing definitions were insufficiently clear and, in fact, were so broad that they hampered the NCOs’ ability to perform their jobs for fear of being accused of improper conduct.⁵⁶ In 2019, the Congressional Research Service (CRS) issued a short report on hazing in the military, which noted that the line between permissible and impermissible behavior “can quickly blur,” particularly during the “physically and mentally rigorous training” of new recruits.⁵⁷

⁴⁹ *Id.* at 20 (emphasis added).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* USMA’s current definition of hazing follows a similar approach. DEP’T OF THE ARMY, REGULATION 150-1, UNITED STATES MILITARY ACADEMY: ORGANIZATION, ADMINISTRATION, AND OPERATION ¶¶ 6–15 (2019) [hereinafter AR 150-1] (“another military member, regardless of service or rank”).

⁵³ KELLER ET AL., *supra* note 5, at iii.

⁵⁴ *Id.* at x.

⁵⁵ GAO-16-226, *supra* note 1, at 21; *see also* First Lieutenant Ethan Brooks, *Hazing Versus Challenging*, MARINE CORPS GAZETTE, Aug. 2014, at 24 (“In some cases, because of the controversy over what actually counts as hazing, Marines do not recognize it when it occurs.”).

⁵⁶ GAO-16-226, *supra* note 1, at 24. Separately, a Marine NCO noted that implementation of the Marine Corps anti-hazing policy by eliminating incentive physical training was undermining discipline and was detrimental to NCO morale. For example, an NCO could no longer order a Marine who dropped his or her rifle to “follow the weapon down for pushups.” Gunnery Sergeant Jeffrey L. Eby, *Empowering NCOs To Lead*, MARINE CORPS GAZETTE, Mar. 1998, at 48.

⁵⁷ KAMARCK, *supra* note 1, at 1.

As discussed further below, the Uniform Code of Military Justice (UCMJ) has had no specific article defining or prohibiting hazing,⁵⁸ and recent changes to the UCMJ do not include a specific article for hazing.⁵⁹

In 2018, DoD issued an Instruction containing its most recent definition of hazing. The DoD Instruction (DoDI) defines hazing:

A form of harassment that includes conduct through which Service members or DoD employees, *without a proper military or other governmental purpose* but with a nexus to military Service, physically or psychologically injures or creates a risk of physical or psychological injury to Service members for the purpose of: initiation into, admission into, affiliation with, change in status or position within, or a condition for continued membership in any military or DoD civilian organization.⁶⁰

The DoDI clarifies that hazing may occur in person, through social media, or through other electronic communications, and that hazing “is evaluated by a reasonable person standard.”⁶¹

The DoDI offers several examples of improper hazing “when performed without a proper military or other governmental purpose:

- (1) Any form of initiation or congratulatory act that involves physically striking another person in any manner or threatening to do the same;
- (2) Pressing any object into another person’s skin, regardless of whether it pierces the skin, such as ‘pinning’ or ‘tacking on’ of rank insignia, aviator wings, jump wings, diver insignia, badges, medals, or any other object;
- (3) Oral or written berating of another person with the purpose of belittling or humiliating;
- (4) Encouraging another person to engage in illegal, harmful, demeaning or dangerous acts;
- (5) Playing abusive or malicious tricks;
- (6) Branding, handcuffing, duct taping, tattooing, shaving, greasing, or painting another person;
- (7) Subjecting another person to excessive or abusive use of water;
- (8) Forcing another person to consume food, alcohol, drugs, or any other substance; and
- (9) Soliciting, coercing, or knowingly permitting another person to solicit or coerce acts of hazing.”⁶²

Although these specific examples are helpful, the DoDI obviously cannot address comprehensively all of the various forms of conduct that may or

⁵⁸ GAO-16-226, *supra* note 1, at 8, 29, 67; *see also infra* note 328 and accompanying text.

⁵⁹ *See infra* notes 329–32 and accompanying text.

⁶⁰ DOD INSTRUCTION 1020.03, HARASSMENT PREVENTION AND RESPONSE IN THE ARMED FORCES ¶ 3.5 (2018) (emphasis added) [hereinafter DoDI 1020.03]. The DoD Instruction does not constitute a punitive regulation, although it does state that violations “*may* constitute violations” of the UCMJ “and *may* result administrative or disciplinary action.” *Id.* ¶ 1.2d (emphasis added).

⁶¹ *Id.* ¶ 3.5. A reasonable person is a hypothetical person “who exercises the degree of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own and of others’ interests.” *Reasonable person*, BLACK’S LAW DICTIONARY (8th ed. 2004).

⁶² DoDI 1020.03, *supra* note 60, ¶ 3.5a.

may not constitute improper hazing. Further, the DoDI did not reference or explain its relationship to the statutory prohibition on hazing for the service academies then set forth at 10 U.S.C. §§ 4352, 6964, 9352.

The DoDI makes clear that harassment does not constitute what otherwise would be impermissible hazing when it is part of “properly directed command or organizational activities that serve a proper military or other governmental purpose, or the requisite training activities required to prepare for such activities (e.g., administrative corrective measures, extra training instruction, or command-authorized physical training).”⁶³ Consent and the grade, rank, status, or Service of the victim does not authorize otherwise improper harassment.⁶⁴ Finally, the prohibition on hazing is all-inclusive, extending to “all circumstances and environments including off-duty or ‘unofficial’ unit functions and settings.”⁶⁵

The most obvious qualifier for the DoD’s definition of hazing is that it be “without a proper military purpose or other governmental purpose.” A great deal of hazing-like conduct at the service academies, for example, was rationalized by its military benefit. Presumably this qualifier would permit the continuation of exceptional physically and mentally rigorous and stressful military training, such as what occurred at the service academies⁶⁶ and U.S. Marine Corps recruit training, to include some level of acerbic haranguing of the new entrants; at U.S. Army Ranger School, which uses hunger and sleep deprivation as part of its training program;⁶⁷ and at U.S. Navy SEAL training, which has included extensive use of calisthenics to the point of physical exhaustion, punishment exercises, deliberate exposure to extremely cold temperatures, and sleep deprivation.⁶⁸

Unfortunately, rather than treating hazing as a stand-alone concept, the DoDI treats it as one type or subset of harassment, giving rise to potential confusion.⁶⁹ The Instruction notes that DoD “does not tolerate or condone harassment,”⁷⁰ which includes discriminatory harassment, sexual harassment, and bullying and hazing.⁷¹

⁶³ *Id.* ¶ 3.5b.

⁶⁴ *Id.* ¶ 3.5c.

⁶⁵ *Id.* ¶ 3.5d.

⁶⁶ The current definition of hazing at USMA excludes “mission or operational activities or requisite training to prepare for such missions or operations; administrative corrective measures, such as verbal reprimands; extra military instruction; command-authorized physical training; and other similar activities authorized by the chain of command.” AR 150-1, *supra* note 52, ¶ 6-15. The Naval Academy apparently has no such exception specifically articulated in its definition of hazing. DEP’T OF THE NAVY, OFFICE OF THE COMMANDANT OF MIDSHIPMEN, U.S. NAVAL ACAD., COMDTMIDNINST 5400.6V, 3-1 (2019) [hereinafter COMDTMIDNINST 5400.6V].

⁶⁷ See DENVER, *supra* note 4, at 20, 122.

⁶⁸ *Id.* at 18, 36, 38, 41, 59, 61.

⁶⁹ The Congressional Research Service noted that “[o]ne of the main obstacles to effectively countering hazing is its similarity to other forms of unwelcome behavior, including harassment, bullying, and discrimination,” but opined that in the DoDI the DoD distinguished between these various types of misbehavior as part of a comprehensive service-wide policy. KAMARCK, *supra* note 1, at 1.

⁷⁰ DoDI 1020.03, *supra* note 60, ¶ 1.2(a).

⁷¹ Harassment generally refers to “unwelcome or offensive” behavior “that creates an intimidating, hostile, or offensive environment” and includes “offensive jokes, epithets, ridicule or mockery, insults or put-downs, displays of offensive objects or imagery, stereotyping, intimidating acts, veiled threats of violence, threatened or provoking remarks, racial or other slurs, derogatory remarks about a person’s accent, or displays of racially offensive symbols.” *Id.* ¶ 3.1. Discriminatory harassment focuses on “unwelcome conduct based on race, color, religion, sex (including gender identity), national origin, or sexual orientation.” *Id.* ¶ 3.2. Sexual harassment focuses on *quid pro quo* and sexual comments or conduct that creates an intimidating, hostile, or offensive environment. *Id.* ¶ 3.3. Bullying is another subset of harassment “that includes acts of aggression by Service members or DoD civilian employees, with a nexus to military service, with the intent of harming a Service member

Even with the increased specificity provided through the DODI and service-specific guidance over the years, the definition of permissible and impermissible hazing remains elusive.

III. HAZING AT THE MILITARY ACADEMIES

A. *The Old Corps*

Some form of hazing of fourth class cadets and midshipmen has existed at the service academies since before the Civil War. Pre-Civil War hazing was generally found during summer encampments and was limited to such “harmless pranks,” such as “pulling a sleeping plebe out of bed, cutting tent ropes in the middle of the night, and hiding a plebe’s clothes at night, causing him to be late for formation or to have to report wrapped in a blanket.”⁷² Hazing as a form of misconduct prior to the Civil War was such a rare event as evidenced by the fact that in the first fifty-two years of its existence, the USMA had only two reported dismissals of cadets for hazing-type misconduct.⁷³

Following the Civil War, however, an unwritten set of rules developed that determined how the upper class and the fourth class interacted, which USMA leadership eventually viewed as the beginning of improper hazing.⁷⁴ Hazing took a dark and violent turn.⁷⁵ One author opines that the violent hazing was the result of untested upperclassman attempting to exert their authority over plebes fresh from the war.⁷⁶ Another scholar opines that the decision at the end of the war to extend the period before the fourth-class cadets were formally accepted into the Corps of Cadets, from the end of their first summer until the end of their first academic year, increased the frequency and severity of hazing-related misconduct by prolonging the period that plebes were subject to hazing.⁷⁷ Regardless of its cause, some of the hazing became brutal, causing the Superintendents of both the USNA and USMA to condemn the practices.⁷⁸

Congress officially outlawed hazing in 1874. Despite being outlawed, hazing continued and once again became problematic.⁷⁹ USNA plebes from the late 1800s and early 1900s reported being beaten with various items, such as broom handles and coat hangers.⁸⁰ Plebes were challenged to formal fist fights

either physically or psychologically, without a proper military or other governmental purpose.” *Id.* ¶ 3.4.

⁷² GAO/NSIAD-93-36, *supra* note 6, at 11.

⁷³ Alexander, *supra* note 14, at 4.

⁷⁴ DAVID W. GRANEY, *ROGUE INSTITUTION: VIGILANTE INJUSTICE, LAWLESSNESS, AND DISORDER AT THE AIR FORCE ACADEMY* 41 (2010). Some of the hazing-type conduct appears to have been embraced, or at least tolerated, by Academy officials. *See* THEODORE J. CRACKEL, *THE ILLUSTRATED HISTORY OF WEST POINT* 162 (1991) (summer training conducted by upperclassmen became known as “Beast Barracks” and developed into a form of sanctioned or “official hazing”).

⁷⁵ GAO/NSIAD-93-36, *supra* note 6, at 11 (“It extended throughout the fourth class year and became much more virulent in its form.”). The first time that the Naval Academy officially recognized improper conduct known as hazing dates to October 6, 1865, when the Superintendent appointed a board to investigate the “disgraceful” molesting of a Midshipman Sheeler. *Naval Academy-Hazing*, 18 Op. Atty. Gen. 292, 294 (1885).

⁷⁶ CAPTAIN CAROL BARKALOW WITH ANDREA RAAB, *IN THE MEN’S HOUSE: A INSIDE ACCOUNT OF LIFE IN THE ARMY BY ONE OF WEST POINT’S FIRST FEMALE GRADUATES* 35 (1990).

⁷⁷ Alexander, *supra* note 14, at 6; *see also* CRACKEL, *supra* note 74, at 162.

⁷⁸ GAO/NSIAD-93-36, *supra* note 6, at 11 (“In the 1870s, the West Point Superintendent labeled the practices ‘essentially criminal’ and called them a ‘vicious and illegal indulgence’; and the Superintendent of the Naval Academy referred to the hazing of junior class cadets as a ‘cruel and senseless practice.’”).

⁷⁹ *Id.* at 11.

⁸⁰ GALE G. KOHLHAGEN & ELLEN B. HEINBACH, *USNA: THE UNITED STATES NAVAL ACADEMY: A PICTORIAL CELEBRATION OF 150 YEARS* 98 (1995); *see* JOHN MCCAIN WITH MARK SALTER, *FAITH OF MY FATHERS: A FAMILY MEMOIR* 122 (1999) (noting that McCain’s father “Jack” (USNA 1931)

by upperclassmen.⁸¹ In 1920, following Congressional investigations into the death of plebes after excessive hazing, the USNA Superintendent segregated the entire fourth class, and posted first-classman guards on the stairs with bayonets until the upper classes pledged in writing to stop the hazing.⁸²

Although officially prohibited, hazing continued in practice because graduates, faculty, and students supported the practice.⁸³ Graduates defended the practices as “a method of suppressing the cockiness of the plebes,” pointing out that they had survived the practice without injury and had benefited from it.⁸⁴ Even the plebes did not object to the practice “because they felt it would make better men out of them and, by showing how much they could endure, increase their status among their peers.”⁸⁵ Further, the plebes refused to identify those members of the upper class who had hazed them,⁸⁶ and many upperclassmen adopted a code of silence.⁸⁷ In the unusual event that cadets were dismissed for hazing-related misconduct, frequently they were reinstated.⁸⁸

Some of these practices, traditions, and behavioral norms eventually became part of the latter-day Fourth Class System.⁸⁹ For example, “official hazing” practices adopted at USMA in the wake of the Civil War continued well into the next century, such as bracing and double-timing (running between locations): “Heads back, chests out, stomachs in – they were constantly ordered about, berated and harassed.”⁹⁰ Most forms of extreme physical hazing, however, were eventually eliminated from the academies by the late 1950s and early 1960s.⁹¹

Some forms of hazing-type behavior were extremely physically stressful. For example, USNA plebes were ordered to hold stacks of books in their outstretched arms for extended periods of time or perform push-ups or deep knee bends until muscle failure.⁹² While a plebe at USMA, Douglas MacArthur was forced to engage in vigorous exercise until he experienced muscle failure and collapsed.⁹³ Some plebes were required to assume an uncomfortable squatting position for long periods of time, sometimes fainting.⁹⁴ “Swimming to

had been beaten with a “broom with its bristles cut to just below its stitching”) [used with permission of Random House, an imprint and division of Penguin Random House LLC, New York].

