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FOREWORD

As we enter our sixth year of publication, the National Security Law Journal continues to grow and garner support from students, practitioners, military professionals, members of academia, and others interested in national security law and policy. Our success as a top national security law publication is due to the hard work of our student members and the support of our many dedicated readers.

In this issue, Daniel Mandell traces the history of military commissions to juxtapose their traditional use as tribunals of necessity with their current use at Guantanamo Bay. Next, Major Aaron Jackson and Colonel Kristine Kuenzli evaluate the principle of honor as applied in the "perfect warfare" doctrine, proposing a new lens through which to view this principle in today's "imperfect battlefield" scenarios. Completing this issue are two Comments by Scalia Law students: Max Ross explores the use of targeted sanctions to reduce and eliminate corruption, arguing for Global Magnitsky Act sanctions against corrupt government officials in Mexico and Latin America; and Quinn Kahsay argues that control of prisoner exchanges should remain exclusively with the President because Congress is structurally incapable of facilitating the transfer of captured terrorists to the control and custody of foreign nations.

I want to thank our Editorial Board and members of NSLJ for their tremendous effort this year in publishing this issue. I also have the utmost confidence in our incoming Editorial Board, and I know you will continue to expand the National Security Law Journal, both in membership and reach.

Please continue the discussion with us on social media via Facebook (facebook.com/NatlSecLJ) and Twitter (@NatlSecLJ), and subscribe to our YouTube channel (youtube.com/NatlSecLJ).

Caelyn Palmer
Editor-in-Chief

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THE GUANTANAMO BAY MILITARY COMMISSIONS: A HISTORICAL PERSPECTIVE

Daniel Mandell*

The use of military commissions in the United States has a history as old as the country itself. This history makes it clear that military commissions are tribunals of necessity, appropriately used in circumstances where traditional tribunals are unavailable or inappropriate. The Guantanamo Bay military commissions, however, challenge this history. The purpose of this article is to place the Guantanamo Bay military commissions in a historical context and contrast with their eponymous predecessors. This article reviews the use of military commissions throughout United States history, noting how each prior use of commissions was found to be appropriate or inappropriate depending on the perceived need. This article then highlights how the Guantanamo Bay military commissions are unique when compared to prior military commissions and concludes that the historic need for a trial would be better served if defendants charged with terrorism-related offenses were tried in traditional federal Article III courts rather than military commissions.

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INTRODUCTION

The Guantanamo Bay military commissions have been, to put it mildly, controversial since their creation in 2001. Supporters of the commissions contend they are both necessary and appropriate tribunals for those brought before them, while detractors see the commissions as an open wound on the American *corpus juris*.[1] What is seldom mentioned in the debates over the commissions is that this is far from the first time the United States government has used such tribunals. In fact, the history of military commissions in the United States dates to the country's founding and the Revolutionary War: commissions have repeatedly been used when there was a need for trial, but no alternative forum was deemed appropriate. Moreover, the Guantanamo Bay commissions are not the first ones to stoke significant controversy. Rather, prior uses of commissions have involved interesting – if not concerning – interactions between the three branches of the federal government. Understanding this history and how the Guantanamo Bay commissions compare to their predecessors – and thus how well the commissions satisfy

[1] *Compare, e.g.*, Edwin Meese III, *Guantanamo Bay prison is necessary*, CNN.COM, Jan. 11, 2012, (available at https://www.cnn.com/2012/01/11/opinion/meese-gitmo/index.html) *with* Vince Warren, Gitmo: *10 years of injustice and disgrace*, CNN.COM, Jan. 11, 2012, (available at https://www.cnn.com/2012/01/10/opinion/warren-close-gitmo/index.html).

their intended purpose – is an important piece of the current debate over the commissions, a debate that is likely to continue for years to come.

The purpose of this article is to provide a review of military commissions throughout American history and to analyze how the current commissions at Guantanamo Bay compare to their eponymous predecessors. Specifically, this article discusses how commissions have traditionally been used in three types of situations: to try violations of the law of war, in territories under martial law, and in response to a need resulting from the lack of alternative civilian or military tribunals. This article further contends that the current commissions are unique in American history and raises questions as to their true necessity.

Part II of this article explores the foundational need in the Anglo-American system for a trial in some form to be held before punishment is inflicted. Part III provides an overview of modern courts-martial and military commissions. Part IV traces the use of military commissions throughout United States history. Part V juxtaposes the current military commissions operating at Guantanamo Bay with the historical use of military commissions. Finally, this article concludes that because federal Article III courts can successfully handle terrorism-related cases, the Guantanamo Bay commissions, in contrast to their historical counterparts, are not necessary to ensure the effective prosecution of certain categories of cases.

I. THE NEED FOR TRIALS

The use of a trial to establish guilt and punishment for a violation of law can be traced back to the earliest human civilizations, such as the Sumerians.[2] Societies have held trials since that time not only to establish guilt in situations where culpability is unclear, but also to ease the moral burdens that come with judging and sentencing another person: a trial can act

[2] *See* SAMUEL NOAH KRAMER, HISTORY BEGINS AT SUMER 56-59 (3d. ed. 1981) (recounting a murder trial from 1850 B.C.E.). Requirements for criminal trials can also be found in the Bible. *See, e.g.*, Deuteronomy 17:8-9 (King James).

as "a kind of moral safe harbor in administering punishment, by allowing us to declare that the accused was convicted according to impersonal procedures, and not according to our own individual whim."[3]

In order to alleviate the moral qualms that came with judging, the English, from whom America's judicial procedures are derived, "invented a considerable number of methods of purgation or trial, to preserve innocence from the danger of false witnesses, and in consequence of a notion that God would always interpose miraculously to vindicate the guiltless."[4] These methods included the *corsned*, or morsel of execration, the ordeal by fire (hot iron) or cold water, compurgation or wager of law, and combat (which evolved into the duel).[5]

However, in 1215, the Fourth Lateran Council forbade clerical participation in the ordeals, declaring them to be "no different from blood surgery or blood warfare: it polluted any clergyman who took part in it, and therefore no blessings could be pronounced over the ordeal."[6] Four years later, in response to the Church's ban on the use of the ordeals, King Henry III directed that a new method of judging be established.[7] The solution decided upon was the jury, an institution that had a presence in England at least as far back as the tenth century.[8] "[B]y 1220 the twelfth-century jury of presentment . . . was converted into a thirteenth-century form of the criminal jury we know today, charged with the duty of declaring accused persons guilty or not guilty."[9] Initially these juries consisted of thirty-two people: twelve "hundredors" drawn from the medieval subdivision of a county, and twenty villagers from the towns surrounding the alleged offense.[10]

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[3] JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL 13 (2008).

[4] 4 WILLIAM BLACKSTONE, COMMENTARIES *341 (Oxford, Clarendon Press, 1765).

[5] *Id.*; Sanjeev Anand, *The Origins, Early History and Evolution of the English Criminal Trial Jury*, 43 ALTA. L. REV. 407, 409-15 (2005).

[6] Whitman, *supra* note 4, at 126.

[7] *Id.* at 126-27; Anand, *supra* note 6, at 415.

[8] 3 WILLIAM BLACKSTONE, COMMENTARIES *349-50.

[9] Whitman, *supra* note 4, at 138.

[10] Anand, *supra* note 6, at 416.

However, shortly after 1222, the use of villagers ceased, leaving a jury of twelve from the local area.[11] Thus, jury trials as we know them today came about as a way for judges to continue avoiding the moral and religious qualms that came with passing judgment over man.[12]

By the 18th century, however, society's focus shifted from the judge to the defendant. Trials came to be seen as critical to the protection of individuals' rights. Blackstone described the trial by jury as a "palladium" that would protect "the liberties of England" as long as it "remains sacred and inviolate."[13] And at the birth of the United States, Alexander Hamilton wrote in Federalist No. 83,

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government. For my own part, the more the operation of the institution has fallen under my observation, the more reason I have discovered for holding it in high estimation; and it would be altogether superfluous to examine to what extent it deserves to be esteemed useful or essential in a representative republic, or how much more merit it may be entitled to, as a defense against the oppressions of an hereditary monarch, than as a barrier to the tyranny of popular magistrates in a popular government. Discussions of this kind would be more curious than beneficial, as all are satisfied of the utility of the institution, and of its friendly aspect to liberty.[14]

Thus, for many centuries now, the trial has provided a way to resolve questions of guilt and punishment; although it initially served as a means to avoid the religious ramifications of passing judgment over man, it has come to be seen as a bulwark protecting individual liberty. This need exists even when the established trial

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[11] *Id.*

[12] *See* Whitman, *supra* note 4, at 150.

[13] 4 BLACKSTONE, *supra* note 5, at *350.

[14] THE FEDERALIST No. 83, at 521-22 (Alexander Hamilton) (Benjamin F. Wright ed., 1961).

forum is unavailable (i.e., when there is no federal Article III court), thus creating a need for an alternative forum to address such situations.

II. THE CURRENT MILITARY TRIAL OPTIONS: COURTS-MARTIAL AND MILITARY COMMISSIONS

In the United States military system, the court-martial is the standard trial mechanism to prosecute criminal offenses. Courts-martial operate according to the Manual for Courts-Martial ("MCM"). The MCM sets forth a full set of procedures and rules that must be adhered to, including requirements such as an accused's right to counsel and pre-trial discovery, creating a strong resemblance to a standard federal Article III civilian court in many ways.[15] Courts-martial have jurisdiction over any person subject to a court-martial under the Uniform Code of Military Justice (mostly active duty personnel of the domestic armed forces), and persons accused of violations of the law of war.[16] This second category includes

> any person who by the law of war is subject to trial by military trial for any crime or offense against: (a) The law of war; or (b) The law of the territory occupied as an incident of war or belligerency whenever the local civil authority is superseded in whole or part by the military authority of the occupying power.[17]

Military commissions, on the other hand, are tribunals "born of military necessity," whose authority "can derive only from the powers granted jointly to the President and Congress in time of war."[18] They have traditionally been *ad hoc* tribunals turned to when courts-martial or civilian courts were unavailable,

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[15] *See generally*, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016 ed.).

[16] *Id.* at R.C.M. 202.

[17] *Id.* at R.C.M. 201(f)(1)(B).

[18] Hamdan v. Rumsfeld, 548 U.S. 557, 590-91 (2006); *see also Ex parte* Vallandigham, 68 U.S. 243, 249 (1863) (contrasting courts-martial and military commissions in the context of military jurisdiction, explaining that while courts-martial try cases created by statute, military offenses that fall outside of statute "must be tried and punished under the common law of war" by military commissions).

but the need for a trial still existed, and would typically dissolve after a specific offense had been addressed. As detailed further below, three different forms of military commissions have been used throughout American history: (1) for crimes committed by civilians where martial law has been declared; (2) in places where, and during times when, civil courts were not open and functioning, including in conquered territory controlled by the military; and (3) for unlawful enemy combatants accused of violating the law of war.

An important feature of the third type of commission is that they historically do not employ the full panoply of procedures found in civilian courts and courts-martial. However, such procedures are not necessary because this type of commission's purpose is "primarily a factfinding one – to determine, typically on the battlefield itself, whether the defendant has violated the law of war."[19] The facts will be easy to determine because the commission would commence almost immediately after the alleged crime and near the crime scene, thus eliminating the need for a pre-trial discovery process and procedures designed to control the evidence considered.

According to a – if not *the* – leading military historian, William Winthrop,[20] the common law governing military commissions requires that five conditions be met in order for this type of commission to have jurisdiction: (1) unless authorized by statute, the offense must have been "committed within the field of the command of the convening commander"; (2) unless authorized by statute, the field of command must be in "the theatre of war or a place where military government or martial law may legally be exercised"; (3) "the trial must be had within the theatre of war, military government, or martial law"; (4) the offense "must have been committed within the period of the war or of the exercise of military government or martial law"; and (5) the defendant can only be a member of the enemy's army charged with violating the law of war, individuals of a conquered and

[19] *Id.* at 596-97.

[20] *See* Reid v. Covert, 354 U.S. 1, 19 n.38 (1957) (plurality opinion) (stating that Winthrop is considered by some as the "Blackstone of Military Law").

occupied territory, individuals in a territory under martial law, or a member of the United States military who, during a time of war, is charged "with crimes or offences not cognizable, or triable, by the criminal courts or under the Articles of war."[21] As explained below, Winthrop's criteria can be used as a guide to determine the appropriateness of a military commission trying a violation of the law of war. Historically, each time Winthrop's criteria were satisfied, the commission was uncontroversial; however, when the criteria were not satisfied, the commission proved to be controversial and its legality questioned.

III. MILITARY COMMISSIONS THROUGHOUT UNITED STATES HISTORY

A. Early use of Commissions

The first use of a tribunal resembling a military commission appears to be in 1474, when a commission tried Peter von Heigenbach, governor of the territory of Breisbach, Germany, for ordering murder, arson, and rape while he was in command of the city.[22] Later, during the Thirty Years War in the 17th century, Swedish King Gustavus Adolphus turned to commissions when he needed a way to enforce discipline in his army.[23] Commissions became "an alternative to the exercise of [commanders'] unlimited power on the battlefield,"[24] and a means of prosecuting mercenaries for committing "war crimes outside the umbrella of the law of war."[25]

By the latter part of the 18th century, the use of military commissions to try soldiers for war crimes was "well

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[21] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 836-38 (rev. 2d ed. 1920). Winthrop notes that the third condition is not always complied with. *Id.* at 836. Justice Stevens recognizes an implied sixth condition that must be met for this type of commission to have jurisdiction: the charged offense must be a violation of the law of war. *Hamdan*, 548 U.S. at 597.

[22] LEON FRIEDMAN, THE LAW OF WAR 775 (Random House 1972).

[23] Michael Lacey, *Military Commissions: A Historical Survey*, 2002 ARMY LAW 41, 42 (2002).

[24] *Id.* at 41.

[25] FRIEDMAN, *supra* note 23, at 776 ("Although the charges were treason or murder, the essence of their offenses was that they committed war crimes outside the umbrella of the law of war.").

established."[26] According to some authors, in 1776, the British used a military commission – but called it a court-martial – to try American spy Nathan Hale.[27] Others contend that it is more likely that Hale was never tried because British military law at the time did not require foreign spies to be tried.[28] During the American Revolution, George Washington ordered a "Board of General Officers" be used to try former American soldier Thomas Shanks and British Major John André for spying.[29] André's Board consisted of six major-generals and eight brigadier-generals who were charged with deciding how to classify André and determine his punishment. The commission concluded that André should be considered a spy and, in accordance with "the law and usages of nations," put to death.[30]

It is unclear why Washington chose to subject the two men to Boards of General Officers, since he believed he "retained customary authority for the summary treatment of spies" and sent

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[26] Timothy MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, 2002 ARMY LAW 19, 27 (2002). Today, soldiers would be tried by courts-martial.

[27] Lacey, *supra* note 24, at 42 (citing Wigall Green, *The Military Commission*, 42 AM. J. INT'L L. 832 (1948)). The British used 'court-martial' to refer both to what would be a court-martial in today's terms as well as to refer to what would be called a military commission. They did not distinguish between the two until the Boer War in 1899. *Id.* at n.14. Hale would likely have been considered to be an unlawful enemy combatant in modern terms because he was captured in civilian clothing, like the Nazi saboteurs in the *Quirin* case, discussed *infra*.

[28] David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L. 5, 14-15 (2005).

[29] Lacey, *supra* note 24, at 42; Edward G. Lengel, ed., *The Papers of George Washington*: *Revolutionary War Series*, vol. 15, *May–June 1778* (University of Virginia Press 2006); *see also Ex parte* Quirin, 317 U.S. 1, 42 n.14 (1942) (listing many instances of military tribunals being used to try spies during the Revolutionary War). Glazier notes that the commission for Hale was not really a court but merely an advisory panel charged with investigation. Glazier, *supra* note 29, at 19.

[30] Benson J. Lossing, THE TWO SPIES: NATHAN HALE AND JOHN ANDRE 99-100 (1886) (citing the order of Washington and the verdict of the commission). Because André was a spy, he would have faced a military commission rather than a court-martial; however, it is interesting to note that the commission also functioned as what would today be called a Combatant Status Review Tribunal.

more than two dozen accused spies to courts-martial.[31] With respect to André, Washington's September 30, 1780 letter to British General Clinton states only that Washington "determined. . . to refer his case to the examination of a Board of General Officers," even though "Major Andre was taken under such circumstances as would have justified the most summary proceedings against him."[32] It is important to note the correlation between the apparent lack of controversy surrounding Washington's treatment of these men, and the fulfillment of Winthrop's criteria.

B. War of 1812

During the War of 1812, General Andrew Jackson took control of New Orleans and declared martial law.[33] Following the cessation of hostilities, but before word of completed peace negotiations had reached New Orleans, Jackson maintained martial law in the city because, to him, the threat from the British was not over and the need for control was still very much alive.[34]

During this time, Louis Louallier, a New Orleans resident of French origin and state legislator, wrote an article "deliberately and wickedly misrepresent[ing] the order" of continued martial law.[35] According to Jackson, Louallier's publication "occasioned the desertion of the soldiary from their posts, mutiny within my camp and a perfect state of disorganisation and insubordination within my camp."[36] In response, Jackson had Louallier arrested, arguing that "to have silently looked on such an offense without

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[31] Glazier, *supra* note 29, at 21-22; *see also* Robert McConnell Hatch, MAJOR JOHN ANDRÉ: A GALLANT IN SPY'S CLOTHING 259 (Houghton Mifflin Co. 1986) (detailing the fascinating history of the British officer who assisted General Benedict Arnold commit his treason).

[32] Letter from George Washington to Henry Clinton (Sept. 30, 1780), *reprinted in* ANDREANA. CONTAINING THE TRIAL, EXECUTION AND VARIOUS MATTER CONNECTED WITH THE HISTORY OF MAJOR JOHN ANDRE, ADJUTANT GENERAL OF THE BRITISH ARMY IN AMERICA, 29-30 (Horace W. Smith, ed. 1865).

[33] 5 THE LOUISIANA HISTORICAL QUARTERLY 560 (1922).

[34] *Id.* at 563.

[35] *Id.* at 565.

[36] Andrew Jackson, Letter from Andrew Jackson to Editors of the Globe 4 (Feb. 1843) (manuscript) (on file with Library of Congress) [hereinafter Jackson Notes].

making any attempt to punish it, would have been a formal surrender of all discipline, all order, all personal dignity and public safety."[37] Jackson charged Louallier with inciting mutiny and disaffection in the army, and decided that Louallier was "liable to be tried by a Court Martial, by virtue of a general order issued by him [Jackson], declaring martial law to exist in the city of New Orleans."[38] Thus, the use of the military tribunal was directly tied

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[37] *Id.*

[38] Louis Fisher, *Military Tribunals: Historical Patterns and Lessons*, CRS Report for Congress 7 (July 9, 2004); Deposition of Major William O. Winston, 22 March 1815, Transcript of the Record of the United States District Court in *United States v. Major Andrew Jackson* (1815), printed in 5 THE LOUISIANA HISTORICAL QUARTERLY 544 (1922). There is some dispute as to whether this tribunal would constitute a court-martial or military commission in the modern understanding of the terms. *Compare* Lacey, *supra* note 24, at 42 *with* Fisher, *supra* note 39, at 7; W. Winthrop, MILITARY LAW AND PRECEDENTS 832 (rev. 2d ed. 1920); *and* Jonathan Lurie, *Andrew Jackson, Martial Law, Civilian Control of the Military, and American Politics: An Intriguing Amalgam*, 126 MIL. L. REV. 133, 136 (1989). Andrew Jackson also referred to the tribunal as a court-martial, *see supra* note 37. Because Louallier was a civilian being tried under martial law, rather than a member of the armed forces, in today's terms the tribunal is better classified as an occupation or martial law military commission, rather than a court-martial. Though not relevant for purposes of this article, the conclusion of this incident presents a fascinating story in American history, and an interesting example of a conflict between civilian and military authorities: after Louallier was arrested, District Court Judge D. A. Hall issued a writ of *habeas corpus* to Jackson. Because Jackson did not want to ignore or disobey the writ – that would "have increased the evil" – but also because he did not want to obey the writ – since that would have been "wholly repugnant to [Jackson's] ideas of the public safety and his own sense of duty" – Jackson decided the best middle ground was simply to confine the judge, so he ordered the judge arrested. *Cause Shewn by A. Jackson, Major General in the Army of the United States, Commanding the Seventh Military District, on the rule hereunto annexed*, *reprinted in* 5 THE LOUISIANA HISTORICAL QUARTERLY 566 (1922). After a court-martial acquitted Louallier, Jackson ignored the court-martial's ruling and kept Louallier in jail anyway. Jackson also decided that since a military court probably would not convict a federal judge, he was better off just ordering the judge out of the city. Thus, Jackson had his troops march the judge a few miles out of the city and leave him there with instructions that the judge was not to return until the British had left the coast or there was a declaration of peace. Fisher, *supra* note 39, at 7; Jackson Notes. After Judge Hall returned to his court, he ordered Jackson to appear and held him in contempt for disobeying the *habeas* writ. Judge Hall imposed a fine of $1,000, which Jackson promptly paid. Ladies of New Orleans offered to pay the fine, but Jackson asked that the money offered be given to the relief of "the children and widows of those who fell whilst fighting for their country." Jackson Notes; Letter

to a specified necessity, namely, that there was still a threat from the British forces. A committee of the Louisiana Senate that later investigated this incident also specifically focused on whether "the necessity for the continuance of martial law ceased on the 5th day of March, when Louallier was arrested, and the order for a *habeas corpus*, directed to Gen. Jackson, was issued by Judge Hall."[39] Further, because the territory was under martial law, Winthrop's criteria were still satisfied.

C. War with the Seminoles

General Jackson again used military tribunals in 1818 while commanding troops against the Seminoles. Jackson ordered the creation of a "special court" to try two British citizens, Robert Ambrister and Alexander Arbuthnot, for inciting the Creek Indians.[40] The court found both men guilty, and both were executed. Jackson justified the death of the men by saying, "[i]t is an established principle of the law of nations, that any individual of a nation, making war against the citizens of another nation, they being at peace, forfeits his allegiance and becomes an outlaw and a pirate."[41]

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from J. B. Plauché to Hon. G. W. Philips (Jan. 17, 1843), *reprinted in* 5 THE LOUISIANA HISTORICAL QUARTERLY 524.

[39] Report of the Committee of the Senate (of the State of Louisiana, 1843) in Relation to the Fine Imposed on Gen. Jackson, Together with the Documents Accompanying the Same, *reprinted in* 5 Louisiana Historical Quarterly 510. The Committee concluded that necessity did exist, and urged passage of a resolution that would ask Louisiana's federal congressional delegation to seek a law reimbursing Jackson for the $1,000, with 6% interest. *Id.* at 513.

[40] Fisher, *supra* note 39, at 8 (citing 1 American State Papers: Military Affairs 721). The charges against Robert Ambrister were aiding and abetting the enemy and leading the Lower Creeks in carrying on a war against the United States. 1 American State Papers: Military Affairs 731. The charges against Alexander Arbuthnot were "[e]xciting and stirring up the Creek Indians to war against the United States and her citizens . . . [a]cting as a spy, aiding, abetting, and comforting the enemy, and supplying them with the means of war . . . [and e]xciting the Indians to murder and destroy William Hambly and Edmund Doyle, confiscate their property, and causing their arrest with a view to their condemnation to death, and the seizure of their property. . . ." *Id.* at 734.

[41] 1 American State Papers: Military Affairs 735.

Following the incident, the House Committee on Military Affairs investigated Jackson's actions. The Committee's report specifically questioned Jackson's justification for use of a military tribunal given the absence of congressional authorization for the tribunal to hear the charged offenses, the lack of any apparent "exigency," and the fact that the conflict had ended.[42] The Committee ultimately submitted a Resolution to the House disapproving the trials.[43] Thus, as with prior examples, the appropriateness of a military tribunal again turned on the existence of exigent circumstances. Additionally, a correlation can be seen between the situation's failure to satisfy Winthrop's criteria and the controversy that arose from the military tribunal's use.

D. Mexican-American War

The Mexican-American War in 1847 is generally regarded as the first time military commissions – both in form and name – were used by the United States. As with the prior occurrences, these commissions were created in response to a specific need.

Before heading to Mexico to take command, General Winfield Scott sought to establish a military tribunal to enforce disciplinary measures. General Scott was aware of the dangers military invasion could bring and the need to avert a guerrilla war sparked in response to "lawless and undisciplined action by American soldiers."[44] However, there was no reliable civilian judicial system in the area.[45] Moreover, "the Articles of War did not cover crimes committed by the indigenous population against the occupying American forces," and courts-martial, as they existed at the time, could not be used because of their very limited

[42] *Id.*
[43] *Id.*
[44] Fisher, *supra* note 39, at 12.
[45] *Id.* at 11.

jurisdiction.[46] Thus, General Scott felt there was a need to set up a new military tribunal, which he termed a military commission.

The new commissions were created through General Orders, No. 20, of February 19, 1847, which also declared martial law in all areas of Mexico occupied by American troops. General Orders, No. 20 gave the military commissions jurisdiction over cases of "[m]urder, premeditated murder, injuries or mutilation, rape, assaults and malicious beatings; robbery, larceny, desecration of Churches, cemeteries or houses, and religious buildings; and the destruction of public or private property that was not ordered by a superior officer."[47] General Scott further decreed that the commissions would operate in accordance with the Articles of War, would have written records that would be reviewed to ensure that no defendant who should be tried before a court-martial was instead tried by a commission, and that all punishments conformed to what would be expected in a similar case in a civilian court in the United States.[48] In practice, the procedures used for the commissions were nearly identical to those used for courts-martial and similar to civilian criminal trials at the time; the primary differences were the larger role for the judge advocate and limitations on defense counsel.[49]

General Scott separately ordered the creation of councils of war to deal with violations of the law of war.[50] These councils dealt with two groups of defendants: first, Mexican recruiters who tried to convince American soldiers to desert; and second, guerrillas.[51] While councils for recruiters followed similar procedures to those used in military commissions and courts-martial, those for guerrillas did not. Instead, councils prosecuting

[46] Lacey, *supra* note 24, at 43; Erika Myers, *Conquering Peace: Military Commissions As A Lawfare Strategy in the Mexican War*, 35 AM. J. CRIM. L. 201, 206 (2008); *Hamdan*, 548 U.S. at 590-91.

[47] Headquarters, U.S. Dep't of Army No. 2 (19 February 1847) [hereinafter Gen. Orders, No. 20].

[48] *Id.*

[49] Myers, *supra* note 47, at 216-19.

[50] Headquarters, U.S. Dep't of Army, Gen. Orders No. 372 (12 December 1847) [hereinafter Gen. Order No. 372].

[51] Myers, *supra* note 47, at 229.

guerillas operated as "battlefield courts": they could be convened by commanders in the field, were not subject to the rules of evidence, and required a lower threshold for a finding of guilt.[52] Additionally, unlike the military commissions created by General Orders, No. 20, there was no requirement that written records of council proceedings be made and reported to headquarters.[53]

General Scott's military commissions proved uncontroversial: "[a]pparently, the only one to 'object to the legality of the court and deny the authority of Gen. Scott to constitute it' was an accused murderer charged before a commission, who understandably wanted to be sent home."[54] Significantly, there is a notable correlation between the lack of controversy and the fulfillment of Winthrop's criteria: the military commissions set up by General Scott were operating during a declared state of martial law in response to an expected need resulting from the lack of reliable courts or other tribunals. All five of Winthrop's criteria were satisfied.

E. The Civil War

The heaviest use of military commissions was during the Civil War,[55] when approximately 2,000 cases were tried.[56] Commissions were viewed as necessary due to the "then very limited jurisdiction of courts-martial" and the exigencies of the war.[57] During this time, "the terms 'council of war' and 'military commission' merged to form the . . . meaning of military commission"[58] that held until the Military Commissions Act. Despite the enormous number of tribunals that took place during the Civil War, only a few cases are prevalent among historical

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[52] *Id.* at 231-32.

[53] *Id.* at 233 (noting no records of any councils of war exist today).

[54] *Id.* at 225-26 (quoting Letter from J.H. Forster to Col. Hunt (May 2, 1848), National Archives, Record Group 94, Records of the Adjutant General's Office, Letters Received Mar. 13, 1848-July 3, 1848).

[55] Fisher, *supra* note 39, at 16.

[56] Detlev F. Vagts, *Military Commissions: The Forgotten Reconstruction Chapter*, 23 AM. U. INT'L L. REV. 231, 239 (2008).