⁸¹ GAO/NSIAD-93-36, *supra* note 6, at 11 (“If a plebe refused to comply [with hazing-related practices] he would be required to fight a member of the upper class.”).

⁸² KOHLHAGEN & HEINBACH, *supra* note 80, at 99.

⁸³ GAO/NSIAD-93-36, *supra* note 6, at 12 (“Attempts to eliminate hazing [in the early 1900s] were largely unsuccessful because it was supported by the graduates and faculty and the plebes saw it as a point of honor not to reveal the names of those who hazed them.”).

⁸⁴ *Id.* at 11–12.

⁸⁵ *Id.* at 12.

⁸⁶ *Id.*; CRACKEL, *supra* note 74, at 163.

⁸⁷ CRACKEL, *supra* note 74, at 163.

⁸⁸ *Id.* Between 1846 and 1909, 41 USMA cadets were separated for “hazing,” of which 18, or 42.8 percent, were readmitted. Alexander, *supra* note 14, app. 1-2.

⁸⁹ GAO/NSIAD-93-36 *supra* note 6, at 41 (“The [USMA] Academy administration adopted the system and codified it to curb abuses in the treatment of plebes. Over the years, the system evolved into a primary vehicle for leader development”). In 1955, the Air Force Academy was established, adopting much of the West Point Fourth Class System. GRANEY, *supra* note 74, at 41.

⁹⁰ CRACKEL, *supra* note 74, at 162.

⁹¹ See BARKALOW WITH RAAB, *supra* note 76, at 35 (observing that certain forms of physical hazing were outlawed in the 1960s although some physical hazing was unofficially tolerated through at least 1976).

⁹² KOHLHAGEN & HEINBACH, *supra* note 80, at 98, 99.

⁹³ GAO/NSIAD-93-36, *supra* note 6, at 12. At a 1901 congressional investigation into hazing, MacArthur refused to identify the cadets who had hazed him, to the extent they had not already identified themselves. *Id.*

⁹⁴ BANNING, *supra* note 6, at 23. The practice was referred to as “sitting on infinity.” *Id.*

Newburgh” involved a plebe balancing himself on his stomach on a chair or door and then simulating the breaststroke through imaginary water.⁹⁵

In addition, some forms of hazing were humiliating. In the early 1900s, USNA plebes who could not properly answer questions from upperclassmen during meals “were sometimes ordered to eat under the table like dogs.”⁹⁶ Specifically, hazing appears to have been misused as a tool by some midshipmen to block the graduation of African-Americans from the USNA. Joseph H. Conyers, who entered the USNA in 1872 as its first African-American midshipman, was subjected to extensive hazing at the hands of some midshipmen. Such hazing included “assaulting him and in one incident forcing him, wearing almost no clothing, to climb a tree during a cold winter night and imitate a barking dog.”⁹⁷ The next two African-Americans to enter USNA—Alonzo McClellan in 1873 and Henry Baker in 1874—both were subjected to hazing, contributing to their struggles to perform academically and eventual resignations.⁹⁸

It was not until the 1930s before USNA saw another African-American midshipman. In 1936, James Johnson reported to USNA as a midshipman but was given “an especially hard time” and dismissed in 1937 after academic deficiencies.⁹⁹ In 1937, George Trivers entered USNA but resigned after only three weeks.¹⁰⁰ Trivers remarked that he was unprepared “for the hazing and the isolation.”¹⁰¹ A subsequent investigation reported that USNA officials “bent over backwards to see that the Negro midshipmen had fair and impartial treatment,” but that they had been the targets of individual acts of racism and had eventually left for personal reasons and the failure to meet USNA standards.¹⁰²

Finally, in 1945, Wesley Brown entered USNA, graduated in 1949, and eventually retired as a Lieutenant Commander after 20 years of service in the U.S. Navy.¹⁰³ Although the target of “racial taunts and merciless hazing,”¹⁰⁴ during his time at USNA, Brown received the support of other midshipmen, the civilian Annapolis African-American community, and naval officers assigned specifically to monitor and ensure his safety and equitable treatment.¹⁰⁵

In contrast, early African-American cadets at USMA were ignored or “silenced,”¹⁰⁶ rather than subjected to excessive hazing-type behavior.¹⁰⁷ USMA’s first African-American graduate, Henry Ossian Flipper (class of 1877),

⁹⁵ *Id.* Newburgh is a town north of USMA.

⁹⁶ KOHLHAGEN & HEINBACH, *supra* note 80, at 96.

⁹⁷ H. MICHAEL GELFAND, *SEA CHANGE AT ANNAPOLIS: THE UNITED STATES NAVAL ACADEMY, 1949–2000* 50 (2006). [Copyright 2006 by the University of North Carolina Press. Used by permission of the publisher. www.uncpress.org]. Some midshipmen had tried to protect him from excessive hazing. *Id.* Conyers departed USNA as an academic failure in 1873. *Id.*

⁹⁸ *Id.* at 50–51.

⁹⁹ *Id.* at 51.

¹⁰⁰ *Id.* at 51–52.

¹⁰¹ *Id.* at 52.

¹⁰² *Id.*

¹⁰³ T. Rees Shapiro, *His Stormy Voyage Through the Naval Academy Made History*, WASH. POST, May 26, 2012, at B1.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at B5; GELFAND, *supra* note 97, at 54.

¹⁰⁶ A silenced cadet was treated as if he did not exist. Major John H. Beasley, *The USMA Honor System—A Due Process Hybrid*, 118 MIL. L. REV. 187, 198 (1987) (“The ‘silenced’ cadet lived in a separate room, ate alone at a table in the Cadet mess, was not spoken to by any other cadet except for official purposes, and was otherwise completely ignored.”).

¹⁰⁷ See CRACKEL, *supra* note 74, at 164 (“Although they were not hazed in the traditional sense, the social climate among the cadets ensured that black cadets would be subject to scorn and maltreatment during the whole of their stay at West Point”).

experienced little hazing, but was instead largely ignored by other cadets.¹⁰⁸ Benjamin Davis Jr. (class of 1936), the first African-American to graduate from USMA in the twentieth century, wrote in his autobiography that “I was silenced for the entire four years of my stay at the Academy.”¹⁰⁹ Davis reported that he had no friends or roommates at USMA and other cadets spoke to him only as part of an official duty.¹¹⁰

Some of the first women to enter the academies also reported excessive hazing; others experienced ostracism and open hostility.¹¹¹ Many of the first female midshipmen believed that during the initial summer training period they had become the object of “particular attention and scorn from the upperclass.”¹¹² The attitude towards women at the academies quickly changed over time. By 1992, the GAO, reporting on treatment of fourth-class cadets and midshipmen at the three DoD academies, determined that women and minorities were not the recipients of any greater amounts of hazing-type treatment than other groups.¹¹³

Various forms of relatively harmless hazing-type conduct existed throughout the life of the service academies. During the 1870s, USNA midshipmen “had to mimic gorillas, bears and other animals while acting out amusing poems.”¹¹⁴ By 1900, plebes “had to recite inane stories in the wardroom or sing their laundry lists to the tune of ‘Yankee Doodle.’”¹¹⁵ A plebe from the class of 1924 reported that he was required “to sing ‘Anchor’s Away’ while standing on his head under the shower.”¹¹⁶ Plebes were required to hide behind a study table, pop up their heads and say “cuckoo” before an upperclassman could SWAT them.¹¹⁷ During the 1960s, at least one plebe was dispatched on a nighttime reconnaissance mission “to polish the brass balls of the statue of Bill the Goat.”¹¹⁸

At USMA, plebes were ordered to attend funerals for dead insects.¹¹⁹ A common source of amusement were clothing formations, where the plebes were ordered to wear, and drill in, odd collections of uniform items, such as “full dress

¹⁰⁸ JANE EPPINGS, HENRY OSSIAN FLIPPER: WEST POINT’S FIRST BLACK GRADUATE 28 (1996).

¹⁰⁹ BENJAMIN O. DAVIS, JR., AMERICAN: AN AUTOBIOGRAPHY 27 (1991).

¹¹⁰ *Id.* at 24–28.

¹¹¹ *See, e.g.*, BARKALOW WITH RAAB, *supra* note 76, at 36 (“Women, in particular, became a target group for special hazing, though certainly men were not exempt.”); SHARON H. DISHER, FIRST CLASS: WOMEN JOIN THE RANKS AT THE NAVAL ACADEMY 61–62 (1998) (describing that although oftentimes ostracized by male midshipmen and occasionally subjected to offensive taunts, the women generally experienced the same level of hazing during their plebe year as the male plebes); DAVID LIPSKY, ABSOLUTELY AMERICAN: FOUR YEARS AT WEST POINT 50 (2003) (first women to USMA experienced open hostility by male upper class cadets) [© 2003 by David Lipsky, used with permission of the publisher Houghton Mifflin Harcourt Publishing Company]; *cf.* GAIL O’SULLIVAN DWYER, TOUGH AS NAILS: ONE WOMAN’S JOURNEY THROUGH WEST POINT 67 (2009) (explaining that although there were “a few bad apples,” the author—a member of USMA’s second class with women—did not experience hazing focused on her because of her gender); PETERSON, *supra* note 14, at 17–19, 25–26 (describing how a female cadet from the USMA class of 1982 recalled only one time that she believed she was “hazed” because of her gender; the offender was subsequently admonished by another cadet); *id.* at 72 (describing how during plebe year, the female cadet “didn’t feel singled-out because [she] was female”). The first women cadets arrived in 1976 and now constitute 20 percent of the USMA student body. Sarah Larimer, *N. Virginian is First Black Woman to Lead West Point’s Corps of Cadets*, WASH. POST, Aug. 6, 2017, at C3.

¹¹² GELFAND, *supra* note 97, at 143.

¹¹³ GAO/NSIAD-93-36, *supra* note 6, at 24 (USNA), 36 (USAF), 50 (USMA).

¹¹⁴ KOHLHAGEN & HEINBACH, *supra* note 80, at 98.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ BANNING, *supra* note 6, at 27 (noting that all funeral participants came from the ranks of the plebes, “even the mourners”).

hat, a pair of underdrawers, leggings and white gloves – and nothing else.”¹²⁰ Not all clothing formations were quite as amusing. One cadet from the class of 1962 reported that they were required to dress “in sweat suits and raincoats and made to stand in steamy showers until they nearly fainted” and ordered repeatedly “to appear in certain uniform in an impossibly short period of time . . . until the plebes dropped from exhaustion.”¹²¹

Cadets and midshipmen embraced an elaborate set of unofficial traditions and customs that had developed over decades and perhaps longer.¹²² For example, USMA plebes were required to recite their “poop” on demand.¹²³ One of the first female cadets at USMA (class of 1980) identified her poop as “Sir, I’m rough, tough, and full of stuff.”¹²⁴ Her classmate’s poop was: “Sir, I’m 125 pounds of twisted steel and sex appeal. The Lone Ranger would rather French kiss a rattlesnake than mess with me.”¹²⁵

As part of the fourth-class system, cadets and midshipmen were required to memorize a host of information—news, history, trivia, the menu, days until graduation—and recite it upon demand or suffer the wrath of the upper class.¹²⁶ Both cadets and midshipmen were required to act as a form of “verbal alarm clock,” under the scrutiny of the upper class, assuming an assigned station and then yelling out the number of minutes until formation, the uniform of the day, the menu, and other information.¹²⁷

¹²⁰ *Id.* Clothing formations continued at USMA until at least 1976, but sometimes without the same level of frivolity. BARKALOW WITH RAAB, *supra* note 76, at 34. As of 1992, the USNA did not view as hazing fourth class midshipmen being required to “repeatedly change uniforms, this activity is specifically cited as permissible in the fourth class indoctrination instruction.” GAO/NSIAD-93-36 *supra* note 6, at 24.

¹²¹ RUGGERO, *supra* note 14, at 30–31 (noting that the graduate was “almost wistful” as he recalled “the hazing that helped shape him.”); see JOSEPH STEFFAN, HONOR BOUND: A GAY MIDSHIPMAN FIGHTS TO SERVE HIS COUNTRY 53 (1992) (describing an incident from the perspective of a USNA class of 1987 midshipman during which he and other plebes were required to wear raincoats over sweat gear in a hot enclosed environment while holding rifles straight out in front of them, and then exercised vigorously until a plebe passed out); RICHARD C. U’REN, IVORY FORTRESS: A PSYCHIATRIST LOOKS AT WEST POINT 21 (1974) (USMA plebes in the early 1970s were subject to uniform drills: “just before inspection, a new cadet may be ordered to appear in all his uniforms before an upperclassman. He then had to run up and down stairs in his dress uniform, his tropical worsteds, his gym clothes, and so on”).

¹²² GAO/NSIAD-93-36, *supra* note 6, at 10 (“By tradition and custom, each of the fourth class systems has built up a variety of practices that have been part of the programs for decades, and some have been around for a century or more.”).

¹²³ Assigned to a plebe by his/her squad leader or other upper class cadet, poop “called attention to whatever surface characteristic they felt was the most grossly evident about us, alluding to our appearance, our attitude, or our performance.” BARKALOW WITH RAAB, *supra* note 76, at 30–31.

¹²⁴ *Id.* at 31 (“I considered it a compliment.”).

¹²⁵ *Id.* Another of Barkalow’s classmates was required to say: “I’m the Madwoman of Borneo—I have more hair on my chest than you have on your head.” *Id.* In the author’s company (USMA class of 1982), a plebe from the South was required to recite the “Arkansas poop,” which reportedly was an 1881 speech rendered before the Arkansas state legislature concerning how “Arkansas” should be pronounced, that is, ar-kan-zus or ar-kan-saw.

¹²⁶ Peggy O’Donnell, *The Politics of Pie Cutting at West Point’s Mess Hall*, ATLAS OBSCURA (June 27, 2017), <https://bit.ly/39Qezja>; GAO/NSIAD-93-26, *supra* note 6, at 15; COMPTROLLER GEN. OF THE U.S., *supra* note 26, at 1 (“Fourth classmen must memorize and recite professional and nonprofessional topics, including the titles of movies, or, in season, athletic team rosters or coaches.”).

¹²⁷ STEFFAN, *supra* note 121, at 61–62 (referred to as “chow calls” at Annapolis); see also DISHER, *supra* note 111, at 119. Plebes at USMA performing a similar function were referred to as “minute callers.” See DWYER, *supra* note 111, at 18; *id.* at 71–72 (“Minute callers basically just stand in the hallway getting yelled at or waiting to get yelled at. At attention, standing like dingbats under the clocks in the hallways, ten minutes before each formation, eyes straight ahead, shooting ducks for upperclassmen to criticize them . . .”); PETERSON, *supra* note 14, at 74 (minute callers called out the number of minutes until formation, the menu, and uniform). Doolies at the USAFA were similarly required to call minutes. MARK L. NELSON, OUT OF THE BLUE: LEAVING THE AIR FORCE ACADEMY 25 (2016).

At the family-style meals, USMA cadets, while sitting at attention, were required to announce the arrival of the food, memorize the beverage preferences of all upper class cadets at their table, and cut the desert into perfectly even slices.¹²⁸ Plebes did not speak without permission and sat “at attention: *i.e.*, erect, hands in lap, heads up, eyes straight ahead, and using the bottom but not the back of the chair.”¹²⁹ At least through the late 1970s, USMA plebes who failed to perform table duties satisfactorily were still being “ordered to ‘pass out their plates,’” returning their uneaten meal to the mess hall waiter.¹³⁰ Occasionally plebes at USNA had to “shove out,” which meant they had to push their chair away, but maintain a sitting position while eating their meal.¹³¹

One popular tradition at USNA was to require plebes to “burble” a pea.¹³² This entails a midshipman putting a pea between his lips, looking upward, and “[t]hen, ever so gently . . . blow[ing] a steady stream of air so as to lift the pea from your lips and keep it aloft about an inch or so above your mouth for an interminable ten seconds.”¹³³

Some of the requirements imposed on the plebes were part of a highly regimented system of discipline.¹³⁴ For example, at USMA, plebes were required to “ping” when moving between locations, “which meant walking 180 steps per minute at attention.”¹³⁵ Plebes at USNA followed a similar practice.¹³⁶ They were “required to move at double-time (called ‘chopping’) . . . square their corners by pivoting at a 90-degree angle, and ‘sound-off’ with a spirit-related phrase (typically ‘Beat Army, Sir’).”¹³⁷

At the USAFA, plebes were required to sit at attention during meals¹³⁸ and “double-time” across the compound.¹³⁹ Prior to the completion of the fourth class system, doolies at the USAFA had to undergo a week-long period of intense

¹²⁸ O’Donnell, *supra* note 126; PETERSON, *supra* note 14, at 84–85; GAO/NSIAD-93-36, *supra* note 6, at 42. Plebes at the USNA had a similar experience. STEFFAN, *supra* note 121, at 42; *see also* RICH ZINO & PAUL LARIC, TALES FROM ANNAPOLIS: A RING-KNOCKERS’ BEDSIDE COMPANION 47 (2000) (while sitting at attention, midshipmen were required to recite “sports scores, current headlines from the morning paper, the names of movies being shown in town, and a host of other exercises in mental agility”); GAO/NSIAD-93-36, *supra* note 6, at 16 (“Mealtimes were a period of stress for plebes, who were required to eat at attention, sitting on the edge of their chair without touching the chair back, looking straight ahead (referred to as ‘eyes in the boat’), and eating their food with ‘three chews and a swallow.’”). Doolies at the USAFA engaged in similar meal time rituals. GAO/NSIAD-93-36, *supra* note 6, at 31. In the author’s plebe company, poor pie cutters were ordered to the rooms of upperclassmen during the evening hours to practice on Play-Doh pies.

¹²⁹ COMPTROLLER GEN. OF THE U.S., *supra* note 26, at 1.

¹³⁰ RUGGERO, *supra* note 14, at 30.

¹³¹ ZINO & LARIC, *supra* note 128, at 50 (describing how they “were literally sitting on air”).

¹³² *Id.* at 48, 51 (describing memories of plebes from USNA classes of 1967 and 1949).

¹³³ *Id.* at 51.

¹³⁴ *See* GAO/NSIAD-93-36, *supra* note 6, at 41 (“Traditional fourth class life at West Point was highly regimented.”). At USMA, cadet rooms were inspected daily. PETERSON, *supra* note 14, at 74. Further, during the first semester USMA plebes were not authorized stereos or radios and could not watch television during plebe year. *Id.* at 79–80.

¹³⁵ DWYER, *supra* note 111, at 26; *see also* GAO/NSIAD-93-36 *supra* note 6, at 41 (“While inside the Academy’s buildings, fourth class cadets were expected to walk in a military manner, 120 steps per minute, with head and eyes to the front, an arm swing 9 inches to the front and 6 inches to the rear, as in marching.”), 42 (“Outside, cadets had to ‘ping’ (*i.e.*, move at double time) and square corners.”).

¹³⁶ DISHER, *supra* note 111, at 18; *see* MCCAIN WITH SALTER, *supra* note 80, at 121 (McCain, USNA class of 1958, noted: “We were expected to brace up, sit or stand at rigid attention with our chins tucked into our neck, whenever upperclassmen came into view.”).

¹³⁷ GAO/NSIAD-93-36, *supra* note 6, at 15; *see also* GELFAND, *supra* note 97, at 28.

¹³⁸ GAO/NSIAD-93-36, *supra* note 6, at 31. The cadets were also required to perform various table duties and were subject to correction for various infractions and table decorum. *Id.*

¹³⁹ GAO/NSIAD-93-36, *supra* note 6, at 30. The USAFA defined the term double-time as “an easy run, taking 180 steps (36 inches in length) per minute.” *Id.*

physical activity and harassment by upper class cadets, known as “hell week.”¹⁴⁰ For a concentrated period of time, upper class cadets yelled and screamed at the doolies, sometimes ganging-up on a single cadet; required them to brace at attention and perform rifle drills; grilled them on required knowledge; repeatedly inspected, wrecked, and re-inspected rooms; and frequently mandated strenuous physical activity, culminating in the required completion of an obstacle course under stressful conditions.¹⁴¹

B. Formalizing and Refining the Fourth-Class System

During most of the twentieth century, USMA moved to formalize the fourth class system, fully cognizant of the hazing-type conduct aimed at fourth classmen.¹⁴² In 1918, USMA’s Superintendent, Samuel Tillman, moved toward regularizing the fourth class system, including increased upper class cadet authority over plebes.¹⁴³ Although the Academy’s leadership was aware that the expansion of upper class leadership authority produced reports that plebes were unnecessarily harassed, “the tactical department was impressed by the soldierly results that were so quickly brought about by the sharp disciplinary control both in and out of ranks, and did little to change the practice.”¹⁴⁴ The Superintendent believed that the system would work so long as the upper class cadets did not abuse their authority or permit others to do so.¹⁴⁵

The following year, the new Superintendent, Douglas MacArthur, ordered recent graduates to reduce to writing the customs of service of the Corps of Cadets and accepted proposed regulations from the recent graduates articulating the relationship between the upper class and plebes.¹⁴⁶ The fourth class system formalized by Tillman and MacArthur was reviewed again during the 1940s and 1950s, but underwent only minor changes.¹⁴⁷ Various critics of the fourth class system called for change in the late 1950s and early 1960s, with little success.¹⁴⁸ After studying the issue in 1963, Superintendent William Westmoreland reported to USMA graduates that “Beast Barracks is little changed from what you experienced” and that USMA continued to view the summer program as “a sound and effective training experience.”¹⁴⁹

In 1979, Superintendent Andrew Goodpaster made additional refinements to the fourth class system, placing more emphasis on “professionalism and positive leadership” and “stripped out a great deal of the nonsense . . . that had grown up around the Plebe system.”¹⁵⁰ Changes included a reduction in the amount of material plebes were required to memorize, fewer inspections, and an emphasis on imposing more professional and positive leadership responsibilities on upper class cadets.¹⁵¹ General Goodpaster continued to retain concerns about the fourth class system, but in reflecting on

¹⁴⁰ NELSON, *supra* note 127, at 61; *see* GAO/NSIAD-93-36 *supra* note 6, at 55 (noting that in 1983, “13 Air Force Academy fourth class cadets were hospitalized and 136 more were treated (most for dehydration) after rigorous Hell Week activities”).

¹⁴¹ NELSON, *supra* note 127, at 61–67.

¹⁴² The Naval Academy reviewed its fourth class system with an eye toward hazing. GELFAND, *supra* note 97, at 29 (explaining that at the USNA, “[a]t least seven superintendents and commandants have taken steps to reform the indoctrination process and reduce the occurrence of hazing”).

¹⁴³ CRACKEL, *supra* note 74, at 282.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 283.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

USMA's developmental mission, he recognized that the cadets had "to learn to handle authority."¹⁵²

C. *The New Corps*

The beginning of the end of the academies' traditional fourth class model began during the late 1980s when USMA initiated a comprehensive review of the cadet system.¹⁵³ In 1990, USMA significantly modified its fourth class system, followed by the USNA over the next two years.¹⁵⁴ The two academies shifted their focus to "using more positive leadership techniques" and eliminated portions of the fourth class system that the academies viewed as "abuse-prone."¹⁵⁵ USMA accelerated the date the plebes were "recognized"—"the effective end of 'plebe' status for the fourth class"—from the end of the academic year to the middle of the second academic semester.¹⁵⁶ Also that year, USMA introduced the Cadet Leader Development System (CLDS), which changed the fourth class system to a "four class system," focusing more on leadership as a developmental process.¹⁵⁷

The CLDS sought to "establish a climate that is free of the abuses and dysfunctional aspects of the old fourth class system."¹⁵⁸ Of note, the CLDS eliminated the long-standing practice of placing plebes under stressful conditions during meals. Plebes could now "enjoy their meal sitting 'at ease,'" table duties were no longer performed exclusively by plebes, and plebes were no longer required to recite knowledge after the cadets were ordered to "take seats."¹⁵⁹ Indeed, the changes reduced knowledge memorization requirements.¹⁶⁰

The CLDS also eliminated the exaggerated military bearing requirements previously associated with a rigorous system of discipline. As the GAO reported: "With regard to military bearing requirements, traditional practices that do not really constitute proper military bearing (such as ping, bracing, squaring corners, and hugging the walls) have been prohibited."¹⁶¹ Current DoD policy mirrors these changes, recognizing the importance of "proper bearing, fitness, and posture" as part of the cadet and midshipmen leadership development system, but opines that "[e]xaggerated forms of posture, speech or movement generally do not constitute proper military bearing," cautioning the

¹⁵² *Id.* at 284. See GAO/NSIAD-93-36, *supra* note 6, at 90 (responding to a GAO report, the DoD noted that part of the academies' leadership training program included teaching the upper class how "to distinguish what constitutes abuse of authority").

¹⁵³ GAO/NSIAD-93-36, *supra* note 6, at 45 ("In 1989, as part of an in-depth reassessment of virtually all aspects of Academy life, the Superintendent of the Military Academy commissioned three independent reviews of the fourth class system The three reviews arrived at substantially the same conclusion: the fourth class system was in need of major change.").

¹⁵⁴ GAO/NSIAD-93-36, *supra* note 6, at 4, 20; see also *id.* at 41 ("In 1990, the Military Academy overhauled its fourth class system.").

¹⁵⁵ *Id.* at 4.

¹⁵⁶ CRACKEL, *supra* note 74, at 284.

¹⁵⁷ GAO/NSIAD-93-36, *supra* note 6, at 46. USMA continued to follow the CLDS. Dep't of Army Regulation 210-26, United States Military Academy ¶ 2-2, at 9 (Dec. 9, 2009/RAR Sept. 6, 2011) (consolidated in, and superseded by, Dep't of Army Regulation 150-1, United States Military Academy: Organization, Administration and Operation (Mar. 5, 2019)).

¹⁵⁸ GAO/NSIAD-93-36, *supra* note 6, at 47.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* ("Required rote memorization of newspaper articles has been prohibited, as has memorization of trivia such as beverage preferences, complete menus, and sports scores."). The Academy established approved knowledge requirements for all four classes. *Id.* Current DoD policy permits the individual services to determine appropriate knowledge memorization requirements, but cautions that "[m]emorization of trivia, such as complete menus for meals, is generally inappropriate." DoDI 1322.22, *supra* note 23, at 12.

¹⁶¹ GAO/NSIAD-93-36, *supra* note 6, at 47; see LIPSKY, *supra* note 111, at 22 ("plebes no longer have to ping – a kind of racewalk – between barracks.").

academies to monitor such practices and requiring Superintendent-level approval for their implementation.¹⁶²

The success of the initial changes were measured, in part, by reduced attrition rates.¹⁶³ Under the old system, the academies had experienced relatively high attrition rates,¹⁶⁴ particularly during the first year.¹⁶⁵ To illustrate, the attrition rate for the class of 1977 was 41 percent at the USAFA, 46 percent at the USMA, and 33 percent at the USNA.¹⁶⁶ Similarly high attrition rates continued throughout the 1980s and into the early 1990s, when USMA began to implement the new four class system.¹⁶⁷ The initial summer training period, known as “Beast Barracks” at USMA,¹⁶⁸ reflected a disproportionately high attrition rate.¹⁶⁹

Rather than filtering out in the first year those cadets who had difficulty handling stressful situations or who could not meet its exacting requirements, USMA’s focus shifted to retaining the new cadets with a view toward helping them achieve USMA’s standards and developing them into officers during their four years at the Academy.¹⁷⁰ Retention rates at USMA reflected that cultural shift. To illustrate, during the decade preceding the reform, the average graduation rate was only 68.14 percent, but during the 1990s, when the new system was being implemented, the average graduation rate rose to 75.93 percent.¹⁷¹ Between 2000 and 2018, under the mature cadet model, USMA’s average graduation rate rose to slightly over 79 percent.¹⁷² USMA’s plebe year is no longer the filter that it once was; depending on the class, between 93 and 96 percent of plebes returned for their second year.¹⁷³

Changes at the academies were neither immediate nor embraced by cadets, staff, or alumni. Based on surveys conducted between 1990 and 1992, the

¹⁶² DoDI 1322.22, *supra* note 23, at 12.