[57] *Hamdan*, 548 U.S. at 590-91.

[58] Lacey, *supra* note 24, at 43.

literature. These few cases demonstrate how military commissions have always been tribunals of necessity.

First, in 1861, Major General John C. Frémont declared martial law in Missouri after he decided that circumstances were "sufficiently urgent."[59] Hybrid military commissions were set up to deal with a wide range of crimes, including "destruction of railroad ties, tracks, railroad cars, and telegraph lines," all of which fell within the broad category of the "laws of war."[60] Although civilian courts were still operating, Major General Henry Halleck, the Commander of Union forces in the West, deemed them to be "very generally unreliable," leaving no choice but to use a military court.[61] Moreover, General Halleck concluded that the Articles of War "were inadequate for administering justice during the rebellion,"[62] necessitating an alternative form of tribunal.

Second, in 1865, based on the opinion of Attorney General James Speed, President Andrew Johnson convened a military commission to try the individuals charged with the assassination of President Lincoln and the attempted assassination of Secretary of State William Seward.[63] This decision was controversial because civil courts in Washington, D.C. were open and operational. However, Attorney General Speed considered the conspirators to be "secret active public enemies," and assassination to be a violation of the law of war.[64] The conclusion Attorney General Speed drew from these facts was that

> if the persons who are charged with the assassination of the President committed the deed as public enemies. . . they not only can, but ought to be tried before a military tribunal. If the persons charged have offended against the laws of war,

[59] Fisher, *supra* note 39, at 18.

[60] *Id.* (citing [1894] 2 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES 282-89, 402-05, 407).

[61] *Id.* at 19 (citing [1894] 2 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES 247).

[62] Lacey, *supra* note 24, at 43.

[63] 8 Comp. Messages & Papers Pres. 3532 (New York, Bureau of Nat'l Literature 1897).

[64] 11 Op. Atty Gen. 297, 316 (1865).

> it would be as palpably wrong for the military to hand them over to the civil courts, as it would be wrong in a civil court to convict a man of murder who had, in time of war, killed another in battle.[65]

Part of Attorney General Speed's analysis deals with the state of the city of Washington at the time of the assassination. To him, the city was still very much at war: ". . . a civil war was flagrant, the city of Washington was defended by fortifications regularly and constantly manned, the principle police of the city was by federal soldiers. . . [and] [m]artial law had been declared in the District of Columbia. . . ."[66] Thus, once again, the use of a military commission was justified on a finding that the crime at issue was a violation of the law of war and that the geographic region was not secure. These findings also show that Winthrop's criteria were (mostly) satisfied.

F. Reconstruction

Reconstruction saw the continued use of military commissions throughout the southern states. Consistent with history, the resort to commissions continued to be justified on a perceived need for them. For example, in the summer of 1865, General Thomas Ruger had three civilians arrested for assaulting a freedman. Ruger refused to turn the men over to civilian courts, saying that "the restraining influence of prompt trial and punishment of offenders, particularly those guilty of homicide, by military commissions is the only adequate remedy for the existing evils."[67] In other words, General Ruger perceived a need for a tribunal which could administer justice in a far swifter manner than a civilian court.

Another significant example occurred the following year when General Daniel Sickles convened a military commission in South Carolina to try several men accused of attacking an army guard and killing several soldiers.[68] The charges levied against

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[65] *Id*. at 317.
[66] *Id.*
[67] Vagts, *supra* note 56, at 242.
[68] H.R. REP. NO. 39-23 at 3.

the men were that, "while martial law was in force . . . [they] did voluntarily associate with an armed band, and acting therewith, with unlawful force attack and overcome a certain guard detailed and on duty at Brown's ferry" and killed three soldiers.[69] Following a 30-day trial with a full defense of the accused, the commission found four men guilty and sentenced them to death.[70] General Sickles explained his decision to utilize a military commission during testimony before a congressional select committee investigating the incident afterwards. According to General Sickles, "there were no civil courts that could have tried [the defendants]. Neither the United States district nor circuit court, nor the States courts, were open. Steps were in progress to that end, but they had not been consummated."[71]

The case ultimately came before District Court Judge Willard Hall in the United States District Court for the District of Delaware on a petition for a writ of *habeas corpus*.[72] In his opinion, Judge Hall examined the question of whether the military commission had jurisdiction to hear the case.[73] Judge Hall concluded that there was no need to "subject[] the accused to the disadvantages" of a military commission because the authority of the United States had been restored and, contrary to General Sickles' contention, civilian courts were operating.[74]

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[69] *Id.* at 35-36.

[70] *Id.* at 3. It is not clear how many men were on trial for the murders – one witness identified six people but there is no mention of anyone being acquitted by the commission. *Id.* at 2-3.

[71] Murder of Union Soldiers Before the Select Comm. to Investigate the Charges for Murder of Union Soldiers in South Carolina, 39th Cong. (1867) (testimony of Major General Daniel E. Sickles) ("Sickles Testimony") printed in H.R. REP. NO. 39-23 at 10.

[72] *See* United States v. Commandant of Fort Delaware, 25 F. Cas. 590, 590 (D. Del. 1866).

[73] *See id.*

[74] *Id.* at 590-91. It is not clear whether Judge Hall or General Sickles was correct about the operational status of the federal civil court at the relevant time. Although South Carolina Provisional Governor Perry reappointed all judicial officers who would swear allegiance to the United States in his proclamation of July 20, 1865, thus technically re-opening the federal civilian court, it is not clear that the court was able to conduct any significant operations due to the destruction that General Sherman and Union troops had inflicted on the state during its conquest. *See* Warren Moise,

Judge Hall's opinion is also noteworthy for its response to two of the government's arguments defending the use of a military commission. First, Judge Hall addressed the case of *The King v. John Suddis*, 102 Eng. Rep. 119 (1801), which had been proffered to support the argument that "in the absence of all civil judicature, the military may try offenders."[75] Judge Hall found that case to be distinguishable because it concerned an offense (i) by a soldier (ii) at a distant military fortress.[76] Second, Judge Hall rejected a comparison to General Scott's use of commissions in Mexico, explaining that "Mexico was a foreign country, conquered, its language and institutions unknown; South Carolina, a state of the Union rescued from rebellion, its laws and institutions restored."[77] In sum, both sides of this case relied on necessity to reach their conclusions about the appropriateness of using a military commission: General Sickles believed that the commission was necessary to provide a trial because there were no civilian courts available, while Judge Hall found the commission to be unnecessary since the civilian court was operating.

A circuit court in New York issued a similar opinion in a case involving the imprisonment of an 80-year-old South Carolina farmer who had been convicted by a military commission of killing a boy. Like Judge Hall, the court explained that South Carolina's state courts, which had jurisdiction over the state crime of murder, "were in the full exercise of their judicial functions at the time of this trial."[78] As such, "[n]o necessity for the exercise of this anomalous power [the use of a military commission] is shown."[79]

REBELLION IN THE TEMPLE OF JUSTICE: THE FEDERAL AND STATE COURTS IN SOUTH CAROLINA DURING THE WAR BETWEEN THE STATES 119-22 (iUniverse, Inc. 2003). A WestLaw search of cases from the South Carolina federal district court returns no opinions prior to January 1, 1868. Thus, it is possible that both men were correct.

[75] *Commandant of Fort Delaware*, 25 F. Cas. at 590.

[76] *Id.* at 590-91.

[77] *Id.* at 591.

[78] *In re* Egan, 8 F. Cas. 367, 368 (C.C.N.D.N.Y. 1866).

[79] *Id.*

In Virginia, Brevet Major General J. M. Schofield also clashed with civilian courts when he refused to comply with a writ of *habeas corpus* in a case involving Dr. James L. Watson, a white man, who shot a freedman. Although Dr. Watson had appeared before a civilian court and was set free, General Schofield had Dr. Watson arrested and convened a military commission. In his view, a commission was necessary because the civilian court's refusal to bring Dr. Watson before a jury essentially justified his killing of a black man, and thus "endanger[ed] the personal security of all people of color living within the jurisdiction of the court."[80] President Johnson ordered the commission be dissolved before it had made any progress, so the situation was resolved without further incident.[81]

The conflict between generals and the civilian courts ended for a brief period following the Supreme Court's decision in *Ex parte Milligan*. In 1864, Brevet Major General Hovey in Indiana ordered the arrest of Lambdin P. Milligan on charges of conspiracy, affording aid and comfort to rebels, inciting insurrection, disloyal practices, and violating the laws of war. Even though the civilian courts were fully operational, Milligan was brought before a military commission convened by Major General Hovey and convicted.[82]

The Supreme Court began its decision by noting how, during the Civil War, normal procedures could not be followed:

> During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. Then, considerations of safety were mingled with

[80] Andrew Johnson, Message of the President of the United States regarding Violations of the Civil Rights Bill, S. Exec. Doc. No. 39-29, at 29 (1867) (Memoranda from Brevet Maj. Gen. J. M. Schofield to Maj. Gen. O. O. Howard); General Schofield also conceded that he was using the incident as a test case to find "the best practical way" to hand "the important questions involved." *Id.* at 20 (Letter to Maj. Gen. O. O. Howard from Brevet Maj. Gen. J. M. Schofield dated Dec. 8, 1866).
[81] *Id.* at 30 (Message from E. D. Townsend to Gen. Schofield dated Dec. 21, 1866).
[82] *Ex parte* Milligan, 71 U.S. 2 (1866). Because Indiana was not under martial law at time of the case, Milligan's tribunal would be a military commission under today's definition as well.

> the exercise of power; and feelings and interests prevailed which are happily terminated.[83]

The Court concluded that "the laws and usages of war can never be applied to citizens in states where the civilian courts are open and their process unobstructed . . . [and] that the statute of March 3, 1863 gave federal courts 'complete jurisdiction to adjudicate upon this case.'"[84] In discussing limitations on the use of martial law and military commissions, the Court specifically focused on necessity:

> . . . [T]here are occasions when martial rule can be properly applied. . . . As necessity creates the rule, so it limits its duration; for, if this government [by the military under martial law] is continued after the courts are reinstated, it is a gross usurpation of power. [85]

The Supreme Court unanimously held that the military commission lacked jurisdiction, explaining that there was "[n]o reason of necessity" that explained why Milligan could not have been brought before the civilian court.[86]

The following year, though, Congress passed the Act to Provide for the More Efficient Government of the Rebel States.[87] The Act explicitly authorized the general officer of each district in the South to create military commissions "when in his judgment it may be necessary for the trial of offenders. . . ."[88] The preamble of the Act explains that this authority was being granted in response to a specifically perceived necessity:

> Whereas no legal State governments or adequate protection for life or property now exists in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi,

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[83] *Id.* at 109.

[84] Fisher, *supra* note 39, at 24 (citing *Milligan*, 71 U.S. at 117).

[85] *Milligan*, 71 U.S. at 127.

[86] *Id.* at 122.

[87] Vagts, *supra* note 57, at 244-45.

[88] *Id.* (quoting Act to Provide for the More Efficient Government of the Rebel States, ch. 153, 14 Stat. 428, Preamble (1867)). The Act divides the South into five districts and places a general officer in charge of each district.

> Alabama, Louisiana, Florida, Texas, and Arkansas; and whereas it is necessary that peace and good order should be enforced in said states until loyal and republican State governments can be legally established. . . .[89]

The Supreme Court never ruled on the constitutionality of this statute. However, these examples show that the propriety of the use of military commissions was always tied to a perceived need, and whether such a need existed determined whether the commission's use was proper.

G. Reconstruction to World War II

Military commissions were not widely used during the time between Reconstruction and World War II.[90] During World War I, military commissions were not used to prosecute war crimes committed within American territory.[91] There are, however, two items of note from this period that reflect the link between military commissions and the necessity for a trial mechanism.

The first item is the revised Articles of War. Beginning in 1912, Congress revised the Articles of War from 1806.[92] The Army Judge Advocate General at the time, Brigadier General Enoch H. Crowder, played a notable role in crafting the new Articles.[93] In his testimony concerning the revised Articles, General Crowder provided his view on the history of military

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[89] Act to Provide for the More Efficient Government of the Rebel States, ch. 153, 14 Stat. 428, Preamble (1867).

[90] Fisher, *supra* note 39, at 32.

[91] Jennifer Elsea, Cong. Research Serv., RL31191, *Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions* 21 (2001).

[92] The 1806 Articles of War were mostly copied from the 1776 Articles of War, which were copied from the British Articles of War from 1765. Many of the British Articles could be traced back to the code of Gustavus Adolphus. *Revision of the Articles of War Before the Subcomm. on Mil. Affairs of the United States Senate*, 64th Cong. 27-28 (1916) (Statement of Brig. Gen. Enoch H. Crowder, United States Army, Judge Advocate General of the Army) [hereinafter Crowder Testimony].

[93] Fisher, *supra* note 39, at 33; Crowder Testimony, *supra* note 93, at 27-28 ("The revision now before you [the Committee] was submitted by me to the Secretary of War . . . The pending bill . . . is substantially identical with that bill . . . ").

commissions, noting that commissions grew out of "usage and necessity."[94]

The second item is the case of Pable Waberski. Waberski was a Russian national and German spy during World War I. On his way to the United States, he told two men – who happened to be American and British secret service agents – that he was going to the United States to "blow things up."[95] Immediately upon touching American territory, military authorities arrested Waberski .[96] The question faced by the government was whether a military commission could try an alleged spy who had never been on any military installation or battlefield, and who was arrested in a place operating under normal civilian law with functioning civilian courts.

The military's argument rested on § 1341 of the United States Revised Statutes and Article of War 82, both of which have similar language. Article 82 reads:

> Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be triable by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death.[97]

The military asserted that the language "or elsewhere" in Article of War 82 gave the military jurisdiction over Waberski. Attorney General Thomas Watt Gregory, however, came to a different conclusion. Gregory first explained that *Milligan* was controlling precedent for this case, and it clearly stated that a military court did not have jurisdiction. Second, Gregory argued that even if *Milligan* did not exist, the military would still not have

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[94] Crowder Testimony, *supra* note 93, at 40-41.

[95] Opinion of Hon. Thomas Watt Gregory, Att'y Gen, "Trial of Spies by Military Tribunals," 31 Op. Att'y Gen. 356, 357 (1918).

[96] *Id.*

[97] *Id*. at 358. Note how the rule concerning spies is the same as the one applied during the Colonial Era to the cases of Hale and André: spies are considered unlawful combatants and are to be punished with death.

jurisdiction. "[I]n this country," he wrote, "military tribunals . . . can not constitutionally be granted jurisdiction to try persons charged with acts or offenses committed outside the field of military operations or territory under martial law or other peculiarly military territory."[98] To find otherwise would render the Constitution "nugatory in the cases of the most grave class of crimes."[99] Attorney General Gregory's conclusion is wholly consistent with the requirement that some necessity exist before a military commission may properly be used. Commissions, as he understood them, denied defendants the constitutionally guaranteed due process rights provided in a civilian court. Such a deprivation could not be allowed to occur except where there was no other choice, namely, in the middle of a military conflict or a situation where civilian courts were simply not present or operating.[100]

H. World War II

World War II brought with it a resurgence of military commissions and additional examples of commissions falling into two historic groups: commissions for violations of the law of war, and commissions to replace civilian courts where those courts were not operating.

During and after the war, military commissions "operated with quiet efficiency in the United States, France, Germany, Austria, Italy, Japan, and Korea in bringing to trial individuals and organizations engaging in terrorism, subversive activity, and violation of the laws of war."[101] Perhaps the most famous example of the many commissions is that of Japanese General Tomoyuki Yamashita, who was accused of permitting atrocities against civilians and prisoners of war.[102] The Supreme Court ultimately

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[98] *Id*. at 361-62.

[99] *Id*.

[100] The following year the new Attorney General, A. Mitchell Palmer, was provided with different facts of the case, leading him to author a second opinion concluding that Waberski had been acting as a spy and thus could be tried by military commission under Article of War 82. 40 Op. Att'y Gen. 561 (1942) (1919).

[101] Wigall Green, *The Military Commission*, 42 AM. J. INT'L L. 832, 833 (1948).

[102] Fisher, *supra* note 39, at 52-53.

reviewed General Yamashita's case. Writing for the majority, Chief Justice Harlan Fiske Stone upheld the validity of the commission because, *inter alia*, General Yamashita had been charged with violating the law of war.[103] Conversely, in dissent, Justice Frank Murphy focused on the lack of necessity, explaining that "[t]he trial was ordered to be held in territory over which the United States has complete sovereignty. No military necessity or other emergency demanded the suspension of the safeguards of due process."[104] Accordingly, both sides of the Court looked to the traditional roles of military commissions to justify their conclusions: the majority focused on the violation of the law of war, while the dissent focused on the lack of necessity for a commission to hear this charge when civil courts were capable of doing so.

In the United States, military commissions were held in Hawaii following the attack on Pearl Harbor in 1941. On December 7, 1941, Governor J. B. Poindexter declared martial law, suspended the writ of *habeas corpus*, and transferred control of the territory to the military until the danger of invasion was over. The Commanding General of the Hawaiian Department established two types of military tribunals – one for cases with sentences up to five years in prison and a fine of up to $5,000, and another for more severe sentences up to capital punishment.[105] Two commission decisions were appealed to the Supreme Court and demonstrate the necessity requirement. In one case, Harry White was convicted of embezzlement; in the second, Lloyd C. Duncan was convicted of assaulting two Marine Corps sentries. District courts granted writs of *habeas corpus* for both men. On appeal, the United States Court of Appeals for the Ninth Circuit reversed, noting that "martial rule was in effect and the civil courts were disabled from functioning."[106] The Supreme Court, though, disagreed, and held that "since the courts were open and able to function, the military trials of the petitioners were in

[103] *In re* Yamashita, 327 U.S. 1, 25 (1946).
[104] *Id.* at 27 (Murphy, J., dissenting).
[105] Fisher, *supra* note 39, at 47.
[106] *Ex parte* Duncan, 146 F.2d 576, 581 (9th Cir. 1944).

violation of the Constitution."[107] In his dissent, Justice Harold Burton focused on the fact that a very real threat still existed in the territory: "In this case Hawaii was not only in the theater of operations, it was under fire."[108] Thus, these cases again show the importance of necessity to military commissions.

This time also saw what is likely one of the most controversial uses of military commissions in American history. The case – known as the Nazi Saboteur or the *Quirin* Case – has a troubling background and exemplifies what can happen when commissions are used without a genuine need.

The basic facts of this case are well known: in 1942 eight Germans, who had been sent to the United States to blow up various targets, were captured. Although civilian courts in the United States were operating, President Roosevelt decided to try the men before a military commission for two reasons: first, to keep secret the fact that the reason the saboteurs were apprehended so easily is because one of them turned himself into the government and helped authorities capture the others, rather than the government's claim that it captured the Germans on its own;[109] and second, because the Germans never had the chance to actually carry out their plans, they had never actually committed sabotage, leaving only a conspiracy charge.[110] United States Army Judge Advocate General Cramer advised that the punishment for a conspiracy charge would be minimal, a result that did not satisfy a president determined to execute the Germans.[111] Thus, to protect facts and obtain the punishment he wanted, President Roosevelt created a military commission to try the men, citing the law of war (but not the Articles of War) as his justification.[112] In establishing the commission, President Roosevelt gave it broad

[107] Duncan v. Kahanamoku, 327 U.S. 304, 328 (1946).
[108] *Id.* at 344 (Burton, J., dissenting).
[109] *Id.*
[110] *Id.*
[111] *Id.*; Brief of Legal Scholars and Historians as Amici Curiae in Support of Petitioner at 3-4, Hamdan v. Rumsfeld, 548 U.S. 557 (Sept. 7, 2005) (No. 05–184) (hereinafter Brief of Legal Scholars).
[112] Fisher, *supra* note 39, at 37-38.

authority "to do anything it pleases."[113] The commission did not have to adhere to the Manual for Courts-Martial or procedures created by Congress; rather, the commission could make up rules as it went along. Moreover, instead of a traditional review process, the judgments of the commission were sent directly to President Roosevelt.[114]

Almost two weeks into the commission's hearings, defense attorney Col. Royall defied orders from President Roosevelt and turned to the civil courts.[115] Through some backroom meetings, an agreement was made with the Justices of the Supreme Court to hear the case.[116] The evening before the Court was scheduled to hear the case, Col. Royall convinced a district judge to deny a writ of *habeas corpus*; the following day, the attorneys submitted 165 pages of briefs to the Supreme Court.[117] Royall promised to get papers to the appellate court, and oral arguments began.[118]

If the process was not enough to raise some doubts about the *Quirin* precedent, the conflicts-of-interest affecting four of the Justices certainly does. Justice Felix Frankfurter was intimately involved with the Roosevelt Administration as an advisor, specifically offering guidance on how to structure military commissions with a Supreme Court challenge in mind. Justice Frank Murphy was an active reserve army officer during the case, showing up at the conference in his uniform. However, recognizing the conflict, Murphy recused himself before oral arguments began.[119] Justice James F. Byrnes, like Frankfurter, was a close advisor of the Roosevelt Administration: in fact, the

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[113] *Id.* at 38 (quoting RG 153, Records of the Office of the Judge Advocate General (Army), Court-Martial Case Files, CM 3341178, 1942 German Saboteur Case, National Archives, College Park, Md., at 991).

[114] Fisher, *supra* note 39, at 37.

[115] Brief of Legal Scholars, *supra* note 112, at 5.

[116] Fisher, *supra* note 39, at 39. The meetings between the attorneys and Justices took place at the home of Justice Black and the farm of Justice Roberts, while other Justices were called on the phone.

[117] *Id.* at 39-41.

[118] *Id.*

[119] Brief of Legal Scholars, *supra* note 112, at 10.

Attorney General thought Justice Byrnes was on leave from the Court for a time.[120] Finally, Chief Justice Stone's son was part of the defense team.[121] In addition to these conflicts, at least two of the Justices – Stone and Frankfurter – were openly hostile to the defendants' interests.[122]

Despite these circumstances, the Court heard the case and, breaking with precedent, issued a *per curiam* order upholding the validity of the commission before releasing – or even writing – a full opinion. The Court held that the Articles of War – specifically Articles 12, 15, 38, 46, 81 and 82 – provided authorization from Congress to the President to convene a military commission, and that the commission had the jurisdiction to try violations of the law of war.[123] Moreover, the Court rejected the claims of the defense attorneys that the Fifth and Sixth Amendments to the Constitution, as well as Section 2 of Article III, should extend to military commissions and require a trial by jury in this case.[124]

Both the order and the full opinion have been heavily criticized, not only by scholars, but by the Justices themselves.[125] Justice Frankfurter asked Frederick Bernays Wiener to analyze the case, resulting in a critical series of essays pointing out "serious constitutional problems."[126] Justice Jackson expressed his general sense of the *Quirin* case when considering whether the Court should sit in a summer session to hear the *Rosenberg* case, saying "the *Quirin* experience was not a happy precedent."[127] The lesson of this case appears to be that when there is no genuine necessity owing to the lack of alternative civil or military courts,

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[120] *Id.*

[121] Fisher, *supra* note 39, at 40.

[122] Brief of Legal Scholars, *supra* note 112, at 8-9.

[123] *Quirin*, 317 U.S. at 27-28.

[124] *Id.* at 40 ("[W]e must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts.").

[125] *See, e.g.,* Brief of Legal Scholars, *supra* note 112.

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

[127] Fisher, *supra* note 39, at 45 (quoting "Memorandum Re: Rosenberg v. United States, Nos. 111 and 687, October Term 1952," July 4, 1953, at 8 in FRANKFURT PAPERS, Part I).

military commissions are not the best vehicles for ensuring justice in conformity with American standards. Rather, commissions may provide an opportunity for the government to abuse its power to the defendants' detriment. Notably, Winthrop's criteria were not satisfied in the *Quirin* case.[128]

IV. COMPARATIVE HISTORICAL ANALYSIS OF GUANTANAMO BAY MILITARY COMMISSIONS

With the historical use of commissions set forth, it is now possible to examine how the Guantanamo Bay commissions fit into the commission lineage.[129] Of the three historic functions of commissions, the Guantanamo Bay commissions fall squarely into the third category: to punish violations of the law of war. In this way, the commissions are not entirely without precedent, as they serve the same purpose as the military commissions used by George Washington during the Revolutionary War, General Scott in Mexico (with his Council of War), and the *Quirin* Commission ordered by President Roosevelt. However, the Guantanamo Bay commissions are also quite different from these prior examples in important ways.

First, although initially created by President George W. Bush's Military Order of November 13, 2001 concerning Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,[130] after the Supreme Court struck down the commissions in *Hamdan*, Congress resurrected them with the Military Commissions Act of 2006 ("MCA").[131] Never before have law of war military commissions had a statutory authorization such as the MCA. During the Mexican-American War, Secretary of

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[128] *See supra* Part III.

[129] It is important to note that this article is not arguing for or against the closure of the detention center at Guantanamo Bay. That center presently houses individuals who are not awaiting trial because they have been deemed to be active enemy combatants who still present a threat to the United States. Whether these individuals should continue to be held, or where they should be held, is beyond the scope of this article.

[130] Military Order--Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 37 WCPD 1665, 66 Fed. Reg. 57833 (Nov. 13, 2001).

[131] The MCA was amended by the Military Commissions Act of 2009.

War William Marcy recommended legislation to authorize military tribunals, and General Scott tried to obtain clarifying authority from Congress for his commissions.[132] However, Congress failed to act in both instances.[133] Later, General Sickles claimed to derive the authority to convene a military commission during Reconstruction from his position as commander on the battlefield, as well as "various acts of Congress."[134] Even in the *Quirin* decision during World War II, the Supreme Court looked to the 1914 revision of the Articles of War to find a *general* grant of congressional authority to the President to create military commissions.[135] The lack of specific guidance from Congress essentially made prior law of war military commissions Article II courts, created through the President as Commander in Chief. After the MCA, though, the Guantanamo Bay commissions are essentially Article I courts, placing them in the same family as federal bankruptcy courts.

A second distinction between the Guantanamo Bay commissions and their predecessors is that, in addition to having jurisdiction over individuals subject to the MCA for violations of the law of war, the commissions can also hear cases involving offenses made punishable by the MCA: aiding the enemy, and spying.[136] While spying has been punishable by a law of war commission since at least George Washington's time, never before has such a commission been authorized to try federal statutory offenses.[137]

Third, the permanency of the Guantanamo Bay commissions makes them unique. Prior law of war commissions were *ad hoc* tribunals and lasted only for a brief period. Indeed,

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[132] Fisher, *supra* note 39, at 11-12.

[133] *Id.*

[134] H.R. REP. No. 39-23, at 10.

[135] *Quirin*, 317 U.S. at 27 (referencing Articles 12, 15, 38, 46, 81, and 82).

[136] Military Commissions Act of 2009, Pub. L. No. 111-84, § 948(d), 123 Stat. 2576 (2009) [hereinafter MCA].

[137] Stephen I. Vladeck, *The Long Reach of Guantánamo Bay Military Commissions*, N.Y. TIMES, Oct. 4, 2017, (available at https://www.nytimes.com/2017/10/04/opinion/the-long-reach-of-guantanamo-bay-military-commissions.html).

the Supreme Court's decision in *Quirin* was issued less than two months after the defendants were arrested. In contrast, the Guantanamo Bay commissions are run through the Office of Military Commissions, a firmly established office within the Department of Defense that even has its own official seal. Commissions have now been occurring for nearly two decades, with some individual cases lasting for many years. The Guantanamo commissions are now the longest-running law of war commissions in American history.

A specific example of the length of time involved in the Guantanamo Bay commissions is the case of Abd al-Rahim al-Nashiri. Al-Nashiri is charged with the bombing of the USS Cole, which took place in 2000. His commission was not convened until 2011, and, because of various appeals and legal proceedings, remains in the pretrial stages as of late 2018.[138]

Fourth, the Guantanamo commissions are different from their predecessors in that they are subject to an extensive set of rules and procedures, as well as levels of appeals through the civilian judicial system. Typically, military commissions trying law of war violations are held on the battlefield in the middle of a conflict, and the charged offense is straightforward. At such times, full trial procedures cannot and need not be employed. Even the *Quirin* case, a law of war commission that was not in the middle of a battlefield, lacked an extensive set of trial rules and procedures. The MCA, however, provides that the same rules of evidence applicable to courts-martial shall apply to the commissions, and that the Secretary of Defense may prescribe additional procedural rules.[139] The rules have been set forth not just in a single manual, but in multiple editions of manuals.[140]

One final distinguishing feature of the Guantanamo commissions is that, but for their unique statutory basis, they

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[138] Sarah Grant, *Abatement in Al-Nashiri is Reversed*, LAWFARE, Oct. 15, 2018, (available at https://www.lawfareblog.com/abatement-al-nashiri-reversed) ("[w]hen precisely proceedings will resume, however, remains unknown").