¹⁶³ GAO/NSIAD-93-36, *supra* note 6, at 21 (noting as a “positive effect” of changes to the USNA’s fourth class system was that “plebe summer attrition was significantly lower than it had been in the past”); see DIANA JEAN SCHEMO, SKIES TO CONQUER: A YEAR INSIDE THE AIR FORCE ACADEMY 50 (2010) (citing lower attrition as one factor evidencing the success of reforms undertaken by the Air Force Academy). *But cf.* GAO/NSIAD-93-36, *supra* note 6, at 66 (“DOD also stated that some attrition might be necessary to screen students so that those who were not adaptable to a stressful environment are not commissioned.”).

¹⁶⁴ GAO/NSIAD-93-36, *supra* note 6, at 61 (“For the classes of 1972 through 1991, attrition averaged about 28 percent at the Naval Academy, 37 percent at the Air Force Academy, and 35 percent at the Military Academy”); LIPSKY, *supra* note 111, at 19 (explaining that prior to CLDS, USMA’s attrition rate was about 40 percent; by 1998 it was down to 20 percent).

¹⁶⁵ GAO/NSIAD-93-36, *supra* note 6, at 61; U’REN, *supra* note 121, at 56 (twenty percent); see MCCAIN WITH SALTER, *supra* note 80, at 121 (describing how most “left during our plebe year, unable to cope with the pressures”).

¹⁶⁶ COMPTROLLER GEN. OF THE U.S., B-3324555, THE FIVE SERVICE ACADEMIES: A FOLLOWUP REPORT i–ii (Nov. 25, 1977), <https://bit.ly/30D3wXC>. USMA’s attrition rate had increased from 36 percent for the class of 1975 to 46 percent for the class of 1977, in part because of violations of the honor code. *Id.* at ii. In addition, the attrition rate for the class of 1977 at the Coast Guard Academy was 44 percent and at the Merchant Marine Academy was 38 percent. *Id.*

¹⁶⁷ Between 1980 and 1990, USMA’s graduation rate fluctuated between a low of 61.5 percent in 1980 and a high of 74.8 percent in 1989. 1980–2018 Graduation and Commissioning Rates, U.S. MILITARY ACADEMY AT WEST POINT [hereinafter USMA Graduation Rates], *available at* <https://bit.ly/2X76eTi> (last visited July 13, 2020).

¹⁶⁸ GAO/NSIAD-93-36, *supra* note 6, at 10 n.2.

¹⁶⁹ U’REN, *supra* note 121, at 58 (“A disproportionately large number of cadets—thirty-four percent of the four years’ total for any one class—leave voluntarily during the first three months of the year.”); *cf.* LIPSKY, *supra* note 111, at 8 (in the late 1990s USMA had a 10% drop out rate during the first summer).

¹⁷⁰ See Letter from LTG Robert L. Caslen, Jr. To the Men and Women of the Long Gray Line (Oct. 12, 2017) [on file with author].

¹⁷¹ USMA Graduation Rates, *supra* note 167.

¹⁷² *Id.*

¹⁷³ Student Consumer Information-Cadet Achievement, Retention Rates (classes 2012–2017), <https://bit.ly/3ijEmTW>.

GAO found that fourth class cadets at USMA, USNA, and USAFA were regularly “(1) subjected to upperclassmen screaming in their face; (2) verbally harassed, insulted, and ridiculed; (3) required to memorize and recite trivia; and (4) forced to use study hours to prepare for fourth class duties.”¹⁷⁴ At least initially, some USMA graduates and cadets resisted movement away from the traditional fourth class system.¹⁷⁵ Further, some degree of stressful harassment continued to be permitted at the academies,¹⁷⁶ and unofficial hazing was reportedly still tolerated.¹⁷⁷ One author noted that “[a]s late as 1995, plebe year [at USMA] was so frightening that new cadets would pee in their own sinks rather than risk the walk to the bathroom, where upperclassmen were probably ready and waiting with some kind of haze.”¹⁷⁸

In 1997, under new leadership, USMA adopted a no-haze policy, which resulted in the reprimand of upper class cadets for yelling at plebes, and possible expulsion for repeat offenders.¹⁷⁹ Plebes were no longer required to ping and were given a host of privileges denied plebes in the pre-reform period, including permission to listen to music in their rooms during first semester and access to off-post privileges, room phones, and TV cards for their computers.¹⁸⁰ Some of the prior traditions continued, however, including minute calling and performing table duties.¹⁸¹

That same year, the USNA followed the lead of USMA and USAFA by reducing the period that plebes were subject to harassment by the upper class.¹⁸² USNA plebes were still required to memorize large amounts of knowledge, “then recite it under interrogation by upperclassmen,” and were required to “march down the middle of the hallways, turning corners at rigid right angles.”¹⁸³ Reporting on the USNA, a 2002 *Washington Times* article indicated that USNA had moved even further away from the harassment associated with the old fourth class system. The article reported that plebes were being required to write essays rather than being ordered to perform pushups by upper classmen as corrective measures; that the word “kill” had been removed from the plebe vocabulary—“it was too early in their careers to think about the ‘kill piece’ of military training”; that upper class midshipmen had been removed from plebe training duties “after a plebe complained about being screamed at and scolded too harshly”; and that the USNA had removed spot corrections and cruelty from the process.¹⁸⁴

¹⁷⁴ GAO/NSIAD-93-36, *supra* note 6, at 3, 14.

¹⁷⁵ RUGGERO, *supra* note 14, at 33; *cf.* GRANEY, *supra* note 74, at 44–45, 48 (many officers and upperclass cadets supported the fourth class system).

¹⁷⁶ See, e.g., *Academy Cuts First Stress: Scandal Changes Freshman Ritual*, WASH. TIMES (June 25, 2003) (describing how the first four days of a new cadet’s USAFA experience would be “low-stress,” and not follow the prior practice where “upperclassmen yelled at and otherwise hounded the ‘doolies’ from the moment they stepped on buses for the ride to campus”); Michael Hill, *Public Enlists For Cadet Abuse*, WASH. TIMES (June 80, 2008), at A4 (explaining that cadets learn how to receive new cadets, to include yelling at them).

¹⁷⁷ LIPSKY, *supra* note 111, at 21 (“Hazing—even after CLDS—had always been unofficially tolerated at West Point”).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 21.

¹⁸⁰ *Id.* at 22.

¹⁸¹ *Id.* at 37 (noting that only breakfast and lunch were mandatory meals).

¹⁸² Amy Argetsinger, *Less Humble Pie for Naval “Plebes,”* WASH. POST (Dec. 10, 1997), <https://wapo.st/3h3rm43> (describing how the USNA “shorten[ed] by at least a month this humbling initiation process, in which plebes are subjected to harangues and petty chores”).

¹⁸³ *Id.*

¹⁸⁴ *Naval Academy Considers Plebes’ Dignity*, WASH. TIMES (July 29, 2002), at B1. Naval Academy alumni expressed concerns with the changes. *Id.* at B2. A retired vice admiral remarked: “Human dignity is important, but I worry that we’re so concerned about someone’s dignity . . . that when they’re in a stressful situation, they’re very dignified but they fall apart.” *Id.*

As part of an academic thesis, a U.S. Marine Corps officer examined whether the USNA had reduced plebe “hazing and unsanctioned initiation practices” among members of USNA classes 2005 through 2008.¹⁸⁵ The officer-scholar found a “significant decrease” in the frequency of hazing-related conduct when compared to the GAO’s 1992 report on hazing.¹⁸⁶ Profanity and most forms of physical contact with plebes were prohibited, plebes were permitted to eat full meals, and punishment was closely monitored.¹⁸⁷

However, the author found that the USNA still permitted certain hazing-like activities, but had taken steps to control these activities so as to preclude any excesses. For example, uniform races were still permissible—indeed they were “an approved teaching tool”—but were “tightly controlled” and conducted only after receiving the permission of the midshipman company commander.¹⁸⁸ “Bracing up”—tucking the midshipman’s chin into his/her neck while keeping the head upright—was limited to specified times and locations, but the USNA prohibited strenuous or creative bracing.¹⁸⁹ Also, poorly performing plebes could be required to perform multiple repetitions of exercises, “but only as a group incentive,” and were subject to “directive counseling.”¹⁹⁰

Current USNA regulations still require fourth class midshipmen to “[c]hop with ‘eyes in the boat’ and square corners except when in [designated areas].”¹⁹¹ Further, plebes are responsible for a wide variety of information, to include knowing “daily rates, including but not limited to the days; menus for the next three meals; names and billets of [certain duty officers], in-season varsity team captains, and [high-ranking midshipmen]; professional topic of the week; conversational knowledge of past professional topics; and conversational knowledge of three current news articles (international, national, and sports).”¹⁹²

The author noted that three activities that the GAO viewed as hazing—bracing-up, uniform races, and performing multiple sets of exercises—were viewed by the USNA as permissible practices, at least when not performed to excess and in compliance with Academy standards.¹⁹³ In addition, the author used 23 hazing-like behaviors as part of his study, including upperclassmen screaming in a plebe’s face, uniform drills, memorizing and reciting trivia, bracing, pranks, and verbal harassment.¹⁹⁴ Within his surveyed population of midshipmen, over 81 percent of students did not consider any of the identified conduct to constitute hazing.¹⁹⁵ Midshipmen were still confused as to what fourth class practices were permissible.¹⁹⁶

¹⁸⁵ Groah, *supra* note 3, at 1, 3.

¹⁸⁶ *Id.* at 63–64.

¹⁸⁷ *Id.* at 41.

¹⁸⁸ *Id.* at 41, 84.

¹⁸⁹ *Id.* at 41.

¹⁹⁰ *Id.*

¹⁹¹ COMDTMIDNINST 5400.6V, *supra* note 66, ¶ 6.5(1)(b)(2).

¹⁹² *Id.* Reflecting the movement away from the old fourth class system and its unique upper class-plebe system on interaction, however, current USNA regulations sanction only practices “that would be reasonably and lawfully acceptable for use in the Fleet[.]” and caution that all practices should be measured through the prism of whether they could be defended to the *parents* of subordinates. *Id.* ¶ 3.2(2)(e) (emphasis added).

¹⁹³ Groah, *supra* note 3, at 41; *see id.* at 84 (noting that uniform races were permissible under controlled conditions).

¹⁹⁴ *Id.* at 56, 57.

¹⁹⁵ *Id.* at 88.

¹⁹⁶ *Id.*

At the USAFA, some degree of hazing continued at least through 2002,¹⁹⁷ to include a condensed but still robust version of hell week called “Recognition.”¹⁹⁸ In 2004, following a sexual abuse scandal in 2003, the USAFA appears to have taken an abrupt turn away from the old system that gave the upper class a free hand in training the doolies.¹⁹⁹ The USAFA moved toward an “officer development system,” curtailed numerous traditions, and cancelled Recognition for the classes of 2007 and 2008.²⁰⁰ The officer development system shifted the focus away from training doolies to concentrating “on giving each class a role that corresponds to segments in the active-duty air force.”²⁰¹ Further, the USAFA brought in Air Force instructors from Lackland Air Force Base, experienced in training air force enlisted recruits, to teach the upper class how to properly train the doolies.²⁰²

Almost immediately, the cadet upper class trainers (cadre) and the Air Force instructors clashed over fundamental training philosophy, and the cadets resented the close supervision by, and criticism from, the Air Force instructors.²⁰³ The two groups approached training the doolies with completely different mindsets; the instructors advocated for easing up on the doolies, providing greater protections to them, and adopting a more professional approach to training, while the cadets wanted tougher training that served to forge a special life-long bond through a shared and difficult experience and sought to weed out those who were not committed to remaining at the USAFA.²⁰⁴ Further, the cadets overwhelmingly wanted a return to the traditional Recognition ritual, even though some cadets considered it to be a form of “organized hazing,” and indeed cadets placed a premium on Recognition “in direct proportion to the toughness of its challenges.”²⁰⁵ Some members of the class of 2009, subjected to the restored tradition of Recognition, taunted those members of the upper class who had avoided it.²⁰⁶ Further, some doolies felt cheated when they discovered that the training was not as rigorous as anticipated.²⁰⁷

By 2006, the USAFA had toned down Cadet Basic Training and Recognition.²⁰⁸ Upperclassmen accused by the doolies of having treated them too harshly were relieved of their training duties.²⁰⁹ Some vestiges of the old fourth class system survived, however, including a stressful initial entry period at the Academy, which many of the cadet cadre viewed as an opportunity to filter out the weak entrants.²¹⁰ During cadet basic training, doolies were required to sit at attention during meals and perform various table duties,²¹¹ and were subject to frequent on-the-spot corrections by upperclassmen followed by corrective push-

¹⁹⁷ GRANEY, *supra* note 74, at 147 (“yelled and screamed at for nine months”).

¹⁹⁸ *Id.* (“one of the most arduous experiences of my life”).

¹⁹⁹ SCHEMO, *supra* note 163, at 47, 73.

²⁰⁰ *Id.* at 40, 47, 49.

²⁰¹ *Id.* at 49. See generally HQ United States Air Force Academy, Pamphlet 36-3527, THE OFFICER DEVELOPMENT SYSTEM: DEVELOPING OFFICERS OF CHARACTER (Sept. 24, 2013) (discussing the purpose and structure of the USAFA Officer Development System).

²⁰² SCHEMO, *supra* note 163, at 49.

²⁰³ *Id.* at 74, 108.

²⁰⁴ *Id.* at 74–75.

²⁰⁵ *Id.* at 48–49, 237, 247.

²⁰⁶ *Id.* at 48, 73.

²⁰⁷ *Id.* at 108.

²⁰⁸ *Id.* at 3, 105, 119 (“tame”).

²⁰⁹ During the third week of cadet basic training, a doolie accused an upperclassman of humiliating the new cadet by berating him in front of his unit. The upperclassman was confined to his room until the Academy investigated, and ultimately cleared the cadet of any wrongdoing. *Id.* at 56. Aware of the incident, other upper-class cadres became uncertain about the parameters of permissible training. *Id.*

²¹⁰ *Id.* at 17, 75, 123 (noting that Academy staff disagreed that the cadet cadre legitimately served such a role).

²¹¹ SCHEMO, *supra* note 163, at 28.

ups and other exercises.²¹² The stressful treatment associated with basic training was significantly reduced, however, as the doolies transitioned into the academic year.²¹³ Doolies continued to perform duties as minute callers, regularly were quizzed on various knowledge memorization requirements, could not carry their rucksacks on their shoulders, and were addressed only by their last names.²¹⁴

Although firmly entrenched at the academies, modern reforms, including the developmental model, have not been fully embraced by academy graduates and remain the object of criticism.²¹⁵ An open question remaining, however, is whether the modern developmental system is better than the earlier attrition model, which tested cadets’ mental toughness and resilience before it invested significant amounts of money and resources in them.²¹⁶ Are the current Academy graduates going into the military with skill sets that could have been better developed in a more stressful environment? Did the reduction of hazing-like activity impact the quality of officer produced, particularly in terms of ability to deal with adversity, to overcome failure, to not quit when things get tough? In sum, is the modern developmental system better or just different?

D. The Purpose of Hazing-Related Activities at The Academies

The various forms of hazing-type activities have been leveled almost exclusively at fourth class cadets and midshipmen. Historically, the fourth class system was intended to indoctrinate the new cadets and midshipmen and transition them from civilians into the military.²¹⁷ The system promoted “self-discipline, professional knowledge, physical fitness, ethics, teamwork, and esprit de corps . . .”²¹⁸

Complementing other training and educational activities, the fourth class system was designed to develop such characteristics as discipline, habit, command presence, time organizational skills, an ability to think well under pressure and exercise good judgment, superior military bearing and appearance, etiquette, familiarity with professional military topics, and basic leadership principles.²¹⁹ USMA’s requirement to memorize huge amounts of knowledge was “meant to teach [plebes] to establish priorities within a short time, to respond effectively under stress . . . and to ‘generate an appropriate sense of curiosity and enthusiasm for matters pertaining to the army, the military profession, and world

²¹² *Id.* at 33.

²¹³ *Id.* at 109, 124–25.

²¹⁴ *Id.* at 156, 190–91.

²¹⁵ In response to widely-circulated open letter criticizing policies at USMA and a perceived decline in standards, the Superintendent of the USMA took the unusual step of posting a response on the Academy’s public website, seeking to refute the criticisms. *See* Caslen, *supra* note 170. The Superintendent acknowledged that USMA had shifted from “an ‘attritional model to a ‘developmental’ model,” which he recognized “did not sit well” with many graduates, but posited that USMA had made the shift without compromising its standards. *Id.* at 4.

²¹⁶ The initial training program for SEALs, for example, has an extremely high attrition rate and deliberately attempts to weed out those without the requisite mental toughness. DENVER, *supra* note 4, at 23 (describing a 70–80 percent attrition rate), 29–30. The majority of SEAL candidates who depart do so in the first week of the course, with almost all departures occurring in the first five weeks. *Id.* at 33. *Cf.* Major Carl Forsling, *Keeping the Right People: Tougher Screening and Training Is Required*, MARINE CORPS GAZETTE 73, 74 (May 2014) (arguing that the Marine Corps should impose more difficult training and higher standards to “weed out” those that do not want to be Marines badly enough and that some level of attrition should be built into the process).

²¹⁷ GAO/NSIAD-93-36, *supra* note 6, at 10, 15, 29 (“The first year at the Air Force Academy is designed to be a time of intense indoctrination and serves as a demanding transition from civilian to military life.”).

²¹⁸ *Id.* at 10.

²¹⁹ COMPTROLLER GEN. OF THE U.S., *supra* note 26, at 2–3.

affairs.”²²⁰ The entire spectrum of fourth class activities was “designed to challenge the cadets to discover their limits . . . and to learn to cope with demanding, stressful situations, such as those encountered in combat.”²²¹ Character development was a frequently cited justification for many stress-inducing activities of the fourth class system.²²²

Prior to the major revisions of the fourth class system in the 1990s, cadets and midshipmen suffered a verbal assault as soon as they reported for duty.²²³ As one graduate described it: there was “the noise, the screaming; the nose-to-nose, spittle-flying screeching of upper class into the faces and ears of shocked new cadets.”²²⁴ The extremely stressful entry into the academies served as a rite of passage,²²⁵ toughened the new cadets,²²⁶ and the cadets and midshipmen viewed the rigors of the first year, and particularly the first summer, as part of a vetting process to weed out those unsuited for military service.²²⁷ The stressful atmosphere encouraged teamwork and facilitated a bond among the fourth class and a recognition that they needed to support each other to survive their ordeal.²²⁸

One USMA graduate noted “hazing was specifically related to . . . learning time-management and self-disciplinary skills that would enable a potential officer to function in a high-stress military environment.”²²⁹ The harassment was not designed to be “directed at their gender, religion or race.”²³⁰ In addition, the system oftentimes reflected various traditions and customs, developed over time, which were viewed as harmless and “done in a spirit of fun.”²³¹ Significantly, although the fourth class system envisioned leadership development of the upper class vis-a-vis the fourth class, the harassment aspect of the relationship was never intended to be a leadership technique that academy graduates were to transport to their units following graduation.²³²

²²⁰ U’REN, *supra* note 121, at 34; *see* SCHEMO, *supra* note 163, at 59 (part of the military indoctrination effort), 61 (learn to perform under pressure).

²²¹ COMPTROLLER GEN. OF THE U.S., *supra* note 26, at 3 (discussing the USAFA).

²²² *Id.* at 1; *see* PETERSON, *supra* note 14, at 186 (explaining how stress builds character).

²²³ U’REN, *supra* note 121, at 19 (“[E]very new cadet is physically and mentally – there is no other word for it – assaulted.”).

²²⁴ RUGGERO, *supra* note 14, at 30; *see also* RICK ATKINSON, THE LONG GRAY LINE: THE AMERICAN JOURNEY OF WEST POINT’S CLASS OF 1966 17 (1989) (“[T]he intensity of disdain from the upper-class cadre, who barked and shrieked until spittle flecked the faces of the pathetic creatures cowering before them, was unnerving.”). One female cadet from the class of 1981 described her first day at USMA as similar to being in labor for 24 hours, “off-the-chart contractions, crashing into each other, no breaks, no drugs.” DWYER, *supra* note 111, at 23.

²²⁵ U’REN, *supra* note 121, at 18; BARKALOW WITH RAAB, *supra* note 76, at 30; *see* ZINO & LARIC, *supra* note 128, at 125.

²²⁶ BARKALOW WITH RAAB, *supra* note 76, at 33.

²²⁷ *Id.* (explaining how students are “subjected to a host of physical, mental, and emotional stresses designed either to eliminate them from the Corps or to make them worthy of further ascent”); PETERSON, *supra* note 14, at 38 (“The first eight weeks . . . are designed to weed out the weakest very early . . .”); GELFAND, *supra* note 97, at 27 (“test plebes to see whether or not they can take it”); U’REN, *supra* note 121, at 32 (“identify cadets unable to function under stress”). *But cf.* GAO/NSIAD-93-36, *supra* note 6, at 20 (describing how in a memorandum dated July 13, 1990, the Commandant of the USNA stated “midshipmen should not presume that it is their job to ‘weed out’ plebes who will not perform well in combat or those who cannot handle the stress of a professional military regimen”).

²²⁸ STEFFAN, *supra* note 121, at 43, 46; *see* U’REN, *supra* note 121, at 4 (“Because the multitude of tasks imposed upon them is so great, cadets learn to help each other early in their careers . . . [and] lay the groundwork for intense loyalty to each other.”); *cf.* KAMARCK, *supra* note 1, at 1 (“Some believe that shared experiences of hardship during initiation rituals lead to greater group commitment and dependency.”).

²²⁹ BARKALOW WITH RAAB, *supra* note 76, at 36.

²³⁰ *Id.*

²³¹ GAO/NSIAD-93-36, *supra* note 6, at 4, 10.

²³² *See* RUGGERO, *supra* note 14, at 33 (“Graduates who defend what the old system did for plebes never add, ‘and it taught good leadership techniques to the upperclass cadets.’”).

A psychiatrist stationed at USMA from 1970 to 1972 examined the fourth class system and determined that the stressful summer training, coupled with the “isolation, fatigue, tension, and the use of vicious language[,]” were deliberately planned and were designed to make the new cadets “vulnerable to new ideas, attitudes and behavior” and to force them to “relinquish their individuality and freedom completely,” facilitating their conversion from civilian to soldier.²³³ The psychiatrist concluded that when comparing the new cadets who arrived in July with those who completed the arduous summer training at the end of August: “[t]hat Beast Barracks accomplishes its goals is beyond doubt.”²³⁴ The experience enhanced cadet self-esteem after completing an extremely stressful and rigorous training program, and facilitated forging of close personal bonds with other cadets, group solidarity and identity, obedience, institutional conformity, and a sense of intense personal and institutional loyalty.²³⁵

Significantly, hazing as part of the fourth class system served as the great equalizer for new cadets.²³⁶ The child of privilege and the impoverished, the Sergeant’s son and the General’s daughter, the jock and the intellectual, the popular kid and the social misfit were all brought down to the same base level and then rebuilt in the image of the Service Academy’s choosing. As one observer noted: “[E]very cadet is treated harshly; no allowance is made or recognition given for past achievements”²³⁷ Isolated and under constant scrutiny and criticism, the new cadet can only rebuild his self-esteem “by adhering to the military way”²³⁸ The equalization process is not unique to the academies but is common within the military and reflects a desire to achieve uniformity among a diverse group of new entrants.²³⁹

Despite the long-standing efforts of Congress and Academy officials to curb hazing, the upperclassmen continued to embrace various practices with the unofficial approval of faculty.²⁴⁰ Further, many of the service academy graduates who had to endure hazing found merit with the practice.²⁴¹ USMA’s first African-American graduate (Class of 1877) defended the practices “because he believed it would be impossible to mold and polish the ‘amalgamation’ of West Point without it.”²⁴² Another famous graduate, General of the Army Omar Bradley (class of 1915), supported hazing of plebes.²⁴³

A 1962 USMA graduate, who led a relief force to an infantry company during heavy combat in Vietnam, and then successfully withstood repeated enemy assaults once his unit became besieged, attributed his success to the experiences of his plebe year.²⁴⁴ “Plebe year is supposed to teach you how to function under

²³³ U’REN, *supra* note 121, at 18, 24, 25.

²³⁴ *Id.* at 28.

²³⁵ *Id.* 28–30. There was a downside to the extreme levels of stress. In addition to cadets resigning during Beast Barracks, there have been “psychiatric casualties,” including some suicidal gestures. *Id.* at 60.

²³⁶ George Pappas, *What If The Academy Had Been Abolished in 1830?*, ASSEMBLY, May 1995, at 12, 17 (“The hazing of plebes, bright answers and all, is designed to reduce all newcomers to a common denominator of brotherhood and then raise them up with a healthy respect for their superiors.”).

²³⁷ U’REN, *supra* note 121, at 39.

²³⁸ *Id.*

²³⁹ *See id.* at 3.

²⁴⁰ *See* notes 83, 144, 175 *supra* and accompanying text.

²⁴¹ *See* BARKALOW WITH RAAB, *supra* note 76, at 34 (“it did build you up”); GAO/NSIAD-93-36, *supra* note 6, at 12.

²⁴² EPPINGS, *supra* note 108, at 28.

²⁴³ STEVEN L. OSSAD, OMAR NELSON BRADLEY: AMERICA’S GI GENERAL 36 (2017).

²⁴⁴ RUGGERO, *supra* note 14, at 31.

pressure, how to control your emotions and still make decisions when people are counting on you. I'm not sure plebe year does that anymore."²⁴⁵

Rear Admiral James B. Stockdale, who had survived almost eight years as a prisoner of war in North Vietnam, pointed favorably to his experience as a USNA plebe when discussing training that had prepared him for the prisoner of war (POW) experience.²⁴⁶ Admiral Stockdale stated: "I came out of prison being very happy about the merits of plebe year at the Naval Academy. I hope we do not ever dilute those things. You have to practice being hazed. You have to learn to take a bunch of junk and accept it with a sense of humor."²⁴⁷

More than four decades after graduating, another USNA graduate and former Vietnam POW, John McCain, reflected on the harsh hazing that accompanied his plebe year.²⁴⁸ Service academies are unique; they "are not just colleges with a uniform dress code."²⁴⁹ The academies' purpose is to prepare cadets and midshipmen for the profession of arms and for combat command.²⁵⁰ "The Academy experience is intended to determine whether you are fit for such work If you aren't, the Academy wants to discover your inaptitude as quickly as possibleThe period of discovery is your plebe year, when you are subjected to as much stress as the law and a civilized society will allow."²⁵¹ Although he hated his plebe year, McCain still found merit with the system.²⁵²

A 1983 USMA graduate who commanded a cavalry troop during the Gulf War defended the fourth class system in a widely circulated e-mail.²⁵³ While conducting nighttime operations under extremely chaotic and dangerous circumstances, the graduate came to appreciate the merits of the fourth class system.²⁵⁴ The officer continued: "Its goal was not harassment, ridicule or punishment. Its goal was to train the neural network to deal with an overwhelming amount of disjointed information, quickly process that information, categorize it, and make rapid, sound decisions."²⁵⁵

In short, both neutral professional observers and service academy graduates, determined that the previous fourth class system had merit. The now discarded system quickly transformed civilians into cadets and midshipmen, generated quality officers, and gave graduates skill sets that served them well later in their military careers.

²⁴⁵ *Id.*

²⁴⁶ Read Admiral James B. Stockdale, *Experiences as a POW in Vietnam*, 27 NAVAL WAR C. REV. 2, 2 (1974).

²⁴⁷ *Id.* at 3; see GRANEY, *supra* note 74, at 49 (a 2001 Air Force Academy Plebe was informed that USAFA POWs "were grateful for their Fourth Class experience, because it helped them cope with a similar environment at the POW camp"). The Department of Defense and academy officials have rejected POW preparation as a justification for hazing. GAO/NSIAD-93-36, *supra* note 6, at 69. The GAO noted that "many other POWs who have not undergone rigorous plebe treatment also survived that ordeal." *Id.*

²⁴⁸ MCCAIN WITH SALTER, *supra* note 80, at 120 ("organized torment").

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* at 120–21.

²⁵² *Id.* at 120–23.

²⁵³ RUGGERO, *supra* note 14, at 31–32.

²⁵⁴ *Id.* at 32.

²⁵⁵ *Id.* at 32–33.