[139] MCA at § 949a(a).

[140] *See, e.g.*, Manual for Military Commissions United States 2016 Revised Edition (2016).

would fail to satisfy more of Winthrop's requirements than any prior law of war commission. With respect to the first, second, and third conditions, although there is not a clearly defined battlefield in the conflict against terrorism or violent extremism, it is difficult to contend that the Guantanamo Bay naval base is within the theatre of war: none of the charged offenses occurred at the base. Whether the fourth condition is satisfied is also challenging to discern since there is no definitive commencement to the conflict: although the attacks on September 11, 2001, are often viewed as the start, there were previous attacks on American embassies in Africa, the USS Cole, and the World Trade Center that could also serve as the start of the conflict. It is also unclear when the conflict will end, or even if the conflict can be considered an actual war to which the laws of war apply. Thus, it is difficult to determine whether Winthrop's fourth criterion is met. Finally, the defendants in the Guantanamo commissions are not members of a foreign army. Rather, their alleged offenses were committed under the flag of a non-state entity. Hence, Winthrop's fifth criterion is not met.

Never in the history of the United States has the military used (on its own or on the order of the President) a military commission to try violations of the law of war where the commission likely does not meet all five of Winthrop's criteria. While the most controversial of commissions, such as the *Quirin* commission, have failed to meet one or two of Winthrop's criteria, only the Guantanamo Bay military commissions fail to meet all five.

In short, the Guantanamo Bay military commissions are unprecedented, and in reality have far more in common with a federal bankruptcy court than any other military commission in American history.

V. AN ALTERNATIVE SOLUTION: FEDERAL ARTICLE III COURTS

Military commissions are tribunals of necessity. George Washington and Andrew Jackson turned to commissions to deal with spies, who were unlawful combatants according to the custom of war. General Scott created commissions in response to

a need to enforce discipline and control over a foreign territory. Presidents Johnson and Roosevelt used commissions because they believed the alternative forms of trial available would not lead to their desired result. These tribunals were used to fill a void during a military conflict between courts-martial subject to the Articles of War and Uniform Code of Military Justice, and civilian courts subject to the Constitution and Bill of Rights. According to historical usage and the common law, when either of these two established courts are available options, a military commission is unnecessary, and thus, inappropriate.[141]

As the United States approaches the seventeenth anniversary of the Guantanamo Bay commissions, it has become evident that there is no true necessity for their use because the federal Article III courts – which have always remained fully operational – can handle terrorism cases. Indeed, not only have the federal courts shown that they are capable of handling terrorism-related cases, but that they excel at it. Since September 2001, more than 600 individuals have been convicted of terrorism-related charges in federal Article III courts.[142] As just one example, in May 2017, Tairod Pugh was sentenced to 35 years in prison by United States District Judge Nicholas G. Garaufis in the Eastern District of New York. Pugh was convicted, following a jury trial, of attempting to provide material support to a foreign terrorist organization and obstruction of justice.[143] Even Attorney General Jeff Sessions, who criticized President Obama's attempts

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[141] Though not directly on point, Blackstone recognized the inappropriateness of martial law when civilian tribunals are available, writing that "it ought not to be permitted in time of peace, when the king's courts are open for all persons to receive justice according to the laws of the land." 1 WILLIAM BLACKSTONE, COMMENTARIES *400.

[142] Human Rights First, *Federal Courts Continue to Take Lead in Counterterrorism Prosecutions,* Feb. 14, 2018, (available at https://www.humanrightsfirst.org/resource/federal-courts-continue-take-lead-counterterrorism-prosecutions); *see also* Laura K. Donohue, *Terrorism Trials in Article III Courts*, 38 HARV. J.L. & PUB. POL'Y 105, 105-06 (2015) (reporting even higher numbers).

[143] Press Release, United States Dep't of Justice, *Air Force Veteran Sentenced To 35 Years In Prison For Attempting To Join ISIS And Obstruction Of Justice,* May 31, 2017, (available at https://www.justice.gov/usao-edny/pr/air-force-veteran-sentenced-35-years-prison-attempting-join-isis-and-obstruction).

to use the federal courts for terrorism cases, has permitted the Department of Justice to continue using the federal courts.[144] The federal courts also feature prosecutors who have developed expertise in investigating and prosecuting terrorism-related cases.[145]

The capability of the federal Article III courts stands in stark contrast to the track record of the Guantanamo Bay military commissions. Since 2001, only eight convictions have been secured in Guantanamo Bay; only one has been upheld on appeal.[146] In addition to unresolved questions of constitutionality[147] and the continuing creations of new controversies,[148] it seems that the one thing the Guantanamo Bay military commissions have not been able to provide is precisely what military commissions are designed for: swift justice.

Thus, if the last seventeen years have shown anything, it is that not only do the federal Article III courts undercut any assertion of necessity in favor of the Guantanamo Bay

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[144] *See* United States v. Damache, No. 11-CR-00420-PBT (E.D. Pa. July 28, 2011) (Indictment); Rebecca R. Ruiz, Adam Goldman & Matt Apuzzo, *Terror Suspect is Brought to the U.S. as Trump's Stance Shifts*, N.Y. TIMES, July 21, 2017, at A1.

[145] *See, e.g.*, William Finnegan, *Taking Down Terrorists in Court*, THE NEW YORKER (May 15, 2017) (profiling then-Assistant United States Attorney Zainab Ahmad, who has successfully prosecuted more than a dozen international terrorism cases) (available at https://www.newyorker.com/magazine/2017/05/15/taking-down-terrorists-in-court).

[146] Scott R. Anderson, *Something is Rotten with the State of the Military Commissions*, LAWFARE, Mar. 2, 2018, (https://lawfareblog.com/something-rotten-state-military-commissions); Laura King, *Trump's Guantanamo Bay order may be largely symbolic, but it renews debate*, L.A. TIMES (Jan. 31, 2018) (available at http://www.latimes.com/nation/la-na-guantanamo-background-20180131-story.html).

[147] *See, e.g.,* Bahlul v. United States, 840 F.3d 757 (D.C. Cir. 2016), *reh'g denied* (Nov. 28, 2016), *cert. denied sub nom. al*, 138 S. Ct. 313 (2017) (discussing constitutionality of military commissions' statutorily conferred jurisdiction over offenses that are not violations of the law of war).

[148] *See, e.g.*, Carol Rosenberg, *Now we know why defense attorneys quit the USS Cole case. They found a microphone.,* MIAMI HERALD, Mar. 8, 2018, (available at http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article203916094.html).

commissions, but in fact that they are the far better choice for terrorism-related cases.

CONCLUSION

Military commissions have a legitimate role to play in the American justice system. Where circumstances present a true need because an established civilian court or court-martial is unavailable, commissions have been appropriately used. The current conflict with international terrorism, however, does not present such a need. Rather than providing an *ad hoc* forum for swift battlefield justice, the Guantanamo Bay commissions are slow and full of procedural requirements. In fact, and notwithstanding what they were originally intended to be, today they are nothing more than controversial and inefficient Article I courts created for a single purpose that, after seventeen years, they have been unable to fulfill.

The continuing failure of the Guantanamo Bay commissions is perhaps the most damning way in which they are historic anomalies. These lengthy and largely unsuccessful commissions make it clear that the historic need for a trial would be far better satisfied using federal Article III courts, which have already convicted hundreds of individuals of terrorism-related charges through fair trials and without incident since 2001.[149]

[149] *See* Human Rights First, *supra* note 143.

SOMETHING TO BELIEVE IN: ALIGNING THE PRINCIPLE OF HONOR WITH THE MODERN BATTLEFIELD

Major Aaron L. Jackson* and Colonel Kristine D. Kuenzli**

It is a near-guaranteed question faced by judge advocates at any given Law of Armed Conflict briefing: "Why must I adhere to the Principle of Honor when the enemy does not?" Soldiers, Sailors, Airmen, and Marines preparing for asymmetric warfare are often frustrated by the thought of adhering to rigid principles of battlefield conduct in the face of an enemy all too willing to ignore—and exploit—the rules of combat. It is a fair question from servicemembers risking their lives on the modern battlefield, one that demands a comprehensive legal response. Unfortunately, the answer attempted in the Department of Defense's new Law of War Manual is far from satisfying. Rather than offering an on-target response that focuses on the realities of modern warfare, the manual's justification for the Principle of Honor remains rooted in archaic notions of war often inapplicable to today's battlefield. This

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Article exposes the paradox of continuing to explain the Principle of Honor solely through the lens of traditional "perfect warfare" doctrine despite the realities of today's "imperfect" battlefield. This Article offers several contemporary ways to redefine this important principle.

INTRODUCTION

Judge advocates tasked with teaching the Law of Armed Conflict (hereinafter the "LOAC") to Soldiers, Sailors, Airmen, and Marines are almost certain to see at least one hand rise in the audience by a servicemember with the same vexing question: "Why do I have to abide by the Law of War when the enemy does not?" As members of the Judge Advocate General's Corps currently teaching at the United States Air Force Academy, both authors have encountered this question countless times throughout their careers from military members and cadets seeking to understand the paradox of yielding to medieval notions of honor in the face of an enemy all too willing to ignore the rules of combat. For members of the armed forces, adherence to the Law of War is not an option. For the U.S. servicemember, decisions on the battlefield—often measured in milliseconds—may stand equal chance of medal or Court-Martial.[1] The enemy in the War on Terror, however, often appears all too willing to ignore the rules of warfare. As a result, one may understand the difficulty some servicemembers have accepting grossly different standards of combat on the modern battlefield.[2]

This concern is not reserved for the military, but rather, is one expressed by many in society, particularly the families of servicemembers who watch their loved ones depart for combat and yearn for their safe return. Over the past decade, questions surrounding battlefield conduct have reached every aspect of American life—from the recent presidential campaign[3] and

[1] The legal implication of a servicemember's conduct in war was recently depicted in the movie American Sniper, when Chris Kyle faced the decision to engage a young boy transporting a grenade toward a military convoy in Iraq. When agonizing over the decision to pull the trigger, the sniper's spotter stated, "They'll fry you if you're wrong. They'll send you to Leavenworth." AMERICAN SNIPER (Warner Bros. Pictures 2014).

[2] In the author's recent deployment to an undisclosed location in the Middle East, fighter pilots engaged in air operations in Raqqa, Syria discussed the same struggle when choosing to engage the enemy below.

[3] *See generally* David Welna, *GOP Presidential Candidates Bring Torture Back Into The Spotlight*, NPR: NATIONAL SECURITY (Feb. 9, 2016, 4:22 PM), http://www.npr.org/2016/02/09/466186345/gop-presidential-candidates-bring-torture-back-into-the-spotlight.

Supreme Court nomination[4] to the pages of top-selling books and Hollywood productions. As an illustration, the movie *Lone Survivor* highlighted the brutal consequences of maintaining honor on the battlefield when a Navy SEAL team's decision to release several Afghan civilians encountered during a mountain-side mission led to nineteen American deaths.[5] In the best-selling book that spawned the movie, Marcus Luttrell echoed the frustrations of many who have experienced modern combat: "In the global war on terror, we have rules, and our opponents use them against us. We try to be reasonable; they will stop at nothing." [6] His frustrations speak for many in society trying to understand honor in the War on Terror.

As the leading authority on this subject, the Department of Defense Law of War Manual (hereinafter the "Manual") ought to provide the official legal response for why servicemembers must abide by the Law of War when the enemy does not.[7] This 1,204-page product—a multi-year, Herculean effort first introduced in 2015— admirably approaches the broad and often-amorphous concepts surrounding the rules of war in an organized and comprehensive manner.[8] The Manual is the foundational document for the rules of warfare required by every military member, offering not only the rules but the reasons for their implementation.[9] Any servicemember seeking to understand the Law of War and the justification for expected battlefield conduct need only turn to the pages of this important guide.[10]

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[4] *See generally* Evan Halper, *Sen Feinstein grills Neil Gorsuch on torture and wiretapping work during Bush presidency*, LOS ANGELES TIMES (Mar. 21, 2017, 8:19 AM), http://www.latimes.com/politics/washington/la-na-essential-washington-updates-feinstein-grills-gorsuch-on-torture-and-1490108624-htmlstory.html.

[5] *See* Christopher Klein, *The Real-Life Story Behind "Lone Survivor"*, HISTORY.COM (Jan. 6, 2014), http://www.history.com/news/the-real-life-story-behind-lone-survivor.

[6] MARCUS LUTTRELL, LONE SURVIVOR: THE EYEWITNESS ACCOUNT OF OPERATION REDWING AND THE LOST HEROES OF SEAL TEAM 10 (Little, Brown and Company, 2013).

[7] *See generally* DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL (Dec. 2016).

[8] *See id.*

[9] *See id.*

[10] *See id.*

Despite its comprehensive restatement of the rules of war, the Manual remains incomplete. This Article addresses the Manual's failure to provide a comprehensive explanation for the Principle of Honor based on its dogged reliance on the "perfect war" model (i.e. armed conflicts between nation-states) to fully conceptualize warfare.[11] The Manual's discussion of the Principle of Honor entirely fails to account for the "imperfect war" scenario commonly faced by servicemembers in the War on Terror.[12] This is notably peculiar, because the primary war model faced by the United States for nearly two decades now has been an imperfect one. Moreover, perfect war concepts often do not fit the dynamics of imperfect war. By relying entirely on the perfect war model to explain and rationalize the Principle of Honor, the Department of Defense seems to have placed its proverbial head in the sand, thereby failing to adjust to the modern battlefield and provide military servicemembers with a comprehensive explanation for the Principle of Honor.

The Manual must keep pace with the evolution of modern warfare by providing sound rationale for the Principle of Honor against an "imperfect" enemy that fails to adhere to the rules of war. Failure to do so will continue to erroneously paint a monochromatic picture of the doctrine and provide an unsatisfying answer for those looking to understand why the Principle of Honor remains equally applicable—and enforceable—in all conflicts facing the United States. In other

[11] *See generally* Bas v. Tingy, 4 U.S. 37 (1800). The term "perfect war" more commonly refers to armed conflict sustained by a formal declaration of war by Congress. The authors of this Article intentionally use "perfect war" as synonymous with International Armed Conflicts, or "IACs," that are lawfully entered between two nation-states. While not entirely accurate, the authors used this term to reference the more classic understanding of warfare.

[12] The authors use the term "imperfect war" throughout this Article in reference to conflicts between nation-states and non-state actors (generally referred to as Non-International Armed Conflicts, or "NIACs") where the nature of conflict remains somewhat ambiguous. The authors recognize that the terms "perfect war" and "imperfect war" are (ironically) "imperfectly" used (i.e. beyond their legal definitions) throughout this Article. The authors intentionally did so in order to juxtapose both forms of warfare—the classic depiction of warring nation-states versus the ambiguity of contemporary warfare. They request your indulgence in consideration of this Article.

words, the Department of Defense owes a better, contemporary answer for servicemembers with their hands in the air at the LOAC briefing. This Article attempts to do just that.

I. THE PRINCIPLE OF HONOR

A. The Origins and Codification of LOAC

To understand the problem with the current Manual, the reader must understand the evolution of the Law of Armed Conflict and the voluminous amount of materials the Manual attempts to consolidate and clarify. LOAC is not a singular work of art, but rather, a puzzle formed by hundreds of individual pieces of international and domestic law.[13] LOAC is captured by myriad international treaties, including the Hague Conventions of 1899 and 1907, the Geneva Conventions of 1948, the Additional Protocols of 1977, international judicial decisions, customary international law principles, and works of international scholars.[14] Within the domestic arena, various pieces of legislation, case law, the Uniform Code of Military Justice, and other military documents, such as Army Field Manual 27-10, form the United States' understanding and implementation of LOAC.[15] Until 2015, the Department of Defense had not attempted a cross-service document designed to "put the pieces together."[16] Today's Manual provides an outstanding step toward consolidating and conceptualizing this immensely important area of law. Despite its successes, there remains one glaring error: the explanation of the Principle of Honor.

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[13] *See* GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 11-20 (Cambridge Press, 2010).

[14] *See id.*

[15] *Id.*

[16] The Manual was first introduced in June of 2015. U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL ¶ 1.1.1 (2016). After receiving respectful criticism from legal scholars and field experts, the Manual was updated and released in December of 2016. *Id.* Though many aspects of the Manual were updated, the Principle of Honor, as it pertains to this Article, remained unchanged. *See id.* at ¶ 2.6.

B. "Honor" in Warfare

Honor on the battlefield is a concept as old as war itself. In approximately 800 B.C., Homer's "The Iliad" reflected the soldier's duty to honor and country.[17] Thucydides' depictions of the Peloponnesian War around 400 years later illustrated a similar notion of battlefield honor, going so far as to identify honor as one of three driving forces of mankind.[18] In the 5th century B.C., Sun Tzu's masterpiece "The Art of War" discussed, among other things, the importance of maintaining a tempered sense of honor at the upper echelons of the rank structure.[19] These influential works, representing commonly-held beliefs, depicted honor as a manifestation of internal fortitude rather than a principle of reciprocal conduct exchanged between enemies on the battlefield.

The movement toward globalization in the mid-1800s brought this conduct to the pages of domestic and international law. The "Lieber Code" (hereinafter the "Code") represents the first domestic attempt to codify the rules of war. [20] Known also as the "Instructions for the Government of Armies of the United States in the Field," or "General Orders No. 100," the Code was an instruction prepared by German-American jurist and political philosopher Francis Lieber, dictating acceptable conduct for

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[17] *See* HOMER, THE ILIAD (Samuel Butler trans., MIT CLASSICS). "My doom has come upon me; let me knot then die and without a struggle, but let me first do some great thing that shall be told among men hereafter." *Id.* "Without a sign, his sword the brave man draws, and asks no omen, but his country's cause." ALEXANDER POPE, THE ILIAD OF HOMER (Alexander Pope trans. 1720).

[18] *See generally* THUCYDIDES, *The Outbreak of the Peloponnesian War*, THE LATIN LIBRARY (available at http://thelatinlibrary.com/imperialism/readings/thucydides1.html) ("It was in keeping with the practice of mankind for us to accept an empire that was offered to us, and if we refused to give it up under the pressure of three of the strongest motives, fear, honor, and self-interest.").

[19] *See generally* SUN TZU, THE ART OF WAR (Huang trans. 1993) (Sun Tzu identified five "dangerous faults" that impact the effectiveness of general officers that included "a delicacy of honor which is sensitive to shame.").

[20] *See* GENERAL ORDERS NO. 100: INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (24 Apr. 1863) (available at http://avalon.law.yale.edu/19th_century/lieber.asp) [hereinafter Lieber Code].

warring soldiers.[21] The Code was subsequently signed into law by President Lincoln at the height of the Civil War.[22] The Lieber Code ensured the humane, ethical treatment of populations in occupied areas.[23] Among other things, the Code expressly forbade giving "no quarter" to the enemy (i.e. killing prisoners of war), the use of poisons, and employing torture to extract confessions.[24] It described the rights and duties of prisoners of war and further defined the state of war, status of occupied territories, methods to achieve the ends of war, and permissible and impermissible means to attain those ends.[25] As such, it is considered to be the first attempt to codify customary rules of war and serves as the precursor to international humanitarian law through international treaties such as the Hague Regulations of 1907.[26]

While the Code was being adopted within the United States, a conference met in Geneva, Switzerland to draft a resolution focused on establishing international standards for medical services and treatment of the sick and wounded during times of war.[27] This international resolution, spearheaded by a new organization that would later become the International Committee of the Red Cross, brought nations together to eventually secure the 1864 Convention for the Amelioration of the Condition of the Armies in the Field and the 1868 Additional Articles Related to the Condition of the Wounded in War.[28]

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[21] *See id.*

[22] *See id.*

[23] *See id* at art. 67.

[24] *See id* at art. 16 and 60.

[25] *See generally id.*

[26] *See generally* Hague Convention (IV) Laws and Customs of War on Land (18 Oct. 1907) (available at https://ihl-databases.icrc.org/ihl/INTRO/195).

[27] *See History of the ICRC*, ICRC.ORG (available at https://www.icrc.org/en/who-we-are/history) (Oct. 29, 2016); *see generally Additional Articles relating to the Condition of the Wounded in War* (Oct. 20, 1868) (available at http://hrlibrary.umn.edu/instree/1868a.htm); *see generally* Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (Aug. 22, 1864) (available at http://avalon.law.yale.edu/19th_century/geneva04.asp); *see generally* Daniel Palmieri, *How warfare has evolved—a humanitarian organization's perception: The case of the ICRC, 1863-1960,* 97 INT'L REV. RED CROSS 985, 987 (2016).

[28] *Id.*

Inherent within these international treaties was the understanding that warfighters injured during hostilities should be treated humanely and with dignity, thereby establishing—for the first time in history—international law that secured, among other things, honor on the battlefield.[29]

The Department of Defense's inclusion of honor as a distinct principle of warfare in the Manual is a marked change from decades of prior guidance.[30] Early efforts to establish principles of LOAC included a Principle of Honor.[31] The notion of "honor" as a specific principle, however, retreated into the shadows of LOAC doctrine by the mid-twentieth century.[32] Instead, LOAC doctrine directly focused on two concepts: chivalry and perfidy.[33] Based on notions of trust, good faith, and professionalism, chivalry refers to battlefield conduct that reflects the distinguished nature of the military profession.[34] Perfidy is defined as "acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obligated to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence."[35] In

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[29] *Id.*

[30] *Id.*

[31] *See generally* Sean Watts, *The DOD Law of War Manual's Return to Principles,* JUST SECURITY (June 20, 2015, 9:12 AM), https://www.justsecurity.org/24270/dod-law-war-manuals-return-principle.

[32] Sean Watts, *The DOD Law of War Manual's Return to Principles,* JUST SECURITY (June 20, 2015, 9:12 AM), https://www.justsecurity.org/24270/dod-law-war-manuals-return-principle. "Since 1956, the principle of honor or chivalry had largely fallen out of US law of war expressions, leaving the increasingly narrow prohibition of perfidy as one of the only clearly expressed limitations on treacherous or bad faith means and methods of warfare."

[33] *See, e.g.,* U.S. DEP'T OF ARMY, FM 27-10 THE LAW OF LAND WARFARE (1956) (available at http://www.aschq.army.mil/gc/files/FM27-10.pdf). Chapter 1, Basic Rules and Principles "requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes and that they conduct hostilities with regard for the principles of humanity and chivalry." *Id.*

[34] As noted in the U.S. Army Judge Advocate Operational Law Handbook, "Chivalry . . . demands a degree of fairness between offense and defense and requires mutual respect and trust between opposing forces." DAVID H. LEE ET AL, OPERATIONAL LAW HANDBOOK, 14-15 (David H. Lee 2015).

[35] Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art. 31¶ 1, June 8. 1977

essence, perfidy involves injuring the enemy by resorting to means that do not reflect integrity and honor on the battlefield.[36] Though remaining an important aspect of U.S. war doctrine through discussion of both chivalry and perfidy, the Principle of Honor remained noticeably absent until now.

Response to the Manual's restoration of the Principle of Honor has been mixed. One commentator noted a "visceral negative reaction" to the new focus: "the last time I checked, knighthood and the Crusades weren't shining examples of humanity."[37] The reemergence of the Department of Defense's interpretation of the Principle of Honor, however, has garnered the support of others, to include former Deputy Judge Advocate General for the United States Air Force, Major General (ret.) Charles J. Dunlap,[38] who recognized that "while some elements of chivalry may have indeed drawn from chauvinistic connotations, *modern* concepts of battlefield honor can and do draw from a broader and deeper moral source that underpins the law of war."[39] Whether you agree with either opinion, the Manual clearly reestablishes the Principle of Honor as a core principle of LOAC. It does so, however, using the same conceptual model as when it was first introduced.

[hereinafter AP I]. Article 37 makes clear that "it is prohibited to kill, injure, or capture an adversary by resort to perfidy." Examples of perfidy include feigning surrender in order to draw the enemy closer, feigning wounded status, or misusing protective emblems such as the Red Cross.

[36] LEE, *supra* note 34, at 15. The dichotomy of conduct experienced on today's "imperfect" battlefield is often reflected through perfidy. United States servicemembers are precluded from resorting to acts of perfidy at all times, regardless of the circumstance. Acts of perfidy, however, are commonplace for the enemy and are often used as a means of gaining tactical or strategic advantage. This inequity of conduct commonly generates frustration and confusion among servicemembers, often expressed with great enthusiasm during the typical LOAC briefing.

[37] Rachel VanLandingham, *The Law of War is Not About "Chivalry,"* JUST SECURITY (Jul. 20, 2015, 9:13AM), https://www.justsecurity.org/24773/laws-war-chivalry.

[38] Charles J. Dunlap, Jr., *Honor, Morality and the DoD Law of War Manual,* JUST SECURITY (Oct. 26, 2015, 11:00 AM), https://www.justsecurity.org/27094/honor-morality-dod-law-war-manual.

[39] *Id.*

II. THE CURRENT PARADOX

The Manual needs to provide servicemembers with a realistic understanding of why they must adhere to honorable conduct regardless of the enemy's resolve to ignore the Laws of War. By relying on precedent rooted in archaic notions of a "perfect war" model, the Manual has failed to align the Principle of Honor with the realities of modern warfare. This section identifies the existing foundational concepts of the Principle of Honor adopted by the Manual that are inconsistent with the current battlefield.

A. "Pacta Sunt Servanda"

The Manual's primary justification for the Principle of Honor seems to rely on the doctrine of *pacta sunt servanda*,[40] a principle of international and contract law that generally acknowledges the importance of keeping one's promises.[41] In international law, this doctrine is used, among others, as a mechanism to enforce treaty law. Under *pacta sunt servanda*, a nation-state that fails to comply with international treaties risks its ability to enter into future agreements. On a macro scale, an international community that fails to recognize the importance of *pacta sunt servanda* significantly endangers global stability. As a result, nation-states agree that such promises "should be kept" in order to maintain international order.[42]

From a military perspective, the doctrine of *pacta sunt servanda* stands for the premise that combatants agree to adhere to certain limitations of conduct to best ensure that opposing

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[40] U.S. DEP'T OF ARMY, *supra* note 33, ¶ 2.6.2.1. ("Here, honor does not address what those limits are so much as requires that parties accept that there are legal limits that govern their conduct of hostilities. This acceptance is a prerequisite for the existence and operation of the law of war in the way that the principle of pacta sunt servanda (treaties are binding are parties and must be performed by them in good faith) provide a necessary foundation for treaties to exist and operate as instruments that are legally binding on States.")

[41] *See* CHARLES L. KNAPP, ET AL., PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS 26 (Aspen Publishers, 5th ed. 2003).

[42] *Id.*

forces will do the same. As noted in the Manual, "*honor* may be understood to provide a foundation for obligations that help enforce and implement the law of war or special agreements between belligerents during armed conflict."[43] Failure to adhere to *pacta sunt servanda* risks unnecessary escalation of force and inappropriate battlefield tactics, thus delaying—or outright eliminating—a return to normalcy at the conclusion of hostility. Through *pacta sunt servanda*, opposing military forces understand the importance of maintaining order on the battlefield and are, therefore, willing to operate within the boundaries of LOAC.

The Manual's use of *pacta sunt servanda* is often inapplicable to the imperfect war model found in the War on Terror. While *pacta sunt servanda* reflects a willingness to limit one's battlefield conduct as a form of a quid pro quo with the enemy, the reality is terrorist organizations operating within the imperfect warfare model generally do not adhere to modern principles of warfare.[44] On the contrary, they commonly exploit their enemy's general reluctance to violate LOAC in order to gain a strategic advantage.[45] One recent example was during the recapture of Raqqa, where ISIS forces used women and children as human shields to avoid direct targeting.[46] Such conduct remains common practice for terrorist organizations engaged in the War on Terror. *Pacta sunt servanda* is thus untenable within the imperfect warfare model, requiring a new conceptualization for the Principle of Honor in modern warfare.

B. "Mutual Respect Between Opposing Forces"

The Manual's substantive discussion of honor is heavily tied to the notion of mutual respect: "Honor demands . . . a certain

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[43] U.S. DEP'T OF ARMY, *supra* note 33.