IV. HAZING WITHIN THE RANKS

Historically, some forms of hazing within the military has been an accepted practice, within certain limits.²⁵⁶ Rituals that involve some degree of hazing-like conduct are even officially sanctioned. In its 2016 report, the GAO noted that “because hazing can be associated with rites of passage and traditions, the Army, Navy and the Marine Corps—either in their policies or through supplemental guidance—permit command-authorized rituals, customs, and rites of passage that are not cruel or abusive, and require commanders to ensure that these events do not include hazing.”²⁵⁷

Various forms of hazing-like conduct have frequently been associated with entry into a unit. Some of these initiation rituals were harmless fun,²⁵⁸ others were improper.²⁵⁹ Other hazing-related rituals involved promotions,²⁶⁰ the completion of specialized training,²⁶¹ and significant unit events such as when a sailor crossed the equator or the international dateline for the first time.²⁶² Hazing has also been associated with intra-unit efforts to correct the behavior of unit members perceived as low-performing.²⁶³

Within the armed forces, Marine Corps recruit training enjoys the reputation for having one of the most physically demanding and mentally stressful

²⁵⁶ See Groah, *supra* note 3, at 19 (“In the military a degree of hazing is not only accepted but expected.”).

²⁵⁷ GAO-16-226, *supra* note 1, at 15.

²⁵⁸ When the author joined his artillery unit in 1983, he was required to “send a round down range” during the unit’s initiation ceremony. This ritual involved loading a projectile (raw egg) in the officer’s mouth, followed by adding propellant (alcohol) and then firing the round (swallowing).

²⁵⁹ See *United States v. Roberts*, 14 M.J. 671, 672 (N-M.C.M.R. 1982), *rev’d* (as to Roberts), 15 M.J. 106 (C.M.A. 1983) (summary disposition) (describing how a sailor is “greased,” that is, “they pull your pants off and put a grease gun in your seat and pump you full of grease and coffee grounds and cigarette butts and anything that will fit through the tubing”); *United States v. Barnes*, 60 M.J. 950, 953–54 (N-M. Ct. Crim. App. 2005) (discussing how three sailors were repeatedly beaten as part of an initiation to their ship); Groah, *supra* note 3, at 17 (A 1993 television story featured the “Hell Night” initiation of a Marine Corps Silent Drill Team. Naked Marines had “their genitalia covered in edge dressing while being sprayed with urine.”).

²⁶⁰ Rod Powers, *What Is The Marine Corps Hazing Policy?*, THE BALANCE (Sept. 8, 2016), <https://bit.ly/39PeD2w> (“One past ritual, known as “the gauntlet,” may have been conducted amongst Marine noncommissioned officers as a Marine entered the NCO ranks. This painful process involved the newly promoted Marine getting kned in the thigh by his fellow Marines, in an effort to leave a continuous bruise running up and down each leg to create a literal ‘blood stripe.’”); see *Bd. Vet. App. No. 0933949* (Sept. 10, 2009) (Appellant “reported that when he made E-4 rank he was subjected to the ‘blood stripe’ hazing ritual where several other non-commissioned officers kned him in both knees”), available at <https://bit.ly/2XiCAug>; *Marines Convict Six of Hazing at New River*, WILMINGTON STAR NEWS (Dec. 3, 2002) (related to Marine’s promotion to corporal), <https://bit.ly/3fgZSXH>.

²⁶¹ See *Bd. Vet. App. No. 1538432* (Sept. 9, 2015) (Appellant alleged “that he was awarded the Aircrew Badge by having the badge punched into his chest 13 times”), <https://bit.ly/2Pg5y9I>; *Bd. Vet. App. No. 0932360* (Aug. 27, 2009) (Appellant alleged that he participated in various “hazing incidents including receiving ‘blood wings’”), <https://bit.ly/3gwd5I>; *Bloody Hazing by Marines*, ARIZ. REPUBLIC (Jan. 11, 1997), at A8 (jump wings beaten into Marines’ chests).

²⁶² See *Bd. Vet. App. No. 18101842* (May 10, 2018) (“[T]he Veteran reported that he was forced to participate in an initiation ceremony when the ship crossed the equator, where he was forced to crawl on his hands and knees, submerge his head in a bucket of garbage, and inappropriately interact with other sailors who were dressed as women.”), <https://bit.ly/2Pip3i2>; *Bd. Vet. App. No. 1514544* (Apr. 3, 2015) (“The Board finds that the appellant’s stressor of being hazed as a tradition for crossing the Equator as credible given the history of that tradition.”), <https://bit.ly/3gxSeK1>. Cf. GAO-16-226, *supra* note 1, at 15 (discussing a “crossing the line ceremony” conducted under strictly controlled conditions).

²⁶³ *United States v. Davis*, 47 M.J. 484, 485, 487–88 (C.A.A.F. 1998); see *Bd. Vet. App. No. 1759803* (Dec. 21, 2017) (“he had a blanket party on him (i.e. was hazed)”), <https://bit.ly/2BOhBYE>; *Bd. Vet. App. No. 1534047* (Aug. 10, 2015) (“[T]he Veteran alleges that he was the recipient of an army ‘blanket party’ during basic training . . . [which] consisted of unit members pinning him to his bunk with a blanket and then striking him with bars of soap held in socks.”), <https://bit.ly/3glFtSA>.

training regimes. For many Americans, the popular movie *Full Metal Jacket* exemplifies the Marine Corps recruit training experience.²⁶⁴ Within the Marine Corps, a significant degree of hazing-like conduct has been a deliberate and long-standing component of recruit training.²⁶⁵

Similar to the earlier academy system, the Marine Corps intentionally sought to initially disorient new entrants as they received them into their institutions to facilitate the transition from civilian to members of the armed forces,²⁶⁶ shifted the new entrant's focus from himself/herself to that of the group/team,²⁶⁷ pushed them to the point of physical and mental exhaustion,²⁶⁸ heavily indoctrinated them in the history, values and culture of the institution,²⁶⁹ and used stress and fear to facilitate training,²⁷⁰ replete with a heavy dose of "in your face" yelling and screaming.²⁷¹ Also, as with the academies' earlier fourth class system, the treatment of Marine recruits was not something intended to be replicated in units.²⁷²

Further, like the academies, Marine recruit training has experienced abuses.²⁷³ Although officially banned, some hazing-like practices and maltreatment continued to exist and were a frequent part of recruit training.²⁷⁴

Some form of hazing-like conduct has existed in recruit training since 1915, when the Marine Corps formalized recruit training at its training depot in Parris Island, South Carolina.²⁷⁵ In the years following the formalization of recruit

²⁶⁴ R. Lee Ermey, who played a drill instructor in the movie about a platoon of Marines that are trained at Parris Island and then serve together in Vietnam, had served as a Marine Corps drill instructor at Parris Island before being wounded in Vietnam. Harrison Smith, *Ex-Drill Instructor Turned Actor*, WASH. POST (Apr. 17, 2018), at B6.

²⁶⁵ Groah, *supra* note 3, at 19 ("in Marine Corps recruit training hazing is an instrumental and planned portion of initial training"); see also JOHN C. STEVENS III, COURT-MARTIAL AT PARRIS ISLAND 155 (1999) (during the early 1950s moderate levels of physical force known as "thumping" were an "integral part" of recruit training) [cited with permission of the Naval Institute Press]; LtCol Brandon D. McGowan, *Improving Our Ethical Foundation at Recruit Training*, MARINE CORPS GAZETTE, Feb. 2013, at 28 ("institutionally accepted hazing").

²⁶⁶ RICKS, *supra* note 3, at 28, 40, 42; see KEITH FLEMING, THE U.S. MARINE CORPS IN CRISIS: RIBBON CREEK AND RECRUIT TRAINING 3 (1990) (through the mid-1950s, "shock treatment" resulting in recruit disorientation was a fundamental part of the training regimen) [cited with permission of the University of South Carolina Press].

²⁶⁷ McGowan, *supra* note 265, at 27; Captain Stephan G. Page, *Recruit Training*, MARINE CORPS GAZETTE 66 (Aug. 2013) ("recruits are introduced to an environment of team building and an idea of something bigger than oneself"). Cf. U.S. Marine Corps, MCWP 6-11, Leading Marines 16 (Nov. 27, 2002) [hereinafter *Leading Marines*] ("Everything that the Marine Corps does is a team effort.").

²⁶⁸ RICKS, *supra* note 3, at 47; FLEMING, *supra* note 266, at 3.

²⁶⁹ RICKS, *supra* note 3, at 37, 43, 66; McGowan, *supra* note 265, at 27 ("immersed in our Corps' culture"). Cf. *Leading Marines*, *supra* note 267, at 11 ("Marines undergo a personal transformation at recruit training . . . [T]hey are ingrained with a sense of service, honor, and discipline.").

²⁷⁰ RICKS, *supra* note 3, at 67 ("use of fear as an educational device"); see Company Commanders, *supra* note 4, at 60 ("[O]ur general approach, with its emphasis on the application of appropriate levels of stress, is highly effective.").

²⁷¹ RICKS, *supra* note 3, at 60-61; FLEMING, *supra* note 266, at 3 (describing "shouting, cursing drill instructors . . . with face-to-face, nose-to-nose harangues").

²⁷² See McGowan, *supra* note 265, at 26 (at Marine recruit training "we have intentionally set aside our 'train as we fight' philosophy").

²⁷³ STEVENS, *supra* note 265, at 13 (in the early 1950s mistreatment of recruits, including broken noses, was not uncommon); Dan Lamothe, *Marine Corps Recruit's Skin 'Liquefied' in SC Hazing Incident by Instructor*, WASH. POST (May 4, 2017), at A3 (required to exercise on floor covered in bleach and required to stay in wet uniform). A Vietnam-era Marine reported that during recruit training three recruits were required to insert their penises into the breeches of their rifles, close the bolt, and run while singing the Marine Corps Hymn. RICKS, *supra* note 3, at 90.

²⁷⁴ STEVENS, *supra* note 265, at 13, 61, 155 (physical force such as pushing, shoving, slapping the back of the head or kicking a recruit in the rear end were accepted practices); see Smith, *supra* note 264, at B6 (Vietnam-era drill instructors occasionally "raised a hand" to privates who failed to follow orders").

²⁷⁵ FLEMING, *supra* note 266, at 10.

training, drill instructors required recruits to walk long distances with packs filled with sea water, carried buckets of sand for extended periods, performed hundreds of repetitions of raising and lowering the his rifle over his head, and drill instructors required the recruits to stand motionless in a sandy area while bitten by sand fleas²⁷⁶ and forced recruits to run a gauntlet where other recruits hit him with their belts.²⁷⁷

Noticeably absent from recruit training, until World War II, was physical mistreatment of the recruits by the drill instructors.²⁷⁸ During World War II, less-experienced drill instructors began to rely on corporal punishment, profanity, and various forms of hazing as part of recruit training.²⁷⁹ The surge of recruits during the Korean War again taxed the Marine Corps’ training capabilities, and additional forms of hazing became more common place.²⁸⁰

During 1956, Marine Corps Recruit Depot Parris Island suffered through the infamous Ribbon Creek incident during which six recruits drowned when a drill instructor, frustrated with a perceived discipline problem, marched his platoon into a swampy tidal pool at night.²⁸¹ The drill instructor was eventually charged with several offenses, but was convicted of only involuntary manslaughter by simple negligence and drinking in the barracks.²⁸² Ultimately, the drill instructor was sentenced to three months hard labor and reduction in rank from staff sergeant to private.²⁸³

In the post-Vietnam era, a combination of inadequate drill instructor training, overworked drill instructors, and poor-quality recruits²⁸⁴ facilitated widespread harassment and abuse of the recruits and resulted in at least one recruit being beaten to death during pugil stick training.²⁸⁵ Though the Marine Corps increased supervision of recruit training and emphasized positive leadership, the drill instructor community opposed these changes due to a belief that to produce quality Marines, drill instructors needed to maintain their “heavy-handed, high stress approach,”²⁸⁶ a perspective widely shared within the Marine Corps.²⁸⁷

²⁷⁶ *Id.* at 11, 13, 14 (explaining that standing motionless while being bitten by sand fleas was designed to teach the recruits to ignore distractions as riflemen, a skill useful when in combat).

²⁷⁷ *Id.* at 11, 13; *see* Bd. Vet. App. No. 0839499 (Nov. 17, 2008) (finding as “arguably credible” the “hazing-type” allegations of a former Marine at Parris Island in 1945 that included “being stripped, pushing an object across the floor with his nose, wearing a bucket on the head, being made to lie quietly despite cold weather, running a ‘belt line’ gantlet [and] standing at attention for prolonged periods”), <https://bit.ly/3gmerKT>.

²⁷⁸ FLEMING, *supra* note 266, at 11.

²⁷⁹ *Id.* at 15.

²⁸⁰ *Id.* at 17.

²⁸¹ STEVENS, *supra* note 265, at 1–10.

²⁸² *Id.* at 150.

²⁸³ *Id.* at 153. The court-martial panel sentenced the drill instructors to nine months hard labor, reduction to private, and a bad conduct discharge, but the Secretary of the Navy reduced the sentence. *Id.*

²⁸⁴ In 1974, only 50 percent of Marine recruits were high school graduates. COMP. GEN., MARINE CORPS RECRUITING AND RECRUIT TRAINING POLICIES AND PRACTICES, B-157371, at 5 (1977). This improved to 53 percent in 1975 and 61 percent in 1976. *Id.* In 1975, the San Diego Recruit Depot reported 3553 nonjudicial punishments (NJPs) and 47 courts-martial. *Id.* at 10. Disciplinary actions significantly decreased in 1976, however, to 2079 NJPs and 19 courts-martial. *Id.* *See generally* BGen Bernard E. Trainor, *The Personnel Campaign Issue Is No Longer in Doubt*, MARINE CORPS GAZETTE, Jan. 1978, at 22 (discussing the Marine Corps’ difficulty obtaining high-quality recruits in the post-Vietnam era).

²⁸⁵ *See* Trainor, *supra* note 284, at 25 (describing how improper practices by drill instructors “became institutionalized”), 29 (“abuse . . . were by-products of low quality recruit input”); Dan Lamothe, *Often-Forgotten Boot-Camp Scandals Had Prompted Marine Corps Reforms*, WASH. POST (Oct. 4, 2016), at A13 (the death of a recruit during pugil stick training in San Diego and the shooting of another in Parris Island led to disciplinary actions and reform of recruit training).

²⁸⁶ Trainor, *supra* note 284, at 29.

²⁸⁷ *Id.* at 30.

More recently, the Marine Corps convicted a drill instructor of several Uniform Code of Military Justice (UCMJ) violations for abusing recruits.²⁸⁸ The drill instructor reportedly slapped and punched recruits and ordered a recruit into a commercial clothes dryer.²⁸⁹ An investigation led to charges against four additional drill instructors, at least one of whom was acquitted.²⁹⁰

Like the academies, the Marine Corps has instituted various reforms over time. Following the Ribbon Creek incident, the Marine Corps relieved several drill instructors²⁹¹ and imposed a higher level of supervision over recruit training.²⁹² Many drill instructors resisted the reforms that followed the Ribbon Creek incident, however.²⁹³ Based on input from drill instructors, the Marine Corps implemented several additional reforms benefiting drill instructors. For example, recruit training was extended two weeks; drill instructors were afforded greater prestige, including the return of the campaign hat; drill instructor living quarters improved; and drill instructors received free laundry services to maintain their impeccable appearance.²⁹⁴ Interestingly, one of the drill instructor-requested reforms was an official definition of “hazing.”²⁹⁵ Despite these reforms, however, the Marine Corps retained its “shock treatment” approach to new recruits, and grabbing a recruit by the collar and “shaking him up a bit” remained a common practice.²⁹⁶

Although retaining its rigor, the Marines continued to reform recruit training. Currently, Marine Corps recruiting policy does not permit profanity or physical harm directed at recruits.²⁹⁷ However, the media has continued to report that a culture of hazing-like conduct continues to exist.²⁹⁸

²⁸⁸ United States v. Felix, No. 201088871, 2019 W.L. 2525841, *1 (N-M. Ct. Crim. App. June 19, 2019) (convicted “of eight specifications of violating a lawful general order, three specifications of maltreatment, and a single specification each of making a false official statement and drunk and disorderly conduct, in violation of Articles 92, 93, 107, and 134”).

²⁸⁹ See *id.* at *2–5 (describing the physical abuse).

²⁹⁰ *Id.* at *15 (one drill instructor pled guilty at a summary court-martial to Recruit Training Order violations, maltreatment, and disorderly conduct); Jeff Schogol, *Parris Island Drill Instructor Found Not Guilty in First Hazing Scandal Court-Martial*, MARINE CORPS TIMES (May 25, 2017), <https://bit.ly/2W9xakC>. Approximately 20 Marines were investigated for potential criminal charges relating to this event. Dave Philipps, *Marines Scrutinize a Culture of Toughness After a Muslim Recruit’s Death*, N.Y. TIMES (Sept. 14, 2016), <https://nyti.ms/2ZkhAo9>.

²⁹¹ RICKS, *supra* note 3, at 105; see STEVENS, *supra* note 265, at 61 (although without fault, senior leadership was reassigned).

²⁹² STEVENS, *supra* note 265, at 61 (reforms included greater oversight); see Company Commanders, *supra* note 4, at 60 (“officer supervision in recruit training can be traced back to this notorious training mishap”).

²⁹³ Fleming, *supra* note 266, at 94.

²⁹⁴ *Id.* at 2.

²⁹⁵ *Id.* at 59.

²⁹⁶ *Id.* at 94. The drill instructors argued that it was a better practice to physically shake up a recruit than to permanently damage his record by resorting to the UCMJ. *Id.*

²⁹⁷ U.S. Marine Corps, Order 5354.1E, Marine Corps Prohibited Activities And Conduct Prevention and Response Policy ¶ 010401(b) (“physically striking another to inflict pain . . . verbally berating another . . . threatening or offering violence or bodily harm to another”) (15 June 2018); RICKS, *supra* note 3, at 56, 68, 86; Dan Lamothe, *Hazing Marine Battled Boot Camp “Hell,”* WASH. POST, Sept. 30, 2016, at A2 (noting how Marine drill instructors are taught not to physically abuse recruits).

²⁹⁸ Dan Lamothe, *More Than 20 Marines Disciplined For Abuse, Racism in Calif. Boot Camp*, WASH. POST, Oct. 6, 2019, at A12 (“verified allegations of Marines assaulting recruits by kicking, punching and shoving . . .”); Janet Reitman, *The Making–And Breaking–of Marines*, N.Y. TIMES MAG. 32, 36 (Jul. 9, 2017) (“The Marines have . . . investigated hundreds of hazing allegations in the past five years alone.”); *id.* at 37 (“[d]rill instructors scream”); Lamothe, *supra* note 297, at A2 (“a culture of hazing and bullying recruits remains”); see Philipps, *supra* note 290 (quoting a retired Marine LtCol as saying “[y]ou can make all these rules, but Parris Island still has a permissive culture,” she said. . . . ‘The culture was allowed to flourish,’ [she] said. ‘There is a hands-off approach. There is a belief that officers don’t make Marines, Marines make Marines . . .’”).

Historically, with its reliance on hazing or hazing-like conduct, the Marine Corps recruit training system, like the academy fourth class system - has enjoyed a high degree of success in transitioning civilians into disciplined, high quality members of the armed forces. Further, many graduates of recruit training have expressed a profound sense of accomplishment associated with successfully completing recruit training²⁹⁹ and point to numerous positive results, including developing strong bonds with each other,³⁰⁰ and profess a strong loyalty to the institution.³⁰¹ Other Marines continued to defend the harsh recruit training as a rite of passage.³⁰²

In the wake of the Ribbon Creek incident, the Marine Corps conducted a survey of prior recruits and determined that the vast majority (83%) believed that “they had been treated as marines should be treated.”³⁰³ The overwhelming number of survey responses defended the harsh training, with many calling to make it more difficult.³⁰⁴ Similar to many academy alumni, a high percentage of Marines believe that modern reform efforts have reduced the difficulty and effectiveness of new entrant training,³⁰⁵ resulting in the unmerited graduation of many recruits.³⁰⁶

More recently, the GAO conducted a limited survey of servicemembers at two bases in California, Marine Corps Base Camp Pendleton and U.S. Naval Base Coronado.³⁰⁷ One survey question asked: “Some activities that are traditions in the Marine Corps/Navy are now considered hazing. Is it important to continue any of these activities?”³⁰⁸ The majority of the Navy and Marine Corps servicemembers surveyed replied “yes.”³⁰⁹

V. THE LEGAL RESPONSE TO HAZING

The first reported court-martial of a cadet for hazing-related misconduct occurred in July 1846, when USMA Cadet John Tammany was dismissed pursuant to a General Court-Martial order following the ill-treatment of a plebe.³¹⁰ The dismissal was based on a violation of a USMA regulation stating that a cadet shall not “traduce or defame another.”³¹¹

The first attempt to criminalize the specific criminal offense of “hazing” at the academies dates to 1874, when Congress passed legislation requiring the Superintendent of the USNA to court-martial midshipmen for hazing.³¹² Even

²⁹⁹ RICKS, *supra* note 3, at 245.

³⁰⁰ *Id.* at 230, 249.

³⁰¹ *Id.* at 238.

³⁰² Philipps, *supra* note 290, at A13; see Trainor, *supra* note 284, at 30 (Marines defended harsh training conditions as “an initiation rite”).

³⁰³ STEVENS, *supra* note 265, at 157.

³⁰⁴ *Id.*

³⁰⁵ RICKS, *supra* note 3, at 89, 91; see Forsling, *supra* note 216, at 73 (“we’ve made it too easy”), 74 (“make recruit training and Officer Candidates School longer and more difficult”) (“weed out those who don’t want the title badly enough”).

³⁰⁶ RICKS, *supra* note 3, at 91 (the lower 10 percent should not have graduated); cf. Dave Moniz, *Gone Soft?*, ARMY TIMES (Aug. 7, 2000), at 18 (Army basic training attrition rate dropped dramatically after changes designed to get struggling recruits to graduation prompting inquiries that the Army is sacrificing the quality of its force).

³⁰⁷ GAO-16-226, *supra* note 1, at 57.

³⁰⁸ *Id.* at 61.

³⁰⁹ *Id.* Of the Naval personnel, 31 replied yes, 10 replied no, and 14 were unsure. Of the Marines, 27 replied yes, 19 replied no and 9 were unsure. *Id.*

³¹⁰ Alexander, *supra* note 14, at 4 (citing USMA, *Casualties of the Corps of Cadets*, Vol. 1, 1802 to 1915 (West Point, NY: Office of the Adjutant, USMA Archives)).

³¹¹ *Id.*

³¹² GAO/NSIAD-93-36, *supra* note 6, at 13 (citing Act of June 23, 1874, ch 453, 18 Stat. 203).

before this statutory basis for court-martial, both the Naval and Military Academies administratively dismissed midshipmen and cadets for improper hazing.³¹³ Under the 1874 Act “several” midshipmen were subject to court-martial for the offense of hazing, including at least one second class midshipman for “pulling the nose . . . and otherwise mistreating” and “striking at . . . and otherwise annoying” a fourth classman.³¹⁴

In *Melvin v. United States*,³¹⁵ Midshipman Melvin unsuccessfully challenged the military’s jurisdiction after his court-martial conviction for hazing in violation of the Act of 1874 and subsequent 1906 dismissal. Melvin’s charged misconduct was “causing certain midshipmen of the fourth class to stand on their heads, to hang from a locker, and to do a physical exercise known as the sixteenth.”³¹⁶

In 1906, the Secretary of the Navy dismissed Midshipman Stephan Decatur from the USNA following Decatur’s court-martial conviction for hazing.³¹⁷ Rejecting defense counsel’s argument that hazing was limited to physical cruelty, the court convicted Decatur after he used one Midshipman to send a “nonsensical message” and ordered another Midshipmen to bring him breakfast.³¹⁸

Currently, there exist three laws specifically prohibiting hazing at the military academies: (1) 10 U.S.C. § 8464 (formerly 10 U.S.C. § 6964, USNA), (2) 10 U.S.C. § 7452 (formerly 10 U.S.C. § 4352, USMA), and (3) 10 U.S.C. § 9452 (formerly 10 U.S.C. § 9352, USAFA).³¹⁹ However, there are few, if any, reported hazing convictions associated with these statutes.³²⁰ Any cadet or midshipman dismissed from an academy for hazing under the authority of these statutes may not be reappointed as a cadet or midshipman and may not be appointed as a commissioned officer “in a regular component of the Army, Navy, Air Force or Marine Corps, until two years after graduation of his class.”³²¹ Cadets at the USMA and the USAFA have a statutory right to trial by court-martial before they may be dismissed for hazing.³²² Midshipmen may not be “dismissed for a *single* act of hazing except by sentence of court-martial.”³²³

As with other members of the armed forces, cadets and midshipmen of the service academies are subject to court-martial under the UCMJ.³²⁴ The United States Coast Guard Academy, which is part of the Department of Homeland

³¹³ Naval Academy-Hazing, 18 Op. Atty. Gen. 292, 293 (1885) (“[m]any cadets were dropped from the roll for the offense of hazing”), 294 (an 1868 order from the Superintendent noted that the Naval Academy had “dismissed those midshipmen who were leaders in the *hazing* or maltreatment of the fourth-class midshipmen”), 29–96 (an 1872 order referenced “action taken by the Naval Department last year, in dismissing parties who were found guilty of ‘hazing’”); Alexander, *supra* note 14, at Appx 2-1 (between July 1846 and September 1874, five upper-class cadets were dismissed, and one resigned, for hazing-related misconduct).

³¹⁴ Hazing at the Naval Academy, 18 Op. Atty. Gen. 376 (1886).

³¹⁵ 45 Ct. Cl. 213 (1910).

³¹⁶ *Id.* at 215–16.

³¹⁷ *Decatur Is Dismissed*, N.Y. TIMES (Jan. 26, 1906), <https://nyti.ms/3fhwmRu>.

³¹⁸ *Court Defines Hazing*, N.Y. TIMES (Jan. 10, 1906), <https://nyti.ms/2Xm6rC3>.

³¹⁹ GAO/NSIAD-93-36, *supra* note 6, at 13; *see also* DoDI 1322.22, *supra* note 23, at 21 (prohibiting the practice of hazing) (citing 10 U.S.C. §§ 4352, 6964, 9542).

³²⁰ *See* 10 U.S.C.A. §§ 4352, 6964, 9352 (2010 & Supp. 2018) (no cases listed).

³²¹ 10 U.S.C. §§ 7452(c), 8464(f), 9452(c); *see also* DoDI 1322.22, *supra* note 23, at 21; AR 150-1, *supra* note 52, at 19 ¶ 6-15(b).

³²² 10 U.S.C. §§ 7452(b), 9452(b).

³²³ 10 U.S.C. § 8464(c) (emphasis added).

³²⁴ *See generally* Michael J. Davidson, *Court-Martialing Cadets*, 36 CAP. UNIV. L. REV. 635 (Spring 2008).

Security, also retains court-martial jurisdiction over its cadets, although the first court-martial of a Coast Guard Academy cadet did not occur until 2006.³²⁵

The UCMJ did not specifically criminalize “hazing,”³²⁶ and the military does not desire a separate enumerated offense for hazing, viewing it as duplicative with other existing offenses.³²⁷ The recently enacted Military Justice Act of 2016,³²⁸ which became effective not later than January 1, 2019,³²⁹ similarly elected not to contain a punitive article specifically targeting hazing.³³⁰

The academies have rarely charged a cadet or midshipman with hazing-related misconduct as a criminal offense.³³¹ Instead, the academies have punished upper class cadets and midshipmen for hazing-type misconduct through their internal disciplinary processes.³³² Although relatively rare, cadets have been charged under the UCMJ for hazing-type misconduct.³³³ For example, two upper class cadets at the USAFA were charged with arson under Article 126 after they set a plebe’s room on fire at night and then sprayed the plebe with whipped cream as he exited his room.³³⁴ In addition, hazing-related forms of misconduct have been prosecuted under other articles, such as Article 93 (Cruelty and Maltreatment) and Article 128 (Assault).³³⁵ Also, cadets and midshipmen have received nonjudicial punishment via Article 15 of the UCMJ.³³⁶ To illustrate, in 1987 an USAFA first class cadet received an Article 15 for “conduct unbecoming an officer candidate” after striking a fourth class cadet.³³⁷

In comparison to cadets and midshipmen, the UCMJ has been applied to other members of the armed forces with a greater level of frequency for hazing-type misconduct.³³⁸ For example, the Coast Guard convicted seven crew

³²⁵ *Coast Guard Sex Case Leads to Expulsion, Six-Month Sentence*, WASH. POST (June 29, 2006), at A15 (describing the “first student court-martialed in the academy’s 130 year history”).