[44] *See generally* Holly Williams, *ISIS Fighters Holed Up In Raqqa Believed to Have Used Women, Children to Use as Human Shields*, CBSNEWS.COM (Oct. 17, 2017, 7:17 P.M), https://www.cbsnews.com/news/isis-fighters-holed-up-in-raqqa-believed-to-have-women-children-to-use-as-human-shields/.

[45] *Id.*

[46] *Id.*

mutual respect between opposing military forces."[47] Use of the term "mutual respect" pervades the Manual's discussion of honor, recurring four separate times in different areas throughout the section.[48] Yet, by using the antiquated term "mutual respect" as a primary conceptualization of the Principle of Honor, the Manual continues to languish in the past.

The reality is that respect on the modern battlefield is not "mutual." Despite U.S. efforts, enemy combatants—from Al Qaeda operatives in Iraq, Afghanistan, or Yemen to Islamic State belligerents in Iraq and Syria—do not demonstrate respect for lawful combatants. In early 2015, Jordanian pilot Moaz al-Kasasbeh was burned alive after capture by the Islamic State after crashing in ISIS-controlled territory.[49] A video of the violent execution was subsequently released worldwide by the terrorist organization for propaganda purposes.[50] Two Turkish soldiers received the same fate the following year.[51] Fighters captured by the organization are commonly paraded through crowded streets in cages.[52] Individuals believed to be soldiers or spies are often summarily executed by terrorist organizations after capture. Such engagement of soldiers identified as *hors de combat* by international law highlights the general lack of "mutual respect" for lawful combatants held by those operating within the

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[47] U.S. DEP'T OF ARMY, *supra* note 33, ¶ 2.6. There are three subparagraphs that make up the Honor section. The first subparagraph provides a quick background of terminology, the second discusses "a certain amount of fairness in offense and defense," and the third directly references mutual respect. The author elected not to identify the first subparagraph as a key section based on its brevity.

[48] *See id*. at ¶ 2.6, 2.6.3, 2.6.3.2, and 2.6.3.3. Despite repeatedly using the term, the Manual includes just one sentence to justify its adoption: "[o]pposing military forces should respect one another . . . because they share a profession *and they fight one another on behalf of their respective States* and not out of personal hostility." *Id.* at ¶ 2.6.3. (emphasis added).

[49] *Jordan Pilot Murder: Islamic State Deploys Asymmetry of Fear*, BBC NEWS (Feb. 4, 2015), http://www.bbc.com/news/world-middle-east-31129416.

[50] *See id*.

[51] *IS 'Burns Turkish Soldiers Alive' in Syria Execution Video*, BBC NEWS (Dec. 23, 2016), http://www.bbc.com/news/world-middle-east-38412076.

[52] Yousuf Basil & Holly Yan, *New ISIS Video Shows Kurdish Peshmerga Soldiers in Cages in Iraq*, CNN.COM (Feb. 23, 2015, 1:29 A.M.), http://www.cnn.com/2015/02/22/middleeast/isis-crisis/index.html.

imperfect war model. As a result, a reliance on "mutual respect" is misplaced and inappropriate for the modern battlefield.

C. "A Common Class of Professionals"

Similar to "mutual respect," the Manual further justifies the Principle of Honor by noting that "*honor* . . . reflects the premise that military forces are a common class of professionals who have undertaken to comport themselves honorably."[53] In other words, the profession of arms demands a certain level of respect on the battlefield based on the enemy's elevated status as a professional soldier. Inclusion of this passage perpetuates medieval notions of chivalry by demanding a more exacting standard of conduct between "a common class of professionals."

By singularly identifying the opposition as "a common class of professionals," the Manual continues to monochromatically rationalize the Principle of Honor through the perfect war model—lawful fighting forces operating under the combatant's privilege. The Manual fails to provide justification for the extension of honor to unprivileged belligerents operating outside the law on the modern battlefield. Interestingly, the Manual does recognize the existence of unlawful belligerents in combat.[54] It does so, however, as if in passing, through a single sentence discussing whether to extend certain privileges to captured forces based on their combatant status.[55]

Enemy belligerents within the imperfect war model are not a "common class of professional," nor have they demonstrated serious intent to "comport themselves honorably" on the battlefield.[56] This is evidenced by the treatment of captured soldiers, destruction of civilian objects and antiquities, and adoption of perfidy as a standard battlefield tactic. Terrorist

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[53] U.S. DEP'T OF ARMY, *supra* note 33, ¶ 2.6.3.2.

[54] *Id.* ("On the other hand, private persons are generally denied the privileges of combatant status because they do not belong to this class of combatants.").

[55] *Id.*

[56] *Id.*

organizations such as the Islamic State commonly rape women,[57] kill innocent civilians,[58] and engage in "kidnap for ransom" exploits.[59] One report indicates that thousands of civilians have been used as human shields throughout Iraq's recent efforts to recapture the city of Mosul.[60] To characterize such organizations as a "common class of professional" on par with the lawful combatant is a gross misstatement and highly offensive to the military profession. While the Department of Defense may not intend to place terrorist organizations within this distinguished category, they have not provided any other definition for this group of individuals engaged on the battlefield, nor do they offer any reason for why servicemembers must continue to abide by the Principle of Honor when engaging an unlawful combatant.

D. "Breach of Trust with the Enemy"

The Manual further justifies the Principle of Honor by explaining that "*honor* forbids resort to means, expedients, or conduct that would constitute *a breach of trust with the enemy*."[61] Perfidy is identified by the Manual as conduct that violates such trust between opposing forces.[62] The notion of "trust with the enemy" falls underneath the Manual's larger concern of ensuring "fairness" on the battlefield. The Manual makes the necessity of fairness abundantly clear: "Honor *requires* a certain amount of fairness in offense and defense."[63] To ensure fairness on the

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[57] *See, e.g.,* Douglas Ernst, *ISIS Captive Talks Terror Group's Rape Culture: "This is Normal,"* WASH. TIMES (Feb. 17, 2017), http://www.washingtontimes.com/news/2017/feb/17/isis-captive-talks-terror-groups-rape-culture-this.

[58] *See id.*

[59] *See generally* Paul Adams, *Kidnap for Ransom by Extremist Groups Extracts High Price*, BBC NEWS (Dec. 12, 2104), http://www.bbc.com/news/world-asia-30384160.

[60] *See* Laura Smith-Spark, *ISIS 'Executes' 232 near Mosul, Takes Thousands as Human Shields, UN says*, CNN (Oct. 29, 2016), http://www.cnn.com/2016/10/28/middleeast/iraq-mosul-isis/index.html.

[61] U.S. DEP'T OF ARMY, *supra* note 33, ¶ 2.6.2. (emphasis added)

[62] *Id.* at ¶ 2.6.2.2. "In particular, *honor* requires a party to a conflict to refrain from taking advantage of its opponent's adherence to the law by falsely claiming the law's protection." *Id.*

[63] *Id.* at ¶ 2.6.2. (emphasis added).

battlefield, combatants must engage in conduct that reflects a certain degree of trust between forces.

One may again understand the Manual's inclusion of this ideal in the perfect war scenario. While numerous justifications may be imagined, the Manual specifically provides three helpful concepts: engaging in an unfair manner on the battlefield, and thereby breaching the trust of the enemy, may 1) undermine LOAC protections, 2) impair "non-hostile relations between opposing belligerents," and 3) hinder any restoration of peace at the conclusion of conduct.[64] More broadly speaking, failure to adhere to honorable conduct on the battlefield raises the potential for opposing forces to engage in dishonorable conduct, including undermining LOAC protections. Continued behavior of this sort may generate a "race to the bottom" in terms of battlefield conduct, thus promoting an escalation of violence beyond that necessary to accomplish the military objective. Moreover, such dishonorable conduct may delay—or destroy—any chance for a return to peace at the end of hostilities. As a result, for the Principle of Honor to be applicable, opposing forces must enter into a form of "mutual trust" with the enemy that ensures both sides will continue to operate within the law. Given that terrorist organizations generally disregard the Law of War, however, this standard is again unworkable in the imperfect war scenario.

E. "In Good Faith"

Imbedded within the discussion of "mutual trust" is the idea of "good faith" on the battlefield.[65] Specifically, the Manual provides that "[*h*]*onor* may be understood to provide the foundation for the requirement for persons to comply with the law of war in good faith."[66] Violations of "good faith" include:

> (1) killing or wounding enemy persons by resort to perfidy; (2) misusing certain signs; (3) fighting in the enemy's uniform; (4) feigning non-hostile relations in order to seek a military advantage; and (5) compelling nationals

[64] *Id.* at ¶ 2.6.2.2.
[65] *Id.* at ¶ 2.6.2.1.
[66] *Id.*

> of a hostile party to take part in the operations of war directed against their own country.[67]

By using the terms "mutual trust with the enemy" and "good faith," however, the Manual once more demonstrates its problematic reliance on the perfect warfare model to justify the Principle of Honor. Both terms envision an exchange of professional conduct that simply does not exist in the War on Terror. Ruses, exploitations, and generally unfair conduct are daily exerted against the American servicemember. To expect—or hope for—more from the unlawful belligerent class would be foolish considering past experiences, further demonstrating that the current justification for the Principle of Honor identified by the Manual defies the reality of the modern battlefield. A better justification for this principle is therefore necessary.

III. CONTEMPORARY PROPOSALS FOR THE PRINCIPLE OF HONOR

In an age when our enemies will likely not confine themselves to honorable conduct, the Department of Defense must provide warfighters with contemporary rationale for doing so. Because the perfect war model proves insufficient to match the realities of warfare, one may find resolution through concepts rooted in human rights law, contract law, philosophy, and/or economic theory. Though each approach provides novel solutions, all options focus on establishing a construct beyond the archaic and untenable concepts of *quid pro quo* and *pacta sunt servanda*, thereby aligning the Principle of Honor with the modern battlefield.

A. The Human Rights Law Approach

The Human Rights Law (hereinafter referred to as "HRL") Approach answers the question posed at the LOAC briefing by reminding servicemembers that we abide by certain principles of human dignity in all possible circumstances based on fundamental tenets of law and practice rooted in the Universal Declaration of Human Rights (hereinafter referred to as

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[67] *Id.* at ¶ 2.6.2.2.

"UDHR").[68] This argument recognizes that, if we apply the higher ideal of human dignity as founded in the UDHR in times of war, we retain a truer and deeper commitment to honor in warfighting.[69] Applying this overarching principle of HRL to all conflicts would allow the focus to shift from the idea of reciprocal behavior to the unilateral preservation of dignity for all human beings—even when the enemy does not.[70]

Human dignity serves as a foundational principle of the UDHR and may be used to justify the Principle of Honor within the imperfect war model. The UDHR firmly declares, twice within the declaration's preamble, the dignity of every human being.[71] The term "dignity" is emphasized at various other points throughout the declaration, beginning with Article 1: "All human beings are born free and equal in dignity and rights."[72] Out of the 30 total articles that make up the UDHR, two other articles also affirm this

[68] *See generally,* UNIVERSAL DECLARATION OF HUMAN RIGHTS OF 1948 [hereinafter UDHR], (available at http://www.un.org/en/universal-declaration-human-rights/.). While aspects of human rights law have existed throughout history, this concept did not achieve international recognition until proclaimed by the United Nations General Assembly on 10 December 1948. *Id.* Still reeling at the time from the effects of two world wars in less than four decades, this declaration emphasizes the basic guarantees afforded to every human being. Not only did the United States approve of the UDHR, it played a highly influential role in creating the document and gaining consent of the General Assembly. *See generally*, Richard Gardner, *Eleanor Roosevelt's Legacy: Human Rights*, N.Y. TIMES (Dec. 10, 1988), http://www.nytimes.com/1988/12/10/opinion/eleanor-roosevelt-legacy-human-rights.html. Eleanor Roosevelt, United States delegate to the United Nations, served as chairwoman of the commission that ultimately developed and gained approval of the UDHR. Though not regarded as international law at the time of proclamation, many legal scholars today believe the declaration has since achieved binding effect as customary international law. *See, e.g.* Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287 (1996). *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 (AM. LAW INST. 2003).

[69] *Id.*

[70] *See generally,* UDHR.

[71] UDHR, *supra* note 68 at Preamble. The declaration begins by recognizing the "inherent dignity . . . of all members of the human family," and later emphasized "the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom."

[72] *Id.* at art. 1.

point.[73] By virtue of this inherent dignity as a member of the human race, the declaration affords all humankind certain rights regardless of circumstance.

To be sure, this approach is not without criticism. Some legal professionals may take issue with the suggested attempt to incorporate HRL into LOAC.[74] For some, interweaving these two concepts creates something of a non-sequitur. This is primarily because some may be tempted to treat these two legal constructs as a zero-sum game: only one (HRL or LOAC) may operate in a given scenario and identifying which of these different and incompatible concepts applies merely depends on the given situation. This view, however, is mistaken—one does not lose the underlying HRL components when circumstances necessitate application of LOAC.[75]

HRL is already embedded within LOAC. One such example is the minimal standard of "humane treatment" for all captured individuals required by Common Article 3 of the Geneva Conventions.[76] The necessity for "humane treatment" and

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[73] *See id*. at art. 3 (Article 3 specifically affords "the right to life, liberty, and security of person."). *See also id*. at art. 28 (Article 28 provides that "[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.").

[74] In preparation for this Article, the authors discussed their theories at length with other military lawyers and field experts. This concern was expressed by a retired Air Force judge advocate, who took significant issue with the idea of interweaving HRL and IHL. This portion of the Article directly addresses his concerns.

[75] *See generally* Aaron L. Jackson, *ISIS in the United States: Which Legal Regime Applies?,* JUST SECURITY (January 11, 2016), https://www.justsecurity.org/28745/isis-united-states-legal-regime-applies/.

[76] Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea [hereinafter Second Geneva Convention], art. 3, Aug. 12, 1949, 75 U.N.T.S. 85, which provides that "In the case of armed conflict . . . occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: 1) Persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* . . . shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria."

protection against "cruel treatment" or "torture"[77] found within the Geneva Conventions closely follows Article 5 of the UDHR.[78] Common Article 3 further provides a right to protection against "outrages upon personal dignity"[79] as well as a right to a "regularly constituted court" prior to the passing of any sentence.[80] Article 75 of the Additional Protocol provides similar protection,[81] and the right to a regularly constituted court in matters of sentencing within the Geneva Conventions follows Articles 10 and 11 of the UDHR.[82] Language ensuring protection from discrimination articulated in both Common Article 3 and

[77] Second Geneva Convention, *supra* note 76 at Art. 3(a); *see also* Additional Protocol I, *infra* note 80 at art. 75(2).

[78] UDHR, *supra* note 68 at art. 5("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.").

[79] Second Geneva Convention, *supra* note 76, at art. 3(1)(c).

[80] *Id.* at art. 3(1)(d). In addition to Common Article 3 of the original Geneva Conventions, Article 75 of the Additional Protocol (enacted 28 years later), provides similar protection. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, art. 75, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I], which provides that "[P]ersons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria." Article 75, Additional Protocol I (1977).

[81] Second Geneva Convention, *supra* note 76 at art. 3(a); *see also* Additional Protocol I, *supra* note 80.

[82] UDHR, *supra* note 68, at art.10, which ensures that "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." Article 11 provides:

(1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Additional Protocol I also mirror Article 2 of the UDHR in remarkable fashion.[83]

Each of these examples demonstrates that components of HRL are already found within LOAC, yielding the conclusion that combining the two legal regimes in some circumstances is not at all inappropriate or uncommon.[84] As such, the notion of human dignity articulated within the UDHR may—and should—apply to the Principle of Honor in all scenarios of war, both perfect and imperfect. As the UDHR demonstrates, and LOAC affirms, there are some universal principles of human dignity that transcend one's circumstances. A foundational component of the Principle of Honor is that we are called to treat human beings with a certain level of dignity in war as in peace, regardless of the enemy's actions. Incorporating these HRL principles within the Manual offers a logical—and legal—explanation, without notions of reciprocity, for sustained honor on the modern battlefield.

B. The Contract Law Approach

A second way to justify the Principle of Honor in imperfect war is through a Contract Law Approach that focuses on the servicemember's contractual duty to the American people rather than the enemy. As noted earlier, *pacta sunt servanda* provides the primary legal justification for compliance with the Principle of Honor within the perfect war model. While the doctrine is primarily used as a basis for international treaty law, it equally applies to contract law. Just as nation-states that fail to enforce

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[83] *Id.* at art. 2, which states the following: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty."

[84] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 701 (AM. LAW INST. 2003) provides that certain fundamental rights fall within the category of Customary International Law and violations occur when a state practices, encourages or condones an exhaustive list of conduct, including the following: . . . torture or other cruel, inhumane, or degrading treatment or punishment; consistent patterns of gross violations of internationally recognized human rights.

treaty obligations risk their ability to engage in future agreements with other nation-states, a businessperson known for reneging on contracts will likely soon find himself or herself out of business. The doctrine of *pacta sunt servanda* cannot apply to the imperfect war model, however, as the modern-day enemy fails to acknowledge any duty owed to the other party. In situations where the enemy fails to adhere to general notions of fair play or mutual exchange of civility on the battlefield, one cannot rely on this doctrinal standard.

Expanding the possible parties of the contract to those beyond the battlefield may provide servicemembers with an explanation of the Principle of Honor applicable to the imperfect warfare paradigm. The servicemember's ultimate contractual duty is not to the enemy but the American people and is secured upon entrance into military service by raising his or her right hand and executing a statutory oath directed to the citizenry at large.[85] It is an exchange between servicemember and citizen, whereby the population agrees to support that military member in exchange for honorable defense of the nation.

One important duty of the servicemember is to "support and defend the Constitution of the United States,"[86] and aspects of the Principle of Honor may be found directly and indirectly within the Constitution. Directly, Article VI of the Constitution recognizes international law as the "supreme law of the land."[87] As noted earlier, many aspects of the Principle of Honor have been codified through various treaties and customary international law principles, thus directly demanding adherence to such principles.

[85] 10 U.S.C. § 502(a) (2012). The enlisted oath identified in 10 U.S.C. § 502(a)) requires servicemembers to swear (or affirm) the following: "I, (state your name), do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the order of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God."

[86] *Id.*

[87] U.S. CONST. art. IV, cl. 2. "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land[.]"

Respect for human dignity is also indirectly embedded within the Constitution.[88] This fundamental principle of American society defines us as a nation. Demonstrating respect for human dignity also advances our position on the global stage, which in turn aids in the defense of the nation, thus indirectly upholding the servicemember's duty to the American people. For these reasons, adherence to such international and domestic principles fulfills the servicemember's contractual obligation to support the Constitution, even in the direst of circumstances.

Offering new contractual parties beyond those comprehended by the Manual may provide sound rationale for the Principle of Honor in imperfect warfare. Just as the businessman can expect future contracts by adhering to the obligations of his current contracts, the military member may expect future support from the American people by respecting his or her contractual duty to uphold constitutional standards of dignity and honor on the battlefield. Not only does the Contract Law Approach remove existing notions of battlefield reciprocity, it emphasizes the servicemembers' obligation to the American people rather than the enemy.

C. The Philosophical Approach

A third potential solution takes a Philosophical Approach, rather than a legal one, by encouraging servicemembers to seek answers from within rather than focusing on external factors. Instead of being concerned about the enemy's conduct, regardless of the perfect or imperfect warfare model, this justification looks to individual behavior. In this case, focusing on oneself leads to an understanding that acting with honor preserves our own humanity. While one may believe that holding all parties of a conflict to the same "honorable" standards will naturally result in all parties acting with honor, this is clearly not the natural—or common—result on today's battlefield. By first recognizing the brutality of war and natural tendencies of mankind, one may truly understand why honor is essential in times of war.

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[88] *See generally* U.S. CONST. amends. I-X.

There is a historical basis of "humanity" that helps frame this solution. Early historical references to the natural, brutal tendencies of man, and the need to overcome those tendencies, provide the basis for the argument that honor is essential on today's battlefield. In the 5th century B.C., military strategist and philosopher Sun Tzu discussed this by recognizing that war is not a campaign directed at the ultimate extermination of the enemy, but rather, there exists a need in war to preserve the "nation" or "enemy."[89] He explained that, when "victory can be effectively obtained in other ways, battles should be avoided," going so far as to recognize that "neutralizing an adversary's forces without battle is absolute perfection."[90] Through this, Sun Tzu recognized that winning a war involved a combination of fighting and other means used to subdue the enemy, including treating the enemy with respect and honor. If one engages in battle without a sense of honor, they will not be able to subdue the enemy without intense bloodshed, thereby restraining one's desire to execute war in its most base form.[91]

Sun Tzu's call to display honor in combat as a means to restrict man's natural tendencies was also recognized by the Institute of International Law in its 1880 publication of the Oxford Manual on the Laws of War on Land.[92] The Oxford Manual identified battlefield honor as the only way to restrict a soldier's natural tendencies in combat and recognized that "a positive set of rules . . . serves the interests of belligerents and is far from hindering them, since by preventing the unchaining of passion and savage instincts -- which battle always awakens, as much as it awakens courage and manly virtues . . . ."[93] This document offers

[89] SUN TZU, *supra* note 19, at 48.

[90] *Id.*

[91] *Id.* Although Sun Tzu wrote his seminal work in the 5th century B.C., modern translations of his works on war became popular in the late 18th Century and aided in forming modern notions of warfare. Legend has it that Napoleon read Sun Tzu when the first French edition was published while he was a military student in France. *Id.* at Intro., n. 3.

[92] THE LAWS OF WAR ON LAND MANUAL, Institute of International Law Oxford Manual (1880), (available at http://hrlibrary.umn.edu/instree/1880a.htm.).

[93] *Id.* at Preface. In its preface, the legal manual provided: "A positive set of rules · · · serves the interests of belligerents and is far from hindering them, since by preventing the unchaining of passion and savage instincts -- which battle always

an early attempt to merge this important philosophical principle with LOAC.[94] Its applicability remains equally strong today.

Despite these historical efforts to instill battlefield honor as a way to restrict man's natural tendencies, others have been reluctant to take this approach, instead embracing—often encouraging—carnal behaviors in times of conflict.[95] In 1929, for example, Admiral Lord Fisher famously criticized the "humanity of war."[96] When asked by journalists of his thoughts regarding several proposed humanitarian changes to the law of war, Admiral Lord Fisherresponded:

> [T]he humanizing of war! You might as well talk of the humanizing of help. When a silly ass got up at the Hague and talked about the amenities of civilized warfare and putting your prisoners' feet in hot water and giving them gruel, my reply, I regret to say was considered totally unfit for publication. As if war could be civilized. If I'm in command when war breaks out I shall issue my order – 'the essence of war' is violence. Moderation and war is in the facility. Hit first, hit hard, and hit everywhere.[97]

Although a work of fiction, Tolstoy's "War and Peace" also recognizes the natural tendencies of man during war, famously describing war as "the most horrible thing in life."[98] These

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awakens, as much as it awakens courage and manly virtues, -- it strengthens the discipline which is the strength of armies; it also ennobles their patriotic mission in the eyes of the soldiers by keeping them within the limits of respect due to the rights of humanity."

[94] *Id.*

[95] *See generally* ADMIRAL R. H. BACON, THE LIFE OF LORD FISHER OF KILVERSTONE 120-21 (Vol. 1 1922).

[96] *Id.*

[97] *Id.*

[98] LEO TOLSTOY, WAR AND PEACE 458-60 (Waxkeep Publishing 2013). "[T]hey talk to us of the rules of war, of chivalry, of flags of truce, of mercy to the unfortunate and so on. It's all rubbish! If there was none of this magnanimity in war, we should go to war only when it was worthwhile going to certain death. War is not a courtesy but the most horrible thing in life, and we ought to understand that and not play at war. We ought to accept this terrible necessity sternly and seriously. It all lies in that . . . let war be war and not a game. As it is now, war is a favourite pastime of the idle and frivolous."

historical perspectives recognize that war is brutal, and the natural tendencies of man are to engage in whatever means necessary to achieve their interests in battle.

Adherence to the Principle of Honor in combat is worth striving for. It serves as a check of one's natural tendencies, thus preserving our own humanity, regardless of an enemy's response or whether one operates within the perfect or imperfect warfare paradigm. As the vile behavior of terrorist organizations engaged in imperfect war encourages an even darker response, the emphasis on the Principle of Honor becomes even more important. Through this, the Department of Defense may find a third possible method for applying the Principle of Honor to the modern battlefield.

D. The Economic Approach

A fourth approach comes through the employment of economic principles to support the application of the Principle of Honor on today's battlefield. Specifically, the Economic Approach focuses on two economic theories to shape warfighters' honorable behavior: rational self-interest, incorporating the concept of psychic income, and the notion of long-term externalities. To begin with, the theory of rational self-interest explains that individuals generally operate from a self-interested perspective and will, therefore, attempt to make choices that maximize their own position as related to others.[99] Under a pure rational self-interest approach, the warfighter would not act with a sense of honor—or otherwise obey the law—based on a sense of duty or respect in the face of difficult circumstances, but would rather approach the battlefield with an interest in sustaining their own life at all costs. Individuals that go against their rational self-interest for loftier purposes may be rare.[100] One may argue that

[99] JEFFREY HARRISON AND JULES THEEUWES, LAW AND ECONOMICS 514 (2008). Individuals make choices that maximize those things that cause them the greatest pleasure and provide the greatest utility while also minimizing those things that cause displeasure. *Id.* at 515.

[100] In purely economic terms, the "mere existence of an obligation or issuance of a legal command" may prove an insufficient incentive. Robert Cooter, *Prices and Sanctions*, 84 COLUMBIA L. REV. 1523, 1524 (1984).

servicemembers have an inherent sense of duty or obedience to the law that overcomes their natural desire to achieve pure rational self-interest.[101] The questions received at the typical LOAC briefing, however, provide evidence to the contrary and demonstrate that appealing to a servicemember's sense of duty does not satisfy all concerns. Further, while many servicemembers may feel a natural pull toward duty and respect, some may fall away in the face of significant—if not mortal—danger on the battlefield. As a result, emphasizing other interests through a "psychic income" analysis may be more effective to addressing servicemembers' concerns.

Commanders may find success in emphasizing the value of "psychic income" to satisfy a servicemember's rational self-interest. "Psychic income" is a residual benefit to society that also satisfies rational self-interest.[102] Rather than focusing on obedience to orders, the modern commander must characterize the Principle of Honor as a reflection of the servicemember's individual value and their recognized place in civilized society. If the warfighter was only acting from a self-serving perspective, or only responding through obedience to the law, it may be difficult to induce a sense of honor in their behavior. If we include psychic income into the calculation, however, the warfighter may enjoy an alternate utility that encourages altruistic behaviors. Focusing on honor in terms of "psychic income" may encourage members to avoid pure rational self-interest and operate from a higher

[101] Commanders may attempt to impose sanctions on the warfighter through use of other legal constructs such as the Uniform Code of Military Justice. These external inducements, however, are not always effective. Commanders must offer the warfighter more than mere reminders of the legal implications of dishonorable conduct to explain and justify honorable conduct in all circumstances of war.

[102] *See* HARRISON AND THEEUWES, *supra* note 99, at 514. While individuals may operate under pure self-interest in most circumstances, there are other instances when one acts outside of individual self-interest, such as by giving charitable donations or offering unconditional love. These altruistic behaviors allude to a more complex decision-making process and explains that individuals may make certain choices based on an increase in some other type of utility—or psychic income—that is difficult to quantify. Essentially, we sometimes act against our own perceived rational self-interest because we derive an alternative type of utility from our behavior. Although these actions may appear to be purely altruistic, in reality, they satisfy an alternate self-interest—a psychic income.

philosophical perspective that supports the Principle of Honor in imperfect warfare scenarios.

A second economic theory applicable in this case is that of economic externalities.[103] Externalities arise when one individual, or a group of individuals, are affected by the decisions of other individuals or groups.[104] These effects, called externalities, can be positive or negative.[105] In society, we generally attempt to limit negative externalities and encourage positive ones.

Applying the concept of externalities to combat, engaging the enemy with a sense of honor encourages positive—and reduces negative—externalities. Specifically, individuals may be positively impacted by the reality that American warfighters respect human dignity, hold themselves to higher moral standards, and protect fundamental human rights. These positive externalities may be enjoyed by military members engaged in conflict as well as civilians in the nation experiencing conflict. Any of these may elevate the United States' global reputation, garner local support, enhance coalition partnerships, and reduce terrorist recruitment and/or retention.

Another positive externality that can arise when warfighters display honor on the battlefield is the long-term, residual effects of the Principle of Honor on the civilian population of the nation where the conflict takes place. War often impacts the civilian population long after a conflict has subsided, to include the formation of new laws, tribunals, and generally accepted practices that may transcend the conflict and imprint themselves

[103] *Id.* at 59.

[104] *Id.* Typically, externalities arise as a result of two parties engaging in a mutually beneficial transaction. Although the two parties agree to engage in a transaction, such as a contract or property matter, other parties may be affected outside of the agreement. Single actors may also engage in activities that impact others.

[105] Although courts typically only address situations where the externalities are negative, such as pollution or noise, positive externalities can also arise, such as a neighbor who decides to maintain a beautiful rose garden that enhances neighbors' enjoyment of outside space or improves property values.

on the civilian population. This possibility is supported by the current U.S. Army Rule of Law Handbook:

> Irrespective of the specific legal context, rule of law operations should be guided and informed by human rights law purely as a matter of efficiency. US forces should model behavior for, and encourage actions by, the host national government that will encourage the host nation to adopt and practice strong human rights norms.[106]

Adding to the Manual discussion of economic principles, specifically the importance of satisfying rational self-interest through psychic income and securing long-term positive externalities, offers a contemporary approach to the Principle of Honor. Appealing to these more sensible concepts will offer the modern warfighter with a more tangible reason to apply the Principle of Honor to the battlefield, regardless of the perfect or imperfect warfare scenario.

IV. WHY THIS MATTERS

This Article begins—and ends—in the LOAC briefing room and the young servicemember with his or her hand in the air. More often than not, servicemembers see through the thin veil of logic currently used to explain the Principle of Honor. The Manual's answer simply does not apply, and it only takes a matter of seconds for many servicemembers to reach this conclusion. Some in the briefing room respond to this realization with a smirk, an eye-roll, and general acceptance of another task ordered without explanation. For others, the response is more animated, particularly as servicemembers move closer to the battlefield. Regardless of the response, the current approach to the Principle of Honor is far from adequate. For our military members and our nation, we must do better.[107] For purposes of this Article, change

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[106] U.S. ARMY RULE OF LAW HANDBOOK, U.S. Army JAG School Center for Law and Military Operations 24 (2011).

[107] The authors do not offer this Article for pure academic purposes, but rather, to demand needed change to the Manual and our collective understanding of the Principle of Honor. There are tangible effects to maintaining the status quo that must be eliminated.

is necessary to provide clarity, reduce frustration, and enhance compliance.

First, the Manual must change to provide clear instruction to our servicemembers. Relying on perfect warfare notions of *pacta sunt servanda* to describe the Principle of Honor leads some servicemembers to conclude that the Principle of Honor does not apply to the imperfect war scenario, especially when the enemy does not reciprocate honorable conduct. While servicemembers may continue to question whether this principle applies to an enemy that defies the rules on war, it is important to remember that the Principle of Honor applies in every circumstance faced in war. It is a part of who we are as a professional fighting force, regardless of enemy conduct, and it is what our nation requires. As military professionals, we must ensure our troops fully understand all rules of warfare by providing clear and rational instruction applicable to every circumstance. The Manual must modify its definition of the Principle of Honor to incorporate the modern realities of the battlefield, for both coherency of the principle and for the safety of servicemembers.

Second, providing applicable rationale for the Principle of Honor in imperfect warfare scenarios alleviates significant frustration, which tends to negatively affect a servicemember's morale. Servicemembers and civilians alike are commonly frustrated at the thought of losing American lives to an enemy who does not adhere to the rules of war.[108] Compiling this frustration with the lack-luster justification for the Principle of Honor currently offered by the Manual tends to further amplify resentment, leaving servicemembers to risk their life for a principle they do not understand or believe no longer applies. Though morale may seem a trivial matter, for a commander with troops engaged in lengthy combat operations, morale is vital to mission success. Providing a comprehensive answer for the Principle of Honor within the imperfect war paradigm would

[108] This statement comes from the authors' experiences teaching the Law of War and engaging servicemembers and civilians on the topic.

minimize this frustration and enhance morale, thus elevating our servicemembers' preparedness for war.

Third, providing sound rationale for the Principle of Honor also enhances compliance. Servicemembers must not only know—but believe in—their cause and purpose of conduct. Embracing the reason for honorable conduct in every scenario leads to reduced cynicism, enhanced motivation, and an elevated warrior ethos.[109] On the contrary, servicemembers who do not believe in the basis for the Principle of Honor may be reluctant to obey, particularly in the heat of battle or long days of combat.[110] This result has been tragically observed at times within the War on Terror.[111] Aligning the Principle of Honor with the modern battlefield provides an answer that individuals can believe in, thus increasing "buy-in" and reducing the risk of future LOAC violations.

CONCLUSION

Military servicemembers are called to perform the extraordinary—to rise above human instinct and obey the Laws of Armed Conflict at all times, often at great risk to personal safety. This may be evidenced by the decision not to pull the trigger or press the button if doing so would violate LOAC, even when facing situations of mortal danger. It is a monumental order for a young man or woman, especially knowing the enemy who seeks to kill them will eagerly defy the rules of combat servicemembers are called to obey. We must provide Soldiers, Sailors, Airmen, and Marines a comprehensive reason for doing so.

The authors of this Article do not seek to redefine the Principle of Honor. Hands do not rise at the LOAC briefing because servicemembers do not understand what the Principle of Honor is. Many simply do not understand why it continues to apply in

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[109] *See id.*

[110] *Id.*

[111] *See generally* Thom Shanker and Graham Bowley, *Images of G.I.'s and Remains Fuel Fears of Ebbing Discipline*, N.Y. TIMES (Apr. 18, 2012), http://www.nytimes.com/2012/04/19/world/asia/us-condemns-photo-of-soldiers-posing-with-body-parts.html.

the War on Terror. There is no "*mutual* respect between opposing forces," and terrorist groups do not rise to the "common class of [military] professional." There is no "trust with the enemy," nor is there "good faith" between opposing forces within the imperfect war dynamic. This realization by servicemembers often results in confusion and frustration in the classroom, which often leads to cynicism, loss of morale, and potential non-compliance on the battlefield. To avoid this, the Department of Defense must complete the circle currently left open by the Manual's lackluster description of the Principle of Honor by providing sound rationale for why the principle continues to apply in all scenarios of war—perfect and imperfect.

This Article provides several novel ways to align the Principle of Honor with the imperfect warfare paradigm. By applying this concept to human rights law, contract law, philosophy, and/or economics, the authors have attempted to provide contemporary explanations for why the Principle of Honor equally applies to the modern battlefield. It is important to note that the authors do not intend—nor wish—to advocate for a single proposed approach. All offer unique and independent solutions. The more complete answer, however, is likely found through a combination of these proposals or by identifying those ideals that transcend each approach. Regardless, we hope this Article encourages our nation's military and legal experts to reconsider this important principle and provide a more complete rationale for the Principle of Honor within the Manual. Doing so will undoubtedly provide a more satisfying experience for Soldiers, Sailors, Airmen, and Marines attending the LOAC briefing—and the judge advocates leading them.

WITH FRIENDS LIKE THESE, WHO NEEDS ENEMIES? TURNING ATTENTION TO PUBLIC CORRUPTION IN MEXICO

Max Ross*

The United States has a strong national security interest in reducing and eliminating corruption through the use of targeted sanctions. Target sanctions are valuable for their efficacy and ability to avoid harming civilian populations. This Article proposes using Global Magnitsky Act sanctions against corrupt officials in Mexico and Latin America to achieve the dual aim of bolstering the United States' national security interests and further development of bilateral partnerships in the region.

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INTRODUCTION

This Comment analyzes how the United States' national security interests are harmed by the corruption of Mexican public officials, arguing that Congress and the President should use the Global Magnitsky Act's targeted sanctions regime against known corrupt officials to make Mexico a stronger partner in the fight against transnational criminal organizations.

A COMPROMISED PARTNER

Heroin overdoses kill approximately two hundred Americans every week, with the vast majority of heroin supplied by cartel organizations in Mexico.[1] Overdoses have risen dramatically in recent decades, more than doubling between 2000 and 2014.[2] Transnational criminal organizations ("TCO")[3] who supply America's heroin have operated nearly unchecked by the Mexican government, threatening security while fostering corruption across the region.[4] Since former Mexican president Felipe Calderon's escalation of the fight against TCO drug traffickers in 2006, over 100,000 Mexicans have died from homicide and more than 26,000 have gone missing.[5]

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[1] Don Winslow, *El Chapo and the Secret History of the Heroin Crisis*, ESQUIRE (Aug. 9, 2016), *available at* http://www.esquire.com/news-politics/a46918/heroin-mexico-el-chapo-cartels-don-winslow/.

[2] *Id.*

[3] Because TCOs are difficult to define, this comment uses the term as catchall for several different kinds of profit-oriented groups operating across international borders that use laundering operations to cover black market profits and use violence. *See* Luz Estella Nagle, *The Challenges of Fighting Global Organized Crime in Latin America*, 26 FORDHAM INT'L L.J. 1649, 1655-56 (2002).

[4] VANDA FELBAB-BROWN, UNITED STATES NATIONAL SECURITY POLICY IN LATIN AMERICA: THREAT ASSESSMENT AND POLICY RECOMMENDATIONS FOR THE NEXT ADMINISTRATION 8 (2008).

[5] John M. Ackerman, *Mexico Is Not a Functioning Democracy*, FOREIGN POLICY (Feb. 23, 2016), *available at* http://foreignpolicy.com/2016/02/23/obama- pena-nieto-mexico-corruption/; Jason M. Breslow, *The Staggering Death Toll of Mexico's Drug War*, PBS FRONTLINE (Jul. 27, 2015) (citing UN Iraq Body Count Report and the Instituto Nacional de Estadistica, Geografia, e Informatica (Mexico)), *available at* http://www.pbs.org/wgbh/frontline/article/the-staggering-death-toll-of-mexicos-drug-war/.

In 2015, the Obama administration noted in the United States Global Anti-Corruption Agenda that the United States "views corruption as a growing threat to the national security of our country and allies around the world."[6] This is particularly relevant in Mexico, where corruption has debilitated the government's capacity to enforce the rule of law and to resist narcotics-smuggling cartels.[7] At one point in 2016, there were six current and former Mexican governors under investigation by the Mexico's attorney general, three of whom had outstanding indictments in the United States.[8] One governor, Javier Duarte of the state of Veracruz, was accused of using state resources to protect shipments of cocaine and amassing a network of shell companies to embezzle as much as $1.7 billion.[9] After stepping down in October 2016 due to the allegations, Duarte managed to disappear and elude law enforcement for eight months before being discovered in Guatemala and extradited back to Mexico.[10]

The ripple effects of the Mexican government's losing struggle against narcotics smugglers cannot be ignored.[11] American lawmakers should continue to seek solutions via the prioritization of good governance and anti-corruption efforts, as

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[6] WHITE HOUSE, EXEC. OFFICE OF THE PRESS SECRETARY, FACT SHEET: THE U.S. GLOBAL ANTICORRUPTION AGENDA, (Sept. 24, 2014) *available at* https://obamawhitehouse.archives.gov/the-press-office/2014/09/24/fact- sheet-us-global-anticorruption-agenda.

[7] EXEC. OFFICE OF THE PRESIDENT, NATIONAL SECURITY POLICY 2015 27-28 (2015).

[8] *See* Andrea Noel, *Mexican Governors on the Lam*, DAILY BEAST (Dec. 3, 2016), *available at* http://www.thedailybeast.com/articles/2016/12/03/mexican-governors-on-the-lam.html; *These Mexican states are way too corrupt, according to the scandal-plagued president*, REUTERS (Jul. 12, 2016), *available at* https://news.vice.com/article/these-mexican-states-are-way-too-corrupt- according-to-the-scandal-plagued-president.

[9] Noel, *supra* note 8.

[10] Christopher Woody, *A former Mexican governor has been accused of involvement in forced disappearances, and it points to a sinister problem with Mexico's police* BUSINESS INSIDER (June 11, 2018), https://www.businessinsider.com/javier-duarte-former-veracruz-mexico-governor-accused-disappearances-2018-6.

[11] *See* Gabriel Marcella, AMERICAN GRAND STRATEGY FOR LATIN AMERICA IN THE AGE OF RESENTMENT, STRATEGIC STUDIES INSTITUTE, 46 (September 2007).
Some estimates put the death toll in Mexico much higher. Compare these deaths to the number of civilian deaths in Iraq (81,636) and Afghanistan (21,415) between 2007 and July 2015. Breslow, *supra* note 5.

the Obama administration sought to do through its Global Anti-Corruption Agenda.[12] Legislation that strengthens and reinforces foreign anticorruption generally will help strengthen Mexico in the fight against TCOs and ease the collateral effects felt by law enforcement in the United States. Targeted sanctions against public officials are an important tool to help deter bad behavior.[13] In addition to funding anticorruption efforts, Congress and the President should use the Global Magnitsky Act ("GMA") sanctions from the Sergei Magnitsky Rule of Law Accountability Act (the "original Magnitsky Act") to target corrupt government officials in Mexico with asset freezes and visa bans. This will dramatically reduce incentives to participate in corrupt activity.

Part I of this Comment will provide a general overview of corruption in Latin America and why it matters to the United States. Part II will explain why corruption of Mexican public officials remains particularly important to the security of the United States. Part III will review the strengths and weaknesses of the approaches the United States has taken to combat crime and corruption abroad. Part IV will explain the growing use of targeted sanctions and will propose using the GMA's targeted sanctions against corrupt public officials in Mexico.

I. Why Corruption in Latin America Matters

Mexico and Latin America have deep historic and economic ties to the United States. The Western Hemisphere has few countries overtly hostile to the United States, and relations between the United States and its neighbors have been incrementally improving for years.[14] While relations have

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[12] WHITE HOUSE, *supra* note 6.

[13] William Felix Browder, *Putting the Bad Guys on Ice*, BLOOMBERG (Feb. 19, 2015), *available at* http://www.bloomberg.com/news/articles/2015-02-19/u- s-should-freeze-assets-ban-travel-of-human-rights-abusers-more-often (Highlighting the fear of reprisal human rights abusers feel under the original Magnitsky Act).

[14] *Opportunities for U.S. Engagement in Latin America Before the S. Comm. On Foreign Relations*, 114th Cong. (2016) (statement of Shannon K. O'Neil, Nelson and David Rockefeller Senior Fellow for Latin America Studies) (highlighting

become less antagonistic, the United States' assistance in Latin America has created security gaps regarding assistance used to influence those countries.[15]

Latin America is one of the most violent regions in the world, due in part to pervasive corruption that corrodes the state's ability to support the rule of law.[16] In the case of Mexico, "Washington is providing equipment and training to compromised agencies—at the same time that it's tracking their close ties to organized crime."[17] After a historical overview of the United States' involvement in Latin America, this Part will show that the inability of Latin American nations to support the rule of law can be largely attributed to the corruption of their government officials.

The United States benefits economically from being located in a region of mostly democratic countries with emerging economies,[18] which is why it has experimented with regional policy alternatives throughout its history.[19] During the Cold War, Latin America was considered fertile ground for both

improvements in relations with Latin American countries thanks to changes in the U.S. attitude towards Cuba).

[15] *See* Marcella, *supra* note 11, at 43.

[16] *Opportunities for U.S. Engagement in Latin America Before the S. Comm. On Foreign Relations*, 114th Cong. (2016) (statement of Shannon K. O'Neil, Nelson and David Rockefeller Senior Fellow for Latin America Studies).

[17] Jesse Franzblau, *Why Is the US Still Spending Billions to Fund Mexico's Corrupt Drug War,* THE NATION, (Feb. 27, 2015), https://www.thenation.com/article/us-connection-mexicos-drug-war-corruption/.

[18] *Posture Statement of Admiral Kurt W. Tidd Before the S. Armed Services Comm.*, 114th Cong. 1 (2016) (statement of Kurt W. Tidd, Commander, United States Southern Command).

[19] *See Opportunities for U.S. Engagement in Latin America Before the S. Comm. On Foreign Relations*, 114th Cong. (2016) (statement of Shannon K. O'Neil, Nelson and David Rockefeller Senior Fellow for Latin America Studies); Marcella, *supra* note 11, at v. Aggressive United States involvement in the region began with the Monroe doctrine, when President James Monroe declared to the world's colonial powers that aggression and attempts to re-colonize the western hemisphere after independence would not be tolerated. Latin America largely aligned with the United States throughout the early twentieth century and expressed hostility toward the axis powers during World War II. BRUCE W. JETLESON, AMERICAN FOREIGN POLICY 36, 92 (5th ed. 2014).

United States and Soviet influence.[20] Throughout the period, the United States' Latin America policy focused on a mix of security and development in the name of fighting communism.[21] Even before the fall of the Soviet Union, the United States' national security interests had expanded to countering the drug trade in narcotics source and transit countries.[22] In 1971, President Richard Nixon declared the "War on Drugs," beginning a new era in the prioritization of narcotics by United States law enforcement.

Crucial to understanding United States' national security interests in Latin America is a general understanding of corruption and its many forms. Corruption is a timeless and pervasive phenomenon that can be difficult to measure objectively due to its inherent secrecy and because assessing the effects of corruption involves questions of degree and perception.[23] For this reason, effort is frequently placed on collecting data on the total number of allegations within a country[24] to calculate the Corruption Perception Index ("CPI").[25] The World Bank provides a useful definition on the ways corruption can influence public officials:

> [T]he abuse of public office for private gain. This private gain could be in the form of money or favors for the benefit

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[20] Marcella, *supra* note 11, at 4.

[21] *Id*.

[22] JETLESON, *supra* note 19, at 657 (quoting JULIA E. SWEIG, FRIENDLY FIRE: LOSING FRIENDS AND MAKING ENEMIES IN THE ANTI-AMERICAN CENTURY 149-151, 160-164 (New York: Public Affairs, 2006).

[23] *See* Scheherazade S. Rehman & Frederick V. Perry, *Corruption, Constitutions, and Crude in Latin America*, 20 L. & BUS. REV. AM. 163, 167 (2014); Patricio Maldonado & Gerardo D. Berthin, *Transparency and Developing Legal Frameworks to Combat Corruption in Latin America*, 10 SW. J.L. & TRADE AM. 243, 249-51 (2004).

[24] While it can be useful to depersonalize the discussion of corruption in this way, more research on the effectiveness of different anti-corruption interventions is needed. Maldonado & Berthin, *supra* note 23, at 250.

[25] The CPI has been reported since 1995 and is based on surveys of various business and citizen groups in 174 countries in the world. Maldonado & Berthin, *supra* note 23, at 250. Transparency International's surveys ask questions such as "Is corruption a big problem in your country?" and "Do you trust your government?" Rehman & Perry, *supra* note 23, at 189.

> of family or friends-or for the benefit of special interest groups such as a political party seeking to obtain or retain power. Such behavior by persons concerned with the procurement process often leads to economic losses for the public. Thus, many lose for the benefit of a few.[26]

In Latin America, enduring decades of an economic system that benefits the few has helped normalize, if not legitimize, corruption, which in turn severely reduces a state's capacity to fight crime and enforce the rule of law. This holds true at all levels of society: the perception of corruption for even the pettiest bribe diminishes civic confidence in the ability of governments to enforce the rule of law, fundamentally weakening state institutions.[27] For that reason, strong state institutions must always hold public officials accountable for misconduct.[28]

In Latin America, corruption has negative consequences beyond diminishing the effectiveness of law enforcement. According to the Inter-American Development Bank:

> The prevalence of corruption is to some degree an expression of the weakness of the rule of law as a whole, but its attention relates . . . to the weakness of the state's financial administration, poor policy designs, deficiently transparent expenditure systems, antiquated procurement and public accounting systems, poor regulatory capacity, an absence of clear rules regarding privatization processes, and weaknesses in the civil service.[29]

Put another way, corruption is largely accepted to stunt economic growth because it distorts the regulatory environment

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[26] Rehman & Perry, *supra* note 23, at 167-68 (citing WORLD BANK, STRENGTHENING WORLD BANK GROUP ENGAGEMENT ON GOVERNANCE AND ANTICORRUPTION 67 (Mar. 21, 2007)).

[27] WHITE HOUSE, *supra* note 6.

[28] Rachel Hilderbrand, *U.S. and Mexico's Law Enforcement Strategy: Strengthening Mexico's Institutions or Continuing Militarization?*, COUNCIL ON HEMISPHERIC AFFAIRS, 36 WASH. REPORT ON THE HEMISPHERE 7 (2016).

[29] Marcella, *supra* note 11, at 21 (quoting Christina Biebesheimer, *Expectations and Reality in Rule of Law Reform in Latin America*, 2 INTER-AMERICAN DEVELOPMENT BANK, 2004).

of markets.[30] Corruption drains public revenue collected by governments, lessening their ability to deliver social benefits to the people.[31] For example, the weakness and corruption of law enforcement in El Salvador, Guatemala, and Honduras has allowed gang violence to spread, prompting significant increases in emigration and culminating in the 2014 migration crisis of unaccompanied minor children from Central America.[32]

Corruption in Latin America matters to the United States because most of the narcotics that enter the United States are of South American origin and are moved through established routes in Mexico and Central America controlled by powerful TCOs.[33] TCOs profit from drug consumption in the United States, Europe, Asia, and within Latin America itself.[34] The enormous American demand for drugs has created huge financial incentives for cartels to supply this market.[35]

The problem with current attempts to tackle TCOs is that governments underappreciate the importance of corruption among law enforcement officials. The United States tends to pay little attention to the corruption of Latin American public officials, considering corruption merely a consequence or side

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[30] *Id*. at 7; Rehman & Perry, *supra* note 23, at 193.

[31] WHITE HOUSE, *supra* note 6.

[32] *See* Tidd, *supra* note 18; Danielle Renwick, *Central America's Violent Northern Triangle*, COUNCIL ON FOREIGN RELATIONS, Jan. 19, 2016, *available at* http://www.cfr.org/transnational-crime/central-americas-violent-northern-triangle/p37286 (noting that nearly 100,000 such minors arrived in the U.S. between October 2013 and January 2015).

[33] Peter Chalk, *The Latin American Drug Trade: Scope, Dimensions, Impact, and Response* 6 (2011), *available at* http://www.rand.org/content/dam/rand/pubs/monographs/2011/RAND_MG1076.pdf.

[34] Marcella, *supra* note 11, at 9.

[35] Christopher Paul et al., *Mexico Is Not Colombia: Alternative Historical Analogies for Responding to the Challenge of Violent Drug-Trafficking Organizations*, RAND CORP. 21, 24 (2014), *available at* http://www.rand.org/content/dam/rand/pubs/research_reports/RR500/RR548z1/RAND_RR548z1.pdf (noting that the United States bears responsibility for the destabilization of the Latin American governments by failing to reduce the demand for illegal drugs, a topic not covered by this comment).

effect of the drug trade and lack of development.[36] Instead the United States prefers to focus on assistance in the form of training and hardware programs for Latin American militaries, law enforcement agencies, and justice systems.[37] For example, the United States, through the military support program Plan Colombia, enhanced the Colombian military's capability to fight traffickers and rebel groups.[38] While Plan Colombia dramatically improved Colombia's domestic security situation (proving that some security reforms with a strong military focus can be beneficial), [39] Colombia still remains hampered by corruption. In 2015 Colombia tied with Sri Lanka and Liberia at 83 on the CPI.[40] Without further anticorruption improvements, Colombia may squander its recent progress.[41]

Separately, the United States only recently began to address the problem of corrupt public officials in other parts of Latin America. For example, in Central America the United States recently began to support anticorruption efforts.[42] Between 2008 and 2015 the United States contributed over $1 billion to Central American anticorruption efforts through the Central America Regional Security Initiative ("CARSI").[43]

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[36] *See* Ackerman, *supra* note 5, at 3-4; *but see* Heather Nauert, *Global Magnitsky Designations for Nicaragua*, U.S. DEP'T OF STATE (July 5, 2018), *available at* https://www.state.gov/r/pa/prs/ps/2018/07/283833.htm.

[37] *See* Franzblau, *supra* note 17; Roger F. Noriega & Felipe Trigos, *Why isn't Mexico's security strategy working?*, AMERICAN ENTERPRISE INSTITUTE (Jun. 12, 2014), *available at* https://www.aei.org/publication/why-isnt-mexicos-security-strategy-working/.

[38] Some well-financed narcotics traffickers invested in submarines for smuggling. Chalk, *supra* note 33, at 59.

[39] *See* Tidd, *supra* note 18. There is now a treaty in place with the so called "narco-terrorists," the FARC, or the Revolutionary Armed Forces of Colombia.

[40] TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTIONS INDEX (2015), *available at* http://www.transparency.org/cpi2015#downloads (follow "Downloads" hyperlink; then click "Data and Methodology".)

[41] *See* Joel Gillin, *Understanding the causes of Colombia's conflict: Weak, corrupt state institutions*, COLOMBIA REPORTS, (Jan. 13, 2015), *available at* http://colombiareports.com/understanding-colombias-conflict-weak-corrupt-state-institutions/.

[42] Renwick, *supra* note 32, at 8.

[43] *Id.*

Based on Plan Colombia's moderate success in fighting TCOs, the United States launched the Merida Initiative in partnership with the Mexican government.[44] The United States planned that the Merida Initiative would eventually have the same long term effects on TCOs as Plan Colombia did in Colombia.[45] To date, Plan Colombia and the Merida Initiative produced mixed results.[46] Like Plan Colombia, the Merida Initiative lacks an anticorruption focus specific to the Mexican context.[47] To understand the shortcomings of the Merida Initiative, the next Part will cover Mexican corruption in detail and explain why the corruption of Mexican officials is a national security concern for the United States.

II. Mexico's Corruption Problem

As the Mexican government struggles to contend with drug cartels, it is frequently hamstrung by corruption and ineptitude.[48] In the 2018 CPI, Mexico ranks 138th out of 180 countries, tied with Russia, Iran, and Papua New Guinea.[49] The failure of the weak Mexican federal government and even weaker Mexican state governments to establish a strong sense of the rule of law is due to corruption within law enforcement agencies and a weak judiciary system.[50] According to United Nations statistics, Mexico remains among the most violent countries in the world.[51] By one estimate, only 1% of reported crimes in Mexico are solved.[52] Official surveys estimate that only 19% all crimes committed are ever reported in the first place.[53]

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[44] Noriega & Trigos, *supra* note 37, at 12, 19.

[45] *See* Felbab-Brown, *supra* note 4, at 5, 8; Tidd, *supra* note 18.

[46] *See* Felbab-Brown, *supra* note 4, at 8.

[47] Franzblau, *supra* note 17.

[48] Ackerman, *supra* note 5, at 1, 4.

[49] TRANSPARENCY INTERNATIONAL, CORRUPTION PERCEPTIONS INDEX (2017).

[50] Noriega & Trigos, *supra* note 37, at 2, 8, 10.

[51] Breslow, *supra* note 5 (citing UN Iraq Body Count Report and the Instituto Nacional de Estadistica, Geografia, e Informatica (Mexico)).

[52] Katy Watson, *People vs Politicians: Who can tackle Mexico's Corruption?*, BBC (Mar. 22, 2016), *available at* https://www.bbc.com/news/world-latin-america-35865948.

[53] Viridiana Rios, *Five Security Priorities for Mexico*, WILSON CENTER – MEXICO INSTITUTE, *available at* https://www.wilsoncenter.org/article/five-security-priorities-for-mexico.

Crimes are infrequently reported because only half the victims of crimes feel they are treated well when they report to authorities.[54] This high level of crime has consequences, with some estimates of Mexico's lost economic output due to corruption at 9%.[55]

The United States Department of Justice reports that cartels bring in between $18 and $39 billion dollars of profit annually.[56] These funds allow the cartels to purchase military grade munitions and weapons and to field their own paramilitary units competitive with standard national military forces.[57] The cartels can even afford to recruit directly from the ranks of the Mexican military.[58] With such unchecked power, Mexico's drug cartels represent a kind of shadow government.

Mexico's cartels have long operated with impunity. During the Vicente Fox administration (December 2000-November 2006), corruption reached such a high level that one of the leading TCOs in Mexico, the Gulf Cartel, sent a letter to President Fox demanding that the federal police forces stop lending their services to work as "protection" for the Sinaloa Cartel.[59] In 2008, the anti-drug chief for President Fox's successor, Calderon, was arrested for providing intelligence the Sinaloa Cartel.[60] Observers who track the rise in the power of

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[54] *Id.*

[55] *Id.*

[56] David Pion-Berlin & Harold Trinkunas, Latin America's Growing Security Gap, 22 J. OF DEMOCRACY 40, 41 (2011).