³²⁶ KAMARCK, *supra* note 1, at 2; GAO-16-226, *supra* note 1, at 8 (“no specific article”); KELLER ET AL., *supra* note 5, at 2 (as of 2015, “hazing was not an enumerated offense under the Uniform Code of Military Justice”).

³²⁷ GAO-16-226, *supra* note 1, at 7 (“All of the armed services agreed that a separate enumerated offense of the UCMJ for hazing would be duplicative.”).

³²⁸ National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2894 (2016).

³²⁹ *Id.* § 5542, 130 Stat. 2967.

³³⁰ *Id.* §§ 5401-5542, 130 Stat. 2937-2960.

³³¹ GAO/NSIAD-93-36, *supra* note 6, at 2.

³³² *See id.*, at 19, 32, 44; GAO-16-226, *supra* note 1, at 8. For a description of lesser punishments that may be imposed on USMA cadets for hazing see AR 150-1, *supra* note 52, at 16 ¶ 6-4.

³³³ *See* Stephen Losey, *Air Force Academy Cadets Face Charges, Possible Court-Martials, For Swim Team Hazing*, AIR FORCE TIMES (Sept. 14, 2018), <https://bit.ly/2PkSff3>. Eventually, the USAFA dropped the charges. *Air Force Academy Dismisses Hazing Charges Against 3 Cadets*, AIR FORCE TIMES (Mar. 6, 2019), <https://bit.ly/3aUIRD4>.

³³⁴ GAO/NSIAD-93-36, *supra* note 6, at 32. The cadets were convicted and were sentenced to receipt of “30 demerits, 40 hours of marching, 2 months of restriction, and were ordered to pay for the damage.” *Id.* at 33.

³³⁵ GAO-16-226, *supra* note 1, at 8; *cf.* GAO/NSIAD-93-36, *supra* note 6, at 13 (“A cadet who commits a hazing-related infraction can be charged under the [UCMJ] for conduct unbecoming an officer candidate.”).

³³⁶ 10 U.S.C. § 815. Since at least 2009, USMA cadets have not been subject to NJP under Article 15. AR 150-1, *supra* note 52, at 16 ¶ 6-1; DEP’T OF THE ARMY, Reg. No. 210-16, UNITED STATES MILITARY ACADEMY, 16 ¶ 6-1 (Dec. 9, 2009); AR 150-1, *supra* note 52, at 16 ¶ 6-1.

³³⁷ GAO-93-36, *supra* note 6, at 32. As punishment, the cadet received “60 demerits, 120 hours of marching, 6 months of restriction [and] was placed on probation . . .” *Id.*

³³⁸ *See, e.g.*, Lamothe, *supra* note 297, at A3; Dan Lamothe, *Marine Instructors Face Hazing Charges*, WASH. POST, Apr. 7, 2017, at A3; Vergakis, *supra* note 13; Tony Perry, *Ex-Marine Drill Instructor Convicted of Mistreating Recruits at Boot Camp*, LA TIMES (Nov. 15, 2007), <https://lat.ms/2Dsjuul>; *Marines Convict Six of Hazing at New River*, WILMINGTON STAR NEWS (Dec. 3, 2002), <https://bit.ly/2DoRYy6> (an additional nine Marines received NJP). *Cf. Ex-Drill Sgt. Charged With Abuse*, ARMY TIMES (Oct. 16, 2000), at 3 (Army drill sergeant charged with physically abusing recruits).

members of the Coast Guard Cutter *Venturous* for hazing-related misconduct occurring between 2007 and 2009.³³⁹ The conduct included giving shipmates a “pink belly” (slapping the individual’s abdomen), tying the person’s hands and feet, mixing baby powder and liquid from “glow sticks” on his chest and abdomen, and teabagging the person, “that is, place his genitals on or close to the individual’s face or head, while the individual was tied up.”³⁴⁰ Hazing-related misconduct has been prosecuted pursuant to various UCMJ articles, to include Article 92, Failure to obey order or regulation,³⁴¹ Article 93, Cruelty or maltreatment,³⁴² Article 128, Assault,³⁴³ and Article 81, Conspiracy.³⁴⁴

Although the 1956 Ribbon Creek incident resulted in a court-martial conviction, at the time charges were rarely brought against drill instructors who mistreated recruits and convictions were difficult to obtain.³⁴⁵ Courts-martial of drill instructors remain relatively rare in more recent times.³⁴⁶

During the Ribbon Creek court-martial, the defense called other experienced drill instructors who testified that they also took their platoons into the marshes and swamps at night.³⁴⁷ Recruits who survived the night time march into the swamp supported the DL.³⁴⁸ In addition, defense counsel persuaded the Commandant of the Marine Corps, General Randolph Pate, to testify, who questioned the severity of the charges, and suggested that if he had been in charge of Parris Island, the drill instructor’s punishment would have been limited to reduction to private and a transfer.³⁴⁹

Further, the defense called Marine Corps legend LTG (Ret.) Lewis B. “Chesty” Puller to testify.³⁵⁰ Called by the defense as an expert on Marine Corps training, Puller testified about the importance of *esprit de corps*, that discipline was the most important aspect of military training, and through hypothetical questions generally supported the accused’s decision to take his platoon into the

³³⁹ GAO-16-226, *supra* note 1, at 1. *Coast Guard Courts-Martials Cutter Venturous Crew Members For Hazing*, COAST GUARD NEWS (June 24, 2011), <https://bit.ly/31eTyuL>.

³⁴⁰ *United States v. Johanson*, 71 M.J. 688, 689 (C.G. Ct. Crim. App. 2012).

³⁴¹ 10 U.S.C. § 892. *See e.g.*, *United States v. Haverty*, 76 M.J. 199, 208 (C.A.A.F. 2017) (describing a violation of Army Reg. 600-20, Personnel-General, Army Command Policy (Mar. 18, 2008), when recklessness is the *mens rea* required for a conviction of the regulatory prohibition on hazing); *In re Carrillo*, 79 M.J. 716 (N-M. Ct. Crim.App. 2019); *United States v. Offutt*, No. 20120804 (Army Ct. Crim. App. Oct. 22, 2014); *United States v. Hill*, 71 M.J. 678 (Army Ct. Crim. App. Oct. 19, 2012); *United States v. Isaacs*, 2003 WL 21785753, at *1 (N-M. Ct.Crim.App. July 30, 2003). *Cf.* *United States v. Hill*, 71 M.J. 678 (Army Ct.Crim.App. Oct. 19, 2012) (noting that soldier had been charged with violating a lawful general regulation that prohibited hazing). The Air Force has not issued a punitive anti-hazing regulation. *The Military Commander and the Law* 205 (14th ed. 2017), <https://bit.ly/3kns5l>.

³⁴² 10 U.S.C. § 893. *See e.g.*, *United States v. Morrow*, No. 20111135 (Army Ct. Crim. App. Feb. 27, 2014); *United States v. Johanson*, 71 M.J. 688, 689 (C.G. Ct. Crim. App. 2012).

³⁴³ 10 U.S.C. § 928. *See e.g.*, *United States v. Davis*, 47 M.J. 484 (C.A.A.F. 1998); *United States v. Isaacs*, 2003 WL 21785753, at *1 (N-M. Ct.Crim.App. July 30, 2003); *United States v. Johanson*, 71 M.J. 688, 689 (C.G. Ct. Crim. App. 2012).

³⁴⁴ 10 U.S.C. § 881. *See e.g.*, *United States v. Isaacs*, 2003 WL 21785753, at *1 (N-M. Ct.Crim.App. July 30, 2003 (“convicted of conspiracy to commit assault and hazing”).

³⁴⁵ STEVENS, *supra* note 265, at 13.

³⁴⁶ Perry, *supra* note 338. Between 2005 and 2007, of the 500 drill instructors at the Marine Corps Recruit Depot in San Diego, California, 44 were disciplined administratively, but only two were subject to court-martial. *Cf.* Lamothe, *supra* note 297, at A12 (noting that the Marine Corps elected not to court-martial drill instructors in multiple cases).

³⁴⁷ STEVENS, *supra* note 265, at 136–37.

³⁴⁸ *Id.* at 168.

³⁴⁹ FLEMING, *supra* note 26, at 83.

³⁵⁰ STEVENS, *supra* note 265, at 137. Puller had served in the Marine Corps for over 35 years and was the recipient of five Navy Crosses. *Id.* at 139.

swamp.³⁵¹ Based on Pate’s earlier testimony, Puller opined that the Marine Corps regretted court-martialing the accused.³⁵²

VI. CONCLUSION

“Hazing” within the armed forces has been difficult to define. Service members continue to labor under regulations, instructions, and policies that fail to clearly articulate the line between permissible and impermissible behavior. Regardless of its technical definition, few would disagree that members of the armed forces should not be subject to physical assault, or targeted because of race, color, national origin, religion, gender, and sexual orientation.

Hazing-like conduct within the armed forces has proved controversial and oftentimes abusive. The academies, military entry level training programs such as Marine Corps recruit training, and various operational units have suffered significant abuses involving egregious misconduct. With regard to the academies, one 1992 study determined that a “strong correlation exists between exposure to such treatment and a number of undesirable outcomes, including higher levels of physical and psychological stress among cadets and midshipmen, lower grade point averages, attrition from the academies, and reduced career motivation.”³⁵³ Critics viewed such activities “as a waste of time . . . [that] reduce[d] a servicemember’s ability to perform at their psychological and physical peaks.”³⁵⁴

Within the armed forces generally, the GAO reported that various traditional ceremonies and rites of passage have sometimes “included cruel or abusive behavior,” and further noted that hazing may migrate into, or be combined with, incidents of sexual assault.³⁵⁵ Further, as discussed in this Article, a review of reported courts-martial incidents and other reports of hazing indicate that such conduct can occasionally exceed all bounds of acceptable behavior, even under the broadest of training rationales.

However, there is merit to some forms of hazing-like activities within the military when conducted in a controlled environment.³⁵⁶ Traditions are important to the military; they boost morale, forge bonds, and create *esprit de corps*. In addition, it is important that members of the military learn to operate effectively in stressful environments and be able to quickly recover from short-term failures. Significant portions of the armed forces have embraced some level of hazing-like conduct as part of entry-level military training, often ignoring or opposing institutional attempts to mitigate or eliminate past practices. For those with a deep sense of commitment to an institution, it is understandable that they want to preserve the high standards they experienced as students and deny entry to those who are unwilling or unable to meet those standards or embrace the culture embodied by the institution.

Many young Americans historically have sought the rigorous challenge these institutions provide. Further, proponents of many of the now-disfavored past practices point to the successful products these institutions have generated.

³⁵¹ *Id.* at 139–40; FLEMING, *supra* note 266, at 84.

³⁵² FLEMING, *supra* note 266, at 84.

³⁵³ Statement of Paul L. Jones, Director, Defense Force Management Issues, National Security and International Affairs Division, GAO/T-NSIAD-92-41, DOD Service Academies: Status Report on Reviews of Student Treatment 2 (June 2, 1992); *see also* GAO/NSIAD-93-36, *supra* note 6, at 65; Groah, *supra* note 3, at 43.

³⁵⁴ KAMARCK, *supra* note 1, at 1.

³⁵⁵ GAO-16-226, *supra* note 1, at 1, 9.

³⁵⁶ *See* Company Commanders, *supra* note 4, at 60 (recruit training “must be conducted in a controlled, deliberate and sober manner . . .”).

It is difficult to dispute that the earlier academy system—with its extremely stressful fourth class system, rigid honor code, longstanding traditions, and strict disciplinary system—and the Marine Corps’ rigorous recruit training regime, had value. The academy system was widely viewed as one that quite simply worked and set the standard by which other officer programs were measured.³⁵⁷ The Marine Corps similarly, and rightfully, boasts of a time-tested recruit training process that has proven highly effective.³⁵⁸ Indeed, the Marine Corps unapologetically embraces its harsh entry-level training regime as foundational.³⁵⁹ Many graduates of both the “old corps” academies and earlier Marine Corps recruit training found merit in the arduous and stress-inducing training programs, and left with skill sets that served them well as they progressed through their careers.³⁶⁰

If history is an indicator, the armed forces will continue to grapple with an understandable and workable definition of hazing. Clearly there are two extremes, one encompassing morale building and unit bonding traditions, customs and initiations; and one reflecting unacceptable misconduct levied at members of the armed forces, which is the proper subject matter for the military’s disciplinary system.

Department of Defense Instruction 1020.03 is an improvement over earlier attempts to define hazing, but its examples are not comprehensive, it fails to link itself to the statutory prohibitions on hazing, and it perpetuates the historic confusion by treating hazing as a subset of harassment, rather than treating it as a stand-alone concept. To preserve legitimate military traditions, and to provide greater clarity to those charged with training servicemembers, the military would be better served by abandoning its attempts to define hazing as a legal concept, and simply focus on providing more specific guidance to servicemembers on how they may celebrate their traditions and properly conduct various forms of training.

The UCMJ has proven itself sufficient to address hazing-like misconduct and requires no modification to criminalize “hazing.” The existing punitive articles cover any misconduct in this area. That the military has struggled to define “hazing” for decades, and that three statutes specifically designed to criminalize “hazing” have failed to produce a reported conviction, support the military’s decision not to adopt a punitive article for “hazing.”

Within the spectrum of hazing-like activities, however, are the harsh, stressful, uncompromising, and humiliating conduct that has been used with success to transition civilian entrants into disciplined military professionals capable of successfully operating in the most challenging of conditions. It is within that sphere that the armed forces will struggle most when drawing the line between permissible and impermissible conduct.

³⁵⁷ U’REN, *supra* note 121, at xi (“the standard set at West Point is considered the ideal for the rest of the army”); GAO/NSIAD-93-36, *supra* note 6, at 10 (“Officers graduating from the academies have long been considered the standard for military professionalism.”).

³⁵⁸ See Company Commanders, *supra* note 4, at 60 (“[M]any generations of experience have proven that our general approach, with its emphasis on the application of appropriate levels of stress, is highly effective.”).

³⁵⁹ “All Marines pass through the crucible of our entry level training. In that harsh and uncompromising forge, their steel is tempered to withstand the stresses of future challenges even more severe and testing. It is here that we lay the foundation.” Leading Marines, *supra* note 267, at 31.

³⁶⁰ See *supra* notes 239–53, 297 and accompanying text.