[57] *Id.* at 41-42.

[58] The Los Zetas cartel originally recruited directly from the ranks of the Mexican army to serve as protection and enforcement for the Sinaloa cartel. Eventually these guards broke with their bosses and went out on their own. *See* Paul, *supra* note 35, at 41, 89 (comparing Los Zetas to Burmese military units which participate in the production and trafficking of narcotics, making that government complicit in the drug trade.).

[59] Hilderbrand, *supra* note 28, at 8. In Mexico, there is a widespread belief that the Sinaloa cartel is preferred by the Mexican government because it is less violent than other cartels such as Los Zetas or the Jalisco New Generation cartels. Winslow, *supra* note 1.

[60] The Mexican government's liaison to Interpol was also arrested in 2008. Ken Ellingwood, *Former anti-drug chief is arrested*, L.A. TIMES, (Nov. 22, 2008), *available at* http://articles.latimes.com/2008/nov/22/world/fg-bribe22.

Mexican TCOs believe that the Sinaloa cartel's connections to municipal, state, and federal officials allow it to dominate over its rivals.[61] Prosecution of high-level officials is rare in Mexico.[62] Politicians are frequently targeted for their opposition to the cartels. On January 1, 2016, the 33-year-old newly elected mayor of Temixco (a small city in the south of Mexico) promised in her inauguration speech to combat the cartels and their influence within local government.[63] The next night, armed commandos woke Mayor Mota in her home and executed her.[64] She was one of "152 mayors, candidates, and former mayors killed from 2005 through 2017, with 14 victims in 2015, six in 2016, and 21 in 2017. In total, nine sitting mayors were killed in 2017."[65] This makes mayors who object to corruption twelve times more likely to be killed than the general population in Mexico.

Beyond the silencing of politicians and law enforcement officials, Mexican cartels have also successfully suppressed media through intimidation and violence.[66] Mexico is now also one of the most dangerous places in the world for journalists, who are three times more likely to be killed than the average person in Mexico.[67] During the governorship of the Javier Duarte, cartels killed more than fifteen journalists in the state of Veracruz alone.[68]

Since President Calderón's militarization of Mexico's fight against cartels, the Mexican government has been under

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[61] Winslow, *supra* note 1.

[62] Hilderbrand, *supra* note 28, at 8.

[63] Ackerman, *supra* note 5.

[64] *Id.*

[65] Laura Calderón, Octavio Rodriguez Ferreira & David A. Shirk, *Drug Violence in Mexico: Data and Analysis Through 2017* JUSTICE IN MEXICO 5 (Apr. 2018), *available at* https://justiceinmexico.org/wp-content/uploads/2018/04/180411_DrugViolenceinMexico-12mb.pdf [hereinafter Calderón].

[66] Ackerman, *supra* note 5 ("A long list of independent journalists are excluded from radio and television for their anti-government views and Mexico's leading radio news anchor, Carmen Aristegui, was arbitrarily fired, apparently on direct order from the office of the president.").

[67] *See* Calderón, *supra* note 65.

[68] *Id.*

increasing scrutiny for its human rights record.[69] United States support for such heavy-handedness and militarization only changed the scope of the fight and has itself furthered violence,[70] rather than contributing to long-term solutions. Observers argue that in a highly corrupt environment like Mexico, a militarized approach to fighting the drug war reduces the willingness of law enforcement agencies to cooperate, because trust between branches and agencies of government is reduced.[71] Militarization of the conflict against TCOs increases the overall level of violence.[72]

The failure of the United States and Mexico to reduce public corruption has three major consequences. First, it has led to a sharp increase in the amount of violence experienced on both sides of the border.[73] Second, public corruption allows an avalanche of narcotics to enter the United States and has created a public health emergency.[74] Finally, the inability of law enforcement officials to control corruption allows people to move freely across the border without government knowledge.[75] With respect to the first problem, violence caused by the drug trade has reached unacceptable levels even within the United States.[76] The high perception of corruption in Mexico led to the formation of armed vigilante groups in places where the Mexican state appears to not adequately protect its citizenry.[77] The

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[69] *See* Ackerman, *supra* note 5.

[70] *See* Franzblau, *supra* note 17.

[71] Hilderbrand, *supra* note 28, at 8.

[72] *See id.*

[73] *See The Rise of Mexican Drug Cartels and U.S. National Security Before H. Comm. On Oversight and Gov't Reform Judiciary*, 111th Cong. 3-4 (2009) (statement of Lanny A. Breuer, Assistant Attorney General; William Hoover, Assistant Dir. Field Operations ATF; Anthony P. Palacio, Assistant Administrator for Intelligence).

[74] *See id.*; Winslow, *supra* note 1.

[75] Breuer, *supra* note 73.

[76] GEREBEN SCHAEFER ET AL., SECURITY IN MEXICO: IMPLICATIONS FOR U.S. POLICY OPTIONS xvi, 46, (2009), *available at* http://www.rand.org/content/dam/rand/pubs/monographs/2009/RAND_MG876.pdf.

[77] These groups are problematic and corruptible in their own way. CARTEL LAND (The Documentary Group; Our Time Productions 2015) (documenting the quick rise and success of "autodefensas," or self-defense groups in the state of

emergence of vigilante groups on both sides of the border should alarm United States policymakers.

As previously stated, the majority of the narcotics that enter the United States come from Mexico.[78] The cartels bear significant responsibility for two crises facing the United States: the heroin and methamphetamine epidemics,[79] and increasingly engage in human trafficking across the border.[80] The corruption of law enforcement officials makes the border more porous and prevents the United States government from knowing who has entered and exited the country.[81]

III. Efforts to Address Corruption

No silver bullet can immediately end corruption. Anticorruption is a project that requires a "permanent, proactive and unwavering commitment from many actors, including governments, the donor community, the private sector, the media," and other groups.[82] Policymakers in the United States and in Mexico should be praised for past commitments to curb corruption via multilateral treaties. While enforcement of these treaties is inconsistent, both countries remain parties to the treaties that commit them to search for new methods to fight corruption.[83] This Part will first review the international treaties targeting corruption to which the United States and Mexico are parties, and then cover the bilateral and unilateral actions taken by the United States to fight corruption abroad.

Michoacán and their quick fall into corruption and participation in protection rackets for methamphetamine cooks and innocent citizens).

[78] Schaefer, *supra* note 76, at xvi.

[79] Winslow, *supra* note 1.; Schaefer, *supra* note 76, at xvi.

[80] Schaefer, *supra* note 76, at 25.

[81] *Id*. at 26.

[82] Maldonado & Berthin, *supra* note 23, at 247.

[83] Noriega & Trigos, *supra* note 37; Nancy Zucker Boswell, *Combating Corruption: Focus on Latin America,* 3 SW. J. L. & TRADE AM. 179, 190 (1996).

A. The Multilateral Approach to Fighting Corruption

Freedom from corruption is arguably a human right under international law, and the United States and Mexico are parties to a number of multilateral treaties that require both to take certain steps to fight corrupt influences within the government.[84] The United States, Mexico, and numerous countries in Latin America signed the United Nations Convention Against Corruption ("UNCAC"),[85] the Inter-American Convention Against Corruption ("IACAC") (1996),[86] and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997).[87] With these agreements in place, the relevant issue for United States policymakers is how the United States can assist its partners in meeting their treaty commitments.

The UNCAC is the first legally-binding multilateral agreement to specifically address public corruption.[88] It attempts to address the damage done to democracy, development, and the rule of law by establishing criminal penalties (some mandatory and some optional) for certain corrupt practices.[89] The UNCAC requires countries to outlaw foreign bribery, money laundering, influence peddling and embezzlement, and encourages outlawing less common forms of corruption.[90] The IACAC, passed by the Organization of American States, defines corruption and calls on signatories to implement certain anti-corruption mechanisms such as public comment provisions and

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[84] *See* Juliet Sorensen, *Ideals without Illusions: Corruption and the Future of a Democratic North Africa*, 10 NORTHWESTERN J. INT'L HUMAN RIGHTS 202, 202 (2012) (citing G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948)).

[85] United Nations Convention Against Corruption, Oct. 31, 2003, S. TREATY DOC. NO. 109-6, 2349 U.N.T.S. 41.

[86] Inter-American Convention Against Corruption, Mar. 29, 1996, S. TREATY DOC. NO. 105-39, 35 I.L.M. 724, *available at* http://www.oas.org/juridico/english/treaties/b-58.html.

[87] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. NO. 105-43, 37 I.L.M. 1.

[88] S. TREATY DOC. NO. 109-6, 2349 U.N.T.S. 41.

[89] *Id.*

[90] *Id.*

transparency laws.[91] The OECD Convention on Combatting Bribery was "signed at the request of the United States Congress and the President," and calls on signatories to enact domestic laws equivalent to the United States' Foreign Corrupt Practices Act ("FCPA")[92], which prohibits bribery of foreign government officials by American companies.[93] The right to freedom from corruption is thus guaranteed by treaties and agreements in addition to customary international law.[94] Article 21 of the Universal Declaration of Human Rights further declares a right for people to have some choice and influence over the representatives whom govern them.[95] Inherent in this right to democratic governance is the right to a government free from corruption.[96]

Although Mexico made progress guaranteeing freedom from corruption, it must work to ensure this freedom is protected through enforcement of domestic anticorruption laws. Countries should be encouraged to put pressure on each other to guarantee that none are failing to meet their treaty commitments and obligations under customary international law.

B. United States' Bilateral and Unilateral Efforts to Fight Corruption

Acting at times with partner nations and at times alone, the United States is proactive in the fight against corruption and crime. The current approach to addressing corruption in Mexico involves targeting Americans through the FCPA, and by slowly building up Mexican institutional strength through the Merida Initiative. Currently, the Merida Initiative rule of law programs only provide rewards and support for Mexican institutions that

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[91] Rehman & Perry, *supra* note 23, at 173-74 (citing Inter-American Convention Against Corruption, Mar. 29, 1996, S. TREATY DOC. NO. 105-39, 35 I.L.M. 724).

[92] *Id.* at 173 (citing Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. TREATY DOC. NO. 105-43, 37 I.L.M. 1).

[93] Foreign Corrupt Practices Act, 15 U.S.C. §§ 78dd-1(2012).

[94] Sorensen, *supra* note 84, at 202.

[95] *Id.* (citing G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948)).

[96] *Id.*

make progress but do little to seek out and deter corrupt behavior by government officials in Mexico.[97]

Congress first began to act against corrupt practices within United States companies doing businesses overseas in the 1970s. Congress signed the FCPA in 1977, and although federal prosecutors in the United States did not immediately bring cases against American business; severe penalties now exist for any business entity attempting to bribe foreign officials.[98] During the Obama administration's turn at FCPA enforcement, the United States government increasingly used the law to try and change corrupt cultures in other countries rather than just deter Americans from corrupting foreign officials.[99] Notably, the Office of Foreign Asset Control ("OFAC") has a designation for sanctioning TCOs, but it has yet to employ this designation to target Mexican cartels or officials.[100]

The Merida Initiative, created during the George W. Bush administration, is a historic cooperation program between the United States and Mexico to fight TCOs.[101] Recognizing Mexico as a security priority, the Merida Initiative has a military/law enforcement element as well as a development/rule of law element.[102] The current rule of law programs administered by the United States Agency for International Development ("USAID") under the Merida Initiative focus on helping state governments within Mexico fully implement a series of constitutional legal reforms which move Mexico toward an oral,

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[97] *See* Franzblau, *supra* note 17.

[98] Daniel R. Alonso, *Corruption Enforcement Becomes Focus of U.S. Foreign Policy*, CFO, (May 20, 2015), *available at* http://ww2.cfo.com/regulation/2015/05/global-corruption-enforcement-becomes-focus-u-s-foreign-policy/.

[99] *Id.*

[100] *See* Transnational Criminal Organizations, U.S. DEP'T. TREASURY (last accessed Sept. 9, 2018), *available at* https://www.treasury.gov/resource-center/sanctions/Programs/Pages/tco.aspx (targeting MS-13, but not Mexican smuggling cartels).

[101] Merida Initiative, U.S. DEP'T OF STATE (last accessed 1/7/2016), *available at* http://www.state.gov/j/inl/merida/.

[102] *See id.*

adversarial criminal justice trial system.[103] Mexican states with the longest history of USAID support saw a drop in pre-trial detention rates, in part through use of alternative mechanisms for non-violent and unintentional misdemeanors.[104] Through another Merida Initiative program, USAID delivered dozens of grants to nongovernmental organizations "that have resulted in programs for at-risk youth and programs that reduce violence against women, improve mental health, strengthen community cohesion, and improve education."[105] Merida Initiative programs provide "classroom lessons on the culture of lawfulness and ethics to more than 600,000 students and 14,000 teachers, in some 7,000 separate schools located in 24 Mexican States."[106] USAID committed to funding these rule of law programs through 2018.[107]

On the military side, the Merida Initiative has provided funding for equipment, such as helicopters for Mexico's Navy, Army, Federal Police, and Secretariat for Public Security.[108] By one estimate, funding now reaches over 52,000 Mexican officers.[109]

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[103] Mexican states have even fewer resources and less legal expertise than the Mexican federal government. USAID, MEXICO RULE OF LAW INFORMATION SHEET (Jan. 2016), *available at* https://www.usaid.gov/sites/default/files/documents/2496/DO2%20fact%20sheet%20Jan2016.pdf.

[104] *Id*. (noting a drop of 25%).

[105] *Security Challenges in Latin America Before the Subcomm. On State, Foreign Operations, and Related Programs of the H. Appropriations Comm.*, 112th Cong. (Mar. 29, 2012) (statement of William R. Brownfield, Assistant Secretary, Bureau of International Narcotics and Law Enforcement Affairs), *available at* https://2009-2017.state.gov/j/inl/rls/rm/187097.htm.

[106] *Id.*

[107] *See generally* USAID, MEXICO COUNTRY DEVELOPMENT COOPERATION STRATEGY FY 2014 – FY 2018, (Addendum Nov. 2015), *available at* https://www.usaid.gov/sites/default/files/documents/1862/USAID-Mexico-CDCS-with-Addendum-1-as-of-Nov-2015.pdf.

[108] *Security Challenges in Latin America Before the Subcomm. on State, Foreign Operations, and Related Programs of the H. Appropriations Comm.*, 113th Cong. (Mar. 29, 2012) (statement of William R. Brownfield, Assistant Secretary, Bureau of International Narcotics and Law Enforcement Affairs), *available at* https://2009-2017.state.gov/j/inl/rls/rm/187097.htm.

[109] *Id.*

The greatest advantage of the current United States approach to fighting Mexican drug cartels is that it does not antagonize the Mexican government. The confidence and trust on which the Merida Initiative is based is important to its success, especially as there is "historic suspicions of [United States] law enforcement officials and Mexican sensitivities to deeper cooperation with the [United States] government."[110]

Some Latin American countries managed to reduce corruption without foreign assistance or intervention. Chile is one of the highest ranked Latin American countries on the CPI at 27th,[111] thanks to reforms passed over a decade ago. In 1999, Chile reformed its justice system to place effective sanctions on "big fish," or high level government officials engaged in corruption.[112] Chile also passed campaign finance reforms that seek to prevent undue influence in government.[113] These reforms contribute to Chile's relatively high position on the CPI.[114] The fact that Latin American countries demonstrate an ability to control corruption should factor into U.S. diplomatic policy. Without it, "[n]ew restrictions on bilateral cooperation, which make both nations more vulnerable to criminal activities, may reinforce the perception that Mexican authorities are more committed to protecting their country's sovereignty than to fighting crime."[115]

There are several disadvantages to the current approach to fighting corruption in Mexico: it does not properly prioritize corruption of public officials; it allows for wasted resources; and it sends the wrong message to partners in the fight against TCOs.

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[110] Noriega & Trigos, *supra* note 37.

[111] Chile falls behind only Uruguay, which ranks 21st. TRANSPARENCY INTERNATIONAL, *supra* note 40.

[112] This is akin to the "kingpin" theory of fighting crime mentioned above. Like the Carter administration passing "sunshine" government transparency laws after the Watergate scandal, Chile's own scandals caused it to pass the Law of Administrative Integrity in 1999. *See* Alejandro Ferreiro, Symposium, *Corruption, Transparency and Political Financing: Some Reflections on the Experience in Chile*, 10 SW. J.L. & TRADE AM. 345, 348 (2004).

[113] *See* Ferreiro, *supra* note 112, at 353.

[114] TRANSPARENCY INTERNATIONAL, *supra* note 40.

[115] Noriega & Trigos, *supra* note 37.

The Merida Initiative support may eventually lower corruption and enhance respect of the rule of law in Mexico, but it is taking far too long to produce results. USAID's goal to help all of Mexico's states fully implement the 2008 reform by 2016 fell short, with only six of Mexico's thirty-one states fully implementing the reforms to date.[116] USAID's rule of law programs do not have long-term effects on Mexico's cartels, who can quickly ramp up their capacity for violence and ability to elude law enforcement.[117]

The current approach to anticorruption in Mexico and Central America requires the Department of Justice and the State Department to annually appropriate hundreds of millions of dollars, much of which is not spent effectively.[118] Between 2008 and 2014, United States assistance to Mexico totaled over $3 billion.[119] In Mexico, despite the enormous allocation of resources for new training for attorneys, new court facilities, and the creation of a new national code, the United States' rule of law support effort has incomplete results and has not significantly reduced Mexico's perception of corruption.[120] This is largely because the United States' funding for rule of law programs comes with few strings attached and little to nothing is done about endemic high-level public corruption.[121]

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[116] USAID, MEXICO RULE OF LAW INFORMATION SHEET, (Jan. 2016), *available at* https://www.usaid.gov/sites/default/files/documents/2496/DO2%20fact%20sheet%20Jan2016.pdf.

[117] Berlin & Trinkunas, *supra* note 56, at 45; Noriega & Trigos, *supra* note 37.

[118] *See The Rise of Mexican Drug Cartels and U.S. National Security Before H. Comm. On Oversight and Gov't Reform Judiciary*, 111th Cong. 15, 20 (2009) (statement of Lanny A. Breuer, Assistant Attorney General; William Hoover, Assistant Dir. Field Operations ATF; Anthony P. Palacio, Assistant Administrator for Intelligence), *available at* https://www.justice.gov/sites/default/files/criminal-ocgs/legacy/2011/06/24/AAG%20Breuer%20Remarks_Mexican%20Drug%20Cartels_7.9.09.pdf.

[119] John M. Ackerman, *Why America Is to Blame for Mexico's Carnage and Corruption*, FOREIGN POLICY (Nov. 26, 2014), *available at* http://foreignpolicy.com/2014/11/26/why-america-is-to-blame-for-mexicos-carnage-and-corruption/.

[120] Rios, *supra* note 53.

[121] *See* USAID, *supra* note 107, at 18.

The United States' current position of overlooking corruption by Mexican public officials, conditioned on continued cooperation by law enforcement in the fight against the cartels, sends the wrong message to all parties involved. While there is growing evidence that the Mexican people want change and reform with respect to corruption,[122] the United States appears unwavering in its support for the Mexican government and unwilling to criticize its approach toward corruption.[123]

The United States needs an update to its current corruption-fighting approach. As long as Mexico fails to enforce the rule of law, the United States faces the risks that come with living beside a severely weakened state.[124] Although United States is limited in the actions it can take to handle a problem in a friendly, neighboring country,[125] tools that the United States uses elsewhere can and should be equally applied in Mexico.

IV. Using The Global Magnitsky Act

In eastern Europe and Russia, the United States has taken bold unilateral action to fight corruption through use of targeted sanctions. Rather than blindly continuing to provide resources and support to a state that has not shown that its law enforcement officials can act honestly,[126] the United States should target known corrupt Mexican government officials with individualized sanctions while maintaining current levels of support for Mexican law enforcement and rule of law programs. In December 2012, President Obama signed the Russia and Moldova Jackson–Vanik Repeal and original Magnitsky Act, which put targeted sanctions on specific Russian government officials linked to serious human rights violations and corruption

[122] Duncan Wood, *Fighting Corruption in Mexico*, FOREIGN AFFAIRS, (Jun. 22, 2016), *available at* https://www.foreignaffairs.com/articles/mexico/2016-06-22/fighting-corruption-mexico (citing the coalition of civic groups that began to mobilize for anticorruption reforms in 2015 under the banner 3de3 (3for3).
[123] Ackerman, *supra* note 5.
[124] *See* Felbab-Brown, *supra* note 4, at 3, 8.
[125] *See* Hilderbrand, *supra* note 28, at 9.
[126] Franzblau, *supra* note 17.

in Russia and Europe.[127] On December 23, 2016, the National Defense Authorization Act for the fiscal year 2017 included the GMA, enacting a worldwide version of the original Magnitsky Act.[128] Under the GMA, the President of the United States now has the power to impose targeted sanctions on non-United States citizens guilty of corruption or gross human rights violations anywhere in the world.[129] Before exploring the use of targeted sanctions, this section will briefly provide a history of the events that led to the passage of the original Magnitsky Act.

Russian lawyer Sergei Magnitsky investigated members of the Russian Interior Ministry for the largest tax-fraud case in Russian history, finding that at least $230 million had been embezzled.[130] The scheme indicated the presence of high level links to organized crime and government officials.[131] To shift blame, the same Russian officials Magnitsky had been investigating retaliated by imprisoning him for the same crimes they were accused of committing.[132] Almost a year into his imprisonment, Magnitsky was found dead in his cell after being beaten to death with rubber truncheons by guards, according to independent investigators.[133] In response to his death, United States lawmakers sought targeted sanctions against certain Russian officials responsible for Magnitsky's death and eventually passed the original Magnitsky Act.[134] Through the original Magnitsky Act, the United States targeted the Russian

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[127] Sergei Magnitsky Rule of Law Accountability Act of 2012, 22 U.S.C.A. § 5811 (West 2012).

[128] Global Magnitsky Human Rights Accountability Act, S. 2943, 114th Cong. § 1261 (2016) (enacted).

[129] Enough Team, *"A Groundbreaking Achievement": Congress Passes "Global Magnitsky Human Rights Accountability Act"*, ENOUGH PROJECT (Dec. 8, 2016), *available at* http://www.enoughproject.org/blogs/%E2%80%9C-groundbreaking-achievement%E2%80%9D-congress-passes-%E2%80%9Cglobal-magnitsky-human-rights-accountability-ac.

[130] Marius Fossom, *Tajikistan's Magnitsky: The Case for a Global Magnitsky Act*, THE DIPLOMAT (Dec. 2, 2016), *available at* http://thediplomat.com/2016/12/tajikistans-magnitsky-the-case-for-a-global-magnitsky-act/.

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.*

officials with visa bans and asset freezes within the banking system.[135] Like the Obama administration's new use of the FCPA penalties, the growing recognition that public corruption around the world affects United States national security established the original Magnitsky Act.[136]

Fortunately, targeted sanctions to fight corruption are emerging as an element of United States' strategy in the Western Hemisphere.[137] In July 2018 the Trump Administration sanctioned three government individuals in Nicaragua connected with human rights abuses, one of whom is the current commissioner of the national police.[138] This is precisely the approach the United States could take with respect to Mexico. The visa restrictions and the asset freezes of the Global Magnitsky Act are the appropriate tools for dealing with public corruption in Mexico, because their use would be both lawful and effective.[139]

Targeted sanctions are an increasingly attractive tool because they are non-violent and not overbroad, unlike general economic sanctions or trade embargoes which can wreak havoc on civilian populations.[140] In the past, the United States used targeted sanctions as a "warm-up" to other sanctions or as a "knock-out" punch to put the finishing touches on a larger sanctions regime, and the sanctions generally succeeded when designed to moderate improvements.[141] An analysis of targeted

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[135] 22 U.S.C.A. § 5811.

[136] Joseph K. Grieboski, *Global Magnitsky Act is a human rights paradigm shift*, THE HILL, (Sept. 10, 2015), *available at* http://thehill.com/blogs/pundits-blog/international/252636-global-magnitsky-act-is-a-human-rights-paradigm-shift.

[137] Nauert, *supra* note 36.

[138] *Id.*

[139] S. 2943, 114th Cong. § 1261.

[140] Elizabeth Clark Hersey, Note, *No Universal Target: Distinguishing Between Terrorism and Human Rights Violations in Targeted Sanctions Regimes*, 38 BROOK. J. INT'L L. 1231, 1233-34 (2013).

[141] Gary C. Hufbauer & Barbara Oegg, Article, *Targeted Sanctions: A Policy Alternative?*, 32 LAW & POL'Y INT'L BUS. 11, 17 (2000). This comment does not call for targeted sanctions against corrupt Mexican officials to form part of a greater sanctions regime, but only to compliment support the United States already provides.

economic sanctions such as asset freezes shows that targeted sanctions are effective in bringing new policies nearly half of the time, compared to full trade embargoes, which succeeded in only a quarter of cases.[142]

The GMA is unique because of its worldwide scope, allowing sanctions against public officials who are:

> responsible for, or complicit in, ordering, controlling, or otherwise directing, acts of significant corruption, including the expropriation of private or public assets for personal gain, corruption related to government contracts or the extraction of natural resources, bribery, or the facilitation or transfer of the proceeds of corruption to foreign jurisdictions.[143]

Under the GMA, Congress may submit the names of individuals recommended for sanctions, subject to the President's approval. [144] The President may also unilaterally add individuals to the sanctions list based on "credible evidence."[145] The GMA states that the President shall consider information from at least two members of the relevant congressional committees charged with oversight, or information provided by other countries governments or by nongovernmental organizations.[146] The President can also remove an individual from potential targeting if there exists credible information that the individual: is innocent; has been appropriately punished; has shown a credible change in behavior; or if necessary for national security purposes.[147]

Tools like the GMA are increasingly attractive for policymakers, but they are not without complications for the individuals and states targeted with sanctions. Targeted sanctions raise issues of due process under customary

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[142] *Id*. at 16.
[143] S. 2943, 114th Cong. § 1263(a)(3).
[144] S. 2943, 114th Cong. § 1261.
[145] *Id.*
[146] S. 2943, 114th Cong. § 1263(c)(1)-(2).
[147] S. 2943, 114th Cong. § 1263(g)(1)-(4).

international law.[148] To ensure due process, the Universal Declaration on Human Rights seeks to protect the right to property and free association,[149] arguing that neither right should be taken from an individual arbitrarily.[150] The International Covenant on Civil and Political Rights contains a similar provision that guarantees the right to due process if faced with a charge.[151] This typically means guaranteeing the right to a hearing before the loss of property.[152] Because most individuals do not have the resources to handle their adjudication personally at the international level, and because treaties and multilateral conventions rarely confer jurisdiction on national courts to handle corruption, targeted sanctions regimes may deprive individuals of their property without due process.[153] The United Nations has attempted to grapple with this issue. In response to due process challenges to its targeted sanctions regime against Taliban officials, the United Nations created an independent ombudsman's office to review the cases of individuals targeted with sanctions.[154] This provided some amelioration of the due process issue.[155]

Another concern raised by targeted sanctions regimes is that of state sovereignty, a key principle of international law.[156] Sovereignty is a government's "exclusive authority over [its] territory and population."[157] Within a state's territory, sovereignty gives rise to exclusive internal jurisdiction, or the right to create, enforce, and adjudicate laws.[158] Scholars of

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148 *See* Hersey, *supra* note 140, at 1234.

149 G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

150 *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); Hersey, *supra* note 142, at 1252.

151 *See* Hersey, *supra* note 140, at 1253 (citing International Covenant on Civil and Political Rights, Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171.).

152 *See id.*

153 *See id.*

154 *Id.*

155 *Id.*

156 *See* AM. SOC'Y INT'L L., *Jurisdictional, Preliminary, and Procedural Concerns, in* BENCHBOOK ON INTERNATIONAL LAW § II.A 2 (Diane Marie Amann ed., 2014), *available at* www.asil.org/benchbook/jurisdiction.pdf.

157 *See* Hersey, *supra* note 140, at 1248.

158 *See id.*

international law consider extraterritoriality an affront to democratic state sovereignty.[159] "Targeted sanctions against individuals affiliated with a recognized state government (as opposed to non-state groups like terrorist organizations), may infringe on the target state's exclusive internal jurisdiction, in violation of international law" because they are examples of extraterritorial action.[160] The GMA limits on the actions of United States citizens, as well as the restrictions on property within the United States, clearly fall within traditional notions of state sovereignty.

There are two arguments under which states can defend the use of targeted sanctions against foreign government officials. First, the universality principle of jurisdiction, which claims that the law equally grants jurisdiction to all nations.[161] Viewed under this light, one state can contend that it is not acting extraterritorially when it acts to enforce international law under the universality principle, because the law is the same within its own territory and in the territory where the law is being enforced.[162] Second, the effects doctrine, which claims that "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power."[163] While neither rationale has yet gained widespread consensus as a justification for sanctions targeting corruption and human rights violations, targeted sanctions regimes are not going away anytime soon.[164] This is especially true for sanctions that seek to address internationally recognized crimes, so it is incumbent upon forward-thinking policymakers to determine

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[159] *Id*. at 1248-49.

[160] *Id*. at 1260.

[161] AM. SOC'Y INT'L L., *supra* note 156, at § II.A 4 ("Universal jurisdiction derives from the view that certain conduct (such as genocide, torture, piracy, aircraft hijacking, hostage taking, war crimes, and the slave trade) so concerns the entire international community of states that the prosecution of offenders by any state is warranted.").

[162] *See id*.

[163] *Id*. at 7 (quoting Justice Holmes majority opinion in Strassheim v. Daily, 221 U.S. 280, 285 (1911)).

[164] *See* Hersey, *supra* note 140, at 1262.

how to make targeted sanctions work in a way that conforms to principles of international law.[165]

Anti-corruption and human rights activists called for the United States government to move forward with the GMA since the passage of the original Magnitsky Act.[166] The original Magnitsky Act set a new tone for action against corruption and human rights violations around the world.[167] Passage of the law shows that United States is both willing to take a stand on principle and to resist corruption in countries that affect United States interests.[168] In spring 2014, the European Parliament passed its own law similar to the original Magnitsky Act.[169] The original Magnitsky Act proved effective in light of the immediate response it provoked, as Russia took steps to prevent American adoptions of Russian children as well as to announce its withdrawal from a bilateral agreement on international criminal cooperation signed with the United States in 2002.[170] This response is indicative of that that the original Magnitsky Act created a panic among members of the Russian president's inner circle that their money in Western bank accounts is no longer safe.[171]

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[165] *See id*. at 1266.

[166] *The Global Magnitsky Act Will Help Protect Human Rights Activists Worldwide*, WASH. POST (May 2, 2016) (arguing for its use in Azerbaijan) *available at* https://www.washingtonpost.com/opinions/a-means-to-better-protect-human-rights-activists-around-the-globe/2016/05/02/1f069f38-0b10-11e6-a6b6-2e6de3695b0e_story.html?utm_term=.df925111c9c0; *The Global Magnitsky Human Rights Accountability Act Moves Forward in Congress*, Enough Project, (May 18, 2016) (quoting John Pendergast about its potential use in South Sudan) *available at* https://enoughproject.org/blog/global-magnitsky-human-rights-accountability-act-moves-forward-congress.

[167] *But see* Steven Pifer, *Burying the Magnitsky Bill's Message*, BROOKINGS (June 29, 2012), *available at* https://www.brookings.edu/opinions/burying-the-magnitsky-bills-message/.

[168] Grieboski, *supra* note 136.

[169] Browder, *supra* note 13.

[170] John R. Cook, ed., *Jackson-Vanik Amendment Repealed; Magnitsky Provisions Draw Russian Ire and Termination of Adoption and Anticrime Agreements*, 107 AM. J. INT'L L. 449, 450-51 (2013).

[171] Browder, *supra* note 13. Browder goes on to state "Magnitsky sanctions are the first major disruptive technology to transform human rights advocacy." *Id*.

The GMA includes a process for delisting, resolving any question issue over due process.[172] The GMA explains that the President shall consider information from at least two members of the relevant congressional committees charged with oversight or on information provided by other countries' governments or by nongovernmental organizations whose role is to monitor human rights.[173] Upon receiving a submitted name from Congress, the President has 120 days to determine whether the named person has engaged in serious corruption or human rights violations.[174] If the President becomes aware of credible information that the sanctioned person did not participate in the activity for which the United States imposed sanctions, or if the person credibly demonstrates a significant change in behavior, a payment of compensation for the activity, and a credible commitment not to engage in the activity in the future, then the President may remove the sanctions on the person.[175] Like the ombudsman procedure employed by the United Nations, these provisions alleviate the due process issues raised by the GMA.[176]

Under the universality principle, the GMA's use against corrupt Mexican officials would be legal because targeted sanctions would only seek to hold the Mexican government to its international legal commitments.[177] Because corruption is proscribed by international conventions to which Mexico is a party, the sanctioning party (the United States) would not be acting extra territorially, but rather seeking to adjudicate those laws (conventions) to which both countries are parties. The people of Mexico have a right to freedom from corruption under

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[172] S. 2943, 114th Cong. § 1263. Unfortunately, the original Magnitsky Act does not mention how notice is delivered to the affected parties and it does not provide the means by which an affected person can challenge the sanctions against them. Furthermore, the original Magnitsky Act does not provide guidance around what information qualifies as "credible." *See* Hersey, *supra* note 140, at 1272.

[173] Those members being the chairman and ranking member of the committee. S.2943, 114th Cong. § 1263(c)(1)-(2).

[174] S. 2943, 114th Cong. § 1263(d)(1).

[175] S. 2943, 114th Cong. § 1263(g)(1), (3).

[176] Hersey, *supra* note 140, at 1258.

[177] United Nations Convention Against Corruption, Oct. 31, 2003, S. TREATY DOC. NO. 109-6, 2349 U.N.T.S. 41.

customary international law.[178] Under the effects doctrine, the United States has strong grounds for jurisdiction to impose targeted sanctions on corrupt Mexican officials that have "or is intended to have substantial effect within its territory."[179]

The GMA sanctions can be effective because their use would avoid damaging the Mexican people while preserving the working relationship between the United States and Mexico. Targeted sanctions can have a meaningful effect on public corruption in Mexico if they shift the behavior of public officials in any number of ways. The Global Magnitsky Act's targeted sanctions will at the very least deter individuals from keeping their assets within United States' jurisdiction,[180] preventing United States citizens and banks from being complicit in corruption. Further, targeting certain officials with asset freezes and visa bans will hamper their ability to continue participating in corruption, setting an example for others.[181] Visa restrictions draw attention to the corruption of public officials by denying them and their supporters' legitimacy.[182] The lack of legitimacy brought on by public bans from travel into the United States will ideally be reflected at the ballot box when Mexican voters seek stronger leadership.

Nothing is preventing the United States from working with Mexico on strategic issues while imposing sanctions on judges and law enforcement officials that support TCOs.[183] The United States' relationship to Mexico is very different from its relationship to Russia, so targeted sanctions may be even more successful against Mexico than against Russia. Mexico's interconnected relationship with the United States, as well as the

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178 *See* Sorensen, *supra* note 86, at 202.

179 AM. SOC'Y INT'L L., *supra* note 157, at § II.A 7 (quoting § 402(1)(c) of the Restatement of International Law.).

180 Grieboski, *supra* note 136.

181 *See* Hufbauer & Oegg, *supra* note 141, at 15-16.

182 *See id.* at 15.

183 William Felix Browder, *Putting the Bad Guys on Ice*, BLOOMBERG (Feb. 19, 2015) *available at* http://www.bloomberg.com/news/articles/2015-02-19/u-s-should-freeze-assets-ban-travel-of-human-rights-abusers-more-often (referring in the text to potentially using the Global Magnitsky Act against judges in Azerbaijan who convict journalists critical of the ruling regime.).

Mexican public's deep desire for a reduction in corruption,[184] mean that Mexico's response to imposed GMA sanctions will be very different from Russia's angry retaliation to the original Magnitsky Act.

Finally, use of the GMA in Mexico would closer align the United States' foreign policy with its values of human rights and fundamental freedoms, thereby building credibility in that country and in the region of Latin America.[185]

CONCLUSION

Mexican corruption is an important national security concern for the United States. While Mexico's law enforcement and military remain committed to the fight against TCOs, there is little reason to believe the cartels can be defeated in the absence of tactics that target their enablers within government. Using the GMA's sanctions against corrupt Mexican officials will allow the United States to help the Mexican government gain more effective control over its territory and people. Publicly shaming the corrupt and seizing their assets while continuing to work with the Mexican government is the logical next step in fighting cartel organizations.

[184] *See* Wood, *supra* note 122.
[185] Grieboski, *supra* note 136.

IN YOUR HOUSE, I LONG TO BE: CONGRESS, COMMANDER-IN-CHIEF, AND THE POWER TO CONDUCT PRISONER EXCHANGES

Quinn Kahsay*

There are few things more certain in politics than the desire for power. It lurks behind every decision. This Article examines the power struggle between Congress and the President regarding military decision-making over prisoner exchanges. This Article suggests that allowing Congress to share or take part in prisoner exchanges would damage national security interests because Congress is not structurally capable of implementing a prisoner exchange. The 2014 National Defenses Authorization Act and exchange of Bowe Bergdahl are analyzed as case examples. This Article concludes by offering a legal and policy rationale to show that the national security interests of the United States are best served by allowing the President to maintain constitutionally unlimited control over the transfer of captured terrorists to the control and custody of foreign nations.

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INTRODUCTION

A disheveled and malnourished man emerges confused as his apparent captors escort him through the Afghan desert – a dry place with little to capture the eye besides occasional shrubbery.[1] As time passes, the blades of a helicopter can be heard as they disturb the otherwise silent desert.[2] Upon landing on the burning Afghan sand, a handful of passengers exit the helicopter and approach a truck in which the disheveled man is sitting.[3] The helicopter passengers speak briefly with the disheveled man's drivers before returning with him to the helicopter.[4] Before the man is permitted to enter the helicopter, his new escorts pat him down – presumably to ensure that he is not carrying weapons.[5] The escorts then board the helicopter with the apparently relieved man, and the helicopter slowly rises and disappears into the sky. [6]

The scene plays out like a Tom Clancy novel, but it is in fact the prisoner exchange of United States Army Sergeant Bowe Bergdahl. The situation described occurred in the Afghan desert and ended within minutes.[7] It was the grand finale to a situation

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[1] *See* Mark Thompson, *Watch the Bowe Bergdahl Video*, TIME MAGAZINE (June 4, 2014), *available at* http://time.com/2822102/heres-what-that-bergdahl- video-really-shows/.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*

that extended over the course of several years and caused both political and legal tension.

This Article will focus on the President's constitutional ability to conduct prisoner exchanges, using the Bergdahl exchange and the 2014 National Defense Authorization Act ("NDAA") as examples. This Article will examine arguments in favor of Executive Branch and Legislative Branch control over prisoner exchanges, with a focus on the assertion that deference should be given to the Commander-in-Chief in exchanges like that of Bergdahl and the national security implications of this assertion. The paper will conclude with policy recommendations regarding the division of power and make a final argument as to why the President should enjoy constitutionally unlimited control over the transfer of captured terrorists to the control and custody of foreign nations.

HISTORY AND CONTROVERSY SURROUNDING THE BERGDAHL EXCHANGE

Sergeant Bergdahl deserted his unit's base in Paktika Province, Afghanistan on June 30, 2009 in the dead of night.[8] A search for Bergdahl ensued shortly after his absence was noticed, and carried on for ninety days.[9] After nearly three months, it was discovered that Bergdahl had been captured by the Taliban.[10] The United States attempted to negotiate Bergdahl's release with the Taliban in November 2010, but talks soon ended. [11] Due to external pressure, the United States began to negotiate with the Taliban through the Qatar government.[12] The Taliban made it clear that any deal for Bergdahl must

[8] Eric Schmitt et al., *Bowe Bergdahl's Vanishing Before Capture Angered His Unit,* N.Y. TIMES (June 2, 2014), http://www.nytimes.com/2014/06/03/us/us- soldier-srgt-bowe-bergdahl-of-idaho-pow-vanished-angered-his- unit.html?_r=0.

[9] *Id.*

[10] *Id.*

[11] Adam Entous & Julian E. Barnes, *Behind Bowe Bergdahl's Release, A Secret Deal that Took Three Years*, WALL ST. J. (June 1, 2014), http://www.wsj.com/articles/behind-bergdahls-release-a-secret-deal-that-took-three-years-1401673547.

[12] *Id.*

include the release of five Taliban members detained at Guantanamo Bay, Cuba.[13]

Before striking a deal, the Obama Administration informed the Legislative Branch of the potential exchange and received a negative response to the proposal.[14] Two main reservations were espoused by those opposed to a deal. First, making a deal with the Taliban would break the long-standing assertion that the United States government does not negotiate with terrorists.[15] Second, the Taliban's demand for five prisoners in exchange for Bergdahl struck some as unreasonable and unbalanced.[16] Despite these concerns, the Obama Administration continued attempting to secure Sergeant Bergdahl's release.[17] In September 2013, talks increased once the Qatar government received a so-called proof-of-life video from the Taliban.[18] The Taliban then sent a proof-of-life video to the United States in January 2014.[19] This caused the Obama Administration to increase urgency in the talks, as Bergdahl's condition noticeably worsened.[20] The Obama Administration feared what would happen if Bergdahl expired while imprisoned by the Taliban.[21] A few short months later, the Obama Administration secured Bergdahl's release, though doing so raised an assortment of legal questions.[22]

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[13] *Id.*

[14] Charlie Savage & David E. Sanger, *Deal to Free Bowe Bergdahl Puts Obama on Defensive*, N.Y. TIMES (June 3, 2014), http://www.nytimes.com/2014/06/04/world/prisoner-deal-puts-president-on-defensive.html; *see also* Alexander Bolton, *Prisoner swap blows up on White House*, THE HILL (June 3, 2014), https://thehill.com/policy/defense/208163-prisoner-swap-blows-up-on-the-white-house ("More than two years ago, Members of Congress were briefed on the possibility of such an exchange, and the chairmen at the time and I raised serious questions to the administration.").

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Schmitt et al., *supra* note 8.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

The Obama Administration had previously expressed a belief that Congress must be informed of a prisoner exchange and, although the Administration informed Congress the day of the exchange, it did not abide by the text of the 2014 NDAA.[23] The NDAA is a defense spending bill that Congress reviews annually to make specifications for how the Department of Defense can spend money.[24] To ensure the exchange went smoothly, the Obama Administration labeled Bergdahl a prisoner of war.[25] Under typical circumstances, this would have been enough to avoid legal issues. However, in the 2014 NDAA, Congress tried to establish a procedure by which it required the President to notify Congress of a prisoner transfer that utilized congressionally-approved funds.[26] Specifically, "[t]he Secretary of Defense *shall notify* the appropriate committees of Congress . . . *not later than 30 days before* the transfer or release of the individual [from Guantanamo]."[27] Congress added the passage in 2014 owing in part to a desire to prevent the United States from

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[23] *See also* Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States Relating to International Law: General International and U.S. Foreign Relations Law: United States Negotiates Prisoner Exchange to Secure Release of U.S. Soldier Held in Afghanistan*, 108 AM. J. INT'L L. 517, 519 (2014); *see also* U.S. Gov't Accountability Off., B-326013, *Department of Defense--Compliance with Statutory Notification Requirement* 3 (2014) (noting that the Secretary of Defense provided written notice on May 31, 2014 to the appropriate congressional committees); *see also* Burgess Everett & John Bresnahan, *Hill Leaders Didn't Know of Swap*, POLITICO (June 3, 2014, 12:04 PM), http://www.politico.com/story/2014/06/harry-reid-bowe-bergdahl-briefedprisoner-deal-white-house-107373; *see also* Eric Schmitt & Charlie Savage, *Bowe Bergdahl, American Soldier, Freed by Taliban in Prisoner Trade*, N.Y. TIMES (May 31, 2014), http://www.nytimes.com/2014/06/01/us/bowe-bergdahl-american-soldier-is-freed-by-taliban.html?_r=0.

[24] *History of the NDAA*, COMMITTEE ON ARMED SERVICES (the specific issue with the 2014 NDAA is the 30-day notice requirement that Congress attached via a rider in response to fears that the President was about to transfer Guantanamo Bay detainees for Bergdahl) https://armedservices.house.gov/ndaa/history-ndaa.

[25] Josh Rogin, *White House Changes Tune on Bergdahl, Says He Was a 'Prisoner of War'*, THE DAILY BEAST (June 2, 2014), http://www.thedailybeast.com/articles/2014/06/02/white-house-changes-tune-on-bergdahl-says-he-was-a-prisoner-of-war.html; *see also* Justus Reid Weiner, *Leave No Man Behind: The United States and Israel Face Risks in Their Prisoner Release Policies*, 39 FLETCHER FORUM WORLD AFF. 7, 17 (Winter 2015).

[26] *See* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1035(d), 127 Stat. 672, 853 (2013).

[27] *Id.*

exchanging the five Taliban members for Bergdahl.[28] Those opposed to the transfer quickly used the 2014 NDAA to argue that the Bergdahl exchange was illegal.[29] However, if the proposition put forth by those opposed to the transfer is accepted, the 2014 NDAA would change the historical scope of the President's power.[30]

Examination of the scope of the President's power over the exchange of prisoners began under by the George W. Bush Administration and its theory that the President has final authority regarding wartime decisions.[31] Since Congress passed the Authorization for Use of Military Force of 2001 ("AUMF"), the President was given broad authority to make decisions concerning prisoners of war.[32] This authority raises several questions pertaining to prisoner exchanges: is this what happened with the Bergdahl exchange? What impact will it have on national security? Should the Executive Branch be forced to consult the Legislative Branch, or does the President have "constitutionally unlimited control over the transfer of captured terrorists to the control and custody of foreign nations?"[33]

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[28] Celidon Pitt, *Fair Trade: The President's Power to Recover Captured U.S. Servicemembers and the Recent Prisoner Exchange with the Taliban*, 83 FORDHAM L. REV. 2837, 2843 (2015).

[29] David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb--Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 738 (2008).

[30] *Id.*

[31] Steven M. Maffucci, *Leave No Soldier Behind? The Legality of the Bowe Bergdahl Prisoner Swap*, 63 BUFF. L. REV. 1325, 1340 (2015).

[32] *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). Congress passed the AUMF days after the September 11, 2001, attacks and signed by the President shortly thereafter. It authorizes the President to: use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons. *See also* Ex Parte Quirin, 317 US. 1, 28 (1942); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality opinion) (quoting *Quirin*, 317 U.S. at 28, 30).

[33] Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Def. (Mar. 13, 2002)

Significantly, what would be the impact on national security if the Executive must consult the Legislative Branch?

LEGALITY OF THE OBAMA ADMINISTRATION'S ACTIONS

The theory that the Obama Administration broke tradition by negotiating with terrorists is a complex one and largely depends on how "terrorist" is defined. As the adage goes, "one man's terrorist is another man's freedom fighter."[34] Terrorism is broadly defined from one source as "the systematic use of terror or unpredictable violence against governments, publics, or individuals to attain a political goal."[35] Under this definition, any number of individuals or groups could be considered a terrorist organization. Indeed, Syrian President Bashar al-Assad could be considered a terrorist for his use of chemical bombings on his own people.[36] Even though Assad's actions form a systematic use of terror in hopes of attaining a political goal, the United States considers him to be a war criminal and not a terrorist.[37] For the purposes of this Article, the definition provided by the Federal Bureau of Investigation will control: "Terrorism is the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives."[38]

The United States' recent foreign conflicts focused on the so-called "War on Terror," resulting in the "unusual entwinement with the home front, its heavy focus on preemptive action and intelligence collection, and its targeting of a diffuse, non-state

(regarding "The President's power as Commander in Chief to transfer captured terrorists to the control and custody of foreign nations").

[34] Symposium, *Negotiating with Terrorists and Non-State Actors: The Journey to World Peace*, 4 CARDOZO ONLINE J. CONFLICT RES. 2 (2003).

[35] *See* ALEX P. SCHMID, THE ROUTLEDGE HANDBOOK OF TERRORISM RESEARCH 142 (2011).

[36] Anne Barnard & Michael R. Gordon, *Worst Chemical Attack in Years in Syria; U.S. Blames Assad*, N.Y. TIMES (Apr. 4, 2017), https://www.nytimes.com/2017/04/04/world/middleeast/syria-gas-attack.html.

[37] *Id.*

[38] *See* 28 C.F.R. § 0.85.

enemy, all guarantee that presidential uses of force are likely to be conducted for years to come in a context that is thick with statutory restrictions."[39] These conflicts are novel in nature, and it is likely that Congress will continue to pass regulatory statutes as a means to control some of the President's power.[40] The courts have continued to resist implementing a brightline rule regarding whether Congress has this power to restrain the ease with which the Commander-in-Chief can negotiate and implement prisoner exchanges.[41]

Because there are multiple definitions of terrorism,[42] the State Department has a significant amount of latitude and flexibility in deciding whether a group is labeled a terrorist organization.[43] It is important to note that the Taliban is not a single, cohesive group. The group responsible for capturing Bergdahl–Afghanistan's Taliban[44]–is not on the State Department's list of Foreign Terrorist Organizations.[45] While this may seem counterintuitive, the Taliban group that is on the State Department's list of Foreign Terrorist Organizations, the Tehri-I Taliban of Pakistan,[46] was not involved with Bergdahl's capture nor the negotiations that ensued.[47]

The biggest factor in these divergent State Department listings is that of political expediency.[48] The United States' government made the calculation, over the course of multiple administrations, that naming the Afghan Taliban a terrorist group would impede both the United States and the Afghan consular links with the Taliban, thereby damaging prospects of a

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[39] Barron & Lederman, *supra* note 27, at 945.
[40] Pitt, *supra* note 26, at 2843.
[41] *Id.*
[42] *See* 28 C.F.R. § 0.85.
[43] 8 U.S.C. § 1189 (2012).
[44] Eric Schmitt et al., *supra* note 8.
[45] Masood Farivar, *Why Isn't Afghan Taliban on US List of Foreign Terror Groups?*, VOA NEWS (Feb. 20, 2017, 5:11 PM), https://www.voanews.com/a/afghan-taliban-us-list-foreign-terror-groups/3732453.html.
[46] *Id.*
[47] Schmitt et al., *supra* note 8.
[48] Farivar, s*upra* note 4.

peace deal.[49] Under this decision, the Obama Administration was not, in a legal sense, negotiating with a terrorist organization when it engaged in discussions with the Afghan Taliban.[50] Thus, the tradition of refusing to negotiate with terrorists was not broken.

THIRTY-DAY NOTICE REQUIREMENT AND ITS LEGALITY

The question of whether the Bergdahl exchange defied the 2014 NDAA is still unanswered. Since Congress did not clearly state whether the thirty-day notice requirement was intended to overrule the President's constitutionally protected ability to transfer civilians and military personnel, "the notice requirement does not in its terms apply to a time-sensitive prisoner exchange designed to save the life of a U.S. soldier."[51] There is no definitive view on how courts will rule on this issue, it is projected that courts will read an implied exception into the notice requirement.[52]

HISTORY OF THE SPENDING POWER

The historical context of Congress's spending power is important in understanding how it was used regarding the 2014 NDAA. The Constitution grants the spending power to Congress as an "empowerment of the legislature [that] is at the foundation of our constitutional order."[53] This is a power given to the Legislative Branch in a broad swath of democratic countries, including the United Kingdom's Parliament, which the Founders used as a model to construct American branches of government.[54] Congress was given this power as a check on the President, though not necessarily to limit his powers as the Commander-in-Chief.[55] Rather, it was granted to prohibit the

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[49] *Id.*

[50] *Id.*

[51] Jack Goldsmith, *Was the Bergdahl Swap Lawful?*, LAWFARE (Mar. 25, 2015, 9:19 PM), https://www.lawfareblog.com/was-bergdahl-swap-lawful.

[52] Maffucci, *supra* note 28, at 1326.

[53] Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1374-77 (1988).

[54] *Id.* at 1344.

[55] *Id.*

President from using federal funds for his own purposes.[56] The spending power is specifically enumerated in Article I, Section 9 of the Constitution: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law "[57]

Congress originally applied its spending power strictly as it related to military spending through a process by which the Commander-in-Chief requested funds.[58] After the Commander-in-Chief made the request, Congress then authorized and stated the specific purpose for which the funds could be used.[59] This strict process watered down during the Civil War when Congress began to use less specificity in describing which aspects of war could receive funding.[60] This trend continued through World War II until the late 1950s, when Congress was concerned about covert operations that were not technically acts of war.[61] Congress began to attach riders to bills, much like in the 2014 NDAA, in an attempt to curtail what they saw as Presidential overreach.[62] It was generally understood the President could not use funds without recognizing the restraints Congress had attached to the funds.[63] The question remains as to whether Congress can use its spending power to constrain every detail of powers belonging to the Commander-in-Chief. To answer this, consideration must be given to the historical context of Commander-in-Chief powers, as well as how the Supreme Court has ruled in analogous situations.

CONSTITUTIONAL AUTHORITY: CONGRESS V. THE PRESIDENT

Even if the courts were to decide that the 2014 NDAA did not include an implied exception, the constitutionality of the NDAA's thirty-day notice requirement is still on unstable ground.

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[56] *Id.*
[57] U.S. CONST. art. I, § 9, cl. 7.
[58] Stith, *supra* note 51.
[59] *Id.*
[60] John Yoo, *Transferring Terrorists*, 79 NOTRE DAME L. REV. 1183, 1214-18 (2004).
[61] *Id.*
[62] *Id.; see also* Celidon Pitt, *supra* note 26, 2843.
[63] Stith, *supra* note 51, at 1344.

This is because it is conceivable that Congress created this provision in an attempt to use its spending power to strip the President of his constitutionally protected powers. The Constitution grants the President broad powers as Commander-in-Chief.[64] Specifically, "[t]he President shall be Commander-in-Chief of the Army and Navy of the United States, and of the Militia of the several States. . . ."[65] It is important to note the historical context of what the role of Commander-in-Chief entails.

Commanders-in-Chief historically decide when prisoners can have liberty.[66] No traditional limits were placed on how and to whom the Commander-in-Chief could transfer a prisoner.[67] The text, structure, and history of Article II powers show that the President maintains broad latitude over such transfers.[68] As Jay Bybee noted in his memorandum regarding the prisoner transfer:

> Our constitutional history and practice confirm this: The President has since the Founding era exercised exclusive and virtually unfettered control over the disposition of enemy soldiers and agents captured in time of war. Indeed, on several occasions throughout American history, the President, either in furtherance of diplomatic or military goals or merely for the sake of convenience, has transferred POWs from the custody and control of the United States to the custody and control of other foreign nations.[69]

Congress maintained a significant amount of control over the military in the early days of the United States, specifically over its structure and personnel.[70] However, regulating when the President can go to war and who may join the armed services is

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[64] U.S. CONST. art. II § 2, cl. 1.

[65] *Id.*

[66] *See generally* Bybee, *supra* note 30.

[67] *Id.* at 8.

[68] *Id.; see also* U.S. CONST. art. II § 2, cl. 1.

[69] Bybee, *supra* note 30, at 2.

[70] David J. Barron & Martin S. Lederman, *The Commander and Chief at the Lowest Ebb-- A Constitutional History*, 121 HARV. L. REV. 941, 957 (2008).

distinct from military command duties.[71] Congress first recognized this in the late 18th century during skirmishes with the French, when it passed an act providing that "the President . . . is authorized to exchange or send away from the United States to the dominions of France, as he may deem proper and expedient, all French citizens that have been or may be captured and brought into the United States."[72] In 1812, Congress passed an act that endorsed the President's ability to "make such regulations and arrangements for the safe keeping, support and exchange of prisoners of war as he may deem expedient."[73]

Rather than attempt to limit the power of the President as it relates to prisoner exchanges, Congress expanded the President's Commander-in-Chief powers in 1947 when it passed an act "plac[ing] American governmental decisions regarding war making, intelligence, covert operations, military sales, and military aid under the executive's unified and coordinated control."[74] Until the Bergdahl exchange, sharp policy disagreements arose concerning whether the Commander-in-Chief had the power to enter war without Congressional approval; but Congress did not contest that the Commander-in-Chief had the ability to conduct tactical decisions at his discretion.[75] Because the Supreme Court left open the possibility that "independent war powers" are still subject to potential statutory limitations, legal scholars proposed that "Congress may constitutionally constrain the President as long as the legislative action does not violate a mandatory provision or express

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[71] Pitt, *supra* note 26, at 2843.

[72] Captured French Citizens Act, ch. 18, 1 Stat. 624, 624 (1799).

[73] Safe Keeping and Accommodation of Prisoners of War Act, ch. 128, 2 Stat. 777 (1812).

[74] Harold Hongju Koh, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 78, 102 (1990); Pitt, *supra* note 26, at 2846; *see also* Louis Fisher, *Presidential Power in National Security: A Guide to the President-Elect*, 39 PRES. STUDIES Q. 347, 352 ("Although some justices of the Supreme Court have described the president's foreign relations power as 'exclusive,' the Court itself has not denied to Congress its constitutional authority to enter the field and reverse or modify presidential decisions in the area of national security and foreign affairs.").

[75] *See* Barron & Lederman, *supra* note 27, at 750-51; *see also* Pitt, *supra* note 26, at 2846.

restriction of the Constitution and does not impede on an exclusive presidential power."[76]

The watershed case, as it concerns the Commander-in-Chief's foreign affairs power, is *United States v. Curtiss-Wright Export Corp*.[77] In *Curtiss-Wright*, the United States alleged that Curtiss-Wright colluded with Bolivia for the sale of fifteen machine guns while Bolivia was engaged in an armed conflict in the Chaco.[78] Curtiss-Wright's actions were thus direct violations of a Joint Resolution of Congress and a proclamation issued by President Roosevelt.[79] While distinguishable from the Bergdahl situation in that the statute regarded the sale of arms in the Chaco War and not prisoner exchanges, the Court extrapolated on how Congressional power is limited in foreign affairs.[80] Justice Sutherland wrote:

> In this vast external realm, with its important, complicated, delicate, and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation, the Senate cannot intrude; and Congress itself is powerless to invade it.[81]

The Court also distinguished internal and external affairs, holding that the President must enjoy "freedom from statutory restriction which would not be admissible were domestic affairs alone involved."[82]

The Court touched on national security-related policy concerns that exist when giving Congress the same power over

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[76] William M. Hains, *Challenging the Executive: The Constitutionality of Congressional Regulation of the President's Wartime Detention Policies*, 2011 BYU L. REV. 2283, 2284 (2011); *see also* Pitt, *supra* note 26, at 2847.
[77] *See generally* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936); *see* Pitt, *supra* note 26, at 2847.
[78] *Curtiss-Wright Exp. Corp*., 299 U.S. at 311.
[79] *Id.*
[80] *Id.* at 319.
[81] *Id.*
[82] *Id*. at 320.

international affairs as it has over domestic affairs.[83] The Court noted that foreign relations required caution and secrecy, which the Court explained are not attributes of Congress.[84] The Court further held that allowing Congress to be involved with negotiations would likely cause "danger and mischief" as Congress could be swayed by political reasons more so than the President.[85] The Court's strongest argument against giving Congress more power with foreign affairs was in noting that all agencies were required to provide requested information to Congress, except for the State Department.[86] The State Department differs from other governmental departments in that it only has to provide the information if "not incompatible with the public interest."[87] The Supreme Court further noted that the State Department's decision not to release information it felt would be damaging to national security was rarely, if ever, questioned and that the same latitude should be given to the Commander-in-Chief.[88]

Scholars who believe that the Supreme Court would find that Congress lacks authority to place restrictions on prisoner exchanges often point to *Youngstown Sheet & Tube Co. v. Sawyer*.[89] In *Youngstown*, the Supreme Court reviewed whether President Harry Truman acted within the scope of his power when seizing steel mills in the hope of avoiding a labor emergency during the Korean War.[90] While the Supreme Court ultimately held that Truman's actions violated the Takings Clause of the Fifth Amendment, the Court also examined the relationship and power balance between the President and Congress.[91] President Truman asserted that if Congress had its way, damage would be done to the ongoing war.[92] President

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[83] *Id.*
[84] *Id.* at 321.
[85] *Id.* at 320-21.
[86] *Id.* at 321.
[87] *Id.*
[88] *Id.*
[89] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); *see also* Pitt, *supra* note 26, at 2848-51.
[90] *Youngstown*, 343 U.S. at 582-83.
[91] *Id.* at 631-33.
[92] *Id.* at 582-83.

Truman justified his actions as necessary to prevent the mills from closing.[93] Truman argued that support for his actions came from "the Constitution, by historical precedent, and by court decisions."[94]

The Court did not accept Truman's argument.[95] Justice Black wrote in his majority opinion that "the President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."[96] Justice Black also stated that one reason for this was because Truman had been preempted by Congress as it expressly rejected using seizure as a means of solving labor disputes.[97] Hence, Truman's only remaining argument was leaning on the Constitution as his source for power to seize the mills.[98] Justice Black struck down that argument using Article II of the Constitution and pointing out how it limits the President's "functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."[99]

The main lesson from these cases is that the President must always consult with Congress in domestic affairs, but not always in foreign affairs.[100] Those who rely on the *Youngstown* decision to assert that the President must consult with Congress before initiating a prisoner transfer miss the distinction the Court drew in *Curtiss*.[101] Arguments based on *Youngstown* would likely be valid if the question was whether the President could use his power on domestic prisoners. It is hard to see how a serious argument could be made that the Bergdahl exchange

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[93] *Id.* at 584.
[94] *Id.*
[95] *Id.* at. 588-89.
[96] *Youngstown*, 343 U.S. at 585.
[97] *Id*. at 586-87.
[98] *Id.* at 587.
[99] *Id.*
[100] *See Curtiss-Wright Exp. Corp*., 299 U.S. at 319 (noting the difference between domestic and foreign affairs); *but see Youngstown*, 343 U.S. at 587.
[101] *See Curtiss-Wright Exp. Corp*., 299 U.S. at 319; *but see Youngstown*, 343 U.S. at 587.

was not a foreign affair, and as such, within the scope of the President's Commander-in-Chief powers.[102]

The biggest remaining question for the Supreme Court to answer is whether prisoner exchanges fall under the realm of "War Conduct."[103] The Supreme Court held in *Hamdan v. Rumsfeld* that Congress cannot be the orchestrator of the conduct of military campaigns.[104] The Court also held that the President cannot establish military commissions without consulting Congress, thereby ensuring that any answer, as it relates to dealings in foreign affairs, remained nebulous at best.[105] This means that the Supreme Court has expanded on its rationale in *Curtiss* by holding that even in foreign affairs there are limits to presidential power; but Congress cannot assume control of military operations. [106] The secretive nature of foreign affairs was one of the main reasons given for not allowing Congress to have more influence in foreign affairs.[107] Therefore, it seems the Court would be less likely to find that Congress could have say in a matter of utmost security like that of prisoner exchanges.

If the Supreme Court were to rule that the Commander-in-Chief must follow the 2014 NDAA notice requirement, or simply notify Congress at all, the Court would be ignoring the traditional Commander-in-Chief powers.[108] To realize this, one only needs to look at the history of how the Commander-in-Chief

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[102] *See Curtiss-Wright Exp. Corp*., 299 U.S. at 319 (explaining that the President does not need to consult with Congress in all foreign affairs because such matters are secretive, and Congress cannot be trusted to keep that secret).

[103] Maffucci, *supra* note 28, at 1340.

[104] Hamdan v. Rumsfeld, 548 U.S. 557, 592 (2006).

[105] *Id*.; *see also* Steven M. Maffucci, *Leave No Soldier Behind? The Legality of the Bowe Bergdahl Prisoner Swap*, 63 BUFF. L. REV. 1325, 1340 (2015).

[106] *See Curtiss-Wright Exp. Corp*., 299 U.S. at 319.

[107] *Id.*

[108] Barron & Lederman, *supra* note 27, at 738.

of the United States has previously acted with regards to prisoners.[109]

The first Commander-in-Chief, George Washington, established local prisoner exchanges throughout the Revolutionary War.[110] President Abraham Lincoln followed suit in the Civil War, but went further and exchanged soldiers who were legally considered to be "non-state actors."[111] During World War II, Presidents Roosevelt and Truman initiated the transfer of enemy soldiers to domestic solitudes.[112] Furthermore, during the Vietnam War, there were thousands of reciprocal releases conducted by the United States government.[113] A reciprocal release involved the United States freeing enemy combatants in exchange for expected Vietcong reciprocity.[114] Essentially, an enemy combatant would be freed without overt assurances of reciprocity other than the enemy's word.[115] From this, it is clear that the President is given wide latitude to make decisions about the transfer of prisoners based on the Constitution and the history of the Commander-in-Chief powers. Congressional silence itself implicates an acknowledgment of the President's Commander-in-Chief authority regarding the transfer of enemy prisoners during wartime.

Those opposed to the Bergdahl transfer have said that the history of the Commander-in-Chief powers should not be considered in his case, as the government broke precedent by "negotiating with terrorists" and paying the Qatar government 100 million USD for assisting in the exchange.[116] As previously mentioned, the Taliban group that captured Bergdahl was not a legally designated terrorist organization by the State

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[109] U.S. DOJ, Memorandum for William Haynes (2002) (regarding "[t]he President's power as Commander in Chief to transfer captured terrorists to the control and custody of foreign nations").

[110] Barron & Lederman, *supra* note 27, at 738.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] Pitt, *supra* note 26, at 2843.

Department.[117] Furthermore, the United States has previously exchanged money to nation-states during prisoner exchanges.[118] The Commander-in-Chief has been expected, at a bare minimum, to discuss the potential of conducting a prisoner exchange with the enemy in every kind of conflict.[119] Factually speaking, the number of prisoner exchanges that occurred in both the Civil and Revolutionary wars are significantly higher than any exchanges that have occurred during the War on Terror, and the exchanges that occurred in those conflicts did not require Congressional approval.[120]

Although the Constitution grants Congress the power to declare war, it does not grant it the enumerated power to force the Commander-in-Chief to consult Congress before conducting a prisoner transfer.[121] While such a move could be made by passing a constitutional amendment, Congress did not attempt to do so, but simply attached a rider to the 2014 NDAA.

JUSTIFICATION OF THE OBAMA ADMINISTRATION'S ACTIONS UNDER THE IMMINENT THREAT THEORY

Those who believe that the President should be given more latitude in conducting prisoner exchanges have asserted the argument that if a soldier's life is in 'imminent danger,' the President has the power to conduct a prisoner exchange regardless of whether a relevant statute exists.[122] There is little precedent regarding Presidential power to protect soldiers, and the law is, again, nebulous at best. However, protagonists of this argument often cite a select few which should be examined.[123]

The *Slaughter-House Cases* provide an example. The Supreme Court held that a "privilege of a citizen of the United States is to demand the care and protection of the Federal

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[117] *See* Farivar, *supra* note 45.
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] U.S. CONST. art. I § 8, cl. 11.
[122] Maffucci, *supra* note 28, at 1347.
[123] *Id.*

government over his life, liberty, and property when . . . within the jurisdiction of a foreign government."[124] This logic was expanded upon in *In re Neagle*. There, the Supreme Court formally recognized the idea that the Constitution gives the Executive branch the ability to protect American citizens.[125] Neagle, a U.S. Marshall, was assigned to protect Justice Field. Acting as Field's bodyguard, Neagle fatally shot a man who Neagle believed was about to attack Field.[126] Following Neagle's arrest, the United States sought his release via a writ of *habeas corpus*.[127] Finding that the Attorney General acted lawfully in giving Fields's U.S. Marshal protection, the Court reasoned that the President's power to "take care that the laws be faithfully executed" goes beyond "the enforcement of acts of congress or of treaties of the United States according to their express terms."[128] This power contains "the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution."[129] The language used in this opinion supports the idea that foreign relations fall under an exclusive national security area in which the President may actexclusively.

Perhaps the clearest example of the recognition of the Commander-in-Chief power to protect a citizen in imminent danger took place in a New York circuit court.[130] In *Durand v. Hollins*, the court noted that "as it respects the interposition of

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[124] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1872).

[125] In re Neagle, 135 U.S. 1, 67 (1890).

[126] *Id.*

[127] *Id.*

[128] *Id.* at 64.

[129] *Id.*

[130] Durand v. Hollins, 8 F. Cas. 111 (C.C.S.D.N.Y. 1860) (in which a group seeking to run the transport trade over the City of Greytown in what is now Nicaragua. During this time, the United States supported a rival company operated by Nicaraguans. This caused tensions which came to ahead when a group of Greytown citizens terrorized the American diplomat and wounded him. In response, the United States sent Captain Hollins to Greytown to collect reimbursement for injuries done to the property of the U.S. supported company and an apology for injuring the diplomat. Greytown elected to disregarded Captain Hollins's request, and Hollins reacted by bombing and burning down the city.).

the executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the President."[131] While courts have not specifically stated whether the President has the power to protect citizens, they did recognize that the President, at a minimum, has Commander-in-Chief powers of which some must be independent from congressional dictation.[132]

From a historical and practical perspective, the power to protect is a power that the President uses unilaterally, indicating it is a power not shared with Congress.[133] While there is no situation totally analogous to that of the Bergdahl exchange, there are similar examples in which the President exercised the power to protect, which has been used at least since the Jefferson presidency.[134] Moreover, "the Administrations of Presidents Ford, Carter, Reagan, George H.W. Bush, Clinton, George W. Bush, and Obama have all, in one form or another, asserted the constitutional authority to act unilaterally in protecting the lives of Americans abroad." [135]

While other scholars have justified the Obama Administration's prisoner exchange for Bergdahl under the imminent threat exception,[136] the conclusion has not been formalized by the Supreme Court. Yet, the totality of Supreme Court cases regarding foreign affairs seem to support the conclusion that the Supreme Court will tolerate,[137] if not endorse, the President's near-exclusive power to conduct foreign

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[131] *Id.* at 112.

[132] Maffucci, *supra* note 28.

[133] *Id.*

[134] Arthur H. Garrison, *The History of Executive Branch Legal Opinions on the Power of the President as Commander-in-Chief from Washington to Obama*, 43 CUMB. L. REV. 375, 458 (2013); *see also Maffucci, supra* note 28.

[135] *See* Maffucci, *supra* note 28, 1349-1350.

[136] *Id.*

[137] *See generally* Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1305 (1988).

affairs, and thereby prisoner exchanges, free of Congressional restraint.[138]

EFFECTS ON NATIONAL SECURITY: LEGISLATIVE BRANCH CONSULTATIONS

Aside from the fact that history points toward the conclusion that the Commander-in-Chief may conduct prisoner exchanges at his discretion, there are policy concerns that cannot be ignored pertaining to Congressional attempts to share this power mantel. First, Congress is notorious for its inability to keep a secret. This is a concern that has existed since the inception of Congress.[139] Congress is a body of individuals who are largely concerned with their own reelection and future political prospects.[140] While those concerns should not outweigh consideration that must be undertaken when conducting a prisoner exchange, it is far from certain that Congress takes those considerations as seriously as they should.[141]

As Alexander Hamilton noted in *Federalist No. 23*, the Commander-in-Chief powers should be as separated as possible from the powers executed by Congress.[142] As described:

> These powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent and

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[138] *Id.* (After *Youngstown*, the Supreme Court broadly defined the United States foreign policy power to lean in the Executive Branch's favor. After the Court's decision in Chadha got rid of Congressional power with regards to the War Powers Resolution, the Arms Export Control Act, the Nuclear Non-Proliferation Act, the National Emergencies act, and IEEPA. *See generally* Goldwater v. Carter, 444 U.S. 996 (1979); United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 324 (1937). These cases fused the Executive Branches power as it relates to treaties. More recently, Dames & Moore v. Regan, 453 U.S. 654 (1981) gave lower courts the ability to rule in the Executives favor if decisions were made of economic necessity.).

[139] Letter from Samuel Chase to Richard Henry Lee (May 17, 1776), *in* 4 LETTERS OF DELEGATES TO CONGRESS, 1774-1789: May 16, 1776-August 15, 1776, 22 (Paul Smith ed., 1979).

[140] *Id.*

[141] *Id.*

[142] *See* ALEXANDER HAMILTON, THE FEDERALIST NO. 23, at 142 (Edward Earle ed. 1941).

> variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason, no constitutional shackles can wisely be imposed on the power to which the care of it is committed.[143]

Hamilton indicates that Congress would not have the elasticity needed to wield the powers of the Commander-in-Chief. That is, Congressional actions need debate and compromise within its own body of members.[144] While this is useful for many other affairs, it would be impractical regarding the deft negotiation and urgent decisions required of the Commander-in-Chief. At the same time, having the Commander-in-Chief powers incorporated into one individual allows a quick response without the possibility of leaks and extreme debate. Simply put, Congress is incapable of having the ability to require the President to notify it before completing a prisoner exchange.[145]

Additionally, Congress has a high turnover rate, leading to a lack of consistency concerning the establishment stable foreign policy, and does not allow members to gain the knowledge needed to handle specific international issues. In other words, the rider attached to the 2014 NDAA undermines the Founders' original intent for foreign policy. The Founders considered vesting only some power to conduct foreign affairs with Congress.[146] However, while the Founders purposely divided many other powers among the branches of government, they reached the conclusion that handling foreign affairs was unique to the Executive Branch because it was the only branch capable of adequately handling such issues. The Act ignores Hamilton's concerns about preventing the legislature from taking power from the Commander-in-Chief.[147] If Congress could force the Commander-in-Chief to give them a thirty-day notice

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[143] *See id.* (emphasis added).

[144] *See generally id.*

[145] James F. Basile, *Congressional Assertiveness, Executive Authority and the Intelligence Oversight Act: A New Threat to the Separation of Powers*, 64 NOTRE DAME L. REV. 571, 580 (1989).

[146] *Id.* at 580-81.

[147] *See* HAMILTON, *supra* note 136, at 142.

before conducting a transfer, where would the line be drawn concerning the balance of powers between the Commander-in-Chief and Congress? Proponents of the 2014 NDAA rider put forth that Congress is using its spending power and is simply asking for notice before money is spent on transferring prisoners.[148] Even this argument fails, as Congress could then ask for notice on any Commander-in-Chief decision that requires the use of government funds.

Congress previously tried to take some of the Commander-in-Chief powers from the President.[149] Following the Iran-Contra affair, Congress proposed, and failed, to pass the Intelligence Oversight Act.[150] James Basile aptly noted that practicality is the best reason for opposition to the Act and why Congress should not attempt to strip inherent Commander-in-Chief powers from the President.[151] Many legal experts have touched on the practical reasons why the Commander-in-Chief should have more power in situations with urgent national security interests.[152]

Although the Assistant Attorney General spoke about the proposed Oversight Act,[153] the same logic is applicable to the

[148] William M. Hains, *Challenging the Executive: The Constitutionality of Congressional Regulation of the President's Wartime Detention Policies*, BYU L. REV. 2283, 2284 (2011).

[149] Intelligence Oversight Act, S. 1721, 100th Cong., 2d Sess. § 503 (1987).

[150] James F. Basile, *supra* note 139.

[151] *Id.* at 599.

[152] S. REP. NO. 276, 100th Cong., 2d Sess. 19-20 (1988) (statement of Charles J. Cooper, Assistant Attorney General "There may be instances where the President must be able to initiate, direct, and control extremely sensitive national security activities. We believe this Presidential authority is protected by the Constitution and that by purporting to oblige the President under any and all circumstances to notify Congress of a covert action within a fixed period of time, [the Act] infringes on this constitutional prerogative of the President. A President is not free to communicate information to the Congress if to do so would impair his ability to execute his own constitutional duties. Under some circumstances, communicating findings to Congress within 48 hours could and will frustrate the President's ability to discharge those duties.").

[153] Generally, the Oversight Act was a proposed piece of legislation which purported to give the President the ability to authorize special acts so long as the President notified Congress via a written record no later than forty-eight hours after reaching the decision to initialize a special act.

2014 NDAA and the Commander-in-Chief's ability to carry out a prisoner exchange. While the Oversight Act would have required the President to notify Congress within forty-eight hours of a proposed transfer, the 2014 NDAA went even further by forcing the President to notify Congress thirty days *prior* to the prisoner exchange. The fear that sensitive information was likely to leak if the President had to notify Congress within forty-eight hours of carrying a special action can only be rational if notification must occur thirty days prior. By requiring the President to notify Congress, in effect giving up some of the Executive Branch's inherent Commander-in-Chief powers, the President's ability to execute the national security interests of the United States would be irreparably damaged.

Proponents of allowing Congress to force the President into providing notice when conducting prisoner transfers point out that that it could lead to the President seizing even more Commander-in-Chief powers.[154] However, the scope of conducting prisoner exchanges is so narrow in nature that the possibility for the Executive Branch to use it as a means of furthering its power into other arenas should not outweigh the concerns of giving Congress the power of forcing consultation. While the slippery slope argument can be made whenever a new power is established, or whenever the Court is deciding whether the power always latently existed, such an argument should not carry the day. The Founders purposefully created a system of checks and balances, so that if one branch began to overstep its constitutional bounds, that branch would be limited accordingly.[155] There is no reason to believe that giving the President the clear ability to have total control over prisoner exchanges would not be checked if the power began to expand. If the President does so, either Congress or the Supreme Court can intervene and condemn the President's actions, as both have done in the past.

The remaining argument asserts that by having the President and Congress working in tandem, the process appears

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[154] *Cf.* Maffucci, *supra* note 28, at 1356.

[155] *See generally* HAMILTON, *supra* note 136.

more legitimate to the general public.[156] This argument is rooted in Justice Jackson's frequently cited concurrence in *Youngstown*, in which he noted:

> When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty.[157]

Yet, Jackson carefully identified that the President could exercise power without Congress concurring or without a specifically enumerated power, if the Court scrutinized the situation in which it was occurring.[158] In prisoner exchanges, the Court adopting the position that Congress has concurrent power with the President would restrict Commander-in-Chief powers, and that is not found within the Constitution. While this should not be the only reason a Court would rule in such a manner, there are basic political issues that should be considered. The Founders recognized that allowing Congress and the President to share the Commander-in-Chief powers would lead to a lack of responsibility.[159] Hamilton clearly pointed out in *Federalist No. 70* that a rule allowing Congress to share Commander-in-Chief powers "tends to conceal faults and destroy responsibility."[160] Using the example proposed by Hamilton, the President would be forced to accept responsibility for his actions, and if the populace did not agree with the prisoner exchange, as some members of Congress did not with Bergdahl, he would take a political loss. Therefore, the President would be driven to act both dependably and with the interest of the public, as he could not shift blame to members of Congress.[161]

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[156] *Id.*
[157] *Youngstown*, 343 U.S. at 635-36.
[158] *Id.* at 638.
[159] Basile, *supra* note 139, at 582.
[160] THE FEDERALIST NO. 70, AT 459 (ALEXANDER HAMILTON) (EDWARD EARLE ED., 1941).
[161] THE FEDERALIST NO. 23, AT 162 (ALEXANDER HAMILTON) (EDWARD EARLE ED., 1941).

The totality of how the Court has outlined the President's Commander-in-Chief powers leads to the conclusion that the Court would look unfavorably upon an obvious attempt by Congress to seize some of that power. Previous cases have recognized the President's near- complete power over foreign affairs as well as the President's discretion concerning implementation of military strategy.[162] In noting that the President has a duty to the lives of American citizens while they are out of the country, the Court implicitly states that the tools the President uses to protect American citizens cannot be abridged.[163] One of those tools is the ability to conduct a prisoner exchange. Congress cannot change the way the President utilizes his inherent powers and tools.[164] If the President's Commander-in-Chief powers were functionally impeded by Congress, those powers would be far less effective.[165] Thereby, the 2014 NDAA would be unlikely to pass constitutional muster as it practically prevents the President from exercising a fulfilling or Commander-in-Chief duty.

Additionally, because the President is elected by the people, and the United States vets his policies, it is more likely that the public will agree with his decisions regarding prisoner exchanges. On the other hand, the members of Congress are elected by a narrower portion of the public. Because of how voters select those members, it is more likely that the Congressional body would act out of partisanship, rather than the betterment of the Country.[166] In sensitive matters, like prisoner exchanges, tense partisanship could lead to disastrous consequences.

The very nature of the Legislative Branch dictates that it is against the national security interests of the United States for Congress to share the power of prisoner exchanges with the Executive Branch. For this reason, Congress should not be

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[162] Basile, *supra* note 139, at 596.

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *See generally* Alex J. Whitman, *Pinpoint Redistricting and the Minimization of Partisan Gerrymandering*, 59 EMORY L.J. 211, 214 (2009).

allowed to take the power which currently exists exclusively with the President and erode it.

CONGRESSIONAL APPROVAL WOULD VIOLATE THE 1947 NATIONAL SECURITY ACT AND GOVERNMENTAL STRUCTURE

Immediately following the conclusion of World War II, President Harry Truman pushed for the 1947 National Security Act to improve what he considered to be an "antiquated defense setup."[167] There were several new tenets created in the 1947 National Security Act; however, one of the most central concepts was to define war making, intelligence, covert operations, and military strategy as included within the United States "national security" interests.[168] The Act further defined the national security interests as falling under the Presidential, rather than Congressional, powers.[169]

There are two main components to the Act as it concerns defining the President's national security power. First, President Truman and Congress envisioned the Act being implemented by a President with a great deal of latitude over foreign affairs powers.[170] Second, the Act intended the President to have the power not just in times of war, but also in times of "false peace."[171] In other words, Congress does not need to formally declare war for the President's national security powers to materialize. Rather, the power continually exists. In contrast, the 1947 National Security Act did not award Congress any role in foreign affairs or in the national security arena.[172] This is significant because it suggests that Congress acknowledged that the Executive Branch is better equipped to handle military strategy than Congress, and, thereby, better suited to handle prisoner exchanges.

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[167] *See generally* Michael Warner, *Legal Echoes: The National Security Act of 1947 and the Intelligence Reform and Terrorism Prevention Act of 2004*, 17 STAN. L. & POL'Y REV. 303, 309 (2006).
[168] 50 U.S.C. §§ 401-405 (1982).
[169] *See generally* Koh, *supra* note 131, at 1269.
[170] *Id.* at 1280.
[171] *Id.*
[172] *Id.*

The President is singularly accountable to the country.[173] Because of the way the Founders structured the American government, the President is the only person able to make a quick decision, which is required in situations like the Bergdahl exchange.[174] Only the President can decisively initialize national security policy by using inherent Commander-in-Chief powers in a way that Congress cannot.[175] Unlike Congress, the structure of the Presidency allows the Executive to make such decisions in a secretive and decisive manner.[169]

CONCLUSION

If the Supreme Court were to find that Congress acted within its constitutional means when it attached the rider to the 2014 NDAA, Congress would unconscionably eliminate an immense amount of power from the Commander-in-Chief. This would be complicated by Congress's inherent lack of suitability for handling this power. Congress is a slow-moving body, and decisions that are of vital importance to national security often require swift response. Congressional members would have difficulty learning the information needed to make specific decisions and would be susceptible to leaking information regarding prisoner exchanges to secure political advantage. There are simply some aspects of power that Congress is not equipped to handle. The Supreme Court has given the President tremendous power concerning foreign affairs and military strategy. The 2014 NDAA thirty-day notice requirement does not appear to pass constitutional muster.

Even if the Congress could constitutionally force the President to provide notice before initiating a prisoner exchange, there are national security reasons why such an action would be impractical. Congressional members are more likely to pay attention to the desires of their narrow base of constituents than the President. The fact that Congressional members are only directly accountable to a small portion of American citizens

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173 *Id.* at 1292.

174 *Id.*

175 *Id.*

means that they may not always act in the best interest of the United States. This would severely, adversely affect the United States' national security interests, and render it nearly impossible for Congress to give full attention to the desires of the nation. The President does not have this problem.

The way that the Founders designed the branches government all but explicitly state that the power of prisoner exchanges is a power intended exclusively for the presidency. Historical practice bears this out from as early as the actions of President Washington. Early Founders, such as Hamilton, wrote as much in *The Federalist Papers*. From a practical standpoint, Congress would neither be able to act as quickly nor as secretly as prisoner exchanges require. The Bergdahl exchange took place over the course of several years. Over that time-period, Congressional membership changed. The changing of membership would negatively impact both sides' ability to strike a deal. The fact that Congress must debate matters, and that it has a reputation for not being able to keep sensitive matters secret, only improves the policy rationale for why the President should be given exclusive power over prisoner exchanges.

While Congress may desire to share the President's Commander-in-Chief powers over prisoner exchanges, it is simply a role for which Congress is ill-suited. Therefore, the President should enjoy constitutionally unlimited control over the transfer of captured terrorists to the control and custody of foreign nations.